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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ANGEL DE JESUS ZEPEDA RIVAS, BRENDA RUBI RUIZ TOVAR, LAWRENCE KURIA MWAURA, LUCIANO GONZALO MENDOZA JERONIMO, CORAIMA YARITZA SANCHEZ NUÑEZ, JAVIER ALFARO, DUNG TUAN DANG,

Petitioners-Plaintiffs,

v.

DAVID JENNINGS, Acting Director of the San Francisco Field Office of U.S. Immigration and Customs Enforcement; MATTHEW T. ALBENCE, Deputy Director and Senior Official Performing the Duties of the Director of the U.S. Immigration and Customs Enforcement; U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT; GEO GROUP, INC.; NATHAN ALLEN, Warden of Mesa Verde Detention Facility,

Respondents-Defendants.

CASE NO. 3:20-CV-02731-VC

OPPOSITION TO MOTION TO STAY IN LIGHT OF *FRAIHAT* (ECF NO. 38)

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I. INTRODUCTION

Defendants seek to stay this action, including Plaintiffs-Petitioners' motion for emergency preliminary relief, based on the preliminary injunction issued in *Faour Abdallah Fraihat, et al v. U.S. Immigration and Customs Enforcement, et al,* Case No. 5:19-cv-01546-JGB-SHK (C.D. Cal.). The Court should not grant the requested stay for any of several reasons.

First, the parties in the two cases are different. The subclasses in *Fraihat* are nationwide in scope but include only medically vulnerable people and people with disabilities, making those subclasses both broader and narrower than the putative class in this case of all ICE detainees at Mesa Verde ICE Processing Facility ("Mesa Verde") and Yuba County Jail ("Yuba").

Second, the issues in the two cases are different. *Fraihat* addresses ICE's defective policies in responding to COVID-19 nationwide and requires implementation of new policies but *does not require either social distancing or release*. In *Fraihat*, "[t]he class's interest is not in release" and it "do[es] not seek any individualized determination by this Court of whether they are entitled to release" but asks "whether ICE's systematic actions … in response to COVID-19 amount to violations of the class members' constitutional or statutory rights." (*Fraihat* ECF 132, Order at 26 n.22, 27.) By contrast, this action challenges ICE's failure to allow for social distancing at two specific facilities and specifically seeks immediate release of class members to enable the necessary social distancing. This remedy is in harmony with, but distinct from, *Fraihat*'s precatory language instructing ICE to *consider* the releasing detainees.

Third, even if the minimum requirements of the first-to-file rule were met, the Court should exercise its discretion to deny the stay given that the ongoing COVID-19 pandemic imperils every ICE detainee at Mesa Verde and Yuba and that *Fraihat* does not require social distancing or release of any class members from those facilities.

II. FACTUAL AND PROCEDURAL BACKGROUND

On August 19, 2019, several ICE detainees and two organizations filed *Fraihat* as a putative class action challenging conditions within ICE detention centers around the country. (*Fraihat* ECF 1, Complaint for Declaratory and Injunctive Relief.) Specifically, the *Fraihat*

complaint challenges (1) ICE's failure to monitor and oversee medical and mental health care, (2) ICE's failure to monitor and oversee segregation, and (3) ICE's failure to monitor and oversee disability-related practices. The *Fraihat* complaint claims these practices violate the Due Process Clause of the Fifth Amendment and the Rehabilitation Act.

On March 24, 2020, the *Fraihat* plaintiffs filed emergency motions for a preliminary injunction and certification of a nationwide subclasses based on the threat COVID-19 posed to putative class members. (*Fraihat* ECF 81, 83.) The *Fraihat* plaintiffs sought an order requiring ICE*, inter alia*, to identify "all people in ICE custody with one or more [COVID-19] Risk Factors," assess precautions that should be implemented to ensure the health and safety of such persons during the COVID-19 pandemic, "release individuals with one or more Risk Factors," and modify its existing COVID-19 protocols. (*Fraihat* ECF 81.) The *Fraihat* plaintiffs sought provisional certification of two subclasses of people in ICE custody: (1) people who have a Risk Factor placing them at heightened risk from COVID-19 and (2) people whose disabilities place them at heightened risk from COVID-19. The *Fraihat* defendants filed an opposition to these motions and the plaintiffs filed reply briefs.

