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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 Sandor Anival Cordova Carballo, et al.,

7 Plaintiffs,

8 v.

9 William Barr, et al.,

10 Defendants.

Case No. 2:20-cv-02196-APG-BNW

Order/R&R

11
12 Before the Court is a motion by defendants¹ to strike plaintiffs' amended complaint. ECF
13 No. 2. Plaintiffs opposed the motion, ECF No. 5, and also filed a motion to file a second
14 amended complaint, ECF No. 6. For the reasons explained below, the Court orders that the
15 motion to strike is denied as moot, recommends that the motion to amend be denied in part, and
16 orders that the motion to amend is granted in part.

17 **I. Background**

18 Plaintiffs are over two dozen persons being held in civil immigration detention at Nevada
19 Southern Detention Center ("NSDC"). ECF No. 1. Broadly speaking, plaintiffs allege in the
20 operative complaint that the conditions at NSDC place them at substantial risk of contracting and
21 falling gravely ill with COVID-19. *Id.* at 2. They therefore challenge the conditions of their
22 confinement and bring suit against NSDC's warden and assistant warden and various federal
23 officials in charge of administering and enforcing the immigration laws. *Id.*; *id.* at 18–19.

24 This matter began as a hybrid habeas and civil rights action with a different case number.
25 ECF No. 1, *Cordova Carballo v. William Barr*, Case No. 2:20-cv-01315-APG-BNW. There,
26 defendants moved to dismiss the entirety of the complaint. Ultimately, the district judge
27 dismissed plaintiffs' habeas claims for lack of jurisdiction and failure to state a viable claim for

28 ¹ The moving defendants are William Barr, Chad Wolfe, Matthew Albence, and Thomas Feeley. ECF No. 2 at 1 n.1.

1 habeas relief. ECF No. 46 at 11–12, *Cordova Carballo v. William Barr*, Case No. 2:20-cv-01315-
2 APG-BNW. The Court likewise dismissed as moot the claims by the following plaintiffs who
3 were no longer detained at NSDC: Hector Perez Alvares, Mojahamed Betiche, Bambang Budiano,
4 Sandor Anival Cordova Carballo, Jose Rodolfo Castellanos, Jose Seron Figueroa, Edgar Ramirez
5 Garcia, Eduardo Gallardo Gonzalez, Jerardo Guerrora, Sudhamma Kukulpane, Julian Martin, Israel
6 Mendoza, and Yupanqui Sanchez. *Id.* at 14. Finally, the district judge held that this matter would
7 "proceed on the civil rights claims of the remaining plaintiffs" and authorized plaintiffs to amend
8 their complaint. *Id.* at 15.

9 Plaintiffs filed their amended complaint, and defendants promptly moved to strike it
10 because it supposedly failed to conform to the district judge's order. ECF Nos. 51 at 52, *Cordova*
11 *Carballo v. William Barr*, Case No. 2:20-cv-01315-APG-BNW. Because this matter no longer
12 had a habeas component, the district judge directed the clerk of court to administratively close the
13 hybrid habeas matter, open the underlying case as a civil rights action in all respects, and detach
14 and separately docket plaintiffs' amended complaint and defendants' motion to strike in the new
15 case. ECF No. 60, *Cordova Carballo v. William Barr*, Case No. 2:20-cv-01315-APG-BNW.

16 The Clerk of Court did so. ECF Nos. 1 and 2. Plaintiffs have since opposed defendants'
17 motion to strike and, in tandem, filed a motion to file a second amended complaint ("SAC"). ECF
18 Nos. 5 and 6. Defendants, in turn, opposed plaintiffs' motion. ECF No. 10.

