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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

ISAAC KIGONDU KINITI, Plaintiff, v. BARBARA WAGNER, et al., Defendants.	***Case No. 3:05-cv-01013-DMS-PCL*** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR CLASS CERTIFICATION UNDER THE [PROPOSED] SECOND AMENDED COMPLAINT**

Introduction

This action began in May 2005 with the filing of a *pro se* Complaint by plaintiff Isaac Kigondu Kiniti. In his original Complaint, as in his First Amended Complaint, Mr. Kiniti alleges violations of his constitutional rights stemming from, *inter alia*, the severe and chronic overcrowding of immigration detainees at San Diego Correctional Facility (SDCF). On January 24, 2007, plaintiff Kiniti, by and through his attorneys, filed under separate cover a Motion for Leave to Amend the First Amended Complaint and Add Parties. Plaintiff's Proposed Second

Amended Complaint, attached to the aforementioned motion for leave to amend, contains class action allegations on behalf of the class of "all immigration detainees in ICE custody who are now or in the future will be confined at San Diego Correctional Facility" (hereinafter the "SDCF Class"), and seeks only injunctive and declaratory relief.

In the Proposed Second Amended Complaint, the putative class alleges that more than two-thirds of the detainees at SDCF are currently affected by the practice of triple-celling (*i.e.*, housing three detainees in a small cell designed for two), that still more detainees are housed in makeshift beds in the common dayroom space, and that all detainees are at risk of future harm from this chronic and severe overcrowding. Putative representative plaintiffs further allege that the long-standing and pervasive overcrowding at SDCF:

> is the root cause of numerous unsafe and intolerable conditions that afflict detainees at the facility, including: increased violence, tension, discomfort, stress, mental suffering, psychiatric problems, and exposure to respiratory and other infections; diminished access to medical, mental health and dental services; diminished access to exercise and dayroom space and other facility services; poor sanitation and decreased ability to maintain personal hygiene; overburdened and unsanitary shower and toilet facilities, resulting in more frequent plumbing malfunctions and exposure to urine and feces; and the loss of personal dignity due to all of the above.

Proposed Second Amended Complaint, ¶ 3.

In connection with the class action allegations contained in the Proposed Second Amended Complaint, which is to be filed with the Court and served on all defendants should the Court grant plaintiff's motion for leave to amend, plaintiff hereby moves for certification of the SDCF Class and an order appointing the undersigned counsel to represent the certified class, pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

For the reasons set forth below, plaintiff's Motion for Class Certification Under the [Proposed] Second Amended Complaint should be granted, and an order should be issued appointing the undersigned as class counsel.

I. This Case is Properly Maintained as a Class Action.

A. Background Principles Applicable to Class Certification

In order for a class to be certified, the following requirements must be satisfied:

(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.

Fed. R. Civ. P. 23(a). In addition, the class must meet the requirements of one of the three subsections set forth in Rule 23(b). Here, plaintiff Kiniti and putative named plaintiffs Jose Morales-Vargas, Sylvester Owino, Hernan Ismael Delgado and Any Castro seek certification pursuant to Rule 23(b)(2).

Initial determination of class certification is solely a procedural issue that must not be based on the merits of the case; plaintiff's burden is limited to demonstrating that the proposed class satisfies the requirements of Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). In ruling on the motion for class certification, the Court must take the substantive allegations of the Proposed Second Amended Complaint as true. *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

B. The Rule 23(a) Prerequisites to Class Certification Have Been Satisfied.

1. Numerosity and Impracticality of Joinder

The first prerequisite of Rule 23(a) is that "the class [be] so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). While there is no ironclad rule as to when the size of the proposed class renders joinder impracticable, sheer numerosity is generally sufficient. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 810 (1982), *on remand*, 713 F.2d 504 (9th Cir. 1983); 5 *Moore's Federal Practice*, §23.22[3][a] (Matthew Bender, 3d ed.) (hereinafter "*Moore's Federal Practice*") (noting that classes comprising more than 40 individuals are generally found to satisfy the impracticality of joinder requirement). Where, as in this case, the proposed class exceeds 1000 immigration detainees, joinder is clearly impracticable.

