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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSUE CASTAÑEDA JUAREZ, *et al.*,

Petitioner-Plaintiffs,

v.

NATHALIE ASHER, *et al.*,

Respondent-Defendants.

Case No. C20-700-JLR-MLP

ORDER

I. INTRODUCTION

This matter is before the Court on Respondent-Defendants Nathalie Asher, Matthew Albence, and U.S. Immigration and Customs Enforcement’s (“ICE”) (collectively, “Respondents”) return memorandum and motion to dismiss. (Mot. (Dkt. # 102).) Petitioner-Plaintiffs Josue Castañeda Juarez, J.A.M., Wilfredo Favela Avendaño, and Naeem Sohail Khan (collectively, “Petitioners”) oppose dismissal and request the opportunity to conduct discovery (Resp. (dkt. # 108)) and Respondents filed a reply (Reply (dkt. # 112)). Petitioners also filed a notice of supplemental authority. (Dkt. # 120.) Having considered the parties’ submissions, the balance of the record, and the applicable law, the Court ORDERS Respondents’ motion be

1 STRICKEN and the parties are directed to submit limited discovery requests to the court for
2 consideration.

3 **II.BACKGROUND**

4 **A. Procedural History**

5 Petitioners are individuals either currently or previously held in civil detention by ICE at
6 the Northwest ICE Processing Center (“NWIPC”) in Tacoma, Washington.¹ (*See* Compl. (Dkt. #
7 1) ¶¶ 11-14.) On May 8, 2020, Petitioners filed their petition and complaint (hereinafter
8 “petition”), seeking a writ of habeas corpus and injunctive and declaratory relief against
9 Respondents. (*Id.*) Petitioners represent that they are “vulnerable to serious medical
10 complications from COVID-19 and are at risk of serious illness and death so long as they are
11 held in detention” due to their medical conditions (*Id.* at ¶ 95.)

12 On May 11, 2020, Petitioners filed both a motion for a temporary restraining order
13 seeking immediate release from detention as they await adjudication of their immigration cases
14 and a motion for class certification. (Dkt. ## 22, 21.) Petitioners argued that because
15 Respondents cannot remedy the grave risk of harm that they, and others similarly situated, face
16 from COVID-19, their continued detention at the NWIPC violates their Fifth Amendment rights.
17 (Dkt. # 22 at 14.) After hearing oral argument, the court ordered Respondents to show cause
18 explaining why ICE, in consultation with its contractor the GEO Group (“GEO”), could not
19 immediately (a) begin testing detainees at NWIPC on a voluntary basis; and (b) implement a
20 plan for those that refuse testing. (*See* 5/28/2020 Order (Dkt. # 78) at 7.) In response,
21 Respondents filed a declaration from Stephen Langford, the NWIPC facility administrator,
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23 ¹ Petitioners concede that Petitioner Castaneda-Juarez’s claims are moot. (Resp. at 25.) The parties
dispute whether Petitioner J.A.M’s claims are moot based on his release.

1 stating that ICE implemented the “COVID-19 Collection and Testing Operational Plan” to begin
2 comprehensive testing of the 563 detainees that were housed at the NWIPC at that time. (2d
3 Langford Decl. (Dkt. # 82).) Respondents also filed a memorandum outlining the procedures
4 under this plan for testing all detainees who consented to a test and setting forth protocols in the
5 event that a detainee refused testing. (2d Lippard Decl. (Dkt. # 80), Ex. A.) After considering
6 Respondents’ submissions, the Honorable James L. Robart ordered Respondents to inform the
7 court within at least 24 hours after learning that an individual physically present at the NWIPC
8 tests positive for, or is diagnosed with, COVID-19. (6/4/2020 Order (Dkt. # 83).)

9 On June 12, 2020, Judge Robart denied Petitioners’ motion for a temporary restraining
10 order, finding Petitioners were unlikely to succeed on their claim that Respondents violated their
11 Fifth Amendment right to reasonable safety at the NWIPC. (Dkt. # 91 at 14-15.) Judge Robart
12 also found Petitioners failed to make a clear showing that their continued detention was not
13 reasonably related or excessive to a legitimate government interest, and that Petitioners failed to
14 show a likelihood of irreparable harm. (*Id.* at 16-17.)

15 On September 25, 2020, Judge Robart denied Petitioners’ motion for class certification,
16 finding Petitioners failed to satisfy the requirements of Rule 23(b)(2) for an indivisible, uniform
17 remedy that would provide relief to the proposed class due to the case-by-case considerations
18 needed to determine whether release is appropriate for each individual. (Dkt. # 121.)

