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14
15 **UNITED STATES DISTRICT COURT**
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

16 ISAAC KIGONDU KINITI,) *Case No. 3:05-cv-01013-DMS-PCL*
17)
18 Plaintiff,) **MEMORANDUM OF POINTS AND**
19 v.) **AUTHORITIES IN SUPPORT OF**
20 BARBARA WAGNER, et al.,) **MOTION FOR CLASS CERTIFICATION**
21 Defendants.) **UNDER THE [PROPOSED] SECOND**
) **AMENDED COMPLAINT**
)

22 **Introduction**

23 This action began in May 2005 with the filing of a *pro se* Complaint by plaintiff Isaac
24 Kigondu Kiniti. In his original Complaint, as in his First Amended Complaint, Mr. Kiniti alleges
25 violations of his constitutional rights stemming from, *inter alia*, the severe and chronic
26 overcrowding of immigration detainees at San Diego Correctional Facility (SDCF). On January
27 24, 2007, plaintiff Kiniti, by and through his attorneys, filed under separate cover a Motion for
28 Leave to Amend the First Amended Complaint and Add Parties. Plaintiff's Proposed Second

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

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

11 is the root cause of numerous unsafe and intolerable conditions that
12 afflict detainees at the facility, including: increased violence, tension,
13 discomfort, stress, mental suffering, psychiatric problems, and
14 exposure to respiratory and other infections; diminished access to
15 medical, mental health and dental services; diminished access to
16 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.

17 Proposed Second Amended Complaint, ¶ 3.

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

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

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

27 ***A. Background Principles Applicable to Class Certification***

28 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

1 impracticable, (2) there are questions of law or fact common to the
2 class, (3) the claims or defenses of the representative parties are
3 typical of the claims or defenses of the class, and (4) the
representative parties will fairly and adequately protect the interests
of the class.

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

8 Initial determination of class certification is solely a procedural issue that must not be
9 based on the merits of the case; plaintiff's burden is limited to demonstrating that the proposed
10 class satisfies the requirements of Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178
11 (1974). In ruling on the motion for class certification, the Court must take the substantive
12 allegations of the Proposed Second Amended Complaint as true. *Blackie v. Barrack*, 524 F.2d
13 891, 901 n.17 (9th Cir. 1975).

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

15 1. Numerosity and Impracticability of Joinder

16 The first prerequisite of Rule 23(a) is that “the class [be] so numerous that joinder of all
17 members is impracticable.” Fed. R. Civ. P. 23(a)(1). While there is no ironclad rule as to when
18 the size of the proposed class renders joinder impracticable, sheer numerosity is generally
19 sufficient. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982), *vacated on*
20 *other grounds*, 459 U.S. 810 (1982), *on remand*, 713 F.2d 504 (9th Cir. 1983); 5 *Moore’s*
21 *Federal Practice*, §23.22[3][a] (Matthew Bender, 3d ed.) (hereinafter “*Moore’s Federal*
22 *Practice*”) (noting that classes comprising more than 40 individuals are generally found to satisfy
23 the impracticability of joinder requirement). Where, as in this case, the proposed class exceeds
24 1000 immigration detainees, joinder is clearly impracticable.

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

1 the Department of Homeland Security, Immigration and Customs Enforcement, while other class
2 members are released from detention, removed from the country, or transferred to other detention
3 facilities. The rotating membership of the proposed class is an additional basis for finding
4 joinder impracticable. *See Andre H. v. Ambach*, 104 F.R.D. 606, 611 (S.D.N.Y. 1985) (“The fact
5 that the [detention center] population . . . is constantly revolving establishes sufficient numerosity
6 to make joinder of the class members impracticable.”). The inclusion in the class of future
7 detainees, whose identities cannot possibly be ascertained at this time, provides still further basis
8 for concluding that joinder is impracticable. *See, e.g., Jones v. Diamond*, 519 F.2d 1090, 1100
9 (5th Cir. 1975); *Skinner v. Uphoff*, 209 F.R.D. 484, 488 (D. Wyo. 2002) (finding certification
10 appropriate for class of current and future prisoners seeking injunctive relief; “[a]s members *in*
11 *futuro*, they are necessarily unidentifiable, and therefore joinder is clearly impracticable”);
12 *Moore’s Federal Practice*, §23.22[7].

