

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-03495-PAB-MEH

DARUS WILKINS,

Plaintiff,

v.

JOHN PALOMINO,
CHRIS CHAVEZ,
KARA KENNEDY,
NITA HUNT,
BRENT PIERCE,
LUKE HOLLAND, in their individual and official capacities, and
VIRGINIA FREED, in her individual capacity,

Defendants.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Michael E. Hegarty, United States Magistrate Judge.

Plaintiff has filed a “Motion for an Order to Show Cause for a Preliminary Injunction” (“Motion”). ECF 75. He seeks a preliminary injunction “to compel Core Civic and the Colorado Territorial Correctional Facility Clinical Services to provide a medically appropriate course of corrective surgery” for his back. *Id.* at 2. Additionally, he requests “to be examined by a qualified neurologist that specializes in spinal injuries and to obtain from that specialist an evaluation of the condition of plaintiff’s lower back.” *Id.* Defendants John Palomino, Chris Chavez, Kara Kennedy, Brent Pierce, and Luke Holland (collectively, “BCCF Defendants”) filed a response in opposition to the Motion, arguing, in part, that Plaintiff’s claims for injunctive relief are moot. ECF 79. Defendant Virginia Freed filed her own response in which she joins the legal arguments set forth

in the BCCF Defendants’ response.¹ ECF 80. The Motion has been referred by Chief Judge Philip A. Brimmer for a recommendation, and the Court heard oral argument on August 12, 2021. As set forth below, this Court respectfully recommends denying Plaintiff’s Motion.

BACKGROUND

As relevant to the Motion, Plaintiff, a *pro se* prisoner, alleges that that Defendants illegally restrained him for the purpose of taking a DNA swab. Am. Compl., ECF 64. This occurred at Bent County Correctional Facility (“BCCF”). *Id.* at 6. In illegally restraining him, Plaintiff alleges the use of excessive force, including the placing of knees on his lower back while he was handcuffed, causing substantial and permanent injury. *Id.* at 13. Among other claims, Plaintiff asserts an Eighth Amendment Cruel and Unusual Punishment claim stemming from insufficient medical care to treat his injuries. *Id.* at 19–20. As of March 2021, Plaintiff received multiple MRI scans and was scheduled for neurosurgery. *Id.* at 21. In his prayer for relief, Plaintiff requests monetary damages, “a declaration that the acts and omissions described herein violated plaintiff’s rights,” and injunctive relief. *Id.* at 22. Specifically, Plaintiff requests an injunction ordering Defendants to arrange for physical therapy or other follow-up medical treatment, to carry out such treatment, to be seen and evaluated by a psychological practitioner, and to carry out the treatment directed by the psychological practitioner. *Id.*

The BCCF Defendants, at all relevant times, were employees of BCCF. *Id.* at 3–5. Defendant Freed was a Bent County Department of Human Services social worker. *Id.* at 5. She is not directly employed by BCCF. ECF 80 at 1. When Plaintiff filed his original Complaint, he did so from Colorado Territorial Correctional Facility (“CTCF”). ECF 1 at 24. Although the

¹ Defendant Nita Hunt has not yet appeared in the case.

Court cannot discern an immediately apparent date of transfer on the docket, every certificate of service has been sent to Plaintiff at CTCF. *E.g.*, ECF 13, 57, 78.

LEGAL STANDARDS

I. Preliminary Injunction

“A preliminary injunction is an extraordinary remedy, the exception rather than the rule.” *Free the Nipple-Fort Collins v. City of Fort Collins, Colo.*, 916 F.3d 792, 797 (10th Cir. 2019). To obtain a preliminary injunction, “the moving party must demonstrate four factors: (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest.” *Carranza v. Reams*, – F. Supp. 3d –, 2020 WL 2320174, at *6 (D. Colo. May 11, 2020) (quoting *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009)). Here, Plaintiff must make a “heightened showing of the four factors,” because he seeks a disfavored mandatory injunction—the request for relief would “alter the status quo” by requiring defendant to take affirmative actions. *Id.* (citing *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005)).

II. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(1)

Rule 12(b)(1) empowers a court to dismiss a complaint for “lack of subject matter jurisdiction.” Fed. R. Civ. P. 12(b)(1). Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff’s case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction “must dismiss the cause at any stage of the proceeding in

which it becomes apparent that jurisdiction is lacking.” *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

III. Treatment of a Pro Se Plaintiff’s Pleadings

A pro se plaintiff’s “pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.” *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)). “Th[e] court, however, will not supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on plaintiff’s behalf.” *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009) (quoting *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997)). The Tenth Circuit interpreted this rule to mean, if a court “can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, [it] should do so despite the plaintiff’s failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.” *Diversey v. Schmidly*, 738 F.3d 1196, 1199 (10th Cir. 2013) (quoting *Hall*, 935 F.2d at 1110). However, this interpretation is qualified in that it is not “the proper function of the district court to assume the role of advocate for the pro se litigant.” *Garrett*, 425 F.3d at 840 (quoting *Hall*, 935 F.2d at 1110).

ANALYSIS

Plaintiff’s Motion seeks an immediate preliminary injunction forcing Defendants to “compel Core Civic and the [CTCF] Clinical Services to provide a medically appropriate course of corrective surgery” and to have Plaintiff “examined by a qualified neurologist that specializes in spinal injuries.” Mot. at 2. Defendants assert that Plaintiff’s transfer to CTCF moots his injunctive relief claims. The Court agrees.