19 **II. Legal Standards**

20 **a. Amendment under Rule 15**

21 Generally, a party may amend its pleading once "as a matter of course" within twenty-one
22 days of serving it, or within twenty-one days after service of a responsive pleading or motion
23 under Rule 12(b), (e), or (f). Fed. R. Civ. P. 15(a)(1). Otherwise, "a party may amend its pleading
24 only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).
25 "The court should freely give leave when justice so requires." *Id.*

26 "The court considers five factors [under Rule 15] in assessing the propriety of leave to
27 amend": (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of
28 amendment, and (5) whether the plaintiff has previously amended the complaint." *United States*

1 v. *Corinthian Colls.*, 655 F.3d 984, 995 (9th Cir. 2011). The Court need not consider all of these
2 factors in each case. *Wizards of the Coast LLC v. Cryptozoic Entertainment LLC*, 309 F.R.D. 645,
3 649 (W.D. Wash. 2015). But prejudice to the opposing party is the touchstone of the inquiry, and
4 undue delay is "by itself insufficient to justify denying leave to amend." *Id.* (citing *Eminence*
5 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003); *Bowles v. Reade*, 198 F.3d
6 752, 758 (9th Cir. 1999)).

7 "The standard for granting leave to amend is generous." *Corinthian Colls.*, 655 F.3d at
8 995. And "the nonmovant bears the burden of showing why amendment should not be granted."
9 *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661, 666 (Fed. Cir. 1986); *see also DCD Programs, Ltd. v.*
10 *Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) ("party opposing amendment bears the burden of
11 showing prejudice"); *United States for use & benefit of Source Helicopters, Div. of Rogers*
12 *Helicopters, Inc. v. Sayers Constr., LLC*, 2020 WL 3643431, at *1 (D. Nev. July 6, 2020) ("The
13 party opposing amendment holds the burden to demonstrate futility."); *Akinola v. Severns*, 2015
14 WL 456535, at *2 (D. Nev. Feb. 2, 2015) ("party opposing the amendment carries the burden of
15 showing why leave to amend should not be granted.").

16 **b. Striking pleadings**

17 Rule 12 authorizes the Court to "strike from a pleading an insufficient defense or any
18 redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Pleadings have
19 limited importance in federal practice, so motions to strike are generally disfavored. *Cortina v.*
20 *Goya Foods, Inc.*, 94 F. Supp. 3d 1174, 1182 (S.D. Cal. 2015) (citation omitted). In determining
21 whether to strike material under Rule 12, the Court views the targeted pleading in light most
22 favorable to the pleader. *Grano v. Sodexo Mgmt., Inc.*, 2020 WL 7074905, at *7 (S.D. Cal. Dec.
23 3, 2020).

24 The Local Rules similarly authorize the Court to strike any document that does not
25 conform to an applicable Federal Rule of Civil Procedure. LR IA 10-1(d).

III. Analysis

a. Motion to strike

Defendants' motion to strike focuses on how the amendments in the complaint at ECF No. 1 are broader than what the district judge authorized in his order dismissing the hybrid habeas matter. ECF No. 2 at 2. Defendants claim that at this stage of the litigation, Rule 15 authorizes amendment only with consent of the parties or leave of the court. *Id.* at 3. Thus, according to defendants, any amendments not authorized by the Court violate Rule 15 and should therefore be struck. *Id.*

True, the district judge's order did not expressly authorize plaintiffs to add new claims, previously dismissed plaintiffs, or new defendants. However, in response to defendants' motion to strike, plaintiffs filed a motion to amend their complaint. It does not appear that the district judge's order restricted plaintiffs from seeking further leave to amend under Rule 15. The Court will therefore analyze the propriety of amendment under Rule 15.

