UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

RUBEN CEDILLO, TERRY HOUSTON, JUSTIN WRIGHT, CRAIG ARNO, ALONZO CLEAVES, JOHN GREENEMEIER, JOHN ROUSSEL, LEONARDI guess Tara and Sheila had it out yesterday. Kara and Tim were in Dan's office this morning discussing it HUGALL, Plaintiffs, v. TRANSCOR AMERICA, LLC, Defendant.	)	Case No. 3:13-cv-00869 **Judge Sharp** **Magistrate Judge Brown** Jury Demand

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT TRANSCOR'S MOTION FOR JUDGMENT ON THE PLEADINGS

I. BACKGROUND.

Three plaintiffs, Kevin Schilling, John Pineda and William Tellez, originally filed an action entitled *Schilling, et al v. TransCor*, No. C 08-941 SI, in the Northern District of California on February 14, 2008. Complaint at ¶¶ 8, 22; *Schilling* Complaint, Ex. 1.[1] The

[1] In addition to considering the allegations of Plaintiffs' Complaint, TransCor has attached to its Motion certain public documents filed in the predecessor *Schilling* action, of which TransCor requests the Court take judicial notice under Fed.R.Evid. 201. A court may consider public records when deciding a Rule 12(b)(6) or (12 (c) motion without converting the motion to one for summary judgment, particularly where such prior court proceedings are referenced in, but not attached to, the complaint and "are central to the plaintiff's claim." *See Jackson v. City of Columbus*, 194 F.3d 737, 745-46 (6th Cir.1999) (public court records from a related case); and 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990) ("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account."). Additionally, Plaintiffs' tolling allegations are "legal conclusions that

Schilling action challenged the constitutionality of the treatment of these three individual inmates during their extradition trips in California and Nevada respectively taken in September, August, and February of 2006, and further sought relief for a class of at least 16,000 other inmates who were transported in restraints for at least 24 hours by TransCor during the time period of 2006-2008. *Id.* at ¶¶ 15, 30; Ex. 2, Order Granting Class Certification; *Schilling v. TransCor*, 2010 WL 583972, at *7 (N.D.Cal. Feb. 16, 2010). Before obtaining class certification, Plaintiffs estimated "the class damage claim to be $223,670,000.00." Ex. 3, Joint Case Mgt. Statement at § 11.

On February 16, 2010, the Northern District of California (Judge Illston) granted the *Schilling* plaintiffs' motion for class certification by certifying the following class:

> A class of all pretrial detainees and prisoners who were transported by TransCor America LLC, its agents and/or employees between February 14, 2006 and the present, and who were forced to remain in restraints in the transport vehicle for more than 24 hours without being allowed to sleep overnight in a bed. The class includes pretrial detainees and prisoners who were removed from one transport vehicle and placed directly onto another, without being housed overnight, whose combined trip lasted more than 24 hours.

Schilling, Ex. 2 at 18.[2] Judge Illston also certified a subclass of California prisoners covering the same class period for purposes of pursuing relief under California's Bane Act. *Id.* at 19. A Class Notice was published for three months in the *Prison Legal News*, advising affected inmates that

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the district court is not required to accept as true." *Wyster-Pratte Management Co., Inc. v. Telxon Corp.*, 413 F.3d 553, 561 (6th Cir. 2005).

[2] After TransCor unsuccessfully challenged the class certification order in appeals to the Ninth Circuit and Supreme Court, *TransCor v. Schilling*, 131 S.Ct. 1044 (Jan. 24, 2011), the parties undertook written and deposition discovery, participated in additional case management conferences, and Defendants sought clarification and/or decertification of the class following the Supreme Court's decision in *Wal-Mart, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). During briefing on the parties' cross-motions for partial summary judgment, the Court denied Defendants' motion. *Schilling v. TransCor*, 2012 WL 2792688 (N.D.Cal. July 9, 2012).

they were members of the certified class, and giving all class members an opportunity to opt out. Ex. 5.

After the *Schilling* plaintiffs and Defendants filed cross-motions for summary judgment on the constitutionality of the inmates' treatment, the Northern District of California denied plaintiffs' motion and granted Defendants' cross-motion on August 8, 2012, framing the dispositive issue as follows:

> As an initial matter, the Court is required – in light of the class definition – to confine its analysis to determining whether the conditions complained of inflict a constitutional deprivation if their duration is 'more than 24 hours.' As 24 hours plus one minute is the lowest common denominator for the class, the Court must determine whether depriving prisoners of a bed, and/or holding them in restraints, and/or depriving them of sanitation facilities for 24 hours and one minute is 'sufficiently serious' to amount to a constitutional deprivation.
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> * * *
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> For the foregoing reasons, the Court finds that the conditions plaintiffs complain of – in the context of transportation of prisoners and over a 24-hour plus one minute period – do not, without more and on a class-wide basis, constitute unconstitutional deprivations under the Eighth or Fourteenth Amendments. To be clear, the Court does not find that the conditions alleged, if imposed for periods exceeding 24 hours or if imposed in different manners or with specific injuries, could not constitute unconstitutional deprivations to individual prisoners. As a class–wide matter, however, and on the record presented, the Court does not find that plaintiffs have established or can establish a constitutional violation.

Ex. 6 at 9; *Schilling v. TransCor*, 2012 WL 3257659, at *11 (N.D.Cal. Aug. 8, 2012).