19 On July 16, 2020, Respondents filed the instant return memorandum and motion to
20 dismiss. (Mot.) Respondents also filed a number of notices regarding COVID-19 positive test
21 results in response to Judge Robart’s June 4, 2020 Order. (1st COVID-19 Not. (Dkt. # 87)); (2nd
22 COVID-19 Not. (Dkt. # 92)); (3rd COVID-19 Not. (Dkt. # 96)); (4th COVID-19 Not. (Dkt. #
23 99)); (5th COVID-19 Not. (Dkt. # 100)); (6th COVID-19 Not. (Dkt. # 101)); (7th COVID-19

1 Not. (Dkt. # 114)); (8th COVID-19 Not. (Dkt. # 115)); (9th COVID-19 Not. (Dkt. # 116)); (10th
2 COVID-19 Not. (Dkt. # 118)); (11th COVID-19 Not. (Dkt. # 119)); (12th COVID-19 Not. (Dkt.
3 # 122); (13th COVID-19 Not. (Dkt. # 123).)

4 **B. Respondents' Motion**

5 The primary disputes between the parties in this matter are whether the claims by
6 Petitioner J.A.M., who has been released from the NWIPC, are moot, and whether the conditions
7 at the NWIPC violate Petitioners' Fifth Amendment² substantive due process rights to (1)
8 reasonably safe conditions of confinement and (2) conditions that do not amount to punishment.
9 Specifically, Petitioners' petition and complaint for relief asserts they are at a higher risk of
10 complications from COVID-19 due to age and/or their medical history, and that the conditions of
11 confinement at NWIPC make it impossible for Respondents to protect vulnerable individuals
12 from risk of contracting COVID-19. (Compl. at ¶¶ 4-5.)

13 Respondents' motion argues Petitioners have failed to state a claim for a current Fifth
14 Amendment violation because the petition alleges conditions at NWIPC from May 2020. (Reply
15 at 5.) Respondents assert that since that time, NWIPC has changed its protocols in response to
16 the evolving pandemic and therefore Petitioners' allegations are outdated and no longer support a
17 reasonable inference of a constitutional violation. (*Id.* at 5-7.) Respondents rely primarily on the
18 declarations of (1) Drew Bostock, the Officer in Charge with ICE Enforcement and Removal
19 Operations ("ERO") in the Seattle Field Office ("ERO Seattle") (2d Bostock Decl. (Dkt. # 63));
20 (2) Jack Lippard, the Assistant Officer in Charge with ERO Seattle (3rd Lippard Decl. (Dkt. #
21 104)); and (3) Dr. Sheri Malakhova, the Clinical Director for the ICE Health Services Corps
22 ("IHSC") (2nd Malakhova Decl. (Dkt. # 103)). These declarations provide updates to

23 ² As federal civil detainees, Petitioners are protected by the Fifth Amendment. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

1 information regarding NWIPC's COVID-19 protocols that was previously brought to the Court's
2 attention in declarations supporting Respondents' opposition to Petitioners' motion for a
3 temporary restraining order.

4 Pursuant to Rule 12(b)(6), a party may move for dismissal when the opposing party "fails
5 to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To grant a motion to
6 dismiss, the court must be able to conclude that the moving party is entitled to judgment as a
7 matter of law, even after accepting all factual allegations in the complaint as true and construing
8 them in the light most favorable to the non-moving party. *Fleming v. Pickard*, 581 F.3d 922, 925
9 (9th Cir. 2009). There must be no genuine issues of material fact in dispute. *Id.* However, to
10 survive a motion to dismiss, a plaintiff must cite facts supporting a "plausible" cause of action.
11 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

12 When ruling on a motion to dismiss, a court may consider the pleadings, documents
13 attached to the pleadings, documents incorporated by reference in the pleadings, and matters of
14 judicial notice. *U.S. v. Ritchie*, 342 F.3d 903, 907-08 (9th Cir. 2003). However, "[i]f, on a motion
15 under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by
16 the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ.
17 P. 12(d). "All parties must be given a reasonable opportunity to present all the material that is
18 pertinent to the motion." *Id.*

19 Although Respondents fashion their motion as a return memorandum and motion to
20 dismiss, the supporting declarations do not fit an exception to the general rule that a district court
21 may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.
22 However, the declarations address the core factual issues raised in Petitioners' petition regarding
23 conditions of confinement at the NWIPC, and therefore the court finds they should be

1 considered. Rather than convert Respondents' motion to dismiss to a motion for summary
2 judgment at this time, the Court strikes the motion and grants Petitioners' request to conduct
3 discovery, discussed below. Respondents' motion is stricken with leave to renew after the close
4 of discovery.

5 **C. Request for Discovery**

6 Petitioners requests the parties be given an opportunity to conduct discovery. (Resp. at
7 18-24.) Petitioners first argue that discovery is appropriate because their complaint seeks
8 injunctive relief pursuant to 28 U.S.C. § 1331. (*Id.* at 19.) Petitioners assert they have attempted
9 to engage in a Rule 26(f) conference to discuss discovery, but that Respondents assert discovery
10 is not appropriate because this action is a habeas petition which does not require discovery as a
11 right. (Dkt. # 110-1.) Petitioners also argue that even under the applicable habeas rules, they
12 have shown good cause for permitting discovery. (Resp. at 19-24.) Specifically, they argue that
13 because there are disputed facts regarding the current conditions of confinement, document
14 discovery and an expert inspection of NWIPC, either in person or via video, is warranted. (Resp.
15 at 23.)

