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EASTERLING AND CHARLES HOWARD

12 **UNITED STATES DISTRICT COURT**  
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 ISAAC KIGONDU KINITI; JOSE MORALES-  
15 VARGAS; SYLVESTER OWINO; HERNAN  
ISMAEL DELGADO; and ANY CASTRO, on  
behalf of themselves and all others similarly situated,

16 Plaintiffs,

17 v.

18 JULIE L. MYERS, Assistant Secretary, U.S.  
19 Immigration and Customs Enforcement (ICE);  
20 JOHN P. TORRES, Director, Office of Detention  
and Removal Operations, ICE; RON SMITH,  
21 Director, San Diego Field Office, ICE; ANTHONY  
CERONE, Officer-in-Charge at San Diego  
22 Correctional Facility (SDCF), ICE; CORRECTIONS  
CORPORATION OF AMERICA, INC. (CCA); JOE  
23 EASTERLING, SDCF Warden, CCA; CHARLES  
HOWARD, SDCF Assistant Warden, CCA,

24 Defendants.  
25

Case No. 3:05-cv-1013 DMS (PCL)

**DEFENDANTS CORRECTIONS  
CORPORATION OF AMERICA, JOE  
EASTERLING AND CHARLES  
HOWARD'S REPLY IN SUPPORT OF  
MOTION TO DISMISS PLAINTIFF'S  
SECOND AMENDED COMPLAINT**

Filed: May 9, 2005  
Judge: Honorable Dana M. Sabraw  
Magistrate: Honorable Peter C. Lewis  
Trial: Not Yet Set

26 Defendants Corrections Corporation of America ("CCA"), Joe Easterling and  
27 Charles Howard submit there Reply in Support of Motion to Dismiss Plaintiff's Second  
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1 Amended Complaint. This Court should grant Defendants' Motion to Dismiss because:  
2 (1) Plaintiffs Jose Morales-Vargas, Hernan Ismael Delgado and Any Castro should be  
3 dismissed as Plaintiffs because they are no detained at SDCF (Morales-Vargas and Castro  
4 have been deported); and (2) there is no reasonable expectation or demonstrative  
5 probability that ICE will send CCA an ICE detainee population that would require CCA to  
6 triple cell ICE detainees.

7 This Reply is supported by the following Memorandum of Points and Authorities,  
8 attached exhibits and the entire Court's file herein.

9  
10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. PLAINTIFFS MORALES-VARGAS, DELGADO AND CASTRO'S CLAIMS**  
12 **ARE MOOT BECAUSE THEY ARE NO LONGER DETAINED AT THE**  
13 **SAN DIEGO CORRECITONAL FACILITY (SDCF).**

14 Where a detainee/inmate cannot establish a reasonable expectation that he will be  
15 transferred back to the alleged offending facility and once again be subjected to the  
16 conditions for which he previously sought an injunction, his claim is rendered moot. *See*  
17 *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1095 (9<sup>th</sup> Cir. 2004); *Dilley v. Gunn*, 64  
18 F.3d 1365, 1368-69 (9<sup>th</sup> Cir. 1995); *Mitchell v. Dupnik*, 75 F.3d 517, 528 (9<sup>th</sup> Cir. 1996);  
19 *Darring v. Kincheloe*, 783 F.2d 874, 876 (9<sup>th</sup> Cir. 1986); *City of Los Angeles v. Lyons*, 461  
20 U.S. 95, 101-102, 103 S.Ct. 1660 (1983) (finding plaintiffs lacked standing to seek  
21 injunctive relieve regarding use of police choke holds absent a showing of realistic threat  
22 to plaintiffs – not others- of future injury).. An inmate/detainee's claim that he or she  
23 "might" be transferred back to the alleged offending facility sometime in the future is too  
24 speculative to prevent mootness. *See Dilley*, 64 F.3d at 1369. Once a detainee/inmate is  
25 released or transferred from the alleged offending correctional facility, a judicial  
26 pronouncement in the form of declaratory judgment would become a mere advisory  
27 opinion, which the Constitution prohibits. *See McQuillion*, 369 F.3d at 1095; *see also*  
28 *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2230 (1975).

