No. 15-55391 & 15-55398

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. BAEZA, *ET AL.*; C. CORRAL, *ET AL.*,

Plaintiffs-Appellants,

v.

LEROY BACA,

Defendants-Appellees.

PLAINTIFFS' OPENING BRIEF ON CONSOLIDATED APPEALS

ON APPEAL IN SECTION 1983, FEDERAL QUESTION ACTIONS, FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN U.S.D.C. CASE NOS. CV-07-03109-DDP(SHX) CV-07-05749-DDP(SHX)
HONORABLE DEAN D. PREGERSON, PRESIDING

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I. INTRODUCTION

Plaintiffs in *Baeza v. Baca,* No. 15-55391, and *Corral v. Baca,* No. 15-55398, submit this consolidated Opening Brief[1] in support of their appeals from the district court's orders dismissing these two related, putative class actions, each with identical allegations of unconstitutional, forced floor-sleeping at the Los Angeles County Sheriff's Department Jail ("Jail'), but for different time periods, pursuant to the policies, practices and customs of the defendant, then-Sheriff, LeRoy Baca. Plaintiffs also appeal the district court's effective denials, by the district court vacating, and never ruling upon, in both *Baeza* and *Corral*, of the motions for class certification, for summary adjudication, and in *Corral* to consolidate *Corral* with *Thomas* and *Baeza*, and the failure to rule upon the motion for consolidation filed in the related class action of *Thomas v. Baca*, CV-04-8448-DDP, filed on June 13, 2011, and taken under submission in *Thomas* on August 12, 2011. *Thomas* CD-824.

Originally, on October 12, 2004, the related class action of *Thomas v. Baca*, alleging unconstitutional, forced floor-sleeping at the Jail, was filed against defendant Baca and other defendants. In that case, the district court promptly certified the class, on May 17, 2005, *Thomas* ER-Vol. 4: 641; CD-98, *Thomas v. Baca,* 231 F.R.D. 397 (C.D.Cal. 2005), but it did not define the class period.[2] *Ibid.* In *Thomas*, on September 21, 2007, the district court granted in

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[1] Consolidated by this court's October 21, 2015 order. 9th Cir. Dkt. 11.

[2] The *Thomas* class period was December 18, 2002 to the date of certification, May 17, 2005. *Thomas v. Baca*, 514 F.Supp. 2d 1201, 1205 (C.D.Cal. 2007). *Thomas* ER-Vol. 4: 614-15; CD-619, The filing of the *Baeza* and *Corral* actions extended the latter date to May 10, 2007, so that the three, related actions total period would be December 18, 2002 to May 10, 2007, or five and one-half

part the plaintiffs' motion for summary adjudication of issues, holding defendant Baca liable in his official capacity for violations of the Eighth and Fourteenth Amendments, for having a policy, practice, and custom of causing both inmates and pretrial detainees to sleep on the Jail's floors. *Thomas* ER-Vol. 4 at 603; CD-619; *Thomas v. Baca*, 514 F.Supp. 2d 1201 (C.D. Cal. 2007), *cert. denied sub nom. Baca v. Thomas*, 555 U.S. 1099 (2009).

Unconstitutional floor-sleeping at the Jail continued after the date that the district court had set as the closing date for the *Thomas* class, and the *Baeza* and *Corral* actions were filed alleging unconstitutional floor-sleeping at the Jail outside and after the *Thomas* class period (based on discovery obtained in *Thomas* and floor-sleeper who had contacted plaintiffs' counsel). The *Corral* class action alleged that unconstitutional, forced floor-sleeping occurred during the period from May 17, 2005 through December 31, 2005. *Corral* ER-Vol. 3: 548; CD-1. The *Baeza* class action alleged that unconstitutional, forced floor-sleeping occurred during the period from January 1, 2006 through May 10, 2007. *Baeza* ER-Vol. 1: 126; CD-1, thus making a continuous class period of from December 18, 2002 to May 10, 2007.[3]

As set forth hereinbelow, all three cases were deemed related by the district court, which stayed both *Corral* and *Baeza* during the pendency of an interlocutory petition for permission to appeal by defendant Baca of the *Thomas* class action certification. The district court vacated motions to certify the classes

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years, as opposed to the *Thomas* period of two and one-half years. The claims of all defendants in all of the three actions were identical, except for the dates on which each plaintiff was forced to sleep on the floors.

[3] For the same reasons, *Baeza* and *Corral* both were low-numbered to *Thomas* as related actions, and all three actions should have been consolidated. It was an abuse of discretion for the district court not to have ordered consolidation.

in both *Corral* and *Baeza*, as well as motions for summary adjudication of the *Monell* issue, and other motions in both cases, and continued the stays of *Baeza* and *Corral* during the global settlement proceedings for the three actions that took place within the *Thomas* action. *See infra.*

II. JURISDICTIONAL STATEMENT

A. DISTRICT COURT JURISDICTION

The basis for district court subject matter jurisdiction was federal question jurisdiction, 28 U.S.C. §§ 1331, and civil rights jurisdiction, 1343(a)(4), because these are civil actions arising under the Constitution and laws of the United States, and specifically under 42 U.S.C. § 1983. The relevant facts that establish jurisdiction are that plaintiffs and putative class members, all Los Angeles County Sheriff's Jail pretrial detainees and post-conviction inmates, pursuant to a policy, practice and custom of then Sheriff Leroy Baca, were made to sleep on the floors during their incarcerations at the Jail, in violation of the Eighth Amendment, in the cases of post-conviction inmates, and the Fourteenth Amendment Due Process Clause, in the cases of pretrial detainees.

B. APPELLATE JURISDICTION

Appellate jurisdiction is based upon 28 U.S.C. 1291, from final judgments of the district court, involuntarily dismissing both actions. *See Lal v. California*, 610 F.3d 518, 523 (9th Cir. 2010) (a plaintiff may appeal an involuntary dismissal as a final order).

(i) The *Baeza* putative class action

The district court disposed finally of this action in its "Order Granting Order [*sic*] To Dismiss," dated February 11, 2015. *Baeza* ER-Vol. 1: 2; CD-62. The notice of appeal timely was filed on March 11, 2015. *Baeza* ER-Vol. 1: 1; CD-64, and it was docketed on March 11, 2015.

(ii) The *Corral* putative class action

The district court disposed finally of this action in its "Order Granting Motion to Dismiss," dated February 11, 2015. *Corral* ER-Vol. 3: 375; CD-50. The notice of appeal timely was filed on March 11, 2015. and was docketed on March 11, 2015. *Corral* ER-Vol. 3: 374; CD-52.

III. ISSUES PRESENTED FOR REVIEW

The issues presented for review, which are the same in both *Baeza* and *Corral*, are:

1. Did the district court err by granting defendant's motion to dismiss for lack of prosecution, made pursuant to Fed. R. Civ. P. Rule 41(b)?

2. Did the district court err in denying plaintiffs' motions for orders denying plaintiffs' motions for orders withdrawing the court's orders staying discovery, and to set discovery cutoff, pretrial, and trial dates?

3. Did the district court err in vacating and refusing to rule upon, and thereby denying, plaintiffs' motions to consolidate the three actions, to grant summary adjudication, and for class certification?

IV. COURSE OF PROCEEDINGS AND DISPOSITIONS

1. *Baeza*

The *Baeza* class action was filed on May 10, 2007, and the operative complaint is the Complaint, *Baeza* ER-Vol. 1: 126; CD-1. An Answer to Plaintiffs' Complaint was filed by defendant Baca on May 31, 2007. *Baeza* ER-Vol. 1: 114; CD-8. A Notice of Related Cases also was filed on May 10, 2007, *Baeza* ER-Vol. 1: 123; CD-5, stating that the action arises "from the same transactions, happenings, and event, to wit, continued floor sleeping, since the class closure date in *Thomas v. Baca*, 04-08448-DDP(SHx)," and "call[s] for a

determination of the very same, identical legal issues decided by the court in that action[.]"

Based upon the related case statement, the action was transferred from Judge Margaret M. Morrow to Judge Dean D. Pregerson on June 4, 2007. *Baeza* ER-Vol. 1: CD-6.

The plaintiffs in *Baeza* vigorously pursued the class action. On June 11, 2007, the *Baeza* plaintiffs filed a motion for class certification and for an order for identification and provision to plaintiffs of identification of class members. *Baeza* ER-Vol. 2: 358; CD-9. Also, on June 11, 2007, plaintiffs filed a motion for summary adjudication of issues. *Baeza* ER-Vol. 2: 155; CD-10-12. Both motions were set for hearing on July 9, 2007. On July 3, 2007 the district court granted defendant Baca's *ex parte* application to continue the hearing and briefing schedules on plaintiffs' motions for class certification and for summary adjudication of issues, and continued the hearing date to October 29, 2007. *Baeza* CD-16. Subsequently, at defendant's request by *ex parte* application, *Baeza* CD-20, on November 20, 2007 the district court vacated all of plaintiffs' motions. *Baeza* ER-Vol. 1: 109; CD-26.

2. *Corral*

The *Corral* putative class action was filed on September 4, 2007; the operative complaint is the Complaint, and the action was assigned to Judge Dean D. Pregerson. *Corral* ER-Vol. 3: 545-48, CD-1, 3, 4. An Answer to plaintiffs' Complaint was filed by defendant Baca on September 28, 2007. *Corral* ER-Vol. 3: 496; CD-16. A Notice of Related Cases was filed on September 4, 2007, stating that the action arises "from the same transactions, happenings, and event, to wit, continued floor sleeping, since the class closure date in *Thomas v. Baca*, 04-08448-DDP(SHx), and *Baeza v. Baca*, CV-07-03109-DDP(SHx), [and] call[s] for a determination of the very same, identical

legal issues decided by the court in that action[.]," *Corral* ER-Vol. 3: 546; CD-3. An order re transfer pursuant to L.R. 83-1.3.1 (Magistrate Judge Related Cases) was issued on September 21, 2007, adding the case to Magistrate Judge Hillman's calendar. *Corral* ER-Vol. 3: 545; CD-4.

