IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER, et al.,

Plaintiffs,

v.

GOVERNOR OF THE STATE OF CALIFORNIA, et al.,

Defendants.
/

No. C 09-5796 CW

ORDER GRANTING MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT (Docket No. 345)

Plaintiffs, a group of Pelican Bay State Prison inmates, move for leave to file a supplemental complaint. Defendants, the Governor of the State of California, Secretary of the California Department of Corrections and Rehabilitation (CDCR), Chief of CDCR's Office of Correctional Safety, and Warden of Pelican Bay State Prison, oppose the motion. After considering the parties' submissions and oral argument, the Court grants the motion.

BACKGROUND

Facts plead in the Second Amended Complaint (2AC) are summarized in the Court's June 2, 2014 Class Certification Order, see Docket No. 317, and its Order Denying Defendants' Motion to Dismiss, see Docket No. 191. The following is a summary of those facts, noting those facts that are relevant to this motion.

This litigation was commenced in 2009 by Plaintiffs, a group of ten inmates who were housed at Pelican Bay State Prison's SHU. Each inmate had been deemed by CDCR a "validated" gang member, and had been placed in Pelican Bay's SHU for an indeterminate length of time. At the time the 2AC was filed, five of those inmates had been incarcerated in the SHU for a period of more than ten years.

Plaintiffs challenged a lack of meaningful review of their placement in Pelican Bay's SHU, as well as the inhumane conditions in Pelican Bay's SHU, in which they had been confined for more than ten years.

In December 2012, Defendants filed a motion to dismiss the 2AC, which was denied by this Court in April 2013. Defendants filed an answer to the 2AC in late April 2013.

On June 2, 2014, this Court certified, under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2), two classes in this case. Of relevance to this motion, one of those classes, named the Eighth Amendment class, comprised "all 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." June 2, 2014 Order Granting in Part Mot. Class Cert., Docket No. 317 at 21. This class brought claims alleging cruel and unusual punishment in violation of the Eighth Amendment. Id. In that Order certifying the Eighth Amendment class, the Court stated that, as of the date of certification, "any inmates who have been transferred out of the Pelican Bay SHU must be excluded from the Eighth Amendment Class." Id.

On October 17, 2014, CDCR permanently implemented the Security Threat Group (STG) policy, first piloted in 2012. See 15 Cal. Code Regs. § 3000 et seq. This policy alters aspects of CDCR's gang validation process and its practice of indeterminate housing in Pelican Bay's SHU. STG, in part, allows Pelican Bay's SHU inmates to "step down" from the most restrictive placement in the SHU to less restrictive housing conditions, provided that the inmate fulfills certain obligations:

> Step Down Program (SDP) is a five-step program that provides inmates placed in a Security Housing Unit (SHU) due to STG validation and/or documented STG behaviors with a program expectation of discontinuing participation in STG related activities and includes increased incentives to promote positive behavior with the ultimate goal of release from the SHU.

Id.

SDP has five steps, ranging from Step One (most restrictive) to Step Five (least restrictive). In Steps One through Four, inmates are deemed to "continue to pose a threat to the safety of staff, inmates, and the public" and, thus, are housed in a SHU at Pelican Bay or elsewhere. Id. Steps One and Two are "designated for housing of STG affiliates determined to pose the greatest threat to the safety of staff, inmates, and the public, in addition to the security of the prison based upon intelligence and/or confirmed STG behaviors." Id. According to the regulations, Steps One and Two are designed to be completed in twelve months each, although they may be accelerated at the 180-day review. According to CDCR, "Steps One and Two are primarily intended as periods of observation." Id.

Steps Three and Four both require a minimum of twelve months of "program participation, compliance with program expectations, completion of all required components/curriculum, and the inmate remaining free of STG disciplinary behavior." Id. Upon completion of Step Four, "the inmate will be endorsed to General Population or similar specialized housing for a 12-month observation period known as Step 5." Id.

