United States District Court,
M.D. Florida.
Sylvester BUTLER, et al., Plaintiffs,
v.
James V. CROSBY, Jr., et al., Defendants.
No. 3:04CV917-J-32MMH.

filed Sept. 20, 2004.
last filing April 21, 2006.
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ORDER

HOWARD, Magistrate J.

***1** THIS CAUSE is before the Court on Plaintiffs' Motion for Leave to File Second Amended Complaint, with Rule 3.01(G) [sic] Certification (Doc. No. 127; Motion) filed on November 30, 2005. Defendants James V. Crosby, Jr., Bradley Carter, George Sapp, Stephen Sirmones, Joe Lazenby, Jr., Allen Clark, Mark Redd, Keith Musselman, Tony Anderson, William Muse, Colin Halle, Steven Tricocci, Tim Chastain, Rodney Barnett, Ronnie Barton, Kenneth Lampp, Wendell Whitehust, Stacey Green, David Reynolds, John Riggs, Glynn Reeder, John Rizer, Oscar Shipley, Dean Ellis, Jeffrey Lindsey, and Billy Jarvis (Defendants) filed a response in opposition to the Motion on December 9, 2005. *See* Defendants' Response in Opposition to Plaintiffs' Motion to File Second Amended Complaint (Doc. No. 128; Opposition). Defendant James Wilson (Defendant Wilson) filed a separate memorandum opposing the Motion on December 14, 2005. *See* Defendant James Wilson's Response in Opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint (Doc. No. 129; Defendant Wilson's Response). Plaintiffs filed a reply [FN1] on December 22, 2005. *See* Plaintiffs' Reply in Support of Motion for Leave to File Second Amended Complaint (Doc. No. 132; Reply). Accordingly, the Motion is now ripe for review.

FN1. On December 14, 2005, Plaintiffs requested leave from the Court to file a reply to the Opposition and requested oral argument on the Motion. *See* Plaintiffs Motion for Leave to File Reply to Defendants Memorandum Opposing Plaintiffs Motion for Leave to Amend Complaint, with Rule 3.01(g) Certification, Supporting Memorandum of Law, and Request for Oral Argument (Doc. No. 130) at 4. The Court granted Plaintiffs leave to file a reply and took their request for an oral argument under advisement. *See* Order (Doc. No. 131). After due consideration of the parties' memoranda and applicable authority, the Court concludes that an oral argument on the Motion in not needed. *See* Local Rule 3.01(d), United States District Court, Middle District of Florida (Local Rule(s)). Thus, Plaintiffs' request for oral argument on the Motion is due to be denied.

I. Background

A review of the procedural background to date is necessary before addressing the substance of the Motion. On September 12, 2003, a class action lawsuit, *Brown, et al. v. Crosby, et al.*, Case No. 2:03-cv-526-FtM-29DNF (M.D.Fla.), [FN2] was instituted in the Fort Myers division of the Middle District of Florida and assigned to The Honorable John E. Steele. *See* Complaint (*Brown* Doc. No. 1; *Brown* Complaint) at 1. In the *Brown* suit, several inmates sought declaratory and injunctive relief against six defendant employees [FN3] of the Florida Department of Corrections (FDOC) in their official capacities as well as various Florida correctional institutions. *Seegenerallyid.*The named plaintiffs alleged that "employees at the Florida correctional institutions routinely misuse chemical agents on inmates in segregated housing units, and that defendants permit this routine misuse by refusing to reprimand the correctional officers."*See* Opinion and Order (*Brown* Doc. No. 205; Class Action Order) at 3. The plaintiffs further asserted that the defendants' "policy, practice and custom of misuse 'necessitate[ ] injunctive relief directing defendants to cease their practice of permitting employees to abuse inmates with chemical agents and to implement remedial measures." ' *Id.* at 4 (quoting *Brown* Complaint at 10). Accordingly, the *Brown* plaintiffs sought class certification for:

> FN2. All documents filed in this case will be referred to as "*Brown* Doc. No."
>
> FN3. The defendants were: James V. Crosby, Jr., as the Secretary of the Florida Department of Corrections (FDOC); Gerald H. Abdul-Wasi, as the Inspector General of FDOC; Joseph Tompson, as the warden at Florida State Prison, Chester Lambdin, as the warden at Charlotte Correctional Institution; Joseph Petrovsky, as the warden at Santa Rosa Correctional Institution; and Wendell Whitehurst, as the warden at Washington Correctional Institution. *Id.* at 6-7

all persons who are:

(a) now in, or will hereafter come into, the custody of the Florida Department of Corrections, and

(b) now housed, or will hereafter be housed, in any type of segregated housing, including but not limited to Maximum Management, Close Management, Disciplinary Confinement or Administrative Confinement, and

***2** (c) have been, or may be in the future, subjected to a non-spontaneous use of force by way of chemical agents used maliciously and sadistically for the very purpose of causing harm and not in a good-faith effort to maintain or restore discipline.

