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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER, et al.,

Plaintiffs,

v.

EDMUND G. BROWN, JR., et al.,

Defendants.

No. C 09-5796 CW

ORDER DENYING
MOTION FOR
PRELIMINARY
INJUNCTION (Docket
No. 157)

Plaintiffs, ten inmates at Pelican Bay State Prison, move for a preliminary injunction. Defendants, the Governor of the State of California, the Secretary of the California Department of Corrections and Rehabilitation (CDCR), the Chief of CDCR's Office of Correctional Safety, and the Warden of Pelican Bay State Prison, oppose the motion. The Court took the matter under submission on the papers and now denies the motion.

BACKGROUND

In December 2009, Plaintiffs Todd Ashker and Danny Troxell filed this action challenging the conditions of confinement in Pelican Bay's Secure Housing Unit (SHU), where they both live. Docket No. 1, Compl. ¶¶ 16-18. Their pro se complaint charged various CDCR officials with violating their First, Fifth, Eighth, and Fourteenth Amendment rights. Id. ¶ 8.

On September 10, 2012, after securing counsel, Ashker and Troxell filed a second amended complaint (2AC) that added eight of their fellow SHU inmates as Plaintiffs and converted this suit into a putative class action. Docket No. 136, 2AC ¶ 1. In their

1 2AC, they assert claims under the Eighth and Fourteenth Amendments
2 and seek declaratory and injunctive relief. Id. ¶¶ 177-202.

3 Four days before Plaintiffs filed the 2AC, Plaintiff Ashker
4 was transferred to a new cell within the SHU. Declaration of Todd
5 Ashker ¶ 21. The new cell is located in a different pod from his
6 previous cell. Ashker asserts that the cell's location prevents
7 him from communicating with his co-Plaintiffs in this litigation,
8 all of whom are housed in his old pod. Id. ¶¶ 8-12. Of
9 particular note, he asserts that his transfer makes it impossible
10 for him to communicate with Troxell, who had previously served as
11 Ashker's writing assistant by helping him draft letters and pro se
12 legal documents.¹ Ashker, who suffers from a physical disability
13 that prevents him from writing for long periods of time, contends
14 that his separation from Troxell has made it "much more painful
15 for [him] to write to [his] attorneys as well as others with whom
16 [he has] corresponded for many years." Id. ¶¶ 6-12; Declaration
17 of Danny Troxell ¶¶ 3, 7.

18 Ashker now alleges that Defendants ordered his transfer in
19 retaliation for his litigation and other advocacy activities. He
20 asserts that the move undermines his ability to participate in
21 this suit by hindering his ability to discuss litigation strategy
22 with his co-Plaintiffs and communicate with his attorneys. Id.
23 ¶¶ 30-31; Troxell Decl. ¶ 8; Declaration of Jules Lobel ¶¶ 6-7.
24 He seeks a preliminary injunction directing Defendants to return
25 him to his old cell and prohibiting them from transferring him

26
27 ¹ According to Ashker, guards permitted him and Troxell to exchange
28 certain writing materials between their adjacent cells, pursuant to an
"informal understanding" between Ashker and CDCR officials. Ashker
Decl. ¶¶ 7, 10, Ex. C.

1 again during the pendency of this litigation. Docket No. 157,
2 Mot. Prelim. Inj. 1.

3 Defendants oppose Ashker's request and contend that his
4 transfer was not ordered for retaliatory reasons but, rather, to
5 protect Ashker's safety. For support, they have submitted a
6 declaration from the Pelican Bay gang investigator whose
7 investigation prompted Ashker's transfer. Although much of the
8 declaration is sealed, the investigator's underlying assertion is
9 that Ashker would have been exposed to certain security risks had
10 he remained in his old cell.