Just as in *Baeza*, the plaintiffs in *Corral* also vigorously pursued their putative class action. On October 1, 2007, the *Corral* plaintiffs filed motions for consolidation with *Thomas* and *Baeza*, class certification, and for summary adjudication of issues. *Corral* ER-Vol. 3: 504-44 ; CD-7, 8, 9. All of these motions were set for hearing on October 22, 2007. On October 10, 2007 the district court *sua sponte* continued the hearing date to October 29, 2007. *Corral* CD-12. At defendant's request by *ex parte* application for an order vacating plaintiffs' motions for summary adjudication of issues and for class certification, on October 18, 2007, the district court issued an order granting defendant's *ex parte* application. *Corral* ER-Vol. 3: 494; CD-18. Subsequently, on November 20, 2007 the district court vacated all of plaintiffs' motions. *Corral* ER-Vol. 3: 493; CD-19.

3. The Related Case, *Thomas v. Baca,* CV-04-8448-DDP(SHx)

Thomas v. Baca is a class action involving floor-sleeping in the Jail that was certified as a class action on May 17, 2005. *Thomas* ER-Vol. 4: 641; CD-98. On September 21, 2007, the district court granted in part the plaintiffs' motion for summary adjudication of issues, holding defendant Baca liable in his official capacity for violations of the Eighth and Fourteenth Amendments for having a policy, practice, and custom of causing both inmates and pretrial detainees to sleep on the floor. *Thomas*, 514 F.Supp.2d 1201; *Thomas* ER-Vol. 4: 603; CD-619. The class period for that class action was December 17, 2002 through May 17, 2005 (plus two years preceding December 2002 for individuals who were continuously incarcerated.) *Thomas* ER-Vol. 4: 614-15; CD-619.

In its September 21, 2007 order, the district court stated that "it is in large part Defendant's own records that convinced the Court of the custom's existence." *Thomas*, 514 F.Supp.2d. at 1219. *Thomas* ER-Vol. 4: 637; CD-619. The district court's May 17, 2005 order in *Thomas* ordered that defendant "maintain records that identify by full name and booking number each person who was required to sleep on a floor, without or without bedding. The record for each person shall also include the date, time and location for each occurrence." *Ibid.*; *Thomas* ER-Vol. 4: 655; CD-98. Pursuant to a subsequent order dated July 1, 2005, the defendant was ordered to produce to the *Thomas* plaintiffs "copies of any records of 'floor-sleepers' that it has maintained in compliance with the May 17, 2005 order." *Thomas* ER-Vol. 4: 640; CD-155. Plaintiffs' counsel in *Thomas* "compiled summaries of floor sleepers in six LASD facilities during the period May 29, 2005 to September 29, 2015." *Thomas*, 514 F.Supp.2d. at 1209. *Thomas* ER-Vol. 4: 621; CD-619. The first summary of floor sleepers listed 24,688 instances where individuals were forced to sleep on the floor. The second summary listed 5,181 individuals who were forced to sleep on the floors for more than one night, the majority of whom slept on the floors between two and seven nights. *Ibid.* *Thomas* ER-Vol. 4: 621; CD-619.

The records upon which the district court in the *Thomas* September 21, 2007 order relied in holding defendant Baca liable in his official capacity for unconstitutional floor-sleeping were kept by defendant during the period alleged by plaintiffs for the *Corral* class action – May 17, 2005 through December 31, 2005. *Corral* ER-Vol. 3: 548; CD-1. Thus, the summaries also showed that floor-sleeping continued during the *Corral* putative class action. In the *Baez* putative class action, in which the class period ran from January 1, 2006 through May 10, 2007, it is alleged that floor-sleeping also continued during that period. *Baeza* ER-Vol.1: 126; CD-1.

On October 1, 2007, a motion to consolidate the *Corral* action with the *Baeza* and *Thomas* actions was filed by plaintiffs in *Corral*. *Corral* ER-Vol. 3: 541; CD-7. At defendant's request, made by *ex parte* application, *Corral* CD-14, the motion to consolidate the related actions was vacated by the district court on November 20, 2007; *Corral* ER-Vol. 3: 493; CD-19.

In both *Baeza* and *Corral*, on October 18, 2007, the district court granted the defendant's *ex parte* applications to vacate the various motions made by the plaintiffs in *Baeza* and *Corral*, or in the alternative, for an order continuing the hearing date, and stated:

> In considering Defendant's application, the Court notes that it has set a briefing schedule in the related matter of Thomas v. Baca, CV-04-08448, on a motion for class certification, a motion for reconsideration/ clarification of the order granting summary judgment, and a request that the Court certify an interlocutory appeal. *Because the resolution of these matters could have great impact on the disposition of the motions in the instant case, the Court finds it would be in the interest of judicial economy to resolve the Thomas issues first.*

Baeza ER-Vol. 1: 110-11; CD-24 (emphasis added). An identical order issued in *Corral*, also on October 18, 2007. *Corral* ER-Vol. 3: 494-95; CD-18. These orders by themselves effectively stayed both *Baeza* and *Corral* from October 18, 2007, until the district court in *Thomas* finally decided the class certification issue on March 22, 2012, CD-870, for five and one-half years.

On May 30, 2011, the district court signed a stipulated order to continue pretrial conference and trial dates in *Thomas*, pending plaintiffs' petition for permission to appeal the court's decertification order, *Thomas* ER-Vol. 4: 565; CD-880, and another six months passed, until September 10, 2012, when this court finally denied the *Thomas* plaintiffs' request for permission for interlocutory appellate review of its decertification order. *Thomas* CD-885.

Even according to defendant, plaintiffs in *Baeza* and *Corral* were responsible for a delay only from March 22, 2012 to March 7, 2014, when plaintiffs in both cases filed their motions to reactivate the actions. *Baeza* ER-Vol. 1: 55, 65; CD-46; *Corral* ER-Vol. 3: 439; CD-35. Yet, defendant ignored the fact that, on June 13, 2011 in the *Thomas* action, the *Thomas* plaintiffs filed a motion to consolidate the related cases of *Baeza* and *Corral* with the *Thomas* action, *Thomas* ER-Vol. 4: 568; CD-808, and that the district court had not ruled on that motion as of March 7, 2014, when plaintiffs in both actions moved to lift the stay. *Baeza* ER-Vol. 1: 91; CD-44; *Corral* ER-Vol. 3: 475; CD-33. Thus, with respect to all of the delay until March 7, 2014, at least two thirds of the time of the delay was attributable to *defendant*'s 2007 *ex parte* applications and the district court granting his applications.

Thus, it was unfair and inequitable for the district court to blame plaintiffs for the delay. At most, the *Baeza* and *Corral* plaintiffs actually delayed for only one and one-half years, from September 2012 to March 7, 2014, when plaintiffs in both *Corral* and *Baeza* moved to lift the stay that, at that time, still existed.

At all times, the district court presumably was monitoring its own calendar and dockets and was fully cognizant of the exceptional, close interrelationships of the three, *Baeza*, *Corral*, and *Thomas* actions -- all of which were identical, except for the named plaintiffs and the periods of time during which all plaintiffs unconstitutionally had been forced to sleep on the Jail's floors.

Thus, as of October 18, 2007, the district court had stayed both the *Baeza* and the *Corral* actions, and never had lifted its stays.

In *Baeza*, on November 20, 2007, even though it had previously issued a scheduling order setting discovery cutoff and pretrial and trial dates, *Baeza* ER-Vol. 1: CD-14, the district court vacated plaintiffs' motions for class

certification, motion for order for identification and provision to plaintiffs of class members, and for summary adjudication. *Baeza* ER-Vol. 1: 109; CD-26.

On October 1, 2007, in the *Corral* putative class action, plaintiffs filed a motion to consolidate *Corral, Baeza*, and *Thomas*, motions for summary adjudication of issues, and for class certification, and for an order for identification and provision to plaintiffs of class members, all of which were vacated by the district court on November 20, 2007. *Corral* ER-Vol. 3: 504-545, 493; CD-7, 8, 9, 19.

On January 11, 2008, in the *Thomas* class action, the district court issued an order granting defendant's motion for certification of defendant's interlocutory appeal under 28 U.S.C. § 1292(b)633. *Thomas* ER-Vol. 4: 598; CD-659. In that order, in certifying defendant's interlocutory appeal, the district court stated:

> In this case, the as-yet-to-occur trial on the damages is likely to be labor intensive and complicated. It may involve tracking down hundreds of individuals whose whereabouts are, having left LASD custody, presently unknown. If the Court proceeds with this trial and is then reversed in part or in its entirety, the trial will have been a waste of resources because it either will have been completely unnecessary or because it may need to be redone based upon the Ninth Circuit's guidelines. In contrast, if the Court is affirmed, no time will be wasted because Defendant presumably would have appealed after the damages trial in any case. For this reason, and because of the importance of the constitutional question at issue, the Court finds that the "exceptional circumstances" here justify an interlocutory appeal.[4]

[4] Every single part of this order turned out to be incorrect. The damages trial neither was labor-intensive nor complicated, and plaintiff's counsel efficiently tried it in two and one-half days. The district court was not reversed, nor was it likely it would be reversed. *Viz.*: after petitioning this court for permission for a certified, interlocutory appeal, defendants filed a certiorari petition with the Supreme Court, who denied the petition, and then defendant filed yet another,

Thomas ER-Vol. 4: 601; CD-659.