Brown Complaint at 8.

While *Brown* was pending, on September 20, 2004, six of the named plaintiffs in *Brown* also filed the above captioned matter seeking compensatory and punitive damages from twenty-seven defendants sued in their individual capacities as correctional officers and supervisors at Florida State Prison (FSP).*See* Initial Complaint and Jury Demand (Doc. No. 1; Initial Complaint) at 1-2. Although seeking different relief and limiting the issues to one particular institution, the basis of the instant suit was predicated on the same general claims as the suit in *Brown;* that the plaintiffs had been harmed due to the misuse of chemical agents at a specific Florida correctional institution. *CompareBrown* Complaint *with* Initial Complaint.

Because the two cases appeared to be related, Defendants filed a motion to stay the instant proceeding pending the outcome of *Brown* .*See* Defendants' Amended Motion to Stay/Abate (Doc. No. 70; Motion to Stay). Defendants argued that the instant lawsuit and the *Brown* lawsuit were virtually identical so that once the court in *Brown* determined certain issues it would limit the relevant issues in the instant suit. *Seeid.* at 4. Defendants further alleged that if the two cases continued simultaneously there would be duplication of discovery. *Seeid.* at 5. However, Plaintiffs argued that the two cases were different because the "burdens imposed on the plaintiffs in injunctive cases and money damages cases are very different ...," the underlying facts and evidence would be different, the discovery would be different, and the remedies would be different. *See* Plaintiffs' Response to Defendants' Amended Motion to Stay/Abate and Request for Oral Argument (Doc. No. 71; Plaintiffs' Response to Motion to Stay) at 6-7.

After holding a telephonic hearing, the assigned district judge, The Honorable Timothy J. Corrigan, denied the Motion to Stay, without prejudice. *See* Order (Doc. No. 76). Thus, the instant case continued to proceed concurrently with *Brown.*

Subsequently, on May 12, 2005, Plaintiffs filed a stipulated motion to amend the Initial Complaint. *See* Stipulated Motion, with Rule 3.01(G) [sic] Certification, to Amend Complaint and Memorandum of Law in Support Thereof (Doc. No. 92). As the amendment was unopposed, this Court granted the request on May 17, 2005. *See* Order (Doc. No. 94). Consequently, the Amended Complaint was filed on May 19, 2005. *See* Amended Complaint and Jury Demand (Doc. No. 96; Amended Complaint). The Amended Complaint did not make any substantive changes to the claims contained in the Initial Complaint. *Compare* Initial Complaint *with* Amended Complaint. Thereafter, on May 25, 2005, Defendant Wilson filed a Motion to Dismiss the Amended Complaint, *see* Defendant James Wilson's Motion to Dismiss and Supporting Memorandum of Law (Doc. No. 101), which is currently pending before the assigned district judge.

***3** Meanwhile, the named plaintiffs in *Brown* filed a motion for class certification on January 20, 2005. *See* Plaintiffs' Motion for Class Certification (*Brown* Doc. No. 166). Judge Steele denied that motion on June 21, 2005. *See* Class Action Order at 23. The *Brown* plaintiffs petitioned the Eleventh Circuit for an appeal of that order, but on August 24, 2005, their petition was denied. *See* Petition for Permission to Appeal a Decision of the U.S. District Court of the Middle District of Florida (*Brown* Doc. No. 219). As a result, all parties entered a stipulation of dismissal on November 23, 2005, *see* Stipulation of Dismissal (*Brown* Doc. No. 226), leading to Judge Steele's dismissal of the case, without prejudice, on November 28, 2005. *See* Order (*Brown* Doc. No. 227).

Two days after the dismissal of *Brown*, Plaintiffs in the instant matter moved this Court for leave to amend the Amended Complaint to add the following:

1) Four new plaintiffs, Paul Echos, Charles Morgan, Michael McKinney, and Antonio Ward;

2) One new Defendant, Michael Rathmann, in his individual and official capacity as warden of FSP;

3) Claim for declaratory relief that the misuse of chemical agents at FSP violates the Eighth Amendment of the United States Constitution; [FN4]

> FN4. The Eighth Amendment protects a convicted individual's right to be free from "cruel and unusual punishments." *See*U.S. CONST . amend. VIII.

4) Claim for injunctive relief prohibiting Defendants Crosby and Rathmann from misusing chemical agents at FSP;

5) Claims for injunctive relief to prohibit Defendant Crosby from returning Plaintiffs Thomas and Ulrath to FSP; and

6) Recently discovered factual allegations.

See Reply at 5-6.[FN5]Pursuant to the Amended Case Management and Scheduling Order, the deadline to amend a pleading in this action was November 30, 2005. *See* Amended Case Management and Scheduling Order (Doc. No. 124; Amended CMSO). As the Motion was filed on that date, it is due to be reviewed pursuant to Rule 15(a), Federal Rules of Civil Procedure (Rule(s)).[FN6]

> FN5. Although not specifically mentioned by Plaintiffs or Defendants, it appears that as a result of the amendments to add claims for injunctive relief, Plaintiffs are also now seeking to bring suit against Defendant James V. Crosby, Jr. in his official capacity as the Secretary of FDOC. *See* Motion, Exh. A.