Joinder of all class members is further complicated by the nature of immigration detention, which is often quite fluid. The size and make-up of the proposed class—which includes immigration detainees who are not now, but will in the future be, detained at SDCF—change daily, as additional detainees are brought to SDCF to be held in the custody of

the Department of Homeland Security, Immigration and Customs Enforcement, while other class members are released from detention, removed from the country, or transferred to other detention facilities. The rotating membership of the proposed class is an additional basis for finding joinder impracticable. *See Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) ("The fact that the [detention center] population . . . is constantly revolving establishes sufficient numerosity to make joinder of the class members impracticable."). The inclusion in the class of future detainees, whose identities cannot possibly be ascertained at this time, provides still further basis for concluding that joinder is impracticable. *See*, *e.g.*, *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975); *Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) (finding certification appropriate for class of current and future prisoners seeking injunctive relief; "[a]s members *in futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable"); *Moore's Federal Practice*, §23.22[7].

Finally, courts typically find joinder to be impracticable if it is reasonable to conclude that the class members would be unable to file individual actions to vindicate their rights. *See*, *e.g.*, *Leyva v. Buley*, 125 F.R.D. 512, 515 (E.D. Wash. 1989) (certifying class of migrant workers and citing class members' lack of sophistication, limited knowledge of the legal system, limited or non-existent English skills, and fear of retaliation). Such is the case with the purported class members, who have even less access to the legal system than pre-trial criminal detainees; immigration detainees appearing in Immigration Court and before the Board of Immigration Appeals have only a statutory "privilege of being represented (at no expense to the Government)." 8 U.S.C. § 1362.

2. Commonality

The second prerequisite of Rule 23(a) is that there be a single question of law *or* fact common to members of the class. *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975) ("all that is required is a single issue of law or fact"); *see also Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997). The Proposed Second Amended Complaint in this action identifies multiple questions of *both* law and fact common to the entire class.

These common questions include, but are not limited to: whether defendants have failed

to provide adequate shelter, reasonable safety, and basic human needs to plaintiffs as a result of overcrowding at SDCF; whether plaintiffs' conditions of confinement subject them to unreasonable risk of violence, injury, illness and mental suffering; whether plaintiffs' conditions of confinement are effectively punitive; whether defendants' conduct violates the Fifth Amendment; and whether defendants' conduct shows a pattern of officially sanctioned behavior that violates plaintiffs' rights and establishes a credible threat of future injury.

The commonality prerequisite is therefore satisfied.[1]

3. Typicality

The third prerequisite of Rule 23(a) is that the putative named plaintiffs' claims be typical of those of the class. The purpose of this requirement is to assure that the interests of the named plaintiffs align with the interests of the class. *Weinberger v. Thornton*, 114 F.R.D. 599, 603 (S.D. Cal. 1986). This prerequisite is viewed under the rule's "permissive standards," such that "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). *See also Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975) ("the typicality requirement is ordinarily not argued.").

The typicality requirement is satisfied "[i]f the class representative's claims arise from the same events, practice, or conduct, and are based on the same legal theory as those of other class members." *Moore's Federal Practice*, §23.24[2]. The fundamental inquiry for typicality is whether all members of the class would benefit in some way from a judgment favorable to the

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[1] Of course, factual differences may exist among class members with respect to the precise way in which each individual is affected by the institutional practice or condition. Such differences do not defeat commonality. *See*, *e.g.*, *Marisol A*, 126 F.3d at 377 ("the unique circumstances of each [plaintiff] do not compromise the common question of whether . . . defendants have injured all class members by failing to meet their federal and state law obligations"); *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) ("[f]actual differences in the claims of class members should not result in a denial of class certification where common questions of law exist"); *see also Bradley v. Harrelson*, 151 F.R.D. 422, 426 (M.D. Ala. 1993) (concluding that factual differences between class members as to the nature and severity of their mental illness do not preclude finding of commonality in a class action challenging the delivery of mental health services to Alabama prisoners).

plaintiffs. *See Ellis v. Naval Air Rework Facility*, 404 F. Supp. 391, 396 (N.D. Cal. 1975).