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

22 2. Commonality

23 The second prerequisite of Rule 23(a) is that there be a single question of law *or* fact
24 common to members of the class. *Blackie v. Barrack*, 524 F.2d 891, 904 (9th Cir. 1975) (“all
25 that is required is a single issue of law or fact”); *see also Marisol A. v. Giuliani*, 126 F.3d 372,
26 376 (2d Cir. 1997). The Proposed Second Amended Complaint in this action identifies multiple
27 questions of *both* law and fact common to the entire class.

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

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

7 The commonality prerequisite is therefore satisfied.¹

8 3. Typicality

9 The third prerequisite of Rule 23(a) is that the putative named plaintiffs' claims be typical
10 of those of the class. The purpose of this requirement is to assure that the interests of the named
11 plaintiffs align with the interests of the class. *Weinberger v. Thornton*, 114 F.R.D. 599, 603
12 (S.D. Cal. 1986). This prerequisite is viewed under the rule's "permissive standards," such that
13 "representative claims are 'typical' if they are reasonably co-extensive with those of absent class
14 members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
15 1019 (9th Cir. 1998). *See also Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir.
16 1975) ("the typicality requirement is ordinarily not argued.").

17 The typicality requirement is satisfied "[i]f the class representative's claims arise from the
18 same events, practice, or conduct, and are based on the same legal theory as those of other class
19 members." *Moore's Federal Practice*, §23.24[2]. The fundamental inquiry for typicality is
20 whether all members of the class would benefit in some way from a judgment favorable to the
21

22 ¹ Of course, factual differences may exist among class members with respect to the
23 precise way in which each individual is affected by the institutional practice or
24 condition. Such differences do not defeat commonality. *See, e.g., Marisol A*, 126 F.3d
25 at 377 ("the unique circumstances of each [plaintiff] do not compromise the common
26 question of whether . . . defendants have injured all class members by failing to meet
27 their federal and state law obligations"); *Milonas v. Williams*, 691 F.2d 931, 938 (10th
28 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).

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

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

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

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

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

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

1 4. Adequacy of Representation

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

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

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

21
22
23 ² In addition to seeking injunctive relief in his Complaint and First Amended Complaint,
24 plaintiff Kiniti also sought damages for the injury he personally suffered as a result of
25 Defendants’ unconstitutional actions. In the Proposed Second Amended Complaint, Mr.
26 Kiniti has withdrawn his request for damages and instead is pursuing only injunctive and
27 declaratory relief as a representative of the putative class. However, even if Mr. Kiniti
28 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.

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

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

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

8 Fed. R. Civ. P. 23(b)(2). Courts have repeatedly held that civil rights class actions are the
9 paradigmatic 23(b)(2) suits, “for they seek classwide structural relief that would clearly redound
10 equally to the benefit of each class member.” *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d
11 Cir. 1979), *vacated on other grounds sub nom.*, *Lombard v. Marcera*, 442 U.S. 915 (1979); *see*
12 *also Johnson v. General Motors Corp.*, 598 F.2d 432, 435 (5th Cir. 1979); *Elliott v. Weinberger*,
13 564 F.2d 1219, 1229 (9th Cir. 1977) (action to enjoin allegedly unconstitutional government
14 conduct is “the classic type of action envisioned by the drafters of Rule 23 to be brought under
15 subdivision (b)(2)”), *aff’d in pertinent part sub nom.*, *Califano v. Yamasaki*, 442 U.S. 682, 701
16 (1979)). As stated in the leading treatise on class actions:

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

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

22 Injunctive challenges to prison conditions routinely proceed as class actions, and are
23 typically maintained under subdivision (b)(2). *See, e.g., Jones’El v. Berge*, 374 F.3d 541 (7th
24 Cir. 2004); *Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982) (class certified under Rule
25 23(b)(2)); *Diamond*, 519 F.2d at 1097, 1099-1100 (encouraging the liberal application of Rule
26 23, and in particular subdivision (b)(2), in civil rights actions, and observing that “[r]ealistically,
27 class actions are the only practicable judicial mechanism for the cleansing reformation and
28 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

1 satisfied.

2 **Conclusion**

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

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8 Dated: January 24, 2007

Respectfully submitted,

9
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