UNITED STATES DISTRICT COURT
NORTHERN DISTRICT FLORIDA
TALLAHASSEE DIVISION

JAC'QUANN (ADMIRE) HARVARD, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No.: 4:19-cv-00212-MW-CAS
MARK S. INCH, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE TO THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE OR OCALA DIVISION, PURSUANT TO 28 U.S.C. § 1404(a)

Plaintiffs, by and through undersigned counsel and on behalf of the class they seek to represent, hereby file this Response to Defendants' Motion to Transfer Venue to the Middle District of Florida (Motion) (ECF 26). Defendants, in seeking to transfer this case away from where they reside and transact business, have fallen far short of meeting their heavy burden of demonstrating that Plaintiffs' choice of forum is clearly improper. Their arguments rest on a complete mischaracterization of Plaintiffs' claims, incorrect speculation about the witnesses who may testify in

this matter, and a disregard for relevant law. Plaintiffs respectfully request that the motion be denied.

MEMORANDUM OF LAW

I. Applying the Correct Standard and Properly Characterizing Plaintiffs' Claims, This Case Should be Litigated in the Northern District of Florida, Not in the District Where Plaintiffs Are Incarcerated

Before turning to the relevant transfer factors, Plaintiffs address Defendants' initial arguments.

First, Defendants have mischaracterized Plaintiffs' claims. Far from being limited to a series of "individual acts" affecting only these seven Plaintiffs, this class action challenges Defendants' statewide policy and practice of isolating over 10,000 people for at least 22 hours per day in cells smaller than an average parking space and depriving them of basic human needs. ECF 13 ¶¶ 2, 59, 75. They allege that this statewide policy and practice, promulgated and enforced in Tallahassee, exposes *all* persons in isolation to a substantial risk of serious harm to their mental and physical health, in violation of the Eighth Amendment. *Id.* at ¶¶ 5, 54, 75, 83. Plaintiffs further allege that Defendants, including their policymakers in Tallahassee, have known about these risks yet have failed to ameliorate them, thereby exhibiting deliberate indifference. *Id*. at ¶¶ 5, 7, 59. Finally, Plaintiffs allege that Defendants, through this same isolation policy and practice, discriminate against people with disabilities. *Id.* at ¶¶ 151-160. Thus, the basic assumption underlying

Defendants' motion—that this case centers on what happened to these individual Plaintiffs—is simply incorrect.

Second, Defendants' suggestion that claims brought by incarcerated people should, as a matter of course, be litigated in the district of their incarceration is incorrect. Defendants ask the Court to sidestep a careful case-by-case venue analysis and, instead, follow a novel standard they propose: "Prisoner Cases should be transferred to the prisoner's place of incarceration. . . ." ECF 26 at 8. The cases Defendants cite do not stand for this broad proposition.[1] Rather, they underscore the necessity of an individualized analysis of the relevant factors.

Defendants emphasize but misinterpret *Starnes v. McGuire*, 512 F.2d 918 (D.C. Cir. 1974). In *Starnes,* the plaintiff was incarcerated in Kansas but filed an individual suit in Washington, D.C., alleging that he was improperly denied parole due to conduct that occurred in Colorado and Kansas. *Id.* at 925. Although the plaintiff alleged the existence of a national policy issue, the court determined that the case was truly a challenge to his individual parole decision. *Id.* at 929. As a

[1] In fact, contrary to Defendants' contention, in both *Walker v. Grubb*, No. 3:18cv2182/MCR/EMT, 2019 WL 542113 (N.D. Fla. Jan. 10, 2019), and *Kidrowski v. Rossamano*, No. 5:19-cv-65-MCR/MJF, 2019 WL 2455262 (N.D. Fla. Mar. 19, 2019), the cases were transferred *away* from the district in which the plaintiffs were incarcerated.

result, the court held that transfer to Kansas, where the evidence and witnesses were located, was appropriate.[2] *Id.*

In its analysis, the *Starnes* court considered a hypothetical case in which people incarcerated across the nation "allege a pattern of action by the Bureau of Prisons that evidences an unwritten national policy, suggest that proof of such a pattern will be forthcoming at trial, and challenge that pattern as a denial of constitutional rights." *Id.* at 933. Under this scenario, the court concluded, "*the plaintiffs' choice of forum should be given substantial weight*." *Id.* (emphasis added). This hypothetical is a near-perfect description of the instant case. Plaintiffs, representing a class of people incarcerated at different institutions across the state, allege a statewide policy that violates the constitutional and statutory rights of people in isolation. *Starnes* does not counsel in favor of transfer—in fact, quite the opposite.

