UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ISAAC KIGONDU KINITI,

Plaintiff,

vs.

BARBARA WAGNER, et al.,

Defendants.

CASE NO. 05cv1013 DMS (PCL)

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND FIRST AMENDED COMPLAINT AND ADD PARTIES

This matter comes before the Court on Plaintiff's motion for leave to amend the First Amended Complaint ("FAC"). Defendants have filed an opposition, and Plaintiff has submitted a reply. Additionally, the Department of Homeland Security ("DHS") has filed an *amicus* brief in opposition to Plaintiff's motion. The Court finds the matter suitable for submission without oral argument pursuant to Local Civil Rule 7.1(d)(1). For the following reasons, the Court grants Plaintiff's motion.

I.

BACKGROUND

On May 9, 2005, Plaintiff Isaac Kigondu Kiniti, a civil immigration detainee at the San Diego Correctional Facility ("SDCF"), filed the complaint in this action, along with a motion to proceed *in forma pauperis* ("IFP"). The complaint alleged violations of constitutional rights against Corrections Corporation of America, Inc. ("CCA"), the Warden and several officers at SDCF. On August 4, 2005, the Court granted Kiniti's IFP application and reviewed his complaint *sua sponte* under 28 U.S.C. §

1915(e)(2). Pursuant to its *sua sponte* review, the Court dismissed several claims and several named defendants, with leave to amend. Kiniti filed his FAC on June 29, 2006. The remaining defendants answered the FAC on October 30, 2006. Kiniti, now represented by counsel, seeks leave to file a Second Amended Complaint ("SAC"). The proposed SAC seeks to (1) add four additional plaintiffs and class action allegations; (2) strike all damages claims; and (3) add additional defendants and dismiss some of the named defendants.

The four additional plaintiffs, all civil immigration detainees housed at SDCF, include Jose Morales-Vargas, Sylvester Owino, Hernan Ismael Delgado, and Any Castro. Morales-Vargas came to the United States from Guatamala in June 2006. Until very recently, he was housed at SDCF. Owino, a Kenyan national, came to the United States in 1998, and has been detained at SDCF since November 2005. Delgado, a Salvadorian, entered the United States in 1980. He has been housed at SDCF since October 8, 2004. Castro, a Honduras citizen, was detained at SDCF from September 2006 until February 1, 2007, when she was deported. Kiniti, also a Kenyan national, came to the United States in 1997. First detained at SDCF in November, 2004, Kiniti was transferred from that location but later returned to SDCF in June 2006. These plaintiffs seek to represent a class consisting of "all immigration detainees [] who are now or in the future will be confined at [SDCF]." (SAC, ¶¶ 9-20, 105.)

The proposed SAC seeks to substitute the defendants named in the FAC with Julie L. Myers, John P. Torres, Ron Smith, Anthony Cerone, Joe Easterling, Charles Howard, and CCA. Myers serves as Assistant Secretary for U.S. Immigration and Customs Enforcement ("ICE"), a branch within DHS charged with detaining and removing non-citizens. Torres is the director of the Office of Detention and Removal Operations, a division of ICE that manages the daily detention of immigration detainees. Smith serves as Director of the ICE San Diego Field Office. Cerone is the ICE Officer-in-Charge at SDCF, and Assistant Field Officer Director of the ICE San Diego Field Office. Easterling and Howard are Warden and Assistant Warden at SDCF. CCA, a Maryland incorporated company, provides detention and corrections services. Pursuant to contract, CCA houses immigration detainees in ICE custody at SDCF. Both ICE and CCA staff work on-site at SDCF, although the facility is operated primarily by CCA employees. All defendants are sued in their official capacities. (SAC,

¶21-28.)

The proposed SAC alleges only one claim for relief under the Fifth Amendment Due Process Clause of the United States Constitution. Specifically, it alleges:

> Defendants' policies, practices, acts, and omissions with respect to chronic and severe overcrowding at SDCF – including but not limited to the triple-celling of immigration detainees and the housing of additional detainees in common dayroom spaces – deprive plaintiffs of adequate shelter, reasonable safety, and basic human needs, and place them at unreasonable, continuing and foreseeable risk of, *inter alia*, increased violence, illness, mental suffering, and deteriorating health.

