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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Jane Doe # 1; Jane Doe # 2; and Norlan Flores, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Jeh Johnson, Secretary, United States Department of Homeland Security, in his official capacity; R. Gil Kerlikowske, Commissioner, United States Customs & Border Protection, in his official capacity; Michael J. Fisher, Chief of the United States Border Patrol, in his official capacity; Jeffrey Self, Commander, Arizona Joint Field Command, in his official capacity; and Manuel Padilla, Jr., Chief Patrol Agent-Tucson Sector, in his official capacity,

Defendants.

Case No. 4:15-cv-00250-TUC-DCB

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY

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INTRODUCTION

Civil detainees remain confined in Defendants' Tucson Sector short-term holding facilities, often over several nights, deprived of basic human needs, including sleep, warmth, adequate food and water, and minimally necessary health and sanitary conditions. According to the reports of dozens of prior detainees, including the Plaintiffs, Defendants continue to fall short of constitutional standards and CBP guidelines. Plaintiffs seek limited discovery narrowly-tailored to facilitate Plaintiffs' efforts to gather direct evidence on the specific substandard conditions in which the putative class members are now being held. Plaintiffs intend to offer this evidence in support of their imminent motion for a preliminary injunction, which seeks to prevent further ongoing and irreparable harm to the putative class members *while this litigation is pending*.

Defendants have consistently taken a "no compromise, no access" position with respect to Plaintiffs' discovery requests, both during the meet-and-confer and in their opposition (the "Opposition") to Plaintiffs' Motion for Expedited Discovery (the "Motion"). Defendants attempt to resist any discovery at this critical juncture by advancing several problematic arguments. First, Defendants argue that Plaintiffs offer no "compelling need" for discovery. (*See, e.g.*, Opposition to Pls.' Mot. to Expedite Discovery ("Opp'n") at 2, 4, 8, 15, ECF No. 39.) Yet the Defendants' Opposition does not deny a single fact asserted in Plaintiffs' Motion, any of the dozens of publicly available sources cited in the Motion, or any of the 50 declarations from former Tucson Sector civil detainees in support of Plaintiffs' class certification motion. Each of these sources gives detailed accounts of the ongoing deprivations of basic human needs endured by civil detainees held in these facilities. Plaintiffs have made the requisite showing of good cause, and Defendants' silence is telling.

Second, Defendants argue that any preliminary effort to halt the inhumane treatment of putative class members would improperly infringe upon Defendants' right to maintain the status quo. (*See, e.g.*, Opp'n at 2, 4-5, 15.) This argument fails for the obvious reason that Defendants cannot justify ongoing violations of the U.S. Constitution

and other laws simply by claiming the violations have already been taking place. Perhaps recognizing the weakness of this position, Defendants attempt to gird the purported right by claiming, without basis, that Plaintiffs intend to circumvent a full trial on the merits by expediting a request for permanent injunctive relief. This claim is simply false and should be rejected.

Third, Defendants argue that there is no urgent need to preserve evidence of the (inhumane) conditions in these facilities because those conditions have not changed in many years. (Opp'n at 8.) Again, Defendants do not deny the conditions and further acknowledge that these conditions will not change with the mere passage of time so that the requested discovery will be equally available in the normal course of litigation. This argument fails for the same reason as the status quo argument: past and present misconduct do not justify ongoing and future misconduct.

Finally, Defendants mischaracterize Plaintiffs discovery requests as overly broad, and then claim that granting the requests would cause undue burden and prejudice by, for example, forcing Defendants to put entire facilities on lockdown for a full day. (Opp'n at 11.) Defendants cynically claim that providing access to these facilities would create the very same inhumane conditions Plaintiffs seek to abate. Defendants undercut their own argument, however, by claiming that discovery in the normal course of litigation would be adequate for Plaintiffs' purposes. (*Id.* at 2, 8.) Presumably the burdens Defendants conjure up today would still be burdens tomorrow, yet Defendants fail to explain why this is not so. Regardless, Plaintiffs' requests are reasonable in light of the violations alleged, and narrowly tailored to provide Plaintiffs with direct evidence of present conditions in Defendants' Tucson Sector facilities.

For all the foregoing reasons, and because good cause exists, Plaintiffs reiterate their request that the Court grant their motion for expedited discovery.

