KAMALA D. HARRIS
Attorney General of California
JAY C. RUSSELL
Supervising Deputy Attorney General
MARTINE N. D'AGOSTINO
Deputy Attorney General
CHRISTINE M. CICCOTTI
Deputy Attorney General
ADRIANO HRVATIN
Deputy Attorney General
State Bar No. 220909
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-1672
Fax: (415) 703-5843
E-mail: Adriano.Hrvatin@doj.ca.gov
*Attorneys for Defendants*

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

| | |
|---|---|
| **TODD ASHKER, et al.,**<br>Plaintiffs,<br>**v.**<br>**GOVERNOR OF THE STATE OF CALIFORNIA, et al.,**<br>Defendants. | C 09-05796 CW<br>**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT** |

## STATEMENT OF FACTS AND ISSUES

Plaintiffs' motion for leave to file a supplemental complaint should be denied because it seeks to greatly expand the scope of this litigation with new allegations that violate Rule 15(d) of the Federal Rules of Civil Procedure. For five years, this case has focused on the conditions of confinement in Pelican Bay State Prison's Security Housing Unit (SHU). Over seven months ago, this Court certified a class of inmates "who are now, or will be in the future, assigned to the Pelican Bay SHU for a period of more than ten continuous years." (Class Cert. Order 21, June 2, 2014, ECF No. 317.) The Court expressly excluded from the class "inmates transferred out of the

Pelican Bay SHU" because they "lack commonality with inmates who remain housed in the Pelican Bay SHU and would not benefit from any of the injunctive relief that Plaintiffs are seeking here." (*Id*. at 14.)

Plaintiffs now seek—through an alleged "supplemental" pleading—to give standing to inmates who are no longer class members because they have been transferred from Pelican Bay's SHU. They assert, on behalf of a separate proposed class of inmates, a supplemental Eighth Amendment claim challenging conditions "at the Pelican Bay SHU *and other CDCR SHUs*." (Pls.' Prop. Supp. Compl. ¶¶ 260, 262 (italics added).) On its face, the supplement would multiply the scope of this case at least three-fold by requiring the parties and the Court to examine the conditions of confinement at all four male CDCR SHUs. And Plaintiffs go even further, seeking to assert supplemental "individual claims" challenging conditions of CDCR's general population housing units for named Plaintiffs no longer housed in Pelican Bay's SHU. (*See*, *e.g.*, Pls.' Prop. Supp. Compl. ¶¶ 215-217.)

Under the guise of a "supplement," Plaintiffs would amend the Court's order on class certification and assert a distinct and unique Eighth Amendment claim to allow former class members to carry their alleged injuries with them and challenge the conditions of confinement at three other SHUs, and potentially every CDCR institution. Permitting these new claims—which amount to a new lawsuit concerning alleged prison conditions far beyond the walls of Pelican Bay—would significantly prejudice Defendants at this stage of the litigation. Over the past three years, Defendants' efforts, and those of their consultants and experts, have appropriately focused on Plaintiffs' allegations concerning Pelican Bay. Requiring Defendants to duplicate those efforts at least three-fold, given the fast-approaching dispositive motion and trial dates, is patently unfair and prejudicial. It also contravenes this Court's recently reaffirmed direction that the parties be prepared to proceed to trial on December 7, 2015 on the two complex, yet narrow, claims the Court certified for resolution on June 2, 2014. (Order Granting in Part Pls.' Mot. Amend Sched. 2, Nov. 20, 2014, ECF No. 339.)

Given the improper grounds on which Plaintiffs seek to supplement their complaint, and the prejudice Defendants will suffer if they are forced to defend a greatly expanded case under the current case schedule, Plaintiffs' motion must be denied.

## ARGUMENT

### I. PLAINTIFFS' SUPPLEMENTAL COMPLAINT VIOLATES RULE 15(D).

While leave to permit supplemental pleadings is generally permitted, it is well-accepted that a supplemental pleading cannot introduce a separate, distinct, and new cause of action. *Planned Parenthood of So. Arizona v. Neely*, 130 F.3d 400, 402 (9th Cir. 1997). Matters newly alleged in a supplemental complaint must have some relation to the claim set forth in the original pleading. *Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988). Plaintiffs' motion for leave fails to meet these threshold requirements.