The putative named plaintiffs are immigration detainees at SDCF who have personally experienced the consequences of the defendants' policies, practices, acts and omissions pertaining to the chronic and severe overcrowding of SDCF. With the exception of plaintiff Isaac Kigondu Kiniti, each of the other putative named plaintiffs is currently triple-celled. Plaintiff Jose Morales-Vargas has been housed at SDCF since June 16, 2006, and has been continuously triple-celled with the exception of a brief 11-day period when he was housed in segregation. Proposed Second Amended Complaint, ¶ 14. Plaintiff Sylvester Owino arrived at SDCF on November 8, 2005. *Id*. at ¶ 15. He has been triple-celled for most of his detention at SDCF and without interruption since June 11, 2006. *Id*. at ¶ 16. Plaintiff Hernan Ismael Delgado is also currently triple-celled. *Id*. at ¶ 18. Delgado has been in ICE detention since February 2003, and has been housed at SDCF since October 8, 2004. *Id*. Delgado has been triple-celled for the majority of his time at SDCF, and was forced to sleep on the floor in a plastic "boat" containing a thin sleeping mat for the first six months of his detention at SDCF. *Id*. Plaintiff Any Castro has been detained at SDCF since September 2006, and has been triple-celled for the entirety of her stay in detention. *Id*. at ¶ 20. Like plaintiff Delgado, plaintiff Castro was forced to sleep on the floor of her cell in a "boat" for the first two months of her time at SDCF. *Id*. Although plaintiff Kiniti is not now triple-celled, Kiniti has been triple-celled at various points during his stay in SDCF and remains at constant risk of once again being triple-celled, or suffering the consequences of his refusal to be triple-celled. *Id*. at ¶ 12. In early 2005, Kiniti complained to auditors from the Department of Homeland Security Office of Inspector General (OIG) about the problem of overcrowding and triple-celling at SDCF, and personally met with a senior auditor for the OIG during her visit to the facility. *Id*. Kiniti subsequently filed the instant lawsuit arguing, *inter alia*, that triple-celling and overcrowding at SDCF are unconstitutional.

The serious harm suffered by the putative named plaintiffs as a result of the chronic and severe overcrowding at SDCF is typical of the type of harm experienced by other class members. This harm includes not only the concrete harm of being triple-celled—a harm that is itself experienced by two-thirds of the immigration detainees now held at SDCF—but also all of the

other dangers and indignities that accompany this overcrowding. Pervasive overcrowding at SDCF increases the tension between detainees at the facility, who are forced to spend significant periods of time confined in cells that are designed to house two, not three, people. Plaintiff Morales-Vargas has had to defend himself in at least five incidents of detainee-on-detainee violence that went unnoticed or ignored by security staff, and plaintiff Owino has witnessed numerous fights among detainees that have transpired without the intervention of security staff. *Id*. at ¶ 72. When plaintiff Castro was first brought to SDCF, she spent two months sleeping on the floor of her cell in a "boat." *Id*. at ¶ 20.

All detainees are also at heightened risk of illness as a result of the severe and chronic overcrowding at SDCF. *Id*. at ¶¶ 80-82. Detainees living in severely overcrowded conditions are at greater risk for both methicillin resistant staphylococcus aureus (MRSA) and multidrug resistant tuberculosis (MDRTB). MRSA is a highly contagious bacteria known to spread rapidly in institutional settings where poor sanitation and close confinement create a greater likelihood of transmission. MDRTB is a potentially fatal air-borne disease that can spread in overcrowded conditions with poor air circulation.

Plaintiff's counsel have interviewed and corresponded with numerous putative class members who are suffering the same constitutional injury as the putative named plaintiffs because of the overcrowding of SDCF. Counsel have also interviewed and corresponded with individuals who are not now detained at SDCF, but were detained at that facility within the past several months, who similarly experienced constitutional deprivations as a result of the overcrowding. Some of the allegations contained in the Proposed Second Amended Complaint pertain to the experiences of individuals who, though they are not putative representative plaintiffs, are members of the putative SDCF Class. *See*, *e.g.*, *id*. at ¶¶ 77, 83, 84. The claims of the putative named plaintiffs are typical of those of the class; they are "part of the class and possess the same interest and suffer the same injury as the class members." *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (internal quotation marks omitted).