Since SDP has been implemented, two named Plaintiffs (Asker and Franco) remain in Pelican Bay's SHU in Steps One and Two. Four named Plaintiffs (Dewberry, Ruiz, Troxell and Franklin) have

been moved to a SHU at the California Correctional Institution (CCI) at Tehachapi in Steps Three and Four. Three named Plaintiffs (Johnson, Redd and Reyes) have been moved to Step Five and transferred to California State Prison (CSP) Sacramento and CSP Concoran.[1] Plaintiffs allege, upon information and belief, that "it is likely that there are twenty to twenty-five former Pelican Bay SHU prisoners who had been incarcerated for ten or more years in the Pelican Bay SHU who have, like Dewberry, Ruiz, Troxell and Franklin, been transferred to Step Three or Four at a CDCR SHU." Pls.' Suppl. Compl., Docket No. 345-1 ¶ 201.

Plaintiffs admit that there are a few differences between Pelican Bay's SHU and Tehachapi's SHU. See id. ¶ 203. Tehachapi's SHU cells have "windows and a solid steel door, as compared to no window but a perforated metal mesh door at the Pelican Bay SHU." Id. However, Plaintiffs in Steps Three and Four at Tehachapi are still confined to their cells for twenty-two to twenty-three hours a day and, Plaintiffs allege, "most days of the week, Step Three prisoners [at Tehachapi SHU] are confined to their cell for the entire twenty-four hours." Id. ¶ 205. Plaintiffs Dewberry, Ruiz and Troxell are receiving one to two hours a week of a thirteen-week group therapy program. Id. ¶ 207.

The supplemental complaint that Plaintiffs seek leave to file alleges that, for the four named Plaintiffs who are currently in Steps Three and Four at Tehachapi's SHU, "the cruel and unusual

[1] As of the date of filing, Plaintiff Esquivel had not yet received his Department of Review Board (DRB) review for the SDP. At the hearing, Plaintiffs' counsel seemed to indicate that Esquivel had received a hearing, and had been placed in Step Five and, hence, in general population.

treatment they experienced in over ten years of isolation, and its debilitating effects, have not abated, but continue under a different name in a different prison." Docket No. 345 at 3.

LEGAL STANDARDS

Federal Rule of Civil Procedure 15(d) provides, "On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." "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. Its use is therefore favored." Keith v. Volpe, 858 F.2d 467, 473 (9th Cir. 1988) (citing Fed. R. Civ. P. 15, advisory committee's note). "While some relationship must exist between the newly alleged matters and the subject of the original action, they need not all arise out of the same transaction." Keith, 858 F.2d at 474. However, "[w]hile leave to permit supplemental pleading is 'favored,' it cannot be used to introduce a 'separate, distinct and new cause of action.'" Planned Parenthood of S. Arizona v. Neely, 130 F.3d 400, 402 (9th Cir. 1997) (citing Keith, 858 F.2d at 473; Berssenbrugge v. Luce Mfg. Co., 30 F. Supp. 101, 102 (D.Mo. 1939)).

"To determine if efficiency might be achieved, courts assess whether the entire controversy between the parties could be settled in one action." Planned Parenthood, 130 F.3d at 402. "The legal standard for granting or denying a motion to supplement under Rule 15(d) is the same as the standard for granting or denying a motion under Rule 15(a)." Athena Feminine Technologies

Inc. v. Wilkes, 2013 WL 450147, at *2 (N.D. Cal. 2013). "Four factors are commonly used to determine the propriety of a motion for leave to amend [under Rule 15(a)]. These are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment." Ditto v. McCurdy, 510 F.3d 1070, 1079 (9th Cir. 2007).

DISCUSSION

Plaintiffs argue that the motion for leave to file a supplemental complaint should be granted because the supplemental allegations are tightly bound to the current Eighth Amendment claim and, as such, the supplement will serve Rule 15(d)'s goal of judicial economy. Defendants argue that allowing supplementation would "assert a distinct and unique Eighth Amendment claim" and allow former class members to retain class status in direct contravention of the Court's June 2, 2014 Class Certification Order. They also argue that allowing such new allegations would significantly prejudice them because they would need to conduct investigations at three other SHUs and, potentially, all CDCR facilities.