The focus of Plaintiffs' claims to date has been on alleged "harsh" and "inhumane" conditions of Pelican Bay's SHU. These claims have been the subject of extensive litigation for well over two years, and yet Plaintiffs now seek leave to supplement their complaint to assert another Eighth Amendment claim challenging alleged conditions, not just at Pelican Bay's SHU but also at "other CDCR SHUs." (Pls.' Prop. Supp. Compl. ¶¶ 256, 260, 262.) And they seek to certify a "supplemental Eighth Amendment class of all prisoners who have now, or will have in the future, been imprisoned by defendants at the Pelican Bay SHU for longer than 10 continuous years and then transferred from Pelican Bay SHU *to another SHU in California*." (*Id.* ¶ 218 (italics added).) This claim is separate and distinct from Plaintiffs' pending claims, and at best is only tangentially related to the Eighth Amendment claim certified by the Court over seven months ago challenging the conditions at Pelican Bay's SHU.

Plaintiffs contend their new Eighth Amendment claim is "tightly bound to the current Eighth Amendment claim" on the ground that the alleged conditions they experienced in Pelican Bay's SHU continue in another CDCR SHU at Tehachapi. (Pls.' Mot. Leave 4.) But Plaintiffs do not challenge the conditions of Tehachapi's SHU "on their own." (*Id.*) Instead, Plaintiffs seek to preserve former class members' standing to assert an Eighth Amendment claim even though

the individual inmates are no longer housed in Pelican Bay's SHU. (*Id.*) Plaintiffs' argument is both legally unsound and over-reaching.

The Court's order on class certification makes clear that class membership requires housing in Pelican Bay's SHU. (Class Cert. Order 21.) Plaintiffs cannot look to Rule 15(d) to keep alive individual inmates' claims that have been rendered moot by their having received the very thing for which they sued. Individual inmate cases are brought regularly challenging conditions at Pelican Bay and at other institutions. Plaintiffs concede that this is a claim that could be brought in a separate suit challenging the conditions of confinement at those different institutions. (Pls.' Mot. Leave 4 n.3 (admitting that "[o]f course, Supplemental Plaintiffs could bring a separate suit challenging conditions of confinement at Tehachapi SHU under the Eighth Amendment").) The state and federal courts are tasked with adjudicating the merit of those complaints, whether at Pelican Bay, Tehachapi, or any other SHU or housing setting in California state prisons. If former class members wish to challenge those conditions individually (which Plaintiffs purportedly seek by their supplemental complaint), they can do so without supplement here.

Plaintiffs' proposed supplemental Eighth Amendment claim, which incorporates allegations that could arise at every CDCR institution throughout the state, is too attenuated to Plaintiffs' pending challenge to Pelican Bay SHU conditions, and it contradicts the allegations in the second amended complaint that attempt to distinguish Pelican Bay from other prisons in California and nationally. For instance, Plaintiffs previously alleged that Pelican Bay's SHU "is the most restrictive prison in California," and that conditions are "harsh, even compared to other California SHUs." (Second Am. Compl. ¶¶ 29, 72.) All litigation efforts to date have focused on investigating Plaintiffs' allegations regarding Pelican Bay SHU confinement. The supplemental complaint now asserts that "the cruel and unusual treatment [Plaintiffs] experienced in over ten years of isolation [in Pelican Bay's SHU], and its debilitating effects, have not abated, but instead continue under a different name in a different setting." (Pls.' Mot. Leave 3.) To litigate this new contention will require a separate and extensive investigation into conditions in those "different settings," and the policies and practices applied at each institution. Doing so would likely destroy the findings as to numerosity, commonality, typicality, and adequacy of representation that the

Court considered to assess conditions only at Pelican Bay. Plaintiffs' motion for leave to supplement their complaint to add new, distinct, and separate claims regarding the conditions at other SHUs throughout the state (and arguably at every CDCR prison) goes far beyond what is permitted under Rule 15(d). Accordingly, it must be denied.