The only other support Defendants offer in this section is a litany of individual *pro se* district court cases that are drastically different from, and inapplicable to, this case. Several involved situations in which venue was not even proper in the transferor court—a situation not present here.[3] In others, all events and parties were

[2] Defendants quote *Starnes* as stating, "[A]bsent extraordinary circumstances which we need not today delineate, such actions should ordinarily be transferred as a matter of course…" ECF 26 at 8-9. But the court here was describing a *past* decision, which it then clarified by explaining that a full analysis of the transfer factors is required in all cases. *Id.* at 923, 925-926.

[3] *See Walker*, 2019 WL 542113; *Kidrowski*, 2019 WL 2455262. ECF 26 at 10.

located in the Middle District, the transferee forum,[4] unlike in the present case where Defendants reside in the Northern District and Plaintiffs' allegations arise from policy actions or inactions that occurred in Tallahassee.

For these reasons, the Court should decline to apply Defendants' proposed standard and, instead, perform a complete analysis of the relevant statutory factors. *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n.1 (11th Cir. 2005). In this case, such an analysis weighs heavily against transfer.

II. Analysis of the Transfer Factors Weighs in Plaintiffs' Favor

"The decision to transfer a case to another district is left to the sound discretion of the trial court." *Brown v. Connecticut Gen. Life Ins. Co.*, 934 F.2d 1193, 1197 (11th Cir. 1991). A District Court may transfer a civil action to any other district or division where the case may have been brought "[f]or the convenience of parties and witnesses" and "in the interest of justice." 28 U.S.C. § 1404(a). A party seeking transfer faces a high hurdle for several reasons. First, as the Eleventh Circuit has explained several times, a plaintiff's choice of forum "should not be disturbed unless it is *clearly outweighed by other considerations*." *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 260 (11th Cir. 1996) (emphasis added) (quoting *Howell v. Tanner*,

[4] *See Armington v. Atkinson*, No. 4:18CV541-MW-CJK, 2018 WL 7019057, at *1 (N.D. Fla. Dec. 11, 2018), *report and recommendation adopted*, No. 4:18CV541-MW/CJK, 2019 WL 176936 (N.D. Fla. Jan. 11, 2019); *Jemison v. Fla. State Prison*, No. 16-20034-CIV, 2016 WL 8671826, at *2 (S.D. Fla. Jan. 8, 2016). ECF 26 at 10.

650 F.2d 610, 616 (5th Cir. July 18, 1981)). Second, in moving for a transfer under 28 U.S.C. § 1404(a), "[t]he burden is on the movant to establish that the suggested forum is more convenient." *In re Ricoh Corp.*, 870 F.2d 570, 573 (11th Cir. 1989); *see also Mason v. Smithkline Beecham Clinical Laboratories*, 146 F. Supp. 2d 1355, 1359 (S.D. Fla. 2001) ("Defendants moving for transfer have a heightened burden as they must prove with particularity the inconvenience caused by the plaintiff's choice of forum."). Accordingly, to the extent the parties' allegations present conflicting inferences, the Court should construe all reasonable inferences in Plaintiffs' favor. *Robinson*, 74 F.3d at 255. The Court should evaluate the transfer factors with these principles in mind.[5] For instance, if a factor is neutral, it weighs against transfer.