I. Relationship between the supplemental complaint and the original action

"Allegations contained in supplemental pleadings need not arise out of the same transaction or occurrence as the allegations contained in the original complaint. They need bear only 'some relationship' to the subject of the original action." Pratt v. Rowland, 769 F. Supp. 1128, 1131 (N.D. Cal. 1991) (citing Keith, 858 F.2d at 474). This is a "minimal test." Id.

The 2AC sought "injunctive relief compelling defendants

. . . to cease holding prisoners in the inhumane conditions of solitary confinement for extremely long periods of time." Suppl. Compl., Docket 345-1 ¶ 10. It specified Pelican Bay because "the conditions at the Pelican Bay SHU are extremely harsh when compared to the experience of a typical California state prisoner, particularly given the extraordinary length of SHU confinement at Pelican Bay." Id. ¶ 8. The Court found that Plaintiffs, in their motion for class certification, had adequately plead questions of law and fact common to the Eighth Amendment class members: the length of time spent in SHU, the negative mental and physical health effects of prolonged confinement in SHU, and the conditions of confinement compared to the "ordinary incidents of prison life." See June 2, 2014 Order at 12.

Defendants contend that the supplemental pleading asserts allegations that are, "at best[,] . . . only tangentially related to the Eighth Amendment claim certified by the Court." Defs.' Opp'n Pls.' Motion, Docket No. 362 at 3. They argue that the "focus of Plaintiffs' claims to date has been on alleged 'harsh' and 'inhumane' conditions of Pelican Bay's SHU," id., and that these new claims "amount to a new lawsuit concerning alleged prison conditions far beyond the walls of Pelican Bay." Id. at 2.

Defendants' argument is unpersuasive. Plaintiffs' allegations of continued inhumane treatment in other SHUs after more than ten years in Pelican Bay's SHU are closely related to the 2AC allegations; namely that prolonged social isolation and lack of environmental stimuli in a SHU leads to "serious psychological pain and suffering and permanent psychological and physical injury." 2AC ¶¶ 181. The Court, in a previous order,

found that "these allegations are plausible in light of another court's fact findings that even shorter stays in the SHU are capable of causing psychological harm." April 9, 2013 Order Denying Defs.' Mot. Dismiss, Docket No. 191 at 9. Prolonged stays in SHU -- no matter which SHU -- may violate the Eighth Amendment.

While Plaintiffs admit conditions at Tehachapi SHU are slightly different from the conditions at Pelican Bay, their main contention is the same: housing inmates in a SHU for prolonged periods of time is cruel and unusual punishment. Furthermore, as outlined above, Plaintiffs have alleged that, for Steps Three and Four inmates that were moved from Pelican Bay's SHU to Tehachapi's SHU, the conditions at Tehachapi are not meaningfully different from the conditions at Pelican Bay. They will continue to experience the physical and mental health effects of being housed in solitary confinement for more than a decade.

Thus, the Court finds that the new allegations bear more than "some relationship" to the allegations in the 2AC.

II. "Separate, distinct and new cause of action"

As noted above, while Rule 15(d) permits the filing of a supplemental pleading, leave to submit a supplemental complaint cannot be used to introduce a separate, distinct and new cause of action. See Planned Parenthood, 130 F.3d at 402.

The proposed supplemental complaint alleges the same Eighth Amendment cause of action plead in the 2AC, but on behalf of inmates who were housed at Pelican Bay's SHU for more than ten years and who have now been transferred, under SDP Steps Three and Four, to a SHU at another CDCR facility.

