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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

18 ISAAC KIGONDU KINITI, et al.,)
 19)
 Plaintiffs,)
 20)
 v.)
 21)
 JULIE L. MYERS, et al.,)
 22)
 Defendants.)
 23 _____)

Case No. 3:05-cv-1013-DMS-PCL
**REPLY MEMORANDUM IN
 SUPPORT OF DEFENDANTS'
 MOTION TO DISMISS¹**

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 25
 26
 27 ¹ This reply memorandum is filed on behalf of the Federal Defendants. The United
 28 States does not represent defendants Corrections Corporation of America (CCA), Joe Easterling,
 or Charles Howard in this matter.

PRELIMINARY STATEMENT

1
2 Defendants, by and through undersigned counsel, hereby file their reply in support of their
3 preceding motion to dismiss under Fed. R. Civ. P. 12.

4 In this action, plaintiffs seek declaratory and injunctive relief from this Court for alleged
5 constitutional violations based on "chronic and severe" overcrowding at the San Diego
6 Correctional Facility (SDCF). While defendants dispute this characterization, defendants have
7 also made clear that plaintiffs' claims, as raised in the Second Amended Complaint, are no longer
8 live. Since late January 2007, the number of U.S. Immigration and Customs Enforcement (ICE)
9 detainees housed at SDCF per day has fluctuated between 595 and 692, well below SDCF's
10 "design capacity," as alleged by plaintiffs, of 800 ICE detainees. Declaration of Timothy L. Perry
11 (Perry Decl.) at ¶¶ 16-18; Second Amended Complaint at ¶¶ 47-51. Furthermore, since late
12 January 2007, there has been no triple-celling of any ICE detainees at SDCF; no "boats" have been
13 used for ICE detainees; and no immigration pod, administrative segregation unit or holding cell
14 has exceeded capacity. Perry Decl. at ¶¶ 19-20, 26. No ICE detainees are forced to sleep on
15 "makeshift beds" in the common day rooms at SDCF, contrary to plaintiffs' allegations, though at
16 times, certain ICE detainees are assigned to common area bunk beds in the day rooms in the
17 interest of ensuring safety and security among the ICE detainee population. *Id.* at ¶ 23. As
18 previously alluded to in the aforementioned declaration, these detainees cannot be placed
19 anywhere else because certain ICE detainees cannot be commingled out of concern for the
20 personal safety and security of the facility's detainee population and staff.²

21 These facts, as set forth in the Declaration of Timothy L. Perry, Deputy Assistant Director
22 for the Detention Management Division within ICE's Office of Detention and Removal Operations
23 (DRO) and the officer responsible for managing the ICE detention program from a national level,
24 *see id.* at ¶¶ 1-2, demonstrate that plaintiffs' claims are moot. Furthermore, Mr. Perry explicitly
25

26 ² The fluctuations cited in plaintiffs' opposition to defendants' Motion to Dismiss were the
27 direct result of the dynamic fluctuations of the detainee population at SDCF, as cited in
28 defendants' Motion to Dismiss. To illustrate the variation in detainee counts, defendants chose
two days which captured such variations, evidencing the very temporary nature of such
assignments.

1 states in his Declaration that he has no reasonable expectation that SDCF will use "boats" or
2 "triple-celling" to house additional ICE detainees; no reasonable expectation that the ICE detainee
3 population levels will significantly increase above current levels and "overcrowd" SDCF; no
4 reasonable expectation that SDCF will use "makeshift beds" to house ICE detainees; and no
5 reasonable expectation that any immigration pod, administrative segregation unit or ICE holding
6 cell at SDCF will exceed capacity. *Id.* at ¶¶ 21, 24, 26. Mr. Perry makes it absolutely clear that
7 there is no reasonable expectation that the conduct alleged by plaintiffs in the Second Amended
8 Complaint will occur.

9 ARGUMENT

10 **I. The Federal Defendants' Mootness Argument is Distinguishable from Defendant** 11 **Corrections Corporation of America, Inc.'s (CCA) Futility Argument in Opposition to** 12 **Plaintiffs' Motion for Leave to Amend the First Amended Complaint and Add Parties.**

13 In plaintiffs' opposition to the motion to dismiss, plaintiffs argue that the Court should
14 refuse to consider defendants' mootness arguments on the basis that, in the Court's February 27,
15 2007 Order, the Court addressed defendant CCA's argument that amending the First Amended
16 Complaint was futile because, among other things, plaintiffs were no longer subject to triple-
17 celling conditions and therefore lacked standing to bring suit. *See* Order Granting Plaintiff's
18 Motion to Amend First Amended Complaint and Add Parties ("Order") at 4. In this Order, the
19 Court laid out the blueprint as to what issues needed to be addressed in order to show that
20 plaintiffs' claims were indeed moot. The Court noted that "Defendants' argument that Plaintiffs'
21 claims are moot assumes the injuries alleged stem solely from 'triple-celling,'" which the Court
22 found was not the case. Instead, the Court stated, plaintiffs' other claims needed to be addressed,
23 including the allegations that there is "chronic and severe overcrowding" at SDCF that includes
24 "but [is] not limited to" triple-celling of immigration detainees; that SDCF forced detainees to
25 sleep on makeshift beds in the common dayroom space; and that detainees experienced
26 overcrowding in holding cells. Order at 5. The Court further noted that:

27 It is unclear, however, whether SDCF still surpasses its capacity, whether any
28 detainees are housed in the "dayroom on bunk beds," . . . or, whether the holding
cells have become less crowded in general. Defendants do not contend the
individual pods do not exceed their capacity; nor do they claim conditions
throughout the facility have improved. It therefore cannot be said that Plaintiffs'
proposed amendment is futile.