The district court's rationale with respect to certifying defendant's interlocutory appeal in *Thomas* did not apply, and should not have been applied by the district court, to the imposition of its stay of both the *Baeza* and *Corral* putative class actions, pending resolution of the *Thomas* action. Imposing a stay and not allowing discovery in both *Baeza* and *Corral* ineluctably made discovery in these two actions at first impossible and then more difficult as time passed, in that plaintiffs would have difficulty locating potential witnesses, such as former Jail employees. The district court refusing to rule upon, not deciding, and vacating the motions plaintiffs made in each action, such as the *Corral* plaintiffs' motion for consolidation of the three actions, was bound to multiply the proceedings and violated Fed. R. Civ. P. Rule 1's admonition that the Rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." As stated above, the evidence supporting *Monell* liability was collected during the class period for the *Corral* putative class action, *Thomas* ER-Vol. 4: 603; CD-619. It demonstrated that defendant's policy and practice of making inmates sleep on the floor continued during the *Corral* time period. In *Baeza*, the plaintiffs attached 185 declarations from inmates who were forced to sleep on the floor, sometimes for many days, to its motion for summary adjudication of issues. *Baeza* ER-Vol. 2: CD-10-12. This demonstrated the

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post-judgment appeal that, after pursuing it for one and one-half years, defendant abandoned and moved to dismiss. Yet, all of *defendant's* tactics delayed *plaintiffs*' actions and resulted in *plaintiffs* being punished with involuntary dismissals. *Plaintiffs* never wasted any time or resources, nor was there likely to have been any such waste. There never should have been a stay in *Thomas*, much less in *Baeza* and *Corral*. The stay hurt only plaintiffs in these appeals, with delays they did not contribute to or cause having been blamed on them and resulting in dismissal of their cases.

defendant's ongoing policy and practice of forcing inmates to sleep on the floor. Leaving discovery, and case-dispositive motions, up in the air, inhibited and did not help the global settlement negotiations, because there was no basis to settle the *Baeza* and *Corral* actions, which had been left in a vacuum.

On May 20, 2008, this court issued its order denying defendant's motion for en banc reconsideration of its request for interlocutory appeal. *Thomas* ER-CD-666. Thereafter, throughout 2008, the district court in its orders in both *Baeza* and *Corral*, referred to each action as a "Stayed Case." *See Baeza* Orders dated May 22, CD-30, June 5, CD-31, July 1, CD-34, September 30, CD-35, November 7, 2008, CD-36. *Baeza* ER-Vol. 1: 100-01, 107-08. The district court issued identical orders in the *Corral* case. *Corral* ER-Vol. 3: 482-85, 491-92; CD-16, May 22, 2008, CD-22; June 5, CD-23; July 1, CD-26, September 30, CD-27, November 7, 2008, CD-28.

In both *Baeza* and *Corral*, on June 30, 2008, prior to the first status conference re *stayed* case, set for July 7, 2007, plaintiffs filed a brief regarding case status. In the *Baeza* submission, plaintiffs requested that the court permit "the parties to file supplemental briefing on plaintiffs' motion for summary adjudication of issues with respect to the impact of the Court's ruling in *Thomas*, and set a hearing date on that motion and also hear plaintiffs' previously filed motion for class certification at the same time." *Baeza* ER-Vol. 1: 102, 105; CD-33. The plaintiffs in both *Baeza* and *Corral* also requested consolidation of those actions with the *Thomas* action and suggested that, once that was accomplished, that both defendants and plaintiffs be given a nine month period to complete their discovery. *Baeza* ER-Vol. 1: 102, 105; CD-33; *Corral* ER-Vol. 3: 486; CD-25. In their briefs regarding case status, the plaintiffs also suggested that the court delay the settlement proceeding in *Thomas* until it ruled on the *Baeza* and *Corral* motions for summary adjudication of issues, class

certification, and potential consolidation of the *Baeza/Corral* cases with *Thomas*. *Baeza* ER-Vol. 1: 102, 105; CD-33. *Corral* ER-Vol. 3: 496; CD-25. None of plaintiffs' requests ever were ruled upon or considered by the district court.

On November 24, 2008, because pretrial and trial dates had previously been set in the *Baeza*, and were fast approaching, plaintiffs in *Baeza* filed an *ex parte* application to resume discovery and to continue pretrial and trial dates, because plaintiffs in both *Baeza* and *Corral* had not been able to conduct discovery because of the stay imposed by the district court's October 18, 2007 order. *Baeza* CD-38. Defendant filed no response to plaintiffs' *ex parte* application, even though he too would have greatly benefited from the ability to conduct discovery, including taking depositions of the numerous plaintiffs in the action while events were still fresh in their minds, and even though he later bitterly complained in his motion for failure to prosecute, *Baeza* ER-Vol. 1: 55; CD-46, that delay caused solely by plaintiffs had greatly hampered his ability to conduct discovery. Although the district court continued the pretrial conference and trial dates in the *Baeza* action, it denied plaintiffs' request to conduct discovery, stating:

> The Court finds there is good cause for discovery in the case to be stayed pending settlement discussions. In court in November [2008] all parties indicated an interest in immediate settlement talks before proceeding further with Thomas v. Baca and its related cases. Accordingly, to the extent Plaintiffs request that the Court order discovery to resume, the Court denies this request.

Baeza ER-Vol. 1: 98-99; CD-42. Because the stay as to both the *Baeza* and *Corral* putative class actions never had been lifted, the district court's order and its rationale in its order in *Baeza*, applied equally to the *Corral* action.

In *Thomas*, on September 4, 2009, plaintiffs filed a Notice of Non-Settlement and Request for Status Conference/Briefing Schedule, in which plaintiffs notified the district court that the parties were unable to resolve the action by settlement, and requested a status conference to set a briefing schedule to determine whether the *Thomas* class action should be structured as an opt-in or opt-out class, and who would pay for costs associated with notice, possible special master, and other issues, as set forth in the district court's December 8, 2008 Order. *Thomas* ER-Vol. 4: 596; CD-764. On October 5, 2009, defendant responded, in part, by stating: "Defendant has no objection to participating in a Status Conference should the court determine that one is necessary; however, Defendant respectfully submits that settlement discussions and issues related thereto should be exhausted before the parties complete the briefings referenced in Plaintiffs' Notice." *Thomas* ER-Vol. 4: 594, 595; CD-766 (underlining in original). Thus, as of October 5, 2009, defendant apprised the district court that he wanted "settlement discussion and issues thereto to be exhausted" before advancing the *Thomas* class action, by determining key factors that the district court itself thought should be briefed, such as whether the *Thomas* class action should be an Opt-in class and who should pay for giving class notice. The district court clearly had stayed both *Baeza* and *Corral* until settlement negotiations in the *Thomas* class action were concluded. Thus, in late 2009, the delays in *Baeza* and *Corral* were of no concern at all to the attorney, Justin W. Clark, who was handling all three actions, notwithstanding his later contention in his motions in *Baeza* and *Corral* to dismiss for lack of prosecution, *Baeza* ER-Vol. 1: 55; CD-46; *Corral* ER-Vol. 3: 439 ; CD-35, that the delays in *Baeza* and *Corral* had prejudiced defendant.

Settlement negotiations continued in the *Thomas* action until March 2, 2011, before both the district court and Magistrate Judge Carla M. Woehrle,

who directed counsel to contact the court clerk "to schedule a further conference is [*sic*] it subsequently appears that additional court supervised settlement discussions could be productive." *Thomas* ER-Vol. 4: 593; CD-797. Thus, settlement negotiations in *Thomas* still were considered to be a possibility by Judge Woehrle and there was no resolution of the *Thomas* action that would have operated to vacate the stays of the *Baeza* and *Corral* actions.

A Rule 26 Joint Report was filed in *Thomas* on March 2, 2011, in which plaintiffs' pending motions included motions for consolidation of both *Baeza* and *Corral*, in which certification of the *Baeza* and *Corral* putative class actions were discussed, and it which it was indicated that settlement negotiations had been ongoing in all three related actions since December 11, 2008. *Thomas* ER-Vol. 4: 576; CD-798. On March 25, 2011, the district court set pretrial and trial dates of July 9, 2012 and July 17, 2012 in the *Thomas* action. *Thomas* ER-Vol. 4: 574; CD-803.

On June 13, 2011, in the *Thomas* action, the *Thomas* plaintiffs filed a motion to consolidate the related cases of *Baeza* and *Corral* with the *Thomas* action. *Thomas* ER-Vol. 4: 568; CD-808, a year before the pretrial and trial dates set in *Thomas*, which would have given plenty of time to conduct discovery in both *Baeza* and *Corral*. Hearing on the motion to consolidate was continued by the district court and it finally was heard on August 12, 2011, and the district court took the motion to consolidate under submission. *Thomas* ER-Vol. 4: 567; CD-823. However, the district court ***never*** ruled on plaintiffs' motion to consolidate the three related cases, even though once the *Thomas* case was decertified, it would have been an easy matter to try all three cases together.

On September 27, 2011, defendant Baca filed a motion to decertify the *Thomas* class action. *Thomas* CD-825. The motion to decertify was heard on November 21, 2011, and was taken under submission. *Thomas* CD-840. The

district court did not issue its order decertifying the class action until six months later, March 22, 2012. *Thomas* CD-870.

In a stipulation and order dated May 30, 2011, the parties in *Thomas* stipulated that the pretrial conference set for July 9, 2012, and trial date of July 17, 2012 be taken off calendar, pending plaintiffs' petition for permission to file an appeal of the class decertification order, to be rescheduled in the event that the petition was not granted. *Thomas* ER-Vol. 4: 565; CD-880.