The supplemental allegations arise from the same alleged actions by Defendants: continued housing, in SHU, of prisoners who have already been in an SHU for at least ten years despite CDCR's knowledge of the harmful effects of prolonged solitary confinement. Plaintiffs rely on a school desegregation case, Griffin v. Cnty. Sch. Bd. of Prince Edward, 377 U.S. 218 (1964), to support their contention that a supplemental complaint is appropriate given the events that have occurred since the date of the filing of the original complaint. In Griffin, black schoolchildren filed a supplemental complaint alleging that, despite the Supreme Court's ruling in Brown v. Board of Education, 347 U.S. 483 (1954), the public school district in Price Edward County, Virginia, continued to deny black children "the same opportunity for state-supported education afforded to white people." Id. at 226. The county had closed all the public schools and instituted a freedom of choice program by which the county provided tuition vouchers to students to attend private schools instead of integrating the public schools. The Court found that, even though the supplemental pleading added new parties and relied on "transactions, occurrences and events which had happened since the action had begun," the "new transactions were alleged to have occurred as a part of continued, persistent efforts to circumvent" the previous desegregation order. Id. The Court found that the supplemental complaint was appropriate because the new allegations were "merely part of the same old cause of action" which alleged that Prince Edward County was using public funds to "avoid the desegregation ordered in the Brown cases." Id.

Defendants argue that Griffin is inapposite because it "involved 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" which the defendants failed to do. Docket No. 362 at 7. They also argue that Griffin involved "specific attempts by the defendants to contravene the court's earlier rulings," id., which, they argue, is not the case here.

Again, Defendants' arguments are unpersuasive. In the proposed supplemental complaint, as was the case in Griffin, Plaintiffs are alleging that Defendants are continuing the same behavior that led to the 2AC, albeit at another location. Furthermore, as in Griffin, Plaintiffs allege that through moving inmates from Pelican Bay's SHU to another SHU, Defendants are attempting to "evade Court review of a major aspect of California's ongoing and inhumane practice of prolonged solitary confinement, even while the abuse of Plaintiffs . . . that began at Pelican Bay continues elsewhere under Defendants' direction." Docket No. 345 at 4. Lastly, although Griffin involved a post-judgment supplement, there is nothing to suggest that was determinative.

Accordingly, for the reasons discussed above, the Court finds that the supplemental complaint is not asserting a "separate, distinct and new cause of action."

III. Judicial Economy

In Keith, the Ninth Circuit held that supplemental pleading is "a useful device, enabling a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried

and prosecuted." 858 F.2d at 473 (quoting New Amsterdam Casualty Co. v. Walker, 323 F.2d 20, 28-29 (4th Cir. 1963)).

Plaintiffs admit that they could file a new complaint "challenging conditions of confinement at Tehachapi SHU under the Eighth Amendment." However, they argue that "such a case would need to replicate -- before a new judge -- much that is currently before this Court, resulting in exactly the lack of judicial economy that Rule 15(d) is designed to avoid." Docket No. 345 at 4, n.3. Defendants posit that "[t]o litigate this new contention will require a separate and extensive investigation into conditions" at Tehachapi's SHU, and the policies and procedures in place there. Docket No. 362 at 4.

Defendants' argument is unpersuasive. As discussed at the hearing, judicial economy would be served by allowing the supplemental complaint, briefing and ruling on a motion to dismiss and, if necessary, bifurcating the trial such that the allegations in the supplemental complaint would not be litigated until after the conclusion of the trial based on the 2AC allegations.

Thus, the Court finds that judicial efficiency would be served by litigating all the claims in this action rather than by forcing Plaintiffs to file a separate complaint.

IV. Prejudice, Undue Delay, and Futility

In addition to the factors discussed above, when deciding on whether to allow a supplemental complaint, courts in this district commonly evaluate the factors of bad faith, undue delay, prejudice to the opposing party, and futility of amendment. See, e.g., Yates v. Auto City 76, 299 F.R.D. 611, 613-14 (N.D. Cal. 2013);

Athena Feminine Techs., Inc. v. Wilkes, 2013 WL 450147, at *2 (N.D. Cal.).

A. Prejudice

Defendants assert that they would be unfairly prejudiced by expanding the scope of the litigation because they would need to conduct "extensive investigations at potentially every CDCR institution." Docket No. 362 at 6. Plaintiffs argue that supplementation would only "require some limited additional discovery and related delay." Docket No. 345 at 8.