After this adverse class judgment, the *Schilling* plaintiffs sought to amend the class certification order to propose smaller and divided subclasses with lengthier transport periods of: (a) 24 to 48 hours; (b) 48 to 72 hours; (c) 72 to 96 hours; and (d) 96-plus hours, with new class representatives proposed (inmates Justin Wright, Craig Arno, Troy Kincheloe, and Ruben Cedillo). Ex. 7, Motion to Amend Class Certification. After Judge Illston denied this class amendment motion on October 11, 2012, Ex. 8, the *Schilling* plaintiffs proposed and the court

approved a "Class Notice" advising prisoners who may have been part of the certified class to file their own actions because the statute of limitations had resumed running in light of the recent rulings. Ex. 10 at Ex. 1 [ECF 220-1].[3] Specifically, the Class Notice (published in a January, 2013 edition of Prison Legal News) advised:

> On August 8, 2012, the Court granted the defendants' motion for summary judgment, finding that the mere fact that a person was transported, restrained, and denied overnight sleep in a bed for 24 hours did not violate[] the Eighth Amendment. On October 11, 2012, the Court denied plaintiffs' motion to amend the class certification order to establish classes of persons transported for two, three, four or more days. *The effect of these orders is to restart the clock ticking on the statute of limitations applicable to claims of persons who had been in the originally certified class*. Those claims may be barred by the mere passage of time, unless you take immediate action to preserve your rights *by filing your own action in court*.
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> ***
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> *If this class action was filed before your right to file a claim expired, the time to file was stayed or tolled until the court's recent actions when the clock started ticking again*. That's why you must immediately consult with attorneys to find out how and when you must act in order to protect your rights.

Id. (emphasis added); *see also* Ex. 11, Prison Legal News, January (2013). The claims of the individual plaintiffs were settled at a January 10, 2013 settlement conference (Ex. 12), an order dismissing the case with prejudice entered on January 31, 2013 and, pursuant to the parties' stipulation, the dismissal order was revised and the case terminated April 4, 2013. Exs. 13 & 14.

This new action, *Cedillo v. TransCor*, was filed April 8, 2013 in the Northern District of California by the same attorneys who represented the *Schilling* Plaintiffs. Because the eight (8) Plaintiffs were transported on TransCor vehicles in the 2006-07 period across segments of the country having little or no connection to the Northern District of California, and because the

[3] On November 2, 2012, TransCor also filed a document entitled "Defendants' Notice of Intent to Argue Resumption of Statute of Limitations on August 8, 2012 for Future Claims." Ex. 10.

majority of the witnesses were Tennessee-based, TransCor moved to transfer venue to the Middle District of Tennessee, which motion was granted. ECF 24.

According to the Complaint, the respective residencies, transport dates and routes of the eight plaintiffs are as follows:

- Ruben Cedillo (California resident): October 31-November 3, 2006 trip from Coalinga, California to Fresno, California (Complaint at ¶ 29);
- Terry Houston (Arizona resident): June 9-11, 2006 extradition trip from Redding, CA facility to San Luis Obispo, CA facility (*Id*. at ¶ 31);
- Justin Wright (Tampa, FL resident): June 4-12, 2006 extradition trip from facility in Sharpes, Florida to facility in Elmira, New York, divided into two travel segments separated by a multiple-day stopover at Christian County Jail in Hopkinsville, Kentucky (*Id*. at ¶ 33);
- Craig Arno (Trenton, NJ resident): November 12-20, 2007 extradition trip from facility in Hutchison, Texas to facility in Atlantic City, New Jersey, include multi-day stopover at Christian County Jail in Hopkinsville, Kentucky (*Id*. at ¶ 35);
- Alonzo Cleaves (Savannah, GA resident): August 31-September 10, 2007 extradition trip from facility in Las Vegas, Nevada to facility in Estill, South Carolina, include multi-day stopover at Christian County Jail in Hopkinsville, Kentucky (*Id*. at ¶ 37);
- John Greenemeier (Vernon, NJ resident): September 14-27, 2006 extradition trip from facility in Arizona to facility in New Jersey, include multi-day stopover at Christian County Jail in Hopkinsville, Kentucky (*Id*. at ¶ 39);
- John Roussel (Madison, WI resident): March 17-24, 2007 extradition trip from facility in Iowa to facility in Madison, Wisconsin, including multi-day stopover at Christian County Jail in Hopkinsville, Kentucky (*Id*. at ¶ 41);
- Leonard Hugall (Lake City, FL resident): October 11-15, 2007 trip from facility in Florida to Michigan, including a multi-day stopover at Christian County Jail in Hopkinsville, Kentucky, to help Michigan police find the body of a 13-year-old girl raped and killed in 1984 (*Id*. at ¶ 43; http://www.wsvn.com/news/articles/local/MI64136).

Thus, by the time the *Schilling* Complaint was filed on February 14, 2008, the following time periods had already passed on the individual Plaintiffs' claims:

- Cedillo: 15 months, 11 days;
- Houston: 20 months, 3 days;
- Wright: 20 months, 2 days;
- Arno: 2 months, 25 days;
- Cleaves: 5 months, 4 days;
- Greenmeier: 16 months, 18 days;
- Roussell: 10 months, 20 days; and
- Hugall: 3 months, 30 days.

II. LEGAL ANALYSIS.

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008) (quoting *JP Morgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007). Before addressing the untimeliness of the claims brought by certain individual Plaintiffs, TransCor will address the inapplicability of equitable tolling and *res judicata* to the class claims asserted by Plaintiffs.

A. *AMERICAN PIPE* TOLLING DOES NOT APPLY TO SUBSEQUENT CLASS ACTIONS, REQUIRING DISMISSAL OF ALL CLASS CLAIMS.

The Supreme Court has held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974). The Supreme Court subsequently extended the doctrine, holding that "all members of the putative class [may] file individual actions in the event that class certification is denied, provided . . . that those actions are instituted within the time that remains on the limitations period." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 346–47 (1983). Thus, *American Pipe* tolling extends to all putative class members, whether seeking to intervene or to initiate their own suit, in order to give full effect to the efficiency and economy goals of class action procedure. Without such protection, putative class members would have an incentive to file unnecessary, individual lawsuits to protect their rights in the event of denial of class certification. 462 U.S. at 349–51.