ARGUMENT

I. GOOD CAUSE EXISTS TO GRANT PLAINTIFFS' EXPEDITED DISCOVERY REQUESTS

A. Defendants Do Not Deny Any Asserted Facts Regarding Current Conditions in Tucson Sector Short-Term Detention Facilities

Plaintiffs seek expedited discovery to prevent ongoing and irreparable harm to putative class members who continue to be subjected to the risk of physical and mental harm resulting from confinement under inhumane conditions in Defendants' Tucson Sector detention facilities. Plaintiffs' Motion cites more than a dozen public news stories, government reports and nongovernmental organization reports documenting some of the same conditions. (Pls.' Mot. to Expedite Discovery ("Mot."), ECF No. 25; *see also* Index to Exhibits, ECF No. 26-1.) Defendants' Opposition further acknowledges the more than 50 declarations filed in this case that provide firsthand accounts from former detainees of their experiences while detained by Defendants. (Opp'n at 6-7.) All these sources provide evidence that Defendants are violating the putative class members' constitutional rights and CBP's own guidelines.

Significantly, Defendants do not deny any facts asserted in Plaintiffs' Motion, the cited news sources, or the former detainee declarations. To the contrary, the Padilla Declaration in support of Defendants' Opposition confirms at least some of Plaintiffs' factual assertions. (*See, e.g.*, Padilla Declaration ¶ 8, ECF No. 39-1 (acknowledging lights remain on "round-the-clock"); *id.* ¶ 11 (acknowledging that "Border Patrol stations are not designed for long-term care and detention" and that aliens are often held in custody for longer than 12 hours); *id.* ¶ 15 (acknowledging detainees find air conditioned facilities "cooler than they are accustomed to" and are generally "not provided showers while in CBP custody"); *id.* ¶ 27 (acknowledging tours or visitors can be provided access to secure areas).

In light of this evidence, Plaintiffs have sufficiently shown good cause for expedited discovery to gain access to some of Defendants' facilities and collect direct

evidence as to the nature of the conditions in which putative class members are being held and the full scope of Defendants' wrongful conduct.

B. The Status Quo Rule Does Not Permit the Inhumane Treatment of Putative Class Members

Defendants falsely claim that Plaintiffs seek permission "to conduct discovery, litigate the merits of the case, and obtain the ultimate relief they seek in this case, all before Defendants have had a chance to raise their legal challenges to Plaintiffs' Complaint or answer their allegations." (Opp'n at 2; *see also id.* at 15.) Defendants' claim has no basis in fact. Plaintiffs readily acknowledge that the full nature and scope of any permanent injunctive relief will properly be determined after dispositive motions or a full trial on the merits. Plaintiffs here seek only to gather evidence in support of a motion for *preliminary* injunction to abate ongoing and irreparable harm to the putative class members while this litigation is pending. Defendants fail to identify any rule or reason for prohibiting such requests for preliminary injunctive relief at this stage of litigation.

Nevertheless, in an attempt to bolster their untenable claim, Defendants repeatedly suggest that Plaintiffs' motion for a preliminary injunction will improperly seek to alter the status quo. (*See, e.g.*, *id.* at 2, 4-5, 15.) That Defendants would advance such a technical argument is remarkable considering the "status quo" they seek to preserve involves the inhumane treatment and deprivation of putative class members' basic human needs in violation of the U.S. Constitution, the Administrative Procedure Act ("APA") and Defendants' own guidelines, inadequate as they are. Defendants should not be permitted to avoid discovery about whether their conduct violates putative class members' rights on the basis that such discovery might ultimately lead to the vindication of those rights.

The cases Defendants cite in support of their defense of the status quo are entirely distinguishable from the present case. For example, *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804 (9th Cir. 1963) involved a trademark license dispute between the owner of a registered trademark and the exclusive licensee who sought to continue operations

under that trademark. The court had no difficulty recognizing that the status quo—which involved a mutually profitable business relationship that had endured in twelve cities for more than a decade—should be preserved pending final resolution on the merits. *Id.* at 809. Here, on the other hand, no such beneficial relationship exists to justify invocation of the status quo rule. Indeed, the *Avis* court warned against rigid application of the rule in every case, regardless of the peculiar facts, and stated that "[t]he infinite variety of situations in which a court of equity may be called upon for interlocutory injunctive relief requires that the court have considerable discretion in fashioning such relief." *Id.* Certainly an exercise of such "considerable discretion" is warranted in the present case.

Defendants also rely on *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) for the proposition that the purpose of a preliminary injunction is merely to preserve the status quo. (Opp'n at 5.) In that case, the trial court granted a preliminary injunction requiring the University to pay for plaintiff's sign-language interpreter. The ultimate issue was never fully decided on the merits, but was preserved by an injunction bond. The Supreme Court recognized that any issue preserved by an injunction bond generally cannot be resolved on appeal, and remanded to ensure that the issue would be decided on the merits rather than on a mere showing of a "likelihood of success." *Id.* at 399. Here, however, no preliminary injunction has issued, no issues are currently being preserved by an injunction bond, and Defendants' right to a full trial on the merits is not being jeopardized by Plaintiffs' limited discovery requests.