16 Although Petitioners seek civil injunctive relief in addition to habeas relief, this action is
17 primarily a habeas matter as Petitioners seek release from their current confinement based on
18 alleged constitutional violations. Parties in a habeas proceeding are not entitled to discovery as a
19 matter of course. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). However, Rule 6 of the Rules
20 Governing Section 2254 Cases in the United States District Courts ("Rule 6") provides that "[a]
21 judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of
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1 Civil Procedure and may limit the extent of discovery.” Rule 6(a).³ Good cause may be shown
2 “where specific allegations before the court show reason to believe that the petitioner may, if the
3 facts are fully developed, be able to demonstrate that he is ... entitled to relief.” *Bracy*, 520 U.S.
4 at 908-09 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). Absent a showing of good
5 cause, a court should deny a motion for leave to conduct discovery. *Rich v. Calderon*, 187 F.3d
6 1064, 1067-68 (9th Cir. 1999); *McDaniel v. U.S. Dist. Court*, 127 F.3d 886 (9th Cir. 1997).
7 “[C]ourts should not allow prisoners to use federal discovery for fishing expeditions to
8 investigate mere speculation.” *Calderon v. U.S. Dist. Court N.D. Cal.*, 98 F.3d 1102, 1106 (9th
9 Cir. 1996).

10 Here, Petitioners raise concerns regarding NWIPC’s ability to safely house detainees
11 during the pandemic. Petitioners allege that even though Respondents have implemented
12 COVID-19 protocols, Petitioners dispute, *inter alia*, whether Respondents are properly screening
13 and testing detainees in general population, whether they are adequately screening their own staff
14 and other individuals entering the NWIPC, and whether guards are properly wearing masks
15 around detainees. (Resp. at 16.) In support of their argument, Petitioners assert other matters in
16 this district question NWIPC’s adherence to its COVID-19 protocols. (*Id.* at 7 (citing *Almeida v.*
17 *Asher*, C20-490 (W.D. Wash. 2020), Dkt. # 29 (Declaration from detainee stating only one guard
18 in a pod wears a mask).) If NWIPC is not following its own protocols, Petitioners may be
19 entitled to relief based on their claim that the conditions of confinement do not make Petitioners
20 reasonably safe from COVID-19. Accordingly, the court finds Petitioners have established good
21 cause under habeas standards for discovery.

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23 ³ The Court applies this habeas rule to the Petitioners’ § 2241 petition. *See* Rule 1(b) of the Rules
Governing Section 2254 cases (“The district court may apply any and all of these rules to a habeas corpus
petition not covered” by 28 U.S.C. § 2254.).

1 Other developments in this matter also support allowing the parties to more fully develop
2 the facts. Respondents recently filed a notice regarding a GEO employee that tested positive for
3 COVID-19. (Dkt. # 122.) According to Respondents, the officer last worked at NWIPC on
4 Friday, September 25, 2020. (Dkt. # 122-1 at ¶ 4.) The officer did not work over the weekend
5 and called out sick on Monday, September 28, 2020. (*Id.*) The officer returned to work the
6 following day, reported he had not experienced COVID-19 symptoms in the last 24 hours during
7 his entrance screening, and was allowed entry into the facility. (*Id.* at ¶ 5.) The officer
8 subsequently informed a senior officer that he had experienced a fever and loss of taste and smell
9 on Sunday but was feeling better on Monday. (*Id.*) Respondents were later informed that the
10 officer tested positive for COVID-19. (Dkt. # 122.) This notice raises concerns about the
11 adequacy of NWIPC's screening protocols. Because there are factual questions that directly
12 relate to Petitioners' allegations regarding the NWIPC's COVID-19 protocols, and enforcement
13 of those protocols, limited discovery would aid in a fair resolution of this matter.

14 I. CONCLUSION

15 For the foregoing reasons, it is ORDERED:

16 (1) The parties are directed to submit to the court proposed discovery requests on or
17 before October 21, 2020.

18 (2) Any responses to discovery requests may be submitted to the court on or before
19 November 4, 2020.

20 (3) Respondents' motion (dkt. # 102) is STRICKEN with leave to renew after the
21 discovery deadline.

22 (4) Discovery is to be completed by February 4, 2021.

23 (5) Dispositive motions must be filed by March 4, 2021.

1 (6) The Clerk is directed to send copies of this order to the parties and to the
2 Honorable James L. Robart.

3 Dated this 7th day of October, 2020.

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5 MICHELLE L. PETERSON
6 United States Magistrate Judge
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