The Sixth Circuit's decision in *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988) emphasized the limitations of *American Pipe* tolling to successive class actions. In the predecessor action, class certification was initially denied, and the plaintiff filed a second motion for class certification. Before the court could rule on that motion, the plaintiff settled her individual claim and the suit was dismissed with prejudice. *Andrews*, 851 F.2d at 147–48. The putative class members from the original case later filed the *Andrews* suit, asserting both individual and class claims. *Id.* The Sixth Circuit rejected any notion of tolling for the subsequent class action:

> We also agree with the district court's conclusions concerning the plaintiffs' attempt to gain classwide relief. *The courts of appeals that have dealt with the issue appear to be in unanimous agreement that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class.*

Id. at 149 (emphasis added). Cases from across the country recognize this same limitation—that tolling protects only the *individual* claims of absent class members, and does not apply to follow-on class actions, for to do so would be an "abusive" practice, and result in a never-ending filing of subsequent actions. *See Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir.1987) ("We agree with the Second Circuit that to extend tolling to class actions "tests the outer limits of the *American Pipe* doctrine and ... falls beyond its carefully crafted parameters into the range of abusive options."); and *Korwek v. Hunt*, 827 F.2d 874, 878 (2nd Cir.1987) (putative class members may not "piggy-back one class action onto another and thus toll the statute of limitations indefinitely.").[4]

[4] *See also Madani v. Shell Oil*, 357 Fed. Appx. 158 (9th Cir. 2009) ("The district court correctly ruled that the limitations period for *this* class action was not tolled by a *prior* class action. *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir.1987). Nor does *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139 (9th Cir.2000) (en banc), compel a different result. None of the peculiar reasons justifying tolling in that case is present in this case."), *cert. denied*, 130 S.Ct. 3477 (2010).

The Sixth Circuit's recent decision in *Vertrue, Inc. Marketing and Sales Practices Litigation*, 719 F.3d 474 (6th Cir. 2013) illustrates the wisdom of not allowing tolling under the present circumstances. The litigation in *Vertrue* involved a prior class action challenging the marketing practices of a company, yet the plaintiffs in that first action had never obtained a ruling on class certification, which the Sixth Circuit held created an exception to the general *Andrews* rule against tolling for successive class actions:

> Here, no court has definitively ruled on class certification, as the district court dismissed the plaintiffs' actions in *Sanford* before ruling on the plaintiffs' motion for class certification. *Sanford*, 2008 WL 4482159, at *6. Because the risk motivating our decision in *Andrews*—namely, repetitive and indefinite class action lawsuits addressing the same claims—is simply not present here, we hold that the commencement of the original *Sanford* class action tolled the statute of limitations under *American Pipe.* The parties agree that if *American Pipe* tolling is allowed in this case, the plaintiffs' federal claims were timely filed. Because no court ever denied the motion for class certification in the *Sanford* action, we affirm the district court's conclusion that the plaintiffs' federal claims were timely filed.

Vertrue, 719 F.3d at 479-80 (footnotes omitted). Unlike *Vertrue*, the *Schilling* plaintiffs obtained certification as a class action, an adverse ruling on the merits was entered against the certified class, a motion to amend class certification was denied, and then absent class members (represented by the same attorneys) brought a new action seeking class relief. These are precisely the type of "repetitive and indefinite class action lawsuits addressing the same claims" referenced in *Vertrue* that warrant denial of *American Pipe* tolling.

The filing of the *Schilling* action February 14, 2008 may have temporarily suspended running of the statute of limitations on the absent class members' *individual* claims under the *American Pipe* tolling doctrine, but such tolling did not suspend the running of the limitations period for subsequent class actions such as this new *Cedillo* suit. If Plaintiffs' tolling argument were accepted, it would necessarily mean that absent class members (or their class counsel)

disappointed with a liability determination in an earlier, certified class action, could file repetitive actions while arguing that the clock for class claims was not running during the pendency of the earlier-filed actions. Such a result would permit putative class members to "piggy-back one class action onto another and thus toll the statute of limitations indefinitely," a result inconsistent with the principle of finality in litigation, the judicial economy envisioned by Rule 23, and hardly envisioned by the Supreme Court's *American Pipe* decisions. *Korwek,* 827 F.2d at 878. It would also signal to class counsel a new era of "hedging their bets," namely that an overbroad class definition in the first action—to exploit early, large settlements even if liability is thin[5]—is the best strategy because if the action is ultimately dismissed after a broad-based class is certified, those same attorneys can recruit new claimants and propose a more narrowly defined class,[6] a no-risk gamble that will be repeated over and over again if class claims are tolled.