Defendants also cite *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority*, 234 F.R.D. 4 (D.D.C. 2006), which involved claims under the Americans with Disabilities Act seeking declaratory and injunctive relief for failure to provide adequate paratransit services. In that case, the court denied a broad request for expedited discovery, finding that the relief plaintiffs intended to seek in a preliminary injunction was "dramatically greater and more demanding . . . than the relief they sought" in the original complaint. *Id.* at 7. The complaint originally sought only declaratory relief and injunctions to stop the discriminatory practices and to develop

and implement a remedial plan. The preliminary injunction motion, on the other hand, sought much more, including designation of a special master to monitor operations and designation of an expert to monitor how performance statistics were gathered. *Id.* at 6-7. Here, in contrast, Plaintiffs' discovery requests are reasonable and discrete in light of their original prayer for relief and their stated reasons for seeking a preliminary injunction. Defendants fail to identify any basis for suspecting that Plaintiffs will unfairly widen the scope of relief sought in a motion for preliminary injunction.

C. Defendants' Opposition Articulates the Wrong Standard for Showing Good Cause

Defendants argue repeatedly that Plaintiffs have the burden to show a "compelling need" for expedited discovery. (Opp'n at 4 (citing *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063 (C.D. Cal. 2009).) Defendants fail to articulate the correct standard. The word "compelling" is found nowhere in the *Davis* opinion. Rather, there must be some "*prima facie* showing of the *need* for the expedited discovery." *Am. LegalNet, Inc. v. Davis*, 763 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009) (emphasis in original) (quotations & citations omitted). As already discussed, Plaintiffs have made the requisite showing of good cause. *See, generally*, *Yokohama Tire Corp. v. Dealers Tire Supply, Inc.*, 202 F.R.D. 612, 614 (D. Ariz. 2001). Furthermore, *Davis*, which involves misappropriation and unfair competition claims, is distinguishable from the present case because the court expressly found that the plaintiff could not adequately show any irreparable harm. *Id.* at 1071. Additionally, the discovery requests in *Davis* are not comparable to those of Plaintiffs in this case. There, plaintiff sought to depose the defendant, propound written interrogatories, have an expert image and analyze the defendants' hard drives, collect broad categories of emails, marketing and sales documents, business plans, and forecasts, and even serve a third-party subpoena. *Id.* at 1067-68. Here, Plaintiffs have narrowly tailored their discovery requests, which identify several discrete categories of records compiled over the past six months, policies and procedures currently in effect, and

inspection of a select number of facilities for no more than one day each. (*See* Mot. at 6-7.)

Defendants also argue that Plaintiffs have failed to show that expedited discovery is necessary for the administration of justice. (Opp'n at 8.) Defendants argue that expedited discovery in this case "does not serve to move the case forward in an efficient manner." (*Id.* at 6.) For this proposition, Defendants rely on *Semitool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273 (N.D. Cal. 2002). However, Defendants entirely miss the point of Plaintiffs' requests. In *Semitool*, the plaintiff sought expedited discovery to determine which patents were infringed, thereby expediting possible amendment to its complaint, facilitating a more complete and informed Case Management Conference, and avoiding necessary amendments to its initial disclosures at a later date. *Id.* at 276. Here, Plaintiffs request expedited discovery not to expedite the litigation more generally, but to halt the ongoing irreparable harm to putative class members. The *Semitool* court implicitly recognized that irreparable harm was a valid basis for granting expedited discovery, noting that the plaintiff "has not argued that it will be irreparably harmed if it does not receive expedited discovery." *Id.*

D. The Need To Prevent Irreparable Harm to Putative Class Members Is Urgent

Defendants argue that "Plaintiffs do not explain why immediate discovery of these conditions is necessary in light of their express allegations that the conditions at Border Patrol facilities are long-term and ongoing." (Opp'n at 8.) Defendants further acknowledge that "conditions at Border Patrol stations are not something that will change or become impossible to document due to 'the passage of time alone . . . .'" (*Id.* (quoting *Monsanto Co. v. Woods*, 250 F.R.D. 411 (E.D. Mo. 2008).) With this admission, Defendants articulate precisely why Plaintiffs' requested relief is so urgent. Without a court order, Defendants will do nothing to provide the requested discovery or end the everyday suffering of putative class members from being deprived of warmth, basic hygiene and sanitation, adequate food, water, and medical care.

Furthermore, Plaintiffs have limited the temporal scope of their requests to include logs, videos, and other records of confinement conditions over only the past six months. (Mot. at 7.) While Plaintiffs will be entitled to seek earlier records during the ordinary course of discovery, the present requests should provide valuable information on conditions as they existed within a reasonable time before this lawsuit was filed, and whether constitutionally-required or CBP's own detention standards were being violated. The requests are reasonable considering Plaintiffs have no assurances that Defendants have taken the appropriate steps to alter their document and video preservation practices to avoid destruction of this evidence.[1]

E. Defendants Fail to Show Any Undue Burden

Defendants have consistently taken a "no compromise, no access" position in this case, both during the meet-and-confer with Plaintiffs' counsel[2] and throughout the Opposition. Defendants have made clear to Plaintiffs that, without a court order, Defendants will continue to resist and delay any expedited discovery in this case.