On June 15, 2012, this court granted the *Thomas* plaintiffs' motion to expedite the petition for permission to appeal the decertification of the damages class action. *Thomas* CD-881. The petition for permission to appeal was denied by this court on September 10, 2012. *Thomas* CD-885. Thus, the issues in *Thomas* remained unresolved and there was no reason to take any action in *Baeza* and *Corral* pending the *Thomas* petition for permission to appeal because, had the decertification order in *Thomas* been reversed by the Ninth Circuit, there was every reason to believe all of the actions would have been settled or consolidated and tried together. Also, the motion in *Thomas* to consolidate *Thomas, Baeza* and *Corral,* still had not been ruled upon.

From December 2012 through January 2013, plaintiffs' attorney, Marion R. Yagman, who for some years had been suffering from back pain, became virtually completely disabled from a crippling hip disorder that caused severe, unrelenting pain, which was diagnosed in February 2013 as being caused by the complete destruction of cartilage in her right hip, so that there was bone on bone. On April 25, 2013, Ms. Yagman underwent hip replacement surgery. The recovery from that surgery took approximately nine months, to January 2014, and Ms. Yagman was virtually unable to perform any legal activities during that period of time. *See* Declaration of Marion R. Yagman filed in both *Baeza* and *Corral* in opposition to defendant's motions to dismiss for lack of prosecution,

and in support of plaintiffs' motions to lift stay of discovery and reactivate action. *Baeza* ER-Vol. 1: 4; CD-56; *Corral* ER-Vol. 3: 377; CD-44.

Plaintiffs' attorney recovered sufficiently from the hip replacement surgery so that on March 7, 2014, plaintiffs in *Baeza* and *Corral* filed identical motions to lift stay of discovery and reactivate actions, and to set discovery cutoff, pretrial and trial dates. *Baeza* ER-Vol. 1: 91; CD-44; *Corral* ER-Vol. 3: 474; CD-33. Because the district court still had not issued an order the *Thomas* action with respect to the motion to consolidate all three related cases, and the pretrial and trial dates in *Thomas* were set for June 9 and June 24, 2014, *Thomas* CD-889-892, plaintiffs anticipated that once the *Baeza* and *Corral* actions were reactivated, the district court would consolidate all three cases so that they could be tried together, particularly since neither action had been certified as a class action, and the *Thomas* action had been decertified.

Only after plaintiffs in *Baeza* and *Corral* made their motions to reactivate their cases did defendant, who previously had made no complaint of prejudice with respect to any lack of any activity in *Baeza* or *Corral*, on March 17, 2014 filed motions to dismiss for lack of prosecution in both *Baeza* and *Corral*, claiming he had been severely prejudiced by the delay, although he had previously sat on his hands and had done nothing to expedite either case. *Baeza* ER-Vol. 1: 55; CD-46; *Corral* ER-Vol. 3: 439; CD-35. On April 14, 2014, the district court heard oral argument on plaintiffs' motions to lift the stays and on defendant's motion to dismiss for lack of prosecution in both *Baeza* and *Corral*. The district court took both motions under submission. *Baeza* CD-59; *Corral* CD-47.

After eight months had passed from the date on which the motions had been submitted, on December 17, 2014, because no ruling had issued on the motions, plaintiff initiated joint Local Rule 83-9 Requests for Decision with

respect to both motions in *Baeza* and *Corral*. *Baeza* ER-Vol. 1: 3; CD-61; *Corral* ER-Vol. 3: 376; CD-49. This eight-month delay was due solely to the district court. Another two months' delay continued, so that this year's delay had nothing to do with plaintiffs.

Only on February 11, 2015, eleven months after plaintiffs in *Baeza* and *Corral* filed their motions to reactivate the actions, did the district court finally issue its order granting defendant's motion to dismiss for lack of prosecution, and denying as moot plaintiffs' motions to lift stays. *Baeza* ER-Vol. 1: 2; CD-63; *Corral* ER-Vol. 3: 375; CD-50.

V. ARGUMENT

A. Summary Of Argument

Three Eighth Amendment, Fourteenth Amendment, § 1983 jail conditions actions were inextricably intertwined with one another and traveled the same paths, frequently crossing over into one another's litigation streams. Yet, the district court chronically ignored and didn't rule on motions in two of the actions it dismissed and failed to consider at all the pertinent factors on which a legitimate dismissal must be based.

The plaintiffs in the two, dismissed actions were no more culpable - indeed, hardly were culpable at all – than both defendant and the court, yet only the plaintiffs in those two actions suffered the harsh, unwarranted consequences of the delays in those two actions, for which defendant and the district court together were significantly more culpable – if there actually was an culpability at all – than the plaintiffs.

Moreover, the district court chronically, consistently, and systematically refused to consider, much less to rule upon, virtually all of plaintiffs' motions (except to deny the plaintiff's motions to withdraw the stay), including their motions to consolidate, for summary adjudication of issues, and for class

certification. All of these refusals contributed to the ultimate, unreasoned, unreasonable, and erroneous Rule 41(b) involuntary dismissal.

B. Standard Of Appellate Review

A Rule 41(b) dismissal for failure to prosecute is reviewed for abuse of discretion. *Hearns v. San Bernardino Police Dep't,* 530 F.3d 1124, 1129 (9th Cir. 2008). Any questions of law are reviewed de novo. *See e.g. Jeff D. v. Kempthorne,* 365 F.3d 844, 850-51 (9th Cir. 2004); *Koon v. United States,* 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law." (Citation omitted.)); *In re Dominguez,* 51 F.3d 1502, 1508 n. 5 (9th Cir.1995). When, as here, a district court does not conduct a Rule 41(b) analysis explicitly, then this court "reviews the record independently to determine whether the district court abused its discretion[,"] *Ghazali v. Moran,* 46 F.3d 52, 54 (9th Cir. 1995) (per curiam), so that there in fact is de novo review.

Issue 1: The Rule 41(b) Dismissal Was Contrary To Law, And Was An Abuse Of The District Court's Discretion.

Dismissal Under Rule 41(b)

> Rule 41(b) provides a rather drastic remedy by which a trial court can penalize a plaintiff for his counsel's failure to comply with an order of the court. . . . [S]ince it may severely punish a party not responsible for the alleged dereliction of his counsel, the rule should only be invoked in extreme circumstances[] . . . [and i]n reviewing the propriety of dismissal under Rule 41(b) we should, we think, look to see whether the court might have first adopted other, less drastic alternatives.

Industrial Building Materials, Inc. v. Interchemical Corporation, 437 F.2d 1336, 1338-39 (9th Cir. 1971). *See Lal,* 610 F.3d at 525 ("We have stated that dismissal under Rule 41(b) 'is so harsh a penalty [that] it should be imposed as a sanction only in extreme circumstances.'" (Quoting *Dahl v. City of Huntington*

Beach, 84 F.3d 363, 366 (9th Cir. 1996). "This is almost identical to our stance on default judgments, which are 'appropriate only in extreme circumstances.'" (Quoting *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam). Here, there are no "extreme circumstances" so as to warrant plaintiffs' default.

"[A]n extraordinary circumstance warrant[s] relief from a judgment dismissing the case for failure to prosecute under Rule 41(b)." *Id.* at 521.

And, when, as here, this court can "derive little guidance from the District Court opinion[] [and i]t would appear from the opinion that no other sanctions were considered[,]" *Industrial Building Materials, Inc.*, 437 F.2d at 1339, then Rule 41(b) dismissal is an abuse of discretion.

Although "broad discretion must be granted trial courts on matters of continuances[] . . . an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay,'" *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)), is erroneous.

> A district court's order dismissing an action for lack of prosecution will be reversed only for an abuse of discretion. *Link v. Wabash R.R.*, 370 U.S. 626, 633, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962); *Citizens Utilities Co. v. American Tel. & Tel. Co.*, 595 F.2d 1171, 1174 (9th Cir.), *cert. denied*, 444 U.S. 931, 100 S.Ct. 273, 62 L.Ed.2d 188 (1979). The district court must weigh [1] the court's need to manage its docket, [2] the public interest in expeditious resolution of litigation, and [3] the risk of prejudice to the defendants against the [countervailing (4)] policy favoring disposition of cases on their merits. *Id.* Although the failure to prosecute diligently may be sufficient to justify dismissal with prejudice, *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir.1980); *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir.1976), the cases focus on whether any aspect of the delay prejudiced the defendants, *e.g.*, *Nealey*, 662 F.2d at 1279. The pertinent question, therefore, is whether there has been delay *and* prejudice to the defendants sufficient to justify dismissal with prejudice. *Id.* at 1280.

Mir v. Fosberg, 706 F.2d 916, 918 (9th Cir. 1983) (emphasis added). *Cf. Ghazali*, 46 F.3d at 53 (regarding dismissal for *failure to file opposition to a motion, as opposed for failure to prosecute*, court held that before dismissing an action on such grounds, the district court must weigh "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Id.* at 53 (quoting *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.1986) (internal quotation marks omitted)). *See also Nealey v. Transportacion Martima Mexicana, S.A.*, 662 F.2d 1275, 1278-79 (9th Cir. 1980) ("the court's exercise of discretion . . . is cabined by the requirement that it weigh . . . the relevant factors." (Internal quotation marks and citation omitted.)) It appears that there are only three-pro-dismissal factors and one pro-non-dismissal factors. *Mir*, 706 F.2d at 918.

While it is not entirely clear whether the five Rule 41(b) factors to be considered when disobedience of a court order is the basis for involuntary dismissal, plaintiff nevertheless discusses all five factors. It would appear that only "[1] the court's need to manage its docket, [2] the public interest in expeditious resolution of litigation, and [3] the risk of prejudice to the defendants [are to be weighed] against [4] the policy favoring disposition of cases on their merits," *Mir*, 706 F.2d at 916, are to be considered, and that delay and prejudice are the correct factors to be considered when involuntary dismissal is based on alleged failure to prosecute. Also, the district court's [4] failure, as here, to consider less severe sanctions is a factor to be considered on appeal.