On April 20, 2020, Judge Bernal in the Central District of California issued an order granting the *Fraihat* plaintiffs' motion to certify subclasses and motion for a preliminary injunction. Judge Bernal certified the risk factor and disability subclasses. (*Fraihat* ECF 132, Order at 21-22). Judge Bernal then "narrowly tailored" the preliminary injunction order to address "[t]he most systemic [ICE] deficiencies," which he described as:

> (1) lack of any requirement, to the Court's knowledge, that Field Offices make individualized custody determinations for at risk detainees, as opposed to a mere request that they do so; (2) discrepancy between the risk factors identified in the Subclass definition and the risk factors triggering individualized custody determinations under the Docket Review Guidance; (3) lack of a performance standard for the safe detention of at risk detainees pending custody decisions, or in the event ICE deems detainees ineligible for release; (4) inconstant adherence to ICE detention standards pertinent to COVID-19.

(*Fraihat* Order at 37.) Judge Bernal also ordered as follows:

- Defendants shall provide ICE Field Office Directors with the Risk Factors identified in the Subclass definition;

- Defendants shall identify and track all ICE detainees with Risk Factors. Most should be identified within ten days of this Order or within five days of their detention, whichever is later;
- Defendants shall make timely custody determinations for detainees with Risk Factors, per the latest Docket Review Guidance. In making their determinations, Defendants should consider the willingness of detainees with Risk Factors to be released, and offer information on post-release planning, which Plaintiffs may assist in providing;
- Defendants shall provide necessary training to any staff tasked with identifying detainees with Risk Factors, or delegate that task to trained medical personnel;
- The above relief shall extend to detainees with Risk Factors regardless of whether they have submitted requests for bond or parole, have petitioned for habeas relief, have requested other relief, or have had such requests denied;
- Defendants shall promptly issue a performance standard or a supplement to their Pandemic Response Requirements ("Performance Standard") defining the minimum acceptable detention conditions for detainees with the Risk Factors, regardless of the statutory authority for their detention, to reduce their risk of COVID-19 infection pending individualized determinations or the end of the pandemic;
- Defendants shall monitor and enforce facility-wide compliance with the Pandemic

(Id. at 38-39.)

On April 20, 2020, Plaintiffs filed this action on behalf of a putative class and subclasses of immigration detainees at Mesa Verde and Yuba. Plaintiffs concurrently filed motions for provisional class certification and for a temporary restraining order. Plaintiffs' motions seek the release of putative class members because the lack of social distancing at the facilities will not adequately protect the class members.

On April 25, 2020, Defendants filed a motion to stay this action in light of *Fraihat*. (ECF 38.)

III. STANDARD FOR A STAY UNDER THE FIRST-TO-FILE RULE

The burden is on the moving party to show that a stay is appropriate. *See Clinton v. Jones*, 520 U.S. 681, 708 (1997). "The first-to-file rule may be applied when a complaint involving the same parties and issues has already been filed in another district." *Kohn Law Grp., Inc. v. Auto Parts Mfg. Mississippi, Inc.*, 787 F.3d 1237, 1240 (9th Cir. 2015) (quotations omitted). Courts analyze three factors in determining whether the rule may be applied: (1)

chronology of the lawsuits, (2) similarity of the parties, and (3) similarity of the issues. *Id*. In a class action, “the classes, and not the class representatives, are compared.” *Adoma v. University of Phoenix*, 711 F.Supp.2d 1142, 1147 (E.D. Cal. 2010).

Where the first-to-file rule does apply, “it is discretionary.” *Alltrade Inc. v. Uniweld Products, Inc*., 946 F.2d 622, 628 (9th Cir. 1991). Accordingly, district court judges may “dispense with the first-filed principle for reasons of equity.” *Id*.