As recognized by *Andrews* and more recently in *Vertrue,* the purpose of *American Pipe* tolling is to give meaning to the procedure and judicial efficiencies of class actions under Rule 23; it would make little sense and be unfair to run the limitations period on the *individual* claims

[5] The decision to certify a class necessarily "places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Associates v. Allstate Ins.*, 130 S.Ct. 1431, 1465 n. 3 (2010) (Ginsburg, J., dissenting). *See also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

[6] Justice Powell's concurring opinion in *Crown* stated that "[w]hen thus notified, the defendant normally is not prejudiced by tolling of the statute of limitations. It is important to make certain, however, that *American Pipe* is not abused by the assertion of claims that differ from those raised in the original class suit." *Crown*, 462 U.S. at 355, 103 S.Ct. 2392 (Powell, concurring). This *Cedillo* action presents class claims that focus on transports for periods of 59 to 67 hours, 67 to 95 hours, and above 95 hours, Complaint at ¶¶ 20-21, 47, which differs substantively from the class claims in *Schilling* set at the lower 24-hour threshold. *See Hoptowit v. Ray*, 682 F.2d 1237, 1258 (9th Cir. 1982) (in evaluating challenges to conditions of confinement, court may consider the length of time the prisoners must go without basic human needs). *But see Infra*, n. 9 (cases discussing non-viability of lengthy prisoner transport claims).

of absent class members during the pendency of an original class action because such claimants have relied to their detriment on class representatives to prosecute their claims. *Crown*, 462 U.S. at 350 ("unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights"). A denial of class certification in an original action, or a liability determination adverse to the certified class but with individual mistreatment claims exempted from its scope, should essentially cut such disappointed class members loose to file their own individual actions, with the time period consumed in the prior action—measured from commencement of the original class action until the adverse class ruling—not counted against them when pursuing their *individual* claims.[7] *Madani v. Shell Oil*, 2008 WL 7856015, *2 (C.D. Cal. 2008) (equitable tolling not applicable to save subsequent class action where dismissal of the earlier action "resulted precisely from an adverse decision on the merits of the claim"), *aff'd*, 357 Fed. Appx. 158 (9th Cir. 2009), *cert. denied*, 130 S.Ct. 3477 (2010).

And this is essentially what occurred in the prior *Schilling* action, where a court-approved "Class Notice" was published through the *Prison Legal News* to all absent class members following the summary judgment ruling and the denial of the motion to amend class certification, advising them to file "your own action" if such putative members wished to enforce their rights post-*Schilling*. Ex. 9, December 12, 2012 Order Approving Plan to Provide Class Notice ("The effect of these orders is to restart the clock ticking on the statute of limitations applicable to

[7] The individual Plaintiffs in *Cedillo* are asserting Section 1983 claims arising from their confinement in TransCor's vehicles for periods in excess of 59 hours (Complaint at ¶¶ 20, 47); this higher hourly threshold is why their *individual* claims are outside the scope of the *Schilling* court's summary judgment order. Ex. 6 at 15 ("To be clear, the Court does not find that the conditions alleged, if imposed for periods exceeding 24 hours or if imposed in different manners or with specific injuries, could not constitute unconstitutional deprivations to individual prisoners. As a class–wide matter, however, and on the record presented, the Court does not find that plaintiffs have established or can establish a constitutional violation.").

claims of persons who had been in the originally certified class. Those claims may be barred by the mere passage of time, unless you take immediate action to preserve your rights by filing your own action in court.").

But an untimely, *successive class action* asserting class claims that could have been, but were not, advanced in *Schilling* does not further such principles of judicial economy for the courts or detrimental reliance for individual claimants, but effectively represents a "try-again" by class counsel. As emphasized by the Northern District of California judge who denied the *Schilling* plaintiffs' motion to amend class certification after they suffered an adverse liability ruling that defeated all class claims: "Plaintiffs made a strategic decision to seek class-wide relief for one class of all inmates transported for 24 hours or more. The Court is wary of allowing amendment at this juncture simply because plaintiffs' strategy did not work." Ex. 7 at 4.

Having adopted an aggressive strategy of defining the proposed class in *Schilling* broadly at the 24-hour mark, to enable a class of more than 16,000 inmate claimants that facilitated class counsel's early damages claims in excess of $200 million,[8] and having unsuccessfully sought to amend the class certification in *Schilling* to include more narrowly defined subclasses,[9] the

[8] In their Joint Case Mgt. Statement in *Schilling*, plaintiffs projected damages as follows: "Assuming TransCor transports 30,000 prisoners per year, and that each class member is entitled to $10,000 for each time he or she was transported by TransCor, then plaintiffs compute the class damage claim to be in excess of $600,000,000.00. Using this formula, adjusted for the number of potential class members after initial discovery, plaintiffs compute the class damage claim to be $223,670,000.00." Ex. 3, Joint Case Mgt. Statement at § 11.

[9] Although Plaintiffs' 59-hour, 67-hour, and 96-hour subclasses in this case are more narrowly defined than in *Schilling*, precedent makes it unlikely that any individual claims will be able to survive summary judgment. *See generally Myers v. TransCor*, 2010 WL 3619831, at *9 (M.D.Tenn. 2010) ("Even if the Court takes as true the allegations that…the inmates being transported were fed infrequently and had difficulty eating and drinking because of the manner of being restrained, and that the inmates being transported were given infrequent bathroom breaks, these allegations simply fail to evidence the type of living conditions which are so extreme as to violate contemporary standards of decency and, thus, the objective component of the Eighth Amendment claim has not been satisfied."); *Waller v. TransCor*, No. 3:07-0171, 2007

American Pipe tolling doctrine should not be available to enable the postponed pursuit of class relief, rendering the class claims untimely under either Tennessee's one-year period, or even California's two-year period. Even looking solely at the most recent transport involving Plaintiff and New Jersey resident Craig Arno, his class claims in this new *Cedillo* action were not filed for more than five years and five months after they accrued when he was extradited from Texas to New Jersey in November of 2007.[10] Without tolling available under *American Pipe*, the class claims and allegations in the Complaint should be stricken and/or dismissed.