As Defendants acknowledge, there are nine factors that guide the District Court's exercise of discretion: (1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the forum's familiarity with the governing law; (8) the weight afforded to plaintiff's choice of forum; and (9) trial efficiency and the interests of

[5] Further, it is undisputed that venue properly lies in this District, as all Defendants reside here. *See* 28 U.S.C. § 1391(b)(1).

justice, based on the totality of the circumstances. *Manuel*, 430 F.3d at 1135 n.1; ECF 26 at 2. An analysis of these factors weighs heavily against transfer.

A. The locus of operative facts weighs heavily against transfer.

In determining the locus of operative facts, a court must look at the site of the events from which the claims arise. *Trans Am Worldwide, LLC v. J.P. Superior Solutions, LLC*, No. 4:17cv560–MW/CAS, 2018 WL 3090394, at *9 (N.D. Fla. Apr. 30, 2018). The locus of operative facts in this case is the Northern District, Tallahassee Division, weighing heavily against a transfer.

Plaintiffs seek to represent a class of approximately 10,000 individuals isolated in unconstitutional conditions throughout the entire state of Florida. *See* ECF 13 ¶ 2. Through their statewide isolation policy and practice, Defendants confine Plaintiffs and the putative class in cells smaller than an average parking space for at least 22 hours a day, subject them to oppressive safety and security measures, and deprive them of basic human needs, violating constitutional and statutory standards. *See* ECF 13 ¶ 2. The FDC's Central Office in Tallahassee, located in the Northern District, is where high-level officials created, implement, and maintain this statewide isolation policy and practice despite their knowledge of the substantial risk of psychological and physical harm that isolation causes to people. Thus, the crux of this case is that Defendants' policymakers—in

Tallahassee—have deprived the proposed class of their constitutional and statutory rights.

As a telling example of Defendants' attempt to divert focus from Plaintiffs' true claims, Defendants include a list of prisons under the heading "Restrictive Housing." ECF 27-10. But this list includes only prisons with two types of isolation—Close Management and Maximum Management. Out of the 10,000 individuals in isolation within the FDC, only approximately 4,000 are in Close Management and Maximum Management. *See* ECF 27-10, 3. Therefore, the majority of individuals in isolation are in Administrative Confinement and Disciplinary Confinement. Defendants' implication—that this case is only about Close Management and Maximum Management—is simply not true.

Plaintiffs agree that, in class cases, determining the appropriate forum may require consideration of its relation to the whole group of members. *Koster v. (American) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 526 (1947). But here, it counsels in favor of the Northern District. Given the potential class of 10,000 people in isolation throughout the Northern, Middle, and Southern Districts, the Northern District—as the District where Defendants reside and where they created, adopted, and implement their statewide isolation policy and practice—is the most appropriate forum. *See Swift v. BancorpSouth Bank*, No. 1:10-cv-00090-MP-GRJ, 2014 WL 12856701, at *3 (N.D. Fla. June 4, 2014) (finding that the district of the defendant's

headquarters, not the district where the class representative resided and where some of the disputed transactions occurred, was the locus of the events because it was a class action case, there were "multitudes of other transactions at issue," and the "common factor tying everything together" was the defendant's policy decision).

In this case, the locus of operative facts is the Northern District. This weighs heavily against transfer.

B. The convenience of the parties and the witnesses weighs against transfer.

This factor similarly weighs in Plaintiffs' favor. Under this factor, "[t]he moving party must make a specific showing of inconvenience to witnesses" to support transfer. *Trans Am Worldwide*, 2018 WL 3090394, at *8 (quotations/citations omitted). *See also Nat'l Tr. Ins. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co*, 223 F. Supp. 3d 1236, 1242 (M.D. Fla. 2016) (same). Defendants have failed to make such a showing.