The totality of the district court's February 11, 2015 identical "ORDER GRANTING ORDER [*sic*] TO DISMISS" in both *Baeza* and *Corral* actions is:

> Having considered the relevant factors, the court GRANTS Defendant's Motion to Dismiss for Lack of Prosecution (Dkt. No. 46 [35]). The court is mindful of counsel's medical issues, [*sic*] Those [*sic*] obstacles notwithstanding, Plaintiffs' delays in prosecution [*sic*] this matter were not reasonable. See F.R.C.P. 41(b). Plaintiffs' Motion to Lift Stay (Dkt. No. 44 [33]) is DENIED as moot. IT IS SO ORDERED.

Baeza ER-Vol. 1: 2; CD-62; *Corral* ER-Vol. 3: 375; CD-50.

Clearly, each order on its face is wholly insufficient to support Rule 41(b) dismissal because of its baseless, conclusory statements, without any explanation or discussion, that the district court had "considered the relevant factors." These orders are *per se* abuses of discretion. Moreover, although the orders mention "Plaintiffs' delays in prosecution[,]" they do not discuss or detail them in any way or take any consideration of the fact that it was defendant's actions, all of which the district court ratified in its orders, that were responsible for the vast majority of delays of the actions. The district court erred by not fulfilling the "Rule 41(b) require[ment] that the trial judge, when he dismisses on the merits, make findings of fact and conclusions of law in accordance with Rule 52(a), Fed.R.Civ.P. . . . ." *Industrial Building Materials, Inc.*, 437 F.2d at 1339.

When a district court does not conduct this analysis explicitly, as here is the case, then "[this court] reviews the record independently to determine whether the district court abused its discretion[,"] so that there in fact is de novo review. *Id.* at 54. The word "just" precedes the word "speedy" in Rule 1, Fed. R. Civ. P.)

Here, public policy indeed may have an interest in the expeditious resolution of this litigation.[5] However, this court must weigh the need for timely resolution against the other factors. There is nothing in the record regarding the district court's need to manage its docket. Defendants always had full notice, not only from these two actions but also since 2004 in *Thomas*, of all of plaintiffs' claims, and therefore could not possibly have been prejudiced in any manner.

"[W]hether actual prejudice exists may be an important factor in deciding whether a given delay is 'unreasonable.'" *Nealey*, 662 F.2d at 1280. Here, there was no actual prejudice, and defendant caused more delay than plaintiffs. "The pertinent question for the district court, then, is not simply whether there has been any, but rather whether there has been sufficient delay or prejudice to justify a dismissal of the plaintiff's case." *Ibid.*

The bulk of the delay - approximately six years of the seven years the actions were pending - was *not* attributable in any way to the *Baeza* and *Corral* plaintiffs or their counsel and it accounted for the vast majority of the failure-to-prosecute/delay time on which the involuntary dismissals in *Baeza* and *Corral*

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[5] These two actions could have been concluded eight months before they were dismissed on February 11, 2015, had the district court entertained the *Thomas* plaintiffs' motion for consolidation, since *Baeza* and *Corral* could have been tried at the same time as, and as part of, the *Thomas* action. It was tried from June 24-26, 2014. CD-1023, 1024, 1037. That trial took only three days (including jury selection through and including verdict), and trying these two actions with *Thomas* would have been accomplished in less than two additional days. Liability on the only issue, *Monell* custom, had been granted by summary adjudication in *Thomas* and would have been both issue and claim preclusive in *Baeza* and *Corral*. The only two issues to be tried would have been, as in *Thomas*, (1) was any given plaintiff forced to sleep on the floor?, and (2) plaintiff's damages. Not consolidating *Baeza* and *Corral* with *Thomas* was a significant abuse of discretion. Consolidation should have been ordered, and that abuse of discretion resulted in the abuse of discretion of Rule 41(b) dismissal.

were based. "Wh[en] both parties in fact were responsible for many delays during the pre-trial stage of the case, the court was [**not**] warranted in finding that [one party's] behavior was particularly egregious [so as to warrant dismissal as to him.]" *Peart v. City of New York*, 992 F.2d 458, 461 (2d Cir. 1993). Here, defendant's repeated actions caused more delay than did plaintiffs' one period of inaction. And, a court "must consider whether [a party whose dismissal involuntarily is sought] received notice that further delay would result in dismissal." *Id.* at 462 (citation omitted). There was no notice.

The only delay attributable to plaintiffs' counsel is excusable, and not to be counted, as explained by this court in *Lal* and *Community Dental Services v. Tani*, 282 F.3d 1164 (9th Cir. 2002).

Plaintiffs' counsel delayed from December 2012 to January 2014 because of a hip ailment and hip replacement. *See supra.* This was "an extraordinary circumstance," *Lal*, 610 F.3d at 524, because counsel had absolutely no control over it. (Counsel was 71 years old at the outset of her severe and disabling pain.)

This court stated in *Lal* that

> [a] dismissal for failure to prosecute under Rule 41(b) is much more like a default judgment than a Rule 68 judgment. . . . [There is a] "well-established policy consideration[] [that] we have recognized as underlying default judgments and Rule 60(b)." [Citation omitted.] The same policy considerations underlie dismissal for failure to prosecute. We have stated that dismissal under Rule 41(b) "is so harsh a penalty it should be imposed only in extreme circumstances." *Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996). This is almost identical to our stance on default judgments, which are "appropriate only in extreme circumstances." *Falk v. Allen*, 739 F.2d 461, 463 (9th Cir. 1984) (per curiam).

Id. at 525.

In *Community Dental Services*, this court held that "judgment by default is an extreme measure and a case should, 'whenever possible, be decided on the merits.'" 282 F.3d at 1170 (quoting from *Falk*, 739 F.2d at 463). Here, there was every opportunity for the two cases to have been decided on their merits long before the February 2015 dismissals, *viz.*, at the June 24-26, 2014 trial in *Thomas*. *Thomas* CD-1023-24, 2027. In *Community Dental Services*, this court also stated:

> Under Federal Rule of Civil Procedure 60(b)(6), a default judgment may be set aside when there is any reason not previously considered in the Rule that justifies granting relief. We have held that a party merits relief under Rule 60(b)(6) if he demonstrates "extraordinary circumstances which prevented or rendered him unable to prosecute [his case]." *Martella v. Marine Cooks & Stewards Union*, 448 F.2d 729, 730 (9th Cir.1971) (per curiam); *see also Pioneer Investment Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). The party must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the prosecution or defense of the action in a proper fashion. *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir.1993).

282 F.3d at 1168. Here, the Rule 41(b) dismissals in effect were default judgments against the plaintiffs. "Extraordinary circumstances which prevented [and] rendered" plaintiffs' counsel "unable to prosecute" the case existed from December 2012 to January 2014, a tiny percentage of the time the actions were pending, from May 2007 to February 2015, 14 months out of a total of eight years, or 0.15% of the total elapsed time. The *Baeza* and *Corral* plaintiffs have shown injury in the dismissal of all of their claims, and have demonstrated "circumstances beyond [plaintiffs' or counsel's] control that prevented [counsel] from proceeding with the prosecution . . . of the action in a proper fashion," but only for those 14 months.

In *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993), this court held:

> Rule 60(b)(6) has been used sparingly as an equitable remedy to prevent manifest injustice. The rule is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment. For example, in *Klapprott v. United States*, 335 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 266 (1949), the Court upheld the use of the rule to set aside a default judgment in a denaturalization proceeding *because the petitioner had been ill*, incarcerated, and without counsel for the four years following the judgment.

(Emphasis added.) *See Klapprott v. United States*, 335 U.S. 601, 604, 614 (1949) ("Petitioner was seriously ill. The illness left him . . . so weakened that he was unable to work. *** [H]e was, weakened from illness). Here, the only delay attributable solely to plaintiffs' counsel was due to the extraordinary circumstance of illness.

The district court abused its discretion because it made a factual mistake, by blaming the delay on which it based involuntary dismissal on plaintiffs when the delay was attributable mainly to defendant and to the district court. There is an abuse of discretion when discretion is exercised based on mistaken facts, *see Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004), and a district court abuses its discretion when the record contains no evidence to support its decision. *United States v. Schmidt*, 99 F.3d 315, 320 (9th Cir. 1996).

The public policy favoring dispositions of cases on their merits appears particularly strong in cases such as these, especially since in *Thomas* defendant lost on the main and only claim, *Monell* custom. The merits already had been litigated on September 21, 2007, *viz. Thomas*, 514 F.Supp. 2d 1201, and in the *Thomas* trial, June 24-26, 2014.

With respect to the availability of less drastic sanctions, a "district court abuses its discretion if it imposes a sanction of dismissal without first considering the impact of the sanction and the adequacy of less drastic sanctions." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1228 (9th Cir. 2006) (internal quotation marks and citation omitted). Here, there was no consideration of less drastic sanctions.

"Because dismissal is so harsh a penalty, it should be imposed only in extreme circumstances. [Citation omitted.] Dismissals have been reversed when the district court failed to consider less severe penalties. *See, e.g.*, *Tolbert v. Leighton*, 623 F.2d 585, 587 (9th Cir. 1980); *Industrial Building Materials*, 437 F.2d at 1339. [A] district court *must* [have] consider[ed] . . . less drastic alternatives sanctions before dismissing." *Raiford v. Pounds*, 640 F.2d 944, 945 (9th Cir. 1981).

> A defendant's motion for dismissal under Rule 41(b) bears some similarity to 'an avoidance or affirmative defense . . . it should be incumbent upon the movant to come forth with some facts indicating delay on the part of the plaintiff[,] . . . only unreasonable delay will support a dismissal for lack of prosecution, . . . and unreasonableness is not inherent in every lapse of time. In our judicial system, many delays are of an acceptable duration; others, though lengthy, may be unavoidable[,] [and w]here these exist, there is no basis for a dismissal.