B. *RES JUDICATA* BARS THE NEW CLASS CLAIMS THAT WERE OR COULD HAVE BEEEN BROUGHT IN *SCHILLING*.

Unlike the parties in most of the *American Pipe* tolling cases, the eight Plaintiffs here were members of a *certified* class, having never opted out following publication of the Class Notice. Ex. 5. Thus, even if this Court were to conclude that tolling should apply to suspend the limitations period on class claims, such claims are precluded by the doctrine of *res judicata* because they were either raised, or could have been raised, in the *Schilling* litigation. Having never excluded themselves from the certified class in *Schilling*, Plaintiffs here—all of whom

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WL 3023827, *3 (M.D. Tenn. 2007) ("Here, the plaintiff was made to endure a four day ride before reaching his final destination. He was not mistreated in violation of the Eighth Amendment simply because the defendants failed to drive him directly from Arkansas to Huntsville, Texas."), citing *Zanzucchi v. Wynberg*, No. 90-15381, 1991 WL 83937 (9th Cir. Nov. 21, 1990) (prisoner was transported on a bus for 18 days with his hands and ankles restrained); *Barker v. Fugazzi*, 18 Fed. Appx. 663 (9th Cir. 2001) (inmate who "endured discomforts and irritations" on 46-hour bus ride from Houston, TX to Pendleton, Oregon, and complained "his restraints were too tight" failed to satisfy objective and subjective elements); *Juliano v. Camden County Dep't of Corrections*, Civ. No. 06-1110 (FLW), 2006 WL 1210845 (D.N.J. May 3, 2006) (prisoner was transported for 10 days on a bus cross country while being shackled in the manner described by the instant plaintiff); and *Jensen v. Jorgenson*, Civ. No. 03-4200, 2005 WL 2412379 (D.S.D. Sept. 29, 2005) (prisoner was held in restraints and driven in a van for 14 days).

[10] As found by Judge Illston in *Schilling*, "[a]t the end of 2008, TransCor stopped Extradition Services to focus instead on local transports" and Special Operations, "mass-transit services[] directly from one location to another…Some of these Special Operations trips last under 24 hours and some last 31 - 36 hours." Ex. 6 at 4.

were members of the *Schilling* class—are precluded from bringing class claims under Supreme Court precedent.

In *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), the Supreme Court considered the question of whether a judgment in a class action determining that an employer did not engage in a general pattern or practice of racial discrimination against the certified class of employees precluded a class member from maintaining a subsequent civil action alleging an *individual* claim of racial discrimination against the employer. *Id.* at 869. While recognizing the general doctrine of claim preclusion, the Court emphasized the difference between establishing that an employer had engaged in a pattern or practice of discrimination and establishing that an employer had discriminated against an individual employee. *Id.* at 874, 876. The court held that individual plaintiffs in a subsequent action were bound under principles of *res judicata* by the prior adverse class action judgment, but that the preclusive effect merely barred "the class members from bringing another class action against the Bank alleging a pattern or practice of discrimination for the relevant time period...." *Id.* at 880. The doctrine of *res judicata* did not, however, bar the plaintiffs from bringing their individual claims (alleging individual mistreatment) against the employer in separate actions. *Id.* "Pursuant to the same general principle that claim preclusion does not apply to matters that could not be advanced in a prior action, individual actions remain available to pursue any other questions that were expressly excluded from the class action." 18A Charles Alan Wright, Arthur R. Miller & Edward R. Cooper, Federal Practice and Procedure § 4455 (3d Ed. 1998). Here, it is undisputed that the *Schilling* plaintiffs *could have advanced* divided subclasses similar to those proposed here (59, 67 and 95+ hour transports) in the prior action.

This Court must apply federal common law in determining the preclusive effect of the *Schilling* class judgment. *Taylor v. Sturgell*, 128 S.Ct. 2161, 2171 ("[t]he preclusive effect of a federal-court judgment is determined by federal common law"). Although the eight Plaintiffs here were not named parties in *Schilling*, they were "parties by representation" because of the certified status of *Schilling* and are bound by the class judgment from asserting new legal theories applicable to the class that could have been asserted and addressed in the prior action. As comment e to the Restatement (Second) of Judgments § 41 states: "[w]hen…a class action is authorized under rules such as Rule 23 of the Federal Rules of Civil Procedure, persons within the class are bound by a judgment for or against the representative." The Supreme Court has made this point abundantly clear in recent decisions. *See Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2380 (2011) ("So in the absence of a certification under that Rule, the precondition for binding [a proposed class member] was not met. Neither a proposed class action nor a rejected class action may bind nonparties. What does have this effect is a class action approved under Rule 23."); and *Taylor*, 553 U.S. at 894 (nonparties can be bound in "properly conducted class actions"). The Sixth Circuit has also underscored this point. *Meridia v. Product Liability Litigation*, 447 F.3d 861, 868-69 (6th Cir. 2006) ("Yet Plaintiffs offer no authority for the proposition that where, as here, hundreds of named litigants and certified classes are consolidated by an MDL Panel, a party may limit the effect of a consolidated order merely by filing a new complaint…it is clear that the district court intended to bind all litigants within its purview, i.e., any named litigant or previously certified class before it.").

"When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar..., the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of

connected transactions, out of which the action arose. *Id.* (quoting Restatement (Second) of Judgments § 24(1) (1982)). The class claims brought in *Schilling* clearly arose from the same nucleus of fact—extradition trips from 2006-08—that encompassed the 22,000 or more inmate trips of which the eight journeys of the Plaintiffs here were but a small subset. The fact that class counsel in *Schilling* structured the class claims to include any inmate who was transported for a period in excess of 24 hours, and that this broad class definition differs from the more narrowly framed subclasses proposed in this new action,[11] is inconsequential to the doctrine of *res judicata* in barring the new class claims. The *Schilling* plaintiffs, who obtained class certification by persuading the Northern District of California that they would adequately represent the class, strategically structured that lawsuit to leverage settlement over liability prospects—believing the case would settle quickly after certification—but the entry of an unfavorable judgment now precludes those certified class members from bringing new class claims that ***could have been brought*** by their class representatives in the earlier *Schilling* matter. *Becherer v. Merrill Lynch, Pierce, Fenner, and Smith, Inc*., 193 F.3d 415, 434 (6th Cir. 1999) (noting that "the class representative assumes a fiduciary relationship" to the class).