IV. ARGUMENT

A. The First-to-File Rule Does Not Apply Because the Parties and Issues are not Substantially Similar

1. The Parties are Different

The classes at issue in *Fraihat* and in this action are not substantially similar. In a class action, “the classes, and not the class representatives, are compared.” *Adoma,* 711 F.Supp.2d at 1147. The two *Fraihat* subclasses include *only* ICE detainees with articulated risk factors or disabilities. *Fraihat* Order at 21-22. By contrast, the proposed class here includes *all* Mesa Verde and Yuba detainees in ICE custody. Defendants fail to explain how the parties are substantially similar given that the defining characteristics of *Fraihat* subclass members (particular COVID-19 risk factors and disability) are absent in many—if not most—of the putative class members in this action. *See, e.g.,* Decl. Luciano Mendoza Jeronimo, ECF 6-4, at ¶ 7 (“I currently have no medical conditions. . . .”).

Though there may be some crossover between the classes, Defendants have come forward with no information suggesting that the class members in *Fraihat* and this case are substantially identical. Defendants have access to detainees’ medical records and are uniquely positioned to assert whether all plaintiffs here fall within the *Fraihat* class. *See* Bonnar, ECF 37-1 at ¶¶12-14; Kaiser, ECF 37-3, at ¶¶10-12. Defendants are also required to identify serious mental health issues that may constitute disabilities. *See Franco-Gonzalez v. Holder*, Case No.

10-cv-02211 DMG, 2014 WL 5475097, *1 (C.D. Cal., Oct. 29, 2014) (requiring the Department of Homeland Security to screen all detainees in California for "a serious mental disorder or defect that may render them incompetent to represent themselves in immigration proceedings"). Defendants accordingly fail to show that the parties in the two cases are sufficiently similar.

2. The Issues are Different

The issues in the two cases are not substantially similar. While both cases broadly implicate the Constitution's Due Process Clause and the COVID-19 pandemic, as in other instances where courts have declined to apply the first-to-file rule, "the two cases … require[] resolution of differing legal issues." *Lovell v. United Airlines*, 728 F.Supp.2d 1096, 1108 (D. Haw. 2010) (citing *Cedars–Sinai Medical Center v. Shalala*, 125 F.3d 765 (9th Cir.1997). In this action, the Court must resolve whether due process prohibits the detention of ICE detainees at Mesa Verde and Yuba in conditions that make social distancing impossible. *See* Complaint at pp. 32-34. The *Fraihat* court, by contrast, addressed "Defendants' system-wide response" and "nationwide measures … in response to COVID-19 to protect the health of vulnerable immigration detainees" nationwide. *Fraihat* Order at 23. Thus, the questions going to the plaintiffs' likelihood of success in each case are distinct.

The questions concerning remedy are also distinct. In this case, Plaintiffs and the putative class seek release from unsafe conditions that do not allow social distancing. *See* Complaint, ECF 1 at pp. 32-34. But in *Fraihat*, "[t]he class's interest is not in release," *Fraihat* Order at 26 n.22, and "Plaintiffs do not seek any individualized determination by this Court of whether they are entitled to release" but "ask the Court to determine whether ICE's systematic actions, or failures to act, in response to COVID-19 amount to violations of the class members' constitutional or statutory rights," *id*. at 27.

Fraihat did not order anyone released, nor did it contemplate such a remedy. Instead it requires ICE to make "timely custody determinations for detainees with Risk Factors." *Fraihat* Order at 38. Defendants are simply wrong in asserting that the *Fraihat* relief "encompasses

further reduction of the MVDF and Yuba populations to allow for greater social distancing and that also requires implementation of additional precautions to protect all detainees from COVID-19." (Opp. at 11.)

J.P. v. Sessions, Case No. 18-06081 JAK, 2019 WL 6723686 (C.D. Cal. Nov. 5, 2019) illustrates why the claims here not substantially similar. In *J.P.*, the denied the government's motion to dismiss under the first-to-file rule, certified a provisional class and granted injunctive relief in a class action challenging the government's family separation policies. The court ruled that "the application of the first-to-file rule … would not sufficiently serve the requisite interests of efficiency and economy at are the basis for the rule," even though the class raised similar issues and was comprised of the same members as a prior class already certified in the Southern District of California (the "*Ms. L* case"). *Id.* at *13. The Southern District had already certified a nearly identical class in *Ms. L*—namely, "all adult parents who are, or will be, detained in immigration custody, and whose minor children have been, or will be, separated from them pursuant to the family separation policy." *Id.* at * 12. The Central District found the two suits to be generally "similar," the classes to be virtually identical, and *some* of the relief sought to be identical. But the court found "the 'central questions' presented by the two cases are distinct": in *Ms. L* the main issue was "whether the family separation process violated the Constitution," while in *J.P.* the main issue was "whether Defendants' alleged failure to provide sufficient mental health and trauma services to individuals separated pursuant to the [family separation] policy violates the Constitution." *Id.* at *12. Thus, "a successful defense in one action may not determine the outcome of the other," *id.*, and the first-to-file rule should not apply. The Court should reach a similar conclusion here given that this case and *Fraihat* concern distinct "central questions" and distinct remedies.