(SAC at ¶ 111.) "Triple-celling" means to house three detainees in a cell designed for two. When this happens, a plastic "boat" containing a thin sleeping mat is placed on the floor for the third detainee to sleep on. (*Id.* at ¶ 54.) Plaintiffs allege this practice affects about 675 of the approximately 1000 detainees at SDCF. (*Id.* at ¶2.) In addition to triple-celling, some detainees are housed in "makeshift beds placed in the common dayroom space." (*Id.* at ¶ 41.) Holding cells and administrative segregation units are also overcrowded. (*Id.* at ¶¶ 75-79.) "A typical holding cell" provides just enough space for 12 detainees to sleep in a row on the floor, side-by-side, touching each other, "like sardines." (*Id.* at ¶76.) Administrative segregation is used to house "overflow detainees" and "detainees who refuse to be triple-celled." (*Id. at ¶ 78.)* Segregated detainees are confined in their cells for 23 to 24 hours per day and are required to eat all meals in their cells. (*Id.* at ¶ 79.) They are provided only one hour out-of-cell for exercise, five days per week, in a small cement yard surrounded by a chainlink fence. (*Id.*)

The proposed SAC seeks declaratory and injunctive relief on behalf of the putative class. Specifically, it seeks: "a judgment declaring that defendants' policies . . . violate plaintiffs' rights under the Constitution," and a judgment "permanently enjoin[ing] defendants . . . from subjecting plaintiffs to the unconstitutional conditions." (*Id.* at "Prayer for Relief" (c)(d).)

II.

LEGAL STANDARD

Leave to amend shall be freely given when justice so requires, Fed.R.Civ.P. 15(a), and should not be denied unless there is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Amendment of pleadings is to be permitted

unless the opposing party makes a showing of one of the above factors. *Shipner v. Eastern Airlines, Inc.*, 868 F.2d 401, 406-7 (5th Cir. 1989). "Ordinarily, courts do not consider the validity of a proposed amended pleading in deciding whether to grant leave to amend." William W. Schwarzer, et al., *Federal Civil Procedure Before Trial*, ¶ 8:422(c) (2006); *see also Saes Getters S.p.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086 (S.D.CA 2002) (the legal sufficiency of a proposed amendment is more appropriately raised in a motion to dismiss rather than in an opposition to a motion for leave to amend). However, leave to amend may be denied if the proposed amendment is futile, although such denials are rare. Schwarzer, et al., *Federal Civil Procedure Before Trial*, ¶ 8:422(c). An amendment is "futile" only if it is clear that no set of facts can be proved under the amendment which would constitute a valid claim or defense. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 188 (9th Cir. 1987).

III.

DISCUSSION

Defendants argue amendment of the FAC is futile because: (1) Plaintiffs are no longer subject to triple-celling conditions, therefore they lack standing to bring suit; (2) Plaintiffs fail to allege an actual or imminent injury because of triple-celling; (3) triple-celling is not unconstitutional; and (4) violations of the American Correctional Association ("ACA") standards do not amount to a constitutional violation. DHS argues, among other things, it will be prejudiced if Plaintiffs are allowed to file the proposed SAC. These arguments are addressed in turn.

A. Standing

"The jurisdiction of federal courts depends on the existence of a 'case or controversy' under Article III of the Constitution." *GTE California, Inc. v. Federal Communications Comm'n*, 39 F.3d 940, 945 (9th Cir. 1994). An actual controversy must exist at every stage of the litigation. *See Roe v. Wade*, 410 U.S. 113, 125 (1973). "In general a case becomes moot 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). In other words, a case is moot if the issues presented are no longer of any direct concern to the parties, and the Court would merely be resolving a hypothetical question. To determine whether a request for declaratory and injunctive relief has become moot, the Court asks "whether the

facts alleged . . . show that there is a substantial controversy, between the parties having adverse legal interests, of sufficient immediacy" to warrant the issuance of a declaratory judgment or injunctive relief. *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975).

Defendants argue Plaintiffs lack standing because "the very condition they alleged violates their constitutional rights – *triple-celling* – is no longer a condition faced by any of the detainees." (Opposition at 7.) (Emphasis added.) On January 27, 2007, ICE ordered SDCF to transfer 104 detainees to another detention facility. (Opposition, Ex. 1, ¶ 6.) Morales-Vargas was among those transferred. (*Id.* at ¶ 7.) Four days later, ICE ordered SDCF to deport five detainees to Honduras, among whom was Castro. (*Id.* at ¶ 9.) With respect to the remaining detainees, Defendants declare "no detainee is triple-celled," and "[a]ll boats have been removed from the housing pods." (*Id.* at ¶ 11.) Delgado has been assigned to an upper bunk, and Kiniti and Owino to lower bunks. (*Id.*) Based on these facts, Defendants contend Plaintiffs "face no risk of impending injury," because the condition for which they sought declaratory and injunctive relief "no longer exists." (*Id.* at 8.) Therefore, according to Defendants, their claims are "moot" and the amendment is futile. (*Id.*)