11 DISCUSSION

12 A party seeking a preliminary injunction "must establish that
13 he is likely to succeed on the merits, that he is likely to suffer
14 irreparable harm in the absence of preliminary relief, that the
15 balance of equities tips in his favor, and that an injunction is
16 in the public interest." Winter v. Natural Res. Def. Council,
17 Inc., 555 U.S. 7, 20 (2008). Alternatively, "a preliminary
18 injunction could issue where the likelihood of success is such
19 that serious questions going to the merits were raised and the
20 balance of hardships tips sharply in plaintiff's favor," so long
21 as the plaintiff demonstrates irreparable harm and shows that the
22 injunction is in the public interest. Alliance for the Wild
23 Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011) (citation
24 and internal quotation and editing marks omitted).

25 Ashker has not satisfied either of these standards because he
26 has not addressed his likelihood of success on the merits of his
27 claims in this suit. Although Ashker asserts that he has
28 presented sufficient evidence to support a claim of prison

1 retaliation, Plaintiffs have not raised any such claim in their
2 2AC, which only alleges violations of the Eighth and Fourteenth
3 Amendments.

4 Other courts have denied preliminary injunctive relief in
5 situations like this. In Devose v. Herrington, for example, the
6 Eighth Circuit denied a prisoner's motion for a preliminary
7 injunction where the motion was "based on new assertions of
8 mistreatment that are entirely different from the claim raised and
9 the relief requested in his [complaint]." 42 F.3d 470, 471 (8th
10 Cir. 1994) (per curiam). The Devose plaintiff, whose underlying
11 Eighth Amendment suit challenged the adequacy of his medical
12 treatment, alleged that prison officials had issued disciplinary
13 sanctions against him in retaliation for filing the suit against
14 them. Id. The court held, "Although these new assertions might
15 support additional claims against the same prison officials, they
16 cannot provide the basis for a preliminary injunction in this
17 lawsuit." Id.

18 The same principle governs here. If the Court were to grant
19 Ashker's motion, it would provide him with relief beyond that
20 which he would receive if Plaintiffs prevailed in this lawsuit.
21 This approach is disfavored. See, e.g., Tatum v. Puget, 2011 U.S.
22 Dist. LEXIS 71576, at *3 (N.D. Cal.) ("[A] preliminary injunction
23 may be granted only when the 'intermediate relief [is] of the same
24 character as that which may be granted finally.'" (citing De
25 Beers Consol. Mines v. United States, 325 U.S. 212, 220 (1945)).

26 Ashker contends that, even if he cannot meet the traditional
27 requirements for preliminary injunctive relief, the Court should
28 nevertheless invoke its authority under the All Writs Act, 28

1 U.S.C. § 1651, and order Defendants to return him to his old cell.
2 The Court will not do so. Ashker's evidence does not indicate
3 that his transfer was motivated by retaliatory animus and does not
4 rebut Defendants' non-retaliatory justification for the
5 transfer -- namely, prisoner safety. See Silva v. Di Vittorio,
6 658 F.3d 1090, 1104 (9th Cir. 2011) (requiring plaintiffs in a
7 prison retaliation action to show that the prison officials'
8 allegedly retaliatory conduct "did not reasonably advance a
9 legitimate correctional goal"). While Ashker asserts that he was
10 transferred because he "initiated the pro se lawsuit that resulted
11 in the amended class action complaint filed in this Court," Ashker
12 Decl. ¶ 16, his transfer was actually ordered before Plaintiffs
13 filed the amended complaint.² This sequence of events undermines
14 Ashker's retaliation claim and supports the Court's decision not
15 to grant the relief he seeks here.

16 CONCLUSION

17 For the reasons set forth above, Ashker's motion for a
18 preliminary injunction (Docket No. 157) is DENIED.

19 IT IS SO ORDERED.

20
21 Dated: 4/18/2013

22 
23 _____
24 CLAUDIA WILKEN
25 United States District Judge

26
27 _____
28 ² As noted above, Ashker was transferred on September 6, 2012. The Court did not grant Plaintiffs leave to file an amended complaint until September 10, 2012. See Docket No. 135, Order Granting Motion for Leave to File Second Amended Complaint.