Claim preclusion applies not only to the precise legal theory presented in the previous litigation, but to "all legal theories and claims arising out of the same operative nucleus of fact." *Adams v. Southern Farm Bureau Life Insurance Co.*, 493 F.3d 1276, 1289 (11th Cir. 2007). This principle applies with equal force to class litigation where a class member is attempting to put a new legal twist on factual matters previously litigated. *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731 (9th Cir. 1984) ("But the doctrine of *res judicata*, in

[11] While the certified class in *Schilling* encompassed more than 16,000 claimants by virtue of setting the hourly threshold at 24 hours, Plaintiffs in this action have proposed three subclasses involving inmates transported for 59 to 67 hours, 67 to 95 hours, and above 95 hours. Complaint at ¶¶ 2, 20-21, 47 and 49.

California as elsewhere, not only bars the maintenance of the identical cause of action in a subsequent suit by the same parties. It also bars the maintenance of a subsequent action *on any part* of the original cause of action, even if that part was not litigated in the prior action.") (emphasis in original); and *Bell v. Board of Education*, 683 F.2d 963, 966 (6th Cir.1982) ("were we to apply a contrary principle rejecting collateral estoppel in school desegregation cases, we would open up for relitigation all school desegregation judgments in de facto school cases…Rights and duties in desegregation cases previously litigated and established would never become final. They would always be subject to collateral attack. Desegregation judgments, like tickets to the theater, would be good for today's show only.").

The eight Plaintiffs here seek class relief on behalf of the same inmates who were members of the certified *Schilling* class, and were similarly transported on extradition trips of various lengths in 2006-07. These 2006-07 extradition trips are the "transactions" or factual events complained of. "Transaction" is defined as a "common nucleus of operative facts." Restatement (Second) of Judgments § 24 cmt. b (1982)). "That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories ... would emphasize different elements of the facts." *Id.* (quoting Restatement (Second) of Judgments § 24 cmt. c). As Wright, Miller, and Cooper have observed:

> If class members could sit back and see whether the court awards them a desirable judgment and then attack the judgment collaterally if unsatisfied with the award they receive, the purpose of res judicata would be undermined . . . . Due process entitles class members to notice and adequate representation. It does not entitle them to continue to challenge the defendant's conduct until they are ultimately successful.

18A Wright, § 4455 at 477 (quoting *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74, 76-77 (N.D. Tex. 1979).

Under *Cooper* and federal preclusion law, the class claims brought in this action are barred by *res judicata* because such Plaintiffs were members of the certified *Schilling* class, were adequately represented, and suffered a decision on the merits that merged into the final judgment dismissing the action with prejudice. Any and all class claims that could have been brought in the prior action cannot be asserted in this new action founded upon the same nucleus of facts.

C. TENNESSEE'S ONE-YEAR STATUTE OF LIMITATIONS REQUIRES DISMISSAL OF CERTAIN PLAINTIFFS' INDIVIDUAL CLAIMS.

Although the *American Pipe* tolling doctrine was designed to rescue the individual claims of class members "in the event that class certification is denied," *Crown, Cork & Seal Co.*, 462 U.S. at 346–47, TransCor does not dispute for purposes of this Motion that the *granting* of class certification coupled with a liability ruling *adverse to the class* in *Schilling* warranted a limited period of tolling for the individual claims of class members to effectuate the purposes of Rule 23. *Crown*, 462 U.S. at 349-50 (discussing the holding in *American Pipe*, and the purpose of promoting the efficiency of the class action by allowing tolling). Three key questions are presented: (1) What is the applicable statute of limitations, and does it apply to all or some of the individual Plaintiffs? (2) How much time remained on the limitations period for individual claimants when the *Schilling* action was filed February 14, 2008; and (3) When did the applicable limitations period resume running?

1. Tenneesee's One-Year Period Should Apply.

The statute of limitations for civil rights claims in Tennessee is one year.[12] Tenn. Code Ann. § 28-3-104; *see also Kessler v. Bd. of Regents*, 738 F.2d 751, 754 (6th Cir. 1984) ("It is undisputed...that a one-year statute of limitations applies to civil rights cases arising in

[12] Congress has never legislated a statute of limitations period for Section 1983 actions, and the courts, pursuant to 42 U.S.C. § 1988, look to analogous state statutes. *Wilson v. Garcia*, 471 U.S. 261 (1985); and *Owens v. Okure*, 488 U.S. 235 (1989).

Tennessee."). This one-year statute of limitations applies to § 1983 claims *brought* in Tennessee. *See Berndt v. State of Tenn.*, 796 F.2d 879, 883 (6th Cir. 1986). While this action involves multiple Plaintiffs alleging mistreatment by TransCor over a variety of extradition trips involving different routes of travel through different states, the procedural nature of a statute of limitations requires the application of the one-year period in Tenn. Code Ann. § 28-3-104.

