IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

NICOLAS REYES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:18-cv-00611
	)	
HAROLD CLARKE, Director of the Virginia Department of Corrections, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS'

RULE 12(B)(3) MOTION TO DISMISS

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Defendants move to dismiss or transfer Mr. Reyes' suit because it was filed in the Eastern District of Virginia instead of the judicial district where Red Onion State Prison is located and where Mr. Reyes has resided in solitary confinement for over twelve years. But as any plain reading of the Complaint demonstrates, Mr. Reyes' constitutional and statutory claims arise not simply from conduct at this geographically remote prison. Rather, his claims arise in substantial part from the acts and omissions of specific Defendants in Richmond implementing and continuing to this day the policies and procedures designed in Richmond that are central to this litigation. For example, the Eastern District is where the Step-Down Program was conceived and implemented and from where it is currently overseen without sufficient safeguards for prisoners like Mr. Reyes, with English language limitations and mental health impairments. And the Eastern District is where the alleged acts or omissions of a number of Defendants have kept Mr. Reyes from progressing out of solitary confinement.

Defendants' motion to dismiss pursuant to F.R.C.P. 12(b)(3) should be summarily denied because it (1) wholly ignores the allegations concerning the acts and omissions in this district, (2) misapplies the controlling legal standards for Rule 12(b)(3) motions, and (3) labors under the mistaken assumption that there can be only one proper venue in a civil proceeding in federal court. Venue is proper in the Eastern District of Virginia because a substantial part of the acts or omissions giving rise to Mr. Reyes' claims occurred in this district. *See* 28 U.S.C. § 1391(b)(2).[1]

[1] Defendants foreshadow the possibility of filing an additional motion to transfer the case to the Western District of Virginia on *forum non conveniens* grounds. *See* Def. Mot. at 2 n.1. This would be equally ill advised. Plaintiff's counsel are willing and able to travel to Wise County, Virginia to depose Defendants who live there, ameliorating Defendants' most significant forum concerns. In all other respects, the Eastern District of Virginia is more convenient for all parties: the Richmond Defendants live within the district, both parties' counsel work within the district, and, presumably, the district is more accessible to the parties' expert witnesses. A motion to transfer on *forum non conveniens* grounds under these conditions would be meritless.

LEGAL STANDARDS

The standards applicable to this motion are straightforward. While Defendants suggest that Plaintiff bears a burden, they fail to note that "[a] plaintiff is obliged, however, to make only a prima facie showing of proper venue in order to survive a motion to dismiss." *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 366 (4th Cir. 2012). "In assessing whether there has been a prima facie venue showing, [courts] view the facts in the light most favorable to the plaintiff." *Id.*; *see also Colonna's Shipyard, Inc. v. City of Key West, Fla.*, 735 F. Supp. 2d. 414, 416 (E.D. Va. 2010) ("[I]n reviewing a Rule 12(b)(3) motion, the court must construe all factual inferences in the plaintiff's favor.").

Moreover, the present venue analysis is not aimed at selecting a "preferred" forum, as Defendants suggest, but instead determining whether the forum selected by a plaintiff is "proper." And critically, the Fourth Circuit has made abundantly clear, "[u]nder the amended statute, it is possible for venue to be proper in more than one judicial district." *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004).

Thus, under 28 U.S.C. § 1391, venue for this action is proper in any "judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2) (emphasis added); *see also* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 311(1), 104 Stat. 5089, 5114 (amending section 1391 to current version). Most significantly, in determining whether events or omissions are sufficiently substantial to support venue under the amended statute, the Fourth Circuit has directed courts not to "focus only on those matters that are in dispute or that directly led to the filing of the action," but rather to review "the entire sequence of events underlying the claim." *Mitrano*, 377 F.3d at 405 (emphasis added) (quoting *Uffner v. La Reunion Fracaise, S.A.*, 244 F.3d 38, 42 (1st Cir. 2001).