At the outset, their laundry list of possible witnesses again misinterprets the essence of this case. The individuals on Defendants' Preliminary Witness List—primarily employees and former employees of the FDC and the FDC's healthcare provider at local institutions—will not be the key witnesses and are likely not necessary at trial. As Plaintiffs have explained, while the effects of Defendants' conduct are felt throughout the state, the crux of this case emanates from Defendants' actions and inactions in Tallahassee. The key witnesses at trial will include high

level officials and policymakers, located in Tallahassee at FDC's headquarters, who can testify to FDC's policies and practices regarding isolation, Defendants' standards for determining who is put in isolation, Defendants' knowledge of the substantial risk of harm to people in isolation, the harm that has actually occurred to them, and the lack of action by Defendants to mitigate such harm. These witnesses will likely include Mark Inch, Secretary; Wes Kirkland, Deputy Director Institutional Operations; Dean Aufderheide, Ph.D., Chief of Mental Health Services; Thomas Reimers, Health Services Director; Michael Harrell, Chief of Security Operations; other policy directors whose decisions affect isolation practices; and the ADA Coordinator, all of whom are located within the Northern District. Key witnesses will also include experts, who are likely located out of state, and for whom neither forum is more convenient than the other.

Defendants' list of 202 "*possible* witnesses implicated by the current allegations of the Amended Complaint," ECF 26-1 at 1, does not counter this point (emphasis added). Indeed, "motions to transfer are not determined solely upon the outcome of a contest between the parties as to which of them can present a longer list of possible witnesses located in the respective districts in which each party would like to try the case." *Mason*, 146 F. Supp. 2d at 1362. *See also Dale v. United States*, 846 F. Supp. 2d 1256, 1258 (M.D. Fla. 2012) ("[T]he Court will not simply tally the number of witnesses in each prospective forum to determine which is more

convenient."). Rather, "[t]he party seeking the transfer must support its motion by clearly specifying the key witnesses to be called and particularly stating the significance of their testimony." *Mason*, 146 F. Supp. 2d at 1362. *See also Endotach LLC v. Cook Medical Inc.*, No. 3:12cv307/MCR/CJK, 2012 WL 12870252, at *3 (N.D. Fla. Nov 7, 2012) ("[T]he court must also consider the substance and significance of their testimony."); *Frasca v. Florida Department of Corrections*, No. 8:16-CV-1967-T-33JSS, 2016 WL 6879244, at *2 (M.D. Fla. Nov. 22, 2016) ("[T]he court must qualitatively evaluate the materiality of the testimony that the witness may provide.").

Merely providing an excessively long and speculative list of all witnesses with any conceivable connection to the matters in the Complaint, without making any effort to narrow it to those individuals who may actually testify at trial, falls far short of the burden imposed by this factor. *See Gubarev v. Buzzfeed, Inc.*, 253 F. Supp. 3d 1149, 1164 (S.D. Fla. 2017) ("Plaintiffs are correct that Defendants' speculation regarding their 'potential witnesses' is not entitled to any weight in this analysis."); *Electronic Transaction Network v. Katz*, 734 F. Supp. 492, 502 (N.D. Ga. 1989) (concluding that case should not be transferred when "[a]t this point, prior to discovery, the court is unable to determine whether live witness testimony truly will be necessary in the trial of the action.").

Turning to the minimal detail Defendants have provided as to the substance of each witness's testimony, it is clear that the vast majority of these individuals will offer cumulative or duplicative testimony—if their testimony is even relevant. Almost all the former employees on Defendants' Preliminary Witness List held identical positions as the current employees, and Defendants have failed to explain how their testimony would not be cumulative, and thus unnecessary, at trial. *See Frasca*, 2016 WL 6879244, at *3 (finding that "the sheer number of medical witnesses itself does not increase the balance of this factor" because their testimony "would likely be cumulative, and not every witness would likely testify at trial."); *Dale*, 846 F. Supp. 2d at 1258 (finding that the non-government employees listed by the United States as potential witnesses would provide cumulative, "and thus unnecessary" testimony). In fact, the general description Defendants provide indicates that many witnesses fall into the same category, indicating they would needlessly be covering the same topics.