Defendants' Opposition argues that providing access to certain areas within the CBP Tucson Sector detention facilities would "impose significant burden on the safe and efficient running of [] operations . . . ." (Opp'n at 11.) Plaintiffs deliberately tailored their requests to impose a minimal burden on the operation of the facilities—both by limiting the number of facilities that would be inspected and by limiting the scope of the

[1] Plaintiffs' counsel sent a preservation letter to Defendants' counsel by email and FedEx on June 10, 2015. As of the filing of this Reply, Plaintiffs' counsel have received no word from Defendants' counsel regarding the preservation requests, except for an automated response acknowledging receipt of the email.

[2] Defendants' Opposition asserts that Defendants' counsel "suggested the possibility of a less invasive tour" to Plaintiffs' counsel, but received no response (Opp'n at 13 n.3) and that Defendants' counsel sought specific requests "so that Defendants could determine if any such information was readily available and could be provided" (*id.* at 14 n.4). However, Defendants' Opposition fails to acknowledge that, when asked by Plaintiffs' counsel during the meet-and-confer to identify a single document that Defendants would be willing to produce on an expedited basis, Defendants' counsel could not do so.

inspection and information sought. Defendants incorrectly claim that Plaintiffs seek access to inspect and photograph the "secure hold area" for a full day, then argue such access would require a lengthy lockdown period to protect the health and safety of visitors and detainees. (*Id.*) Defendants' Opposition cynically claims that granting Plaintiffs access to these secure areas would cause precisely the kinds of risks Plaintiffs seek to abate, such as delays in cell maintenance and food services. (*See, e.g.*, *id.* at 12 n.2.)

However, any short-term burden caused by Plaintiffs' limited requests is greatly outweighed by the potential for injunctive relief from these otherwise common conditions. And, while Plaintiffs do seek permission to physically access some parts of these secure hold areas, Plaintiffs do not seek to occupy those secure areas for an entire day. Plaintiffs' Motion additionally seeks access to areas and documents that Defendants do not contend will pose any significant burden, such as supply storage areas, food preparation and delivery areas, waste facilities, and laundry facilities, and access to review and reproduce records documenting conditions within the facilities. (*See* Mot. at 6-7.) Plaintiffs anticipate these pursuits will absorb a significant portion of the time requested. As for the secure hold areas, Defendants concede that processes are already in place to permit third-party access to visitors and maintenance crews. (Opp'n at 11, 12 n.2.) Plaintiffs' counsel are willing to work with Defendants to ensure that the requested inspections create as few disruptions as possible.

Defendants also raise privacy concerns. (*Id.* at 11-12.) Plaintiffs are, of course, willing to stipulate to entry of an appropriate protective order in this case to protect the rights and dignity of detainees and putative class members alike.

Finally, Defendants argue that expedited discovery should not be allowed before Defendants have had an opportunity to challenge the legal sufficiency of Plaintiffs' Complaint and answer its allegations. (*Id.* at 13.) Defendants fail to cite a single case or specific rule in support of this contention. Defendants further argue that Plaintiffs seek "significant departure from the Federal Rules . . . ." (*Id.* at 15.) Yet Defendants overlook Rule 26(d), which permits early discovery by court order.

CONCLUSION

Plaintiffs seek limited, expedited discovery to gather direct evidence of conditions in four Tucson Sector detention facilities. Plaintiffs intend to use this evidence in support of their imminent motion for a preliminary injunction to stop the ongoing deprivations of putative class members' basic human needs, including adequate sleep, warmth, food and water, hygienic supplies, and healthy, sanitary conditions.

Defendants have consistently taken a "no compromise, no access" stance in response to Plaintiffs' discovery requests. Rather than deny any of Plaintiffs' factual assertions, Defendants attempt to cast Plaintiffs' efforts as an attempt to "substantially alter the status quo" and "seeking preliminary relief for an improper purpose." (Opp'n at 5.) It is clear that, without a court order, Defendants will continue to resist discovery while continuing to detain putative class members under inhumane conditions in violation of their constitutional rights and Defendants' own meager guidelines.

For all of the foregoing reasons, and because good cause exists, Plaintiffs request that the Court grant Plaintiffs' limited expedited discovery requests.

Dated: July 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2015, I caused a PDF version of the foregoing document to be electronically transmitted to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

Harold J. McElhinny	/s/ *Harold J. McElhinny*
(typed)	(signature)