Nealey, 662 F.2d at 1280. A "delay alone should not be deemed to create a 'presumption of prejudice,' save in the sense that if the plaintiff proffers no pleading or presents no proof on the issue of (reasonableness), the defendant wins." *Ibid.*

> Prejudice itself usually takes two forms - loss of evidence and loss of memory by a witness. In every case of delay, a district court in the

> exercise of its discretion should consider whether such losses have occurred and if so, whether they are significant.

Id. at 1281. Here, there is no record of either form of prejudice. And, as in *Nealey*, "[i]n attempting to apply the principles [governing Rule 41(b) dismissals] to the circumstances of the instant case, [this court is] hampered by the district court's virtual failure to make findings of fact[,] [and t]he record provides no support for a conclusion that appellant's delay was unreasonable[,]" *ibid.*, or that there was any *actual* prejudice. The *Thomas* action, filed in October 2004, did not go to trial until late-June 2014, 10 years after it was filed, yet these parallel, related, low-numbered, complimentary actions were dismissed after pending for seven years, and they both very easily could have been tried at the same time as the *Thomas* action. They remained pending until eight months *after* the *Thomas* trial.

> Appellant's papers filed in opposition to the motion to dismiss reflect a request that the district court impose a discovery and trial schedule that will lead expeditiously to a hearing on the merits of appellant's complaint. We think such a procedure a far more appropriate response to the delay in this case than the sanction of outright dismissal with prejudice. *See Nevijel v.North Coast Life Insurance Co.*, 651 F.2d 671, 674 (9th Cir.1981) (dismissal with prejudice under Fed.R.Civ.P. 41(b) for failure to comply with Fed.R.Civ.P. 8(a) & (e) upheld where district court explored all reasonable alternatives to dismissal with prejudice first). Were the plaintiff to fail to comply with such a schedule without cause, the sanction of dismissal might then be appropriate.

Mir, 706 F.2d at 919.

Issue 2: The District Court Erred In Denying The *Baeza* And *Corral* Plaintiffs' Motions For Orders Withdrawing The Court's Orders Staying Discovery, And To Set Discovery Cutoff, Pretrial, and Trial Dates.

Based on all of the facts, the district court should have granted the *Baeza* and *Corral* plaintiffs' motions for orders withdrawing the district court's order staying discovery, that had remained in effect for at least six years at the time plaintiffs made their motions, from November 2007[6] to September 2013, and to set discovery cutoff, pretrial, and trial dates, in March 2014. Soon after plaintiffs in *Baeza* and *Corral* filed these motions, defendant filed his motions to dismiss and the district court only then granted those motions and held that the plaintiffs' motions were moot. The district court erred by abusing its discretion in granting the Rule 41(b) motions and then by holding plaintiffs' motions to be moot.

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[6] Based on plaintiffs' counsel's review of the dockets in these actions, it appears that all matters were stayed in these actions, pending the outcome of defendant's 28 U.S.C. Section 1292(b) interlocutory appeal in the related action, *Thomas v. Baca*, CV-04-08448-DDP(SHx). This is reinforced by the district court's May 22, 2008, June 5, 2008, July 1, 2008, and September 30, 2008 Orders setting and continuing a "Status Conference re Stayed Case[s]."

The conference regarding the stayed actions was continued to November 7, 2008. The district court's November 10, 2008 Order, Doc. 37, set pretrial and trial dates in the *Baeza* action, which prompted plaintiffs' *ex parte* application to continue the pretrial and trial dates, and to permit discovery in that case. The district court in its Order dated December 1, 2008, Doc. 42, found good cause to stay pending settlement discussions. The district court's order in *Baeza* staying the action until settlement negotiations were completed applied equally well to *Corral*. However, the long passage of time during which discovery in these actions was stayed, due to settlement negotiations, and the interlocutory appeals in *Thomas*, gave neither plaintiffs, nor defendants for that matter, enough time to conduct discovery or to bring case-dispositive motions.

These damages class actions were filed in May and September, 2007. In *Corral*, the allegations are that unconstitutional floor-sleeping occurred during the period May 17, 2005 to December 31, 2005; and in *Baeza*, from January 1, 2006 through May 10, 2007. This would have made a seamless, uninterrupted class period of December 2002 to May 10, 2007. Plaintiffs needed to conduct discovery and needed enough time to do so, because their prior experiences with defendants showed a virtually certain need for discovery motions to compel discovery that, even if granted, would have led to defendants filing voluminous motions for reconsideration, all of which would have consumed time, and which would span time. Counsel's experience was that a discovery cycle takes about 110 days and approximately four cycles would have been needed.

Plaintiffs sought discovery in order to prove their *Monell* floor-sleeping claims against defendant, to defend against defense motions for summary adjudication, and affirmatively to represent the interests of the putative classes, and requested that the district court allot 440 days for discovery and thereafter for action-dispositive motions. Plaintiffs requested that the district court allow resumption of discovery, and set discovery cutoff, pretrial and trial dates in this action, as follows:

Discovery cutoff date:	June 30, 2015
Motion hearing cutoff date:	September 30, 2015
Pretrial Conference date:	January 16, 2016
Trial date:	February 1, 2016.

The district court abused its discretion by not addressing and by not granting both plaintiffs' motions, and the district court's failure to address the *Baeza* and *Corral* motions was a material cause of the involuntary dismissals,

because had the motions been considered and granted, then *Baeza* and *Corral* could have gone to trial along with *Thomas*. Plaintiffs seek reversal of the denial, as moot, of these motions.

Issue 3: The District Court Erred In Vacating And Refusing To Rule Upon, And Thereby Denying, Plaintiffs' Motions To Consolidate The Three Actions, To Grant Summary Adjudication, And For Class Certification.

A. The *Corral* Motion To Consolidate Should Not Have Been Vacated, And The Motion In *Thomas* To Consolidate *Thomas* With The *Baeza-Corral* Actions Should Have Been Ruled Upon, And It Was An Abuse Of Discretion For The District Court To Have Vacated/Denied Plaintiffs' Motions.

Motions to consolidate the *Thomas-Corral-Baeza* actions were made in *Corral* on October 1, 2007, *Corral* CD-7, which the district court vacated on November 20, 2007, *Corral* ER-Vol. 3: 541; CD-19, and in *Thomas* on June 14, 2011, *Thomas* ER-Vol. 4: 568; CD-808, which the district court took under submission, but on which it never ruled. The *Corral* motion to consolidate should not have been vacated,[7] and the motion in *Thomas* to consolidate *Thomas* with the *Baeza-Corral* actions should have been ruled upon, and it was an abuse of discretion for the district court to have vacated/*de facto* denied plaintiffs' motions.

Because the vacating of, the refusal to rule upon, and the *de facto* denials of the motions to consolidate ultimately resulted in the Rule 41(b) dismissals, this court should hold that because the Rule 41(b) dismissals for failure to prosecute were based on the district court's abuse of discretion as to the motions

[7] There was no need to make a consolidation motion in *Baeza* because the appropriate motions to consolidate all three cases, *Baeza, Corral* and *Thomas*, had been made in both *Corral* (in 2007) and *Thomas* (in 2011).

to consolidate, that therefore the dismissals were resultant abuses of discretion.

Rule 42(a), Fed. R. Civ. P., permits consolidation, and it is appropriate when there are common questions of fact and law. The purpose of consolidation is to promote efficiency, to avoid unnecessary duplication, and to avoid potentially inconsistent adjudications.

There is but one single, essential requirement for consolidation, and it is ***common questions of fact or law***, *Enterprise Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994); *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993), and consolidation does not affect any party's substantive rights. *J.G. Link & Co. v. Continental Cas. Co.*, 470 F.2d 1133, 1138 (9th Cir. 1972).

Here, consolidation was appropriate, *see e.g. United States E.P.A. v. City of Green Forest, Ark.*, 921 F.2d 1394, 1402 (8th Cir. 1990), and plaintiffs in *Corral* and *Thomas* requested consolidation of all three actions. It made eminent sense to consolidate all three actions and to have all plaintiffs litigate all of their claims in the same action and at trial. Contrariwise, it was inefficient, un-expeditious, and uneconomical for consolidation to have been denied, in violation of the "just, speedy, and inexpensive" requirements of Rule 1, and the denials resulted in the unwarranted, involuntary dismissals of both *Baeza* and *Corral*.

B. The *Baeza-Corral* Motions For Summary Adjudication Should Have Been Granted And It Was An Abuse Of Discretion For The District Court To Deny Them.

Motions for Summary Adjudication were filed in both *Baeza* (June 11, 2007, *Baeza* ER-Vol. 2: 155; CD-10-12), and *Corral* (October 1, 2007, *Corral* ER-Vol. 3: 504; CD-9). Because the vacating of, the refusals to rule upon, and the *de facto* denials of the motions for summary adjudication ultimately resulted in the Rule 41(b) dismissals, this court should hold that because the Rule 41(b)

dismissals for failure to prosecute were based on the district court's abuse of discretion as to the motions for summary adjudication, that therefore the dismissals were resultant abuses of discretion.

Plaintiffs completely met the burden of establishing that there was "no genuine issue as to any material fact and that [they were] entitled to a judgment as a matter of law[,]" Fed. R. Civ. P. Rule 56(c); *see British Airways Bd. V. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978); *Fremont Indemnity Co. v. California Nat'l Physician's Ins. Co.*, 954 F. Supp. 1399, 1402 (C.D. Cal. 1997), by their submission of the multitude of floor sleeper declarations submitted in *Baeza*, *Baeza* ER-Vol. 2: CD-11-12, and by their request for judicial notice of all of the floor sleeper evidence submitted by the plaintiffs and the defendants in the *Thomas* action. Plaintiffs relied upon the proof of nearly 25,000 floor sleepers in *Thomas* as evidence of the custom of floor sleeping, *Thomas*, 514 F.Supp.2d. at 1209, *Thomas* ER-Vol. 4 at 621; CD-619, that in fact was collected during the class period for *Corral*, *Corral* ER-Vol. 3: 548; CD-1, thus establishing, beyond cavil, that floor-sleeping continued during the *Corral* period of floor-sleeping. Indeed, in *Thomas*, the district court granted summary adjudication of the precise, very same issue, *Thomas*, 514 F.Supp.2d 1201, and it should be issue and claim preclusive in these actions. Defendants initially appealed from this ruling, No. 15-56193 (*Thomas*), Dkt. 1, and then dismissed it. Dkts. 33, 35 (*Thomas*).