> FN6. Defendants do not specifically contest the addition of the four new plaintiffs or Defendant Rathmann. *See* Opposition 1-11. As Plaintiffs have alleged a right to relief arising out of the same transactions or occurrences and a common question of law or fact with regard to the new and existing parties, *see* Motion, Exh. A at ¶¶ 351-399, the Court finds that the proposed plaintiffs and defendant may be joined in this action. *See* Rule 20(a).

II. Applicable Standard

Rule 15(a) establishes that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served."Thereafter, a party may amend its pleading only upon leave of court or by obtaining written consent of the opposing party. *Seeid.*The rule provides that "leave shall be freely given when justice so requires."*Id.* As a result, "[t]here must be a substantial reason to deny a motion to amend." *Laurie v. Ala. Ct. of Crim.App.*, 256 F.3d 1266, 1269, 1274 (11th Cir.2001) (per curiam).

Substantial reasons justifying a court's denial of a request for leave to amend include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Maynard v. Bd. of Regents of the Div. of Univers. of the Fla. Dep't of Educ.ex rel.Univ. of S. Fla.*, 342 F.3d 1281, 1287 (11th Cir.2003).

III. Summary of Arguments

***4** Plaintiffs assert that the Court should grant the Motion because their claims for injunctive relief are "necessary to ensure that Defendants will not continue to torture Plaintiffs at FSP." Reply at 5. Additionally, they argue that the amendments are based on new facts revealed through discovery. *Seeid.* at 7. Further, Plaintiffs contend that the Motion was timely filed, *seeid.* at 12, and that the Defendants will not be unduly prejudiced by the amendments. *Seeid.* at 13.Finally, Plaintiffs state that the amendments are not futile, *seeid.* at 14, and will "aid in the efficient resolution" of their asserted claims. *Id.* at 7.

On the other hand, Defendants contend the Motion should be denied. *See* Opposition at 12. Initially, Defendants argue the Motion should be denied because the proposed amendments are based on facts known to Plaintiffs when they filed the *Brown* case. *Seeid* . at 4. They further assert it should be denied because it raises a new legal issue requiring different proofs and thus necessitating two separate trials. *Seeid.* at 5-6.Additionally, Defendants argue the Motion should be denied based on undue delay. *Seeid.* at 7. Moreover, they suggest that the Court should consider that extensive discovery has already taken place, *seeid.* at 8, and that they will be unduly prejudiced if the amendment is granted because several of the deadlines in the CMSO will need to be extended. *Seeid.* at 8-9.Lastly, they contend that the Motion should be denied because the proposed amendments would be futile. *Seeid.* at 9-11.In addition to the arguments raised by the other named Defendants, Defendant Wilson contends that the amendments will be unfairly prejudicial to him at trial.[FN7]*See* Defendant Wilson's Response at 6. The Court will now determine whether leave to amend should be granted pursuant to Rule 15 or whether there is a substantial reason to deny the Motion.[FN8]

FN7. Defendant Wilson adopted the arguments set forth in the Opposition. *See* Defendant Wilson's Response at 4 n. 2.

FN8. Although Defendants have labeled their arguments as *Brown v. Crosby*, New Legal Issues, Delay, Discovery, Undue Prejudice, and Futility of Amendment, the Court will address all arguments in the context of whether substantial reasons are present to warrant a denial of the Motion as required by the Supreme Court in *Foman.*Thus, the undersigned will consider the Defendants' *Brown v. Crosby* argument under the heading of Undue Delay, their New Legal Issues argument under the heading of Undue Prejudice, and their Discovery argument under the heading of Undue Prejudice.

IV. Discussion

A. Undue Delay

While the mere passage of time will not justify the denial of a motion to amend, a plaintiff's undue delay in seeking leave to amend is a sufficient basis to deny such a motion. *See Hester v. Int'l Union of Operating Eng'rs, AFL-CIO*, 941 F.2d 1574, 1578-79 (11th Cir.1991). The Eleventh Circuit has affirmed findings of undue delay when leave to amend was sought after the close of discovery and the filing of dispositive motions. *See Hinson v. Clinch County, Ga. Bd. of*

Educ., 231 F.3d 821, 826 (11th Cir.2000); *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir.1999); *Jameson v. Arrow Co.*, 75 F.3d 1528, 1535 (11th Cir.1996). Moreover, the court has held the denial of a motion to amend was proper when the motion was filed on the last day of discovery and the plaintiff failed to explain why the motion could not have been filed earlier. *See Maynard*, 342 F.3d at 1287.