That Tennessee's one-year period applies to this multi-state, civil rights action involving multiple plaintiffs is illustrated by an opinion from the Eastern District of Tennessee, *Pratt v. Greyhound Lines, Inc*. 2010 WL 703109 (E.D.Tenn. 2010). *Pratt* involved the personal injury claims of a husband and wife who were passengers on a bus en route from Chattanooga, Tennessee, to Denver, Colorado. When the bus was passing through Texas, it was involved in an accident, but the plaintiffs waited until 22 months after the accident to file suit in the Eastern District of Tennessee. 2010 WL 703109, at *1. After noting that Tennessee law classifies the statute of limitations as a procedural issue, the *Pratt* court held that "a federal court sitting in Tennessee applies the Tennessee statute of limitations" and dismissed the action as time-barred by Tennessee's one-year limitations period. *Id*., citing *Elec. Power Bd. of Chattanooga v. Monsanto*, 879 F.2d 1368, 1375 (6th Cir.1989) ("[S]tatutes of limitations are procedural rules and thus the statutes of limitations of the forum state-Tennessee-apply to the claims....").

Application of the Tennessee limitations period for civil rights claims is not affected by the fact that venue was transferred to this District from the Northern District of California for convenience reasons under 28 U.S.C. 1404(a), as this action is a *federal question* case not subject to the rule ordinarily applied to diversity cases in *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964) (when a diversity case is transferred, "the transferee district court must be obligated to

apply the state law that would have been applied if there had been no change of venue."). As a well-known treatise on federal practice emphasizes:

> Following a Section 1404(a) convenience transfer in a federal question case, the transferee court ordinarily should apply the law as interpreted by its own circuit, and should not be required to apply the precedent of the transferor circuit…the better view…is that the transferee court is free to apply the law of its own circuit….federal law, unlike state law, presumptively is uniform and therefore *Van Dusen's* goal of preventing the defendant from using the 'accident' of diversity to achieve a different result than he or she would obtain in state court is irrelevant. *This result is not changed by the courts' recognition that although federal law is 'supposed' to be uniform, it in fact often is not.*

17 Moore's Federal Practice, 111.20[2][a] at 147-149 (2d. ed. 2002) (emphasis added). *See also EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695, 700 (6th Cir. 1999) ("Although district courts must apply the law of the state of the transferor district in diversity actions transferred under 28 U.S.C. § 1404(a) (convenience transfers), the prevailing view for federal questions is that 'the venue of appeal determines choice of law on federal issues.' Federal law is presumed to be uniform, whether or not it is in fact.") (citations omitted); *Menowitz v. Brown*, 991 F.2d 36, 40 (2d Cir. 1993); and *In re Korean Airlines Disaster*, 829 F.2d 1171, 1177 (D.C.Cir. 1987) ("the *Erie* policies served by the *Van Dusen* decision do not figure in the calculus when the law to be applied is federal not state").[13] Thus, Tennessee's one-year limitations period, expressly held by the Sixth Circuit to govern Section 1983 actions, should apply here. *Kessler*, 738 F.2d at 754 ("It is undisputed...that a one-year statute of limitations applies to civil rights cases arising in Tennessee."). Uniform application of federal law (42 U.S.C. § 1988) applicable to the timeliness of Section 1983 actions litigated in the Middle District of Tennessee would also spare the parties

[13] Regardless of whether courts apply a state limitations period to a federal claim, "the choice of a limitations period for a federal cause of action is itself a question of federal law." *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 159 n. 13 (1983).

and the Court from evaluating a patchwork of limitations periods potentially applicable to the various Plaintiffs and their interstate trips.

Alternatively, even if this Court believed it was required under *Van Dusen* to apply the law of California, or California's choice of law rules in deciding which state's limitations period should apply, a federal court sitting in California would be required to apply its borrowing statute to dismiss the claims of at least some of the Plaintiffs. Calif. Code § 361 provides: "When a cause of action has arisen in another State, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this State, except in favor of one who has been a citizen of this State, and who has held the cause of action from the time it accrued." *See also Williams v. Fulton County Jail*, 575 F.Supp. 306 (N.D.Ill. 1983) (applying Illinois borrowing statute to inmate claim arising in Georgia).

That Plaintiffs' cause(s) of action have "arisen" in Tennessee is revealed by the nature of Plaintiffs' allegations against TransCor and decisions made at its Nashville, Tennessee headquarters. Plaintiffs and their counsel have made the theme of this case and *Schilling* about the policies of TransCor, Compl. [ECF 1] at ¶¶ 23-28, 46 & 50, and the trip-scheduling decisions made by TransCor officials in Nashville, *id.* at ¶¶ 29, 31, 33, 35, 37, 39, 41 and 43. Indeed, TransCor is the only defendant—none of the extradition specialists or transportation crew members is a party—which will require Plaintiffs to prove TransCor's policies or customs were the "moving force" behind any alleged constitutional violations. *Monell v. Department of Social Services of N.Y.*, 436 U.S. 658 (1978); *Garner v. Memphis Police Dept.*, 8 F.3d 358, 364 (6th Cir. 1993). The lawsuit, like the predecessor *Schilling* action, is not about whether a TransCor driver ran a red light or took a wrong turn in California, Florida or Kentucky, but rather a civil

rights challenge to TransCor's legitimate policy of keeping inmates restrained for extended periods (with access to bathroom breaks, meal stops and flat-panel TV movies while en route), and scheduling routes according to a regional hub and spoke system designed in Nashville, with all route-scheduling and trip decisions made by TransCor officials in Nashville. Ex. 5, Order at 1, 3-7, 12-15.

Thus, although the harm alleged by the individual Plaintiffs may have been experienced in a variety of states according to the route of each inmate's extradition trip, the underlying conduct of TransCor challenged in this action focuses directly on the policies and trip-scheduling decisions made in Nashville, Tennessee.[14] Accordingly, even if California's substantive law and choice of law rules applied, its borrowing statute requires the application of Tennessee's one-year period because Plaintiffs' allegations demonstrate that the claims "arose" from TransCor's Tennessee-based policies, training, trip-scheduling and other corporate decisions.