More discovery will be required. As Defendants point out, "Plaintiffs' original Eighth Amendment [claim] has required a years-long investigation into nearly every component of prison life at Pelican Bay's SHU." Docket No. 362 at 6. On the other hand, the new Eighth Amendment claim only applies to inmates held at Pelican Bay for more than ten years who were transferred to SHUs elsewhere. Plaintiffs estimate that within the last two years, between twenty and twenty-five former Pelican Bay SHU prisoners who had been incarcerated for more than ten years have been transferred into Steps Three or Four at another SHU. However, there are only four prisons with SHUs and, so far, all class members transferred have been transferred to CCI Tehachapi. Thus, the Court finds that Defendants would not be unfairly prejudiced if Plaintiffs are allowed to file a supplemental complaint.

B. Undue Delay

Defendants also argue that Plaintiffs unduly delayed filing this motion. Defendants argue that Plaintiffs knew about the SDP since 2012 but waited until December 2014 to file this motion.

Plaintiffs counter that they waited to file because the SDP was not a permanent policy until October 2014. Furthermore, they would not have known, prior to being told the named Plaintiffs' placements, which Plaintiffs would be associated with which Steps, information they needed to prepare their supplemental complaint.

Again, Defendants' argument is unpersuasive. Plaintiffs needed to know where the named Plaintiffs were going to be housed under SDP in order to allege the effect the policy would have on the existing claims. Thus, the Court finds that Plaintiffs did not delay unduly in bringing this motion.

C. Futility

Defendants argue that the proposed supplemental complaint fails to state a plausible claim for relief because Plaintiffs "do not seek to challenge conditions at Tehachapi's SHU on their own." Docket No. 362 at 7. However, as discussed above, Plaintiffs are challenging the effect of conditions at Tehachapi SHU on a class member who has already spent a decade or more in Pelican Bay's SHU. Thus, the claim is not challenging the conditions at Tehachapi's SHU in and of themselves, but only as an extension of an already lengthy stay at Pelican Bay's SHU. Therefore, the supplemental allegations merely add to the original allegations, and the Court has already found that those allegations stated a plausible claim for relief. Furthermore, as discussed at the hearing, Defendants will have an opportunity to respond to the supplemental complaint by filing a motion to dismiss.

V. Individual Plaintiffs' Claims and Class Representatives

At the hearing, the Court allowed the parties further to brief two issues: (1) whether those Plaintiffs who were

transferred out of Pelican Bay's SHU into another CDCR facility prior to class certification can continue to pursue their individual claims; and (2) whether the class representatives who were transferred out of Pelican Bay's SHU after class certification can continue to represent the class.

A. Individual Claims

Plaintiffs Franklin, Redd, Reyes, Ruiz and Troxwell are not members of the class because they were transferred out of Pelican Bay's SHU prior to class certification. Plaintiffs argue that these Plaintiffs can continue to pursue their individual claims because "Defendants have failed to establish that their allegedly wrongful behavior cannot reasonably be expected to reoccur, or that interim events have completely and irrevocably eradicated the effects of the violations challenged here." Docket No. 384 at 1. Defendants argue that because these Plaintiffs have obtained "all the relief they sought in their complaint," their claims are moot. Docket No. 383 at 2.

The Court agrees with Plaintiffs. While these Plaintiffs are no longer in Pelican Bay's SHU, their placement in the SDP is based on Defendant's allegedly wrongful actions in (1) validating Plaintiffs under the old process, and (2) housing them in Pelican Bay's SHU for more than ten years. Defendants argue, "When either a previously-validated inmate or a newly validated inmate is placed in the step-down program, they both progress through the program under identical criteria, including the same disciplinary matrix. . . . if any Plaintiff returns to Pelican Bay's SHU, it will be because of gang behavior defined by new CDCR policy . . . not a prior validation." Docket No. 383 at 2. However,

Defendants miss the point. Plaintiffs who have been stepped-down are only in the SDP due to their previous validation under the old validation process. Had Plaintiffs not been validated in the first place, they would not have been in Pelican Bay's SHU and, hence, would not be in the SDP under the new CDCR policy. Plaintiffs who are in the SDP are thus in a worse position than newly-validated inmates because Plaintiffs were validated under allegedly more expansive validation criteria. If Plaintiffs were to engage in punishable behaviors, their regression in the SDP would be predicated on their allegedly wrongful validation.