Defendants submit two reasons in support of their argument that the Motion should be denied due to Plaintiffs' delay in seeking these amendments. *See* Opposition at 4-5, 7-8. First, they suggest that Plaintiffs' undue delay in bringing the Motion warrants its denial. *Seeid.* at 7-8.Next, they contend that Plaintiffs should not be permitted to add the claims for injunctive relief at this time because they were aware of the claims at the time the suit was filed, as evidenced by their inclusion in *Brown.Seeid.* at 4-5.The Court will address each argument in turn.

1. Delay

***5** First, Defendants contend the Motion was unduly delayed because it "was filed over twelve months after the filing of the original complaint and twenty-six months after the filing of the complaint in *Brown*...."*Id.* at 7-8.However, Plaintiffs argue the Motion was not untimely because they have "diligently litigated their claims" and filed the Motion "within the deadline set by the Court."Reply at 12.

Plaintiffs filed the Motion on November 30, 2005. *See* Motion at 1. The deadline to amend pleadings in this case was November 30, 2005. *See* Amended CMSO. This date was agreed to without objection by twenty-six of the defendants,[FN9]*see* Stipulated Motion to Amend Case Management and Scheduling Order (Doc. No. 123), and there were no objections to the scheduling order entered by the district judge. As the Motion was filed within the agreed date set by the Amended CMSO, the Court declines to find that it should be denied as unduly delayed merely because it was filed twelve months after the Initial Complaint was filed. *See Wyatt v. BellSouth, Inc.*, 176 F.R.D. 627, 630 (M.D.Ala.1998) (declining to find a motion to amend filed eighteen months after the initial complaint untimely where the motion was filed within the consented to deadline set in the scheduling order).

FN9. Defendant Wilson did not agree to the extension of the deadline to amend pleadings as it related to him. *See* Stipulated Motion to Amend Case Management and Scheduling Order (Doc. No. 123) at 2 n. 1.

2. *Brown v. Crosby* (Plaintiffs' Prior Knowledge of Claims)

Second, Defendants argue that the Motion should be denied because the proposed amendments for injunctive relief are based on facts known to the Plaintiffs when they filed *Brown.See* Opposition at 4. Although Plaintiffs concede that the proposed amendments include "a few new allegations based on previously known facts ...," Reply at 7, they also contend that their proposed amendments "are based upon facts they have learned in discovery and through public information."*Id.* at 8.

Upon review of the proposed amendments, the Court agrees that Plaintiffs could have included many of the claims for injunctive relief at the time they filed suit. However, the Court is not persuaded that this consideration constitutes a substantial reason warranting a denial of the Motion. Indeed the cases cited by Defendants, *Brooks v. Celeste*, 39 F.3d 125 (6th Cir.1994), and *Pallottino v. City of Rio Rancho*, 31 F.3d 1023 (10th Cir.1994), as support for this argument, *see* Opposition at 5, are unconvincing.

In *Brooks*, the appellate court upheld the district court's denial of the plaintiff's motion to amend. *See* 39 F.3d at 130-31. There, the plaintiff sought to add individual claims against the defendants who were originally sued only in their official capacities. *Seeid.*In denying the motion to amend, the district court found that the plaintiff's requested amendments were unduly prejudicial because the plaintiff did not seek to add the individual claims until after the court had granted class certification in part due to the absence of any individual claims. *Seeid.* at 130.Additionally, the district court found that because the defendants were sued initially only in their official capacities they were not on notice that they might also be sued in their individual capacities. *Seeid.*Thus, although the district court did note that the plaintiff could have alleged the individual claims from the start of her law suit, it denied the request for

other reasons. *Seeid.*

***6** In *Pallottino* the appellate court similarly upheld a district court's denial of the plaintiff's motion to amend. 31 F.3d at 1027. The district court found that the new theory the plaintiff sought to add was one he could have relied upon from the time his case was instituted, but that he did not seek to amend the complaint until after the court had dismissed his case based upon the first theory. 31 F.3d at 1027. In agreeing with the district court's ruling, the appellate court concluded that " '[a] busy district court need not allow itself to be imposed upon by the presentation of theories seriatim." ' *Id.* (quoting *Freeman v. Continental Gin Co.*, 381 F.2d 459, 469-70 (5th Cir.1967)).[FN10] Plaintiffs, in this case, are proceeding under the same theory of chemical agent misuse which was originally pled and are simply seeking to add the claims for injunctive relief to their current complaint. *See* Motion, Exh. A. Accordingly, the Court concludes that neither *Brooks* nor *Pallottino* suggests that a denial of the instant Motion is warranted.

> FN10. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981.

