APPENDIX TABLE OF CONTENTS

OPINION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT (FEBRUARY 1, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-16145

DARNELL T. HINES,

Plaintiff-Appellant,

v.

ASHRAFE E. YOUSEFF, M.D.; GODWIN C. UGUEZE, M.D.; JOSHUA GARZA, RNP; M. AGUIRRE,

Defendants-Appellees.

D.C. No. 1:13-cv-00357- AWI-JLT

Appeal from the United States District Court for the Eastern District of California Anthony W. Ishii, District Judge, Presiding

No. 15-17076

ARTHUR DUANE JACKSON; LEONARD M. LUJAN; MARCUS JACKSON; RODNEY TAYLOR; LACEDRIC W. JOHNSON; L. T. BELTON;

NORMAN JOHNSON; COREY LAMAR SMITH; FREDERICK BEAGLE; ABDULLE ABUKAR,

Plaintiff-Appellees,

v.

EDMUND G. BROWN, JR., Governor; MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation; JEFFREY BEARD, Secretary, California Department of Corrections and Rehabilitation; PAUL D. BRAZELTON, Warden, Pleasant Valley State Prison; JAMES D. HARTLEY, Warden, Avenal State Prison,

Defendants-Appellants.

D.C. No. 1:13-cv-01055-LJO-SAB

No. 15-17155

COREY LAMAR SMITH; DION BARNETT; CHRISTOPHER E. GARNER; RODNEY RAY ROBERTS; JEREMY ROMO; DANNY DALLAS; FREDERICK BEAGLE; DON BELARDES; FLOYD BOYD; RICHARD BURKE; JOSEPH BUSTAMONTE; CHARLES JOSEPH CARTER; OTHA CLARK; DONALD DIBBLE; JEROME FELDER; CANDELARIO GARZA; JEREMY LEE HOLLIS; SCOTT IMUTA; GEORGE JOHNSON; BRUCE KOKLICH; GRADY MONTGOMERY; PETER ROMERO; JOSH THOMAS; AARON TILLIS; RENE VILLANUEVA; BERTRUM WESTBROOK; WAYNE JAMES WOODS;

ABDULLE ABUKAR; RUBEN ARECHIGA; JOHN WESLEY BESS; MICHAEL BLUE; DAVID COX; ORLANDO CRESWELL; DANIEL DAYTON; PABLO DOMINGUEZ; JOSH DRAPER; KENJI DOMINIQUE JACKSON; ALBERT SHERROD; ADRIAN SEPULVEDA; KIRK SMITH; HECTOR TALAMANTES; ISMAEL TORRES-ROBLES; KENNETH WASHINGTON; THOMAS WILEY; DARREN CHARLES WILLIAMS; THEODORE WOOD; DONALD WRIGHT; GEORGE YOUNT; GARLAND BAKER; CHARLES MCQUARN; RICHARD ADAMS; DAVID ATZET; DERRICO AUBREY; DANIEL BOLAND; CHRISTOPHER BONDS; KEEVAN BURKS; KEVIN CALL; JOSEPH DEJESUS; GERALD W. DICKSON; ERIC DONALDSON; ROY LEE DOSS; JOSEPH ALFONSO DURAN; JAMES FARR; JOSEPH FERRIS; ALVIN FLOWERS; STEPHEN FRANKLIN; AUBREY GALLOWAY; JOHN RAY GHOLAR; ROBERT GONZALEZ; VERNON GRANT; WALTER GREEN; ROBERT HARRIS; SINOA HERCULES; BRET HILL; ADRIAN JOHNSON; ELLIS CLAY HOLLIS; EDWARD JONES; ANTHONY R. JONES; LAWRENCE KERNER; TITI LAVEA; CLEOFAS LEWIS; MICHAEL MANNING; ROBERT MAESCHEK; DANIEL MASUSHIGE; ELLIS MCCLOUD; BRANDON MCDONALD; JEFFREY MCDONALD; JUAN MEZA; HERSCHEL MITCHELL; NOEL MORALES; RAYMOND NEWSOM; JESUS ANTONIO PEREZ; HARVEY RAYBURN; JORGE AUGUSTO REYES; JAY ROACH; PAUL RICHARDSON; TYRONE SANDERS; JOHNNY O. SANCHEZ; EDWARD SPENCE; TRACY L. STEWART; LOUIS THOMAS; ELONZA JESSE TYLER; VANCE UTLEY; BYRON

WEST; WILLIAM WILEY; RODNEY WILLIAMS; ROBERT WOLTERS; MICHAEL MORROW; DAMOR HILL; COREY CAMPBELL; ROBERT CONLEY; SINOHE HERCULES; JUAN CARLOS MARTINEZ; JUAN PENALVA; ROBERT PRESTON, JR.; JOHN ARTHUR RUGGLES; WILLIE STEELS; SOLOMON VASQUEZ; GEORGE LEWIS; RICHARD ARTEAGA; PABLO CASTANEDA; CHANEY CLIFFORD; CAMPBELL COREY; ROBERT CONLEY; ALVIN COOPER; KENNETH GLEN CORLEY; WALTER CORNETHAN; ROY CORNING; DENNIS DUREE; SINOHE HERCULES; CARLOS HERNANDEZ; DAMOR HILL; DANILO JALOTLOT; ASAD LEWIS; GEORGE LEWIS; JOE M. LEWIS; JUAN MARTINEZ; THOMAS MILFORD; DALE MILLER; DANIEL MOLEN; ANDRE MOODY; MICHAEL MORROW; FREDDY NEAL; CHEK NGOUN; SIM PEAV; JUAN PENALVA; MARVIN PIERCE; ROBERT PRESTON, JR.; DAVID ROBINSON; RONALD RODRIGUEZ; JOHN ARTHUR RUGGLES; LORENZO SAMS; LEROY SMITH; WILLIE STEELS; MAURICE THOMAS; TYRONE THOMPSON; ROBERTO VASQUEZ; SOLOMON VASQUEZ; PATRICK WALLACE; XAVIER S. WILLIAMS; KENNETH YANCEY,

Plaintiff-Appellants,

v.

ARNOLD SCHWARZENEGGER, Governor; MATTHEW CATE; JAMES D. HARTLEY, Warden; JEFFREY A. BEARD; PAUL D. BRAZELTON, Warden; SUSAN L. HUBBARD; DEBORAH HYSEN; SCOTT KERNAN; CHRIS MEYER; TONYA R.

ROTHCHILD; TERESA SCHWARTZ; JAMES A. YATES, Warden; DWIGHT WINSLOW, M.D.; FELIX IGBINOSA, M.D.; EDMUND G. BROWN, JR., Governor,

Defendants-Appellees.

D.C. No. 1:14-cv-00060-LJO-SAB

No. 15-17201

LORENZO GREGGE, JR.,

Plaintiff-Appellant,

v.

MATTHEW CATE; RALPH DIAZ, Secretary, California Department of Corrections and Rehabilitation;* JAMES A. YATES, Warden,

Defendants-Appellees.

D.C. No. 1:15-cv-00176-LJO-SAB

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* With respect to all official capacity claims, Ralph Diaz is substituted for his predecessor, Matthew Cate, as Acting Secretary for the California Department of Corrections and Rehabilitation. Fed. R. App. P. 43(c)(2). The other defendants who held public office when the complaints were filed were sued in their individual capacities.

Appeal from the United States District Court for the Eastern District of California Lawrence J. O'Neill, Chief Judge, Presiding

Before: Andrew J. KLEINFELD and Sandra S. IKUTA,** Circuit Judges, and Rosanna Malouf PETERSON,*** District Judge.

KLEINFELD, Senior Circuit Judge

Inmates in several California state prisons were exposed to a heightened risk of getting Valley Fever, so they sued state officials for money damages under 42 U.S.C. § 1983. The inmates claim that exposing them to a heightened risk of getting Valley Fever was cruel and unusual punishment in violation of the Eighth Amendment. African-American inmates add a challenge under the Equal Protection Clause of the Fourteenth Amendment. They claim that because African-American inmates were particularly likely to get Valley Fever and suffer serious consequences, they should have been segregated from the prisons with the highest infection rates. In each of the four cases on appeal, we hold that the state officials are entitled to qualified immunity.

** The original panel, consisting of Judge Kleinfeld, Judge Wardlaw, and Judge Peterson, heard oral argument May 17, 2017. Judge Wardlaw recused herself while the case was under submission, and Judge Ikuta was drawn to replace Judge Wardlaw. Judge Ikuta has read the briefs, reviewed the record, and listened to the tape of oral argument.

*** The Honorable Rosanna Malouf Peterson, United States District Judge for the Eastern District of Washington, sitting by designation.

FACTS

A. The Federal Receiver

For years, inmates in California state prisons have claimed that the state violates the Eighth Amendment by failing to provide sufficient medical care. Many inmates have sued. In 2002, California signed a consent decree in one such case, *Plata v. Davis*. As part of that decree, California promised to implement specific procedures to ensure that inmates statewide received constitutionally adequate medical care.[1] But the state did not satisfy the terms of the decree, so in 2006 the *Plata* district court appointed a federal Receiver.[2] The court conferred on the Receiver "all powers vested by law in the Secretary of the [California Department of Corrections and Rehabilitation] as they relate to the administration, control, management, operation, and financing of the California prison medical health care system."[3] The court concurrently "suspended" the Department of Corrections and Rehabilitation's exercise of those powers "for the duration of the Receivership."[4] The Receiver has filed papers with the *Plata* district court, and the district court has entered orders to improve medical care.[5]

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[1] *Plata v. Davis*, No. 01-cv-01351 (N.D. Cal. June 13, 2002), ECF No. 68.

[2] *Plata v. Schwarzenegger*, No. 01-01351, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005), ECF No. 371.

[3] *Plata v. Schwarzenegger*, No. 01-01351 (N.D. Cal. Feb. 14, 2006), ECF No. 473.

[4] *Id.*

[5] *See Plata v. Schwarzenegger*, 603 F.3d 1088, 1091-92 (9th Cir. 2010) (recounting the history of the receivership); *Plata v. Brown*,

Therefore, since 2006, state officials have made decisions about prison medical care while under the control of a federal Receiver, appointed by a federal district court to ensure compliance with the Eighth Amendment. This case challenges how those state officials responded to Valley Fever outbreaks in several prisons in the Central Valley of California, despite the Receiver's control.

B. Valley Fever

Valley Fever is a disease caused by inhaling certain fungal spores. The spores, which live in dry soil, are common in much of the southwestern United States. Millions of people live where the spores are common, and tens of thousands of people are infected each year. Two-thirds of infections are reported in Arizona. One-fourth are reported in California. The rest are typically reported in Nevada, Utah, New Mexico, and Texas.[6]

Once someone has been infected with the fungal spores, they are immune from future infections. But infections affect different people in different ways. About 60% of infected people do not develop any symptoms. Another 30% develop only mild flu-like symptoms (such as fever, cough, rash, headaches, and muscle aches) that usually go away after a few weeks. But around 10% of people develop a severe case of

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754 F.3d 1070, 1079-80 (9th Cir. 2014) (providing a timeline of the receivership).

[6] *See* Centers for Disease Control & Prevention, *Summary of Notifiable Infections Diseases and Conditions, 2015*, 64 MORBIDITY & MORTALITY WKLY. REP. 1, 13 (Aug. 11, 2017); Centers for Disease Control & Prevention, *Increase in Reported Coccidioidomycosis—United States, 1998-2011*, 62 MORBIDITY & MORTALITY WKLY. REP. 217, 217 (Mar. 29, 2013).

Valley Fever. About 8% of infections lead to a severe respiratory disease. And 1-5% of infections spread from the lungs to other parts of the body, a serious condition known as "disseminated cocci." Patients with disseminated cocci can be effectively treated, but they cannot be cured. Many disseminated cocci patients need expensive treatment for the rest of their lives to prevent their symptoms from recurring. In rare cases, such as when disseminated cocci spread to the brain and are not effectively treated, Valley Fever is fatal.

Some groups of people have an above-average risk of experiencing severe symptoms or developing disseminated cocci. One risk factor is having an underlying medical condition, such as HIV, diabetes, or heart disease. Another risk factor is being on a medication that suppresses the immune system, such as chemotherapy. Adults over 55 and pregnant women are at a greater risk. Men are more likely than women to develop disseminated cocci. And for unknown reasons, people of African and Filipino descent are several times more likely to develop disseminated cocci than are people of other racial or ethnic backgrounds.

C. Valley Fever in California Prisons

In 2005, California prison officials noticed a "significant increase" in the number of Valley Fever cases among prisoners. The federal Receiver asked the California Department of Health Services to investigate the outbreak at Pleasant Valley State Prison, the prison with the highest infection rate. After its investigation, the Department of Health Services issued a report in January 2007. It stated that Pleasant Valley State Prison had 166 Valley Fever infections in 2005, including 29 hospitalizations and four deaths.

The infection rate inside the prison was 38 times higher than in the nearby town and 600 times higher than in the surrounding county. According to the report, "the risk for extrapulmonary complications [was] increased for persons of African or Filipino descent, but the risk [was] even higher for heavily immunosuppressed patients." The report then explained that physically removing heavily immunosuppressed patients from the affected area "would be the most effective method to decrease risk." The report also recommended ways to reduce the amount of dust at the prisons. After receiving the health department's recommendations, the Receiver convened its own committee. In June 2007, the Receiver's committee made recommendations that were similar to those from the health department.

In response, a statewide exclusion policy went into effect in November 2007. The inmates who were "most susceptible to developing severe or disseminated cocci" would be moved from prisons in the Central Valley or not housed there in the first place. The prisons used six clinical criteria to identify which inmates were most likely to die from Valley Fever: "(a) All identified HIV infected inmate patients; (b) History of lymphoma; (c) Status post solid organ transplant; (d) Chronic inmmunosuppressive therapy (*e.g.* severe rheumatoid arthritis); (e) Moderate to severe Chronic Obstructive Pulmonary Disease (COPD) requiring ongoing intermittent or continuous oxygen therapy; [and] (f) Inmate-patients with cancer on chemotherapy." Inmates were not excluded from the Central Valley prisons based on race. The Receiver refined the exclusion policy in 2010 and created a list of "inmates who [were] at institutions within the Valley Fever hyperendemic area that [needed] to be transferred out." The record does not

indicate that the 2010 policy excluded inmates from the outbreak prisons based on race.

In April 2012, the prison system's own healthcare services released a report examining Valley Fever in prisons. The report concluded that despite the "education of staff and inmates" and the "exclusion of immunocompromised inmates," there had been "no decrease in cocci rates." The authors found that Pleasant Valley State Prison inmates were still much more likely to contract Valley Fever than citizens of the surrounding county. From 2006 to 2010, 7.01% of inmates at Pleasant Valley State Prison and 1.33% of inmates at Avenal State Prison were infected. By comparison, the highest countywide infection rate was 0.135%, and the statewide rate was just 0.007%. From 2006 to 2011, 36 inmates in the Central Valley prisons died from Valley Fever. Prison healthcare services also found that male African-American inmates were twice as likely to die as other inmates. Each year, about 29% of the male inmates in California are African-American, but 50% of the inmates who developed disseminated cocci between 2010 and 2012 were African-American, and 71% of the inmates who died from Valley Fever between 2006 and 2011 were African-American.

Following this report, the Receiver issued another exclusion policy—one that would effectively suspend the transfer of African-American and diabetic inmates to the Central Valley prisons.[7] The state objected,[8]

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[7] *Plata v. Brown*, ECF No. 2580.

[8] *Plata v. Brown*, ECF No. 2618.

but the district court ordered the prisons to comply with the new exclusion policy.[9]

There are several theories for why Valley Fever was more common inside the Central Valley prisons than in the surrounding areas. One theory is that new construction and excavation stirred up the soil, allowDddding the breeze to circulate the fungal spores. Many of the prisons were newly constructed or were being expanded during the outbreaks. Pleasant Valley State Prison, which had the highest rate of Valley Fever, was next door to a large construction project. Some prisons did not stop the airflow into their buildings on windy days. The prisons also might be built where there are more fungal spores or where the spores are more virulent.

Prison demographics were certainly relevant, as inmates were more likely to have certain risk factors. For example, adult males are at greater risk than women and children, and the prisons at issue in this case housed only adult males. African-Americans were also over-represented in the prison population, and they are more likely to develop disseminated cocci.[10] Also, it could be that many prisoners were brought into the Central Valley from places that did not have the fungal spores, meaning that the inmates were not

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9 *Plata v. Brown*, No. 01-01351, 2013 WL 3200587 (N.D. Cal. June 24, 2013), ECF No. 2661.

10 From 2000 to 2010, about 29% of California's male inmates were African-American. Just 7% of Californians were African-American. CAL. DEP'T OF CORR. & REHAB., CALIFORNIA PRISONERS & PAROLEES 2010, at 20 (2011); *2010 Census Briefs*, U.S. CENSUS BUREAU, at 8 (last visited January 31, 2019), https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf.

immune to the disease when they arrived at the prisons. By contrast, many civilians in the Central Valley could have been infected when they were young and healthy, and as a result, many civilians might have developed immunity without experiencing severe symptoms.

Finally, there may be differences in identifying people with Valley Fever. Inmates may be more likely than civilians to seek and obtain medical attention when they are sick. They may know about Valley Fever and request medical attention, while civilians with flu-like symptoms that go away in a few weeks may not. Prison doctors may be more aware of the Valley Fever problem than many doctors or other medical care providers outside the prisons. And it may be that Valley Fever is more widespread among the civilian population than the statistics indicate, because of lower diagnosis rates rather than lower incidence rates among civilians.

Even though Valley Fever is more common in prisons, it is important to remember that it is not unique to prisons. More than a million people freely live in the Central Valley, and many of them contract Valley Fever each year. Nor is the disease confined to the Central Valley. It occurs throughout the southwestern United States and is especially common in Arizona. Since the prisoners are confined together, it is especially important that Valley Fever is not contagious.

D. The Cases on Appeal

There are four cases consolidated on appeal. Each is a suit for money damages brought under 42 U.S.C. § 1983.

In *Smith v. Schwarzenegger*, current and former inmates of prisons in the Central Valley who were diagnosed with Valley Fever sued various state officials for Eighth Amendment violations. They alleged that the officials were deliberately indifferent to the inmates' exposure to an unreasonable risk of getting Valley Fever and developing disseminated cocci. The defendants moved to dismiss the complaint under Rule 12(b)(6), claiming that they were entitled to qualified immunity. The district court granted the motion to dismiss. It did not grant leave to amend the complaint. The inmates appeal.

In *Gregge v. Cate*, prison doctors diagnosed Gregge with cocci-meningitis while he was incarcerated at Pleasant Valley State Prison. He sued the prison warden and others for violating the Eighth Amendment. As in *Smith*, the district court dismissed the complaint under Rule 12(b)(6) based on qualified immunity. It did not grant leave to amend. Gregge appeals.

In *Hines v. Youseff*, Hines was incarcerated at Corcoran State Prison when he contracted Valley Fever. He brought an Eighth Amendment claim. The officials moved for summary judgment based on qualified immunity. The district court granted that motion and denied leave to amend. Hines appeals.

And in *Jackson v. Brown*, inmates at Pleasant Valley State Prison and Avenal State Prison who got Valley Fever sued various officials. The defendants moved for judgment on the pleadings under Rule 12(c). The district court held that the officials were entitled to qualified immunity against the inmates' Eighth Amendment claim. But a subgroup of African-American inmates in *Jackson* had also alleged that the officials violated the Equal Protection Clause of the Fourteenth

Amendment by intentionally failing to protect African-American inmates, whom the officials knew had a heightened risk of developing disseminated cocci. The court held that the officials were not entitled to qualified immunity against the Fourteenth Amendment claim. The officials appeal that decision. The inmates do not appeal the ruling on their Eighth Amendment claim.

STANDARDS OF REVIEW

We have jurisdiction over all four appeals.[11] We do not have jurisdiction over the *Plata* decree, and it is not on appeal. We review whether the officials are entitled to qualified immunity de novo[12] and the denial of leave to amend for abuse of discretion.[13]

In *Smith* and *Gregge*, the district court granted the officials' Rule 12(b)(6) motions to dismiss the complaint. And in *Jackson*, the district court denied the officials' Rule 12(c) motion for judgment on the pleadings. So for those three appeals, we must accept as true all of the inmates' factual allegations, and we must draw all reasonable inferences in their favor.[14] We must affirm the dismissal of the *Smith* and *Gregge*

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[11] 28 U.S.C. § 1291; *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

[12] *Davis v. City of Las Vegas*, 478 F.3d 1048, 1053 (9th Cir. 2007).

[13] *Yagman v. Garcetti*, 852 F.3d 859, 863 (9th Cir. 2017).

[14] *Gregg v. Hawaii Dep't of Pub. Safety*, 870 F.3d 883, 886-87 (9th Cir. 2017); *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

complaints if those complaints do not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[15] We must reverse the denial of judgment on the pleadings in *Jackson* if "there is no issue of material fact in dispute" and the officials are "entitled to judgment as a matter of law."[16]

Hines was decided at the summary judgment stage, not at the pleading stage. We therefore evaluate the grant of summary judgment based on the cognizable evidence. We must affirm the grant of summary judgment if there are no genuine issues of material fact and if, as the district court concluded, the officials are entitled to judgment as a matter of law.[17]

Despite these different procedural stages and legal tests, the facts alleged in the *Smith*, *Gregge*, and *Jackson* complaints are largely identical to the evidence produced in *Hines*. Each of the appeals also presents the same basic question: whether the constitutional rights that the officials allegedly violated were "clearly established" when the officials acted. We therefore consider all four appeals together.

ANALYSIS

The officials in these cases are entitled to qualified immunity against claims that they were deliberately indifferent to a substantial risk of serious harm in violation of the Eighth Amendment. They are also entitled to qualified immunity against claims that they racially

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15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted).

16 *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

17 Fed. R. Civ. P. 56(a), (c).

discriminated against African-American inmates. But first, we hold that several of the defendants cannot be sued at all because they were not personally involved in any alleged violations.

I. Personal Involvement

The inmates sued the officials under 42 U.S.C. § 1983. That means the inmates must show that each defendant personally played a role in violating the Constitution.[18] An official is liable under § 1983 only if "culpable action, or inaction, is directly attributed to them."[19]

The plaintiff in *Hines* argues that prison officials were deliberately indifferent to a substantial risk of serious harm when they housed him in the Central Valley. But the plaintiff has failed to demonstrate that defendants Joshua Garza, Dr. Godwin Ugeze, and Dr. Ashrafe Youseff were personally involved in any Eighth Amendment violations. Garza, a nurse practitioner, did not have any discretion to determine whether Hines should have been excluded from prisons in the Central Valley. There is also no evidence that Garza actually determined whether Hines should have been excluded from the Central Valley. There is no evidence that Dr. Ugeze was personally involved in determining what categories of inmates to exclude from the Central Valley. Instead, he was instructed to simply follow the exclusion criteria developed by others. And there is no evidence that Dr. Youseff had any contact with Hines.

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[18] *Menotti v. City of Seattle*, 409 F.3d 1113, 1149 (9th Cir. 2005); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

[19] *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011).

So the district court was right to dismiss those defendants from the case.[20]

II. Cruel and Unusual Punishment

The inmates allege that the defendant state officials violated the Eighth Amendment's prohibition on "cruel and unusual punishments" by being deliberately indifferent to the inmates' heightened risk of getting Valley Fever.[21] The district courts in *Smith*, *Gregge*, and *Hines* held that the officials are entitled qualified immunity against those claims. Reviewing de novo, we affirm. Any Eighth Amendment right to be free from heightened risk of Valley Fever was not clearly established when the officials acted.

None of the cases before us seek an injunction that would regulate how the state assigns inmates to the Central Valley or how it addresses the risk of Valley Fever. That is the subject of the *Plata* case, which is not before us. The cases before us are only about whether individual defendants can be held liable for money damages because of allegedly unconstitutional acts and omissions.

To determine whether an official is entitled to qualified immunity, we ask two questions: (1) whether the official's conduct violated a constitutional right; and (2) whether that right was "clearly established" at

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[20] *See Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001) (permitting us to affirm on any ground supported by the record).

[21] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

the time of the violation.[22] *Helling v. McKinney* sets out the constitutional framework for Eighth Amendment claims about involuntary exposure to environmental hazards.[23] It held that an Eighth Amendment claim against an official for unconstitutional prison conditions requires an inmate to prove both an objective and a subjective factor.

For the objective factor, inmates must establish "that it is contrary to current standards of decency for anyone to be . . . exposed against his will" to the hazard.[24] This "requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused."[25] Instead, courts must "assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk," meaning that the risk "is not one that today's society chooses to tolerate."[26]

For the subjective factor, inmates must show that the official is "deliberately indifferent" to the inmate's suffering.[27] In *Farmer v. Brennan*, the Supreme Court explained that this standard means that an official is liable "only if he knows that inmates face a substantial

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[22] *Castro v. Cty. of L.A.*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc).

[23] 509 U.S. 25 (1993).

[24] *Id.* at 35.

[25] *Id.* at 36.

[26] *Id.*

[27] *Id.* at 35.

risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[28]

The courts below did not decide whether exposing inmates to a heightened risk of Valley Fever violates the Eighth Amendment. Neither do we. Instead, we go straight to the second prong of the qualified immunity analysis: whether a right to not face a heightened risk was "clearly established" at the time. A right is clearly established if it was "sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right."[29] That is, the issue must have been "beyond debate."[30] In determining what is clearly established, we must look at the law "in light of the specific context of the case, not as a broad general proposition."[31]

Applying those principles to the cases at hand, we conclude that the specific right that the inmates claim in these cases—the right to be free from heightened exposure to Valley Fever spores—was not clearly established at the time. A reasonable official could have concluded that the risk was not so grave that it violates contemporary standards of decency to expose anyone unwillingly to such risk, or that exposure to the risk was lawful.

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28 511 U.S. 825, 847 (1994); *see also Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1248–49 (9th Cir. 2016).

29 *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotation marks omitted).

30 *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016) (internal quotation marks omitted).

31 *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted).

A. Other Valley Fever Cases

The inmates' alleged constitutional right would be "clearly established" if "controlling authority or a robust consensus of cases of persuasive authority" had previously held that it is cruel and unusual punishment to expose prisoners to a heightened risk of Valley Fever.[32] But no such precedent exists. The inmates argue that several of our memorandum dispositions clearly establish their right to not face an unreasonable risk of Valley Fever. But memorandum dispositions do not establish law.[33] They are, at best, persuasive authority. And more importantly, none of the cited memorandum dispositions held that inmates have an Eighth Amendment right to not be exposed to a heightened risk of Valley Fever.[34] The inmates also point us to unpublished district court decisions about Valley Fever exposure. We have previously said that unpublished district court decisions "may inform our qualified immunity analysis."[35] But we have also noted that "it will be a rare instance in which, absent any published opinions on point or overwhelming obviousness of illegality, we can conclude that the law was clearly established on the basis of unpublished

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[32] *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018).

[33] *See* Ninth Circuit Rule 36-3(a).

[34] *See Holley v. Scott*, 576 F. App'x 670, 670 (9th Cir. 2014); *Johnson v. Pleasant Valley State Prison*, 505 F. App'x 631, 632 (9th Cir. 2013); *Jones v. Igbinosa*, 467 F. App'x 604, 605 (9th Cir. 2012); *Smith v. Schwarzenegger*, 393 F. App'x 518, 519 (9th Cir. 2010).

[35] *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).

decisions only."[36] And at most, the cited district court opinions show that the law was developing—not that it was already clearly established.[37]

We therefore conclude that when the officials acted, existing Valley Fever cases did not clearly establish that they were violating the Eighth Amendment.

B. Eighth Amendment Principles

Of course, we do not require that heightened exposure to Valley Fever must have been previously held unlawful.[38] The qualified immunity analysis does not require a case on all fours. What matters is whether "existing precedent . . . placed the statutory or constitutional question beyond debate," not whether the debate has already taken place.[39] An officer loses qualified immunity, even in novel factual circumstances, if he or she commits a "clear" constitutional violation.[40] This rule prevents absurd results. As then-Judge Gorsuch once explained, "some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the

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36 *Id.*

37 *See Clark v. Igbinosa*, No. 1:10-cv-01336, 2011 WL 1043868, at *2 (E.D. Cal. Mar. 21, 2011); *James v. Yates*, No. 1:08-cv-01706, 2010 WL 2465407, at *4 (E.D. Cal. June 15, 2010).

38 *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

39 *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

40 *Farmer*, 511 U.S. at 847.

most immune from liability only because it is so flagrantly unlawful that few dare its attempt."[41]

But this case does not involve a "clear" or "obvious" violation. The inmates must show that "every reasonable official would [have understood]" that exposing them to a heightened risk of Valley Fever violated the Eighth Amendment.[42] More specifically, they must show that no reasonable officer could have thought that free society tolerated that risk.[43] They have not met that burden for two reasons: a federal court supervised the officials' actions, and there is no evidence that "society's attitude had evolved to the point that involuntary exposure" to such a risk "violated current standards of decency,"[44] especially given that millions of free individuals tolerate a heightened risk of Valley Fever by voluntarily living in California's Central Valley and elsewhere. Those two facts mean that a reasonable official could have thought that he or she was complying with the Constitution.

It is especially significant that state officials could have reasonably believed that they were not violating the inmates' Eighth Amendment rights because the officials reported to the federal Receiver. The *Plata* district court appointed a federal Receiver in 2006—just a year after the Valley Fever outbreak began. The receiver entered orders about Valley Fever. Studies

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41 *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015).

42 *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (internal quotation marks omitted).

43 *See Helling v. McKinney*, 509 U.S. 25, 36 (1993).

44 *Id.* at 29.

were conducted, and in 2010, the Receiver amended the policy excluding certain inmates from the Central Valley. Thus the federal Receiver appointed by the federal court to assure Eighth Amendment compliance actively managed the state prison system's response to Valley Fever.

Because the Receiver oversaw prison medical care and protective measures regarding Valley Fever, state officials could have reasonably believed that their actions were constitutional so long as they complied with the orders from the Receiver and the *Plata* court. The inmates do not claim that state officials defied the *Plata* Receiver. The Receiver promulgated orders directed specifically to the Valley Fever problem, and the inmates do not claim that the defendants defied those orders and that the defiance harmed them. The inmates fault the officials for not following various recommendations made before 2013. For example, in 2007 the California Department of Health Services recommended covering the prison grounds, but the soil was not stabilized until 2011 after the prisons got funding from the Receiver. Other recommendations were never adopted. But the inmates do not argue that the officials disobeyed the Receiver's binding orders, only that the officials did not promptly follow recommendations that were not orders. In determining what constituted the constitutionally sufficient level of protection, an official could reasonably have thought that it sufficed to comply with the Receiver's orders.[45] As we once stated in a different context, "no reasonable prison official would understand that executing a court order

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45 *Stein v. Ryan*, 662 F.3d 1114, 1119–20 (9th Cir. 2011).

without investigating its potential illegality would violate [a] prisoner's right to be free from cruel and unusual punishment."[46]

Second, millions of people live in the Central Valley. This includes many African-Americans and others with a heightened risk of getting Valley Fever. Many people also work in the same prisons where the inmates live, exposed to the same fungal spores as the inmates. These people voluntarily live and work in the Central Valley despite a heightened risk of getting Valley Fever. Likewise, people live in Arizona despite the risk of getting Valley Fever. Each year, two-thirds of all Valley Fever cases are reported in Arizona. And from 1998 to 2016, the infection rate in Arizona nearly tripled.[47] The infection rate is particularly high around Phoenix, Arizona.[48] Yet Arizona's population grew an estimated 35.1% between 2000 and 2016.[49] Where large numbers of people are exposed to a known risk, and yet no societal consensus has emerged that the risk is intolerably grave, a reasonable official can infer that the risk is one society is prepared to tolerate, like the risk of being injured or killed in a traffic accident.

Because so many people freely chose to live in the Central Valley despite the Valley Fever risk, and there is no evidence in the record that "society's attitude had

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46 *Id.*

47 ARIZ. DEP'T OF HEALTH SERVS., VALLEY FEVER 2016 ANNUAL REPORT 20 (2017).

48 *Id.* at 16, 22.

49 *American FactFinder*, U.S. CENSUS BUREAU (last visited July 16, 2018), https://factfinder.census.gov/bkmk/cf/1.0/en/state/arizona/population/pep_est.

evolved to the point that involuntary exposure" to either the heightened risk inside prison or the lower risk outside prison "violated current standards of decency,"[50] it would not have been "clear" to every reasonable officer that the inmates had a valid claim under *Helling*. The inmates have failed to show that every reasonable officer would have thought that "it violate[d] contemporary standards of decency to expose anyone involuntarily to such a risk," that is, that the risk of Valley Fever in the prisons was "not one that today's society chooses to tolerate."[51]

We therefore affirm the district court rulings in *Hines*, *Smith*, and *Gregge* holding that the officials are entitled to qualified immunity against the Eighth Amendment claims. We also hold that the district courts did not abuse their discretion in denying the inmates' motions for leave to amend. Any attempt to amend the pleadings would be futile because we see no way to hold that the officials violated a clearly established Eighth Amendment right.

III. Racial Discrimination

For unknown reasons, Valley Fever disproportionally affects African-Americans. State officials did not exclude African-American inmates from the outbreak prisons until a federal court ordered them to do so in 2013. Some of the inmates in *Jackson* allege that this failure violated the Equal Protection Clause of

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50 *Helling v. McKinney*, 509 U.S. 25, 29 (1993).

51 *Id.* at 36 (emphasis in original).

the Fourteenth Amendment.[52] According to the complaint, the officials "intentionally failed" to exclude African-American inmates from Pleasant Valley and Avenal State Prisons (or otherwise reduce the risk of harm) because the officials wanted to harm African-American inmates. Thus, the inmates allege, it was discriminatory to adopt a race-neutral exclusion policy that excluded inmates from those prisons based solely on medical conditions. That is, they allege it was discriminatory not to discriminate. On a motion for judgment on the pleadings, the district court held that the officials lacked qualified immunity. The officials appealed, and we reverse. We address an unusual Equal Protection claim that it was a denial of equal protection not to segregate prisoners by race.

The district court analyzed this case as being about "the right to non-discriminatory administration of prison services." The district court and the inmates both rely on *Elliot-Park v. Manglona*,[53] but that case is inapposite. In *Elliot-Park*, a Micronesian drunk driver crashed into a Korean driver.[54] The investigating police officers were all Micronesian. The Micronesian driver told an officer that "he had 'blacked out' while driving," but the officers did not test him for intoxication or arrest him for drunk driving.[55] The Korean driver sued the officers, arguing that their failure to

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52 *See* U.S. CONST. amend XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

53 592 F.3d 1003 (9th Cir. 2010).