However, Plaintiffs' request to add further relief in the form of mental health treatment and transitional programming is not well-taken. Plaintiffs failed to plead this new relief in their complaints or proposed supplemental complaint. Thus the Court will not consider this request.

B. Class Representatives

After class certification, Plaintiffs Dewberry, Esquivel and Johnson were transferred from Pelican Bay's SHU under the SDP. Plaintiff Dewberry was moved to CCI Tehachapi's SHU under Step Three. Plaintiffs Johnson and Esquivel were transferred to CSP Sacramento under Step Five. Plaintiffs and Defendants dispute whether these Plaintiffs can remain class representatives and continue fairly and adequately to protect the class's interest even though they are no longer housed in Pelican Bay's SHU.

Plaintiffs rely on Sosna v. Iowa, 419 U.S. 393 (1975), to support their argument that Plaintiffs Dewberry, Esquivel and Johnson can, as is required by Federal Rule of Civil Procedure 23(a), fairly and adequately protect the class's interests even

after they have fallen out of the class. In Sosna, the Supreme Court held that even if a named plaintiff has fallen out of the class, where "it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, we believe that the test of Rule 23(a) is met." 419 U.S. at 403.

Defendants' opposition to Plaintiffs' argument is that Sosna's ruling is not a "flat rule." Docket No. 383 at 3. They also argue that the assertion that Plaintiffs Dewberry, Johnson and Esquivel are unlikely to have conflicting interests is only a "conjecture" that does not satisfy Rule 23(a) and (b).

The Court disagrees with Defendants. Contrary to Defendants' argument, they have not shown that Plaintiffs Dewberry, Johnson and Esquivel have conflicting interests with the class, and the Court does not foresee any present or future conflicts between these Plaintiffs' interests and that of the class. Furthermore, the Court finds it would be inconvenient to have to find a new named Plaintiff every time Defendants move a named Plaintiff out of Pelican Bay's SHU. Accordingly, the Court finds that Plaintiffs Dewberry, Johnson and Esquivel can continue to serve as class representatives, despite being transferred out of Pelican Bay's SHU.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for leave to file a supplemental complaint (Docket No. 345) is GRANTED. In addition, Plaintiffs Franklin, Redd, Reyes, Ruiz and Troxwell may continue with their individual claims, and Plaintiffs Dewberry,

Johnson and Esquivel may continue to serve as class representatives.

Defendants may file a motion to dismiss this supplemental complaint within twenty-eight days of the date of this Order. Plaintiffs must oppose the motion within fourteen days of the date the motion is filed. Defendants will have seven days to reply. The Court will decide the motion to dismiss on the papers.

Rebuttal expert reports are due by March 13, 2015. Expert discovery must be completed by May 15, 2015. Plaintiffs' opening brief on a motion for summary judgment is due on or before July 2, 2015. Defendants' opposition/cross motion (contained within a single brief) is due by July 30, 2015. Plaintiffs' response/opposition is due by August 20, 2015, and Defendants' reply is due August 27, 2015.

A further case management conference and the case-dispositive motions will be heard on September 17, 2015 at 2:00 p.m. A final pre-trial conference will take place on November 18, 2015, and a ten-day bench trial will begin on December 7, 2015 at 8:30 a.m. Issues newly raised in the supplemental complaint will be bifurcated and tried at a later date if necessary.

Further expert reports and summary judgment motions with regard to the allegations in the supplemental complaint, if needed, will be scheduled following the December trial.

IT IS SO ORDERED.

Dated: March 9, 2015

CLAUDIA WILKEN
United States District Judge