The Court does, however, find the Eleventh Circuit opinion in *Halliburton & Assoc.s, Inc. v. Henderson, Few & Co.*, 774 F.2d 441 (11th Cir.1985) to be instructive on this issue. In *Halliburton*, the Eleventh Circuit rejected the reasons given by a district court in denying the plaintiff's motion to amend. *Seeid.* at 443.The plaintiff had sought to amend the complaint to add a claim that it could have brought from the inception of the suit. *Seeid.*In rejecting this as a reason for denying the motion, the Eleventh Circuit noted that the plaintiff's choice of state court forum had been defeated by the defendant's removal of the action to federal court. *Seeid.*Accordingly, the court found that once the plaintiff "found itself in federal court, it may well have decided a different litigation strategy was in order."*Id.* Thus, the court concluded that the fact that the plaintiff could have included its proposed amendment from the beginning of the suit was not a substantial reason to deny the motion to amend. *Id.*

After denial of the motion for class certification, the *Brown* plaintiffs made the decision to stipulate to dismissal of their claims. Plaintiffs, in the instant action, did not initially seek injunctive relief which was already being sought in *Brown.*Their decision to seek an amendment of their complaint to add more narrow requests for injunctive relief in this action may well have been a change in strategy in light of the developments in the *Brown* case. Indeed, it appears to be the very same type of change in strategy which the Eleventh Circuit, in *Halliburton,* acknowledged could, in appropriate circumstances, justify an amendment despite the plaintiff's ability to have included the claims at the inception of the action. Accordingly, the addition of the claims for injunctive and declaratory relief will not be denied as unduly delayed merely because Plaintiffs could have asked for this relief from the start of the suit. *See Gropp v. United Airlines, Inc.*, 847 F.Supp. 941, 946-47 (M.D.Fla.1994) (refusing to deny the motion to amend where the plaintiffs added a new legal theory based on the same allegations in their original complaint).

***7** Moreover, the undersigned notes that several of the proposed factual amendments, i.e. the alleged steroid use and promotions, *see* Reply at 8, do not appear in the *Brown* complaint and appear to stem from documents reviewed through discovery. *Seeid.* at 8. Plaintiffs also assert the additional discovery revealed the gravity of the risk to Plaintiffs which lead to the amendments for injunctive and declaratory relief. *Seeid.*Finally, the proposed new plaintiffs were not named plaintiffs in the *Brown* case, and thus, their contentions also appear to emanate from discovery. *SeeBrown* Complaint at 1. Accordingly, the Court declines to find that Plaintiffs' delay in bringing the Motion was "undue."

B. Bad Faith, Dilatory Motive, Repeated Failure to Cure

Turning now to the issues of bad faith and dilatory motive, the Court notes that Defendants have not suggested a basis for a finding of either bad faith or dilatory motive. Based on the record before it, the Court independently discerns neither evidence of bad faith nor dilatory motive on the part of Plaintiffs in bringing the Motion. Additionally, although Plaintiffs were previously granted leave to amend, the Court does not find that there have been repeated "failures

to cure some deficiency in the pleading."Thus, only the questions of undue prejudice and futility of amendment remain.

C. Undue Prejudice

All Defendants argue that they will be unduly prejudiced if the Court grants the Motion because of the new legal issues raised and their impact on discovery. *See* Opposition at 9; Defendant Wilson's Response at 4 n. 2. In addition, Defendant Wilson argues that permitting the amendments will lead to the introduction of evidence at trial that will be prejudicial to him. *See* Defendant Wilson's Response at 6. The undersigned will address each of their arguments below.

1. New Legal Issue

Defendants' primary contention is that they will be prejudiced by the introduction of a new legal issue. *See* Opposition at 5-7. Further, they allege that if Plaintiffs are allowed to add their claims for injunctive relief "there would have to be two trials in this matter-a jury trial for damages focusing on the actions of the individual Defendants, then a bench trial where this Court would consider evidence pertaining to the injunctive relief sought...."*Id.* at 6. As additional support for their position, Defendants point to Plaintiffs' response to their Motion to Stay in which Plaintiffs argued that the proofs required for the claims seeking injunctive and declaratory relief in *Brown* were so different from the monetary damages sought in the instant case that the two cases should be kept separate. *Seeid.* at 6-7.

On the other hand, Plaintiffs argue that the claims for injunctive relief which they propose to add are consistent with the issues raised in the Initial and Amended Complaints. *See* Reply at 11. Additionally, they contend that it is "common practice to hear claims for injunctive relief and for damages in one trial" and whether the claims will ultimately be severed is an inappropriate basis for denying leave to amend. *Id.* at 12.

***8** Whether a motion to amend adds a new legal issue is a factor courts consider when determining whether to permit an amendment. *See* *Pilkington v. United Airlines, Inc.*, 158 F.R.D. 508, 510 (M.D.Fla.1994) (denying the motion to amend in part because it raised a new legal issue regarding the statute of limitations). However, it is not entirely clear what new issues would be raised by the proposed amendments and Defendants do not identify them.[FN11]All of Plaintiffs' proposed amendments concern the same question of law: whether Defendants' use of chemical agents against Plaintiffs constitute a violation of their Eighth Amendment rights. *See* Motion, Exh. A at 53; Amended Complaint at 26; Initial Complaint at 26. To the extent Defendants contend that adding the claim for injunctive relief raises new legal issues due to the differing legal standards and burdens, the Court finds that in light of the liberal amendment policy, *see* *Czeremcha v. Int'l Ass'n of Machinsts and Aerospace Workers*, 724 F.2d 1552, 1291 (11th Cir.1984), and the considerations addressed below, the addition of these claims will not "unduly prejudice" Defendants.