54 *Id.* at 1005.

55 *Id.* at 1006.

investigate or arrest the drunk driver was motivated by racial animus against Koreans. We held that the officers lacked qualified immunity because "[t]he right to non-discriminatory administration of protective services is clearly established."[56] Because the officers considered race when deciding whom to help, strict scrutiny applied.

But *Elliot-Park* did not establish that state actors could violate the Equal Protection Clause by adopting a race-neutral policy. Implicit in our holding in that case was the fact that police officers typically arrest drunk drivers. The officers diverged from the norm, allegedly because of racial animus. That is, they allegedly treated Korean drivers differently than they treated Micronesian drivers.

Here, by contrast, the officials did not have one policy for African-American inmates and another for white inmates. All inmates were treated the same, regardless of race. The officials are said to have violated the Constitution precisely because they treated the inmates the same regardless of race—not, as in *Elliot-Park*, because they treated people differently because of their race. So for the officials here to lose qualified immunity, it would have to have been clearly established that treating people of all races the same violated the Equal Protection Clause. For three reasons, it would not have been clear to a reasonable person, acting on the officials' information and motivated by their purposes,[57] that the Equal Protection Clause required

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56 *Id.* at 1008.

57 *See Norse v. City of Santa Cruz*, 629 F.3d 966, 974 (9th Cir. 2010) (en banc) (articulating a similar rule in a First Amendment retaliation case).

excluding African-American inmates from these prisons based on race.

First, from 2006 onward, a federal Receiver supervised the prisons. During that time, multiple experts gave recommendations. An exclusion policy went into effect in 2007. The Receiver modified that policy in 2010.[58] It was not until April 2012 that experts proposed excluding African-Americans from the Central Valley.[59] The Receiver did not formally recommend a policy that would exclude African-Americans until November 2012.[60] The inmates note that the prisons objected to excluding African-Americans from the affected prisons. But the inmates do not argue that the prisons failed to obey the district court's order once that order was made. And again, since 2006, the prisons were under the Receiver's supervision. The officials adopted exclusion policies in accord with the Receiver's directions and under the Receiver's watchful eye. Therefore, an official could have reasonably believed that the policies about excluding (or not excluding) African-Americans from Central Valley prisons did not violate the Equal Protection Clause.

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58 *Plata* ECF No. 2617, at 2-3; *id.* ECF No. 2617-2, at 2.

59 *Plata* ECF No. 2580-3, at 13.

60 *Plata* ECF No. 2601, at 3. The Receiver did not want to rely "solely on racial classifications," *id.* at 7, so it crafted a risk-based cutoff that had the effect of excluding African-Americans, inmates of "other races" (*e.g.*, Filipinos), and those over 55—but not Latino/Hispanic or white inmates, *id.* at 8. It is clear that the Receiver considered race, not just risk. *Id.* at 12. And being African-American is now, under the Receiver's cutoff, reason enough to keep an inmate out of the Central Valley prisons.

There is a second reason why the officials have qualified immunity: the Constitution generally demands race neutrality. Over and over again, the Supreme Court has unambiguously held that "all racial classifications" are invalid unless they pass strict scrutiny.[61] That is, an express racial classification (like the ones the inmates want) is presumptively unconstitutional. It can survive only if the state proves that the classification is "narrowly tailored" to achieving a "compelling" state interest.[62] Even so-called "benign" racial classifications must satisfy strict scrutiny.[63] In *Johnson v. California*, prison inmates challenged a policy of temporarily segregating inmates based on race.[64] Even though the prison adopted the policy to avoid racial gang violence, the Supreme Court plainly held that strict scrutiny applied.[65]

Mitchell v. Washington demonstrates how strict scrutiny applies to race-based medical decisions.[66] There, an African-American inmate with Hepatitis C

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61 *Johnson v. California*, 543 U.S. 499, 505 (2005); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Shaw v. Reno*, 509 U.S. 630, 650 (1993); *see also, e.g., Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013).

62 *Johnson*, 543 U.S. at 505 (quoting *Adarand*, 515 U.S. at 227).

63 *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand*, 515 U.S. at 226; and *Shaw*, 509 U.S. at 650).

64 *Id.* at 502-03.

65 *Id.* at 507-09. The Supreme Court remanded the case so that a lower court could determine whether the policy survived scrutiny, *id.* at 515, but the parties settled before a lower court decided that issue.

66 818 F.3d 436 (9th Cir. 2016).

asked a prison doctor to treat him with certain drugs. The doctor did not prescribe the drugs because they "had been largely unsuccessful on African-American males" with Hepatitis C.[67] The inmate sued the doctor on the theory that basing treatment decisions on race violated the Equal Protection Clause. We held that strict scrutiny applied because "even medical and scientific decisions are not immune from invidious and illegitimate race-based motivations and purposes."[68] Even though the doctor might have had good intentions and good data—the inmate later got the demanded treatment, and it was unsuccessful—"there is simply no way of determining what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."[69] The doctor did not give any compelling reason for why he considered the inmate's race, so he violated the Equal Protection Clause.[70]

Third, a reasonable official could have believed that not excluding African-Americans from the prisons was consistent with the scientific data and pre-2012

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[67] *Id.* at 441.

[68] *Id.* at 444.

[69] *Id.* at 445 (quoting *Shaw*, 509 U.S. at 642-43).

[70] *Id.* at 446; *cf. Walker v. Beard*, 789 F.3d 1125 (9th Cir. 2015) (holding that because a prison had "an objectively strong legal basis for believing" that "exempting prisoners from race-neutral [housing policies] on the basis of their religious beliefs" would violate the Equal Protection Clause, the Religious Land Use and Institutionalized Persons Act did not protect a white supremacist inmate that had a religious objection to being housed with non-white inmates). a 1.6 relative risk. Inmates over age 40 had a 1.6 relative risk. And African-American inmates had a 1.9 relative risk compared to white inmates.

expert recommendations. The California Department of Health Services began investigating Valley Fever at Pleasant Valley State Prison in 2005. It summarized its findings in a January 2007 report that assessed the relative risk of contracting Valley Fever for various populations. Overall, inmates with a chronic medical condition had a 2.7 "relative risk," meaning that they were 2.7 times more likely to contract Valley Fever than inmates without a chronic condition. Inmates with pulmonary conditions had a 3.8 relative risk. Diabetics had a 2.7 relative risk. Those with chronic heart conditions had

According to the report, 47% of African-American inmates' risk was due to race alone. But the report also estimated that removing African-American inmates from the prison would only reduce the number of Valley Fever cases by, at most, 16%. And even though being African-American was a risk factor for getting Valley Fever, the report said that being African-American "was not associated with more severe disease." The two biggest risks were having a chronic medical condition and being housed in a facility with more outdoor exposure. So the report concluded that targeting chronic conditions and outdoor exposure could do more to decrease Valley Fever than targeting race or age. Based on these relative risks, the state health department recommended the following:

> Consider relocating the highest risk groups to areas that are not hyper-endemic for [the fungal spores]. Previous studies have suggested that the risk for extrapulmonary complications is increased for persons of African or Filipino descent, but the risk is even higher for heavily immunosuppressed patients. In

> this investigation, we found an increased risk among persons with chronic medical conditions, especially pulmonary conditions. Prevention efforts are critical for these higher risk populations and may mitigate the risk, but physical removal of these highest risk groups from highly endemic regions, if possible, would be the most effective method to decrease risk.

A reasonable official could have read this report and its recommendations and concluded that African-Americans did not need to be excluded from the Central Valley based on race. Even though African-American inmates had a higher risk of getting Valley Fever than did white inmates, those with chronic diseases typically had even higher risks. And because nearly one-third of inmates were African-American, a reasonable official could have decided that it was better to try less burdensome measures first.

In short, it was reasonable to exclude inmates based on medical conditions rather than based on race. Even if state officials should have been more aggressive in excluding inmates whose higher risk appeared to be on account of (or at least connected to) their race, that does not mean their conduct violated clearly established law. The inmates did not have a clearly established right to be segregated from certain Central Valley prisons based on their race. We therefore reverse the *Jackson* court's ruling on the equal protection claim.[71]

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[71] Regarding the claim that the officials violated the Equal Protection Clause by failing to make the prisons safe, the same analysis applies.

CONCLUSION

We are sympathetic to the inmates' plight. Valley Fever is a serious and potentially fatal disease. When state officials know that inmates face a substantial risk of serious harm, the officials are constitutionally required to take reasonable steps to abate that risk.[72] State officials cannot shut their eyes to inmate suffering; they are responsible for the safety of the people in their custody.[73] But it would not have been "obvious" to any reasonable official that they had to segregate prisoners by race or do more than the federal Receiver told them to do. So we conclude that the defendants are entitled to qualified immunity. The rights that the inmates claim were not clearly established when the officials acted. Granting leave to amend would be futile. We therefore AFFIRM the judgments in Hines, Gregge, and Smith, and we REVERSE the judgment on appeal in Jackson.

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[72] *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

[73] *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199 (1989); *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976).

MEMORANDUM DECISION AND ORDER RE FINDINGS AND RECOMMENDATIONS (DOC. 164) RE DEFENDANTS' MOTIONS TO DISMISS (DOCS. 138, 140) (OCTOBER 7, 2015)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

COREY LAMAR SMITH, ET AL.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, ET AL.,

Defendants.

Lead Case No.: 1:14-cv-60-LJO-SAB

Member Case Nos.: 1:13-cv-1618-AWI-SKO
1:13-cv-1822-AWI-GSA
1:14-cv-369-MJS
1:14-cv-430-LJO-SAB
1:14-cv-816-LJO-SAB
1:14-cv-1074-LJO-GSA
1:14-cv-1226-LJO-SAB
1:14-cv-1395-LJO-SAB
1:14-cv-1559-LJO-SAB
1:14-cv-1697-LJO-DLB

Before: Lawrence J. O'NEILL, United States District Judge.

I. Introduction

Coccidioidomycosis, commonly known as "Valley Fever," is an infection caused by inhaling the spores of the fungus Coccidioides, which is endemic to the soil throughout the southwestern United States, and is particularly prevalent in California's San Joaquin Valley.[1] Valley Fever infections generally cause mild flu-like symptoms (or no symptoms at all), but the "disseminated" form of the disease, which occurs when the infection disseminates beyond the lungs and into other parts of the body, can cause serious, life-long health complications, and even death. Some groups of individuals, including certain ethnic groups, individuals over the age of 55, and individuals with compromised immune systems, are particularly susceptible of developing disseminated Valley Fever.

This consolidated action is one of many civil rights cases currently pending in this district brought under 42 U.S.C. § 1983 ("§ 1983") by current and former inmates who contracted Valley Fever while incarcerated at prisons located in the San Joaquin Valley, where cocci naturally exist. Plaintiffs, 159 current and former inmates who contracted Valley Fever while incarcerated in San Joaquin Valley prisons, bring this class action against Defendants, various California prison officials, for (1) violation of the Eighth Amendment and (2) negligence. *See* Doc. 113, Consolidated Amended Complaint ("CAC"), at 2. Plaintiffs' claims are premised on their assertion that Defendants' intentional actions and inaction unconstitutionally and negligently exposed them to an unreasonable risk of contracting Valley

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[1] Valley Fever and the spores that cause it often are referred to interchangeably as "cocci."

Fever and, ultimately, caused them to contract the disease.

Currently pending before the Court is Defendants' motion to dismiss Plaintiffs' Consolidated Amended Complaint ("CAC") in its entirety. Doc. 138. The Magistrate Judge issued Findings and Recommendations ("F&Rs"), Doc. 164, to which the parties filed objections and responses. Docs. 175, 177-79. The Magistrate Judge recommends dismissing Plaintiffs' Eighth Amendment claim without leave to amend on the ground Defendants are entitled to qualified immunity from the claim. Doc. 164 at 36. Because that claim is the only basis for federal court jurisdiction, the Magistrate Judge further recommends declining to extend supplemental jurisdiction over Plaintiffs' negligence claim and dismissing it without leave to amend. *Id.*

In addition, after the F&Rs issued and Plaintiffs filed their objections to them, Plaintiffs filed a motion to amend the CAC to add an additional defendant (Doc. 182), and the parties filed a stipulation concerning Plaintiffs' naming another defendant in the CAC (Doc. 183), both of which were stayed by the Magistrate Judge pending the Court's consideration of the F&Rs. Doc. 184 at 2. The Magistrate Judge reasoned that any amendment would be futile if the Court adopted the F&Rs. *Id.*

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a de novo review of the F&Rs and the relevant record. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); Fed. R. Civ. P. 72(b)(3). For the following reasons, the Court ADOPTS the Magistrate Judge's recommendations to dismiss without leave to amend Plaintiffs' Eighth Amendment claim and to

decline supplemental jurisdiction over their negligence claim.

II. Factual and Procedural Background[2]

Plaintiffs' 276-page CAC names as Defendants former California Governor Arnold Schwarzenegger, 13 various California prison officials, and Doe Defendants 1-50.[3] CAC at 6-7. Plaintiffs bring claims against Defendants for (1) violation of their Eighth Amendment rights and (2) negligence under California state law.[4] The crux of Plaintiffs' claims is that Defendants' acts and omissions recklessly "caused the Plaintiffs to contract Valley Fever, a lifelong crippling disease." *Id.* at ¶¶ 1, 9. Specifically, Plaintiffs allege Defendants knew that housing inmates, like Plaintiffs,

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[2] The Court has considered the entire record, but will discuss only the aspects of it necessary to resolve Defendants' motions to dismiss. The Court incorporates by reference the factual and procedural background outlined in the F&Rs. Doc. 164 at 2-3, 4-11.

[3] The CAC named J. Clark Kelso as a Defendant, but Plaintiffs voluntarily dismissed him. Doc. 135.

[4] The individual Plaintiffs do not bring identical claims. First, some Plaintiffs bring both Eighth Amendment and negligence claims, whereas other Plaintiffs only bring one of those claims. *See, e.g.*, CAC at ¶¶ 2269 (Plaintiff Abukar Abdulle brings both a federal and a state claim), 2271 (Plaintiff Richard Adams brings only a federal claim). Further, the individual claims are not brought against all Defendants because certain Defendants were involved only at prisons where certain Plaintiffs were not housed. For instance, Defendant Brazelton was involved with only Pleasant Valley State Prison ("PVSP"). *Id.* at ¶ 2091. As such, Plaintiffs who were not housed at PVSP do not bring claims against him. *See, e.g.*, *id.* at ¶ 2272 (Plaintiff Richard Adams, who was housed at only ASP, does not bring claims against Brazelton).

in prisons where Valley Fever was known to be hyper-endemic[5] while failing to implement remedial and preventative measures[6] to reduce inmate exposure to cocci "posed an unacceptable risk of irreparable harm." *Id.* at ¶¶ 10, 12, 52. In addition, Defendants allowed "major construction" at the prisons, which churned the soil and released cocci into the air. *Id.* at ¶ 15. Plaintiffs' allegations are informed by, among other things:

> a) review and analysis of public documents published by the State of California, Department of Corrections and Rehabilitation (CDCR) and other public agencies; b) review and analysis of public filings, press releases and other publications by certain of the defendants and other non-parties; c) review of news articles, medical and other reference sources, as well as postings on the State of California CDCR and correctional facility websites concerning the issues described [in the CAC]; and d) review of other available information concerning CDCR's operations, the

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[5] These prisons include Avenal State Prison ("ASP"); California Correctional Institution; California State Prison-Corcoran; Wasco State Prison ("WSP"); North Kern State Prison; PVSP; California Substance Abuse Treatment Facility and State Prison, both of which are in Corcoran; and Kern Valley State Prison. CAC at ¶ 51. Plaintiffs were housed in these and other correctional facilities within the San Joaquin Valley.

[6] Among other things, Plaintiffs allege Defendants knew the following measures would have abated the Valley Fever risks: paving, landscaping, soil stabilization, improved ventilation, respiratory protective gear, and cautioning inmates to stay indoors during high wind conditions. CAC at ¶¶ 12-13.

> medical conditions and treatment described [in the CAC], and the individual defendants.

Id. at ¶ 3.

The incidence rates of Valley Fever at these prisons were significantly higher than the rates in the counties in which they are located. For instance, "[i]n comparison with the rate in California (7/100,000), the rate at PVSP was 1,001 times higher (7011/100,000), the rate at ASP was 189 times higher (1326/100,000) and the rate at WSP was 114 times higher (800/100,000)." *Id.* at ¶ 64. The rates at these prisons were much higher than the rate in Kern County, the county with the highest incidence rate of Valley Fever in California (135/100,000). *Id.* at ¶ 66. The rate of Valley Fever cases at PVSP was 38 times the rate of Coalinga residents and 600 times the rate in Fresno County. *Id.* at ¶ 69. Further, the rate at PVSP was 6 times higher than the rate at the adjacent mental health facility. *Id.* at ¶ 76.

African-Americans, Filipinos, individuals over the age of 55, and individuals with "pre-existing health conditions" or compromised/suppressed immune systems are more susceptible to contracting Valley Fever and are more prone to developing disseminated Valley Fever. *Id.* at ¶¶ 71, 81, 84, 86, 2633. African-Americans accounted for approximately 68% of those infected and died at approximately twice the rate of non-black inmates. *Id.* at ¶ 67. "In fact, African-American prisoners comprised 71% of the 34 Valley Fever deaths in CDCR prisons between 2006 and 2011." *Id.* at ¶ 88. In 2013, medical experts found that 70% of the 36 inmate deaths caused by Valley Fever were African-

Americans and 76% had an immune-compromised condition, such as HIV or diabetes. *Id.* at ¶ 2635.[7]

Between 2006 and 2012, medical experts, CDCR, California public health agencies, a Fresno County Grand jury, and various media organizations had researched the Valley Fever "epidemic" at San Joaquin Valley prisons, and circulated numerous reports, memoranda, and studies to prison officials. *See id.* at ¶¶ 91-127. In addition, in 2012, the federal court-appointed Receiver[8] managing the California State prison system's health care program issued "Recommendations for Immediate Response to Coccidioidomycosis in CDCR Prisons." *Id.* at 2632. Plaintiffs allege Defendants were fully aware of the information discussed in these documents, but "took no action." *Id.* at ¶¶ 91, 128-29. Defendants failed to prevent Plaintiffs and other high-risk inmates from being housed at hyper-endemic prisons, although they had the means and ability to do so. *Id.* at ¶¶ 143, 145. Similarly, Defendants failed to implement remedial and preventative measures to reduce the risk of infection at the prisons, although they had the ability and means to do so. *Id.* at ¶¶ 179-80.

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[7] Most, but not all Plaintiffs were at heightened risk of contracting Valley Fever and developing disseminated Valley Fever due to their ethnicity or medical status. *See, e.g.*, CAC at ¶¶ 1066-69 (Plaintiff Koklich does not allege he was at heightened risk for Valley Fever); *id.* at ¶¶ 1313-15 (Plaintiff Morrow does not allege he was at heightened risk for Valley Fever).

[8] In 2005, the Northern District of California ordered the California prison healthcare system to be placed under a federal receivership. *See Plata v. Schwarzenegger*, No. C01-1351 THE, 2005 WL 2932253, at *1 (N.D. Cal. Oct. 5, 2005).

The thrust of Plaintiffs' Eighth Amendment claim is that Defendants knew of the "serious, epidemic level of risk of harm," *id.* at ¶ 2598, posed by cocci at San Joaquin Valley prisons, yet consciously decided not to do anything to mitigate those risks or to protect Plaintiffs from them. *Id.* at 258; *id.* at ¶ 2648-49. "In fact, Defendants not only failed to implement remedial measures to reduce Plaintiffs' risk of infection, they persisted in practices that increased that risk." *Id.* at ¶ 2642. Specifically, Defendants continued with construction at the prisons, which churned soil and released cocci, thereby exacerbating the Valley Fever problem. *Id.* at ¶¶ 2643-45. These acts and omissions also provided the basis for Plaintiffs' negligence claim brought under California law.

Defendants move to dismiss both claims under Fed. R. Civ. P. 12(b)(6). Docs. 138, 140. Defendants assert they are entitled to qualified immunity from Plaintiffs' Eighth Amendment claim because they did not violate clearly established law. Doc. 138-1 at 13; Doc. 140 at 21; Doc. 177 at 6; Doc. 178 at 4. Defendants argue Plaintiffs' state law negligence claims fail for a variety of procedural and substantive reasons.[9]

III. Standard of Decision

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is a challenge to the sufficiency of the

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[9] As discussed below, the Court will dismiss without leave to amend Plaintiffs' Eighth Amendment claim on the ground Defendants are entitled to qualified immunity from it. As such, the only jurisdictional basis for Plaintiffs' negligence claim is supplemental jurisdiction, which the Court declines to extend over the claim. The Court therefore need not discuss the parties' in-depth arguments concerning Plaintiffs' negligence claim.

allegations set forth in the complaint. A 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). In considering a motion to dismiss for failure to state a claim, the court generally accepts as true the allegations in the complaint, construes the pleading in the light most favorable to the party opposing the motion, and resolves all doubts in the pleader's favor. *Lazy Y. Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008).

To survive a 12(b)(6) motion to dismiss, the Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility for entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a Plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). Thus, "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements' . . . are not entitled to be assumed true." *Iqbal*, 556 U.S. at 681. In practice, "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562. To the extent that the pleadings can be cured by the allegation of additional facts, the Plaintiffs should be afforded leave to amend. *Cook, Perkiss and Liehe, Inc. v. N. Cal. Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

IV. Discussion

A. The Eighth Amendment

Under the Eighth Amendment, "prison officials are . . . prohibited from being deliberately indifferent to policies and practices that expose inmates to a substantial risk of serious harm." *Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014); *see also Helling v. McKinney*, 509 U.S. 25, 35 (1993); *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (prison official violates Eighth Amendment if he or she knows of a substantial risk of serious harm to an inmate and fails to take reasonable measures to avoid the harm). "Deliberate indifference occurs when '[an] official acted or failed to act despite his knowledge of a substantial risk of serious harm.'" *Solis v. Cnty. of Los Angeles*, 514 F.3d 946, 957 (9th Cir. 2008) (emphasis added) (quoting *Farmer*, 511 U.S. at 841). Thus, a prisoner may state "a cause of action under the Eighth Amendment by alleging that [prison officials] have, with deliberate

indifference, exposed him to [environmental conditions] that pose an unreasonable risk of serious damage to his future health," *Helling*, 509 U.S. at 35.

"The second step, showing 'deliberate indifference,' involves a two part inquiry." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010). "First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety." *Id.* (quoting *Farmer*, 511 U.S. at 837). "This part of [the] inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious." *Id.* (citation omitted). "Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." *Id.* (citing *Farmer*, 511 U.S. at 844 ("[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably.") (footnote omitted).

B. Qualified Immunity

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011) (en banc) (citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "Qualified immunity shields an officer from liability even if his or her action resulted from a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* (citation and quotation marks omitted). "The purpose of qualified immunity is to strike a balance between the competing need to hold public officials accountable when they exercise power

irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* (citation and quotation marks omitted). Accordingly, qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft v. al–Kidd*, 563 U.S. 731, S.Ct. 2074, 2085 (2011) (citation omitted). The party asserting the defense of qualified immunity bears the burden of proof. *See Gomez v. Toledo*, 446 U.S. 635, 639-41 (1980).

In determining whether an official is entitled to qualified immunity, courts employ a two-pronged inquiry. *Id.* The facts are construed in the light most favorable to the plaintiff. *Estate of Ford v. Ramirez–Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002). Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Lal v. California*, 746 F.3d 1112, 1116 (9th Cir. 2014). First, a court must determine whether the official violated the plaintiff's constitutional right. *Id.* If a constitutional violation is present, a court must then determine whether the constitutional right was "clearly established in light of the specific context of the case" at the time of the events in question. *Id.* (citation and quotation marks omitted); *see also Saucier v. Katz*, 533 U.S. 194, 201 (2001).

"For the second step in the qualified immunity analysis—whether the constitutional right was clearly established at the time of the conduct—the critical question is whether the contours of the right were 'sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that

right.'" *Mattos*, 661 F.3d at 442 (quoting *al–Kidd*, 131 S.Ct. at 2083). "This inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition" *Saucier*, 533 U.S. at 202. "[W]here there is no case directly on point, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *C.B. v. City of Sonora*, 769 F.3d 1005, 1026 (9th Cir. 2014) (citing *al–Kidd*, 131 S.Ct. at 2083).

However, "closely analogous preexisting case law is not required to show that a right was clearly established." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011) (internal citations and quotations omitted). While "there must be some parallel or comparable factual pattern[,] . . . the facts of already decided cases do not have to match precisely the facts with which [the government employer] is confronted." *Id.* Rather, the preexisting case law must have provided fair warning that the complained-of conduct was unlawful. *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1136-37 (9th Cir. 2003) (citation omitted). "Ultimately, the 'clearly established' prong of the qualified immunity test shows deference towards the actions of government officials, but does not shield individuals who are 'plainly incompetent or those who knowingly violate the law.'" *Reza v. Pierce*, ___ F.3d ___, 2015 WL 4899122, at *7 (9th Cir. Aug. 18, 2015) (citation omitted).

The Court recently found that some, but not all of the same Defendants were entitled to qualified immunity from materially identical claims brought against them. *See Jackson v. Brown*, No. 13-cv-1055, ___ F. Supp. 3d ___, 2015 WL 5522088 (E.D. Cal. Sept. 17, 2015), *amended by* 2015 WL 5732826 (E.D. Cal. Sept.

28, 2015). The Court finds that the logic and conclusions of *Jackson*'s qualified immunity analysis likewise apply to all Defendants here. Defendants are entitled to qualified immunity from Plaintiffs' Eighth Amendment claim because the applicable law remains unsettled and unclear.

C. Analysis

a. The Constitutional Right at Issue

Although it is beyond dispute that Plaintiffs have a constitutional right to safe conditions of confinement, *see generally Farmer*, 511 U.S. 825, the level of detail at which a court must define the contours of that right in the context of analyzing qualified immunity is less clear. As in *Jackson*, the parties here offer various iterations of the constitutional right at issue with differing levels of specificity, and the Court can conceive of other iterations. *See, e.g.*, Doc. 175 at 14-15; Doc. 178 at 5.

Ultimately, however, these varying iterations of the constitutional right at issue in this case are distinctions without any practical difference. The Court need not determine the full contours of the Eighth Amendment in the Valley Fever context,[10] what

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[10] The Supreme Court has cautioned that following a "rigid" qualified immunity analysis "comes with a price": the "expenditure of scare judicial resources on difficult questions that have no effect on the outcome of the case." *Pearson v. Callahan*, 555 U.S. 223, 236-37 (2009). This is particularly true where "[a] decision on the underlying constitutional question in a § 1983 damages action . . . may have scant value when it appears that the question will soon be decided by a higher court." *Id.* at 237-28. As it stands, it appears that the Ninth Circuit soon will have the opportunity to resolve the issue of whether Plaintiffs' Eighth

the constitutional right at issue is in these cases, or whether Plaintiffs have pled a violation of their Eighth Amendment rights sufficiently.[11] As discussed below, under any definition of the constitutional right at issue in this case, and even assuming Plaintiffs have pled an Eighth Amendment claim, the substantial and unsettled case law concerning Valley Fever at the district court level establishes that Defendants are entitled to qualified immunity from Plaintiffs' Eighth Amendment claim. This is a case where the Court can "rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all." *Pearson*, 555 U.S. at 239. Accordingly, the Court skips the first step of the *Saucier* qualified immunity analysis.

Amendment rights were violated. *See Hines v. Youssef*, No. 1:13-cv-357 AWI JLT, 2015 WL 2385095 (E.D. Cal. May 18, 2015) (granting the defendants qualified immunity from the plaintiff's claim that they violated his Eighth Amendment rights by placing him in a Valley Fever-endemic prison, where he contracted the disease), *appeal docketed*, No. 15-16145 (9th Cir. June 8, 2015).

11 The Court acknowledges that it found Plaintiffs in the *Beagle* member cases had stated an Eighth Amendment claim. *See Beagle v. Schwarzenegger*, ___ F.3d ___, 2014 WL 9866913, at *10 (E.D. Cal. 2014). With regard to the *Beagle* Plaintiffs only, the Court is bound by that conclusion here under the law of the case. *See United States v. Lumni Nation*, 763 F.3d 1180, 1185 (9th Cir. 2014). Nonetheless, even assuming all Plaintiffs have satisfied the first prong of the *Saucier* qualified immunity analysis, Defendants are still entitled to qualified immunity from all Plaintiffs' Eighth Amendment claims under the second prong of *Saucier*.

b. Defendants Did Not Violate Clearly Established Law

The second prong of the qualified immunity analysis requires the Court to determine whether the allegedly violated constitutional right was clearly established at the time that Defendants allegedly violated that right. *Mattos*, 661 F.3d at 442. Defendants must have had "'fair and clear warning' that their conduct [was] unlawful." *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) (citations omitted). In other words, the question is whether Defendants could have "reasonably but erroneously believed" that their conduct did not violate Plaintiffs' rights. *Id.* at 1074 (citing *Saucier*, 533 U.S. at 195).

Plaintiffs' alleged injuries—exposure to and contraction of Valley Fever—occurred at different times. *See, e.g.*, CAC at ¶¶ 233-38 (Plaintiff Aubrey alleging he was transferred to PVSP in January 2009, but does not allege when he contracted Valley Fever); *id.* at ¶¶ 254, 258 (Plaintiff Baker alleging he was transferred to ASP in July 2011 and contracted Valley Fever in "late 2011"); *id.* at ¶¶ 779-80 (Plaintiff Franklin alleging he was transferred to PVSP in January 2009 and diagnosed with Valley Fever in August 2010); *id.* at ¶ 1079 (Plaintiff Lavea alleging he was transferred to PVSP in 2008); *id.* at ¶ 1807 (Plaintiff Torres-Enos alleging he was transferred to PVSP in 2006); *id.* at ¶ 576 (Plaintiff Corning alleging he was transferred to ASP in 2007). It is indeterminable when some Plaintiffs' injuries occurred because they do not allege when they first were housed in a San Joaquin Valley correctional facility, though it appears the earliest any Plaintiff was housed in one of the subject facilities was at some

point in 2006. *See, e.g.*, *id.* at ¶¶ 989 (Plaintiff K. Jackson), 1807 (Plaintiff Torres-Enos).

Nonetheless, the Court's conclusion below that Defendants are entitled to qualified immunity remains the same regardless of the time at which Plaintiffs' injuries occurred. Regardless of whether the Court looked only to the state of the law as it existed in 2006, or as it exists today, the Court would still conclude that the right at issue was not clearly established. *See Jones v. Hartley*, No. 1:13-cv-1590-AWI-GSA-PC, 2015 WL 1276708, at *2-3 (E.D. Cal. Mar. 19, 2015) ("Courts have yet to find that exposure to valley fever spores presents an excessive risk to inmate health." (collecting cases)); *Smith*, 2015 WL 3953367, at *3 (recognizing contrary conclusions in Valley Fever cases within this district). Thus, even if the Court looked at the state of the law at the earliest possible time (*i.e.*, 2006) or at the latest possible time (*i.e.*, today), the Court's conclusion that Defendants are entitled to qualified immunity would be the same. *See Reza*, 2015 WL 4899122, at *7 (assessing state of law on date on which the plaintiff allegedly was arrested unlawfully).

This is so because the circumstances in which an inmate's exposure to cocci while incarcerated may support an Eighth Amendment claim are not clear. As the F&Rs correctly recognized, no binding Supreme Court or Ninth Circuit precedent squarely addresses the issue. Doc. 164 at 18-19. The Ninth Circuit has touched on the issue only in brief, undeveloped, and unpublished memorandum decisions.

For instance, in *Smith v. Schwarzenegger*, No. CV 1-07-1547-SRB, 2009 WL 900654, at *1 (E.D. Cal. Mar. 31, 2009), *rev'd*, 393 Fed. App'x 518 (9th Cir. 2010), the plaintiff brought, among other claims, an

Eighth Amendment claim asserting his right to be free from cruel and unusual punishment. In that claim, the plaintiff alleged that he was held in KVSP, which is "located in the San Joaquin Valley where [he is] subjected to the risk of contracting valley fever, in violation of the Eighth Amendment." *Smith*, 2009 WL 900654, at *1. The plaintiff alleged that his being housing at KVSP posed an unconstitutional threat to his health and safety. *Smith*, No. CV 1-7-1547-SRB, Doc. 21 at 7 ("Myself and other inmates . . . in California State Prisoners located in the San Joaquin Valley. . . are being forcibly subjected to contracting . . . Valley Fever"). The plaintiff also alleged that African-Americans, such as himself, and other ethnic groups "are extremely susceptible to contracting Valley Fever." *Id.*

Notably, the plaintiff did not allege that he had contracted Valley Fever; he only alleged that he "may have contracted Valley Fever but will not know for" many years if he contracted the disease. *Id.* (emphasis added). The plaintiff further alleged that the defendants "have failed to act to remove [him] . . . out of the endemic area where . . . inmates have been infected by Valley Fever and have [died] from Valley Fever." *Id.* at 10. Thus, the plaintiff claimed that his Eighth Amendment rights had been violated "not only by possible present harm but by possible future harm, arising out of exposure to San Joaquin Valley Fever," and the defendants' failure to remove inmates from prisons located in areas endemic to Valley Fever. *Id.* at 10-15.

Visiting District Judge Bolton found that:

> Plaintiff has failed to show that any of the named Defendants were deliberately indifferent to a serious risk of harm to Plaintiff's health. Plaintiff does not allege that Defendants were aware of a particular threat to Plaintiff's health or that Plaintiff has been harmed as the result of Defendants' actions or failure to act. Plaintiff alleges only that Defendants are aware of the general presence of valley fever in the areas in which Plaintiff is housed and that Plaintiff may contract valley fever. This is insufficient to establish an Eighth Amendment violation.