1 In their Response, Plaintiffs argue that Plaintiffs Morales-Vargas, Delgado and  
2 Castro's transfer out of SDCF (and actual deportation of Plaintiffs Morales-Vargas and  
3 Castro) does not defeat Defendants' Motion to Dismiss because in the class action context,  
4 Plaintiffs can just substitute in other detainees in place of the transferred Plaintiffs.  
5 Plaintiffs argument fails. Here, the issue at hand is whether Plaintiffs' Second Amended  
6 Complaint survives dismissal, not whether the transferred Plaintiffs can be substituted by  
7 class members. Class certification has not been decided. Therefore, the issue of  
8 substitution of class representatives is premature.

9 Next, Plaintiffs fail to address the issue head on – that three of the named Plaintiffs  
10 have been transferred out of SDCF, with Morales-Vargas and Castro having been  
11 deported out of this county permanently. With Morales-Vargas and Castro's deportation,  
12 these Plaintiffs cannot demonstrate they will be transferred back to SDCF in the future.  
13 Therefore the injunctive relief they seek is no longer of consequence. Moreover, Plaintiff  
14 Delgado's argument that he might some day find his way back to SDCF also fails.  
15 Delgado has not returned to SDCF since his transfer out in February, 2007. Delgado's  
16 claim that he "might" be transferred back to SDCF sometime in the future is too  
17 speculative to prevent mootness. *See Dilley*, 64 F.3d at 1369.

18 Finally, Plaintiffs' attack upon Warden Easterling as to the Warden's knowledge of  
19 when exactly ICE transferred Plaintiff Morales-Vargas out of SDCF is a red herring to the  
20 issue as to whether Morales-Vargas' claims are mooted by the fact that he is no longer at  
21 SDCF. The bottom line is that Plaintiff Morales-Vargas is no longer detained at SDCF. It  
22 was merely an administrative oversight that Warden Easterling's Affidavit submitted as  
23 Exhibit 1 to Defendants' Motion to Dismiss stated that Morales-Vargas was transferred  
24 out of SDCF in January, 2007 and did not reflect that Detainee Morales-Vargas (A 70 161  
25 279) had returned to the facility on February 12, 2007, but was thereafter transferred out  
26 of the facility for deportation on May 3, 2007. *See* Second Affidavit of Warden Easterling  
27 attached hereto as Exhibit 1. At no time during Detainee Morales-Vargas' return to the  
28

1 facility after February 12, 2007, was he triple-bunked or assigned to a bunk bed in the  
2 dayroom. *See id.*

3 In sum, Plaintiffs Morales-Vargas, Delgado and Castro are no longer subjected to  
4 the conditions of which they complain since being transferred out of SDCF.  
5 Consequently, their request for declaratory and injunctive relief from alleged  
6 unconstitutional overcrowding is moot. There is no controversy for the Court to decide  
7 with respect to these transferred Plaintiffs. That this matter could hypothetically be  
8 certified as a class action if the Second Amended Complaint survives does not negate the  
9 fact that these three Plaintiffs are no longer subjected to the SDCF conditions for which  
10 they seek injunctive relief. Therefore, this Court should dismiss the Second Amended  
11 Complaint as to Plaintiffs' Morales-Vargas, Delgado and Castro.