> FN11. Instead, Defendants refer the Court to the arguments made by Plaintiffs in opposition to Defendants' Motion to Stay/Abate. Defendants seem to suggest that Plaintiffs' previous arguments constitute an admission that the issues which they now seek to include are so different as to require that the two cases be kept separate. However, the Court notes that Defendants themselves previously took a position entirely inconsistent with their current position when they argued that the money damage claims in the instant suit and the class action for injunctive relief in *Brown* are "virtually identical." Motion to Stay at 2.

First, the case Defendants rely on in making their argument that "[a]mended complaints have been denied where new legal issues were raised ...,"*see* Opposition at 5-6, is unpersuasive. In *Pilkington*, the court denied the plaintiffs' motion to amend to add new out-of-state plaintiffs because of the plaintiffs' undue delay and dilatory tactics. *See* 158 F.R.D. at 509-10. Although the court found the motion to amend raised new statute of limitations issues that were unduly prejudicial to the defendants, it also found that the defendant would be unduly prejudiced because the amendments added 130 new separate incidents, the evidence relating to the new allegations was located outside of the judicial district, and it would be unlikely that discovery could be completed by the cutoff date. *See* *id.* at 510.Most importantly,

the court was troubled because plaintiffs, knowing that they were going to add the out-of-state plaintiffs, waited until after the court ruled in the plaintiffs' favor denying the defendant's motion to transfer the case before requesting leave to add the new parties. *See id.* at 509-10.Thus, the court did not deny the motion merely because it raised new legal issues.

Second, the court notes that whether a case should be bifurcated due to prejudicial and inadmissable evidence is most appropriately addressed in a specific pre-trial motion for severance. *See* Rules 42(b), 20(b).[FN12] The undersigned recognizes that, as the Defendants point out, the district court in *Brooks* considered whether the requested amendments required different proofs which lead the court to " 'question[ ] whether these claims could be appropriately joined in one action." ' *Brooks*, 39 F.3d at 130. However, as discussed in Part IV.A.2. *supra*, the *Brooks* court relied on several other compelling factors, which are not present here, when it denied the plaintiff's motion to amend. Further, whether certain evidence should be allowed at trial is a consideration best reserved for a separate pre-trial motion. *See*Fed.R.Evid. 105.[FN13]

> FN12. Rule 42(b) provides, in part: "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim ..., or of any separate issue...." Rule 42(b). Also, Rule 20(b) provides that "[t]he court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice."Rule 20(b).

> FN13.Fed.R. Evid. 105 provides: "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."Fed.R.Evid. 105.

2. Discovery / CMSO Deadlines

***9** Next, Defendants assert that they will be prejudiced because an enormous amount of discovery has been completed already. *See* Opposition at 8. However, Plaintiffs state that they do not anticipate extensive additional discovery or the need to enlarge the discovery period. Reply at 12-13. The Court certainly considers the degree of discovery completed when determining whether to grant a motion to amend, and in addition to this factor, the Court must determine how the proposed amendments will affect future discovery. *See Perkins v. Spivey*, 911 F.2d 22, 34-35 (8th Cir.1990) (upholding the district court decision to deny a motion to amend, in part, because of the extensive discovery already conducted and the risk of extensive additional discovery if the amendments were allowed); *seealso Dannebrog Rederi AS v. M/Y True Dream*, 146 F.Supp.2d 1307, 1315 (S.D.Fla.2001) (recognizing that an amendment would be prejudicial "if the opponent would be required to engage in significant new preparation at a late stage of the proceedings"). The burden of additional discovery alone, however, is not a substantial reason to deny a motion to amend. *See A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 87 F.Supp.2d 281, 299 (S.D.N.Y.2000) (citing *United States v. Continental III. Nat'l Bank & Trust Co.*, 889 F.2d 1248, 1255 (2d Cir.1989)).

In this case, Defendants have failed to address how the amendments will affect the discovery already undertaken or what additional discovery will be needed. *See* Opposition at 8. The discovery cut-off date is not until July 31, 2006, *see* Amended CMSO at 1, almost six months away and Defendants have not alleged that they will be unable to complete discovery by this date. Additionally, Plaintiffs contend that they "do not anticipate conducting extensive additional document discovery and submit that all discovery can be completed by the deadline...." Reply at 13. Moreover, as stated *supra*, the proposed amendments for injunctive relief are based generally on the same contentions alleged in the Initial and Amended Complaints. Therefore, it appears to the Court to be more efficient to have the new allegations joined with the instant action rather than Plaintiffs seeking to bring a separate suit for injunctive relief. *See Gropp*, 847 F.Supp. at 946 (finding that "a second case on the [c]ourt's docket involving the claims which arise out of the same transactions or occurrences and which allege the

same facts is a detriment in that it defeats the [c]ourt's ability to manage its docket in a most efficient manner"); *seealso* *Zarnick v. Painewebber, Inc.*, No. 95-138-CIV-FTM-17, 1995 WL 631821 at *2 (M.D.Fla. Oct. 24, 1995) (finding no real prejudice where plaintiffs' proposed amendments were based on the same facts alleged in the original complaint). Thus, the Court's consideration of the amount of discovery completed and the amount to be undertaken weighs in favor of granting Plaintiffs' Motion.