Smith, 2009 WL 900654, at *2. Accordingly, the claim was dismissed with prejudice. *Id.*

On appeal, the Ninth Circuit reversed in an unpublished, one-page memorandum decision. *Smith v. Schwarzenegger*, 393 Fed. App'x 518, 519 (9th Cir. 2010). The Ninth Circuit observed that the district court dismissed the claim "because it determined that [the plaintiff] failed to allege facts demonstrating that the defendants were deliberately indifferent to a serious risk to his health." *Id.* The court held that "[i]n dismissing with prejudice, the district court erred because it is not beyond doubt that [the plaintiff] could prove no set of facts in support of his claims that would entitled [*sic*] him to relief." *Id.* (citing *Helling*, 509 U.S. at 25 (a prisoner "states a cause of action under the Eighth Amendment by alleging that [defendants] have, with deliberate indifference, exposed him to levels of [environmental tobacco smoke] that pose an unreasonable risk of serious damage to his future health")). The Ninth Circuit therefore vacated and remanded the case "with instructions to allow [the plaintiff] the

opportunity to amend his complaint to allege facts demonstrating that the defendants are aware of a substantial risk to [his] health and have not taken action to prevent or minimize that risk." *Id.*[12]

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[12] On remand, the plaintiff filed a fourth amended complaint against Cate, James Yates, the former warden of PVSP, Jeanne Woodford, the former Secretary of CDCR, and "John Doe Appeals Coordinator," among other defendants. *See Smith*, No. 1:07-cv-1547-SRB, Doc. 65 at 1. Judge Bolton summarized the allegations underlying that claim as follows:

> Plaintiff alleges that his Eighth Amendment rights were violated when he was housed in an area with a known valley fever epidemic. Plaintiff alleges that he is particularly susceptible to valley fever because he is African-American and has tuberculosis and hepatitis C. Plaintiff further states that he was recently informed that he has now contracted valley fever and that because of his hepatitis C, he cannot take the valley fever medication. Plaintiff claims that Defendants were aware of the severe risk to his health that results from housing him in this area, but failed to transfer him to another facility. . . .
>
> Plaintiff claims that Defendants Cate and Woodford violated his Eighth Amendment rights when they failed to develop policies for moving high risk inmates, such as Plaintiff, out of prisons located in areas known to have high incidences of valley fever. Plaintiff further claims that while housed at the Pleasant Valley State Prison, he filed a grievance regarding his susceptibility to valley fever and requesting a transfer, but that Defendant Appeals Coordinator was deliberately indifferent to a risk to Plaintiff's health when he informed Plaintiff that he would not process the grievance unless Plaintiff had already contracted valley fever. Plaintiff claims that Defendant Appeals Coordinator's refusal to process the grievance hindered his ability to grieve the issue at any of his later housing assignments. Finally, Plaintiff claims

Similarly, the Ninth Circuit reversed this Court with a one-page decision in *Johnson v. Pleasant Valley State Prison*, 505 Fed. App'x 631 (9th Cir. 2013). In *Johnson*, the plaintiff brought one claim under § 1983 in which he alleged that his exposure to and contraction of Valley Fever while at PVSP violated his Eighth Amendment rights. *Johnson*, 2012 WL 1297380, at *1. The Magistrate Judge issued F&Rs screening the complaint and summarized the plaintiff's allegations in part, as follows:

> Plaintiff . . . is incarcerated at [PVSP], and brings this action against Defendants . . . alleging deliberate indifference in violation of the Eighth Amendment. Shortly after being transferred to PVSP on August 20, 2010, Plaintiff began experiencing flu-like symptoms and was eventually diagnosed with Valley Fever. Plaintiff alleges that Defendants were aware through CDCR memorandums that PVSP and seven other facilities were constructed in "hyperendemic" areas. Defendants allegedly have ignored a threat to Plaintiff, and every other prisoner who is housed at PVSP, by placing them where they are exposed to "environmental hazards" in

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> that Defendant Yates was aware of the risk of Plaintiff contracting valley fever, but did not transfer him, and that Defendant Yates developed a policy requiring Plaintiff to "contract valley fever before he can receive relief from exposure to valley fever."

Id. at 3, 6. Judge Bolton found that these allegations, "[v]ery liberally construed . . . adequately stated Eighth Amendment claims against Defendants Cate, Woodford, Yates, and John Doe Appeals Coordinator." *Id.* at 6.

> violation of the Eighth Amendment's prohibition against cruel and unusual punishment.

Id. The Magistrate Judge found that the plaintiff failed to state a claim under the Eighth Amendment, reasoning:

> To state a claim that the presence or prevalence of Valley Fever at PVSP constituted a danger to Plaintiff's health, Plaintiff must allege facts sufficient to support a claim that prison officials knew of and disregarded a substantial risk of serious harm to him. . . . Even if the risk of contracting Valley Fever is higher at PVSP than in other areas of the state, the Court declines to find that, due to its location, the prison itself constitutes a substantial risk of harm to inmates . . . There is no support for such a sweeping proposition, and the Court finds that Plaintiff's Eighth Amendment claim arising from the mere fact that he is being housed at PVSP is not cognizable under section 1983.

Id. at *3 (citations omitted).

Plaintiff filed objections to the F&Rs. *Id.* at Doc. 14. Citing *Farmer*, 511 U.S. 825, and *Helling*, 509 U.S. 25, the plaintiff argued that the defendants exhibited deliberate indifference to him by placing him at an excessive risk of contracting Valley Fever while incarcerated at PVSP. *Id.* at 2-3. This Court adopted the Magistrate Judge's F&Rs in full and dismissed the plaintiff's sole Eighth Amendment claim. *See* No. 1:11-CV-191-LJO-BAM PC, *Johnson v. Pleasant Valley State Prison*, Doc. 15.

The Ninth Circuit reversed, holding that

> dismissal of [the plaintiff's] action was improper at this early stage because [the plaintiff] alleged that prison officials were aware that inmates' exposure to valley fever posed a significant threat to inmate safety yet failed to take reasonable measures to avoid that threat. . . . *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (a prison official violates the Eighth Amendment prohibition against inhumane conditions of confinement if he or she knows of a substantial risk of serious harm to an inmate and fails to take reasonable measures to avoid the harm).

Johnson, 505 Fed. App'x at 632.

In *Johnson*, the Ninth Circuit "express[ed] no opinion as to the sufficiency or merit of [the plaintiff's] allegations." *Id.* And, as the F&Rs observed, the Ninth Circuit in *Smith* provided no "discussion of what would be required to state a claim under the Eighth Amendment." Doc. 164 at 36 n.5; *Smith*, 393 Fed. App'x at 519. Accordingly, the Court finds that *Johnson* and *Smith* do not clearly establish the right at issue in this case and did not give Defendants notice that they may have violated Plaintiffs' Eighth Amendment rights, particularly given that it is a "rare instance in which, absent any published opinions on point or overwhelming obviousness of illegality, [a court] can conclude that the law was clearly established on the basis of unpublished decisions only." *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002).[13] In short, the Ninth Circuit's

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[13] This conclusion is further reinforced by the Ninth Circuit's decision in *Holley v. Scott*, 576 Fed. App'x 670 (9th Cir. 2014), another one-page memorandum decision addressing an Eighth Amendment claim premised on the plaintiff-inmate's exposure to

Valley Fever spores while incarcerated. In that case, the Magistrate Judge screened the plaintiff's second amended complaint, which alleged an Eighth Amendment claim based on his exposure to Valley Fever spores while incarcerated at PVSP, and dismissed the claim without leave to amend. *Holley v. Scott*, No. 1:12-cv-1090-MJS (PC), 2013 WL 3992129, at *5 (E.D. Cal. Aug. 1, 2013). The plaintiff alleged that he was an African-American at medically high risk of contracting Valley Fever because of his race and health status. *Id.* at *1. The Magistrate Judge found that the plaintiff failed to allege facts demonstrating that the defendants acted with deliberate indifference because the plaintiff did not allege that the defendants were aware of the risks posed by Valley Fever spores at PVSP. *Id.* at *5. On appeal, the Ninth Circuit affirmed. *Holley*, 576 Fed. App'x at 670 (citing *Farmer*, 511 U.S. at 837). Although *Smith* and *Johnson* involved materially similar allegations, the Ninth Circuit's reversals in those cases perhaps can be explained by the fact that they involved original complaints dismissed without leave to amend, whereas *Holley* involved a second amended complaint filed after the Magistrate Judge had "twice previously instructed Plaintiff on the legal standard and given him opportunity to allege facts which meet it," yet the second amended complaint failed to do so. *Holley*, 2013 WL 3992129, at *5. In addition, the plaintiff in *Holley* had satisfied the first, objective prong of his Eighth Amendment claim, but had failed on the second, subjective prong of the claim in that he failed to allege facts showing that the defendants knew of the alleged risk of Valley Fever to which he was exposed. *See id.* at *4-5; *Holley*, Fed. App'x at 670 ("The district court properly dismissed Holley's action because Holley failed to allege facts showing that defendants were deliberately indifferent to a risk of Holley contracting Valley Fever by housing him at Pleasant Valley State Prison.") (citation omitted); *but see Sullivan v. Kramer*, 609 Fed. App'x 435, 436 (9th Cir. 2015) (reversing dismissal of civil detainee's safe conditions claim in which he alleged the defendant "knew of the life-threatening dangers of valley fever . . . but failed to take any preventative measures to protect [him]"); *Samuels v. Ahlin*, 585 Fed. App'x 636, 637 (9th Cir. 2014) (reversing dismissal of civil detainee's safe conditions claim in which he alleged defendants "knew of the life-threatening risk of building Coalinga State Hospital in a

Valley Fevers decisions could not have put Defendants on notice that their conduct was unlawful.

In the absence of controlling authority, a defendant nonetheless may not be entitled to qualified immunity if the illegality of the defendant's conduct was overwhelmingly obvious, *id.*, or "a consensus of cases of persuasive authority" would have put the defendant on notice that his/her conduct was unlawful. *Wilson v. Layne*, 526 U.S. 603, 617 (1999). The F&Rs contain a thorough review of Valley Fever cases in this district. *See* F&Rs at 28-31. Simply put, those cases show that there has been longstanding disagreement among the judges of this district as to whether and under what circumstances inmates housed at prisons in the San Joaquin Valley, where Valley Fever is endemic, may state an Eighth Amendment claim for being exposed to Valley Fever spores while incarcerated. *See id.*

This disagreement has led to diametrically opposed conclusions at times. Critically, judges have disagreed as to whether allegations that an inmate's ethnicity increases the risk of contracting Valley Fever and developing disseminating Valley Fever states an Eighth Amendment claim.[14] Judges also have disagreed as to

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highly endemic area for valley fever, but nonetheless approved or failed to stop the facility's construction").

14 *Compare, e.g., Smith v. Brown*, No. 1:12-cv-238-AWI-JLT (PC), 2012 WL 1574651, at *3-4 (E.D. Cal. May 3, 2012) (holding that African-American plaintiff's allegations that (1) he was exposed to Valley Fever while incarcerated at PVSP, a "hyperendemic area" experiencing an "outbreak of illness"; (2) African-Americans are more susceptible to Valley Fever; and (3) the defendants knew of Valley Fever risks but failed to act were insufficient to state Eighth Amendment claim because the defendants could not "be held liable for housing Plaintiff in an area where there is a potential to be exposed to Valley Fever spores");

whether an inmate's allegations that medical conditions increase the risk of contracting Valley Fever and developing disseminated Valley Fever states an Eighth Amendment claim.[15] Notably, Plaintiffs acknowledge

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Clark v. Igbinosa, No. 1:10-cv-1336-DLB PC, 2011 WL 1043868, at *2 (E.D. Cal. Mar. 21, 2011) (holding that the African-American plaintiff's allegations that (1) African-Americans are the highest risk group for disseminated Valley Fever and (2) being housed at PVSP did not state Eighth Amendment claim because "[g]oing to an area which contains valley fever and contracting valley fever are not sufficient to state an Eighth Amendment claim"); *James v. Yates*, No. 1:08-cv-1706-DLB PC, 2010 WL 2465407, at *3-4 (E.D. Cal. June 15, 2010) (same); *Moreno v. Yates*, No. 1:07-cv-1404-DGC, Doc. 1 at 9-10, 2010 WL 1223131, at *2 (E.D. Cal. Mar. 24, 2010) (granting summary judgment against plaintiff-inmate who contracted Valley Fever at PVSP and who alleged certain racial groups are more susceptible to developing disseminating Valley Fever because "society plainly tolerates the health risks" posed by Valley Fever at PVSP); *King v. Avenal State Prison*, No. 1:07-cv-1283-AWI-GSA (PC), 2009 WL 546212, at *4 (E.D. Cal. Mar. 4, 2009) ("[N]o courts have held that exposure to Valley Fever spores presents an excessive risk to inmate health") *with, e.g., Chaney v. Beard*, No. 1:14-cv-369-MJS, 2014 WL 2957469, at *3 (E.D. Cal. June 30, 2014) ("Plaintiff alleges that he is an African American male and is therefore at an increased risk of harm from Valley Fever. This is sufficient to satisfy the first element of Plaintiff's Eighth Amendment claim.").

[15] *Compare, e.g., Moreno*, 2010 WL 1223131, at *2 (granting summary judgment against plaintiff-inmate because "society plainly tolerates the health risks" posed by Valley Fever at PVSP); *Gilbert v. Yates*, No. 1:09-cv-2050-AWI-DLB, 2010 WL 5113116, at *1, 3 (E.D. Cal. Dec. 9, 2010) (plaintiff with asthma, pulmonary conditions, and hepatitis C who contracted Valley Fever while incarcerated at PVSP did not state Eighth Amendment medical needs claim because even "[a]ssuming that the risk of contracting Valley Fever is higher at PVSP than in other areas of the state and that the disease is fatal in some cases, the Court declines to find that the prison itself, due to its location, constitutes

a substantial risk of harm to inmates"), *aff'd*, 479 Fed. App'x 93 (9th Cir. 2012); *Schroeder v. Yates*, No. 1:10-cv-433-OWW-GSA PC, 2011 WL 23094, at *1 (E.D. Cal. Jan. 4, 2011) (inmate with emphysema and chronic obstructive pulmonary disease could not state claim for exposure to Valley Fever spores while incarcerated at PVSP); *Ayala v. Yates*, No. 1:10-cv-50-MJS (PC), 2011 WL 4527464, at *3 (E.D. Cal. Sept. 28, 2011) ("Exposure to [Valley Fever] at PVSP is not in and of itself an excessive risk to inmate health; Defendants had no duty to take steps to reduce the risk."); *Miller v. Brown*, No. 1:12-cv-1589-LJO-BAM PC, 2013 WL 6712575, at *6 (E.D. Cal. Dec. 18, 2013) (dismissing inmate's Eighth Amendment claim, in part, because he did not "indicate if he in fact contracted Valley Fever") *with, e.g.*, *Whitney v. Walker*, No. 1:10-cv-1963 DLB PC, 2012 WL 893783, at *4 (E.D. Cal. Mar. 15, 2012) (plaintiff's allegation that his immune system was compromised by cancer stated Eighth Amendment claim for contraction of Valley Fever while incarcerated at ASP); *Owens v. Trimble*, No. 1:11-cv-1540-LJO-MJS (PC), 2012 WL 1910102, at *2 (E.D. Cal. May 25, 2012) ("Plaintiff has alleged that his asthma increases the risk of infection [of Valley Fever] and thus satisfies the first element of his Eighth Amendment claim."); *Sparkman v. Calif. Dep't of Corrections and Rehab.*, No. 1:12-cv-1444-AWI-MJS (PC), 2013 WL 1326218, at *3 (E.D. Cal. Mar. 29, 2013) ("Exposure to Valley Fever with such a preexisting lung condition is also a serious medical condition sufficient to satisfy the first prong of an Eighth Amendment claim based on Valley Fever exposure.") (citations omitted); *Wood v. Brown*, No. 1:11-cv-1846-RRB, 2013 WL 1759099, at *2 (E.D. Cal. Apr. 24, 2013) (holding that inmate could potentially state Eighth Amendment claim for being transferred to ASP where he contracted Valley Fever if officials responsible for transfer were properly named); *see also Beagle*, 2014 WL 9866913, at *10 (disagreeing with findings and recommendations and holding that inmates "need not demonstrate that they are at a higher risk of contracting Valley Fever or a more severe form of the disease to state an Eighth Amendment claim"); *see also Borquez v. Arpaio*, No. CV 07-226-PHX-DGC (JCG), 2007 WL 625925, at *3 (D. Ariz. Feb. 26, 2007) (holding that plaintiff-inmate's allegation "that he has been exposed to asbestos and valley fever" while incarcerated failed to state Eighth Amendment claim).

both of these instances of disagreement. *See* Doc. 175 at 28 (arguing that courts in this district are "nearly uniform" in their Valley Fever decisions and "[*m*]*ost* courts" have found that a plaintiff's heightened susceptibility to Valley Fever satisfies *Farmer*'s objective component (emphases added)).

The Court acknowledges that not all Valley Fever cases concern the same factual allegations or the same disposition for the same reasons. Unlike Plaintiffs here, some plaintiffs in Valley Fever cases have simply alleged their constitutional rights were violated because they contracted Valley Fever while incarcerated. *See, e.g.*, *King*, 2009 WL 546212, at *4 ("[T]o the extent that Plaintiff is attempting to pursue an Eighth Amendment claim for the mere fact that he was confined in a location where Valley Fever spores existed which caused him to contract Valley Fever, he is advised that no courts have held that exposure to Valley Fever spores presents an excessive risk to inmate health"). Other cases have involved inmates who, unlike some of the Plaintiffs, had no increased risk factors for contracting Valley Fever or disseminated Valley Fever. *See, e.g.*, *Ayala*, 2011 WL 4527464, at *1; *see also Gaona v. Yates*, No. 1:09-cv-999-SKO PC, 2010 WL 2843163, at *3 (E.D. Cal. July 19, 2010) (finding plaintiff could not state Eighth Amendment claim because he only exhibited "flu-like symptoms" when he contracted Valley Fever while incarcerated at PVSP). And in some cases, the plaintiff did not allege the defendant's (or defendants') acts or omissions caused the plaintiff to be exposed to a substantial risk of Valley Fever. *See, e.g.*, *Tholmer v. Yates*, No. 1:06-cv-1403-LJO-GSA, 2009 WL 174162, at *3 n.3 (E.D. Cal. Jan. 26, 2009) ("Plaintiff does not allege that the acts

or omissions of Defendants have caused an excessively high risk of contracting valley fever at PVSP.").

Some cases, however, involved allegations that are materially identical to Plaintiffs' allegations. In *Moreno*, for instance, the plaintiff contracted Valley Fever in 2006 while housed at PVSP in. 07-cv-1404-DGC, Doc. 1 at 7. The plaintiff alleged the defendants knew that (1) PVSP was in a "hyperendemic" location; (2) "[p]eople with weakened immune systems and of certain racial groups are susceptible [to] developing . . . disseminated valley fever"; (3) "the infection rate among prisoners is 38 times greater than for residents of Coalinga and 600 times greater than for residents of Fresno county"; (4) that there was "a high probability" that plaintiff would be infected with Valley Fever; and (5) the defendants had not "done anything to protect [his] health and personal safety." *Id.* at 7-18. The court granted the defendants' motion for summary judgment, reasoning that "[b]y placing a prison and other extensive facilities in the PVSP location, attended by prison employees, officials, and support personnel, as well as inmates, society plainly tolerates the health risks of that location." *Moreno*, 2010 WL 1223131, at *2.

In *Jones v. Igbinosa*, the plaintiff, who contracted Valley Fever while incarcerated at PVPS, alleged that PVSP "is [in] an epidemic area and that Blacks Afro-Americans and Filipinos are at greater risk of complications from [Valley Fever]." No. 08-cv-163-LJO-SKO PC, 2010 WL 2838617, at *2 (E.D. Cal. July 19, 2010), *aff'd*, 467 Fed. App'x 604 (9th Cir. 2012). The court dismissed the complaint based on, among other things, a finding that "the risk posed by valley fever was [not] 'sufficiently serious'" because the plaintiff did not

allege that "he suffered any serious life threatening complications from the disease," and alleged that "'[i]n most cases, the infection . . . . is usually handled by the body without permanent damages." *Id.* at *3.

The plaintiff's allegations in *Ayala* were largely the same as those in *Jones*. *See* 2011 WL 4527464, at *1. Although *Ayala* did not allege that certain individuals are more susceptible to Valley Fever, he alleged that PVSP, where he was housed, is "hyper-endemic for Valley Fever infection and has dramatically higher rates of infection than other penal institutions," yet the defendants "did not act to mitigate the risk." *Id.* The court dismissed the plaintiff's Eighth Amendment claim without leave to amend on the ground that "Plaintiff's claim that the Defendants are liable because they were aware of the risk and did not act to mitigate the likelihood of infection does not state an actionable claim." *Id.* at *3. The court further held that "[e]xposure to the disease at PVSP is not in and of itself an excessive risk to inmate health; Defendants had no duty to take steps to reduce the risk." *Id.* The court therefore concluded that the plaintiff "cannot state a cognizable claim based on the fact that he was exposed to Valley Fever at PVSP" because "[c]laims based on Valley Fever exposure and contraction fail to satisfy the first prong of the Eighth Amendment analysis, *i.e.*, that the deprivation is sufficiently serious." *Id.*

In *Smith v. Brown*, the plaintiff, who contracted Valley Fever in 2009 while incarcerated at PVSP, alleged as follows:

> Plaintiff contends that "black inmates in general are highly susceptible to Valley Fever." He also claims that each of the defendants was aware that Plaintiff was

> being sent to a "hyperendemic" area institution, but refused to warn him of such a risk. Plaintiff alleges that Defendants failed to follow directions set forth in a November 20, 2007 Memorandum regarding "Exclusion of Inmate–Patients Susceptible to Coccidioidomycosis from Highest Risk Area Institutions" that would have prevent him from acquiring Valley Fever. Plaintiff claims Defendants' actions and failures to act violated the Eighth Amendment.

2012 WL 1574651, at *3. Observing that "[c]ourts have found that claims like Plaintiff's which allege Eighth Amendment violations for contracting Valley Fever are insufficient to establish an Eighth Amendment violation," the court held "Defendants cannot, therefore, be held liable for housing Plaintiff in an area where there is a potential to be exposed to Valley Fever spores." *Id.* at *4.

In *Cooper v. Igbinosa*, the plaintiff, a diabetic incarcerated at PVSP, failed to state an Eighth Amendment claim. 2012 WL 5186660, at *2 (E.D. Cal. Oct. 17, 2012). The plaintiff alleged:

> From 2001 through 2005, soil at PVSP was disturbed greatly for the construction of a mental health hospital and a segregation unit. Defendant Yates worked at PVSP beginning in October 2003. He was aware of the presence of valley fever in the area. Defendants Yates and Igbinosa are responsible for all inmates' health and safety. During the construction, Defendants had notice of an increase in valley fever cases amongst the inmates at PVSP, from 80 in

> 2003, 66 in 2004, 187 in 2005, and 1145 in 2006. Valley fever is a disease arising from spores found near the surface of soil, or in the air when the soil is disturbed. Defendants did not take any corrective measures or give fair notice regarding the outbreak of valley fever from 2003 through 2006, such as preventing or erecting barriers for blowing dirt, educating inmates and staff, increasing ground cover, advising inmates to stay indoors, wet the ground, or give out masks. Plaintiff is diabetic. In June or July of 2006, Plaintiff became sick and went to the medical on B-yard at PVSP. . . . Plaintiff was hospitalized for weeks because of valley fever, suffering chronic breathing problems, acute coughing, severe weight loss, and chest and heart problems. Plaintiff remained under doctor care for valley fever through 2010.

The court dismissed the plaintiff's claim, finding that the plaintiff had "not sufficiently alleged facts which indicate that the harm Plaintiff risked was an excessive risk of serious harm." *Id.* at *2. Although the plaintiff had "alleged facts which indicate that the chance of contracting valley fever increased during the construction period," he had "not alleged facts which indicate that this increase in risk was excessive." *Id.* at *2; *see also Barnhardt v. Cate*, No. 1:10-cv-1351-LJO-GBC (PC), 2011 WL 2446372, at *5 (E.D. Cal. June 15, 2011) (allegation that diabetes made the plaintiff more susceptible to contracting Valley Fever did not support Eighth Amendment claim).

For similar reasons, the court dismissed without leave to amend the plaintiff's Eighth Amendment claim

in *Harvey v. Gonzalez*, No. CV 10-4803-VAP (SP), 2011 WL 4625710 (C.D. Cal. July 27, 2011), *adopted in full*, 2011 WL 4625700 (C.D. Cal. Oct. 5, 2011). The plaintiff alleged his exposure to Valley Fever while incarcerated at PVSP violated his Eighth Amendment rights. *Id.* at *2. The plaintiff alleged that African-Americans are at a "far greater risk of coming down with [Valley Fever] based on their immune systems." *Id.* at *1. The court held that "[m]ere exposure to [cocci] is insufficient to constitute an excessive risk of harm to [the plaintiff's] health." *Id.* at *3. Although the plaintiff's ethnicity was unknown, the court held that, even if plaintiff were able to allege that he was an African-American and that the defendants knew African-Americans were at higher risk of contracting Valley Fever, "that still would be insufficient to state a claim that defendants deliberately exposed [him] to an excessive risk of harm by housing him at PVSP." *Id.*

In *Gilbert*, the plaintiff, an inmate at PVSP who alleged his asthma, pulmonary conditions, and hepatitis C rendered him more vulnerable to Valley Fever, failed to state a claim based on his exposure to and contraction of Valley Fever while incarcerated at PVSP. 2010 WL 5113116, at *1, 3. The court reasoned that even "[a]ssuming that the risk of contracting Valley Fever is higher at PVSP than in other areas of the state and that the disease is fatal in some cases, the Court declines to find that the prison itself, due to its location, constitutes a substantial risk of harm to inmates."[16] *Id.* at *3.

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[16] The Court notes that the Ninth Circuit apparently rejected this logic in *Johnson*, 505 Fed. App'x 631.

Other judges, however, have found that "the first prong of an Eighth Amendment claim is satisfied where the plaintiff has identified a factor responsible for either increasing the risk of contraction [of Valley Fever] or the severity of infection." *Chaney v. Beard*, No. 1:14-cv-369-MJS, 2014 WL 2957469, at *3 (E.D. Cal. June 30, 2014). African-American ethnicity has been accepted as an increased risk factor, as have various medical conditions, particularly those that affect an individual's immune system. *See id.* (collecting cases); *see also Hunter v. Yates*, No. 1:07-cv-151-AWI-SMS-PC, 2009 WL 233791, at *3 (E.D. Cal. Jan. 30, 2009) (plaintiff alleging he "was exposed to a high risk of contracting valley fever" stated claim "[u]nder minimal federal notice pleading standards"); *Thurston v. Schwarzenegger*, No. 1:08-cv-342-AWI-SMS PC, 2008 WL 2020393, at *1 (E.D. Cal. May 9, 2008) (plaintiff stated claim based on allegations that "his medical condition puts him at risk for contracting Valley Fever"). Some judges have found that a plaintiff need not be at a heightened risk for contracting Valley Fever or developing disseminated Valley Fever to state an Eighth Amendment claim. *See, e.g., Beagle*, 2014 WL 9866913, at *10; *Jackson v. Davey*, No. 1:14-cv-1311-LJO-MJS (PC), 2015 WL 3402992, at *5 (E.D. Cal. May 27, 2015).

Given this obvious, legitimate, and reasonable disagreement among judges, the Court finds that Defendants are entitled to qualified immunity from Plaintiffs' Eighth Amendment claim, regardless of how its underlying constitutional right is defined. Even assuming Defendants' conduct was unlawful in this case—an issue which the Court need not and does not decide—the disagreement among judges with regard

to analogous Valley Fever cases brought by inmates in San Joaquin Valley prisons establishes that the right at issue here was not sufficiently clear such that Defendants had "'fair warning' that their conduct was unlawful." *Flores*, 324 F.3d at 1137.[17] "If judges thus disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618; *see also Bahrampour v. Lampert*, 356 F.3d 969, 977 (9th Cir. 2004) ("The fact that there was a conflict in the views of district court judges on the issue demonstrates that the constitutionality of the regulations was not clearly established.").

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[17] The Court recognizes that all of the cases discussed above concerning the district courts' disagreement on Valley Fever issues postdate some of the Plaintiffs' injuries, and a number of those cases postdate the injuries of many Plaintiffs. But, in the Court's view, the fact that the law remains unclear *today* means that it has never been clearly established. *See Rish v. Johnson*, 131 F.3d 1092, 1096 n.5 (4th Cir. 1997) ("The events underlying the inmates' claim occurred over the period of 1988 to 1992. During this period, Eighth Amendment jurisprudence was evolving. However, for ease of discussion, we consider the state of law at the end of the period at issue, reasoning that if the law was not so clearly established in 1992 that the prison officials were not entitled to qualified immunity, it could not have been so earlier."). Although "the fact that a single judge, or even a group of judges, disagrees about the contours of a right does not automatically render the law unclear," *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 378 (2009), given the extensive and substantial litigation concerning Valley Fever that has occurred at the district court level, to find that Defendants are not entitled to qualified immunity would require the Court to conclude that a number of judges were unaware of or repeatedly disregarded clearly established law for years. The Court declines to entertain that conclusion.

Further, because of this disagreement, the Court cannot find that Defendants' conduct was obviously illegal (much less overwhelmingly so) because "[t]he state of the law was at best undeveloped." *Wilson*, 526 U.S. at 617.[18] This is particularly true given that the issue of Valley Fever at San Joaquin Valley prisons has been the subject of substantial litigation within this District,[19] yet no "consensus of cases" has emerged "such that a reasonable [prison official] could not have believed that his actions were lawful." *Id.* Although that litigation has shed some light on the issue, no authority has "fleshed out 'at what point the risk of

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[18] The Court notes that visiting District Judge Bolton, relying on this Court's prior order in *Jackson v. California*, No. 1:13-cv-1055-LJO-SAB, 2014 WL 670104 (E.D. Cal. Feb. 20, 2014), recently found that former Governor Schwarzenegger and various PVSP and ASP officials were not entitled to qualified immunity from an African-American plaintiff's claim that his contracting Valley Fever while housed at PVSP violated his Eighth Amendment rights. *See Smith v. Schwarzenegger*, No. 07-cv-1547 SRB (PC), 2015 WL 106337, at *2 (E.D. Cal. Jan. 7, 2015). This further reinforces the Court's conclusion that the unsettled state of the law pertaining to Valley Fever cases within this district entitles Defendants to qualified immunity from Plaintiffs' Eighth Amendment claim.

[19] *See Hines*, 2015 WL 2385095, at *4 ("A Westlaw search of all federal decisions in the Ninth Circuit using the word string Valley Fever" returns about 420 responses with case filings beginning around 1976. . . . Beginning in 2005, the frequency of case filings increases dramatically and the typical type of case changes dramatically. Even a casual inspection of the listings from cases commenced in the last ten years shows that the overwhelming majority involve claims against state or federal correctional institutions in what has been termed the hyper-endemic cocci zone of the southern San Joaquin Valley"); *Smith*, 2015 WL 3953367, at *3 (recognizing disagreement between judges of this Court concerning Valley Fever cases as of June 29, 2015).

harm from [Valley Fever] becomes sufficiently substantial for Eighth Amendment purposes.'" *Estate of Ford*, 301 F.3d at 1051 (quoting *Farmer*, 511 U.S. at 834 n.3)). The Court therefore GRANTS WITHOUT LEAVE TO AMEND Defendants' motion to dismiss Plaintiffs' Eighth Amendment claim because Defendants have established that they are entitled to qualified immunity from the claim.

Accordingly, the Court:

1. DISMISSES WITHOUT LEAVE TO AMEND Plaintiffs' Eighth Amendment claim on the ground Defendants are entitled to qualified immunity from the claim; and
2. ADOPTS IN FULL the Magistrate Judge's recommendation to decline supplemental jurisdiction over Plaintiffs' California state law negligence claim and DISMISSES the claim WITHOUT LEAVE TO AMEND.

The Court will not order the Clerk of Court to close this case at this time so that the Magistrate Judge can rule on Plaintiffs' pending motion to amend the CAC (Doc. 182).

IT IS SO ORDERED.

/s/ Lawrence J. O'Neill
United States District Judge

Dated: October 7, 2015

FINDINGS AND RECOMMENDATIONS RECOMMENDING GRANTING DEFENDANTS' MOTIONS TO DISMISS ON THE GROUNDS OF QUALIFIED IMMUNITY (ECF NOS. 138-139, 140-141, 142, 154, 156, 158, 160, 161) OBJECTIONS DUE WITHIN FOURTEEN DAYS (MAY 19, 2015)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

COREY LAMAR SMITH, ET AL.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, ET AL.,

Defendants.

Case No.: 1:14-cv-00060-LJO-SAB

Before: Stanley A. BOONE, United States District Judge.

Currently before the Court are two motions to dismiss filed by Defendants in this action. The Court heard oral arguments on April 29, 2015. (ECF No. 162.) Counsel Benjamin Pavone, David Elliott, and Gregg David Zucker appeared for Plaintiffs, and counsel Jon S. Allin and Michelle L. Angus appeared for Defendants Jeffrey Beard, Paul Brazelton, Matthew Cate, James Hartley, Susan Hubbard, Deborah Hysen,

Scott Kernan, Chris Meyer, Tanya Rothchild, Teresa Schwartz, Arnold Schwarzenegger, and James Yates; counsel Kristina Doan Gruenberg appeared for Defendants Felix Igbinosa and Dwight Winslow. *Id.* Having considered the moving, opposition and reply papers, the declarations and exhibits attached thereto, arguments presented at the April 29, 2015 hearing, as well as the Court's file, the Court issues the following findings and recommendations.

I. Procedural History

Plaintiffs Corey Lamar Smith, Dion Barnett, Christopher Garner, Rodney Ray Roberts, Jeremy Romo, and Danny Dallas ("Plaintiffs") filed a complaint in this action against Defendants Arnold Schwarzenegger, Jeffrey A. Beard, Paul D. Brazelton, Matthew Cate, J. Clark Kelso, James D. Hartley, Susan L. Hubbard, Deborah Hysen, Dr. Felix Igbinosa, Tanya Rothchild, State of California, Dr. Dwight Winslow, James A. Yates, and Edmund G. Brown in the Sacramento Division of the Eastern District of California on October 28, 2013. (ECF No. 1.) On January 16, 2014, this action was transferred to the Fresno Division of the Eastern District of California. (ECF No. 7.) On January 28, 2014 an order issued relating this action to *Jackson et al. v. State of California, et al.*, 1:13-cv-01055-LJO-SAB, a class action raising similar claims. (ECF No. 15.) On this same date, Plaintiffs filed a first amended complaint alleging reckless exposure to dangerous conditions and deliberate indifference to serious medical needs in violation of the Eighth Amendment and negligence under California law. (ECF No. 14.)