Defendants' argument that Plaintiffs' claims are moot assumes the injuries alleged stem solely from "triple-celling." (Opposition at 7.) This is not the case. The proposed SAC alleges a "chronic and severe overcrowding" that includes "but [is] not limited to" triple-celling of immigration detainees. (SAC, ¶ 111.) In addition to triple-celling, detainees at SDCF are allegedly forced to sleep on "makeshift beds in the common dayroom space." (*Id*. at ¶¶ 2, 41.) "In the most overcrowded pods, ten to fifteen detainees are housed in the dayroom on bunk beds." (*Id.* at ¶ 70.) As a result, "100 to 120 detainees are routinely housed in pods designed to hold only 64 to 68 detainees." (*Id*. at ¶ 52.) Plaintiffs also allege detainees experience overcrowding at "holding cells" while awaiting deportation, release from the facility, or transportation to an off-site location. (*Id*. at ¶ 75.) Often, detainees are held at "holding cells" for more than 12 hours, some even for several days. (*Id*. ¶¶ 76-77.) "A typical holding cell" provides just enough space for 12 detainees to sleep in a row on the floor, side-by-side, touching each other "like sardines." (*Id.* at ¶ 76.) Plaintiffs further allege overflow detainees and detainees who refuse to be triple-celled are subject to oppressive confinement conditions in the administrative segregation unit. (*Id.* at ¶¶ 78-79.) These allegations specify conditions of

overcrowding unrelated to "triple-celling."

Defendants also claim that 104 detainees have been permanently discharged from SDCF and transferred to another detention center. Based on the allegations in the SAC, that leaves the population at SDCF at approximately 900. (SAC, ¶ 106.) It is unclear, however, whether SDCF still surpasses its capacity, whether any detainees are housed in the "dayroom on bunk beds," *id.*, ¶ 70, or, whether the holding cells have become less crowded in general. Defendants do not contend the individual pods do not exceed their capacity; nor do they claim conditions throughout the facility have improved. It therefore cannot be said that Plaintiffs' proposed amendment is futile. *Foman*, 371 U.S. at 182.

It is also "well-settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *Friends of the Earth, Inc.v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000). "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." *Id.* (citing *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968)). "The 'heavy burden of persuading' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.*

Even assuming Plaintiffs' claims hinge entirely on triple-celling and no detainees are currently subject to that practice, Defendants have not met their "'heavy burden of persuading'" the court that triple-celling cannot reasonably be expected to start up again. *Friends of the Earth*, 528 U.S. at 189. Defendants, in their opposition, do not state that they would not reinstate the practice sometime in the future; rather, Defendants simply declare that all detainees are no longer subjected to triple-celling. Given that triple-celling is alleged to have been a "consistent practice at the facility for over two years," (SAC, ¶ 2), that the pods often exceeded capacity by over 50 percent, (*id.*), and that the detainees' numerous petitions to SDCF regarding triple-celling went unheard and unaddressed, (*id.* at ¶ 88), Defendants' assertion now that no detainees are currently triple-celled fails to establish "it [is] absolutely clear" that triple-celling will not occur in the future. Accordingly, Defendants' voluntary cessation of triple-celling does not render the case moot.

B. Sufficiency of Alleged Injury

Defendants contend the amendment is futile because Plaintiffs have not alleged "they have suffered actual harm, or face personal impending harm" as a result of triple-celling. Defendants' argument is two-fold: (1) the failure to allege an actual harm deprives Plaintiffs of standing, *i.e*, Plaintiffs have not demonstrated an injury in fact; and (2) the same defect shows the allegations are "insufficient to state a claim" for injunctive relief. (Opposition 8-9.)

It is well-established that to adequately allege standing, a plaintiff must allege: (1) an injury that is sufficiently "concrete and particularized," as well as "actual or imminent," (2) a causal connection between the injury and the alleged wrong; and (3) redressibility. *Lujan v. Defendants of Wildlife*, 504 U.S. 555, 561 (1992). "At the pleading stage, general allegations of injury resulting from the defendant's conduct may suffice," and the court presumes that "general allegations embrace those specific facts that are necessary to support a claim." *Id.* When injunctive relief is sought, litigants must adduce a "credible threat" of recurrent injury. *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (holding "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers.").