“When a prisoner files suit against prison officials who work in the institution in which he is incarcerated, seeking declaratory and injunctive relief . . . and then that prisoner is subsequently transferred to another prison or released from the prison system, courts are presented with a question of possible mootness.” *Jordan v. Sosa*, 654 F.3d 1012, 1027 (10th Cir. 2011). The question of mootness concerns whether “a definite controversy exists throughout the litigation and whether conclusive relief may still be conferred by the court despite the lapse of time and any change of circumstances that may have occurred since the commencement of the action.” *Id.* at 1024. If a claim is moot, or becomes moot throughout the course of the litigation, the court lacks subject matter jurisdiction. *See Rio Grande Silvery Minnow v. Bur. of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010). “An inmate’s transfer from a prison facility generally moots claims for declaratory and injunctive relief related to conditions of confinement.” *Bueno v. Chekush*, 355 F. Supp. 3d 987, 1001 (D. Colo. 2018) (quoting *Mitchell v. Estrada*, 225 F. App’x 737, 741 (10th Cir. 2007)).

Here, Plaintiff requests Defendants provide him medical treatment at CTCF. But Defendants do not work at CTCF. They have no influence or control over the decisions made by CTCF personnel. It makes no difference that CTCF and BCCF are both Colorado Department of Corrections prisons. In *Jordan*, the inmate raised First Amendment challenges to implementing regulations that were applied throughout the Bureau of Prisons (“BOP”) system. 654 F.3d at 1029. He argued that being transferred to another BOP facility did not prevent the court from fashioning an equitable remedy. *Id.* The Tenth Circuit disagreed because the prisoner “never sought relief on a system-wide basis against the BOP.” *Id.* The prisoner only sought relief from “individual BOP officials at specific penal institutions” and not from the BOP itself or its director. *Id.* In other words, the prisoner failed to sue “defendants who [were] actually situated to effectuate any

prospective relief that th[e] court might afford him.” *Id.* at 1030. The same is true of Plaintiff in this case. Despite wanting to compel CTCF to provide him medical treatment, he has not sued CTCF or any CTCF official with power to effectuate the relief he seeks.

Additionally, he is no longer under the custody or control of BCCF or Defendants, nor is he subject to conditions of confinement imposed by either. Plaintiff also has not demonstrated “a reasonable expectation that he will be transferred back to [BCCF] and be subject to the alleged conduct again.” *Bueno*, 355 F. Supp. 3d at 1001–02. Because Plaintiff has been transferred to CTCF, “an entry of equitable relief in his favor ‘would amount to nothing more than a declaration that he was wronged, and would have no effect on the defendants’ behavior towards him.’” *Jordan*, 654 F.3d at 1027 (quoting *Green v. Branson*, 108 F.3d 1296, 1300 (10th Cir. 1997)). Consequently, Plaintiff’s injunctive relief claims are moot.² *Id.* (“[C]ourts have routinely dismissed such penitentiary-specific conditions-of-confinement claims as moot.”). Since his claims for relief are moot, Plaintiff cannot demonstrate a likelihood of success on the merits, and his Motion must be denied.³

Finally, as the Court mentioned earlier, the doctrine of mootness concerns this Court’s subject matter jurisdiction. Accordingly, although Defendants have not so moved, the Court may consider *sua sponte* whether to dismiss moot claims. *See, e.g., McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996) (“Because mootness is a matter of jurisdiction, a court may

² As the Court described earlier, even if the Court construed Plaintiff’s claims as seeking some system-wide policy change regarding his medical wellbeing, the claims are still moot because he has not named as a defendant any official except for those at his prior facility. *Jordan*, 654 F.3d at 1028–29 (holding that a claim is still moot if the prisoner “seeks equitable relief and *only* sues prison officials at the transferor institution—that is, the institution where he was *formerly* incarcerated”) (emphasis in original).

³ Because the Court finds Plaintiff’s claims moot, it does not address Defendants’ other arguments in opposition to the Motion.

raise the issue sua sponte.”). Having found Plaintiff’s injunctive relief claims moot because Plaintiff has transferred facilities, the Court *sua sponte* recommends that Chief Judge Brimmer dismiss without prejudice those claims pursuant to Fed. R. Civ. P. 12(b)(1).⁴ *See Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 985 (10th Cir. 2010).

CONCLUSION

For the reasons explained, the Court respectfully recommends **denying** Plaintiff’s Motion [filed July 30, 2021; ECF 75]. Furthermore, the Court *sua sponte* recommends that Plaintiff’s injunctive relief claims be **dismissed without prejudice** pursuant to Rule 12(b)(1).⁵

Respectfully submitted this 12th day of August, 2021, at Denver, Colorado.

BY THE COURT:



Michael E. Hegarty
United States Magistrate Judge

⁴ This includes the claims against Defendant Nita Hunt as a BCCF employee, even if she has not appeared in the case. *Bueno*, 355 F. Supp. 3d at 1002.

⁵ Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party’s failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Duffield v. Jackson*, 545 F.3d 1234, 1237 (10th Cir. 2008) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991)).