An amended complaint supersedes all previous complaints. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012). So, to the extent plaintiffs are entitled to file an amended complaint, the defendants' motion to strike would be moot unless the proposed amendment would violate a directive from the district judge's order permitting amendment. The Court finds that the proposed amendment does not violate a directive by the district judge, and plaintiffs are entitled to Rule 15 relief.² Therefore, defendants' motion to strike will be denied as moot.

b. Motion to amend

Defendants raise several arguments in response to plaintiffs' motion to amend, but they do not cite to Rule 15 or articulate its governing legal standard. As such, defendants do not address bad faith, undue delay, prior amendment, or—the "touchstone" of the Rule 15 analysis—how

² To be sure, the district judge did dismiss certain plaintiffs' claims as moot because they were no longer incarcerated at NSDC, and those plaintiffs are again named in the proposed amended complaint. *See* ECF No. 46 at 14, *Cordova Carballo v. William Barr*, Case No. 2:20-cv-01315-APG-BNW. However, the moot claims were "for injunctive or declaratory relief regarding the conditions at NSDC." *Id.* Now, the returning plaintiffs appear to seek monetary damages for some of their claims, rather than injunctive relief. ECF No. 6-1 at 41–43; ECF No. 5 at 5 ("the Court dismissed the complaint as to the plaintiffs that had been transferred . . . [but] the [plaintiffs] have valid civil rights claims . . . for the time that they were incarcerated"). Defendants have not shown that the district judge's logic applies to the returning plaintiffs' claims for money damages. This does not mean, however, that the returning plaintiffs' money damages claims would necessarily survive a Rule 12 challenge.

1 defendants would be prejudiced by the proposed amendment. As stated, the burden is on
2 defendants to show why amendment should be denied. Therefore, the Court will construe these
3 factors against defendants and in favor of amendment. The Court turns now to the futility factor.

4 Rule 15 does not permit amendment where amendment would be futile. *Pullano v.*
5 *NaphCare*, 2014 WL 4704587, at *5 (D. Nev. Sept. 23, 2014). An amendment is futile if the
6 amended pleading could not withstand a Rule 12 challenge or if it is noncompliant with Rule 20's
7 party-joinder rule. *Dorfman v. Mass. Casualty Ins. Co.*, 2015 WL 7312413, at *3 (C.D. Cal. Nov.
8 19, 2015) (citing *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998)); *Palmer v.*
9 *Cognizant Tech. Solutions Corp.*, 2021 WL 363235, at *3 (C.D. Cal. Jan. 7, 2021) (citing *Wolf v.*
10 *C.I.A.*, 569 F. Supp. 2d 1, 11 (D.D.C. 2008)).

11 **A. Plaintiff Yassine Fadi**

12 The defendants' first argument appears to rely on Rule 20's party-joinder rules.
13 Defendants assert that it is not "appropriate" for plaintiffs to add plaintiff Yassine Fadi. ECF No.
14 9 at 2. Defendants argue that Fadi's claims are materially different from those of the other
15 plaintiffs because the allegations specific to him pertain to religious diet and retaliation, rather
16 than COVID-19 risk factors, symptoms, or social distancing. *Id.*

17 Persons may join in one action as plaintiffs if (1) "they assert any right to relief jointly,
18 severally, or in the alternative with respect to or arising out of the same transaction, occurrence,
19 or series of transactions or occurrences"; and (2) "any question of law or fact common to all
20 plaintiffs will arise in the action." Fed. R. Civ. P. 20(a)(1). Under the first prong, the "same
21 transaction" requirement "refers to similarity in the factual background of a claim." *Coughlin v.*
22 *Rogers*, 130 F.3d 1348, 1350 (9th Cir. 1997). For the second prong, "a single question of law or
23 fact common to all the parties joined" is sufficient. *Boulton v. US Tax Lien Ass'n, LLC*, 2016 WL
24 1461772, at *6 (E.D. Cal. Apr. 14, 2016) (citing *Desert Empire Bank v. Ins. Co. of N. Am.*, 623
25 F.2d 1371, 1375 (9th Cir. 1980)). The common question need not predominate; that is a
26 requirement for class actions, not permissive joinder. *Id.*

27 Here, defendants have not met their burden to show that the amendment adding plaintiff
28 Fadi is futile under Rule 20. First, it is true that the allegations specific to Fadi focus heavily on

1 the alleged denial of Kosher meals and retaliation, but plaintiffs throughout the complaint speak
2 in one voice about how the conditions at NSDC placed them at higher risk from COVID-19. ECF
3 No. 6-1 at 2 (alleging that plaintiffs "challenge their continued detention under conditions of
4 confinement that imperil their lives"). Thus, it appears that Fadi's claims will share at least one
5 common question of fact or law.