## II. PLAINTIFFS' SUPPLEMENTAL COMPLAINT UNDERMINES RULE 15(D)'S PURPOSE.

Even if the Court finds that Plaintiffs' new proposed Eighth Amendment claim is related to the original Eighth Amendment claim, Plaintiffs' motion for leave to supplement their complaint must still be denied. "Rule 15(d) is intended to give district courts broad discretion in allowing supplemental pleadings. The rule is a tool of judicial economy and convenience." *Keith*, 858 F.2d at 473. As such, even if a supplemental complaint has some relation to the claim set forth in the original pleading, a court may deny leave to supplement on grounds of undue delay, prejudice to the opposing party, or futility. *Id*. at 474. Plaintiffs' proposed supplemental complaint contravenes, rather than advances, judicial economy and convenience.

### A. Plaintiffs' Untimely Supplement Will Impact Judicial Resources and Prejudice Defendants.

Plaintiffs contend that "the only possible prejudice to Defendants stems from the existence of an additional claim, which will admittedly require some limited additional discovery and related delay." (Pls.' Mot. Leave 8.) They further assert that although discovery in this case has been ongoing "for quite some time," trial is still over a year away. (*Id*. at 9.) Plaintiffs conclude that although supplementing the complaint "would undoubtedly result in some delay, and possibly a new trial date," such delay is not undue or prejudicial, given that Plaintiffs have moved as promptly as possible. (*Id*.) All of these assertions are untrue and vastly understate the impact of the proposed supplement.

This case has focused *exclusively* on the conditions of confinement at Pelican Bay's SHU. The parties litigated whether Plaintiffs' claims met Rule 23's requirements for class certification based solely on the alleged conditions at Pelican Bay. Numerous Pelican Bay staff have been deposed concerning those conditions. Multiple experts retained by both sides have toured Pelican Bay. The inmates whose records have been reviewed as part of the investigation of Plaintiffs'

claims have all been housed at Pelican Bay's SHU. The supplemental complaint would focus not on Pelican Bay, but rather on three other SHU units, and potentially all CDCR institutions. To respond to Plaintiffs' new list of alleged deprivations at Tehachapi SHU, and possibly other SHU units, as well as general population units statewide, Defendants would need to investigate those institutions' operations, and review the custody files and medical records of inmates housed there. Plaintiffs' original Eighth Amendment has required a years-long investigation into nearly every component of prison life at Pelican Bay's SHU. The allegations Plaintiffs assert to support their proposed supplemental Eighth Amendment claim would similarly require extensive investigations at potentially every CDCR institution.

The prejudice to Defendants is amplified by Plaintiffs' improper delay in seeking to supplement their complaint. According to Plaintiffs, "[u]pon publication of the final regulations governing Plaintiffs' current location and conditions of confinement, Plaintiffs moved promptly, *within two months,* for leave to supplement." (*Id*. at 10 (italics in original).) But they also concede that "California's Step Down Program was first implemented in pilot form in October 2012." (*Id*. at 9.) Plaintiffs have known for at least two years, beginning in October 2012, that inmates in Pelican Bay's SHU assigned to steps three and four of CDCR's step-down program would be transferred to other SHUs, including at Tehachapi. (*See*, *e.g.*, Giurbino Decl. Supp. Defs.' Mot. Dismiss ¶¶ 5-8 & Ex. A, Dec. 17, 2012, ECF No. 161; Defs.' Opp'n Pls.' Mot. Class Cert. 13-14 & n. 4, July 18, 2014, ECF No. 242.) Plaintiffs have had ample opportunity to investigate alleged conditions at these institutions, including at Tehachapi's SHU. Plaintiffs had no reason to wait until they personally received the results of a Department Review Board hearing conducted under the finalized regulations to consider supplementing their complaint. Notwithstanding these procedural changes and the resulting inmate transfers, when the parties appeared at a June 4, 2014 scheduling conference, Plaintiffs made no mention of any intention to supplement their complaint. Plaintiffs should not be rewarded for their lack of diligence, given that the objective of Rule 15(d) is to promote judicial economy and efficiency.