On March 27, 2014, this action was related to *Beagle et al. v. Schwarzenegger, et al.*, 1:14-cv-00430-LJO-SAB, a similar multi-Plaintiff action. *Beagle et al. v. Schwarzenegger, et al.*, 1:14-cv-00430-LJO-SAB at ECF No. 14. Defendants filed a motion to dismiss on May 5, 2014. (ECF Nos. 37-40.) The Court issued an order to show cause why the related actions should not be consolidated. (ECF No. 42.) Defendant Clark Kelso was dismissed from the action due to Plaintiffs' notice of voluntary dismissal on May 22, 2014. (ECF No. 49.)

On May 29, 2014, Plaintiffs filed a notice that *Abukar v. Schwarzenegger*, 2:14-cv-01137-TLN-KJN was a related case (subsequently transferred to this district and assigned case no. 1:14-cv-00816-LJO-SAB). (ECF No. 54.) On June 24, 2014, this Court issued findings and recommendations that were adopted in part on July 30, 2014; and Plaintiffs were ordered to file an amended complaint. (ECF Nos. 70, 80.) On August 17, 2014, Plaintiffs filed a notice that *Adams v. Schwarzenegger*, 1:14-cv01226-LJO-SAB was a related case. (ECF No. 81.) On August 18, 2014, an order issued consolidating *Smith, Beagle, Abukar*, and *Adams* and ordering Plaintiffs to file a consolidated complaint. (ECF No. 82.)

On November 14, 2014, Plaintiffs filed a consolidated complaint. (ECF No. 113.) On February 6, 2015, Defendants Beard, Brazelton, Cate, Hartley, Hubbard, Hysen, Kernan, Meyer, Rothchild, Schwartz, Schwarzenegger, and Yates filed a motion for summary judgment and request for judicial notice. (ECF Nos. 138-139.) On this same date, Defendants Igbinosa and Winslow filed a motion to dismiss, request for judicial notice, and joinder in the motion to dismiss. (ECF Nos. 140-

142.) On April 15, 2015, Plaintiffs filed two oppositions to the motion to dismiss and objections to Defendants' request for judicial notice. (ECF Nos. 154-156.) On April 21, 2015, Defendants Igbinosa and Winslow filed a reply to Plaintiffs opposition. (ECF No. 158) On April 22, 2015, Defendants Beard, Brazelton, Cate, Hartley, Hubbard, Hysen, Kernan, Meyer, Rothchild, Schwartz, Schwarzenegger and Yates filed a reply to Plaintiffs' opposition and a response to Plaintiffs' objections. (ECF No. 160, 161.)

There have been notices of related cases filed for *Morrow v. Schwarznegger*, 1:14-cv-01395; *Hill v. Yates*, 1:13-cv-01618; *Wright v. Yates*, 1:13-cv-01822; *Chaney v. Beard*, 1:14-cv-00369; *Campbell v. Schwarzenegger*, 1:14-cv-1559; *Lewis v. Schwarzenegger*, 1:14-cv-0697; *Blue v. Schwarzenegger*, 1:14-cv-01074; *Gregg v. California Dep't of Corrections*, 2:09-cv-02561; *Bates v. Schwarzenegger*, 1:14-cv-02085; *Robertson v. Stainer*, 1:14-cv-00364; *Morales v. Brown*, 1:14-cv-01717; *Chavarria v. Brown*, 1:15-cv-00223.; and *Altamirano v. Schwarzenegger*, 1:15-cv-00607. Some of these actions have been consolidated into this action, some have been merely related, some are stayed pending decision on Defendants' motions to dismiss, and some have yet to be addressed.[1]

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[1] On May 1, 2015, Plaintiff Josh Thomas filed a motion to represent himself in this action due to counsel informing him that he had to find a new attorney due to where he was housed when he contracted Valley Fever. The Court will address this motion and any other similar motions filed in this action after Judge O'Neill issues his order on this motion.

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on the grounds that a complaint "fail[s] to state a claim upon which relief can be granted." A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In assessing the sufficiency of a complaint, all well-pleaded factual allegations must be accepted as true. *Iqbal*, 556 U.S. at 678-79. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.

In deciding whether a complaint states a claim, the Ninth Circuit has found that two principles apply. First, to be entitled to the presumption of truth the allegations in the complaint "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Second, so that it is not unfair to require the defendant to be subjected to the expenses associated with discovery and continued litigation, the factual allegations of the complaint, which are taken as true, must plausibly suggest an entitlement to relief. *Starr*, 652 F.3d at 1216.

III. Allegations in Consolidated Complaint

Plaintiffs in this action are 159 current and former inmates of the California Department of Corrections and Rehabilitation ("CDCR") who have contracted Valley Fever. (Consolidated Compl. at ¶¶ 9, 184-2081, ECF No. 113.) Plaintiffs allege that the named defendants in this action knew that placing inmates in prisons where Valley Fever spores were prevalent posed an unacceptable risk of harm yet they continued to place inmates in these prisons and did not take measures to protect Plaintiffs from Valley Fever. (*Id.* at ¶ 10.) Plaintiffs bring this action against Pleasant Valley State Prison ("PVSP") Warden Paul Brazelton; the current Secretary of the CDCR Jeffrey Beard; former Secretary of the CDCR Matthew Cate; former Warden of Avenal State Prison ("ASP") James D. Hartley; former Director of the Division of Adult Operations Susan L. Hubbard; Director of CDCR's Office of Facility Planning, Construction and Management Deborah Hysen; Medical Director of Pleasant Valley State Prison Felix Igbinosa; Receiver of the California Correctional Health Care Services Agency J. Clark Kelso; former head of the Department of Adult Institutions Scott Kernan; Senior Chief of Facility Planning, Construction and Management Chris Meyer; former Chief of CDCR's Classification Services Unit; former Deputy Director of Adult Institutions; former California Governor Arnold Schwarzenegger; former Statewide Medical Director Dwight Winslow; and former Warden of PVSP James A. Yates alleging

deliberate indifference in violation of the Eighth Amendment and negligence under state law.[2]

Coccidioidomycosis (hereafter "Valley Fever") is a parasitic disease carried by a fungus-like organism that lives in the soil in certain limited geographic areas, including California. (*Id.* ¶¶ 5, 37.) The organism produces spores that when inhaled can lodge in the respiratory system and infect humans. (*Id.* at ¶¶ 5, 38.) Once in the body, the spores grow on host body tissue and the infection can become debilitating, disfiguring, intensely painful and can lead to death. (*Id.* at ¶¶ 5, 39.) Over thirty inmates have died of the disease and many more have serious medical complications from contracting Valley Fever. (*Id.* at ¶¶ 5, 48.)

In some individuals the disease rapidly spreads to the lungs and other parts of the body. (*Id.* at ¶ 6.) This is known as disseminated infection. (*Id.)* Disseminated infection attacks multiple organ systems, including the skin, lungs, eyes, bones, joints, nervous system, and the brain. (*Id.* at ¶ 7.) Depending on the site of the disseminated infection, it may lead to disfiguring skin lesions, destruction of soft tissue, erosion of bones, joints, and eyes, ulcers penetrating to the pleura in the lungs, and the colonization of other organs including the brain. (*Id.* at ¶ 39.) Where Valley Fever progresses to disseminated infection, the individual needs lifelong treatment and can lose limbs, bones or organs, may suffer disfiguring skin lesions, and if the infection attacks the brain, may suffer

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[2] On January 23, 2015, District Judge Lawrence J. O'Neill issued an order granting Plaintiff's notice of voluntary dismissal of Defendant Kelso. (ECF No. 135.)

permanent brain damage or die from coccidioidal meningitis. (*Id.* at ¶¶ 7, 43, 44.)

Coccidioides replicate so quickly that it is considered the most virulent fungal parasite known to man and was once listed as a potential agent of biological warfare and bioterrorism. (*Id.* at ¶ 40.) The Centers for Disease Control ("CDC") requires scientists handling Coccidioides spores to use protective protocols just one level below that required for handling the Ebola virus. (*Id.*)

In the general population, 40 percent of individuals who contract Valley Fever will show symptoms of a respiratory illness that resembles the flu that may last for weeks or months. (*Id.* at ¶ 41.) In some segment of that 40 percent, the infections cause severe life-threatening pneumonia or disseminated infection to other parts of the body. (*Id.*) This percentage can vary depending on the ethnicity or medical status of the individual because certain ethnic and racial groups, including African-Americans, Filipinos and other Asians, Hispanics, and American Indians, as well as individuals who are immune compromised or immune-suppressed, are more susceptible for developing disseminated infection. (*Id.* at ¶¶ 8, 42.)

There is no cure for Valley Fever in its disseminated form. (*Id.* at ¶ 45.) The disease is treated with antifungal drugs that can have severe side effects and must be taken for a lifetime. (*Id.*) The drugs do not eliminate, but reduce the population of infectious spores. (*Id.*) This does not eliminate the disease but keeps the disease partially and temporarily at bay and debilitating relapses can be expected. (*Id.*) Treatment is expensive, and the cost of medication can be in the range of $5,000 to $20,000 per year. (*Id.* at ¶ 48.)

Seventy-five percent of individuals who stop taking the drugs can be expected to relapse into life-threatening disease within a year. (*Id.* at 45.)

Plaintiffs contend that California health officials have known about the prevalence of Valley Fever in the location of the prisons and the acute risks to inmates for over fifty years. (*Id.* at ¶ 49.) By the late 1960s, employers were warned that bringing susceptible workers into the endemic areas carries with it the responsibility to reduce the rate and severity of infection and providing a vigorous program of medical surveillance. (*Id.* at ¶ 50.) Despite this, between 1987 and 1997, the CDCR built eight prisons in the "hyper-endemic" regions of the San Joaquin Valley: ASP, California Correctional Institution, California State Prison-Corcoran, Wasco State Prison, North Kern State Prison, PVSP, California State Correctional Facility-Corcoran, California Substance Abuse and Treatment Facility-Corcoran, and Kern Valley State Prison. (*Id.* at ¶ 51.) Two of these prisons, ASP and PVSP, have increased risks of contracting Valley Fever and PVSP was known by 2006 to be extraordinarily dangerous. (*Id.* at ¶ 53.)

PVSP, located in Coalinga, California, provides long-term housing and services for minimum, medium, and maximum custody inmates, with approximately 730 staff and 5,188 inmate beds. (*Id.* at ¶ 54.) The area in which PVSP is located is known to be contaminated with Valley Fever spores. (*Id.* at ¶ 55.)

In November 2004, Defendant Kanan, wrote a memorandum ("Kanan Memo") to all health care managers, staff members, and other officials within CDCR regarding Valley Fever and its origin in soil fungus. (*Id.* at ¶ 56.) This memorandum included a

three page overview of Valley Fever, its cause, diagnosis, symptoms, and treatment. (*Id.* at 57.) This memorandum acknowledged that prisons in the Central Valley are located in areas that host spores in the soil; Valley Fever is potentially lethal to individuals exposed to the fungus; winds and construction in the area can cause the organism to be blown into the air where it can be inhaled and pneumonia may occur; a percentage of exposed individuals will get pneumonia or disseminated disease; the risk and incidence of disseminated disease is greatest in American Indians, Asians, African-Americans, and immuno-compromised individuals; dissemination usually occurs to the skin, bones and meninges although any body part can be involved; bone lesions, back pain and paraplegia can result; skin lesions often herald widespread dissemination; meningeal involvement eventually leads to a severe unremitting headache; and treatment must be continued for life to control symptoms and there is no cure at this time. (*Id.* at ¶ 57.) This memo was and continues to be widely available to state officials, including Defendants. (*Id.* at ¶ 58.)

In late summer to early fall of 2005 construction began on a new state facility immediately adjacent to PVSP. (*Id.* at ¶¶ 68, 69.) The construction churned up and broadcast the spores into the air and onto bare soil and surfaces throughout the prison. (*Id.* at ¶ 68.)

In 2005, PVSP began to experience an epidemic of Valley Fever, including multiple deaths from the disease. (*Id.* at ¶ 59.) Infection rates at PVSP were as high as 1,000 times the rate seen in the general population. (*Id.* at ¶ 60.) An internal CDCR memorandum dated October 27, 2006 to all administrative personnel showed an increase in the number of inmates

testing positive for Valley Fever in 2006 with 5 deaths in 2005 and 8 deaths in 2006. (*Id.* at ¶ 61.) This memo showed the incidence of Valley Fever increased at PVSP by more than 445 percent between 2001 and 2005 with an increase of over 2,500 percent in 2006. (*Id.* at ¶ 62.) An August 3, 2006 internal memorandum confirmed that CDCR officials knew that they were exposing inmates to elevated risks of Valley Fever. (*Id.* at ¶ 63.)

In 2006, the California prison system accounted for 30 percent of all Valley Fever cases reported to the State Department of Health Services. (*Id.* at ¶ 62.) From 2006 to 2010, rates of Valley Fever in the "hyper-endemic" area prisons worsened. (*Id.* at ¶ 64.) Infection rates at PVSP, ASP, Wasco, and North Kern were significantly higher than the rates of the counties in which they were located. (*Id.*) PVSP's infection rate was 1,100 times higher than the rate in California, ASP was 189 times higher, and Wasco was 114 times higher. (*Id.*)

A letter dated March 16, 2006 written by a doctor from the California Department of Health Services referenced the exceptionally high risk groups in a letter to an inmate at PVSP and cited a contemporaneous medical journal article. (*Id.* at ¶ 83.)

In 2006, the California Department of Public Heath ("CDPH"), Center for Infectious Disease conducted an epidemiological study of Valley Fever in California prisons. (*Id.* at 107.) The study, published in January 2007, found that the number of cases of Valley Fever at PVSP in 2005 was three times that of the combined total of Fresno County combined. (*Id.* at ¶¶ 107, 108.) The CDPH made recommendations regarding Valley Fever on January 11, 2007, and noted that studies

suggested that the risk for complications is increased for persons of African or Filipino descent and the risk is even higher for immunosuppressed individuals. (*Id.* at ¶ 87.) The study recommended that CDCR evaluate relocating the highest risk groups to areas that are not hyperendemic, and to take steps at the prison to minimize exposure, including ventilation, respiratory protection and dust suppression and soil control. (*Id.* at ¶ 109.)

At some point the California Corrections Health Care Services ("CCHCS") requested assistance from the CDPH in assessing the magnitude of the problem. (*Id.* at ¶ 70.) CDPH reported that the rate of Valley Fever cases at PVSP was 38 times that of the residents of Coalinga and 600 times the rate in Fresno County. (*Id.* at ¶ 71.) The CDPH reported the risk of the disease was associated with increased outdoor time, pre-existing health conditions, and African-American race. (*Id.* at ¶ 71.) The CDPH report included recommendations for reducing incidents of Valley Fever at the hyper-endemic prisons. (*Id.* at ¶ 72.)

Based on CDPH's report, the CCHCS issued recommendations in June 2007 that included; using environmental mitigation in the prisons by landscaping with ground cover and placing other dust reducing material on the grounds; continuing to divert and relocate inmates at high risk of Valley Fever; reinstating the public health system in prisons; notifying the local health departments of new cases; expanding epidemiologic research around cocci; supporting vaccine research; and not expanding prison beds in the hyper-endemic area, including at PVSP. (*Id.* at ¶ 73.)

In September 2007, Defendant Schwarzenegger proposed that the state construct new dormitories at

PVSP to expand by 600 the number of beds available to house prisoners. (*Id.* at ¶ 100.) During a press conference to announce the expansion plans, Defendant Schwarzenegger responded to questions about the expansion inevitably exposing more inmates to Valley Fever by indicting they would go ahead and build. (*Id.* at ¶ 101.)

In November 2007, Defendants Hubbard and Winslow amended the 2006 exclusion policy to protect persons with certain identified medical conditions. (*Id.* at ¶ 74.) The policy did not exclude those high risk racial and ethnic groups. (*Id.)*

In 2007, the CDCR Facilities Department Senior Management officials stated they were preparing to implement measures to reduce the risk of inmates contracting Valley Fever at PVSP, including extensive measures to control inmate exposure to contaminated soil and improved ventilation systems. (*Id.* at ¶¶ 113, 114.) This plan was not implemented until six years later. (*Id.* at ¶ 115.) Additionally in 2007, the New York Times published an article about the Valley Fever epidemic at PVSP which quoted Defendant Yates surmising that the inmates contracted Valley Fever by breathing the spores as they walked around out there. (*Id.* at ¶ 117.)

In 2009, the CDCR requested and then terminated a project by federal health agencies to assist California with the Valley Fever epidemic. (*Id.* at ¶ 77.) In December 2009, the federal agencies wrote a letter to the CDCR indicating that work on the project ceased due to CDCR's lack of support in assisting with the federal agencies investigation, and reminded the CDCR that African-Americans, and individuals of Asian or Filipino descent and immuneocompromised individuals

were at greater risk of developing disseminated infection. (*Id.* at ¶ 78.)

In April 2012, the California Correctional Health Care Services ("CCHCS") released a report that received general circulation among CDCR staff which found that nothing done between 2006 and 2010 had any effect on the Valley Fever rates at PVSP and ASP. (*Id.* at ¶¶ 112, 113.)

From 2006 through 2012, approximately 1,800 inmates became infected at PVSP. (*Id.* at ¶ 65.) Infection rates were also higher than the rate of infection in Kern County. (*Id.* at ¶ 66.) An April 2012 study found that the infection rate at PVSP was seven out of every one hundred inmates. (*Id.*) From 2007 through 2010, the rate of infection at PVSP was six times higher than the infection rate at the adjacent mental health facility. (*Id.* at ¶ 76.) Of the twenty seven inmates that died of Valley Fever between 2006 and 2010, the rate of deaths for African-Americans (68 percent) was twice that of non-African-American inmates. (*Id.* at ¶ 67.) A report by Dr. Pappagianis attributed the increase in Valley Fever incidents to the new construction that occurred in 2005-2006. (*Id.* at ¶ 69.)

A 2012 study in the journal Emerging Infectious Disease found the rate of hospitalization from disseminated infection was 8.8 times higher among African-Americans than whites. (*Id.*) In 2013, Dr. Galgiani analyzed reports from the Receiver's Office and noted that African-American inmates in the Central Valley died from Valley Fever at higher rates than the general inmate population and comprised 71 percent of the inmate deaths from Valley Fever between 2006 and 2011. (*Id.* at ¶ 88.)

The Receiver's Office took steps to force CDCR to relocate the high risk inmates. (*Id.* at ¶ 90.) A spokesperson for the Receiver's office stated that the State of California has known since 2006 that segments of the inmate population were at a greater risk of contracting Valley Fever and mitigation efforts have proven ineffective. (*Id.* at ¶ 90.)

Plaintiffs contend that Defendants were aware that housing inmates at prisons in the hyperendmic region posed an elevated risk of inmates contracting Valley Fever by the 2004 Kanan Memo which was intended to be circulated to all health care professionals in the CDCR system. (*Id.* at ¶¶ 91-92.)

In 2005 a prisoner's rights group sent an informational packet to Defendant Schwarzenegger describing the threat posed by Valley Fever and the threat to African-Americans, Filipinos, elderly inmates and the immune compromised. (*Id.* at ¶ 93.)

In 2006-2007, a Fresno Grand Jury undertook the task of evaluating inmate issues at PVSP and made recommendations. (*Id.* at ¶ 94.) Beginning in 2007, the Grand Jury issued periodic public reports stating that inmates and staff continue to be at risk from Valley Fever. (*Id.* at ¶ 95.) The Grand Jury issued these reports starting in 2007 and continuing each year after to Defendants Brazelton, Yates, and Cates, as well as to other CDCR officials. (*Id.* at ¶ 96.) The Grand Jury required Defendants Yates, Cates, and Brazelton to respond directly regarding the findings in the reports. (*Id.* at ¶ 97.) The Grand Jury found that the disease rates for all groups at the prison had increased dramatically since 2004 and that African-Americans, Hispanics, Filipinos and other Asians were at a far greater risk than other ethnicities. (*Id.* at

¶ 98.) These reports informed Defendants Yates, Cates, and Brazelton that inmates were at an increased risk from Valley Fever if they were housed or remained at PVSP. (*Id.* at ¶ 99.)

CDCR publishes and distributes an orientation manual for all medical personnel that discusses Valley Fever in detail. (*Id.* at ¶ 103.) The orientation manual notes that African-Americans, Filipinos, and those with compromised immune systems or chronic diseases are at a greatly increased risk of developing disseminated infection. (*Id.*) This orientation manual is authorized and promulgated by Defendant Winslow. (*Id.* at ¶ 104.) All medical personnel and facility management were aware of the information in the orientation manual. (*Id.* at ¶ 105.)

Plaintiffs allege that the defendants had the ability to divert inmates away from the hyperendmic prisons and failed to implement remedial measures that were recommended by their own experts. Further, Plaintiffs contend that Defendants had the power to prevent the plaintiffs from being assigned to hyperendemic prisons, could have used a routine review process to transfer Plaintiffs to safer facilities, and failed to implement remedial measures to reduce the risk of infection.

IV. Analysis

Defendants Beard, Brazelton, Cate, Hartley, Hubbard, Hysen, Kernan, Meyer, Rothchild, Schwartz-Reagle, Schwarzenneger, and Yates move to dismiss this action pursuant to Rule 12(b) on the grounds that 1) the consolidated complaint does not allege that any Defendant personally caused the alleged constitutional deprivations; 2) Defendants are entitled to

qualified immunity; 3) Plaintiffs Corley and Spences claims are barred by the statute of limitations; 4) Plaintiffs' negligence cause of action should be dismissed as almost no Plaintiff has complied with California's Government Claims Act; and 5) those Plaintiffs only alleging a claim for negligence under state law should be dismissed. Defendants Igbinosa and Winslow join in the motion to dismiss and additionally, move to dismiss on the same grounds.[3]

Defendants contend that they are entitled to qualified immunity for the decision to house inmates in areas in which Valley Fever spores naturally occur and for any failure to provide environmental safeguards. Plaintiff argues that it was clearly established that housing inmates in endemic areas and failing to implement environmental safeguards would violate the inmates' Constitutional rights. Plaintiff further counters that the allegations in the complaint are sufficient to state a claim against the individual defendants and the right at issue was established more than twenty years ago.

While Defendants move to dismiss this action for failure to state a claim, the Court finds that addressing the issue of qualified immunity in the first instance is appropriate here.

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[3] Defendants Igbinosa and Winslow bring a motion to dismiss any claims against them based upon deliberate indifference to medical needs due to policies or procedures implemented at the prison. At the April 29, 2015 hearing, Plaintiffs conceded that they are not bringing any claims based upon medical care or medical policies. Plaintiffs stated the claims raised in this action are for housing inmates in areas which caused exposure to Valley Fever.

A. Qualified Immunity

1. Qualified Immunity Legal Standard

The doctrine of qualified immunity protects government officials from civil liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). To determine if an official is entitled to qualified immunity the court uses a two part inquiry. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The court determines if the facts as alleged state a violation of a constitutional right and if the right is clearly established so that a reasonable official would have known that his conduct was unlawful. *Saucier*, 533 U.S. at 200.

The district court is "permitted to exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236. The inquiry as to whether the right was clearly established is "solely a question of law for the judge." *Dunn v. Castro*, 621 F.3d 1196, 1199 (9th Cir. 2010) (quoting *Tortu v. Las Vegas Metro. Police Dep't.* 556 F.3d 1075, 1085 (9th Cir. 2009)). In deciding whether officials are entitled to qualified immunity, the court is to view the evidence in the light most favorable to the plaintiff and resolve all material disputes in the favor of the plaintiff. *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th Cir. 2003).

2. The Question at Issue Is Whether Housing Inmates in Prisons in Areas Endemic for Valley Fever, a Naturally Occurring Soil-Borne Fungus Which Can Lead to Serious Illness, Would Violate the Eighth Amendment

Initially, Plaintiffs rely on this Court's finding in *Jackson* that Defendants were not entitled to qualified immunity on similar claims. In the initial finding and recommendation addressing qualified immunity in *Jackson*, 1:13-cv-01055-LJO-SAB (E.D. Cal. February 20, 2014), this Court framed the issue as whether failing to protect high risk inmates from the risk of developing disseminated disease would violate the Eighth Amendment. *Id.* at 16:21-18:23. However, upon consideration of the issue in the current motion, the Court finds this is not the correct question. Therefore, the Court finds that it is appropriate to address the substance of the qualified immunity claim in this motion to dismiss. Further to the extent that this Court previously cited *Helling v. McKinney*, 509 U.S. 25 (1993), for the proposition that Defendants are not entitled to qualified immunity; it now finds that this action is distinguishable.

Defendants contend that they are entitled to qualified immunity because there is no clearly established right not to be housed in the Central Valley or otherwise be subjected to the environmental risk of Valley Fever. Plaintiffs contend that Defendants are defining the right too narrowly. Plaintiffs argue that the right to be addressed here is the significant increased risk of infection from Valley Fever.

It is the plaintiff that bears the burden of demonstrating that the right was clearly established

at the time that the defendants acted. *May v. Baldwin*, 109 F.3d 557, 561 (9th Cir. 1997). Defendants cannot be held liable for a violation of a right that is not clearly established at the time the violation occurred. *Brown v. Oregon Dep't of Corrections*, 751 F.3d 983, 990 (9th Cir. 2014). A constitutional right is clearly established when its contours are "sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). In light of the preexisting law the lawfulness of the officials act must be apparent. *Id.* at 739. The court is to look to the state of the law at the time the defendants acted to see if it gave fair warning that the alleged conduct was unconstitutional. *Id.* at 741.

Further, the Supreme Court has emphasized that it is often difficult for an official to determine how relevant legal doctrine will apply to the specific situation that is faced and that is why qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law[.]" *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir. 2002). It is not sufficient for Plaintiffs to merely argue the general rule that prison officials cannot deliberately disregard an excessive risk of harm. *Estate of Ford*, 301 F.3d at 1051.

When we are considering whether the official had notice that his conduct was unlawful, we look not to the harm that results, but what condition the inmate was exposed to that could cause the harm. In *Helling*, the question was not how serious the harm to the inmate could be from second hand smoke, but whether exposing the inmate "to levels of ETS that pose an unreasonable risk of serious damage to his future

health" would violate the Eighth Amendment. 509 U.S. at 35. The condition the inmate was exposed to was ETS due to being housed with a cellmate who smoked five packages of cigarettes per day.

While Plaintiffs argue that in determining qualified immunity we consider the risk of disseminated disease, Plaintiffs were not exposed to disseminated disease. Plaintiffs allege that they were housed in the Central Valley in an area where spores that cause Valley Fever are endemic. The majority of Plaintiffs allege that they have some factor which causes them to be at an increased risk of developing disseminated infection from Valley Fever. If Plaintiffs are correct that we look only to the harm that could result, the right to be free from any act that caused significant harm would be clearly established and Defendants could never be granted qualified immunity. That is clearly not the intent of the law.

During the April 29, 2015 hearing, Plaintiffs argued that qualified immunity cannot mean that the first time a right is violated the defendants are not liable. But where a right is not clearly established a defendant is entitled to qualified immunity from damages. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). That is not to say that the plaintiff is without remedy for his injury as he could seek tort damages for violations of state law. But the question we address here is whether it is clearly established that the conduct at issue would violate the inmates' federal rights.

When confronted with a claim for qualified immunity we are to ask "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show that the officer's conduct violated a constitutional right." *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004). This inquiry is to be taken in light of the specific context of the case and not as a broad general proposition. *Brosseau*, 543 U.S. at 198. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 199 (quoting *Saucier*, 533 U.S. at 202). Prison officials are entitled to qualified immunity where it is not clearly established that the conduct complained of would violate the Eighth Amendment. *Pearson*, 555 U.S. at 243.

The Supreme Court has told us that we are not to define clearly established law at a high level of generality. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2084 (2011). While Plaintiffs rely on the risk of harm and argue the general rule, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). The Ninth Circuit recently addressed a deliberate indifference claim in which an arrestee was placed in the drunk tank and was attacked by another detainee. *Castro v. Cnty. of Los Angeles*, ___ F.3d.___, 2015 WL 1948146, at *1-2 (9th Cir. May 1, 2015). The right at issue was not merely the right to be free from a risk of violence, but was found to be "the right to be free from violence at the hands of other inmates." *Id.*

Here, Plaintiffs allege that they were exposed to Coccidioides fungal spores that exist in the soil and when inhaled can cause Valley Fever. The Court finds that the question to be addressed here is whether it was clearly established that housing inmates in prisons in areas endemic for Valley Fever, a naturally occurring soil-borne fungus which can lead to serious illness, would violate the Eighth Amendment.[4]

3. It Is Not Clearly Established That Environmental Exposure of Inmates to Valley Fever Would Violate the Eighth Amendment

Plaintiffs argue that Defendants "gloss over the first inquiry "whether a constitutional right was violated." (ECF No. 154 at 21.) However, as here, where Defendants are arguing that it is unclear whether the right at issue exists, the Court can consider

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[4] In determining how to frame the right at issue, the Court considers *Helling*. In *Helling*, the inmate was alleging that he was exposed to a condition created by other prisoners smoking cigarettes with exposed him to environmental tobacco smoke ("ETS"). The *Helling* court did not frame the right as a manmade condition that could cause a serious risk of harm. In *Helling*, the Supreme Court considered whether exposing the inmate "to levels of ETS that pose an unreasonable risk of serious damage to his future health" would violate the Eighth Amendment. 509 U.S. at 35. The court considered the specific substance to which the inmate alleged he was exposed that would cause him harm. Similarly in this instance, the Court considers that Plaintiffs are alleging they were exposed to spores which can cause Valley Fever. However, as discussed below, the Court is not requiring a case to be directly on point, but is analyzing whether prior case law would place Defendants on notice that the exposure of inmates to Valley Fever would violate their rights under the Eighth Amendment.

the second prong of the inquiry first. *Pearson*, 555 U.S. at 236.

Qualified immunity shields an official from personal liability where he reasonably believes that his conduct complies with the law. *Pearson*, 555 U.S. at 244. "'Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'" *Stanton v. Sims*, 134 S.Ct. 3, 5 (2013) (citations omitted). In determining whether the defendant is entitled to qualified immunity, the court is to determine if "a reasonable officer would have had fair notice that [the action] was unlawful, and that any mistake to the contrary would have been unreasonable." *Chappell v. Mandeville*, 706 F.3d 1052, 1056-57 (9th Cir. 2013) (quoting *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1060-61 (9th Cir. 2003)).

Prison officials are entitled to qualified immunity where it is not clearly established that the conduct complained of would violate the Eighth Amendment. *Pearson*, 555 U.S. at 243. Under the Eighth Amendment, prison officials cannot be deliberately indifferent to conditions of confinement that create a substantial risk of significant harm. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). To prove a violation of the Eighth Amendment a plaintiff must "objectively show that he was deprived of something 'sufficiently serious,' and make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (citations omitted). "A deprivation is sufficiently serious when the prison official's act or omission results in the denial of the minimal civilized

measure of life's necessities." *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009) (internal punctuation and citations omitted). A plaintiff satisfies the objective component of whether he has been exposed to a sufficiently serious deprivation by showing that he is incarcerated under conditions that pose a substantial risk of serious harm. *Lemire v. California Dep't of Corrections and Rehabilitation*, 726 F.3d 1062, 1075 (9th Cir. 2013). Therefore, the Court shall examine the state of the law to determine if it is clearly established that housing inmates in prisons in areas endemic for Valley Fever would violate the Eighth Amendment.

a. There Does Not Have to be Case Directly on Point, But Prison Officials Must Have Had Fair Notice That the Conduct Violates the Eighth Amendment

It is not required that there be a case directly on point before concluding that the law is clearly established, "but existing precedent must have placed the statutory or constitutional question beyond debate." *Stanton*, 134 S.Ct. at 5 (quoting *al-Kidd*, 131 S.Ct. at 2085). It was in *Hope* that the Supreme Court established that a case need not be fundamentally similar for prison officials to have notice that their conduct would violate the Eighth Amendment.

In *Hope*, an inmate appealed the finding that prison officials were entitled to qualified immunity for handcuffing him to a hitching post for hours as a form of punishment. *Hope*, 536 U.S. at 735. The district court found that although the actions violated the Eighth Amendment, the officials were entitled to qualified immunity. *Id.* The Eleventh Circuit affirmed, stating that, while there were two analogous cases, there were

no cases with materially similar facts to place defendants on notice. *Id.* The Supreme Court reversed holding that precedent does not require a factual situation to be fundamentally similar, but the prior decision must give reasonable warning that the conduct at issue would violate a constitutional right. *Id.* at 740.

At the time the defendants acted there were two cases, *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) and *Ort v. White*, 813 F.2d 318 (11th Cir. 1987), which held that corporal punishment which runs afoul of the Eighth Amendment, such as handcuffing inmates to a crate or cell for long periods of time and denial of drinking water after the prisoner terminates his resistance, are not permitted. *Hope*, 536 U.S. at 741-43. The Court concluded that "Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous[,]" not out of necessity, but as a punishment for prior conduct. *Id.* at 745. *Gates* and *Ort* provided sufficient notice that this conduct would be unconstitutional. *Id.* In applying the holding in *Hope*, this Court is to determine if there is case law that would have provided Defendants with sufficient notice that environmental exposure of inmates to Valley Fever would violate their Eighth Amendment rights.