2. The Claims of Cedillo, Houston, Wright and Greenmeier for Trips in 2006 Were Time-Barred Before *Schilling* Was Filed.

At the time the *Schilling* matter was filed on February 14, 2008, more than one year had already elapsed on the claims of Plaintiffs Cedillo, Houston, Wright and Greenmeier. Thus, their claims are untimely under Tenn. Code Ann. § 28-3-104, and such Plaintiffs should be dismissed as parties.

3. Plaintiffs Roussell and Cleaves Should Be Dismissed Because the Statute of Limitations Resumed Running No Later Than October 12, 2012.

[14] Significantly, 6 of the 8 Plaintiffs spent at least one night at the Christian County Jail in Hopkinsville, Kentucky—a regional "hub" that is also the focus of Plaintiffs' criticism because the consolidation of trips in the East and Southeast via this hub operated to prolong the extradition trips. Kentucky, like Tennessee, has a one-year period for civil rights actions. *Collard v. Kentucky Bd of Nursing*, 896 F.2d 179 (6th Cir. 1990).

Case law and logic compel the conclusion that a limitations period, once tolled, should begin running as soon as absent class members in the first case reasonably should know that they can no longer depend on the class action to protect their rights. *Crown*, 462 U.S. at 354 ("Once the statute of limitations has been tolled, it remains tolled for all members of the putative class *until class certification is denied*.") (emphasis added).[15] In *Schilling*, such date occurred either when the adverse class summary judgment was entered on August 8, 2012 or, at the latest, on October 11, 2012 when the *Schilling* plaintiffs' motion to amend class certification was denied. And this is precisely what the Class Notice acknowledged referred to these rulings and stated: "The effect of these orders is to restart the clock ticking on the statute of limitations applicable to claims of persons who had been in the originally certified class…If this class action was filed before your right to file a claim expired, the time to file was stayed or tolled until the court's recent actions when the clock started ticking again." Ex. 9.

Assuming, *arguendo*, that tolling lasted from February 14, 2008 (when the *Schilling* complaint was filed) to the latest date of October 11, 2012 (denial of motion to amend class certification), the limitations period ran for another 5 months and 28 days until Plaintiffs filed the *Cedillo* complaint on April 8, 2013. When such period is added to the time period that already lapsed before *Schilling* was commenced, the claim of Roussell is also time-barred (in addition to

[15] The *Crown* court pinpointed the resumption date as the date on which class certification was denied despite the fact that, following the denial, the named plaintiffs "later settled" their individual claims and the case was dismissed with prejudice. 462 U.S. at 348, n.1. This holding therefore eliminates any basis for Plaintiffs' assertion that the statute was tolled "until April 4, 2013." Complaint at ¶ 22. April 4, 2013 was the date on which the *Schilling* case was closed (Ex. 13), not the date when the court effectively denied class relief by entering summary judgment against the class (Ex. 6, August 8, 2012 Order) or, at the very latest, denying the *Schilling* plaintiffs' motion to amend class certification (Ex. 8, October 12, 2012 Order).

those of Cedillo, Houston, Wright and Greenemeier),[16] leaving only Plaintiffs Arno, Hugall and possibly Cleaves. Plaintiff Cleaves, however, should also be dismissed if the Court agrees with TransCor that tolling ended on August 8, 2012 when the Northern District of California entered summary judgment against the certified class, because that date represents the day on which all class relief was denied, resulting in an 8-month period added to Cleaves' pre-*Schilling* period of 5 months and 4 days, which exceeds the one-year limitations period.[17]

Accordingly, the limited relief from tolling requires dismissal of Roussell and Cleaves as plaintiffs, with only the individual claims of Plaintiffs Arno and Hugall surviving this statute of limitations challenge based on the application of Tenn. Code Ann. § 28-3-104. Alternatively, even if California's two-year statute of limitations were applied (Calif. Code of Civil Procedure § 335.1), the individual claims of Plaintiffs Houston, Wright and Greenemeier should be dismissed.

III. CONCLUSION.

The equitable tolling doctrine from *American Pipe* and its progeny must be limited to situations that serve its purposes of furthering the judicial economy inherent in the class action procedure and preserving the individual claims of class members who "rely on the existence of the suit to protect their rights." *Crown*, 462 U.S. at 350. But a successive class action filed more than 5 years after any claims accrued in 2006-07, attempting to piggyback off an earlier, *certified* class action that resulted in a summary judgment adverse to the class, is an abusive, "try-again"

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[16] Because 5 months and 27 days elapsed between October 12, 2012 and the filing of this new action, the individual claims of Plaintiffs Houston and Wright would be untimely even if California's two-year statute of limitations were applied. *Infra* at 6.

[17] Assuming the Court determines any tolling expired with the entry of the adverse class judgment on August 8, 2012, the individual claims of Plaintiffs Houston, Wright, and Greenemeier would be untimely even if California's two-year statute of limitations were applied because an additional 8 months would be added to the time periods associated with their claims. *Infra* at 6.

practice that falls outside the carefully crafted boundaries of *American Pipe*. All class claims should be dismissed under *Andrews*, or the *res judicata* doctrine under *Cooper*, and the individual claims of all Plaintiffs except Arno and Hugall dismissed under Tennessee's one-year statute of limitations. Alternatively and at a minimum, the individual claims of Plaintiffs Houston, Wright and Greenemeier should be dismissed should this Court apply California's two-year statute of limitations.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Memorandum of Points and Authorities in Support of Defendant TransCor's Motion for Judgment on the Pleadings has been served upon Filing Users via the electronic filing system and on other counsel via U. S. Mail, first-class postage prepaid, this October 31, 2013, on the following:

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