A court also may grant summary adjudication of a particular issue, claim, or defense under the same standards used to consider summary judgment. *See* Fed. R. Civ. P Rule 56(a) (summary judgment may be had on a claim "or any part thereof"); *Pacific Fruit Express Co. v. Akron, Canton & Youngstown R.R. Co.*, 524 F.2d 1025, 1029-30 (9th Cir. 1975); Cal. Cent. Dist. Cal. L.R. 56-4.

A motion for summary adjudication should be granted when, as here, there was no genuine issue of material fact and the moving party was entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Plaintiffs identified the declarations submitted in *Thomas*, which demonstrated the absence of any triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

A party who opposes summary adjudication "must set forth *specific* facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 247 (emphasis added; citing *First Nat'l Bank of Arizona v. Cities Services Co.*, 391 U.S. 253 (1968)). Here, defendant kept requesting continuances and then requested that the district court vacate the *Baeza-Corral* respective motions for summary judgment, thereby avoiding having to file an opposition to said motons.

A court may grant summary adjudication of a particular issue, claim, or defense under the same standards used to consider summary judgment. *See* Rule 56(a), Fed. R. Civ. P.; *Pacific Fruit Express Co.*, 524 F.2d at 1029-30.

Plaintiffs made a "showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (citation omitted). Here, plaintiffs met this burden. *See Thomas*, 514 F.Supp. 2d 1203.

A "genuine issue" of material fact did not exist because defendant failed to present the essential elements of its claim and on which it would bear the burden of proof at trial, *Celotex Corp.*, 477 U.S. at 322-23, and a genuine dispute never arose so that there was "evidence . . . such that a reasonable jury could [have] return[ed] a verdict for the nonmoving party [the defendant]." *Anderson*, 477 U.S. at 248.

In 1978 (in *Rutherford v. Pitchess*), and again in 1989 (in *Thompson v. County of Los Angeles)*, and again in 2005 (in both *Thomas v. Baca* and *Rutherford v. Baca*), this same defendant was ordered to end the practice of floor sleeping, but he failed to do so.

C. The *Baeza-Corral* Motions For Class Certification Should Have Been Granted And It Was An Abuse Of Discretion For The District Court To Deny Them.

Motions for class certification were filed in both *Baeza* (*Baeza* ER-Vol. 2: 358; CD-9, June 11, 2007) and *Corral* (*Corral* ER-Vol. 3: CD-8, October 1, 2007). Because the vacating of, the refusals to rule upon, and the *de facto* denials of the motions for class certification ultimately resulted in the Rule 41(b) dismissals, this court should hold that because the Rule 41(b) dismissals for failure to prosecute were based on the district court's abuse of discretion as to the motions for class certification, that therefore the dismissals were resultant abuses of discretion.

Plaintiffs made the following, class action allegations in their operative complaints:

"44. Plaintiffs are two members of the discrete class of persons whose defining characteristic is that they were forced to reside and sleep on the floor at the Los Angeles County jail by defendant Baca during the period January 1, 2006 to and including the time that will be set as the class closing date by the court.

"44. This class potentially contains over 100 and as many as 100,000 members, and the class is so numerous so that joinder of all members is impracticable, and also, because defendants apparently have rendered difficult ascertaining all potential class members names by their disobedience of this court's May 17, 2005 and July 1, 2005 class identification orders in *Thomas v.*

Baca, 04-08448-DDP(SHx), and it is impracticable to join all the members of the class in this action.

"45. There are only common questions of fact and law with respect to all class members, as is the case in *Thomas*.

"46. The claims made by the representative parties is typical of the claims of each class member.

"47. The representatives of the class, plaintiffs, fairly will represent and adequately protect the interests of all class members, and will do so both vigorously and very zealously.

"48. Prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to class members, which would establish incompatible standards for parties opposing the class, and defendants have acted and will continue to act on grounds generally applicable to every class member, and the class questions not only predominate but are the only questions that exist.

"49. Therefore, this action is maintainable under F.R. Civ. P. Rule 23(a), & (b)(1)(A),(B)(1),(2), and (3).

"50. It is not possible accurately to measure the size of the class.

"51. The nature of the notice to be provided to class members should be as follows: defendants should be required to identify and to provide a suitable notice to all class members."

*****

The class sought to be certified both met the requirements for class certification under F.R. Civ. P. Rule 23(a) as well as under all parts of Rule 23(b), and therefore it should have been certified. *See, e.g.*, *Hawkins v. Comparet-Cassani*, 33 F.Supp. 2d 1244 (C.D. Cal. 1998), *rev'd in part*, 251 F.3d 1230 (9th Cir. 2001), *on remand*, 2002 WL 227081 (C.D. Cal. 2002);

Thomas, 231 F.R.D. 397 (same district court judge ordered certification, sought by same plaintiffs' counsel as herein).

The characteristics of the class were typical for all class members. *Ibid.* The size of the class, at least 175 persons, *see* declarations submitted in support of the *Baeza* motion, *Baeza* ER-Vol. 2: CD-11-12, and the evidence set forth in *Thomas*, 514 F.Supp.2d at 1209, that found that there were 24,688 floor-sleeping instances, and that 5,181 inmates slept on the floor for more than a night. The *Thomas* floor-sleeping data was collected during the *Corral* putative class action period, from May 2005 to September 2005, and hence showed massive floor-sleeping during the *Corral* class period. Thus, the numerosity factor made it impracticable for each member to bring her/his own action, and also the individual amounts of money involved made it impracticable for each member to bring her/his own action. *Ibid.* This last factor strongly supported plaintiffs having met the burden under Rule 23(b)(3). *See infra.*

The requirements of numerosity, commonality, typicality, adequacy of representation, and typicality of defendants' actions, Fed. R. Civ. P. Rule 23(a)(1)-(4), (b)(1), (2) & (3), all fully were met. *See Hawkins*. Therefore, certification of the two actions as class actions properly should have been made, in order to adjudicate properly whether or not the policies of the same defendant were unconstitutional.

Additionally, plaintiffs' counsel should have been designated as class counsel, *Berry v. Baca*, 379 F.3d 764 (9th Cir. 2004), *reh'g and reh'g en banc denied.* The requirements of Rule 23(b)(3), which are that the court "find[] that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods [here a multiplicity of individual lawsuits] for the fair and efficient adjudication of the controversy[,]" including "[t]he

matters pertinent[:] (A) the interest of members of the class in individually controlling the prosecution . . .; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; [and] (D) the difficulties likely to be encountered in the management of a class action[,]" similarly, each and all, were met.

Class certification should have been granted and the district court's refusals and failures to rule on the motions were abuses of discretion.

A determination of class certification does not focus on whether a plaintiff has stated a claim, or will prevail on the merits, but rather is limited exclusively to whether the requirements of Rule 23 were satisfied. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). They were satisfied. These actions have merit, obviously had to be brought, and the floor-sleeping situation to which class members had been and continued to be subjected was outrageously and deliberately indifferent to their constitutional rights.

The determination on the issue of class certification was vested in the sound discretion of the trial court, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). Since a court may amend an order granting class certification, *see In re School Asbestos Litigation*, 789 F.2d 996, 1011 (3d Cir. 1986), in a close case a court should rule in favor of class certification. *Kahan v. Rosenstiel*, 424 F.2d 161, 169 (3d Cir. 1970). *Baeza* and *Corral* (as was *Thomas*) were not close cases. The district court did not use sound discretion in ignoring, and thereby denying, the certification motions.

To obtain class certification, a plaintiff must demonstrate that all four requirements of Rule 23(a) and at least one part of Rule 23(b) have been met. The requirements of Rule 23(a) are: (1) numerosity, so as to make impracticable joinder of all class members; (2) common questions of law and fact to the class

members; (3) typicality of claims or defenses; and, (4) representative parties who fairly and adequately will protect the interests of the class. Rule 23(a)(1)-(4).

"The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." *Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). Class treatment was necessary, and is was the only efficient manner to deal with the issue addressed and there was be no fairer way, much less a fair way at all, in which to have protected the rights of the numerous, absentee class members.

>**Numerosity**. The district court should have made a common sense determination whether it would be difficult or inconvenient to join all class members as named parties, under the particular circumstances of the cases. *See, e.g., Senter v. General Motors Corp.*, 532 F.2d 511, 523 (6th Cir. 1976). Here, it was quite inconvenient to join as class members all of the 82 (or thousands) of identified persons whose rights allegedly had been violated by defendant, as parties plaintiffs, because the number was very large. In these cases, the numerosity requirement clearly was met as to floor sleepers.

>**Commonality**. “The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.” *Baby Neal*, 43 F.3d at 56. Plaintiffs easily satisfied the commonality requirement because there were only common questions of law and/or fact. Under *Baby Neal*, a plaintiff merely has to demonstrate that there is one common question of law or of fact to satisfy the commonality requirement.

Here, the common question of fact was whether defendant impermissibly forced plaintiffs and class members to sleep on the jail’s floors, and the common legal question is whether defendant’s conduct was wrongful.

>**Typicality**. Typicality focuses on whether the claims of the class representatives are typical of the claims of the class. "The concepts of commonality and typicality are broadly defined and tend to merge," and both requirements attempt to "assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented." *Baby Neal*, 43 F.3d at 56 (citations omitted). *See also*, *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n. 13 (1982).