Significantly, the Eighth Amendment prohibits punishments that are incompatible with "the evolving standards of decency that mark the progress of a maturing society." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citations omitted). Conditions that cannot be said to be cruel and unusual under contemporary

standards of decency do not violate the Eighth Amendment. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

b. Review of Supreme Court, Circuit, and District Court Decisional Law Shows That Defendants Do Not Have Notice That Environmental Exposure to Valley Fever Would Violate the Eighth Amendment

In determining if the law is clearly established we first look to binding precedent. *Chappell*, 706 F.3d at 1056. If there is none on point, we look to other decisional law, including the law of other circuits and district courts. *Id.* at 1056; *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir. 1996). The Court finds no Supreme Court or published Ninth Circuit case that has addressed whether an inmate's environmental exposure to Valley Fever or any other environmental organism would be a violation of the Eighth Amendment.[5]

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[5] There are two unpublished Ninth Circuit cases which remanded Valley Fever cases without discussion of what would be required to state a claim under the Eighth Amendment. *See Smith v. Schwarzenegger*, 393 Fed.App'x 518, 2010 WL 3448591 (9th Cir. 2010) (not beyond a doubt that plaintiff could prove no set of facts entitling him to relief); *Johnson v. Pleasant Valley State Prison*, 505 Fed.App'x 631, 2013 WL 226722 (9th Cir. 2013) (given the low pleading threshold, dismissal of plaintiff's action at the pleading stage was improper, expressing no opinion as to the sufficiency or merits of the allegations). "An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision." *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001). "[T]he disposition is not written in a way that will be fully intelligible to those unfamiliar with the case, and the rule of law is not announced in a way that makes it suitable for governing future cases." *Hart*, 266 F.3d at 1177-78. "Unpublished dispositions and orders of [the Ninth Circuit] are

Therefore, the Court looks to other conditions of confinement cases addressing environmental exposure to determine if the right at issue is clearly established.

i. The Court finds No Supreme Court or Ninth Circuit Precedent to Place Defendants on Notice That Housing Inmates in Areas Endemic for Valley Fever Would Violate the Eighth Amendment

a) *Helling* is Distinguishable from the Situation Confronted By Prison Officials Here

Plaintiffs rely on *Helling* to argue that the right to be free from environmental exposure to Valley Fever is clearly established. In *Helling*, the Supreme Court addressed whether environmental exposure to environmental tobacco smoke ("ETS") would violate the Eighth Amendment. The plaintiff alleged that he was housed with a cellmate who smoked up to five packages of cigarettes per day exposing the plaintiff to ETS that posed a risk to his health. *Helling*, 509 U.S. at 27. A court trial was held and after a directed verdict, judgment was entered for the defendants. *Id.* at 29. The Court of Appeals affirmed the lower court decision on the basis of qualified immunity, but held that, although the plaintiff did not have a constitutional right to a smoke free environment, plaintiff had stated a cause of action under the Eighth Amendment by alleging he was involuntarily exposed to levels of ETS that posed an unreasonable risk of harm to his future health. *Id.* In support of the judgment, the Court of

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not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." CTA9 Rule 36-3.

Appeals noted the scientific opinion supporting plaintiff's contention that exposure to ETS could endanger an individual's health and "society's attitude had evolved to the point that involuntary exposure to unreasonably dangerous levels of ETS violated current standards of decency." *Id.*

The issue the Supreme Court addressed was whether the plaintiff had stated an Eighth Amendment claim by alleging his compelled exposure to ETS posed an unreasonable risk to his health. *Helling*, 509 U.S. at 31. The Supreme Court rejected the defendants' argument that only deliberate indifference to an inmate's current serious health problem is actionable under the Eighth Amendment, and held that the Eighth Amendment protects against future harm. *Id.* at 33. The Supreme Court remanded stating:

> The Court of Appeals has ruled that McKinney's claim is that the level of ETS to which he has been involuntarily exposed is such that his future health is unreasonably endangered and has remanded to permit McKinney to attempt to prove his case. In the course of such proof, he must also establish that it is contrary to current standards of decency for anyone to be so exposed against his will and that prison officials are deliberately indifferent to his plight. We cannot rule at this juncture that it will be impossible for McKinney, on remand, to prove an Eighth Amendment violation based on exposure to ETS.
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> *Id.* at 35.

> [W]ith respect to the objective factor, determining whether McKinney's conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS. It also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate.

Id. at 36.

The Court finds that *Helling* is distinguishable for two interrelated reasons. First, in this instance, Plaintiffs are exposed to a naturally occurring fungus that lives in the soil in the Central Valley. *Helling* did not address a naturally occurring condition that causes the same risk to those in the surrounding community. Second, the *Helling* court recognized that society's attitude had evolved to the point that involuntary exposure to unreasonably dangerous levels of ETS violated current standards of decency. That is not the case here where society accepts exposure to Valley Fever.[6] Since *Helling* is distinguishable as it does not

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[6] As discussed in detail below, over a million people live in areas in which the cocci spores are endemic and are subjected to the risk of contracting Valley Fever. Further, tens of thousands of individuals live in those areas which are considered to be hyperendemic and are exposed to the risk of contracting Valley Fever. Additionally, the employees who work within the prison and

address an environmental condition that exposes the general community to a risk of harm, it does not provide reasonable warning that the conduct at issue here would violate a constitutional right. *Hope*, 536 U.S. at 740.

The Court therefore turns to precedential Ninth Circuit decisions addressing exposure of inmates to an environmental condition to determine if there is a case sufficiently similar to give Defendants reasonable warning that the conduct here would violate the Eighth Amendment. The majority of Ninth Circuit cases that consider environmental conditions of confinement address exposure to ETS which the Court finds to be distinguishable as discussed above.

b) Neither Ninth Circuit Decisions Nor Common Sense Would Clearly Establish That Housing Inmates in an Area Endemic to Valley Fever Would Violate the Eighth Amendment

The Ninth Circuit has recognized that a right can be established by precedent or by common sense. *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996). In determining whether the law is clearly established in this instance, the Court therefore considers both precedent and whether common sense would clearly establish the right.

Plaintiffs argue that *Kelley v. Borg*, 60 F.3d 664 (9th Cir. 1995), establishes the right not to be exposed to a significant risk of harm. In *Kelley*, the Ninth Circuit considered a case in which an inmate complained of fumes in his cell from which officers refused

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those who visit the prison are exposed to the cocci spores and tolerate the risk of contracting Valley Fever. is misplaced.

to remove him during a lockdown. 60 F.3d at 665. A short time later, the inmate became unconscious and was taken to the infirmary. *Id.* at 666. The appellate court affirmed the district court's holding that it was clearly established that this was deliberate indifference to a serious medical need. *Id.* at 666-67. While Plaintiffs argue that *Kelley* establishes that Defendants had notice that their conduct would violate the Eighth Amendment, *Kelley* does not stand for the general proposition that any condition that would cause substantial harm to an inmate would violate the Eighth Amendment. Therefore, Plaintiffs' reliance on *Kelley* to show that the right at issue here is clearly established

Where an inmate is in imminent danger from an environmental hazard, case law is not required to determine that the right was clearly established. This is an instance where common sense would lead a reasonable prison official to determine that this would violate an inmate's rights. *Newell*, 79 F.3d at 117. However, it is not so obvious for every instance where an inmate is subjected to an environmental condition and complains that it violates the Eighth Amendment. *See Sawyer v. Cole*, No. 3:10-cv-00088-RCJ-WGC, 2012 WL 6210039, *4 (D. Nev. Dec. 12, 2012) *aff'd*, 563 F. App'x 589 (9th Cir. 2014) (qualified immunity applies where inmate alleged he became ill due to mold, fungus, bacteria and otherwise unsanitary conditions in his cell. "[T]he right against seriously dangerous unsanitary conditions cannot be held to be 'clear' at a so high level of generality that any claim of uncleanliness necessarily rises to the level of a constitutional violation against which an officer has no qualified immunity.") The right alleged here is not so obvious

that common sense would dictate the result of the inquiry.

In *Wallis v. Baldwin*, 70 F.3d 1074 (9th Cir. 1995), the Ninth Circuit considered an inmate's claim that prison officials violated his rights when he was required to clean attics which included cleaning up insulation containing asbestos without adequate protective gear or training. 70 F.3d at 1075. The evidence did not show that any minimum exposure to asbestos was considered safe. *Id.* at 1075. The plaintiff presented evidence that the prison officials were aware of the existence of the asbestos and during the time he was assigned to clean the attic the plaintiff had complained to officials about the asbestos. *Id.* at 1077. The court held that exposing the inmate to a known carcinogen in which there is no known safe level for human exposure violated the Eighth Amendment.[7] *Id.* at 1078. Therefore, it is clearly established that prison officials cannot expose an inmate to conditions to which no human can safely be exposed. Since Valley Fever spores are not considered a substance to which no human can safely be exposed this does not place Defendants on notice that environmental exposure to Valley Fever would violate the Eighth Amendment.

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[7] The Fifth Circuit held that for an inmate to state a claim for exposure to carcinogenic asbestos particles, he must show that he was exposed to unreasonably high levels of environmental toxins. *Herman v. Holiday*, 238 F.3d 660, 664 (5th Cir. 2001).

In *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990), the Eleventh Circuit found that housing inmates in a dormitory in which workers removed pipes from the dormitory releasing large quantities of asbestos into the air would violate the Eighth Amendment.

In *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996), an inmate brought suit complaining his conditions of confinement violated the Eighth Amendment. One of the inmate's numerous claims alleged that "food at the IMU was 'spoiled, tampered with, cold, raw, [and failed] to meet a balanced nutritional level,' and that the water was 'Blue/Green in Color and Foul Tasting.' *Keenan*, 83 F.3d at 1091 opinion amended on denial of reh'g, 135 F.3d 1318 (9th Cir. 1998). The Ninth Circuit held that "[f]ood that is spoiled and water that is foul would be inadequate to maintain health." *Id.* However, exposing an inmate to an environmental condition that naturally occurs in the area is not similar to failing to provide fresh food and clean water.

The Court finds that none of these cases would provide sufficient notice to Defendants that housing inmates in areas endemic for Valley Fever would violate the Eighth Amendment.

ii. Out of Circuit Precedent Does Not Provide Sufficient Notice That Housing Inmates in Areas Endemic for Valley Fever Would Violate the Eighth Amendment

Finding no Supreme Court or Ninth Circuit precedent that would place Defendants on notice that housing inmates in areas endemic for Valley Fever would violate the Eighth Amendment, the Court next considers out of circuit decisional law for guidance on the issue. The Eleventh Circuit considered a class action in which inmates on death row alleged that they were subjected to cruel and unusual punishment by being exposed to summertime temperatures in their cells of between eighty to one hundred degrees. *Chandler v. Crosby*, 379 F.3d 1278, 1283-86 (11th Cir.

2004). The appellate court noted that while an inmate need not wait for a tragic event to occur before seeking relief, he must show that the challenged conditions are extreme. *Chandler*, 379 F.3d at 1289. A plaintiff must show at the very least that there is an unreasonable risk of serious damage to his future health or safety and, quoting *Helling*, that the risk is one that society chooses not to tolerate. *Id.* The appellate court then examined other cases involving exposure to heat and ventilation. *Id.* at 1291-95. The court first found that the Eighth Amendment applied to an inmate's claim of inadequate cooling and ventilation and a claim may be stated based upon the conditions in isolation or in combination. *Id.* at 1294. Second, the Eighth Amendment is concerned with the severity and the duration of the conditions to which the inmate is exposed. *Id.* Third, a prisoner's mere discomfort, without more, does not offend the Eighth Amendment. *Id.* The appellate court found that the heat the plaintiffs were exposed to was not unconstitutionally excessive. *Id.* at 1297. Considering the conditions the inmates were exposed to, the inmates did not meet the high bar to state a claim under the Eighth Amendment. *Id.* at 1298; *cf. Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004) (affirming injunctive relief for inmates subjected to profound isolation, lack of exercise, stench and filth, malfunctioning plumbing, high temperatures, uncontrolled mosquito and insect infestations, a lack of sufficient mental health care, and exposure to psychotic inmates in adjoining cells which violates the Eighth Amendment).

In *Rish v. Johnson*, 131 F.3d 1092 (4th Cir. 1997), the Fourth Circuit considered inmates claims that requiring them to clean up blood and other bodily

fluids from environmental surfaces without providing them with protective gear violated the Eighth Amendment. 131 F.3d at 1094. The inmates had volunteered to work as orderlies. *Id.* As orderlies, they cleaned up after inmates who were infected with human immunodefiency virus (HIV) and hepatitis B which both may prove fatal. *Id.* at 1094-95. The district court denied the defendants' motion for summary judgment finding that "a reasonable person, especially a federal officer trained in the prevention of infection or charged with ensuring that inmates take the required precautions, would know that they were violating [the] inmates' constitutional rights if they refused to provide the required equipment or training." *Id.* at 1095. The appellate court reversed, finding "there is no clearly established law dictating that prison officials are deliberately indifferent to a substantial risk of bodily harm if they fail to provide equipment to inmates to ensure that they may follow universal precautions in performing the duties of an orderly." *Id.* at 1101.

In a case which this Court finds to be factually analogous to this action, *Carroll v. DeTella*, 255 F.3d 470 (7th Cir. 2001), the plaintiff alleged that he was exposed to drinking water that was contaminated with radium. 255 F.3d at 471-72. The plaintiff contended that over a four year period he was exposed to unsafe levels of radium that were in excess of the maximum set by the Federal Environmental Protection Agency, while prison guards were provided with bottled water. *Id.* at 472. There were 80 other Illinois water systems that also had radium in their water supply, but there was no evidence regarding the actual radium level in those communities' water supply. *Id.* The Seventh Circuit found that:

Poisoning the prison water supply or deliberately inducing cancer in a prisoner would be forms of cruel and unusual punishment, and might be even if the harm was probabilistic or future rather than certain and immediate, *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). But failing to provide a maximally safe environment, one completely free from pollution or safety hazards, is not. *McNeil v. Lane*, 16 F.3d 123, 125 (7th Cir. 1993); *Steading v. Thompson*, 941 F.2d 498 (7th Cir. 1991); *Harris v. Fleming*, 839 F.2d 1232, 1235–36 (7th Cir. 1988); *Clemmons v. Bohannon*, 956 F.2d 1523, 1527 (10th Cir. 1992) (en banc). Many Americans live under conditions of exposure to various contaminants. The Eighth Amendment does not require prisons to provide prisoners with more salubrious air, healthier food, or cleaner water than are enjoyed by substantial numbers of free Americans. *McNeil v. Lane*, supra, 16 F.3d at 125; *Givens v. Jones*, 900 F.2d 1229, 1234 (8th Cir. 1990). It would be inconsistent with this principle to impose upon prisons in the name of the Constitution a duty to take remedial measures against pollution or other contamination that the agencies responsible for the control of these hazards do not think require remedial measures. If the environmental authorities think there's no reason to do anything about a contaminant because its concentration is less than half the maximum in a proposed revision of the existing standards, prison officials cannot be faulted

> for not thinking it necessary for them to do anything either. They can defer to the superior expertise of those authorities.

Carroll, 255 F.3d at 472-73.

The Seventh Circuit also considered an asthmatic prisoner's claim that prison officials violated the Eighth Amendment by allowing him to be exposed to ETS from which he cannot escape due to his captivity. *Steading*, 941 F.2d at 499.[8] At this time, smoking was common in offices, restaurants, and other public places throughout the United States and the rest of the world. *Steading*, 941 F.2d at 500. The Seventh Circuit compared subjecting prisoners to tobacco smoke to restaurant owners subjecting their patrons to smokers and found that exposure to smoke could not be considered punishment. *Id.* The appellate court found that "[p]risoners allergic to the components of tobacco smoke, or who can attribute their serious medical conditions to smoke, are entitled to appropriate medical treatment, which may include removal from places where smoke hovers." *Steading*, 941 F.2d at 500. But subjecting inmates to the same conditions that society is subjected to was not punishment and did not violate the Eighth Amendment. *Id. Carroll* and *Steading* stand for the proposition that subjecting

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[8] The Court does note that *Schroeder v. Kaplan*, 60 F.3d 834 (9th Cir. 1995) (unpublished), discusses that the Ninth Circuit has recognized that housing an inmate with a sensitivity to smoke in a cell with a heavy smoker may violate the Eighth Amendment. However, the Court does find that exposure to cigarette smoke is distinguishable as it was not a risk that society chose to tolerate at that time. *Schroeder* did not address whether exposure to a risk that society chooses to tolerate would violate the Eighth Amendment.

inmates to conditions of confinement to which society is also subjected does not violate the Eighth Amendment.

iii. Exposure to Valley Fever Is a Risk That Society Chooses to Tolerate

Having reviewed Supreme Court and circuit case law, the Court finds that there is no case that would place Defendants on notice that housing inmates in an area that is endemic for Valley Fever would violate the Eighth Amendment. In this instance, as in *Carroll*, where the radium was in the water supply of 80 communities, a large number of individuals in the Central Valley are exposed to Valley Fever spores in the environment. The 2013 census shows that over a million people reside in the San Joaquin Valley where the risk of Valley Fever is present.[9] *See* United States Census Bureau, State & County QuickFacts, Kern County, California (2013 estimated population of 864, 124) http://www.census.gov/quickfacts/#table/PST045214/06029,00; Fresno County California (2013 estimated population of 955,272) http://quickfacts.census.gov/qfd/states/06/06019.html last visited Feb. 6, 2015. Much of the litigation regarding Valley Fever originates from inmates incarcerated at ASP which is located in Avenal, California, or PVSP which is located in

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[9] Under the Federal Rules a court may take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice may be taken "of court filings and other matters of public record." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001).

Coalinga, California. (ECF No. 28 at ¶ 33.) Tens of thousands of people live, work, and raise their families in the vicinity of ASP and PVSP. *See* United States Census Bureau, Avenal, California http://quickfacts.census.gov/qfd/states/06/0603302.html (last visited February 2, 2015) (2013 estimated population of 14, 176); City of Coalinga HomePage located at http://www.coalinga.com/?pg=1 (last visited February 2, 2015) (approximately 18,000 residents in Coalinga); Pleasant Valley State Prison HomePage located at http://www.cdcr.ca.gov/Facilities_Locator/PVSP.html. Additionally, West Hills Community College is located in Coalinga. *See* City of Coalinga HomePage located at http://www.coalinga.com/?pg=1 (last visited February 9, 2015). It cannot be disputed that a significant number of individuals from all of the high risk categories identified by Plaintiffs live in those areas identified as hyper-endemic.[10] *See* Consolidated Compl. at ¶¶ 108, 145 (African Americans, Hispanics, Filipinos, and other Asians). *Carroll*, which dealt with exposure to a condition of confinement that is common to the surrounding community, provides support for Defendants position that exposing inmates to the risk of Valley Fever does not violate the Eight Amendment.

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[10] Kern County's population is comprised of 9.6% of individuals over 65 years of age, 6.3% African American, 2.7% American Indian, 50.9% Hispanic, and 4.2% Asian. http://www.census.gov/quickfacts/#table/PST045214/06029,00. Fresno County's population is comprised of 10.9% of individuals over the age of 65, 5.9% African American, 3% American Indian, 51.6% Hispanic, and 10.5% Asian. http://quickfacts.census.gov/qfd/states/06/06019.html. Avenal is comprised of 4% of individuals over the age of 65, 10.5% African American, 1.2% American Indian, 71.8% Hispanic, and .7% Asian. http://quickfacts.census.gov/qfd/states/06/0603302.html.

Spores which cause Valley Fever exist in the San Joaquin Valley and the fact that the prison is located in this area is the basis of Plaintiffs' allegations. As in *Carroll*, prison officials have not created the spores in the soil and the claim is that Defendants are failing to provide a "maximally" safe environment. However, the Court finds no case law indicating that prison officials are required to provide an environment that is safer than that of the surrounding communities.

Plaintiffs rely on several recommendations that have been made to relocate inmates out of the areas where Valley Fever spores are prevalent to reduce the incidence of Valley Fever to support their argument that Defendants were aware of the risk of harm. It is unclear from Plaintiffs' complaint if the references in the complaint are separate incidents or stem from the same recommendations. Plaintiffs state that after the CDCR requested assistance from the CDPH, the CDPH recommended continuing to divert and relocate inmates at high risk for Valley Fever. (ECF No. 113 at ¶¶ 70-73.) In a January 11, 2007 document, the CDCR concluded that exclusion of all high-risk inmates was the most effective method to decrease the risk of Valley Fever infections. (*Id.* at ¶¶ 87.) A January 2007 study published by the CDPH recommended relocating the highest risk groups to areas that were not hyperendemic. (*Id.* at ¶ 107-109.) In June 2007, the CDHS offered recommendations to reduce the incidence of Valley Fever by relocating all inmates. (*Id.* at ¶119.) Although these studies and reports have recommended considering relocating inmates to reduce the risk of Valley Fever infection, neither the State of California nor the federal government have implemented any standards or restrictions on exposure to Valley Fever.

Similarly, recommendations have not been issued to any sector of the general public to relocate out of the area.

No governmental agency has found that the San Joaquin Valley or the communities where these prisons are located are unsafe for general human habitation or for any specific group of individuals in the general population. Prison officials have no notice that they must provide safer conditions for the inmates than the residents in the area in which the prisons are located. Similarly, many of the plaintiffs are alleging that they are at a higher risk of developing disseminated infection, but non-imprisoned individuals of these same groups would be subjected to this same risk and society tolerates them residing in the San Joaquin Valley, even in these areas with the highest concentration of Valley Fever spores. It is not clearly established by decisional case law that environmental exposure of inmates to Valley Fever would violate the Eighth Amendment since it is a risk that is tolerated by society. *Carroll*, 255 F.3d at 472-73.

c. Lower Court Decisions in the Ninth Circuit Demonstrate That Whether and When Exposure to Valley Fever Would Violate the Eighth Amendment Is Subject to Debate

i. District Court Decisions on Valley Fever

The Court also looks to lower court decisions in the Ninth Circuit that have addressed whether environmental exposure to Valley Fever can state a claim to determine if Defendants would have notice that they are violating the rights of the inmates by housing

them in endemic areas. Recently, District Judge O'Neill found that the mere exposure to Valley Fever was sufficient to state a claim for deliberate indifference. *Beagle v. Schwarzenegger*, No. 14-cv-00430-LJO-SAB (E.D. Cal. July, 25, 2014) at ECF No. 74. However, as Judge O'Neill recognized in his opinion in *Beagle*, the weight of authority is that an inmate cannot state a claim for violation of the Eighth Amendment based on confinement in a location where Valley Fever is present. *Beagle*, No. 14-cv-00430-LJO-SAB (July 25, 2014) (ECF No. 74 at 9:18-10:13).

Since exposure to Valley Fever is clearly a risk that society chooses to tolerate, this Court has found that merely being housed in an area in which Valley Fever was prevalent is not sufficient to state a claim. *See also Moreno v. Yates*, No. 1:07-cv-1404-DGC, 2010 WL 1223131, at *2 (E.D. Cal. March 24, 2010) (granting summary judgment for defendants as society tolerates the risk of Valley Fever). Even today, courts considering this issue have held the same. *See Williams v. Biter*, No. 1:14-cv-02076-AWI-GSA PC, 2015 WL 1830770, at *3 (E.D. Cal. April 9, 2015 (finding that being housed at Kern Valley State Prison where Valley Fever spores are present insufficient to state a claim); *Hines v. Youssef*, No. 1:13-cv-00357-AWI-JLT, 2015 WL 164215, at *4 (E.D. Cal. January 13, 2015) ("Unless there is something about a prisoner's conditions of confinement that raises the risk of exposure substantially above the risk experienced by the surrounding communities, it cannot be reasoned that the prisoner is involuntarily exposed to a risk the society would not tolerate."); *Sullivan v. Kramer*, No. 1:13-cv-00275-DLB-PC, 2014 WL 1664983, at *5 (E.D. Cal. April 23, 2014) (being confined in an area where Valley Fever spores exist is

insufficient to state a claim for deliberate indifference). The weight of authority shows that it is not clearly established that housing an inmate in an area where Valley Fever is prevalent would violate his Eighth Amendment rights. *See Walker v. Andrews*, No. 1:02-cv-05801-AWI-GSA-PC, 2011 WL 3945354, at *19 (E.D. Cal. Sept. 7, 2011) adopted by ECF No. 183 ("The law is clear that the fact that Plaintiff was confined in a location where [V]alley [F]ever spores existed which caused him to contract [V]alley [F]ever fails to state a claim under the Eighth Amendment.").

Courts within this district have differed on whether an inmate who is subject to a risk factor can state a claim for deliberate indifference. *See Smith v. Brown*, No. 1:12-cv-0238-AWI-JLT (PC), 2012 WL 1999858, at *4 (E.D. Cal. June 4, 2012) (allegation of increased risk of Valley Fever due to asthma insufficient to state a claim); *Jones v. Igbinosa*, No., at *3-4 (E.D. Cal. July 19, 2010) (allegation that African-American inmate at greater risk of contracting Valley Fever is insufficient to state a claim); *Gilbert v. Yates*, No. 1:09CV02050 AWI DLB, 2010 WL 5113116, at *4 (E.D. Cal. Dec. 9, 2010) subsequently aff'd, 479 F. App'x 93 (9th Cir. 2012) (inmate alleging risk factors for Valley Fever did not state a claim for deliberate indifference for failure to transfer him from PVSP); *Hunter v. Yates*, No. 1:07-cv-00151-AWI-SMS-PC, 2009 WL 233791, at *3 (E.D. Cal. January 30, 2009) (inmate alleging high risk of contracting Valley Fever states a claim under the low pleading standard); *Humphrey v. Yates*, No. 1:09-cv-00075-LJO-DLB (PC), 2009 WL 3620556, at * 3 (E.D. Cal. October 28, 2009) (finding allegation that inmate caught Valley Fever twice due to preexisting respiratory conditions is sufficient to state a claim);

Barnhardt v. Tilton, No. 1:07-cv-00539-LJO-DLB (PC), 2009 WL 56004, at *4 (E.D. Cal. January 7, 2009) (inmate's allegation that his diabetes placed him at increased risk of contracting Valley Fever is insufficient to show a serious risk of harm to inmate's health).

More recent cases have found that an inmate claiming to be at an increased risk of contracting Valley Fever could state an Eighth Amendment claim. *See Lua v. Smith*, No. 1:14-cv-00019-LJO-MJS, 2014 WL 1308605, at *2 (E.D. Cal. Mar. 31, 2014) (first prong of deliberate indifference claim is satisfied where plaintiff identifies a factor responsible for increasing the risk of contraction or severity of infection); *Sparkman v. California Dep't of Corrections and Rehabilitation*, No. 1:12-cv-01444-AWI-MJS (PC), 2013 WL 1326218, at *3 (E.D. Cal. March 29, 2013) (inmate with chronic lung disease meets first prong of Eighth Amendment standard); *Holley v. Scott*, No. 1:12-cv-01090-MJS (PC), 2013 WL 3992129, at *3 (E.D. Cal. Aug. 1, 2013) (collecting cases). But many courts have found that the allegation of increased risk of contracting Valley Fever is insufficient to state a claim for violation of the Eighth Amendment. *Smith v. Brown*, No. 1:12-cv-0238-AWI-JLT (PC), 2012 WL 1574651, at *4 (May 3, 2012) (allegation that inmate was African-American is insufficient to state a claim); *Harvey v. Gonzalez*, No. CV 10-4803-VAP (SP), 2011 WL 4625710, at *3 (C.D. Cal. July 27, 2011) (even if inmate alleged that he was at high risk of contracting Valley Fever and defendants were aware of his risk that would be insufficient to state a claim for violation of the Eighth Amendment); *Clark v. Igbinosa*, No. 1:10-cv-01336-DLB PC, 2011 WL 1043868, at *2 (E.D. Cal. March 21,

2011) (allegation that African-American inmate at greater risk of contracting Valley Fever is insufficient to state a claim); *Schroeder v. Yates*, No. 1:10-cv-00433-OWW-GSA PC, 2011 WL 23094, at *1, (E.D. Cal. January 4, 2011) (inmate alleging COPD and emphysema fails to state a claim); *James v. Yates*, No. 1:08-cv-01706-DLB (PC), 2010 WL 2465407, at * 4 (E.D. Cal. June 15, 2010) (allegation of higher risk due to medical conditions is not sufficient to state a claim where prison officials found inmate did not meet criteria for transfer).

ii. Plata Order to Adopt Cocci Exclusion Policy Does Not Establish an Eighth Amendment Right Not to Be Exposed to Valley Fever

Plaintiffs also argue that the June 2013 order in *Plata v. Brown*, No. C01-1351 TEH, 2013 WL 3200587 (N.D. Cal. June 24, 2013), supports their argument that housing inmates in endemic areas would violate the Eighth Amendment. In *Plata*, the court was considering the plaintiffs' request that the Receiver's cocci exclusion policy be implemented. The court ordered that the CDCR "adopt a modified version of the Receiver's cocci exclusion policy that reflects Defendants' agreement to transfer all inmates who are classified as 'high-risk' under the medical classification system and is consistent with the factors identified by the American Thoracic Society as creating an increased risk of severe cocci." 2013 WL 3200587, at *14. The Court notes that *Plata* is a class action in which the prison health care system was found to be deficient and the Federal Receiver was appointed to oversee the system. The *Plata* court only considered the effects of Valley Fever on inmates and did not address whether housing inmates in the San Joaquin Valley where

they are exposed to Valley Fever would violate the Eighth Amendment. Further, while a state may adopt a policy which is more generous than what the Constitution requires, *United States v. Heffner*, 420 F.2d 809, 812 (4th Cir. 1969), the policy itself does not establish that environmental exposure to Valley Fever violates the Eighth Amendment.

It is rare that in the absence of "any published opinions on point or overwhelming obviousness of illegality" that a court could "conclude that the law was clearly established on the basis of unpublished decisions only." *Sorrels v. McKee*, 290 F.3d 965, 971 (9th Cir. 2002). Review of the case law demonstrates that while the law in this area is in the process of becoming established, it is not clearly established even today that housing inmates, even those at an increased risk for developing disseminated disease, in an endemic area would violate the Eighth Amendment.

iii. Prior Orders Finding Defendants' are Not Entitled to Qualified Immunity

Finally, Plaintiffs cite to both *Jackson* and *Smith v. Schwarzenegger*, No. 07-cv091547 SRB (PC), 2015 WL 106337 (E.D. Cal. Jan. 7, 2015) which found that defendants are not entitled to qualified immunity based upon *Helling*. However, as discussed above, this Court finds *Helling* to be distinguishable as it did not deal with a naturally occurring condition to which a large segment of society chooses to tolerate. Further, the Court finds that the right to be addressed was incorrectly defined in *Jackson*. Therefore, the Court does not find the reasoning in the opinions to be

persuasive on the issue of qualified immunity in this instance.

Based upon the review of case law within this Circuit, it is subject to debate whether housing an inmate, even a high risk inmate, in an area where he would be exposed to Valley Fever would violate the Eighth Amendment.

d. Inmates at an Increased Risk of Developing Disseminated Disease

In this action, Plaintiffs are alleging that many of them are at an increased risk of developing disseminated disease due to their race or health conditions. Plaintiffs argue that even if it is not clearly established that it would violate the Eighth Amendment to house any inmate in the endemic area, the fact that certain inmates are at a higher risk of harm is sufficient to place prison officials on notice that they cannot be housed in these areas. At the April 29, 2015 hearing, the Court inquired how Defendants would be on notice of when an increased risk would be sufficient to violate the Eighth Amendment. Plaintiffs responded that any increased risk is sufficient to place Defendants on notice that housing them in an endemic area would violate the inmate's rights.

However, more than half of the residents of the affected areas fall with the groups that Plaintiffs identify as being at high risk. *See* footnote 9. In *Castro*, the Ninth Circuit recognized that "an officer is entitled to qualified immunity when the transition from a risk of some harm to a substantial risk of serious harm would not have been clear to a reasonable prison official." *Castro*, 2015 WL 1948146, at *7 (emphasis in original).

Additionally, as discussed above, courts are not clear on whether an inmate can state a claim or what would be required for an inmate to state a claim due to being at an increased risk of contracting Valley Fever. In this instance, the Court finds that it would not be clear to prison officials at what point an inmate's increased risk of developing disseminated disease due to his race or health conditions would rise to a substantial risk of serious harm.[11]

Therefore, Defendants are entitled to qualified immunity for housing inmates who are at an increased risk of developing disseminated disease in the endemic areas.

e. The Law is Not Clearly Established that Exposing an Inmate to the Environmental Risk of Valley Fever Violates the Eighth Amendment

The Court finds no binding precedent, and lower court cases are unclear, on when or if it would be a violation of an inmate's Eighth Amendment rights to be housed in an area where Valley Fever is prevalent. While Plaintiffs allege that they were subjected to Cruel and Unusual Punishment by being housed in areas where Valley Fever is prevalent, at least a million individuals live in the San Joaquin Valley and

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[11] Similarly, while Plaintiffs allege that the rate of infection within the prison was higher than the rate of infection for residents within the surrounding community, it would not be clear at what point this would transition to a substantial risk to inmates that would violate the Eighth Amendment.

are exposed to Valley Fever. Similarly, tens of thousands of individuals live, work, and raise families in the areas that are the most endemic.

Although some studies and reports have recommended considering relocating inmates to reduce the risk of Valley Fever infection, neither the State of California nor the federal government have implemented any standards or restrictions on exposure to Valley Fever. Similarly, the recommendations have not been issued to any sector of the general public to relocate out of the area. Prison officials could reasonably believe that since the government has not found it unsafe for non-imprisoned individuals to reside in areas in which Valley Fever spores are prevalent that it would not violate the Eighth Amendment to incarcerate inmates in these same areas. *Carroll*, 255 F.3d at 473.

Finally, it is clear that even for those individuals that are at a higher risk from Valley Fever, exposure to Valley Fever is a risk that society tolerates. The Seventh Circuit found it would be inconsistent to find that prisoners are entitled to a healthier environment than substantial numbers of non-imprisoned Americans. *Carroll*, 255 F.3d at 473. More than half of the individuals who reside in the endemic areas belong to the racial groups which Plaintiffs identify as high risk. *See* footnote 9.

The Court finds that it is not beyond debate whether housing inmates in prisons in areas endemic for Valley Fever, a naturally occurring soil-borne fungus which can lead to serious illness, would violate their rights under the Eighth Amendment. *al-Kidd*, 131 S. Ct. at 2083. For the reasons stated, the Court

finds that the right alleged here is not clearly established. Defendants did not have fair notice that exposing inmates to an environmental risk of Valley Fever would violate the Eighth Amendment.[12] *Chappell*, 706 F.3d at 1057 (court is to consider whether an officer would have fair notice that his conduct was unlawful and that any mistake to the contrary would be unreasonable). Therefore, the Court finds that Defendants are entitled to qualified immunity on Plaintiffs' claims arising out of being housed at a prison where they were exposed to Valley Fever. It is recommended that Defendants' motions to dismiss on the ground that they are entitled to qualified immunity be granted.[13]

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[12] The Court is aware of two unpublished Ninth Circuit cases which addressed exposure to a contagious disease. *Brigaerts v. Cardoza*, 952 F.2d 1399, at *2 (9th Cir. 1992) (repeated exposure to contagious disease may violate the Eighth Amendment), and *Muhammad v. Turbin*, 199 F.3d 1332, at *1 (9th Cir. 1999) (exposure to chicken pox and tuberculosis). The Court finds these cases distinguishable. Contemporary standards of decency are violated where an individual with active chicken pox or tuberculosis exposes healthy individuals to the disease. While today's society does not tolerate healthy individuals being exposed to people with contagious diseases, Valley Fever is not a contagious disease and as discussed exposure to Valley Fever is a risk that society tolerates.