6 To be sure, the district judge may still sever claims and parties even if they are consistent
7 with the Rule 20's joinder rules. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, at 1295 (9th Cir.
8 2000). That determination lies within the discretion of the trial court. *Boulton*, 2016 WL
9 1461772, at *6 (citation omitted). To make this determination, courts balance factors like the
10 convenience and economy of one trial; the complexity of legal theories and factual proof; and
11 potential prejudice if severance is granted. *Id.* But defendants neither articulate nor address these
12 factors, so the argument is waived for purposes of plaintiffs' motion to amend.

13 However, Fadi's claims—as set forth in the proposed amended complaint—are futile
14 because he is not named in the caption. *See* Fed. R. Civ. P. 10(a) ("The title of the complaint
15 **must** name all the parties") (emphasis added); *Rodriguez v. Hart*, 2019 WL 688210, at *5 (C.D.
16 Cal. Feb. 19, 2019) ("In any amended complaint he chooses to file, Plaintiff must list his own
17 name and the names of all the Defendants in the proper spaces in the caption or the amended
18 complaint will be subject to dismissal on that basis alone") (citing *Ferdik v. Bonzelet*, 963 F.2d
19 1258, 1260–61 (9th Cir. 1992)). Plaintiffs may move to amend their complaint to include Fadi in
20 the caption, but they must first meet and confer with defendants pursuant to LR 1-3(f) and include
21 a meet-and-confer certification. *See* LR 16-1(d) ("the court may order the parties to meet and
22 confer to discuss a discovery plan, scheduling order, briefing schedule, or any other matters the
23 court deems appropriate.").

24 **B. Brand new defendants**

25 Defendants next argue that the proposed amended complaint added brand new defendants
26 "but failed to allege what specific conduct is being alleged and as to which defendant." ECF No.
27 10 at 2. The proposed amended complaint does indeed name the following new defendants:
28 Pamela K. Lauer, Assistant Warden of NSDC; Mathew Cantrell, Acting Field Director of

1 Immigration and Customs Enforcement ("ICE"); Gabriel C. Ruiz, Supervisory Detention and
2 Deportation Office for ICE; and Tom Simic, chaplain at NSDC. The complaint clearly alleges
3 that these defendants "materially misrepresented"—to the government and general public—
4 "ICE's capacity to contain COVID-19." ECF No. 6-1 at 31. These defendants were supposedly
5 "aware of the limited capacity of the [NSDC] that there was no way to comply with the medical
6 protocols stated" by medical professionals. *Id.* Further, these same defendants allegedly failed to
7 implement "sufficient protocols to responsibly protect plaintiffs from COVID-19." *Id.* at 32.

8 In light of the above allegations, and contrary to defendants' assertion, plaintiffs have
9 alleged conduct as to the newly named defendants. To the extent defendants instead mean to
10 argue that the conduct alleged is insufficient to state a claim upon which relief can be granted,
11 that argument—set forth in a single sentence in defendants' brief and without citation to any
12 authority—is underdeveloped.

13 **C. Eighth Amendment claim in Count 2**

14 Defendants next argue that the proposed amended complaint contains a newly added
15 Eighth Amendment claim. ECF No. 9 at 2. This claim, according to defendants, is futile because
16 the defendants are civil detainees, which means that the Eighth Amendment does not apply. *Id.*
17 Plaintiffs respond that immigration detainees should receive the same level of protection as
18 pretrial detainees and that the conditions of confinement for civil detainees must be superior to
19 those of convicted and even pretrial detainees. ECF No. 15 at 6.