Defendants must demonstrate the amendment is "futile" and that no set of facts could be proved under the amendment which would confer standing or allow injunctive relief. *See DCD Programs*, 833 F.2d at 188. Defendants have not met this burden. The SAC alleges conditions of overcrowding that, if proved, may amount to a constitutional violation. For example, the SAC avers that the housing conditions at SDCF create serious health problems for detainees, with "particularly deleterious effect on asthmatics," such as Owino. (SAC, ¶ 81.) Kiniti alleges he was forced to share a cell with a mentally-ill detainee who subsequently assaulted another cellmate. (*Id*. at ¶ 83.) The SAC also alleges facts tending to show a likelihood of recurring injury. (*See id.* at ¶¶ 86-88, 98-103.) Crediting these allegations, as the Court must at this stage of the proceedings, it cannot be said that no set of facts can be proved under the amendment that would confer standing or provide injunctive relief.

C. Sufficiency of Alleged Constitutional Violations

Defendants argue the proposed amendment is futile because: (1) "triple-celling is not unconstitutional," (opposition at 10-12), and (2) "violations of ACA standards fail to state a

constitutional violation claim." (*Id.* at 12.) These arguments fall short of establishing futility. The first argument fails because, as already pointed out, the SAC alleges conditions of overcrowding caused by various failed policies and practices, "including but not limited to" triple-celling. Thus, assuming triple-celling is not *per se* unconstitutional, Plaintiffs' allegations are not "futile" because they have alleged illegal practices unrelated to triple-celling. The second argument is also unavailing because even if some ACA violations do not amount to a constitutional violation, others might. *See, e.g., Hoptowit v. Ray*, 682 F.2d 1237, 1248-49 (9th Cir. 1982) (overcrowding can, under certain circumstances, result in specific effects that form the basis of a constitutional violation). This is a fact intensive inquiry that must be explored at later stages of the proceedings, not in a motion for leave to amend.

D. Prejudice

DHS argues in its *amicus* brief it "will be substantially prejudiced" if the amendment is allowed because Plaintiff "has had two years to conduct discovery and otherwise pursue the allegations in his complaint." (Brief at 5.)[1] Theoretically, the proposed defendants would have less time to do the same, if added at this stage of the proceedings. However, very little has happened in this case. Kiniti was proceeding *pro se* until very recently. It appears no discovery has been conducted, and no deadline for filing amended pleadings or joining new parties has been set. Accordingly, any prejudice DHS may experience does not warrant denial of Plaintiffs' motion for leave to amend. *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (to justify denial of leave to amend, the prejudice must be substantial); *see also Bell v. Allstate Life*

[1] DHS also argues the SAC attempts to join plaintiffs who are not connected by a common question of law or fact. (Brief at 3-4.) The Court concludes joinder of these Plaintiffs satisfies Rule 20. Rule 20(a) imposes two specific requirements for the permissive joinder of parties: (1) a right to relief must be asserted by, or against, each plaintiff relating to or arising out of the same transaction or occurrence; and (2) some question of law or fact common to all parties must exist. *Desert Empire Bank v. Insurance Co. of North America*, 623 F.2d 1371, 1374 (9th Cir. 1980). First, the proposed Plaintiffs' claim no doubt arises out of the same transaction or occurrence. The SAC alleges these Plaintiffs have been injured by the same policies and practices of Defendants with respect to chronic overcrowding at SDCF. Second, the asserted claim raises common questions of law and fact. Among other things, the case asks this Court to determine whether the alleged conditions of overcrowding violate the due process protections of the Fifth Amendment. Further, Plaintiffs seek only injunctive and declaratory relief. Accordingly, joinder of the proposed Plaintiffs is proper. *See League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914 (9th Cir. 1977) (Rule 20 is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits.)

Ins. Co., 160 F.3d 452, 454 (8th Cir. 1998) ("any prejudice to the nonmovant must be weighed against the prejudice to the moving party by not allowing the amendment.")

Alternatively, pursuant to Fed.R.Civ.P. 12(a)(3)(A), DHS requests a postponement of the scheduled hearing on Plaintiffs' motion for class certification, if Plaintiff is granted leave to amend. The request is reasonable under the circumstances. Therefore, the hearing on motion for class certification is vacated and rescheduled as set forth below.

IV.

CONCLUSION

For these reasons, Plaintiff's motion for leave to amend the complaint is GRANTED. The Clerk of Court shall file the proposed SAC. Defendants shall respond to the SAC pursuant to the Federal Rules of Civil Procedure and Local Rules of this Court.

Plaintiffs' class certification motion shall be heard on May 25, 2007, at 1:30 p.m. Defendants shall file their opposition to the motion on or before May 4, 2007. Plaintiffs shall file their reply on or before May 14, 2007.

IT IS SO ORDERED.

DATED: February 27, 2007

HON. DANA M. SABRAW
United States District Judge

cc: all parties
Judge Lewis