[13] Plaintiffs also allege that Defendants were deliberately indifferent by failing to implement mitigation measures to protect them from exposure to Valley Fever. However, for the reasons discussed above, Defendants are entitled to qualified immunity for not implementing mitigation measures. While Plaintiffs contend that Defendants should have implemented measures including "landscaping, paving, soil stabilization, limiting and strictly controlling excavation and soil-disturbing activities at the prisons, limiting inmate exposure outdoors during windy conditions, and providing respiratory protection for inmates who

B. Supplemental Jurisdiction

Pursuant to 28 U.S.C. § 1367(a), in any civil action in which the district court has original jurisdiction, the district court "shall have supplemental jurisdiction over all other claims in the action within such original

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worked outdoors or went out under adverse conditions", inmates incarcerated at prisons in the San Joaquin Valley are exposed to the same environmental conditions that exist for those non-incarcerated individuals residing in the same areas. The San Joaquin Valley is California's top agricultural producing region and three quarters of California's dairy cows are located here. United States Environmental Protection Agency, Region 9 Strategic Plan, 2011-14, located at http://www.epa.gov/region9/strategicplan/sanjoaquin.html. The San Joaquin Valley is home of the worst air quality in the country and has some of the highest rates of childhood asthma due to the unique topography and wind patterns. *Id.* The San Joaquin Valley contains large areas of exposed soil which is stirred up by wind and farming exposing residents to Valley Fever spores. The Court takes judicial notice of information displayed on government websites and news releases where neither party can dispute the accuracy of the information contained therein. *Daniels –Hall v. National Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (government websites); *In re American Apparel, Inc. Shareholder Litigation*, 855 F.Supp.2d 1043, 1062 (C.D. Cal. 2012) (—Courts in the Ninth Circuit routinely take judicial notice of press releases."). *See Blowing dust forecast for Valleys west side Tuesday*, Fresno Bee, (October 13, 2014), http://www.fresnobee.com/2014/10/13/4177039_blowing-dust-forecast-for-valleys.html?rh=1; *14 Killed, 114 Hurt in I-5 Pileups: Traffic: More than 100 Vehicles Collide in Dust Storm North of Coalinga*, Los Angeles Times (November 30, 1991), http://articles.latimes.com/1991-11-30/news/mn-94_1_dust-storm (last visited May 18, 2015); *Gusts shroud Valley in dust as cold storm moves in*, Fresno Bee (June 5, 2012), http://article.wn.com/view/2012/06/05/gusts_shroud_valley_in_dust_as_cold_storm_moves_in/(last visited May 18, 2015). As discussed herein, the Court finds no precedent to place Defendants on notice that they are required to provide inmates with a safer environment that that of non-incarcerated individuals residing in the same area.

jurisdiction that they form part of the same case or controversy under Article III. . . . " "[O]nce judicial power exists under § 1367(a), retention of supplemental jurisdiction over state law claims under 1367(c) is discretionary." *Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). "The district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Supreme Court has cautioned that "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966).

This action is still at the pleading stage and the Court finds that Defendants are entitled to qualified immunity on the Eighth Amendment claim. Therefore, it is recommended that the Court exercise its discretion to dismiss the state law claims. Since this Court is recommending this action be dismissed, it will decline to address the parties' arguments regarding whether the individual Plaintiffs have complied with the California State Tort Claim Act.[14]

V. Conclusion and Recommendation

Based on the foregoing, IT IS HEREBY RECOMMENDED that:

1. Defendants Beard, Brazelton, Cate, Hartley, Hubbard, Hysen, Kernan, Meyer, Rothchild,

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[14] Similarly, the Court declines to address the other issues raised in Defendants' motions to dismiss at this time. Should this action survive, the Court will address any remaining arguments raised in Defendants' motion to dismiss at that time.

Schwartz-Reagle, Schwarzenneger, and Yates' motion to dismiss be granted;

2. Defendants' Winslow and Igbinosa's motion to dismiss be granted;

3. The Court decline to exercise supplemental jurisdiction over the state law negligence claims; and

4. This action be dismissed on the ground that Defendants are entitled to qualified immunity.

These findings and recommendations are submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fourteen (14) days of service of this recommendation, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

/s/ Stanley A. Boone
United States Magistrate Judge

Dated: May 19, 2015

ORDER ADOPTING FINDINGS AND RECOMMENDATIONS (ECF NOS. 38, 40) FOURTEEN DAY DEADLINE (MARCH 10, 2014)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTHUR DUANE JACKSON, ET AL.,

Plaintiffs,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants.

Case No.: 1:13-cv-01055-LJO-SAB

Before: Lawrence J. O'NEILL, United States District Judge.

On August 1, 2013, the magistrate judge assigned to this action issued a Findings and Recommendations recommending that Defendants' motion to dismiss be granted in part and denied in part. (ECF No. 38.) The Findings and Recommendations were served on all parties and contained notice that any objections were to be filed within fourteen (14) days. On March 6, 2014, Plaintiffs filed Objections to the Findings and Recommendations. (ECF No. 40.)

In their opposition, Plaintiffs contend that the magistrate judge erred in determining that they are unable to state a cause of action under 42 U.S.C. § 1981. Plaintiffs cite two cases out of the Eastern District of Pennsylvania, *Hall v. Pennsylvania State Police*, 570 F.2d 86 (E.D. Pa. 1978) and *Mahone v. Waddle*, 564 F.2d 86 (E.D. Pa. 1977), for the proposition that a contract is not a necessary to bring an action under section 1981. The Third Circuit, acknowledging the sparcity of authority on this issue, has found that section 1981 has broad applicability beyond the mere right to contract. *Mahone v. Waddle*, 546 F.2d 1018, 1027-1028 (3d Cir. 1977).

The magistrate judge, relying on *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470 (2006), *Peterson v. State of California Dep't of Corrections and Rehabilitation*, 451 F.Supp.2d 1092 (E.D. Cal 2006), and *Ennix v. Stanten*, 556 F. Supp.2d 1073 (N.D. Cal. 2008), concluded that Plaintiffs would be unable to bring a claim under section 1981 because Plaintiffs cannot meet the requirement that they are attempting to make or enforce a contract. Section 1981 provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." 42 U.S.C. ¶ 1981.

"To establish a claim under § 1981, the plaintiffs must show that (1) they are members of a racial minority; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination

concerned one or more of the activities enumerated in the statute (i.e., the making and enforcing of a contract)." *Morris v. Office Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996). The magistrate judge was correct that as pled, Plaintiffs have failed to state a cognizable claim under section 1981. The Court will dismiss Plaintiffs' section 1981 claim, but will grant Plaintiffs the opportunity to amend.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a de novo review of the case. Having carefully reviewed the entire file, the Court finds that the Findings and Recommendations are supported by the record and by proper analysis.

Accordingly, it is HEREBY ORDERED that:

1. The Findings and Recommendations dated February 20, 2014 are ADOPTED as modified;

2. Defendants' motion to dismiss the claims against Edmund G. Brown, Jr. is GRANTED;

3. Defendants' motion to dismiss the Eighth Amendment claims against Matthew Cate, Jeffrey Beard, P.D. Brazelton, and James D. Hartley for failure to state a claim is DENIED;

4. Defendants' motion to dismiss the racial discrimination claims as violating the Fourteenth Amendment for failure to state a claim is GRANTED;

5. Defendants' motion to dismiss the racial discrimination claim pursuant to 42 U.S.C.

§ 1981 for failure to state a claim is GRANTED;

6. Defendants' motion to dismiss claims against Defendants in their official capacities is GRANTED;

7. Defendants motion to dismiss claims against Defendants State of California and CDCR is GRANTED without leave to amend;

8. Defendants' motion to dismiss the state law negligence claims for failure to state a claim is GRANTED;

9. Defendants' motion to dismiss the claims for damages on the basis of qualified immunity is DENIED;

10. Within fourteen days from the date of service of this complaint, Plaintiffs are granted the opportunity to file an amended complaint;

11. Within thirty days of the date of service of the amended complaint, Defendants shall file a responsive pleading; and

12. This action is referred back to the magistrate judge.

IT IS SO ORDERED.

/s/ Lawrence J. O'Neill
United States District Judge

Dated: March 10, 2014

FINDINGS AND RECOMMENDATION RECOMMENDING GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS (ECF NOS. 25, 32, 33, 36) OBJECTIONS DUE WITHIN FOURTEEN DAYS (FEBRUARY 20, 2014)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ARTHUR DUANE JACKSON, ET AL.,

Plaintiffs,

v.

STATE OF CALIFORNIA, ET AL.,

Defendants.

Case No.: 1:13-cv-01055-LJO-SAB

Before: Stanley A. BOONE, United States Magistrate Judge.

I. Procedural History

Plaintiffs Arthur Duane Jackson, Leonard M. Lujan, Marcus Jackson, Rodney Taylor, Lacedric Johnson, L.T. Belton, and Norman Johnson filed this civil rights action pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1981 on July 9, 2013. (ECF No. 1.) Plaintiffs bring this action against Defendants Edmund G. Brown, Jr., Matthew Cate, Jeffrey Beard, P.D. Brazelton, and

James D. Hartley for deliberate indifference in violation of the Eighth Amendment, racial discrimination in violation of the Fourteenth Amendment and 42 U.S.C. § 1981, and against the individual defendants and Defendants State of California, California Department of Corrections and Rehabilitation ("CDCR"), and Pleasant Valley State prison for negligence under state law. Plaintiffs are seeking monetary damages and declaratory and injunctive relief.

Defendants filed a motion to dismiss on September 25, 2013. (ECF No. 15.) Plaintiffs filed a first amended complaint on October 16, 2013. (ECF No. 16.) On October 18, 2013, an order issued denying Defendants' motion to dismiss as moot. (ECF No. 24.)

On November 4, 2013, Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. (ECF No. 25.) Plaintiffs filed an opposition to the motion and request for judicial notice on January 22, 2014.[1] (ECF No. 32,

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[1] Plaintiffs' request for judicial notice is denied. Under the Federal Rules a court may take judicial notice of a fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Judicial notice may be taken "of court filings and other matters of public record." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). However, while a court may properly take notice of a doctrine or rule of law from a prior case, *M/V American Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983), on a motion to dismiss pursuant to Rule 12(b)(6) review is confined to the complaint and the court typically does not consider material outside the pleadings,

33.) On February 12, 2014, Defendants filed a reply. (ECF No. 36.)

The Court heard oral arguments on February 19, 2014. (ECF No. 36.) Counsel Jason Feldman and Mark Ozzello appeared for Plaintiffs and Counsel Jon Allin appeared for Defendants. Having considered the moving, opposition and reply papers, and arguments presented at the February 19, 2014 hearing, the Court issues the following findings and recommendation recommending that Defendants' motion to dismiss be granted in part and denied in part and that Plaintiffs be granted an opportunity to file an amended complaint to cure the deficiencies discussed below.

II. Complaint Allegations

Plaintiffs are current or former inmates who allegedly contracted Coccidiododomycosis, commonly known as Valley Fever, while incarcerated at Pleasant Valley State Prison ("PVSP") or Avenal State Prison ("ASP"). (First Am. Compl. 2-5,[2] ECF No. 22.) This action is brought on behalf of three subclasses of Plaintiffs: 1) African-American inmates, 2) inmates over the age of 55, or 3) immune-compromised inmates who were incarcerated at PVSP or ASP from July 8, 2009 through the present and contracted Valley Fever. (*Id.* at 7-8.)

Plaintiffs allege that Valley Fever is a serious infectious disease which is contracted by inhalation of

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U.S. v. 14.02 Acres of Land More or Less in Fresno County, 547 F.3d 943, 955 (9th Cir. 2008).

[2] All references to pagination of specific documents pertain to those as indicated on the upper right corners via the CM/ECF electronic court docketing system.

an airborne fungus and is prevalent in the San Joaquin Valley of California. (*Id.* at ¶ 30.) Epidemiological studies have established that African-Americans, persons over the age of 55, and those in an immune-compromised state are at higher risk for developing Valley Fever. (*Id.* at ¶ 34.)

In June of 1994, the U.S. Centers for Disease Control and Prevention ("CDC") published an article reporting on the impact of Valley Fever in California and that 70% of the reported cases in California arose in the San Joaquin Valley. (*Id.* at ¶ 38.) In September 1995, the CDCR issued a memorandum describing the illness, its long term effects, and the increased risk of acquiring Valley Fever in the subclasses identified by Plaintiffs. (*Id.* at ¶ 39.) In September of 1996, an article was published by two doctors from the University of California-San Diego, School of Medicine, commenting on the Valley Fever epidemic of 1991-1993. (*Id.* at ¶ 40.)

In 1996, the National Foundation for Infectious Diseases held an International Conference on Coccidiodomycosis and published a summary of the articles discussed at the conference. Included in these articles was the "California Health Services Policy Statement on Coccidiodomycosis which stated that from 1991 to 1993 California was spending $60 million in health care costs from Valley Fever infections. The report recognized that Plaintiffs' subclasses were at a higher risk for developing Valley Fever. The report also identified the areas that house PVSP and ASP as the most likely place to generate Valley Fever infections and recommended preventive measures, such as using spherulin skin tests to identify those not vulnerable to

infection, the use of dust control measures, masks and wetting of the soil. (*Id.* at ¶ 41.)

In 2006, the California State Public Health Department issued a report addressing Valley Fever at PVSP and ASP and made suggestions to reduce the amount of Valley Fever infections experienced by individuals in Plaintiff's subclasses. These suggestions were not implemented by the CDCR. (*Id.* at ¶ 45.)

In 2007, an article entitled "Coccidioidomycosis in California State Correctional Institutions" was published, which pointed out that construction of new prisons in affected areas had led to a marked increase in the number of Valley Fever cases and identified the infection rates at these facilities. (*Id.* at ¶ 71.) In June 2007, the Statewide Medical Director for California Prison Healthcare Services submitted a report to the federal receiver entitled "Recommendations to Coccidioidomycosis Mitigation in Prisons in the Hyperendemic Areas of California." The reported indicated that Defendants were recommending certain additional measures for immediate implementation, including environmental mitigation techniques at PVSP and ASP, deferring any new construction that would result in additional prisoners being housed in the hyperendemic areas, providing indoor recreation areas for inmates to use during high wind/dust events, and continuing to exclude certain inmates from facilities in these areas. (*Id.* at ¶ 71.)

On April 29, 2013, the Federal Receiver, J. Clark Kelso, issued a Cocci Exclusion Policy which was amended on May 1, 2013, directing PVSP and ASP to exclude all high risk inmates, including African-Americans, inmates over the age of 55, and those who were immune compromised. (*Id.* at 72.)

Plaintiffs in this action allege that the defendants have been aware, since at least 2006, that Valley Fever affected those inmates in Plaintiff's subclasses and have taken some steps to reduce Valley Fever in the inmate population, but those efforts have been unsuccessful. (*Id.* at ¶ 48.) Plaintiffs contend that Defendants have failed to take action to protect individuals in Plaintiffs' subclasses and they are seeking future health care and health costs after they are released from custody and compensatory damages. (*Id.* at ¶¶ 44, 47.)

Arthur Duane Jackson

Plaintiff A. Jackson, an African-American inmate serving a sentence of 43 years to life, was transferred to PVSP around July 2009. (*Id.* at ¶¶ 3, 49, 51.) At the time of his transfer, Plaintiff A. Jackson was in good health. Plaintiff A. Jackson experienced symptoms of Valley Fever in December 2011, and was temporarily blind as a result of the infection. Plaintiff A. Jackson received treatment when he became ill, but his condition worsened and he developed pneumonia. (*Id.* at ¶ 50.) Plaintiff A. Jackson continues to suffer from the disease. He is receiving medication and is partially blind in his left eye due to the Valley Fever infection and suffers from severe headaches on a daily basis. (*Id.* at ¶ 51.)

Leonard M. Lujan

Plaintiff Lujan is a 62 year old former inmate who was diagnosed with cancer prior to contracting Valley Fever in November 2010 while housed at ASP. (*Id.* at ¶¶ 4, 52.) Following his release from custody, Plaintiff Lujan continues to experience complications of Valley

Fever such as pain, a black spot on his lung, difficulty walking, constant fever, cold sweats, and difficulty breathing and sleeping. (*Id.* at 53.)

Marcus Jackson

Plaintiff M. Jackson is an African-American former inmate who was ordered into the custody of the CDCR in July 2009. (*Id.* at ¶¶ 5, 54.) Plaintiff contracted Valley Fever while housed at PVSP. (*Id.* at 54.) Following his release from custody, Plaintiff M. Jackson is experiencing panic attacks, mental stress, sleeplessness, nausea, inactivity, and vomiting. (*Id.* at ¶ 55.)

Rodney Taylor

Plaintiff Taylor is an African-American former inmate who had diabetes at the time he was transferred to ASP. (*Id.* at ¶ 6.) Plaintiff Taylor lost twenty to thirty pounds in three weeks after he contracted Valley Fever at ASP. (*Id.* at ¶ 56.) Following his release from custody, Plaintiff is experiencing extreme headaches, difficulty walking, lack of endurance, frequent colds, fatigue, and back pain. (*Id.* at ¶ 57.)

Lacedric Johnson

Plaintiff L. Johnson is an African-American inmate who is not scheduled for release until 2027. (*Id.* at ¶¶ 7, 58.) Plaintiff L. Johnson suffers from lung damage, fever, sweats, headaches, loss of concentration, aching joints, severe weight swings, loss of body hair, lightening of skin pigmentation, rash, dark spots on his skin, shortness of breath, fatigue, sleeplessness, back pain and side effects from his prescribed medication as a result of Valley Fever. (*Id.* at ¶ 58.)

L.T. Belton

Plaintiff Belton is an African-American inmate who is scheduled for release in December 2013. (*Id.* at ¶¶ 8, 59.) Plaintiff Belton suffers from headaches, fatigue, difficulty sleeping, joint pain, shortness of breath, numbness on bottom of foot, and difficulty with bowel movements. (*Id.* at ¶ 59.) Plaintiff Belton is undergoing treatment for Valley Fever and taking medication daily. (*Id.* at ¶ 60.)

Norman Johnson

Plaintiff N. Johnson is an African-American inmate who was in relatively good health at the time he was transferred to ASP in May 2012. (*Id.* at ¶¶ 9, 61.) Plaintiff N. Johnson is scheduled to be released from custody in July 2017. Plaintiff N. Johnson experienced chills, lack of appetite, night sweats, chest pain, shortness of breath, muscle and joint pain, fever, and allergies as a result of his Valley Fever. (*Id.* at ¶ 62.)

Plaintiffs bring this action alleging deliberate indifference in violation of the Eighth Amendment; racial discrimination in violation the Fourteenth Amendment; racial discrimination in violation of 42 U.S.C. § 1981; and state law claims of negligence.

III. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on the grounds that a complaint "fail[s] to state a claim upon which relief can be granted." A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

"[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In assessing the sufficiency of a complaint, all well-pleaded factual allegations must be accepted as true. *Iqbal*, 556 U.S. at 678-79. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678.

IV. Discussion

Defendants bring this motion to dismiss on the grounds that 1) the conclusory allegations against defendants in their individual capacities do not state a claim for relief; 2) there are no damages available against defendants in their official capacities; 3) Plaintiffs have failed to plead compliance with the Government Claims Act; 4) the State and CDCR are protected by Eleventh Amendment immunity; and 5) Defendants are entitled to qualified immunity. (Mem. of P. & A. in Supp. of Mot. to Dismiss under Rule 12(b)(6) 2, ECF No. 25-1.)

A. Individual Capacity Claims

Defendants argue that the complaint does not state a claim against the individual defendants for deliberate indifference in violation of the Eighth Amendment, and therefore, must be dismissed. Defendants contend that Plaintiffs have failed to make specific allegations against any named defendant and merely recite general responsibility of their offices. (ECF No. 25-1 at 3.) Additionally, Defendants contend

that the complaint states that Defendants have taken steps to reduce the incidence of Valley Fever in the prison population, but complain that those steps have been ineffective. (*Id.* at 4.)

Plaintiffs oppose the motion contending that the first amended complaint is replete with allegations demonstrating that the individual defendants were aware of the serious medical risks to the plaintiffs due to their susceptibility to Valley Fever and did not act to protect them. (Opp. of Pls. to Mot. of Dfs. To Dismiss the First Am. Compl. 14, ECF No. 32.) Defendants reply that the complaint does not make any attempt to describe the individual defendant's knowledge, authority to act, or personal link to any act or failure to act. (Reply 3, ECF No. 36.)

Plaintiffs' amended complaint merely states that Edmund G. Brown, Jr. is the Governor of California. (ECF No. 22 at ¶ 12.) Plaintiffs fail to set forth any factual allegations to link Defendant Brown to any responsibility for the actions of the other defendants. Governor Brown cannot be held liable for the failure of prison officials to act merely by virtue of his office. Accordingly, Plaintiffs have failed to state a cognizable claim against Governor Edmund G. Brown, Jr. Defendants' motion to dismiss Governor Edmund G. Brown, Jr. for failure to state a claim should be granted. The Court will next address the individual capacity claims against Defendants Matthew Cate, Jeffrey Beard, P.D. Brazelton, and James D. Hartley.

1. Deliberate Indifference

To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison conditions must involve "the wanton and unnecessary infliction

of pain." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). To prove a violation of the Eighth Amendment based on prison conditions, a prisoner must show that a prison official deprived the prisoner of the "minimal civilized measure of life's necessities," and (2) the official "acted with 'deliberate indifference' in doing so." *Grenning v. Miller-Stout*, ___ F.3d ___, 2014 WL 169657 (9th Cir. 2014) (quoting *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002)). In order to find a prison official liable under the Eighth Amendment for denying humane conditions of confinement within a prison, the official must know "that inmates face a substantial risk of serious harm and disregard[] that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

Plaintiffs contend that in 1995 the CDCR circulated a memorandum describing Valley Fever, its long-term effects, and the increased risk of acquiring the disease in Plaintiffs' subclasses. (ECF No. 22 at ¶ 39.) In 2006, the federal receiver was aware that the California State Health Department issued a report addressing Valley Fever and suggesting the implementation of environmental mitigation measures at PVSP and ASP to reduce the cocci spores in the ambient air to reduce the number of infections experienced by Plaintiffs' subclasses. (*Id.* at ¶ 45.) The defendants had that authority to implement these changes, but the great majority of the changes were not implemented. (*Id.* at ¶ 70.) In June 2007, the Medical Director for California Prison Healthcare Services submitted a report to the Federal Receiver on recommendations for Valley Fever mitigation in prisons in the hyperendemic area of California. The report recommended immediate

implementation of environmental mitigation techniques for prisons in the hyperendemic area. (*Id.* at ¶ 71.)

At the pleading stage, the complaint sets forth sufficient factual allegations to state a plausible claim that Defendants Matthew Cate, Jeffrey Beard, P.D. Brazelton, and James D. Hartley were aware that African-American inmates, inmates over 55 years of age, and inmates with compromised immune systems had a significant risk of contracting Valley Fever and failed to take reasonable measures to abate the risk. (*Id.* at ¶¶ 14, 15, 16, 17, 39, 45, 46, 47, 48, 70, 71.)

During the hearing, Defendants argued specifically the complaint was insufficient in respect to the claims against Defendant Jeffrey Beard because he has only been in his current position since 2012. However, Plaintiffs claims encompass July 8, 2009 through the present, (*Id.* at ¶ 22), and the allegations that Defendant Beard is responsible for the health and welfare of the plaintiffs and the operation of the California State prisons and knew of the substantial risk to the plaintiff's subclasses, (*Id.* at ¶ 15), is sufficient to state a claim given the low pleading standard which merely requires factual allegations to state a plausible claim for relief.[3] Similarly, Plaintiffs' allegations regarding the positions occupied by the individual defendants and their responsibilities within the prison system are sufficient at the pleading stage

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[3] To the extent that Defendants argue that Defendant Beard was not employed in his current position during the relevant time period that is an issue to be raised on motion for summary judgment and not at the motion to dismiss stage sinc [sic] the complaint alleges he was involved.

to link them to the failure to act to protect Plaintiffs from the risk of contracting Valley Fever.

Defendants also argue the first amended complaint does not state a claim for deliberate indifference because Plaintiffs admit that steps were taken to reduce the incidence of Valley Fever in the prison population. While prison officials are not liable if they respond reasonably to a serious risk to inmates, *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010), this factual allegation itself does not show that the steps taken here were reasonable to address those inmates at high risk of contracting Valley Fever. Plaintiff's first amended complaint states a cognizable claim against Matthew Cate, Jeffrey Beard, P.D. Brazelton, and James D. Hartley for deliberate indifference in violation of the Eighth Amendment. Defendants' motion to dismiss the Eighth Amendment claim against these individual defendants should be denied.

2. Equal Protection

Defendants move to dismiss Plaintiffs' equal protection claims because the amended complaint merely recites conclusory statements that fail to meet the pleading standard. (ECF No. 25-1 at 4.) Plaintiffs contend that they have stated sufficient factual allegations that African-American inmates were treated differently from similarly situated persons. (ECF No. 32 at 16.) Defendants reply that the complaint alleges a factually neutral policy of housing African-American inmates at PVSP and ASP on the same basis as other ethnicities and Plaintiffs are attempting to state an equal protection claim based upon disparate impact without showing any discriminatory intent. (ECF No. 36 at 3-4.)

The Equal Protection Clause requires that all persons who are similarly situated should be treated alike. *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (2001); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). An equal protection claim may be established by showing that the defendant intentionally discriminated against the plaintiff based on the plaintiff's membership in a protected class, *Lee*, 250 F.3d at 686; *Barren v. Harrington*, 152 F.3d 1193, 1194 (1998), or that similarly situated individuals were intentionally treated differently without a rational relationship to a legitimate state purpose, *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (2005); *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Relying on *Johnson v. California*, 543 U.S. 499 (2005), Plaintiffs contend that the complaint shows that African-Americans were treated differently than other races because the defendants identified and implemented an exclusion policy that singled out African-Americans creating an express racial classification who were denied exclusion based on their race. (ECF No. 32 at 16.) However, this action is distinguishable from *Johnson*.

In *Johnson*, the CDCR was placing inmates in double-cell assignments in the reception center based predominately upon race. *Johnson*, 453 U.S. at 502. Plaintiff was an African-American male who challenged the policy that assigned him to a cell with another African-American inmate as violating the Equal Protection Clause. *Id.* at 504. The issue before the court was whether the policy, which was instituted to address racial violence, should be subject to strict scrutiny. *Id.* at 506. The Supreme Court determined that strict scrutiny applied and the CDCR had the

burden of demonstrating that the race based policy was narrowly tailored to address racial violence. *Id.* at 514.

In this instance, the CDCR has not excluded inmates of any race from being housed at PVSP or ASP. (ECF No. 22 at ¶ 77.) In housing inmates in these prisons, the CDCR is treating African-American inmates the same as members of other races. Proof of racially discriminary [sic] intent or purpose is required to allege a violation of the Equal Protection Clause, and the fact that a challenged policy has a disparate impact is insufficient to state a claim. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977); *see N.A.A.C.P., Los Angeles Branch v. Jones*, 131 F.3d 1317, 1322 (9th Cir. 1997) (The Equal Protection Clause is not implicated by classifications with a disparate racial impact in the absence of discriminary [sic] intent). Plaintiffs conclusory allegations of racial discrimination are insufficient to state a plausible claim that African-American inmates are being intentionally discriminated against based upon their race.

As Plaintiffs recognize in the opposition to the motion to dismiss, the individuals who are similarly situated to African-Americans in this instance are those who are at high risk of contracting Valley Fever. These are the similarly situated individuals to which the Court looks to determine if African-American inmates are receiving differential treatment.

The first amended complaint alleges that the defendants failed to exclude all high risk individuals from being housed in the endemic area. Plaintiffs contend that Defendants have failed to employ any process to divert members of the high risk groups from

assignment to PVSP or ASP. (ECF No. 22 at ¶ 77.) Because African-American inmates were treated the same as all other high risk inmates, the complaint fails to state a cognizable claim for violation of the Equal Protection Clause.

Defendants' motion to dismiss Plaintiffs' equal protection claim should be granted.

3. 42 U.S.C. § 1981

Defendants contend that section 1981 does not apply in this action because the basic elements of a discrimination claim under the section cannot be met. (ECF No. 25-1 at 6.) Plaintiffs argue that section 1981 applies to actions other than those which address the right to make contracts. (ECF No. 32 at 17.) Plaintiffs argue that "Section 1981 provides for the imposition of equality with regard to a myriad of rights." (*Id.* at 18.)

Section 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Plaintiffs' claim that the language "shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other" extends the protection beyond the ability to contract

without citing any case law to support the position. However, "[s]ection 1981 is not 'a general proscription of racial discrimination . . . it expressly prohibits discrimination only in the making and enforcement of contracts.'" *Peterson v. State of California Dep't of Corrections and Rehabilitation*, 451 F.Supp.2d 1092, 1101 (E.D. Cal. 2006) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 176 (1989)). "The specific function of section 1981 is to protect the equal rights of all people to make and enforce contracts. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 475 (2006).

To state a claim under section 1981, "a plaintiff must establish that (1) he or she is a member of a racial minority; (2) the defendant intended to discriminate against plaintiff on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (*i.e.*, the right to make and enforce contracts, sue and be sued, give evidence, etc.)." *Peterson*, 451 F.Supp. at 1101.

"A contract is necessary to a section 1981 claim." *Ennix v. Stanten*, 556 F.Supp.2d 1073, 1082 (N.D. Cal. 2008); *Domino's Pizza, Inc.*, 546 U.S. at 476 ("Any claim brought under § 1981, therefore, must initially identify an impaired 'contractual relationship,' § 1981 (b), under which the plaintiff has rights."). A plaintiff cannot state a claim under section 1981 unless he has rights under an existing contract that he is attempting to make and enforce.[4] *Domino's Pizza, Inc.*, 546 U.S. at 479-80.

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[4] When the Court inquired during the hearing, Plaintiffs' counsel conceded that they did not cite any case law to support their claim, but merely made the argument based upon the plain wording

Plaintiffs are unable to state a claim under 42 U.S.C. § 1981 as they cannot meet the requirement that they are attempting to make or enforce a contract. Defendants' motion to dismiss Plaintiffs claim for racial discrimination in violation of 42 U.S.C. § 1981 should be granted. Further, based upon the allegations in the complaint, the Court finds that the racial discrimination claim under 42 U.S.C. § 1981 is unable to be cured by amendment and therefore, should be dismissed without leave to amend.

4. Individual Capacity Claims

Defendants contend that Plaintiffs do not specify whether the claims are brought against the individual defendants in their individual or official capacity and those claims for damages against the individual defendants for damages in their official capacities must be dismissed. (ECF No. 25-1 at 7.) Plaintiffs respond that the individual defendants are not being sued in their official capacities. (ECF No. 32 at 20.)

When a complaint seeking damages under § 1983 does not allege whether the official is sued in his official or individual capacity, the court presumes that the official is being sued in his individual capacity. *Shoshone–Bannock Tribes v. Fish & Game Com'n, Idaho*, 42 F.3d 1278, 1284 (9th Cir. 1984); *see also Blaylock v. Schwinden*, 863 F.3d 1352, 1354 (9th Cir.

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of the statute. Counsel has a duty to research the claims brought before this court and is admonished that the failure to acknowledge direct contrary case authority is in violation of counsel's professional responsibilities. *See* Cal. Rules of Prof'l Conduct R. 5-200. Counsel is warned that their credibility with the Court may be damaged when they present arguments that are contrary to law.

1988). In this case, Plaintiffs state they are not pursuing official capacity claims, and therefore the Court finds that the claims in this action are proceeding against the defendants in their individual capacity. Defendants' motion to dismiss claims against the defendants in their official capacities should be granted.

5. State Law Claims

Defendants seek to dismiss the state law claims arguing that Plaintiffs have not pleaded compliance with the Government Claims Act. (ECF No. 25-1 at 7.) Plaintiffs contend that the complaint adequately alleges compliance with the Government Claims Act as it states that "Plaintiffs Arthur Jackson, LaCedric Johnson, L.T. Belton, and Norman Johnson have exhausted all applicable and necessary administrative remedies for bringing this action. . . ." ECF No. 32 at 21.)

The California Tort Claims Act[5] requires that a tort claim against a public entity or its employees be presented to the California Victim Compensation and Government Claims Board, formerly known as the State Board of Control, no more than six months after the cause of action accrues. Cal. Gov't Code §§ 905.2, 910, 911.2, 945.4, 950-950.2 (West 2010). Presentation of a written claim, and action on or rejection of the

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[5] The Court recognizes that in *City of Stockton v. Superior Court*, 42 Cal.4th 730, 742 (Cal. 2007), California's Supreme Court adopted the practice of referring to California's Tort Claims Act as the Government Claims Act. However, given that the federal government has also enacted a Tort Claims Act, 28 U.S.C. § 2671, the Court here refers to the Government Claims Act as the California Tort Claims Act in an effort to avoid confusion.

claim are conditions precedent to suit. *State v. Superior Court of Kings County (Bodde)*, 90 P.3d 116, 119 (Cal. 2004); *Shirk v. Vista Unified School District*, 42 Cal.4th 201, 209 (2007). To state a tort claim against a public employee, a plaintiff must allege compliance with the California Tort Claims Act. Cal. Gov't Code § 950.6; *Bodde*, 90 P.3d at 123. "[F]ailure to allege facts demonstrating or excusing compliance with the requirement subjects a compliant to general demurrer for failure to state a cause of action." *Bodde*, 90 P.3d at 120.

In this instance, Plaintiffs' general allegation that they have exhausted all administrative remedies is insufficient to meet this element of their state law claims. Accordingly, Plaintiff's negligence claims should be dismissed for failure to state a claim.

B. Eleventh Amendment Immunity

Defendants contend that the State of California and the CDCR are immune from suit whether Plaintiff is seeking money damages or an injunction. (ECF No. 25-1 at 8.) Plaintiff responds that Eleventh Amendment immunity is inapplicable here as supplemental jurisdiction exists. (ECF No. 32 at 21.) At the hearing, Plaintiffs conceded that they may not bring suit against the State of California or the CDCR.