***10** Defendants also argue that they will be prejudiced because several of the Amended CMSO deadlines will have to be changed. *See* Opposition at 9. Defendants state that both the expert report deadline of December 30, 2005 for Plaintiffs and January 31, 2006 for Defendants, and the mediation deadline, of March 31, 2006, will be impacted. *Seeid.*In response, Plaintiffs contend that "no scheduling issues exist at all and certainly none that prejudice Defendants."Reply at 13. It appears that the expert witness disclosure deadlines will be impacted by the addition of new claims. However, given that almost six full months remain in the discovery period, the Court finds that the need to seek a continuance of those deadlines does not constitute a substantial reason warranting the denial of a motion to amend. With regard to the mediation deadline, it is unclear why that deadline would have to be moved. However, if Defendants believe that the addition of the new claims warrants an extension of the mediation deadline, they are certainly free to bring that to the attention of the Court by separate motion. Accordingly, the undersigned is not persuaded that the impact of the proposed amendments on the current deadlines warrants denial of the Motion.

3. Prejudice to Defendant Wilson

The undersigned must also address Defendant Wilson's contention that the Motion should be denied because the amendments will "lead to the introduction of evidence at trial that [will] result in unfair prejudice to [him]." Defendant Wilson's Response at 6. Plaintiffs contend that this argument is premature and that Defendant Wilson can "address any evidentiary or procedural issues ..." with an admissibility or bifurcation motion. *See* Reply at 12-13. The Court has reviewed the cases cited by Defendant Wilson and finds that they concern admissibility of evidence and bifurcation, rather than the propriety of amendment. *See* Defendant Wilson's Response at 5-6. As discussed in Part IV.C.1. *supra*, these arguments are unpersuasive at this stage of the proceeding. Accordingly, the undersigned will not deny the Motion as unduly prejudicial to Defendant Wilson.

D. Futility

Finally, Defendants contend the Motion should be denied because the amendments sought are futile. *See* Opposition at 9-11. The Eleventh Circuit has instructed that " 'denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." ' *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262-63 (11th Cir.2004) (quoting *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir.1999)); *see also* *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, 777 n. 10 (11th Cir.2000) (" 'A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." ' (quoting *Jefferson County Sch. Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir.1999))). Thus, the Court must consider whether Plaintiffs' proposed amendments would be subject to dismissal.

***11** Defendants argue that Plaintiffs' proposed amendment seeking injunctive relief at FSP is futile because it was rejected by Judge Steele in *Brown* and "cannot be resurrected here." Opposition at 10. In reply, Plaintiffs argue that the *Brown* case does not prohibit their proposed amendments. *See* Reply at 9. Upon review of the *Brown* docket and the Class Certification Order entered by Judge Steele, this Court finds that *Brown* did not foreclose Plaintiffs' proposed amendment to add claims for injunctive and declaratory relief.

In *Brown*, Judge Steele denied the named plaintiffs' request for class certification, in part, because their claims did not satisfy the commonality or typicality requirements of Rule 23(a).[FN14]*See* Class Certification Order at 17-19. Specifically, Judge Steele found the "existence of individual situations and the importance of factual distinctions in determining whether the application of force is justified or excessive fatally undermines the typicality between the named plaintiffs and the proposed class members...."*Id.* at 18.He further

concluded that the named plaintiffs' claims did not satisfy the commonality requirement because "it is impossible to say that the affidavits of the named plaintiffs and the ways in which they claimed to have experienced chemical agent misuse could be fairly compared with the history or individual experiences of absent class members, or that the claims of class members share such common features that rulings could be fashioned to fairly adjudicate the claims as a group."*Id.* at 18.Thus, while Judge Steele found that the named plaintiffs could not pursue a class action, he did not find that they could not seek injunctive relief. Indeed, while Judge Steele denied class certification, the *Brown* complaint, including the requests for injunctive relief, survived defendants' motion to dismiss. *See* Order (*Brown* Doc. No. 115). In denying that motion, Judge Steele specifically found that the *Brown* plaintiffs had both standing to bring the lawsuit and standing to seek injunctive relief. *Seeid.* at 6-9.Moreover, Judge Steele determined that the named plaintiffs sufficiently alleged a claim under the Eighth Amendment. *Seeid.* at 10.Therefore, the decisions in *Brown* neither suggest that Plaintiffs' proposed amendments would be subject to dismissal nor foreclose Plaintiffs' request for injunctive relief in this case.