12 **II. PLAINTIFFS KINITI AND OWINO'S CLAIMS ARE MOOT – THERE**  
13 **HAS BEEN NO TRIPLE CELLING AT THE SAN DIEGO CORECTIONAL**  
14 **FACILITY SINCE JANUARY 27, 2007.**

15 In their Response, Plaintiffs argue that Defendants have attempted a second "bite of  
16 the apple" in arguing the mootness of Plaintiffs' Second Amended Complaint. Plaintiffs  
17 assert that in ruling on Plaintiff's Motion For Leave to Amend the First Amended  
18 Complaint and Add Parties, the Court definitively decided that Plaintiffs' claims were not  
19 moot. In filing their Motion to Dismiss, however, Defendants answered the very  
20 questions the Court previously posed in granting Plaintiffs' Motion to Amend.  
21 Specifically, in so ruling that Plaintiffs' claims were not moot, the Court stated that  
22 Defendants had not answered the following:

- 23 1. whether SDCCD still surpassed its ICE detainee capacity;
- 24 2. whether detainees are still housed in bunk beds in the housing unit  
25 day rooms;
- 26 3. whether the holding cells were less crowded;
- 27 4. whether the individual housing pods exceeded capacity;
- 28 5. whether conditions in general have improved; and

1           6.       whether Defendants intend to reinstate triple celling in the future.

2  
3       See Order dated 2/27/07 at 6. Defendants' Motion to Dismiss and this Reply answer these  
4 questions.

5           A case or controversy becomes moot where intervening events have the Court of  
6 the ability to redress a plaintiff's injuries. See *Cook Inlet Treaty Tribes v. Shalala*, 166  
7 F.3d 986 (9<sup>th</sup> Cir. 1999); *Demery v. Arpaio*, 378 F.3d 1020, 1025-26 (9<sup>th</sup> cir. 2004). A  
8 theoretical possibility that a particular condition may reoccur is insufficient to combat  
9 mootness where a defendant can establish there is no reasonable expectation or  
10 demonstrated probability that the complained of conduct will reoccur. See *Murphy v.*  
11 *Hunt*, 455 U.S. 478, 482 (1990); *Demery*, 378 F.3d at 1027. Here, Defendants  
12 demonstrate there is no reasonable expectation or probability that triple celling will  
13 reoccur.<sup>1</sup> SDCF does not exceed its ICE designated capacity, detainees are not assigned  
14 to live in dayroom bunk beds and they are not living in holding cells. See Affidavit of

15  
16           <sup>1</sup> Defendants maintain that triple celling is not unconstitutional per se and that SDCF's  
17 prior need to triple cell did not result in a violation of Plaintiffs' civil rights. See, e.g., *See Rhodes*  
18 *v. Chapman*, 452 U.S. 337, 348, 101 S.Ct. 2392 (1981); *North v. White*, 152 Fed. Appx. 111 (3d  
19 Cir. 2005) (finding triple-celling of 1/3 of inmate population for one month did not constitute a  
20 constitutional violation where facility was otherwise well maintained and triple-celling was  
21 necessitated by a temporary influx of inmates); *Hubbard v. Taylor*, 399 F.3d 10 (3d Cir. 2005),  
22 remanded 452 F. Supp. 2d 533 (2006) (finding that two to seven months of triple-celling pretrial  
23 detainees in cells designed for one detainee, where detainees had to sleep on the floor on a  
24 mattress in close proximity to the toilet, did not violate the detainee's rights); *Strickler v. Waters*,  
25 989 F.2d 1375, 1382 (4<sup>th</sup> Cir. 1993); *Williams v. Griffin*, 952 F.2d 820, 824 (4<sup>th</sup> Cir. 1991); *Hite v.*  
26 *Leeke*, 564 F.2d 670, 673-74 (4<sup>th</sup> Cir. 1977); *Poole v. Taylor*, \_\_ F. Supp.2d \_\_, 2006 WL  
27 3740811 (D. Del. 12/19/06). (finding that triple-celling a pretrial detainee, who had to sleep on  
28 the floor in a plastic "boat" for six months, did not amount to punishment where the reason for  
triple-celling was due to overcrowding); *Deimerly v. Johnson*, 2006 WL 3754785, \*7 (W.D.  
Wash. 12/18/06) (granting summary judgment to prison officials in case where inmate alleged he  
was forced to sleep on a mattress on the floor of a triple cell for 27 days where the plaintiff failed  
to establish any deprivation of human necessities in addition to floor assignment or  
overcrowding); *Montgomery v. Fink*, 2006 WL 3484301, \*2 (W.D. Pa. 11/30/06) (finding pretrial  
detainee's claim challenging triple-celling failed where the plaintiff failed to allege that he himself  
suffered actual injury, such as or actually contracting an infectious disease); *Ferola v. Director,*  
*South Carolina Dept. of Corrections*, 2006 WL 2475398, \*18 (D.S.C. 8/24/06) (finding inmate  
failed to establish that triple-celling constituted a constitutional violation where inmate failed to  
establish denial of the minimal necessities of life); *Chilcote v. Mitchell*, 166 F. Supp.2d 1313,  
1317-18 (D. Or. 2001) (finding pretrial detainees who were triple-celled failed to state a claim  
where they failed to establish any actual harm because of the triple cell assignment).