Additionally, Defendants' Preliminary Witness List contains many current employees of FDC and its contracted health provider. ECF 26-1. The significance of the convenience for these witnesses is greatly diminished because they are employees of a party. *Gubarev*, 253 F. Supp. 3d at 1164 ("Because the witnesses identified by Defendants are employees of Defendant Buzzfeed, compelling the employees' presence at trial should not be an issue."); *Trinity Christian Ctr. of Santa*

Ana, Inc. v. New Frontier Media, Inc., 761 F. Supp. 2d 1322, 1327 (M.D. Fla. 2010) (convenience factor "is diminished when the witnesses, although in another district, are employees of a party and their presence at trial can be obtained by that party.").[6] As this Court has stated, "the parties and their own employees are accessible and producing them is merely part of the ordinary costs of litigation." *Belacon Pallet Services, LLC v. Amerifreight, Inc.*, No. 1:15cv191/MW/GRJ, 2016 WL 8999936, at *5 (N.D. Fla. Mar. 26, 2016).

For any witnesses outside the Northern District, Plaintiffs are willing to take depositions in places where the witnesses are employed to further lessen any inconvenience. This disfavors a transfer. *See Halbert v. Credit Suisse AG*, 358 F. Supp. 3d 1283, 1287 (N.D. Ala. 2018) (finding that when the plaintiffs were willing to travel to depose the defendants' employees, the convenience of witnesses does not weigh heavily in favor of transfer).[7]

Defendants are also mistaken with respect to the practical realities of travel. They want the case transferred to either Jacksonville or Ocala. ECF 26. But often

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[6] In fact, some courts have gone so far as to ignore proposed witnesses who are employees of the parties in weighing the significance of the convenience factor. *See Delorenzo v. HP Enterprise Services, LLC*, 79 F. Supp. 3d 1277, 1283 (M.D. Fla. 2015); *Elite Flower Services, Inc. v. Elite Floral & Produce LLC*, No. 13-cv-21212, 2013 WL 12095134, at *6 (S.D. Fla. June 18, 2013).

[7] Additionally, if this matter goes to trial, it will be a bench trial. Testimony can be presented by deposition and live witnesses can be taken out of order and on non-consecutive days, or even via videoconference from other districts, to accommodate their schedules.

the difference in mileage between Defendants' relevant institutions and the further of those Middle District courts, compared to the distance from those institutions to Tallahassee, is slight. ECF 26, 6-7. For example, Lowell Correctional Institution is 96 miles from Jacksonville and 175 miles from Tallahassee—a difference of only 79 miles. *Id*. Reception and Medical Center is 72 miles from Ocala and 132 miles from Tallahassee—a difference of only 60 miles. *Id*. On the other hand, Santa Rosa Correctional Institution, located within the Northern District, is 173 miles from Tallahassee compared to 334 to the closest Middle District Court in Jacksonville—a difference of 161 miles. *Id*. And Suwannee Correctional Institution is 92 miles from Ocala and 77 miles from Jacksonville, but only 89 miles away from Tallahassee.[8] In sum, while certain individuals will have to travel slightly farther to the Northern District, those within the Northern District will have to travel a much shorter distance to reach Tallahassee than a court in the Middle District. This is simply not a case in which convenience for witnesses will vary significantly from the Northern District to the Middle District.

C. The location of relevant documents and the relative ease of access to sources of proof are neutral and therefore weigh against transfer.

Given the availability of electronic discovery, the location of relevant documents and other tangible sources is no longer a significant factor in the transfer

[8] Defendants appear to have confused the distances from Suwannee to Ocala and Tallahassee. ECF 26 at 6.

inquiry. *Pennsylvania Nat'l,* 223 F. Supp. 3d at 1243–44; *Weintraub v. Advanced Corr. Healthcare, Inc.*, 161 F. Supp. 3d 1272, 1283 (N.D. Ga. 2015). Therefore, this factor is neutral and weighs against a transfer.

D. The availability of process to compel the attendance of unwilling witnesses is neutral and therefore weighs against transfer.

Transfer may "be denied where the movant does not show that the witnesses would be unwilling to testify and that compulsory process would be necessary." *Trans Am Worldwide*, 2018 WL 3090394, at *9; *see also Belacon Pallet Services, LLC*, 2016 WL 8999936, at *5 (finding that this factor weighed against a transfer when the defendants had not "indicated that these witnesses would be unwilling to testify if this case were tried in Florida"); *F.D.I.C. ex rel. Citizens State Bank v. Fedorov*, No. 10–20912–Civ, 2011 WL 2110830, at *2 (S.D. Fla. May 26, 2011) (finding this factor did not support transfer where "[n]either of the parties has identified any specific witnesses who would be unwilling to appear and may require the court's subpoena power"). Since Defendants identify no specific witnesses who would be unwilling to testify in the Northern District, they have failed to meet their burden under this factor.