**B. Plaintiffs' Supplement Fails to Allege Sufficient Facts to State A Plain and Plausible Claim for Relief.**

Although Plaintiffs' supplemental Eighth Amendment claim seeks relief from conditions of confinement at Pelican Bay's SHU and "other CDCR SHUs" (Pls.' Prop. Supp. Compl. ¶¶ 260, 262), Plaintiffs argue in their motion that they "*do not* seek to challenge conditions at Tehachapi SHU *on their own*." (Pls.' Mot. Leave 4 (emphasis in original).) Plaintiffs also attempt to "clarify" that inmates transferred from Pelican Bay's SHU now housed in the general population nonetheless have a "right to continue in this litigation as individual plaintiffs." (*Id*.) Plaintiffs Johnson, Redd, and Reyes (and more recently Esquivel), who are now housed in general population units, "seek to supplement the complaint to apprise the Court of relevant facts regarding their continuing individual claims," but "do not seek to supplement the complaint for the purpose of challenging those conditions, or certifying a class of other Step Five prisoners." (*Id*.) The proposed supplement does not assert any specific claim for relief on these alleged "continuing individual claims." Plaintiffs do not explain how supplemental allegations that admittedly do not support a claim may nonetheless be asserted in a supplemental pleading. Plaintiffs are required to allege sufficient plausible facts to put Defendants on notice of the claims asserted against them. Plaintiffs' confusing and contradictory assertions do not meet that obligation under the Federal Rules.

Plaintiffs rely on *Griffin v. Cnty. School Bd. of Prince Edward*, 377 U.S. 218 (1964) to argue that their supplement "gives rise to 'the same old cause of action' stemming from the prisoners' continued desire to be released from solitary confinement." (Pls.' Mot. Leave 7.) *Griffin* is inapposite. *Griffin* involved supplemental allegations concerning *post-judgment events* in which the court, as part of its final order, required the parties to comply with a host of broad, equitable directives. 377 U.S. at 222 (requiring the Virginia school system to end race discrimination, take immediate steps to admit high school students without regard to race, and do the same with elementary schools). Moreover, the defendants' actions that the *Griffin* plaintiffs sought to challenge via supplement were alleged to be specific attempts by the defendants to contravene the court's earlier rulings. *Id*. at 226 (alleging the defendant's refusal to levy taxes

and open schools were part of continued, persistent efforts to circumvent a prior order). No such circumstances are present in this case. To the contrary, CDCR's new Security Threat Group regulations and step-down program address and remedy the very constitutional claims Plaintiffs asserted in their second amended complaint.

Plaintiffs' proposed supplement fails for other reasons. Defendants are entitled to challenge whether Plaintiffs properly exhausted their administrative remedies under the Prison Litigation Reform Act as to their supplemental Eighth Amendment claim. In addition, for the individual "Supplemental Plaintiffs" housed in Tehachapi's SHU, this District is not a proper venue for litigating a claim challenging the conditions there. A challenge to conditions at Tehachapi's SHU—a new claim that will require newly named defendants unrelated to the parties or claims now pending—would further run afoul of the rules against improper joinder of claims and parties. Fed. R. Civ. P. 18, 20. If Plaintiffs seek to pursue the allegations in the proposed supplemental complaint, they must do so in a new case.

## III. PLAINTIFFS TRANSFERRED FROM PELICAN BAY'S SHU SHOULD BE DISMISSED.

If a court "determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). For the reasons asserted above, the Court should deny Plaintiffs leave to supplement their complaint. In doing so, and to avoid further litigation on the issue, the Court also should dismiss from this case Plaintiffs Dewberry, Esquivel, Franklin, Johnson, Redd, Reyes, Ruiz, and Troxell, as these Plaintiffs are no longer housed in Pelican Bay's SHU, a condition to membership in either class certified by this Court.

Plaintiffs appear unwilling to acknowledge the plain terms of the Court's order on class certification. The Court held that "any inmates who have been placed in the STG program or transferred out of the Pelican Bay SHU, must be excluded from the proposed Due Process Class." (Class Cert. Order 11). And, "[a]s with the Due Process Class, . . . any inmates who have been transferred out of the Pelican Bay SHU must be excluded from the Eighth Amendment Class." (*Id*. at 14.) Despite this clear directive, Plaintiffs contend that "Plaintiff Dewberry was transferred from Pelican Bay after this Court's ruling on class certification, and thus remains a class representative for the Second Amended Complaint despite his subsequent transfer." (Pls.'