1 Warden Easterling attached to Defendants' Motion to Dismiss as Exhibit 1; Second  
 2 Affidavit of Warden Easterling attached hereto as Exhibit 1; Affidavit of Damon Hininger  
 3 attached hereto as Exhibit 2. Moreover, ICE does not intend to increase SDCF's ICE  
 4 capacity to a level that would require triple celling.<sup>2</sup> *See id.*

5 The designated ICE detainee capacity at SDCF is 800 ICE detainees. *See* Affidavit  
 6 of Warden Easterling attached as Exhibit 1 to Defendants' Motion to Dismiss. Since  
 7 January 27, 2007, the ICE detainee population has not come within more than 96 inmates  
 8 of that capacity.<sup>3</sup> *See* Second Affidavit of Warden Easterling attached hereto as Exhibit 1.  
 9 This month (May, 2007), the ICE population has ranged from a low of 621 detainees to a  
 10 high of 676 detainees. *See id.* This is 124 detainees away from ICE capacity at the height  
 11 of May's population. Moreover, ICE Deputy Assistant Director for Detention  
 12 Management Timothy Perry has previously averred that ICE has no plans to transfer an  
 13 ICE detainee population to SDCF that would exceed the 800 bed capacity, which would in  
 14 turn require triple celling. *See* Affidavit of Timothy Perry, attached as Exhibit 1 to ICE  
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17 <sup>2</sup> Plaintiffs complain that triple celling is not the only condition that violates their rights – that  
 18 assigning detainees to day room bunk beds, assigning detainees to holding cells for an extended  
 19 period of time and assigning detainees to extended segregation stays also violates their  
 20 constitutional rights because these condition also subject Plaintiffs to exposure to communicable  
 21 diseases, increased violence, etc. Defendants maintain, however, that these conditions are not  
 22 different or severable from Plaintiffs' complaints about triple celling. When the need for triple  
 23 celling is eradicated, so to is the necessity to house detainees in dayrooms, holding cells,  
 24 segregation, etc.

25 <sup>3</sup> Since January 27, 2007, the average ICE detainee population has ranged as follows:

26 January 27-31, 2007	High (704)	Low (624)
27 February, 2007	High (683)	Low (641)
28 March, 2007	High (690)	Low (575)
April, 2007	High (662)	Low (605)
May, 2007	High (676)	Low (621)

*See* Second Affidavit of Warden Easterling attached hereto as Exhibit 1.