Defendants' authority on class actions is materially distinguishable given that the claims in *Fraihat* and the claims here turn on distinct facts. *See Henry v. Home Depot*, No. 14-CV-04858-JST, 2016 WL 4538365, at *4 (N.D. Cal. Aug. 31, 2016) ("Henry and Bell now present the exact same legal issue: whether Home Depot's midnight clock-out policy deprived its

employees of overtime wages in violation of California law."); *Clardy v. Pinnacle Foods*, Case No. 16-CV-04385-JST, 2017 WL 57310, at *3 (N.D. Cal. Jan. 5, 2017) ("[B]oth actions allege that Defendant misrepresented the ingredients contained in the products at issue by labeling the boxes they are sold in with either 'Real Ingredients' or 'Nothing Artificial,' even though Defendant knew that artificial and/or unnatural ingredients were used."); *Bodley v. Whirlpool Corp.*, Case No. 17-CV-05436-JST, 2018 WL 2357640, *3 (N.D. Cal. May 24, 2018) ("[T]he cases are clearly based on an identical core of factual allegations."). In contrast to these cases, the facts underlying the claims in *Fraihat* and the facts underlying Plaintiffs' claims are distinct. *Fraihat* turned on ICE's nationwide policies (*see, e.g., Fraihat* Order at 23 (the "shared factual question is therefore what, if any, nationwide measures ICE has taken in response to COVID-19") while Plaintiffs' claims turn on the actual congregate environments at Mesa Verde and Yuba. Defendants have not shown that the issues in the two cases are substantially similar.

B. Even if the First-to-File Rule Applies, the Court Should Not Stay this Action Given the Urgent Need to Create Social Distancing at Mesa Verde and Yuba

The Court has discretion to decline to stay this case, even if it finds that Defendants have carried their burden of showing the first-to-file rule applies. As Plaintiffs explain in great detail in their other filings, there is a need to swiftly address the unconstitutional risks at Mesa Verde and Yuba through judicially mandated social distancing. *Fraihat* will not address this unique and urgent need. Notably, the *Fraihat* plaintiffs sought to incorporate social distancing into its remedy. (*Fraihat* ECF 81 at 3 (seeking an order that would "assur[e] that all [ICE detainees with articulated risk factors] have timely access to … social distancing measures")). But the order in *Fraihat* does not require social distancing at either of the facilities that are at issue in this action. Moreover, *Fraihat*'s relief only applies to ICE detainees with articulated risk factors and disabilities and does not address the significant risks COVID-19 poses to other ICE detainees.

For similar reasons, there is no "efficiency rationale" to the stay Defendants' request. *See Henry*, 2016 WL 4538365, at *4 (noting "efficiency rationale of the first-to-file rule by conserving judicial resources and preventing duplicative litigation"). If this Court stays

Plaintiffs' motions, judges in the Northern District of California will continue to have to address the lack of social distancing at Mesa Verde and Yuba and requests for release in a piecemeal fashion in individual actions. *See Pride v. Correa*, 719 F.3d 1130, 1137 (9th Cir. 2013) (holding that an individual inmate's claim for injunctive relief for individual medical care was not precluded by class action which sought systemic reform relating to same general subject matter); *Parsons v. Ryan*, 754 F.3d 657, 677–78 (9th Cir. 2014) (same). Accordingly, even assuming the first-to-file requirements were satisfied, a stay would be inappropriate given the equities presented by the unique circumstances of this case.

V. CONCLUSION

Defendants' motion for a stay should be denied, because they fail to satisfy two of the requirements under the first-to-file rule and in any event because the equities require an urgent and effective remedy for Mesa Verde and Yuba detainees.

Dated: April 27, 2020

Respectfully submitted,

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