20 Plaintiffs' Eighth Amendment claims are futile. Plaintiffs allege in the proposed amended
21 complaint that the conditions of their confinement constitute "cruel and unusual punishment" in
22 violation of the Eighth Amendment. ECF No. 6-1 at 41. Plaintiffs, however, are civil detainees,
23 not convicted persons. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Civilly-detained
24 individuals "can assert a conditions-of-confinement claim only under the [Fifth or] Fourteenth
25 Amendment's guarantee of 'substantive due process,' not the Eighth Amendment's prohibition on
26 cruel and unusual punishment." *Mackenzie v. Hutchens*, 2013 WL 8291423, at *3 (C.D. Cal. Sept.
27 9, 2013); *Pimentel-Estrada v. Barr*, 458 F. Supp. 3d 1226, 1243 n.9 (W.D. Wash. 2020)
28 ("Petitioner is protected by the Fifth Amendment because he is a federal civil detainee.").

1 Plaintiffs recognize this conclusion in their proposed amended complaint. ECF No. 6-1 at 33
2 ("Because detained immigrants are civil detainees, their constitutional protections while in
3 custody are derived from the Fifth Amendment"). Because plaintiffs are civil detainees, the
4 Eighth Amendment does not apply. The Court, therefore, will recommend that the motion be
5 denied to the extent it asserts an Eighth Amendment claim.

6 **D. Section 1983 claim against CoreCivic's employees**

7 Defendants further argue that plaintiffs' § 1983 claims are futile against CoreCivic's
8 employees. Section 1983 "provides a remedy only for deprivation of constitutional rights by a
9 person acting under color of law of any state or territory or the District of Columbia." *Daly-*
10 *Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987). None of the defendants appear to be state
11 actors. Defendants Koehn, Lauer, and Simic all work at the NSDC, but "[t]he [NSDC] is not a
12 state prison, and its employees are not acting under color of state law." *Adams v. Koehn*, 2020
13 WL 4495268, at *1 (D. Nev. Aug. 4, 2020). Plaintiffs' § 1983 claims are therefore futile, and the
14 Court will recommend that the motion to amend be denied to this extent.

15 **E. *Bivens* claim against CoreCivic's employees**

16 Defendants argue that plaintiffs' *Bivens* claims against CoreCivic's employees are futile
17 because CoreCivic is a private company, and its employees are not federal employees. For this
18 proposition, defendants rely on authority which states that "[a]s a private company, CoreCivic
19 may not be held liable in a *Bivens* action as a matter of law." ECF No. 9 at 3. That argument
20 misses the mark. The quoted proposition addresses whether CoreCivic *itself* can be sued under
21 *Bivens*, not CoreCivic's employees. Moreover, "*Bivens* actions are not categorically prohibited
22 when the defendant is an employee of a private entity." *Bacon v. CoreCivic*, 2020 WL 3100827,
23 at *8 (D. Nev. June 10, 2020) (citing *Minneeci v. Pollard*, 565 U.S. 118, 131 (2012)). It is
24 certainly possible that *Bivens* does not extend to the specific factual context alleged in the
25 complaint. But defendants' argument does not go that far, so it is rejected.

26 **F. Tort claims in Counts 3–5**

27 Defendants assert that plaintiffs added brand new tort claims without complying with the
28 administrative requirements outlined in the Federal Torts Claim Act ("FTCA"), 28 U.S.C. §

1 1346(b). Under that subsection, the trial court has exclusive jurisdiction over civil actions "on
2 claims against the United States, for money damages, . . . for injury or loss of property, or
3 personal injury or death caused by the negligent or wrongful act or omission of any employee of
4 the government" if the United States would be liable to the claimant in accordance with the law of
5 the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1). For purposes of the FTCA,
6 a suit against a government official in their official capacity is a suit against the government.
7 *Ibrahim v. Dept. of Homeland Sec.*, 538 F.3d 1250, 1258 (9th Cir. 2008). Therefore, when
8 federal officials are sued in their official capacities, they, "like their employer, cannot be liable for
9 state-law torts unless Congress has waived the United States' sovereign immunity." *Id.* Congress
10 did so under the FTCA, but only "if a plaintiff first exhausts his administrative remedies." *Id.*
11 (citing 28 U.S.C. § 2675(a)).