"The Eleventh Amendment bars suits for money damages in federal court against a state, its agencies, and state officials acting in their official capacities." *Aholelei v. Dept. of Public Safety*, 488 F.3d 1144, 1147 (9th Cir. 2007). "The Eleventh Amendment also bars 'declaratory judgments against the state governments that would have the practical effect of requiring the state treasury to pay money to claimants.'" *North East*

Medical Services, Inc. v. California Dep't of Health Care Services, 712 F.3d 461, 466 (9th Cir. 2013) (quoting *Taylor v. Westly*, 402 F.3d 924, 929-30 (9th Cir. 2005)). However, the Eleventh Amendment does not generally bar suits for prospective declaratory or injunctive relief against state officials acting in their official capacities for violations of federal law. *North East Medical Services, Inc.*, 712 F.3d at 466; *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012).

A state can waive Eleventh Amendment immunity, but the consent must be expressed unequivocally. *Young v. Hawaii*, 911 F.Supp.2d 972, 982 (D. Haw. 2012). California has not waived immunity for claims brought for injunctive relief or damages pursuant to section 1983. *Brown v. California Dep't Corrections*, 554 F.3d 747, 752 (9th Cir. 2009).

While Plaintiffs contend that there is supplemental jurisdiction to pursue the claims against the State and CDCR, Plaintiffs seek to bring claims on the theories of negligence and premises liability for failure to operate and maintain the facilities in a manner to insure it was reasonably safe and habitable, and had no defects that constituted a dangerous condition. (ECF No. 22 at ¶ 112.)

Under California law,

> a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably

foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Cal. Gov. Code § 835. However, Government Code Section 844.6 is an exception to liability providing that a prisoner cannot recover from a public entity for an injury that was caused by a dangerous condition of public property. *Hart v. Orange County*, 254 Cal.App. 2d 302, 306 (1967).

The first amended complaint fails to state a claim against Defendants State of California and CDCR. *Brown*, 554 F.3d at 752 (As an agency of the State of California, CDCR is entitled to Eleventh Amendment immunity).

C. Injunctive Relief

Defendants contend that Plaintiffs are seeking to have out of custody Plaintiffs provided with medical care at the States' expense. Defendants argue that Plaintiffs seek a fund to pay for medical payment and monetary damages are adequate to compensate for their injury. (ECF No. 25-1 at 8-9.) Plaintiffs contend that they are seeking a court supervised treatment program for Plaintiffs who are no longer in the custody of the CDCR because they need daily medications and

regular check-ups to control their disease. (ECF No. 32 at 22-23.)

"To be entitled to a permanent injunction, a plaintiff must demonstrate: (1) actual success on the merits; (2) that it has suffered an irreparable injury; (3) that remedies available at law are inadequate; (4) that the balance of hardships justify a remedy in equity; and (5) that the public interest would not be disserved by a permanent injunction." *Independent Training and Apprenticeship Program v. California Dep't of Industrial Relations*, 730 F.3d 1024, 1032 (9th Cir. 2013).

In addition, as to those Plaintiffs that are in custody at the time this action is filed, any award of equitable relief is governed by the Prison Litigation Reform Act, which provides in relevant part, "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A).

Additionally, injunctive relief is only appropriate if monetary damages or other legal remedies will not compensate the plaintiffs for their injuries. *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998). While, ultimately, there may be a finding that monetary damages are sufficient to compensate the out of custody Plaintiffs for their injuries, that is not a determination that can be made at this point in the

proceedings. Accordingly, Plaintiffs may choose to amend their complaint to seek injunctive relief.

D. Qualified Immunity

Finally, Defendants contend they are entitled to qualified immunity because no case has held that African-Americans, individuals over the age of 55, or immune compromised prisoners had a constitutional right to be excluded from PVSP or ASP by virtue of those classifications. (ECF No. 25-1 at 10.) Plaintiffs respond that it is clearly established that inmates have a constitutional right not to have their serious medical needs disregarded. (ECF No. 32 at 23-26.)

The doctrine of qualified immunity protects government officials from civil liability where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) (citations omitted). To determine if an official is entitled to qualified immunity the court uses a two part inquiry. *Saucier v. Katz*, 533 U.S. 194, 200 (2001) *overruled in part by Pearson v. Callahan*, 555 U.S. 223. The court determines if the facts as alleged state a violation of a constitutional right and if the right is clearly established so that a reasonable official would have known that his conduct was unlawful. *Ashcroft*, 131 S. Ct. at 2083. "The linchpin of qualified immunity is the reasonableness of the official's conduct." *Rosenbaum v. Washoe County*, 654 F.3d 1001, 1006 (9th Cir. 2011).

Defendants argue that no case had established that the subclasses at issue here could not be housed at PVSP or ASP due to those classifications. However, there does not have to be a case directly on point for it to be clearly established that conduct would violate the Eighth Amendment. *Ashcroft*, 131 S.Ct. at 2084; *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011). The state of the law is sufficiently clear if it gives fair warning to the official that his conduct is unconstitutional. *A.D. v. California Highway Patrol*, 712 F.3d 446, 454 (9th Cir. 2013). "'Clearly established' means that 'it would be clear to a reasonable [prison official] that his conduct was unlawful in the situation he confronted.'" *Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th Cir. 2003) (quoting *Saucier*, 533 U.S. at 202).

It is well established that prison officials who are aware that inmates face a substantial risk of serious harm, violate the Eighth Amendment by disregarding that risk and failing to take reasonable measures to abate it. *Farmer*, 511 U.S. at 847. In cases alleging an Eighth Amendment violation for failure to prevent harm, the objective component is met if an inmate shows that he is incarcerated under conditions posing a substantial risk of harm. *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1242 (9th Cir. 2010); *see Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005) (prison officials may be liable for failure to protect inmate from attack by other inmates).

In this instance, Plaintiffs contend that Valley Fever is a serious infectious disease that can be progressive, painful and debilitating. (ECF No. 22 at ¶¶ 30, 32.) Plaintiffs also contend that prison officials knew that inmates in Plaintiffs' subclasses are at an increased risk of contracting Valley Fever. (*Id.* at

¶¶ 34, 39.) "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199-200 (1989). Prison officials cannot ignore an unsafe condition because no injury has occurred. *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (subjecting inmate to danger of excessive level of second hand smoke may violate the Eight Amendment).

Similarly, the Ninth Circuit has addressed circumstances in which inmates were housed in situations that placed them at a serious risk of contracting a contagious disease and found that it could be deliberate indifference. *See Brigaerts v. Cardoza*, 952 F.2d 1399, at *2 (9th Cir. 1992) (unpublished opinion) ("Repeated exposure to contagious diseases may violate the [E]ighth [A]mendment". . . .); *Muhammad v. Turbin*, 199 F.3d 1332, at *2 (9th Cir. 1999) (unpublished) (recognizing that inmate could state a claim for deliberate indifference if contagious inmates were housed in dangerous proximity to healthy inmates). The Court finds this situation sufficiently similar to *Brigaerts* and *Muhammad* to place prison officials on notice that subjecting inmates to a substantial risk of contracting a serious disease without taking steps to protect them would violate the Eighth Amendment.

The law was sufficiently clear prior to the claims raised here that if prison officials are aware that certain inmates are at a significantly higher risk of contracting a disease based upon identifiable criteria, it would be deliberate indifference to fail to take action

to protect those inmates. Defendants' motion to dismiss the claims against the individual defendants on the basis of qualified immunity should be denied.

V. Conclusion and Recommendation

Based on the foregoing, IT IS HEREBY RECOMMENDED that Defendants' motion to dismiss should be GRANTED IN PART AND DENIED IN PART as follows:

1. Defendants' motion to dismiss the claims against Edmund G. Brown, Jr. should be GRANTED;

2. Defendants' motion to dismiss the Eighth Amendment claims against Matthew Cate, Jeffrey Beard, P.D. Brazelton, and James D. Hartley for failure to state a claim should be DENIED;

3. Defendants' motion to dismiss the racial discrimination claims as violating the Fourteenth Amendment for failure to state a claim should be GRANTED;

4. Defendants' motion to dismiss the racial discrimination claim pursuant to 42 U.S.C. § 1981 for failure to state a claim should be GRANTED without leave to amend;

5. Defendants' motion to dismiss claims against Defendants in their official capacities should be GRANTED;

6. Defendants motion to dismiss claims against Defendants State of California and CDCR should be GRANTED without leave to amend;

7. Defendants' motion to dismiss the state law negligence claims for failure to state a claim should be GRANTED;

8. Defendants' motion to dismiss the claims for damages on the basis of qualified immunity should be DENIED; and

9. Plaintiffs should be granted an opportunity to file an amended complaint to cure the deficiencies described in this order.

These findings and recommendations are submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within fourteen (14) days of service of this recommendation, any party may file written objections to these findings and recommendations with the Court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

/s/ Stanley A. Boone
United States Magistrate Judge

Dated: February 20, 2014

ORDER OF THE NINTH CIRCUIT DENYING PETITIONS FOR REHEARING EN BANC (MARCH 26, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-16145

DARNELL T. HINES,

Plaintiff-Appellant,

v.

ASHRAFE E. YOUSEFF, M.D.; GODWIN C. UGUEZE, M.D.; JOSHUA GARZA, RNP; M. AGUIRRE,

Defendants-Appellees.

D.C. No. 1:13-cv-00357- AWI-JLT
Eastern District of California, Fresno

No. 15-17076

ARTHUR DUANE JACKSON; LEONARD M. LUJAN; MARCUS JACKSON; RODNEY TAYLOR; LACEDRIC W. JOHNSON; L. T. BELTON; NORMAN JOHNSON; COREY LAMAR SMITH; FREDERICK BEAGLE; ABDULLE ABUKAR,

Plaintiff-Appellees,

v.

EDMUND G. BROWN, JR., Governor; MATTHEW CATE, Secretary, California Department of Corrections and Rehabilitation; JEFFREY BEARD, Secretary, California Department of Corrections and Rehabilitation; PAUL D. BRAZELTON, Warden, Pleasant Valley State Prison; JAMES D. HARTLEY, Warden, Avenal State Prison,

Defendants-Appellants.

D.C. No. 1:13-cv-01055-LJO-SAB
Eastern District of California, Fresno

No. 15-17155

COREY LAMAR SMITH; DION BARNETT; CHRISTOPHER E. GARNER; RODNEY RAY ROBERTS; JEREMY ROMO; DANNY DALLAS; FREDERICK BEAGLE; DON BELARDES; FLOYD BOYD; RICHARD BURKE; JOSEPH BUSTAMONTE; CHARLES JOSEPH CARTER; OTHA CLARK; DONALD DIBBLE; JEROME FELDER; CANDELARIO GARZA; JEREMY LEE HOLLIS; SCOTT IMUTA; GEORGE JOHNSON; BRUCE KOKLICH; GRADY MONTGOMERY; PETER ROMERO; JOSH THOMAS; AARON TILLIS; RENE VILLANUEVA; BERTRUM WESTBROOK; WAYNE JAMES WOODS;

ABDULLE ABUKAR; RUBEN ARECHIGA; JOHN WESLEY BESS; MICHAEL BLUE; DAVID COX; ORLANDO CRESWELL; DANIEL DAYTON; PABLO DOMINGUEZ; JOSH DRAPER; KENJI DOMINIQUE JACKSON; ALBERT SHERROD; ADRIAN SEPULVEDA; KIRK SMITH; HECTOR TALAMANTES; ISMAEL TORRES-ROBLES; KENNETH WASHINGTON; THOMAS WILEY; DARREN CHARLES WILLIAMS; THEODORE WOOD; DONALD WRIGHT; GEORGE YOUNT; GARLAND BAKER; CHARLES MCQUARN; RICHARD ADAMS; DAVID ATZET; DERRICO AUBREY; DANIEL BOLAND; CHRISTOPHER BONDS; KEEVAN BURKS; KEVIN CALL; JOSEPH DEJESUS; GERALD W. DICKSON; ERIC DONALDSON; ROY LEE DOSS; JOSEPH ALFONSO DURAN; JAMES FARR; JOSEPH FERRIS; ALVIN FLOWERS; STEPHEN FRANKLIN; AUBREY GALLOWAY; JOHN RAY GHOLAR; ROBERT GONZALEZ; VERNON GRANT; WALTER GREEN; ROBERT HARRIS; SINOA HERCULES; BRET HILL; ADRIAN JOHNSON; ELLIS CLAY HOLLIS; EDWARD JONES; ANTHONY R. JONES; LAWRENCE KERNER; TITI LAVEA; CLEOFAS LEWIS; MICHAEL MANNING; ROBERT MAESCHEK; DANIEL MASUSHIGE; ELLIS MCCLOUD; BRANDON MCDONALD; JEFFREY MCDONALD; JUAN MEZA; HERSCHEL MITCHELL; NOEL MORALES; RAYMOND NEWSOM; JESUS ANTONIO PEREZ; HARVEY RAYBURN; JORGE AUGUSTO REYES; JAY ROACH; PAUL RICHARDSON; TYRONE SANDERS; JOHNNY O. SANCHEZ; EDWARD SPENCE; TRACY L. STEWART; LOUIS THOMAS; ELONZA JESSE TYLER; VANCE UTLEY; BYRON

WEST; WILLIAM WILEY; RODNEY WILLIAMS; ROBERT WOLTERS; MICHAEL MORROW; DAMOR HILL; COREY CAMPBELL; ROBERT CONLEY; SINOHE HERCULES; JUAN CARLOS MARTINEZ; JUAN PENALVA; ROBERT PRESTON, JR.; JOHN ARTHUR RUGGLES; WILLIE STEELS; SOLOMON VASQUEZ; GEORGE LEWIS; RICHARD ARTEAGA; PABLO CASTANEDA; CHANEY CLIFFORD; CAMPBELL COREY; ROBERT CONLEY; ALVIN COOPER; KENNETH GLEN CORLEY; WALTER CORNETHAN; ROY CORNING; DENNIS DUREE; SINOHE HERCULES; CARLOS HERNANDEZ; DAMOR HILL; DANILO JALOTLOT; ASAD LEWIS; GEORGE LEWIS; JOE M. LEWIS; JUAN MARTINEZ; THOMAS MILFORD; DALE MILLER; DANIEL MOLEN; ANDRE MOODY; MICHAEL MORROW; FREDDY NEAL; CHEK NGOUN; SIM PEAV; JUAN PENALVA; MARVIN PIERCE; ROBERT PRESTON, JR.; DAVID ROBINSON; RONALD RODRIGUEZ; JOHN ARTHUR RUGGLES; LORENZO SAMS; LEROY SMITH; WILLIE STEELS; MAURICE THOMAS; TYRONE THOMPSON; ROBERTO VASQUEZ; SOLOMON VASQUEZ; PATRICK WALLACE; XAVIER S. WILLIAMS; KENNETH YANCEY,

Plaintiff-Appellants,

v.

ARNOLD SCHWARZENEGGER, Governor; MATTHEW CATE; JAMES D. HARTLEY, Warden; JEFFREY A. BEARD; PAUL D. BRAZELTON, Warden; SUSAN L. HUBBARD; DEBORAH HYSEN; SCOTT KERNAN; CHRIS MEYER; TONYA R.

ROTHCHILD; TERESA SCHWARTZ; JAMES A. YATES, Warden; DWIGHT WINSLOW, M.D.; FELIX IGBINOSA, M.D.; EDMUND G. BROWN, JR., Governor,

Defendants-Appellees.

D.C. No. 1:14-cv-00060-LJO-SAB

No. 15-17201

LORENZO GREGGE, JR.,

Plaintiff-Appellant,

v.

MATTHEW CATE; RALPH DIAZ, Secretary, California Department of Corrections and Rehabilitation; JAMES A. YATES, Warden,

Defendants-Appellees.

D.C. No. 1:15-cv-00176-LJO-SAB
Eastern District of California, Fresno

Before: KLEINFELD and IKUTA, Circuit Judges, and Peterson*, District Judge.

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* The Honorable Rosanna Malouf Peterson, United States District Judge for the Eastern District of Washington, sitting by designation.

The panel has voted to deny the petitions for rehearing en Banc [Docket Entry No. 117 and Docket Entry No. 120]. Judge Ikuta has voted to deny the petitions for rehearing en Banc, and Judge Kleinfeld and Judge Peterson have recommended denial of the petitions for rehearing en Banc.

The full court has been advised of the petitions for rehearing en Banc, and no judge of the court has requested a vote on the petitions for rehearing en Banc. Fed. R. App. P. 35(b).

The petitions for rehearing en Banc are DENIED.

CONSOLIDATED COMPLAINT— RELEVANT EXCERPTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ABDULLE, ABUKAR; ADAMS, RICHARD; ARECHIGA, RUBEN; ARTEAGA, RICHARD; AUBREY, DERRICO; ATZET, DAVID; BAKER, GARLAND; BARNETT, DION; BEAGLE, FREDERICK; BELARDES, DON; BESS, JOHN WESLEY; BLUE, MICHAEL; BOLAND, DANIEL; BONDS, CHRISTOPHER; BOYD, FLOYD; BRACAMONTE, RAY; BRUCE, GORDON ; BURKE, RICHARD; BURKS, KEEVAN; BUSTAMONTE, JOSEPH; CALL, KEVIN; CAMPBELL, COREY; CAMPOS, RUDOLPH; CARTER, CHARLES; CASTANEDA, PABLO; CHANEY, CLIFFORD; CLARK, OTHA; CONLEY, ROBERT; COOPER, ALVIN; CORLEY, KENNETH; CORNETHAN, WALTER; CORNING, ROY; COX, DAVID; CRESWELL, ORLANDO; DALLAS, DANNY; DEJESUS, JOSEPH; DIBBLE, DONALD; DICKSON, GERALD; DOMINGUEZ, PABLO; DONALDSON, ERIC; DOSS, ROY; DRAPER, JOSH; DURAN, JOSEPH; DUREE, DENNIS; FARR, JAMES; FELDER, JEROME; FERRIS, JOSEPH; FLOWERS, ALVIN; FRANKLIN, STEPHEN; GALLOWAY, AUBREY; GAMBOA, MANUAL; GARNER, CHRISTOPHER; GARZA, CANDELARIO; GHOLAR, JOHN; GONZALEZ, ROBERT; GRANT, VERNON; GREEN, WALTER; HARRIS, ROBERT; HAYNES, HERMAN; HERCULES, SINOA;

HERNANDEZ, CARLOS; HILL, BRET; HILL, DAMOR; HOLLIS, ELLIS; HOLLIS, JEREMY; IMUTA, SCOTT; INFINITY; JACKSON, KENJI; JALOTLOT, DANILO; JOHNSON, ADRIAN; JOHNSON, DANIEL; JOHNSON, GEORGE; JONES, ANTHONY; JONES, EDWARD; KERNER, LAWRENCE; KLVANA, MILOS; KOKLICH, BRUCE; LAVEA, TITI; LEWIS, ASAD; LEWIS, CLEOFAS; LEWIS, GEORGE; LEWIS, JOE; MANNING, MICHAEL; MAESHACK, ROBERT; MARTINEZ, JUAN; MASUSHIGE, DANIEL; MCCLOUD, ELLIS; MCDONALD, BRANDON; MCDONALD, JEFFERY; MCQUARN, CHARLES; MERMEJO, JUAN; MEZA, JUAN; MILFORD, THOMAS; MILLER, DALE; MITCHELL, HERSCHEL; MOLEN, DANIEL; MONTGOMERY, GRADY; MOODY, ANDRE; MORALES, NOEL; MORROW, MICHAEL; NEAL, FREDDY; NEWSON, RAYMOND ; NGOUN, CHECK; OCULAR, EMMANUEL ; PEAV, SIM; PENALVA, JUAN; PEREZ, JESUS; PIERCE, MARVIN; PRESTON, ROBERT; RAYBURN, HARVEY; REYES, JORGE AUGUSTO; RICHARDSON, PAUL; RIPOYLA, RONNIE; ROACH, JAY; ROBERTS, RODNEY RAY; ROBINSON, DAVID; RODRIGUEZ, RONALD; ROMERO, PETER; ROMO, JEREMY; RUGGLES, JOHN; SAMS, LORENZO; SANDERS, TYRONE; SANCHEZ, JOHNNY; SEPULVADA, ADRIAN; SHERROD, ALBERT; SMITH, COREY LAMAR; SMITH, KIRK; SMITH, LEROY; SPENCE, EDWARD; STEELS, WILLIE; STEWART, TRACY; TALAMANTES, HECTOR; THOMAS, JOSH; THOMAS, LOUIS; THOMAS, MAURICE; THOMPSON, TYRONE; TILLIS, AARON; TYLER, ELONZA; TORRES-ENOS, JOHN; TORRES-

ROBLES, ISMAEL; UTLEY, VANCE; VASQUEZ, SOLOMON; VASQUEZ, ROBERTO; VILLANUEVA, RENE; WALLACE, PATRICK; WASHINGTON, KENNETH; WEST, BYRON; WESTBROOK, BERTRUM; WILEY, THOMAS; WILEY, WILLIAM; WILLIAMS, DARREN; WILLIAMS, RODNEY; WILLIAMS, XAVIER; WOLTERS, ROBERT; WOOD, THEODORE; WOODS, WAYNE; WRIGHT, DONALD; YANCEY, KENNETH; and YOUNT, GEORGE,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, Former Governer [sic] of the State of California; JEFFREY BEARD, Secretary California Dept. of Corrections and Rehabilitation, PAUL BRAZELTON, Former Warden, Pleasant Valley State Prison; MATTHEW CATE, Former Secretary of the California Department of Corrections and Rehabilitation; JAMES HARTLEY, Warden Avenal State Prison; SUSAN L. HUBBARD, Former Director, Division of Adult Operations; DEBORAH HYSEN, Chief Deputy Secretary, Facilities Planning, Construction & Management; DR. FELIX IGBINOSA, Medical Director, Pleasant Valley State Prison; SCOTT KERNAN, Former Chief Deputy Secretary of Adult Institutions; CHRIS MEYER, Senior Chief, Facilities Planning, Construction & Management TANYA ROTHCHILD, Former Chief of the Classification Services Unit; TERESA SCHWARTZ, Former Director, Division of Adult Institutions; DWIGHT WINSLOW, M.D., Former Medical Director, CDCR; JAMES A. YATES, Former Warden of Pleasant

Valley State Prison; and UNKNOWN DEFENDANTS 1-50, J. CLARK KELSO, Receiver, California Correctional Health Care Services, in His Official Capacity,

Defendants.

Case No: 1:14-CV-60-LJO-SAB

I. Violation of 42 U.S.C. § 1983 (Cruel and Unusual Punishment Prohibited by the 8th Amendment)

II. Negligence
Demand for Jury Trial

I. JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to Title 28 U.S.C. §§ 1331 and 1343. The individual defendants are persons who caused the Plaintiffs to contract Valley Fever, a lifelong crippling disease. Infliction of that disease constitutes Cruel and Unusual Punishment in violation of the Eighth Amendment to the United States Constitution, by depriving plaintiffs of a federally-guaranteed right under color of state law in contravention of Title 42 U.S.C § 1983.

2. Venue is properly in this Court, pursuant to Title 28 U.S.C § 1391(b)(2), as a substantial part of the events or omissions giving rise to the claim occurred in this judicial district, including exposure to spores that cause Valley Fever, and the Court has ruled that Plaintiffs should proceed in this judicial district.

3. Plaintiffs make the following allegations upon personal knowledge as to those assertions concerning

themselves and, as to all other matters, upon the investigation of counsel, which includes, without limitation: a) review and analysis of public documents published by the State of California, Department of Corrections and Rehabilitation (CDCR) and other public agencies; b) review and analysis of public filings, press releases and other publications by certain of the defendants and other non-parties; c) review of news articles, medical and other reference sources, as well as postings on the State of California CDCR and correctional facility websites concerning the issues described herein; and d) review of other available information concerning CDCR's operations, the medical conditions and treatment described herein, and the individual defendants.

II. SUMMARY OF THIS CASE

4. The American system of justice requires that state correctional authorities carry out the exact sentence determined by the judicial process–no more and no less. Instead, defendants imposed on plaintiffs a lifelong, crippling, and sometimes fatal disease in addition to their judicial sentences.

5. The disease, called Coccidioidomycosis, "Valley Fever," or "VF," is carried by a fungus-like organism that lives and reproduces in the soils in certain limited geographic areas. It produces spores that can infect humans. To those infected, it can be debilitating, disfiguring, intensely painful, and if it is not treated quickly, accurately and indefinitely, may be fatal. Over 30 prisoners have already died from the disease and many more live with serious medical complications from it.

6. For some who come in contact with the spores, the disease rapidly spreads throughout the lungs or to other parts of the body; this is referred to as the "disseminated" disease.

7. Disseminated coccidioidomycosis attacks multiple organ systems including the skin, lungs, eyes, bones, joints, nervous system and brain. Victims of the disseminated form require lifelong treatment and may lose limbs to amputation, require sections of bone or whole organs to be removed, may suffer disfiguring skin lesions, and if the disease attacks the brain, victims may suffer permanent brain damage or die from coccidioidal meningitis.

8. Those in certain ethnic and racial groups, including African Americans, Filipinos and other Asians, Hispanics, and American Indians, as well as persons who are immune-compromised or immune-suppressed from taking medication for chronic arthritis and other diseases, are more susceptible to developing the aggressive, disseminated form of Valley Fever.

9. Plaintiffs in this action are inmates and former inmates of the state correctional system who contracted Valley Fever as a result of Defendants' recklessness. Plaintiffs were required to serve their lawful sentences. They did not also deserve, a life-long debilitating illness as a result of Defendants' deliberate indifference.

10. Defendants knew that placing inmates in prisons where the prevalence of spore-laden soils was a known hazard – where Valley Fever was already occurring at epidemic rates – posed an unacceptable risk of irreparable harm. Yet, they not only placed Plaintiffs in harm's way, they also failed to implement even the few simple measures recommended by the

correctional authority's own medical experts to protect Plaintiffs from the disease.

11. Defendants could have diverted or transferred Plaintiffs away from hyper-endemic prisons, either by formal policy or on a case-by-case basis at the facility level, in order to reduce the rate at which inmates were infected with the virus.

12. Defendants could have also implemented simple environmental measures that CDCR's own staff experts repeatedly recommended at the prisons to reduce inmate exposure: basic precautions such as paving, landscaping, and soil stabilization.

13. California state authorities repeatedly recommended that the prison ventilation systems be improved, that the existing ventilation systems be properly maintained to protect inmates against indoor exposure to the spores, and that inmates be offered respiratory protection and cautioned to stay indoors during high wind conditions to avoid outdoor exposure.

14. Defendants took none of these actions.

15. Instead, Defendants continued to transfer high-risk and all other inmates into these hyper-endemic prisons, failed to take even the simplest protective measures, and allowed major construction, which churns the soil and throws the spores into the air, to take place on site and immediately adjacent to one of the most dangerously infectious prisons, Pleasant Valley.

16. Defendants knowingly exposed each Plaintiff to serious disease risks and demonstrated a reckless indifference to Plaintiffs' safety, health, and constitutional right to be free of excessive punishment.

17. Plaintiffs have sought to resolve this matter through administrative remedies, to no avail.

18. Plaintiffs seek adequate medical care and other damages as appropriate to their injuries.

III. THE DEFENDANT PARTIES

19. Defendant Paul D. Brazelton acted as warden of Pleasant Valley State Prison (PVSP) from early 2012 through the Fall of 2013. He presided over PVSP, the most adversely affected prison, during this period. Mr. Brazelton is believed to reside in Coalinga, California, County of Fresno.

20. Defendant Jeffrey Beard is the current Secretary of the CDCR. He was appointed as Secretary by Governor Edmond G. Brown, Jr., on December 27, 2012. Beard has overseen prison policy since his appointment.

21. Defendant Matthew Cate was the Secretary of the CDCR from 2008-2012. Secretary Cate supervised and was responsible for the housing of inmates at prisons where they contracted Valley Fever. Cate resides in Sacramento County, California.

22. Defendant James D. Hartley is the former warden of Avenal State Prison. He acted in that position from 2007-2014. He is believed to reside in Fresno County.

23. Defendant Dr. Susan L. Hubbard is the former director of the Division of Adult Operations. She is an author of the 2007 CDCR "exclusion" policy that resulted in highly-susceptible inmates continuing to be housed at hyper-endemic prisons. Hubbard resides in Carmichael, Sacramento County, California.

24. Defendant Deborah Hysen is the current Director of CDCR's Office of Facility Planning, Construction and Management (FPCM). Hysen was the Chief Deputy Secretary of FPCM from at least 2006 until 2014, during which time CDCR failed to implement any of the recommended remedial measures to reduce infection rates. Hysen resides in Sacramento, California.

25. Defendant Dr. Felix Igbinosa was the medical director of Pleasant Valley State Prison, having served in that capacity from approximately 2005-2014. Dr. Igbinosa resides in Clovis, California.

26. Defendant J. Clark Kelso is currently serving as the Receiver of the California Correctional Health Care Services agency (CCHCS).[1] Mr. Kelso is believed to reside in Elk Grove, California, Sacramento County.

27. Defendant Scott Kernan is the former head of the Department of Adult Institutions (DAI), titled Chief Deputy Secretary at that time, and served in that position until 2014. He was head of DAI at the time the 2007 exclusion policy was implemented. On information and belief, he resides within or is otherwise subject to the jurisdiction of this federal court.

28. Defendant Chris Meyer was the Senior Chief of Facility Planning, Construction and Management from 2009 to 2014, succeeded by Defendant Hysen as

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1 CCHCS is the California state agency that has been responsible for health care in the state prison system since October 3, 2005, after the *Plata* court determined that the then-existing prison health care system violated the Eighth Amendment. *Plata v. Brown*, Case No. 01-1351 [Northern District of California]. The *Plata* court ordered CCHCS to take over prison healthcare; it has since been legally responsible for overseeing 7,000 staff addressing health care in California state prisons.

head of that office. It was Meyer's responsibility to employ best practices at the prisons to ensure their safety. Plaintiffs are informed and believe that Meyer resides in Sacramento, California, and are seeking to verify that address through his counsel.

29. Defendant Tanya Rothchild is the former Chief of CDCR's Classification Services Unit (CSU), the agency department in charge of transferring inmates to specific prisons. Rothchild resides within or is otherwise subject to the jurisdiction of this federal court.

30. Defendant Teresa Schwartz is a former deputy director of Adult Institutions at CDCR. She was deputy director of DAI at the time the 2007 exclusion policy was initiated. Schwartz resides within or is otherwise subject to the jurisdiction of this federal court.

31. Defendant Arnold Schwarzenegger is the former Governor of California, having acted in that position from 2003 through 2011. Schwarzenegger resides in Los Angeles County, California.

32. Defendant Dwight Winslow, M.D. is the former Statewide Medical Director for CDCR. He co-authored the 2007 exclusion policy. Winslow resides in Sacramento, California.

33. Defendant James A. Yates is the former warden of Pleasant Valley State Prison and is believed to have occupied that position from at least 2005 until 2011. During this time a large number of inmates contracted Valley Fever at PVSP. Yates is believed to reside in Corcoran, Kings County, California.

34. The true names and capacities, whether individual, corporate, associate, governmental or otherwise of some of the Defendants herein are presently unknown to Plaintiffs.

35. Plaintiffs will seek leave of the Court to amend this Complaint to show the true names and capacities of such Defendants if and when these are ascertained by Plaintiffs.

36. Unknown Defendants 1-50 are one or more state officials of the California Department of Corrections and Rehabilitations, each of whom were aware of the increased risk faced by Plaintiffs and had the authority, ability and means to reduce those risks but failed to act to do so.

IV. FACTUAL ALLEGATIONS

A. The Effect of Coccidioidomycosis Infection

37. Coccidioidomycosis is a parasitic disease caused by exposure to airborne fungal spores of Coccidioides organisms found in the soil in certain locations in the southwestern United States including California.

38. When a human inhales the Coccidioides fungal spores, those spores may lodge in various locations in the respiratory system. The spores then grow and transform into large tissue-invasive parasitic spherules. The spherules divide, enlarge, and rupture, each releasing as many as thousands of new "endospores" that can invade surrounding tissue or can migrate through the blood to other tissues and organs, where they repeat the process and continue to multiply in the body.

39. The developing endospores grow on host body tissue, dissolving some of that tissue in the process. Depending on the site of the disseminated infection, this may lead to disfiguring skin lesions, destruction of soft tissue, erosion of bones, joints, and eyes, ulcers penetrating into the pleura in the lungs, and the colonization of other organs including the brain. Lesions may occur in every organ in the body.[2]

40. Coccidioides replicates so quickly that it is considered the most virulent fungal parasite known to man.[3] The Coccidioides fungus was at one time listed as a "Select Agent"—a potential weapon of biological warfare or bioterrorism—in the Antiterrorism and Effective Death Penalty Act of 1996 and the Public Health and Security and Bioterrorism Preparedness and Response Act of 2002.[4] The Centers for Disease Control (CDC) requires scientists handling Coccidioides spores to use protective protocols just one level below that required for handling the hemorrhagic fever Ebola virus.[5]

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2 Smith, Pappagianis, et al, *Human Coccidioidomycosis*, Bacteriology Reviews (September, 1961), 25(3), pp. 310-320, at p. 311.

3 Dixon, *Coccidioides Immitis as a Select Agent of Bioterrorism*, Journal of Applied Microbiology (October 2001), 91(4):602-5.

4 Filip & Filip, Valley Fever Epidemic, Golden Phoenix Books (2008), p. 2 (hereinafter "Filip"). Published in 2008, this reference summarized 268 published medical studies, professional journal articles, and other authoritative material concerning Coccidioidomycosis.

5 "*Biosafety in Microbiological and Biomedical Laboratories*," U.S. Department of Health and Human Services Public Health Service Centers for Disease Control and Prevention National Institutes of Health, (2009, 5th Edition).

41. In the general population, 40% of those exposed will show symptoms of a respiratory illness resembling the flu that may last weeks or months.[6]

42. In a segment of that 40%, however, which varies depending on the ethnicity and medical status of the individual, the infections will cause severe, life-threatening pneumonia or blood-borne spread of the fungus from the lungs to other parts of the body, which is referred to as a disseminated infection.[7]

43. Disseminated infection commonly involves skin and soft tissues, bones, and the central nervous system. Both the spore-provoked pneumonia and the disseminated infection, especially if it reaches the brain and causes meningitis, can be fatal.[8]

44. Per Filip, who authored a leading book on Valley Fever: "Valley Fever can kill, but it can also affect its survivors for a lifetime. It can disseminate to the eyes where it can cause blindness and possibly require the removal of an infected eye. Valley Fever can attack any organ or limb in the body to cause lesions, chronic pain, and to require amputations. Some cases can necessitate surgical removal of an infected lung. . . . " Valley Fever can cause facial lesions that leave permanent scarring and disfigurement. In the most lethal varieties of the disease it can attack the lining of the brain (meninges), [leading to] permanent brain damage. Valley Fever can infect the bones and

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6 Dec. John Galgiani, ¶ 7 (April 25, 2013, Docket 2598 in *Plata* Eastern District case), Valley Fever expert.