1 Order at 6. In response to this guidance, these very issues have been explicitly addressed in
2 the Federal Defendants' subject Motion to Dismiss. See Defendants' Memorandum of Points and
3 Authorities in Support of Defendants' Motion to Dismiss ("Motion") at 3-5. Moreover, the Federal
4 Defendants address the Court's standard set forth by Friends of the Earth, Inc. v. Laidlaw Envtl.
5 Serv., Inc., 528 U.S. 167, 189 (2000), by making absolutely clear that the alleged wrongful
6 conduct was either incorrect (*i.e.* the beds in the dayroom were not makeshift but were instead
7 comparable to those beds provided in the cells at SDCF), or cannot reasonably be expected to
8 occur. Order at 6; Motion at 6-7. Accordingly, the mootness argument set forth by the Federal
9 Defendants in their motion to dismiss is not the same argument set forth by CCA and addressed by
10 the Court in its Order. In fact, the Federal Defendants' Motion to Dismiss explicitly follows the
11 Court's blueprint in addressing the issues that the Court explained were necessary to prove that
12 plaintiffs' claims are moot.

13 **II. Defendants satisfy the requirements set forth by the Friends of the Earth Standard.**

14 The Court, in its February 27, 2007 Order, cited the Friends of the Earth standard that "[a]
15 case might become moot if subsequent events made it absolutely clear that the allegedly wrongful
16 behavior could not be reasonably expected to occur." Order at 6. Defendants have subsequently
17 made it absolutely clear that the alleged wrongful conduct could not reasonably be expected to
18 occur. ICE is the agency that has the authority to control detainee population levels at SDCF.
19 Timothy L. Perry, Deputy Assistant Director for the Detention Management Division within ICE's
20 Office of Detention and Removal Operations (DRO), is the officer who manages the ICE detention
21 program from a national level. Perry Decl. at ¶¶ 1-2. Mr. Perry's duties include developing agency
22 policy, reviewing, planning and implementing facility policy and participating in the oversight of
23 ICE's national detention standards compliance program. Id. at 2. As such, he is authorized to
24 speak on behalf of ICE and represent ICE's position on whether or not the alleged wrongful
25 conduct could reasonably be expected to occur. Mr. Perry, in his official capacity at ICE, states
26 that there is no reasonable expectation the alleged wrongful conduct will occur. Mr. Perry's
27 authority is undoubtedly more credible and authoritative than the authority of the CCA officers as
28 referenced by plaintiffs in their opposition to the Motion to Dismiss, who allegedly stated that

1 triple-celling will return once the lawsuit has ended. See Plaintiffs' Memorandum in Opposition to
2 Defendants' Motion to Dismiss ("Pl.'s Opp.") at 8. However, whether or not such statements were
3 in fact made is a matter defendants have not yet had the chance to investigate.

4 Moreover, in plaintiffs' cited case, Vasquez v. Los Angeles (LA) County, --- F.3d ---, No.
5 04-56973, 2007 WL 1412671 (9th Cir., May 15, 2007), the Ninth Circuit recently reviewed several
6 other factual changes that might render a case moot:

7 For example, a case is moot if a criminal defendant dies during the appeals process
8 or if a civil plaintiff dies where the cause of action does not survive death. Also, if
9 the parties settle the matter, a live controversy obviously no longer exists. If a
challenged law is repealed or expires, the case is moot. *Essentially, any change in
the facts that ends the controversy renders the case moot.*

10 (Emphasis added). Id. at *6 n.6 (quoting Erwin Chemerinsky, Federal Jurisdiction 125-26 (4th ed.
11 2003)), attached as Exhibit A to the Decl. of Tom Jawetz in Support of Pls.' Opp. To Defs.' Mots.
12 To Dis. Pls.' Second Am. Compl., May 21, 2007.

13 Here, the facts as set forth in the Federal Defendants' Motion to Dismiss and the Perry
14 Declaration end the controversy alleged by plaintiffs in their Second Amended Complaint. Since
15 late January 2007, SDCF's detainee levels have not exceeded 692, well below the 800-detainee
16 capacity alleged by plaintiffs; no "boats" or "triple-celling" are being or are expected to be used at
17 SDCF; and no immigration pod, administrative segregation unit or holding cell has exceeded
18 capacity. Again, no "makeshift beds" have ever been used to house ICE detainees. Most notably,
19 ICE, through the Declaration of Timothy L. Perry, has made it absolutely clear that there is no
20 reasonable expectation that the wrongful conduct alleged by the plaintiffs will occur.³ Finally, the
21 Court may rely on Mr. Perry's sworn statement showing that plaintiffs' claims are mooted by facts
22 which effectively end the controversy, in light of his professional experiences and responsibilities
23 as highlighted in his declaration.

24 Thus, for all of the above reasons, defendants have met the Friends of the Earth standard that
25

26 ³ The Perry Declaration explicitly states that ICE detainees are assigned to bunk beds in
27 the day rooms temporarily for the safety and security of the ICE detainee population. Perry Decl.
28 at ¶ 22. Plaintiffs attempt to create a causal link between these bunk bed assignments and the
overcrowding plaintiffs allege in their Second Amended Complaint, but as shown by the Perry
Declaration, such a link is not supported by the evidence.

1 there is no “reasonable expectation” or “demonstrated probability” that the alleged wrongful conduct
2 will occur. As there is no longer a live controversy in the case, plaintiffs' claims are moot, and this
3 case should be dismissed.

4 **CONCLUSION**

5 For the foregoing reasons, the Court should dismiss this action as moot.

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7 DATED: June 1, 2007

8 Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 1st day of June 2007 a true and correct copy of the foregoing Defendants' Motion to Dismiss was served by ECF Filing on all counsel of record.

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