The typicality requirement "is intended to preclude certification of those cases where the legal theories of the named plaintiffs potentially conflict with those of the absentees by requiring that the common claims are comparably central to the claims of the named plaintiffs as to the claims of the absentees." *Baby Neal*, 43 F.3d at 57. Here, the typicality requirement easily was satisfied because all claims of plaintiffs and of absentees were precisely the same.

>**Adequacy of representation**. Rule 23(a)(4) requires that plaintiffs who seek certification must "fairly and adequately protect the interests of the class." All that was required was that "“the plaintiff’s attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and . . . the Plaintiff must not have interests antagonistic to those of the class." *Weiss v. York Hosp.*, 745 F.2d 786, 811 (3d Cir. 1984)(citation omitted). As one of the lead attorneys for the plaintiffs in one of the consolidated Proposition 187 (California's 1994, anti-immigrant initiative) cases before Judge Mariana R. Pfaelzer, *see Children Who Want an Education v. Wilson*, 908 F. Supp. 599 (C.D. Cal. 1995), 54 F.3d 599 (9th Cir. 1995), 59 F.3d 1002 (9th Cir. 1995), plaintiffs’ counsel long since had met the adequacy of representation requirement. Plaintiffs' counsel also was one of the class counsel in two, other certified class actions in before the same district court judge: *Hawkins v. Comparet-Cassani*, 33 F.Supp. 2d 1244 (C.D. Cal. 1998) (the stun belt case),

251 F.3d 1230 (9th Cir. 2001), *on remand*, 2002 WL 227081 (C.D.Cal. 2002), and *Vanke v. Block*, 98-04111-DDP (a Los Angeles County jail over-detention case), 2002 WL 1836305 (C.D. Cal. 2002), 2003 WL 22331964 (9th Cir. 2003), both before Judge Dean D. Pregerson. Moreover, plaintiffs' counsel successfully had litigated many, many actions, both for equitable relief and for damages, at trial, on appeal, at the U.S. Supreme Court, and in settlement, against the Los Angeles County Sheriff's Department. (In that regard, class certification would have promoted potential settlement. At the time certification was sought, plaintiffs' law firm represented over one thousand similarly-situated claimants, all of whom agreed to opt into the classes sought to be certified, and all of whom could not file separate actions were there not available a class into which to opt because they were without the wherewithal to do that.) Plaintiffs' counsel's prevailing on summary adjudication in *Thomas* (and at trial in that case) showed her to be highly qualified as class counsel.

>**Typicality of defendant's actions**. Rule 23(b)(2) dictates that an action may be maintained as a class action only if the prerequisites of Rule 23(a) are met and the party opposing the class has acted or refused to act on grounds generally applicable to the class. *Ibid.* The requirements of Rule 23(b)(1)(A) and (B) were satisfied because defendant acted only on grounds specifically applicable to the classes and "the prosecution of separate actions by . . . individual members of the classes would [have] created a risk of . . . inconsistent or varying adjudications with respect to individual members of the class[es] which would [have] established incompatible standards of conduct for the party opposing the class [Rule 23(b)(1)(A) and,] adjudications with respect to individual members of the class . . . would as a practical matter [have] be[en] dispositive of the interests of the other members not parties to the adjudications

or substantially impair or impede their ability to protect their interests [Rule 23(b)(1)(B)]." *Ibid.*

Because plaintiffs clearly sustained their burdens of satisfying the prerequisites of Rules 23(a) and 23(b)(1) & (b)(2), their actions should have been certified as a class actions. It was an unreasonable waste of both judicial and attorney resources not to have certified class actions.

>Rule 23(b)(3). The requirements of Rule 23(b)(3) also were met.

As set forth above, the district court readily should have found "that the questions of law or fact common to members of the class predominate[d] over any questions affecting only individual members, and that a class action [was] superior to other available methods for the fair and efficient adjudication of the controversy." *Ibid.* It was much superior for the common issues of law and fact to have been decided once and for plaintiffs and class members, both in these two actions, and along with *Thomas*. The issues, save and except for each person's damages were precisely the same, to wit, did defendant have a custom that was violative of constitutional rights and that caused jail detainees to "floor-sleep?" This was proved in *Thomas*.

(A) The interest of members of the classes in individually controlling the prosecutions did not exist, as was evidenced by the fact so many of them (more than 1,000) already were represented by plaintiffs' counsel in *Thomas*. Numerous members of the putative class had contacted plaintiffs' counsel and expressed their wish to have plaintiffs' counsel control the prosecution, and had no wish to control the prosecution.

(B) The extent and nature of the litigation concerning the controversy already commenced by class representatives completely represented class members.

(C) There was great desirability, and no undesirability, of concentrating the litigation of the claims in the particular forum, and with one judicial officer.

(D) There would have been no foreseeable difficulties likely to be encountered in the management of a class action.

Rule 23(b)(3) requires for class certification that common questions "predominate" and that a class action is "superior." A damages class action may be certified when questions of law or fact common to the class "predominate" over questions affecting individual members and a class action is superior to other methods of adjudication. Here, all questions of law ***AND*** fact predominated, and the class action was superior because it would be absurd for hundreds of plaintiffs each to file separate actions, or to believe that they would have done so. Either alternative warranted class certification.

Class certification would have promoted the class action objectives of economy and efficiency common to damages class actions. When economies of time, effort, and expense, as compared to separate lawsuits, permit adjudication of disputes that cannot be economically litigated individually, as here, and to avoid inconsistent outcomes, because the same issues can be adjudicated the same way for the entire class, class certification is warranted. *See e.g.* Adv. Comm. Note 39 F.R.D. 1966.

To decide whether common issues predominate courts identify the substantive issues and the applicable defenses and then inquire as to the proof relevant to each issue. *See e.g. Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981); *Expanding Energy, Inc. v. Koch Indus., Inc.*, 132 F.R.D. 180, 183 (S.D. Texas 1990). Here, it was more than obvious that the issues as to each plaintiff were the same as to the issues of all class members. The substantive issues were: is there a custom of forcing detainees to be on the floors? The issues are the same

for every member of each class. The defenses are precisely the same as to all plaintiffs. The proof of the custom is precisely the same as to the class.

Thus, common questions of both law and fact not only predominate, but are identical.

A class action was superior to individual suits, *see e.g. Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1231-32 (9th Cir. 1996), because no member had any individual interest in controlling the prosecution of the claims made by plaintiffs, and the extent and nature of the litigation already begun was conducive to its maintenance as a class action. *Cf. Abed v. A.H. Robbins Co., Inc.*, 693 F.2d 847, 856 (9th Cir. 1982) (when each class member suffered sizeable damages or has a particular emotional stake in litigation, she or he may wish to control her or his own case). Moreover, it was desirable to concentrate this litigation in the same place, before the same judge. And, there were no viable procedural alternatives. *See e.g. Simer,* 661 F.2d at 672 ; *Expanding Energy, Inc.*, 132 F.R.D. at 183. These cases are so-called "negative value" suits, *see e.g. Castano v. American Tobacco Co.*, 84 F.3d 734, 738 (9th Cir. 1996), because each potential plaintiff's damages would not warrant suit, and therefore, they were preferably maintainable as a class action, so that each "negative value" plaintiff could have a positive outcome for her or his claim. Negative value suits support class certification. *Ibid.* This, perhaps, is the most salient factor that warranted class certification.

Lack of any other litigation in another court is a factor that also warranted class certification, *see e.g. Dirks v. Clayton Brokerage Co.*, 105 F.R.D. 125, 136 (D.Minn. 1985), and there was good reason to have centralized these cases in the district court and before one judicial officer.

All of the conditions for the certification of a damages classes were met and it made eminent sense for the classes to have been certified. The district

court abused its discretion in ignoring the certification motions and by not certifying the classes, this affected the ultimate dismissals, and this court should rule that the denial of certification was an abuse of discretion and order certification itself or order it on remand.

VI. CONCLUSION

The district court abused its discretion and made both mistakes and errors of law at every turn, and this court should reverse all of its orders: (1) granting involuntary dismissal; (2) denying the *Baeza-Corral* plaintiff's motions to withdraw the district court stays; (3) vacating the *Corral* motion to consolidate, made in October 2007, and not ruling on the *Thomas* plaintiffs' motion to consolidate all three actions (made in *Thomas* in June 2011); (4) vacating the plaintiffs' motion for summary adjudication; and, (5) vacating the plaintiffs' motions for class certification. This court should grant summary adjudication as sought, or order that it be granted on remand; order class certification, or order that it be made on remand; and order consolidation, or order that it be made on remand.

Plaintiffs request costs on appeal, pursuant to Fed. R. App. P. Rule 39, and plaintiffs preserve their rights to recover attorneys' fees as part of costs, pursuant to 42 U.S.C. § 1988(b). *Cabrales v. County of Los Angeles*, 935 F.2d 1050 (9th Cir. 1991).

YAGMAN & REICHMANN

By: s/ Marion R. Yagman
MARION R. YAGMAN

RELATED CASE STATEMENT

The following appeal is related – *Thomas v. Baca*, 14-56183, because it is the same case, with all of the same issues, the same defendant, the same counsel, the same district court judge, and its disposition appears to be necessary to the disposition of the instant appeal.

YAGMAN & REICHMANN

By: s/ Marion R. Yagman
MARION R. YAGMAN

BRIEF FORMAT CERTIFICATION

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Nine Circuit Rule 32-1, I certify that the plaintiff's opening brief is proportionately spaced, has a typeface of 14 point Times New Roman, and contains approximately 13,959 words.

s/ Marion R. Yagman
MARION R. YAGMAN

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2015, I electronically filed the foregoing Opening Brief and Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: s/ MARION R. YAGMAN