1 Defendants' Motion to Dismiss. Thus, Plaintiffs' claims that the threat of triple celling  
2 remains immediate fails.<sup>4</sup>

3 Plaintiffs' argument that triple celling will again occur in December, 2007 when  
4 200 beds revert to San Diego County use likewise fails. The 1997 Lease Agreement  
5 between CCA and the County of San Diego for the operation of SDCF originally provided  
6 that SDCF's 200-bed Expansion Premises would revert to the County in December 2007.  
7 *See* Affidavit of Damon Hininger attached hereto as Exhibit 2. For the last several  
8 months, CCA has been in negotiations with the County of San Diego to extend the term of  
9 the lease of the 200-bed Expansion Premises by an additional four years to December  
10 2011, and to extend the notification period for the County of San Diego to acquire the  
11 200-bed Expansion Premises from 90 to 270 days. *See id.* On May 22, 2007, the San  
12 Diego County Board of Supervisors gave their consent to the proposed lease amendments.  
13 *See id.* As a result, SDCF's 200-bed Expansion Premises will remain in use by CCA, and  
14 will not revert to the County of San Diego, until December 2011. *See id.*; *see also* Second  
15 Affidavit of Warden Easterling attached hereto as Exhibit 1.

16 Based upon the above, Plaintiffs' argument that triple celling is sure to again occur,  
17 at least by December, 2007, fails. In short, Plaintiffs' allegation that triple celling will  
18 reoccur is supported by little more than self serving prediction, unsupported by actual  
19 proof. Defendants, in conjunction with the ICE Defendants, have demonstrated that there  
20 is no reasonable likelihood or demonstrated probability that triple celling at SDCF will  
21 again become necessary. Because there is no reasonable expectation that ICE will send  
22 any number of ICE detainees to SDCF that would exceed the 800 bed capacity, and

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24 <sup>4</sup> Plaintiff Kiniti argues that a SDCF case manager and an officer have told him that triple celling  
25 will once again happen as soon as this lawsuit "cools down". *See* Response at 8. Plaintiff Kiniti's  
26 allegations lack credibility. Warden Easterling has never received any information from ICE that  
27 ICE is angry about this lawsuit or that it intends to transfer any number of ICE detainees to SDCF  
28 that would exceed the present ICE detainee available bed space. *See* Second Affidavit of Warden  
Easterling attached hereto as Exhibit 1. As Warden Easterling has received no such notification  
that ICE intends to exceed ICE detainee capacity at SDCF, none of the Warden's subordinates,  
including Officer Hurst or Case Manager Placeno have been advised that there is any intention to  
resume triple-celling, including Officer Hurst and Case manager Placeno. *See id.*

1 because SDCF ICE remains able to house 800 ICE detainees until at least 2011, Plaintiff's  
2 overcrowding claim has been rendered moot. *See Friends of the Earth, Inc., v. Laidlaw*  
3 *Environmental Services (TOC) Inc.*, 528 U.S. 167, 189 (2000); *Murphy*, 455 U.S. at 482;  
4 *Demery*, 378 F.3d at 1027. Therefore, this Court should grant Defendants' Motion to  
5 Dismiss.

6 **III. CONCLUSION**

7 There are no ICE detainees triple celled at SDCF. Nor are any ICE detainees  
8 assigned to live in the dayroom areas of the living units or the holding cells in the  
9 Receiving and Discharge Unit. Accordingly, the conditions for which Plaintiffs seek  
10 injunctive and declaratory relief no longer exist and there is no reasonable expectation or  
11 demonstrated probability that such will reoccur. Therefore, Plaintiffs' claims for  
12 declaratory and injunctive relief are rendered moot. This is especially so for Plaintiffs  
13 Morales-Vargas, Delgado and Castro, who are no longer detained at SDCF (Morales-  
14 Vargas and Castro having been deported). Based upon the foregoing, Defendants CCA,  
15 Easterling and Howard respectfully request this Court dismiss Plaintiffs' Second  
16 Amended Complaint.

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1 Dated: June 1, 2007

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**CERTIFICATE OF SERVICE**

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The undersigned certifies that on this 1<sup>st</sup> day of June, 2007 a true and correct copy of *Defendants Corrections Corporation of America, Joe Easterling and Charles Howard's Motion To Dismiss Plaintiff's Second Amended Complaint* was served by ECF Filing on all counsel of record, along with all exhibits, and through agreement of the parties, has been e-mailed to:

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