Mot. Leave 3 & n.2.) Plaintiffs also argue that "[l]ike Dewberry, . . . Johnson remains a class representative regardless, as he was detained at Pelican Bay SHU at the time the Court certified the class and the class representatives." (*Id.* at 4 & n.4.)

Plaintiffs admit here that they made the same fruitless argument before Judge Vadas when they moved to compel responses to discovery Plaintiff Franklin served after he was transferred from Pelican Bay's SHU. (Pls.' Mot. Leave 5 n.5.) Judge Vadas properly denied that motion. (Order Granting in Part Pls.' Mot. Compel 3, Nov. 21, 2014, ECF No. 340.) And Plaintiffs' reliance on *Demery v. Arpaio*, 378 F.3d 1020 (9th Cir. 2004) is unavailing. The defendant there conceded that there was a live controversy, and neither party on appeal argued that the case was moot. *Id.* at 1025. Neither is there here a likelihood of re-occurrence or a dispute capable of repetition yet evading review. As Plaintiffs concede, Defendants' new Security Threat Group regulations "altered many aspects of California's gang validation process" and "change[d] the process and criteria for validating California prisoners" and "placing such individuals in the Pelican Bay SHU." (Pls.' Mot. Leave 2.) Accordingly, Plaintiffs and other inmates would have to engage in gang activity as defined under CDCR's new validation regulations to have grounds to assert a new claim, which nonetheless would be the subject of another lawsuit, not this one.

In short, the class definitions explicitly contemplate that validated Pelican Bay SHU inmates will fall out of one or both of the certified classes as CDCR continues to review validated inmates under CDCR's new Security Threat Group criteria. The result is that the Court no longer has subject-matter jurisdiction over inmates who are no longer members of the certified classes.

## IV. IF THE COURT GRANTS PLAINTIFFS' MOTION, ALL PENDING LITIGATION DATES MUST BE VACATED.

A supplemental complaint may be filed and served "on just terms." Fed. R. Civ. P. 15(d). If the Court grants Plaintiffs' motion here, the pending litigation dates leading up to the December 7, 2015 trial, entered to efficiently litigate the allegations of Plaintiffs' second amended complaint, must be vacated. Plaintiffs allegedly "would welcome a tight supplemental schedule, limiting any delay to a matter of months, and would be open to other creative solutions to minimize disruption of the current schedule." (Pls.' Mot. Leave 9.) But due process requires

that Defendants have the opportunity to respond to the new allegations, particularly given the extent to which they seek to expand the scope of the existing class-action case. As Plaintiffs purport to represent yet another "supplemental" class of inmates (Pls.' Prop. Supp. Compl. ¶¶ 214, 218-226), due process also requires that Defendants have the opportunity to challenge whether the supplement satisfies Rule 23. Accordingly, if Plaintiffs are permitted to expand this litigation with their new allegations and a new class, Defendants request that the Court allow Defendants thirty days in which respond to the supplemental complaint. After Defendants have challenged the new allegations via a motion to dismiss, the Court should set a case management conference, so that the parties and Court can discuss a schedule to govern the case, depending on what claims survive, through trial.

## CONCLUSION

Plaintiffs' motion for leave to file a supplemental complaint must be denied. Alternatively, should the Court grant Plaintiffs' motion, Defendants respectfully request that the Court vacate all pending litigation deadlines, order that Defendants respond to Plaintiffs' supplemental complaint within thirty days of its filing, and schedule a further case management conference to coincide with a hearing on Defendants' anticipated motion to dismiss.

Dated: January 15, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
JAY C. RUSSELL
Supervising Deputy Attorney General

/s/ Adriano Hrvatin

ADRIANO HRVATIN
Deputy Attorney General
*Attorneys for Defendants*

SF2012204868
41182270.doc

# CERTIFICATE OF SERVICE

Case Name: **Ashker, et al. v. Brown et al.** No. **4:09-cv-05796 CW (NJV)**

I hereby certify that on January 15, 2015, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT**

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 15, 2015, at San Francisco, California.

| L. Santos | */s/ L. Santos* |
|---|---|
| Declarant | Signature |

41182648.doc