Furthermore, there is a process by which this Court could order compliance with a subpoena to any unwilling witnesses. *See* Fed. R. Civ. P. 45 (c)(1)(B)(ii) (indicating that a court's subpoena power extends to any person within the state where that person resides or is employed, if that person is a party's officer or would

not "incur substantial expense"). Thus, the 100-mile limit is not a bar to producing an uncooperative witness. *See Bell v. Rosen*, No. CV214-127, 2015 WL 5595806, at *12 (S.D. Ga. Sept. 22, 2015) (finding a 122-mile drive would not result in a "substantial expense" for witnesses and would thus be within the court's subpoena power). The distances that Defendants cite from what they consider to be relevant institutions to Tallahassee are also within a range that avoids a "substantial expense" to the witnesses.

E. The relative means of the parties weighs against transfer.

Although Defendants admit in their motion that Plaintiffs themselves are unable to fund this litigation, ECF 26 at 16, they still attempt to argue that this factor is neutral. It should be clear that this factor weighs heavily in Plaintiffs' favor when comparing Plaintiffs—indigent persons who are incarcerated in Defendants' custody—to FDC—the third largest state prison system in the country with a $2.4 billion annual budget.[9] Even if the Court wishes to consider counsel's means—an irrelevant consideration—the FDC's $2.4 billion annual budget still greatly exceeds Plaintiffs' ability to fund this litigation. Therefore, the relative means of the parties weighs against a transfer.

[9] These numbers are according to the FDC's 2017-2018 Annual Fiscal Report, available at: http://www.dc.state.fl.us/pub/annual/1718/FDC_AR2017-18.pdf (last visited Aug. 19, 2019).

F. The forum's familiarity with the governing law is neutral and therefore weighs against transfer.

Defendants move to transfer this case from the Northern District of Florida to the Middle District of Florida. Both courts are familiar with the governing law and thus this factor is neutral, therefore weighing against transfer.

G. The consideration afforded to Plaintiffs' choice of forum weighs heavily against transfer.

As discussed above, Plaintiffs' choice of forum is entitled to great deference: it "should not be disturbed *unless it is clearly outweighed by other considerations*." *Robinson*, 74 F.3d 253 at 260 (emphasis added). While Plaintiffs' preferred venue may be entitled to less consideration when the underlying cause of action did not occur within the forum they chose, that is not the case here.[10] As discussed in section II.A., the Northern District is the locus of operative facts in this case.

[10] Even if that were the case, however, the deference is merely reduced, not eliminated. Defendants still bear the burden of showing that the suggested forum is clearly more appropriate, and Plaintiffs' choice of forum is still entitled to some deference. *See Flint v. UGS Corp*., No. C07-04640 MJJ, 2007 WL 4365481, at *3 (N.D. Cal. Nov. 12, 2007) (denying Defendant's motion to transfer and giving plaintiff's choice of forum "some deference," even though operative facts did not occur in that forum and plaintiff's contact with that forum was "de minimis").

H. Trial efficiency and the interests of justice, based on the totality of the circumstances, weigh slightly against transfer.

Given that the focus of Plaintiffs' claims is centered in the Northern District, where Defendants reside and where the FDC maintains its headquarters, the interests of justice are best served by keeping this case in the Northern District.

CONCLUSION

Defendants have failed to meet their heavy burden of demonstrating that Plaintiffs' choice of forum is clearly improper. Therefore, Plaintiffs respectfully request that Defendants' Motion to Transfer Venue be denied.

Certificate of Word Limit: Under N.D. Fla Local Rule 7.1(F), I hereby certify that this response contains 4,100 words.

Respectfully Submitted,

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