> FN14. Rule 23(a) provides: "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."Rule 23(a).

The fact that the injunctive relief requested by Plaintiffs in the proposed amendments is more narrow in scope than the injunction requested in *Brown* further persuades the Court that the requested amendment is not futile. Indeed, Plaintiffs have limited their request for injunctive relief to FSP where the four new Plaintiffs are currently housed and where all of the abusive incidents are alleged to have occurred rather than attempting to effect FDOC system-wide change. *See* Motion, Exh. A at 4-5. Accordingly, the Court is not persuaded that an addition of this claim at this juncture would be futile.

***12** As to the proposed amendment prohibiting Plaintiff Ulrath and Thomas from being returned to FSP, Defendants contend that it should be rejected as futile because Plaintiffs have failed to sufficiently demonstrate an imminent risk of injury. *See* Opposition at 11. Defendants argue that Plaintiffs are "asking this Court to assume that merely because the named plaintiffs will remain in prison for a substantial period of time, that they are at imminent risk of being subjected to being incarcerated at [FSP]."*Id.* at 11.On the other hand, Plaintiffs contend that the harm they are seeking to prevent is likely because FDOC's official policy is to house mentally ill patients at FSP. *See* Reply at 18. Further, Plaintiffs argue that injury is likely because "Defendant Crosby has the authority to transfer Plaintiffs Thomas and Ulrath to FSP ... at any time and for any reason."*Id.*

When seeking injunctive relief a plaintiff "must assert a reasonable expectation that the injury they have suffered will continue or will be repeated in the future." *Malowney v. Federal Collection Dep. Group*, 193 F.3d 1342, 1347 (11th Cir.1999). It must be a "real and immediate-as opposed to a merely conjectural or hypothetical-threat of *future* injury." *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir.1994). Further, a substantial likelihood of injury can be sufficiently alleged where it is the "custom, practice, and policy ... to commit the constitutional deprivations ..." complained of by the plaintiff. *See id.* at 1339.

Here, the undersigned finds that Plaintiffs Thomas and Ulrath have sufficiently alleged facts necessary to make a claim for injunctive relief prohibiting their return to FSP. Plaintiffs allege that from 2000-2004 chemical agents were used at FSP almost two-thousand times, *see* Motion, Exh. A at ¶ 59, and that each of these Plaintiffs have been harmed due to use of a chemical agent against them at FSP. *Seeid.* at ¶¶ 83-350.They have alleged that it is Defendants' policy and practice to return mentally ill patients to FSP. *Seeid.* at ¶ 54.Both Plaintiffs Thomas and Ulrath contend that they are mentally ill and classified as Close Management inmates, *seeid.* at ¶¶ 83, 120, 128, 137, and therefore, it is likely they will be returned to FSP, *seeid.* at ¶¶ 120-122, 143-145.These circumstances are similar to those faced by the courts in *Church,supra,* and *Lynch v. Baxley*, 744 F.2d 1452

(11th Cir.1984). Like the plaintiffs in those cases, Plaintiffs Thomas and Ulrath, by virtue of the involuntary nature of their condition, “cannot avoid ‘exposure to the challenged course of conduct” ’ in which Defendants are alleged to engage. *Church*, 30 F.3d at 1338 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 497, 94 S.Ct. 669, 677 (1974)). Accordingly, Plaintiffs Thomas and Ulrath have sufficiently alleged that they can reasonably be expected to be returned to FSP and that upon their return to FSP there is a real and immediate threat of future injury. Consequently, the Motion will not be denied as futile.

***13** In so holding, the Court notes that while it will not deny Plaintiffs' proposed amendments on the basis of futility, it makes no comment on the ultimate validity of these claims. Rather, the undersigned finds that Plaintiffs have included sufficient allegations to permit them the opportunity to assert these claims and Defendants' arguments to the contrary are unavailing.

V. Conclusion

In light of the foregoing, the Court does not find a “substantial reason” to deny the Motion, and it is therefore due to be granted.

Accordingly, it is hereby ORDERED:

1. Plaintiffs' Motion for Leave to File Second Amended Complaint, with Rule 3.01(G) [sic] Certification (Doc. No. 127) is GRANTED.

2. Plaintiffs shall file their Second Amended Complaint on or before February 16, 2006.

3. Defendants shall plead in response to the Second Amended Complaint in accordance with the requirements of Rule 15, Federal Rules of Civil Procedure.

4. To the extent Plaintiffs Motion for Leave to File Reply to Defendants Memorandum Opposing Plaintiffs Motion for Leave to Amend Complaint, with Rule 3.01(g) Certification, Supporting Memorandum of Law, and Request for Oral Argument (Doc. No. 130) seeks oral argument on Plaintiffs' Motion for Leave to File Second Amended Complaint, it is DENIED.

DONE AND ORDERED.

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