12 To exhaust administrative remedies under the FTCA, the plaintiff must present a claim "to
13 the appropriate federal agency"; the claim is exhausted if the agency denies the claim in writing
14 or fails to make a final disposition within six months after it is filed. 28 U.S.C. § 2675(a). The
15 trial court lacks subject-matter jurisdiction over an FTCA claim unless it is exhausted. *Valadez-*
16 *Lopez v. Chertoff*, 656 F.3d 851, 855 (9th Cir. 2011).

17 Here, defendants target only the new tort claims. Those claims are for negligence,
18 negligent infliction of emotional distress, and intentional infliction of emotional distress. ECF No.
19 6-1 at 42–43. The claims are seemingly asserted against all defendants in their official capacities.
20 *Id.* at 18–20, 32.

21 When federal-question jurisdiction under the FTCA is lacking from the face of the
22 complaint, it is subject to dismissal under Rule 12. *Plante v. U.S.*, 2009 WL 2045692, at *2 (S.D.
23 Cal. July 8, 2009). Plaintiffs did not allege that they exhausted their administrative remedies for
24 their tort claims. Therefore, the newly added tort claims are futile as asserted against all **except**
25 the following three defendants: Brian Koehn, Pamela K. Lauer, and Tom Simic. These three
26 defendants all work at NSDC, which is "a detention facility that is privately owned by CoreCivic
27 and houses federal inmates and detainees." *Adams v. Koehn*, 2020 WL 4495268, at * 1 (D. Nev.
28 Aug. 4, 2020). The defendants' argument (set forth in a single sentence in their brief) has not

1 convinced the Court that the tort claims asserted against Koehn, Lauer, and Simic fall under the
2 FTCA.³ If the claims do not fall under the FTCA, then FTCA-exhaustion is not required.
3 Accordingly, the Court will recommend that the motion to amend be denied to the extent it asserts
4 Counts 3–5 against all defendants **except** Koehn, Lauer, and Simic.⁴

5 * * * * *

6 In sum, the Court will recommend that the motion to amend be denied to the following
7 extent: amendment to add plaintiff Yassine Fadi should be denied because amendment would be
8 futile given that he is not named in the caption; amendment as to Count 2 should be denied as
9 futile because the Eighth Amendment does not apply to plaintiffs; amendment as to the tort
10 claims in Counts 3–5 should be denied as against all but Koehn, Lauer, and Simic because
11 federal-question jurisdiction under the FTCA is lacking from the face of the proposed amended
12 complaint; amendment to assert a § 1983 claim against the CoreCivic defendants should be
13 denied as futile because those defendants are not acting under color of state law.

14 With respect to the remainder of the proposed amended complaint, defendants have not
15 carried their burden of showing that amendment would be futile. Further, and as stated above, the
16 defendants failed to address the remaining Rule 15 factors (i.e., bad faith, undue delay, prior
17 amendment, and prejudice), so these factors are construed against them. Accordingly, the motion
18 will otherwise be granted.

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23 _____
24 ³ In other words, the defendants have not convinced the Court that the claims against Koehn, Lauer, and Simic are
25 claims "against the United States" for "personal injury . . . caused by . . . any employee of the government." *See* 28
26 U.S.C. § 1346(b)(1).

27 ⁴ The Court notes that plaintiffs may, in fact, have exhausted their administrative remedies and simply omitted those
28 allegations from their complaint. If this is so, they may file a motion for further amendment, which the Court will
consider. But if plaintiffs have asserted unexhausted FTCA claims in their complaint, the claims are subject to
dismissal. *D.L. by and through Junio v. Vassilev*, 858 F.3d 1242, 1245–46 (9th Cir. 2017) (citing *McNeil v. United*
States, 508 U.S. 106 (1993)). Further, any future motion to amend must include a meet-and-confer certification
under LR 1-3(f).

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