Furthermore, "substantial" as it is used in section 1391(b)(2) does not mean the chosen venue need have the most substantial contacts to be an appropriate venue or have greater contacts than another proper venue. *See Power Paragon, Inc. v. Precision Tech. USA, Inc.*, 605 F. Supp. 2d 722, 726 (E.D. Va. 2008) ("A plaintiff is not required to establish that his chosen venue has the most substantial contacts to the dispute." (citation omitted)). "The 'substantial part' element does not require that the majority of operative facts underlying a claim occur in one district . . . . In fact, multiple fora may be available if significant events or omissions occurred in various locations." *Kershner v. Kamatsu Ltd.*, 305 F. Supp. 3d 605, 610 (E.D. Pa. 2018) (footnote omitted) (quoting *Optimal Interiors, LLC v. HON Co.*, No. 09-1906, 2009 WL 3837408, at *3 (E.D. Pa. Nov. 13, 2009).[2]

ARGUMENT

Because venue may be proper in more than one judicial district, Defendants' argument in favor of the Western District of Virginia does not at all mean that the Eastern District of Virginia is an "improper" forum. In fact, applying the above standards to this venue motion and considering all of the allegations Defendants conveniently ignore, it is clear that Plaintiffs have made a *prima facie* showing that venue is proper in the Eastern District of Virginia under 28 U.S.C. § 1391(b)(2).[3] The unconstitutional harm Mr. Reyes has suffered, and continues to suffer

[2] Courts also allow venue in a district where acts or omissions related to the legal action occurred even if, unlike the case at bar, "none of those acts or omissions were the act or omission that allegedly caused the injury." *Precept Med. Prods., Inc. v. Klus*, 282 F. Supp. 2d 381, 387 (W.D.N.C. 2003) (emphasis added).

[3] If, however, the Court finds venue is not proper in this district, this case should be transferred rather than dismissed under Rule 12(b)(3). Dismissal would operate only to delay resolution of this matter, which in turn would prejudice Mr. Reyes given the continuing nature of the violations and Mr. Reyes' present condition.

to this day, results from the acts and omissions painstakingly detailed in the Complaint against the Richmond-based Defendants, Messrs. Mathena, Clarke, Robinson, Lee and Herrick related to policies, procedures, acts and omissions coming from Richmond.[4]

Defendant Mathena was the warden of Red Onion State Prison, but significantly, since 2015, he has been employed in this district, in Richmond. Compl. ¶ 21. Plaintiff's allegations squarely address his actions and omissions in both districts. *Id.* ¶ 89, 180–82. Mr. Mathena has been serving in Richmond as the Security Operations Manager for the Virginia Department of Corrections ("VDOC") and also as Chairman of the External Review Team ("ERT"). *Id.* ¶ 182. The ERT is the highest-level authority charged with reclassifying solitary confinement prisoners—including Mr. Reyes—to lower security. *Id*. ¶¶ 80, 182. As its name suggests, the ERT is an External Review Team, comprised of members external to Red Onion. Defendant Mathena chairs the ERT from his office at VDOC headquarters in Richmond. *Id*. ¶¶ 21, 182.

The acts and omissions of the ERT are directly at issue in this case and give rise to Mr. Reyes' claims: ¶ 89 ("Mr. Reyes does not meet the criteria for a Level S (i.e. long-term segregation classification) or SM offender, and yet the ERT and Defendant Mathena, the Chairman of the ERT, have not returned him to general population."); ¶ 182 ("Mr. Reyes remains in solitary confinement due to Defendant Mathena's failure to perform a meaningful review of the necessity of Mr. Reyes' continued isolation."). Defendants' own brief in support of their Rule 12(b)(6) motion acknowledges the central role of the ERT in reviewing each level "S" prisoner to determine if the prisoner is "appropriately assigned to level 'S'" and whether Red

[4] Much of Defendants' brief is focused on rebutting the notion that section 1391(b)(1) applies, which provides for venue based on residence of defendants, and includes affidavits from out-of-state Defendants. In contrast, there are no affidavits rebutting the allegations that a substantial part of Mr. Reyes' claim arises from the acts and omissions occurring in this judicial district.