4. Adequacy of Representation

The fourth prerequisite of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy of representation is a two-part test: (i) counsel for the representative parties are qualified and able to prosecute the action vigorously; and (ii) there is no conflict or antagonism between the named plaintiffs' interests and the remainder of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 522 (9th Cir. 1978).

Plaintiff class members are represented by the National Prison Project of the American Civil Liberties Union Foundation (NPP), the Immigrants' Rights Project of the American Civil Liberties Union Foundation (IRP), the American Civil Liberties Union Foundation of San Diego & Imperial Counties (ACLU of San Diego), and the law firm of Cooley Godward Kronish LLP (CGK). NPP has extensive experience litigating class actions regarding conditions inside prisons and jails, and IRP has unique expertise pertaining to the detention of individuals by ICE. The ACLU of San Diego, through its legal director, and CGK each has significant experience in civil rights and immigrants' rights litigation. Counsel are therefore experienced in class action, civil rights, immigrants' rights, and conditions of confinement litigation.

There is also no conflict between the putative named plaintiffs' interests and the remainder of the class. The putative named plaintiffs have no interests separate from those of a putative SDCF Class, and seek no relief other than the classwide injunctive and declaratory relief sought on behalf of the class.[2]

[2] In addition to seeking injunctive relief in his Complaint and First Amended Complaint, plaintiff Kiniti also sought damages for the injury he personally suffered as a result of Defendants' unconstitutional actions. In the Proposed Second Amended Complaint, Mr. Kiniti has withdrawn his request for damages and instead is pursuing only injunctive and declaratory relief as a representative of the putative class. However, even if Mr. Kiniti were to continue to seek damages in this action, that would not create a conflict of interest preventing class certification. *See*, *e.g.*, *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780-81 (9th Cir. 1986). Here, as in *Probe*, any request for money damages by Mr. Kiniti would be merely incidental to the primary claims common to all named plaintiffs and the class as a whole regarding injunctive relief.

C. Class Certification is Appropriate Pursuant to Rule 23(b)(2).

The final requirement for class certification is satisfaction of at least one of the subsections of Rule 23(b). Certification is appropriate pursuant to Rule 23(b)(2) where:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). Courts have repeatedly held that civil rights class actions are the paradigmatic 23(b)(2) suits, "for they seek classwide structural relief that would clearly redound equally to the benefit of each class member." *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir. 1979), *vacated on other grounds sub nom*., *Lombard v. Marcera*, 442 U.S. 915 (1979); *see also Johnson v. General Motors Corp*., 598 F.2d 432, 435 (5th Cir. 1979); *Elliott v. Weinberger*, 564 F.2d 1219, 1229 (9th Cir. 1977) (action to enjoin allegedly unconstitutional government conduct is "the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2)"), *aff'd in pertinent part sub nom*., *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)). As stated in the leading treatise on class actions:

> Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits. Most class actions in the constitutional and civil rights areas seek primarily declaratory and injunctive relief on behalf of the class and therefore readily satisfy Rule 23(b)(2) class action criteria.

A. Conte & H. Newberg, *Newberg on Class Actions* § 25.20 (4th ed. 2002).

Injunctive challenges to prison conditions routinely proceed as class actions, and are typically maintained under subdivision (b)(2). *See, e.g., Jones'El v. Berge,* 374 F.3d 541 (7th Cir. 2004); *Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982) (class certified under Rule 23(b)(2)); *Diamond*, 519 F.2d at 1097, 1099-1100 (encouraging the liberal application of Rule 23, and in particular subdivision (b)(2), in civil rights actions, and observing that "[r]ealistically, class actions are the only practicable judicial mechanism for the cleansing reformation and purification of these penal institutions.").

In this case, the defendants' unconstitutional policies, practices, acts and omissions pertaining to overcrowding are imposed uniformly on all class members, and declaratory and injunctive relief will redound to the benefit of the class as a whole. Accordingly, Rule 23(b)(2) is

satisfied.

Conclusion

For the reasons set forth above, Plaintiff's Motion for Class Certification Under the [Proposed] Second Amended Complaint should be granted, and plaintiff's counsel should be appointed to represent the certified class, pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.

Dated: January 24, 2007

Respectfully submitted,

By: s/ David Blair-Loy

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