Onion "has made appropriate decisions to advance the offender through the step-down process" (*see* Statement of Fact No. 16). Mr. Mathena has had the opportunity not once, but twice each year, to oversee reviews of each prisoner—including Mr. Reyes—to determine if the prisoner should be moved out of solitary confinement. Compl. ¶ 182. He failed at this completely. Despite Mr. Mathena's responsibility as Chairman of ERT, that body did not provide meaningful oversight of the Institutional Classification Authority's (ICA) segregation retention decisions for Mr. Reyes, and therefore Mr. Reyes remains there to this day. *Id.* ¶¶ 88–89, 182. Defendants make no mention of these allegations, including Mr. Mathena's "promotion" from Red Onion Warden to Chairman of the ERT based in Richmond.

Defendant Clarke, whose job was to set policy for VDOC (including its long-term segregation policy) and to supervise that policy, failed completely to accommodate prisoners with language limitations, cognitive impairments, and serious mental health complications. *Id.* ¶¶ 165, 168, 169. This is precisely the sort of "omission" contemplated by section 1391(b)(2)'s plain language and is at the heart of the venue analysis. Defendants' memorandum, however, simply fails to cite to these allegations.

Defendant Robinson, who was responsible for approving VDOC's long-term segregation policy and overseeing its implementation, allowed the creation and perpetuation of policies that completely omitted adequate safeguards for prisoners with Mr. Reyes' limitations to progress out of solitary. *Id.* ¶¶ 170, 172. One can search in vain for a specific mention of this allegation in Defendants' memorandum: it is not in there.

Defendant Lee, the Psychology Associate Senior at Central Classification Services ("CCS"), was responsible for approving prisoner transfers out of solitary due to mental health reasons. *Id.* ¶¶ 29, 188. Despite being the person perhaps best situated to reverse the

mistreatment visited upon Mr. Reyes, Mr. Lee refused to approve Mr. Reyes' transfer to a residential mental health unit—even after Mr. Reyes was classified as suffering from a substantial mental impairment—because of Mr. Reyes' inability to speak English, thereby causing Mr. Reyes to suffer in unconstitutional conditions in solitary confinement. *Id.* ¶ 188. Defendants make no mention of this allegation in their papers.

And Defendant Herrick, the Director of Health Services at VDOC, was responsible for ensuring that all Red Onion prisoners had adequate access to health services. *Id.* ¶ 190. Despite these important responsibilities, Mr. Herrick disturbingly failed to institute a policy requiring use of interpretation services in mental health exams, directly causing Mr. Reyes to continue to suffer in solitary with declining mental health. *Id.* Again, based solely on a reading of Defendants' venue papers, one would not even know that this allegation was set forth in Mr. Reyes' Complaint.

The acts and omissions of these Defendants, as well as those at Red Onion, are related directly to the failures of the policies and procedures designed in and implemented from this judicial district. Specifically, the Complaint challenges the VDOC Step-Down Program, *id.* ¶¶ 58–62, and how Mr. Reyes was effectively "unable to participate" in the program—which Defendant Mathena stated one "must participate in" to get out of segregation, *id*. ¶ 60—because Mr. Reyes does not speak English. *Id*. ¶ 64. Similarly, the periodic ICA segregation reviews do not allow for meaningful participation from Mr. Reyes as a result of that language barrier. *Id*. ¶¶ 77–91.

It is ironic that in its Rule 12(b)(6) motion to dismiss, filed on the same day, Defendants tout their "nationally-acclaimed" Step-Down program, which was devised and is now overseen out of Defendants' offices in Richmond. *See* Mem. Support Defs' R. 12(b)(6) Mot. Dismiss

1. In his praise of the Step-Down program, Virginia Governor Ralph Northam made note of its creation and administration "[u]nder the leadership" of Richmond-based Defendant Clarke. *See* Press Release, VDOC, Virginia Stands Out for Operating a Corrections System Without the Use of Solitary Confinement (May 10, 2018), https://www.vadoc.virginia.gov/news/press-releases/18may10_restrictivehousing.shtm. Venue may be proper where an organization's leadership resides and relevant decisions are made. *See Nicks v. Koch Meat Co., Inc.*, 260 F. Supp. 3d 942, 952-54 (N.D. Ill. 2017) (finding the oversight and decisions made at corporate headquarters sufficient under section 1391(b)(2)).

For his part, Mr. Clarke has stated since 2013 that the "use[of] data and research—evidence-based practices—[is] inform[ing] this program and that, along with incredible teamwork, is what is making this so successful." Press Release, VDOC, Virginia Recognized for Transforming Highest-Security Prisons (Aug. 7, 2013), https://vadoc.virginia.gov/news/press-releases/13aug06_stepdownrecognition.shtm. The data and research were undoubtedly used, and the teamwork efforts led, by the Richmond Defendants through their actions and their omissions.

Defendants' efforts to soft peddle the importance of the Richmond office cannot stand in the face of even a minimal review of VDOC's own press releases about the Step-Down program. If Defendants want to brag about the Step-Down program in Richmond, they ought to be required to defend it in Richmond—in the Eastern District of Virginia. *Cf. Verizon Online Servs., Inc. v. Ralsky*, 203 F. Supp. 2d 601, 623 (E.D. Va. 2002) (rejecting motion to dismiss or transfer venue to the "situs of the injury" where "a substantial portion" of plaintiff's complaint involved messages sent to and through defendant's servers in the Eastern District of Virginia).

Finally, Defendants' citation to *Adhikari v. KBR, Inc.*, No. 1:15-cv-1248 (JCC/TCB), 2016 U.S. Dist. LEXIS 103593 (E.D. Va. Aug. 4, 2016), is completely unconvincing. In *Adhikari*, several Nepalese workers brought suit against six American businesses who administered the U.S. Army's contract for the provision of logistical support services and laborers to U.S. military bases overseas. They alleged that one of the businesses' subcontractors, an Iraqi company named Daoud & Partners, illegally trafficked workers to military bases in Iraq, where they worked in deplorable conditions. The American companies filed a motion to dismiss for lack of venue, which the court granted on the grounds that the defendants engaged merely in "high-level oversight," *id.* at *14, that held only "some tangential connection with the dispute in litigation," *id.* at *12 (quoting *CMA CGM, LLC v. RLI Ins. Co.*, No. 12-cv-03306, 2013 U.S. Dist. LEXIS 20899, at *2 (D. Md. Feb. 13, 2013). In sharp contrast to that case, Mr. Reyes has described above how the Richmond-based Defendants actively crafted the policies that resulted in his injuries and neglected to take necessary action when their policies plainly failed Mr. Reyes. Unlike in *Adhikari*, Defendants' "oversight in this District . . . compel[led and] direct[ed] the illegal practices occurring" in Red Onion. *Id.* at *15. Moreover, the Court's holding in *Adhikari* was squarely based on the fact that "[i]n human trafficking and forced labor cases, the venue assessment typically turns on where the victims were trafficked and where they were forced to work." *Id.* at *13. Suits involving constitutionally defective prison policies carry no analogous venue limitations, nor do Defendants even attempt to make that leap.

CONCLUSION

In sum, Defendants' arguments as to a "preferred" forum do not and logically cannot establish that Plaintiffs' chosen venue is actually "improper." When properly viewing *all* of the allegations in the Complaint in favor of Mr. Reyes, the Complaint provides a *prima facie*

showing that Mr. Reyes filed suit in a proper forum—the Eastern District of Virginia where a substantial part of the events or omissions giving rise to Mr. Reyes' claims occurred.

Dated: November 2, 2018

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2018, I electronically filed the foregoing Memorandum in Opposition to Defendants' Rule 12(B)(3) Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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