7 Galgiani, ¶ 7.

8 *Id.*

joints, causing chronic debilitation, pain, and resulting in the need for joint fusions or amputations . . . people with Valley Fever have become wheelchair bound as a result of disseminated spinal lesions. . . . "[9]

45. Once the disease is established in the disseminated form, there is no cure. The disease is treated with antifungal drugs which can have severe side effects and must be taken for a lifetime. These drugs do not cure the disease, however, since they only reduce but do not eliminate the population of infectious spores. Continuous treatment with oral anti-fungal medication may keep the disease partially and temporarily at bay, but the disease remains within an infected person for his or her lifetime, and repeated debilitating relapses may be expected. As many as 75% of patients who stop taking the drugs will relapse into the life-threatening disease within a year.[10]

46. Treatment of Valley Fever is expensive, for the patients and for the public health system. As of 2006, "The cost of antifungal medication is high, in the range of $5,000 to $20,000 per year of treatment. For managing critically ill patients with coccidioidomycosis, there are considerable additional costs including intensive care support for many days or weeks."[11] Some patients require repeated hospitalization for the disseminated disease. As of 2011, the cost for such

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[9] Filip, at pp. 63-65.

[10] *See, e.g.,* Filip, p. 40; Kanan, Renee, M.D., "*Valley Fever,*" Dept. of Corrections Memo to Health Care Managers November 5, 2004 [hereinafter "Kanan" or "Kanan Memo"], p. 4; Galgiani, John, et al., *Practice Guidelines for the Treatment of Coccidioidomycosis*, Oxford Journals (2000).

[11] Galgiani, *Practice Guidelines*, at p. 659.

treatment was in the range of $55,000 per hospitalization on average.

47. Plaintiffs in this case, who have had Valley Fever for relatively short amounts of time, have already reported one or more of the following symptoms: skin lesions; fever; shortness of breath and wheezing; chronic and severe coughing including coughing up blood; chest pain; uncontrollable chills and night sweats; nausea; rapid weight loss; rashes; burning sensations in various body parts (feet, joints, etc.); chronic exhaustion; joint and bone pain, stiffness and swelling; swelling of the legs, ankles, and feet; sensitivity to light; vision problems; neurologic symptoms including inability to concentrate; foot drop and partial paralysis; and excruciating head and neck pain.

48. Over thirty inmates have already died from exposure to the disease within the prison system from 2005 to the present, and more are expected to die prematurely, while hundreds or perhaps thousands will live with grave consequences of the disease.

B. Defendants, as Prison Officials and Medical Experts, Were Aware of the Increased Risk of Valley Fever at These Prisons

49. California health officials have known about the prevalence of Valley Fever in the locations of the hyper-endemic prisons and the disease's acute risks to inmate health for over (50) years.[12]

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[12] *See, e.g.*, Smith, C. E.: *The Epidemiology of Acute Coccidioidomycosis With Erythema Nodosum ("San Joaquin" or "Valley Fever")*, American Journal of Public Health 30, at p. 600 (June 1940).

50. By the late 1960's, employers were being warned that "the importation of any susceptible labor force into the endemic areas carries with it the responsibility for reducing the rate and severity of infection through whatever dust control measures are possible and for providing a vigorous program of medical surveillance."[13]

51. Despite this, between 1987 and 1997, the CDCR built eight prisons within the hyper-endemic regions of San Joaquin Valley: Avenal State Prison; California Correctional Institution; California State Prison-Corcoran; Wasco State Prison; North Kern State Prison; Pleasant Valley State Prison; California Substance Abuse Treatment Facility and State Prison, both at Corcoran; and Kern Valley State Prison.

52. Locating these prisons in these hyper-endemic region of the Central Valley, significantly overcrowding them, housing inmates at risk or at increased risk from Valley Fever there, and failing to implement any of the remedial measures recommended to reduce inmate exposure to cocci has had drastic repercussions on the health and welfare of California's inmate population.[14]

53. Though all of these prisons presented a potentially elevated risk of exposing inmates to Valley Fever, there are two—ASP and PVSP—at which these

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[13] Schmelzer and Tabershaw, *Exposure Factors In Occupational Coccidioidomycosis,* American Journal of Public Health and the Nations Health, January 1968: Vol. 58, No. 1, p. 111.

[14] *Coccidioidomycosis in California's Adult Prisons 2006-2010,* California Correctional Health Care Services; April 16, 2012. wrote a memorandum to all health care managers, staff members, and other officials within CDCR regarding Valley Fever and its origin in soil fungus.

risks are acutely amplified, and one in particular, PVSP, which by 2006 was known to be extraordinarily dangerous.

54. Pleasant Valley State Prison (PVSP) is located in Coalinga, California. The prison provides long-term housing and services for minimum, medium and maximum custody inmates. It was opened in November 1994, covers 640 acres and was designed to house 3,000 inmates. Today, there are approximately 730 staff and 5,188 prisoner beds.

55. The soil surrounding and at PVSP and other hyperendemic prisons is known to be contaminated with the Coccidioides fungus.

56. In November 2004, before the drastic rise in incidence rates at PVSP, Defendant Renee Kanan, M.D., Deputy Director of Health Care Services at CDCR,

57. Known as the Kanan Memo, it included a three-page overview of Valley Fever, its cause, diagnosis, symptoms and treatment. The memorandum admitted that: (a) the Central Valley prisons are located within areas which host the dangerous cocci fungus in the soil (b) Valley Fever has "potential lethality" for people exposed to the fungus; (i) "winds and construction activity may cause the organism to be blown into the air where it can be inhaled and pneumonia can occur"; (ii) "[a] percentage of individuals exposed to coccidioides immitis . . . will progress to frank, generally patchy pneumonia (the incubation period is up to four (4) weeks), or to disseminated disease"; (iii) "[t]he risk and incidence of disseminated disease are highest in American Indians, Asians, Blacks and immuno-compromised individuals"; (iv) "[d]issemination usually occurs to the skin, bones and meninges, although any part of

the body can be involved"; (v) bone lesions, back pain and paraplegia may result from Valley Fever; (vi) skin lesions "imply a poor prognosis and often herald widespread dissemination"; (vii) "[m]eningeal involvement eventually leads to a severe, unremitting headache" and (vii) "[t]reatment must be continued for life to maintain control of symptoms; there is no cure for coccidiodal meningitis at this time."

58. Dr. Kanan's memo was and continues to be widely available to state officials, including the Defendants, after it was initially distributed to CDCR officials.[15]

59. Beginning in 2005, after the Kanan memo was distributed, Pleasant Valley State Prison (PVSP) began to experience an epidemic of Valley Fever, including multiple deaths from the disease.

60. Infection rates at PVSP during this time were as much as 1,000 times the rate seen in the general population, yet state officials continued to transfer susceptible and high-risk inmates to this prison.

61. An internal CDCR memorandum dated October 27, 2006 to all administrative personnel, apparently generated at the request of Sacramento

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[15] The Kanan Memo was addressed to Nadim Khoury, M.D. (Assistant Deputy Director (A), Clinical Policy and Programs Branch, Health Care Services Division of Department of Corrections); Donald Smilovitz, M.D. (Physician and Surgeon, Infection Control Department, CMC); Anita Mitchell, M.D. (Chief Medical Officer, Clinical Standards & Services (CSS), HCSD); and Tim Rougeux (Project Director, Medical Programs Implementation) and then available, and on information and belief, read widely throughout CDCR.

government officials, described the epidemic infection rates:

"The Cocci information requested by [California government officials in] Sacramento is as follows:

2001–42 inmates	
2002–38 inmates	
2003–80 inmates	
2004–66 inmates	1 death
2005–187 inmates	5 deaths
2006–1145 inmates	8 deaths

The above information is an approximation of the number of inmates with positive Cocci lab results."[16]

62. This memo showed that Valley Fever incidence rates increased at PVSP by more than 445% between 2001 and 2005, and by over 2,500% by 2006. In 2006 (through mid-August), the California prison system accounted for 30% of all Valley Fever cases reported to the State Department of Health Services.

63. An August 3, 2006 internal memorandum confirmed that CDCR officials knew that they were exposing inmates to elevated risk of Valley Fever.[17]

64. During 2006-2010, rates of Valley Fever in the hyper-endemic area prisons worsened. The rates at Pleasant Valley State Prison, Avenal State Prison, Wasco State Prison, and North Kern State Prison, were each significantly higher than rates in the counties in

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16 Durst, Karen, "Coccidioidomycosis (Cocci) Report," [CRCR memorandum dated October 27, 2006 to Administrative Personnel].

17 *See* Dovey & Farber-Szekrenyi, "*Inmate Patients at High Risk of Valley Fever Excluded from Specific Central Valley Institutions*," p. 1 [CDCR Memo August 3, 2006, hereinafter "Dovey"].

which they are located. In comparison with the rate in California (7/100,000), the rate at PVSP was 1,001 times higher (7011/100,000), the rate at ASP was 189 times higher (1326/100,000) and the rate at WSP was 114 times higher (800/100,000).

65. Between 2006 and 2012, approximately 1,800 inmates became infected with Valley Fever at PVSP.[18]

66. The rates at PVSP, ASP, and WSP were also much higher than the rate in Kern County, the county with the highest rate of cocci in California (135/100,000). An April, 2012 retrospective study found that the infection rate at PVSP was approximately 7,011 cases for every 100,000 people, or 7 out of every 100.

67. Of the 27 CDCR inmates who died of Valley Fever between 2006 and 2010, eighteen (or 68 percent) were African-Americans, according to the report. The rate of death due to Valley Fever among African-Americans was twice that among non-black inmates.

68. Following the Kanan Memo, which warned that construction activity was associated with the increased exposure to the spores that cause Valley Fever, some experts observed that the probable cause of the rapid and continuing increase in Valley Fever cases at PVSP that began in 2005/2006 was the construction of a new state facility immediately adjacent to the prison. The excavation and construction churned up and broadcast Coccidioides spores through the air and on to bare soil and surfaces throughout the prison, where they took root to become an ongoing source of

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[18] No footnote.

infection.[19] Those spores spawned cocci colonies that pose an ongoing threat of Valley Fever infection at the prison currently and into the future.

69. Dr. Pappagianis' report confirms "the influence of 'new construction' (including excavation)" on PVSP's Valley Fever rates as follows: "Construction began in late Summer to early Fall [2005] and soon the number of cases increased. . . . It was evident that PVSP had a higher rate of infections than other institutions some of which had comparable numbers of inmates. By mid-August 2006, PVSP had 300 new cases recognized, far exceeding those recognized at (51) [at] Avenal, the next highest represented. We calculated incidence of 3,000/100,000 for PVSP in 2005; and in 2006 up to mid-August the rate was 6,000/100,000. For comparison, the highest incidence rate of [Valley Fever] was 572/100,000 for Kern County during the epidemic year 1993."[20]

70. After evidence of the epidemic became unmistakable, California Corrections Health Care Services (CCHCS) requested assistance from the California Department of Public Health (CDPH) in assessing the magnitude of the problem.

71. CDPH reported that the rate of cases at PVSP was 38 times the rate in residents of Coalinga, and 600 times the rate in Fresno County and confirmed that at least 29 persons had had to be hospitalized and 4

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[19] *See* Winslow D, Khoury N, Snyder N, Bick J, Hawthorne K, Chapnick R, et al., 2007; "*Recommendations for Coccidioidomycosis Mitigation in Prisons in the Hyperendemic Areas of California*," p. 4, June, 2007 [hereinafter "Winslow Recommendations"].

[20] Kanan Memo [Attachment 3, p. 4].

deaths had resulted. CDPH reported that risk of disease was associated with increased outdoor time, pre-existing health conditions, and African-American race.

72. CDPH's report included specific recommendations for reducing Valley Fever at the hyper-endemic prisons.

73. Based on the CDPH report, CCHCS issued recommendations in June, 2007, which included: (i) proceeding with environmental mitigation in the prisons through landscaping with ground cover, and placing concrete and other dust reducing materials on the grounds; (ii) continue the diversion and relocation of inmates at high risk for coccidioidomycosis; (iii) reinstate the public health system in prisons; (iv) notify the local health departments of new cases identified by prison providers; (v) expand epidemiologic research around cocci; (vi) support vaccine research; (vii) do not expand prison beds in the hyper-endemic area, especially at Pleasant Valley State Prison.

74. In November, 2007, Defendants Hubbard and Winslow amended the 2006 exclusion policy, which on information and belief was ratified by Defendants Schwartz, Kernan, Cate and Schwarzenegger. That policy protected only persons with certain identified medical conditions. It failed to protect any other inmates including those in the identified high-risk racial and ethnic groups, although risks to persons in those groups were already well-known to Defendants.

75. Predictably, the wholly inadequate 2007 policy failed to stem the epidemic of Valley Fever.

76. From 2007 through 2010, the rate in PVSP was 6 times higher than the rate among residents of

the adjacent state mental health facility built in 2005.[21]

77. During 2009, CDCR first requested, and then without explanation, terminated a project by the leading federal health agencies to assist the California prison system with the Valley Fever epidemic.

78. In December 2009, after California officials had canceled the project, two officials at the Centers for Disease Control (CDC) and its National Institute for Occupational Safety and Health (NIOSH), wrote to Nikki Baumrind, Ph.D, M.P.H., Chief of the Occupational and Public Health Section of the California Department of Corrections and Rehabilitation. This letter made it clear that the CDC and NIOSH had ceased their work on the project due to the CDCR's "lack of support" in assisting with the federal agencies' investigation.

79. The NIOSH officials reminded CDCR that "[p]eople at greater risk for developing disseminated infection include people of African American; Asian or Filipino descent; . . . and immunocompromised persons".[22]

C. Defendants Knew Certain Groups Were Particularly Susceptible

80. It is commonly and widely-known among prison officials and medical personnel that certain

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21 "*Coccidioidomycosis in California Department of Corrections and Rehabilitation Institutions,*" p. 2 [CDCR Report, October 10, 2012].

22 Letter from NIOSH to CDCR, December 4, 2009, p. 2.

groups are much more susceptible than others to the aggressive and disseminated form of Valley Fever.

81. The scientific literature acknowledged the exceptional susceptibility of African-Americans and Filipinos over 80 years ago.[23]

82. An article in the journal *Military Medicine* in June 2003 observed that "Filipinos and African-Americans have been shown to have up to a 200-fold increased risk of disseminated disease and an increased mortality rate."[24]

83. California's Department of Health Services referenced the exceptionally high-risk groups in a letter dated March 16, 2006 from Duc Vugia, M.D., M.P.H. of the California Department of Health Services to Bernard Henderson, an inmate at PVSP, citing an article in a contemporaneous medical journal.[25]

84. In addition to the higher-risk racial and ethnic groups, anyone with a compromised or suppressed

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[23] *See* Smith, Pappagianis, et al, *Human Coccidioidomycosis*, Bacteriology Reviews (September, 1961), 25(3), pp. 314, 318, fns. 5, 27.

[24] Filip, p. 29, citing Crum NF, Lederman ER, Hale BR, Lim ML, Wallace MR. "*A Cluster of Disseminated Coccidioidomycosis Cases at a US Military Hospital*, Mil Med. (June 2003), 168(6), pp. 460-464.

[25] *See* Letter from Duc Vugia, M.D., citing Galgiani article (March 16, 2006)]; Galgiani, John et al., *Coccidioidomycosis*, 41 Clinical Infectious Diseases Journal 1217-1218 ["several-fold higher for persons of African or Filipino ancestry (possibly also for persons of Asian, Hispanic, or Native American ancestry), and as high as 30%-50% of infections for heavily immunosuppressed patients"].

immune system also has an increased risk of developing disseminated Valley Fever.[26]

85. A compromised immune system may be caused by any of several chronic diseases including diabetes, HIV, lung disease, organ transplant, or taking TNF inhibitors as medication for arthritis.

86. Individuals over the age of 55 have also been found to be at increased risk, if exposed, of developing the severe disseminated disease.[27]

87. California's Department of Public Health informed the CDCR in its January 11, 2007, "Recommendations for Coccidioidomycosis Mitigation in Prisons in Hyperendemic Areas of California" that "[p]revious studies have suggested that the risk for extrapulmonary complications is increased for persons of African or Filipino descent, [and] the risk is even higher for heavily immunosuppressed patients." The DPH in 2007 therefore concluded that exclusion of all of these high-risk inmates was "the most effective method to decrease risk [of Valley Fever infections]."[28]

88. CDCR's inmate mortality figures bear this out. In analyzing reports from the Receiver's medical staff, Dr. Galgiani noted that "African-American prisoners [in the Central Valley state prisons] died with Valley

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[26] *See, e.g.,* American Thoracic Society, "*Patient Information Series*," American Journal of Respiratory Care Medicine, Vol. 184, p. 6.

[27] Clinical Infectious Diseases Journal (March 2001) 1:32(5), 708-15. The 2011 Thoracic Society also supports this conclusion, p. 5.

[28] CCHCS Report dated April 16, 2012 relating recommendations in Jan, 2007, p. 8, Box 2.

Fever at a higher rate than the general inmate population, and at much higher rates than African-American men in California."[29] In fact, African-American prisoners comprised 71% of the 34 Valley Fever deaths in CDCR prisons between 2006 and 2011.[30]

89. A 2012 study in the journal Emerging Infectious Diseases found the rate of hospitalization from disseminated cocci among blacks in California was 8.8 times higher than for whites.

90. After CDCR failed to act to address the risks to the susceptible racial and ethnic groups, the Receiver finally took steps to force CDCR to relocate the omitted higher-risk inmates. Joyce Hayhoe, a spokeswoman for the Receiver's office, disclosed that, "The State of California has known since 2006 that segments of the inmate population were at a greater risk for contracting Valley Fever, and mitigation efforts undertaken by CDCR to date have proven ineffective." She stated that, "as a result, the Receiver has decided that immediate steps are necessary to prevent further loss of life."

D. Each Defendant Knew the Risks to Inmates but Chose to Disregard Those Risks

91. Each of the named Defendants was aware that housing inmates at the hyper-endemic prisons posed a greatly elevated risk to those inmates of contracting Valley Fever and that failure to control exposure to the cocci-containing soil at those locations (such as by construction activity) increased that risk significantly.

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[29] Galgiani Declaration, April 25, 2013 [Docket 2598], ¶ 10.

[30] *Id.*

92. The 2004 Kanan Memo was circulated to a number of specific health care professionals inside the prison system and was intended to be circulated to all health care managers within the Department of Corrections, for general circulation to all health care professionals in the system. On information and belief, at a minimum Defendants Schwarzenegger, Cate, Kelso, Winslow, Hubbard, and Igbinosa knew of and were familiar with the substantive contents of that memo and its ramifications while they held positions, since 2004, in the state government and state prison system.

93. In 2005, the prisoners' rights group Prison Movement sent an informational briefing packet directly to then-Governor Schwarzenegger describing the threat posed by Valley Fever, and especially its threat to susceptible groups including African-Americans, Filipinos, elderly inmates and the immune-compromised.

94. Beginning in 2006-2007, and continuing yearly thereafter, a Fresno County Grand Jury undertook the task of evaluating inmate issues at PVSP and made a series of recommendations.

95. Beginning in 2007, the Grand Jury issued periodic public reports concerning Valley Fever incidence at PVSP. It observed that "[l]ocal prison officials are well aware of this health crisis . . . " and stated that inmates and staff continue to be at risk from Valley Fever.

96. The Grand Jury issued these reports, starting in 2007 and continuing each year thereafter, directly to Defendants Brazelton, Yates, and Cate, and to Mr. Kelso of the California Correctional Health Service, as well as to other CDCR officials, while they held office within, and oversaw, the state prison system.

97. In these reports, the Grand Jury required Defendants Yates, Cate, and Brazelton at a minimum to respond directly to the Grand Jury regarding these findings, under the authority of California Penal Code Section 919(b). Defendant Yates also sent copies of his response at a minimum to Defendant Cate, to Kelso, and other CDCR officials.

98. The Grand Jury found, consistent with common medical knowledge regarding the disease, that disease rates for all groups at the prison had increased dramatically since 2004 and that African Americans, Hispanics, Filipinos, and other Asians were at far greater risk from the disease than other ethnicities.

99. In addition to the other sources of information available to them, some of which are discussed further below, the Fresno Grand Jury findings informed Defendants Yates, Cate, Brazelton, each year from 2007 on, during the period each Defendant was employed in the state prison system, that inmates like Plaintiffs were at increased risk from Valley Fever and susceptible to potentially fatal health consequences as a result, if they were housed at or remained at PVSP.

100. Despite his personal knowledge of the threat of Valley Fever, including on information and belief, the information provided to him about the risks of increased exposure to the spores that cause Valley Fever by construction activity, in September 2007 then-Governor Schwarzenegger proposed that the state construct new dormitories at PVSP to expand by 600 the number of beds located and prisoners housed there.

101. At a press conference called to announce the expansion plans, Governor Schwarzenegger responded to questions about the fact that the proposed expansion

would inevitably expose more prisoners to the disease. Defendant Schwarzenegger indicated he would deliberately disregard the risk of exposing large numbers of additional prisoners to Valley Fever, stating: "We will go ahead and build."

102. On information and belief, as described herein, by the time of the press conference Defendant Schwarzenegger was fully informed that inmates housed at PVSP, and at the hyper-endemic prisons in general, were at a greatly increased risk of contracting Valley Fever, that racial and ethnic minorities were particularly susceptible to these risks, and that preventative measures such as ground cover to control spores were recommended but not implemented, and that the risks would be increased by the construction. Governor Schwarzenegger's comments at the press conference evidenced his deliberate indifference to those risks.

103. Further, CDCR publishes and distributes an Orientation Manual for all medical personnel. The Manual discusses the coccidioides epidemic in detail and specifically notes that African Americans, Filipinos, and those with compromised immune systems or chronic diseases are at greatly increased risk for contracting Valley Fever in its most deadly form.[31]

104. The orientation manual is authorized and promulgated by Defendant Winslow, the Chief Physician Executive at CDCR. Winslow clearly knew of the increased risks but took no other steps to prevent Plaintiffs' infection.

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31 Imai & Winslow, M.D.'s, Department of Correctional Healthcare Services, "*Letter from the Chief Physician Executive*, January 23, 2008.

105. All medical personnel and facility management at CDCR were aware of the information in the Orientation Manual and its implications for inmates housed at hyper-endemic prisons.

106. Defendants were provided with numerous others sources of information that further confirmed and reinforced the risk to inmates including Plaintiffs.

107. In 2006 the California Department of Public Health, Center for Infectious Disease conducted an epidemiological study of Valley Fever in California prisons (the "Study"). The Study was published in January 2007.

108. The Study found that the number of cases of Valley Fever reported at PVSP in 2005 was 3 times that of the entire rest of Fresno County combined. The Study reported that any persons with suppressed immune systems as a result of disease or medications which are immune-suppressive, such as those for chronic arthritis, are at extremely high risk of the deadliest form of Valley Fever, as are African-Americans, Hispanics, Filipinos and other Asians.

109. The Study recommended that CDCR evaluate relocating the highest risk groups to areas that are not hyper-endemic to Coccidioides, and at a minimum, to take steps at the prisons to minimize exposure, including ventilation, respiratory protection, and dust suppression and soil control.

110. On information and belief, each of the Defendants was at all relevant times aware of the CDPH Study and familiar with its conclusions regarding inmates, Valley Fever, and suggested mitigation measures.

111. Further, CDCR published general-circulation policy memos in both 2006 and 2007 regarding Valley Fever at PVSP and other hyper-endemic prisons.

112. On information and belief, each of the Defendants other than Defendant Schwarzenegger received copies of these particular memos, and in the normal course of their duties was expected to read and understand both the memos and the underlying information available to CDCR staff regarding Valley Fever at PVSP and the other hyper-endemic prisons.

113. In 2007, CDCR Facilities Department Senior Management officials including Defendant Hysen stated that they were preparing to implement measures to reduce the risk to inmates of contracting Valley Fever at PVSP.

114. The planned remedial actions included extensive measures to control inmates' exposure to contaminated soils outside buildings and greatly improved ventilation systems to prevent exposure inside buildings.

115. Not a single element of this remedial plan was implemented until six *years* later, and only after two contested court orders forced the agency to act. CDCR management asserted that they supposedly considered the remedial plan "too expensive." The comprehensive planned remedial program was estimated to cost $750,000; one of the options, which was considered capable of reducing inmates' risk of infection significantly, cost only $110,000.[32] Defendants failed to implement even that limited-cost option.

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[32] January 2007 Memorandum from Yates to Schwartz, re: remedial measures at PVSP.

116. CDCR now spends $23 million each year treating inmates infected with Valley Fever.

117. The New York Times quoted Defendant Yates in 2007 regarding the Valley Fever epidemic at his prison, PVSP, in a story on Valley Fever at California prisons. Yates surmised to the Times that inmates and staff at PVSP contracted the disease by breathing in spores from the air as they "walk around out there."[33]

118. Defendant Yates was clearly aware of the risks and the exposure pathways subjecting inmates at PVSP to Valley Fever certainly no later than 2007, and almost positively in the years before.

119. In June 2007, the California Department of Health Services (CDHS) offered specific recommendations for reducing Valley Fever incidence among CDCR inmates. CDHS recommended that CDCR consider relocating all inmates "from this institution [PVSP] to institutions with rates of cocci equal to or better than their local community rates."[34]

120. Further, in August 2007, the Prison Legal News (PLN), a specialty periodical of extensive circulation in the prison community, ran as its cover story an investigation of Valley Fever at California prisons.[35] The PLN cover story described in detail the source, exposure pathways, prognosis, and risk factors for the

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33 "*Infection Hits a California Prison Hard*," New York Times, December 30, 2007. Yates reported that 26 PVSP staff members had filed workers compensation cases based on Valley Fever.

34 *Winslow Recommendations*, June, 2007.

35 "*California Prison Beset by Deadly Valley Fever Epidemic*," Prison Legal News (June 2008), Vol. 19, p. 22.

disease and its endemic presence in the subject California prisons.

121. Despite their actual knowledge of the risk and the appropriate remedial actions, Defendants took little to no action to address the greatly increased risks to inmates at these prisons or to keep inmates away from the risk.

122. In April, 2012, the California Correctional Health Care Services (CCHCS) released a report titled, "*Coccidioidomycosis in California Adult Prisons, 2006-2010.*" The Report received general circulation among CDCR staff including specifically Wardens and Unit Managers and executives.

123. The CCHCS Report found that CDCR had done nothing between 2006 and 2010 that had any effect on cocci incidence rates at PVSP and ASP. This failure to act continued for years and confirms Defendants' deliberate indifference.

124. The Report reiterated that Valley Fever incidence rates at the hyper-endemic prisons were drastically elevated, and that African-Americans in particular were at increased risk from Valley Fever and of suffering its lethal form. The Report found that African-American inmate men died from cocci at far higher rates than unincarcerated African-Americans in California and much higher rates than the general inmate population.

125. The CCHCS Report found that PVSP in particular had extensive areas of unstabilized soil on its grounds, posing an extreme risk of spore release, transport, and infection and noted that simply " . . . planting lawns and paving roads reduced the rate of coccidiodal infection by one-half to two-thirds," based

on results at a military installation that had been studied.

126. The Report concluded that "the incarceration of individuals . . . in prisons within the endemic areas will continue to provide a stream of challenging and costly cases of coccidioidomycosis."

127. In addition to the massive numbers of inmates infected with Valley Fever, over 80 CDCR facility staff members have contracted Valley Fever to date, and at least one CDCR corrections officer has died from the disease.

128. Each Defendant at all relevant times possessed sufficient information, common throughout the organization, that exposure to spore-infested soils at the eight California hyper-endemic prisons posed an unacceptably high risk of life-long Valley Fever infection, illness, and death, to inmates located at the hyper-endemic prisons.

129. At all times, all Defendants have had ready access to information concerning an inmate's racial and ethnic composition as part of his central file; classification and facility management are required to consider each inmate's racial make-up for purposes of appropriate housing determinations. Defendants nevertheless took no action, either to exclude at-risk inmates from the hyper-endemic prisons or to make those prisons safer.

E. Defendants Had the Power to Assign or Transfer Every Susceptible Inmate Away from the Danger

130. Defendants had the ability to divert all at-risk inmates away from the high-risk prisons in the initial facility assignment process.

131. At all relevant times, CDCR had robust, systematic procedures to match inmates to facilities but Defendants failed to use or to adapt those procedures to identify at-risk inmates or prevent their assignment to the hyper-endemic prisons.

132. The classification scoring system that drives CDCR's housing placement decisions under Title 15, § 3375(b), allowed Defendants to consider environmental risk to an inmate's health, allowing consideration of an inmate's "needs, interests and desires, his/her behavior and placement score in keeping with the Department and institution's/facility's program and security missions and public safety."

[. . .]

(vi) such other relief as the Court deems just and proper.

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Date: November 10, 2014

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Date: November 10, 2014

SMITH & GREGGE
CONSOLIDATED OPENING BRIEF

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SMITH, ET AL.,

Appellants,

v.

SCHWARZENEGGER, ET AL.,

Respondents.

GREGGE,

Appellant,

v.

CATE, ET AL.,

Respondents.

Smith Ninth Circuit Case No.: 15-17155
Gregge Ninth Circuit Case: 15-17201

Smith E.D. No. 1:14-cv-00060-LJO-SAB
Gregge E.D. No. 1:15-cv-00176-LJO-SAB

Consolidated Appeal Case No: 15-16145 (Hines)
Consolidated Appeal Case No: 15-17076 (Jackson)

On Appeal from the United States District Court,
Eastern District of California
Hon. Lawrence J. O'Neill, Judge Presiding

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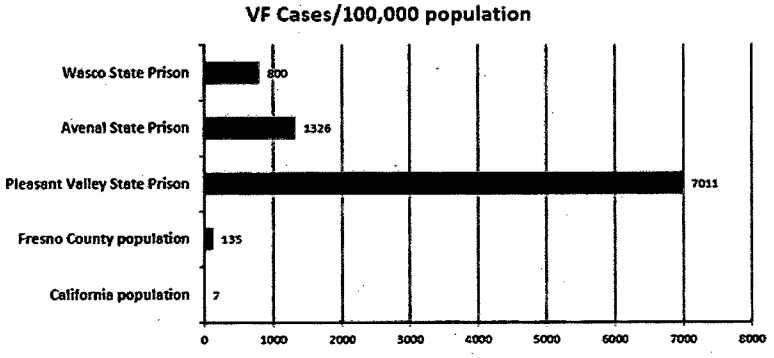
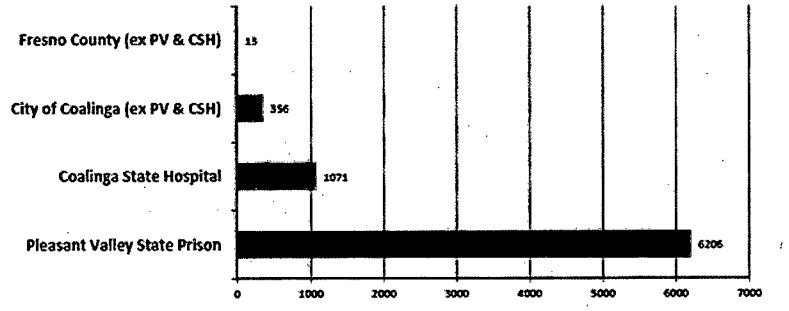
APPENDIX A

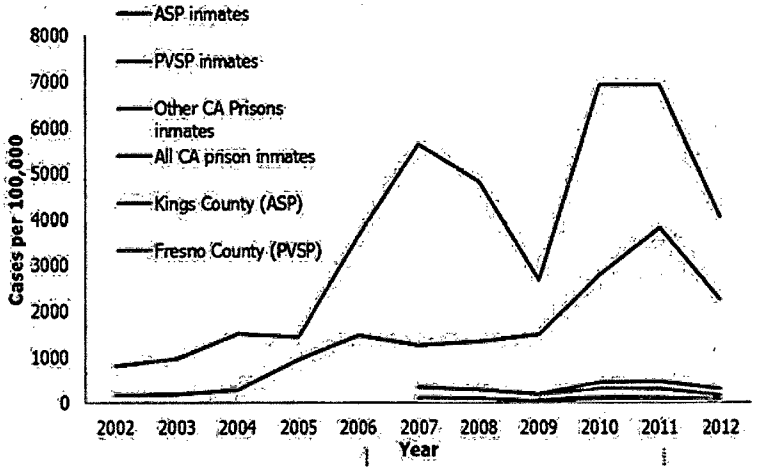
Coccidioidomycosis Incidence Rate
PVSP/ASP/WASCO v. Surrounding Area (2006-2010)



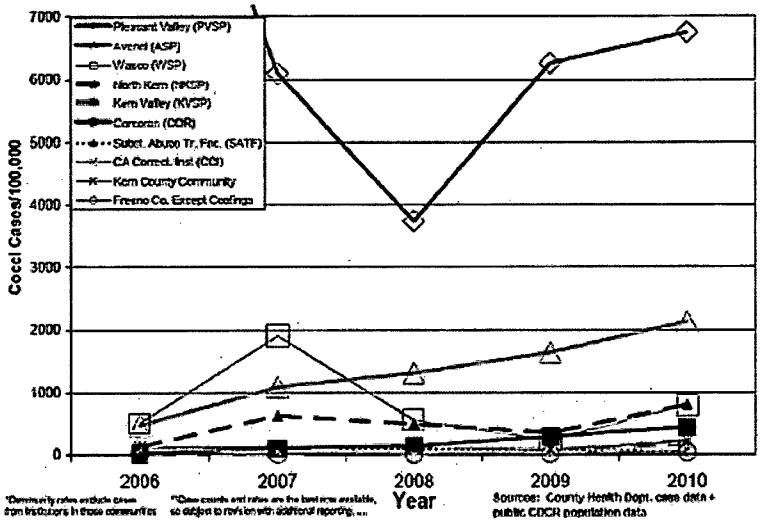
Coccidioidomycosis Incidence Rate
PVSP v. Local Area (2006-2010)



Coccidioidomycosis Incidence Rate
PVSP/ASP v. Surrounding

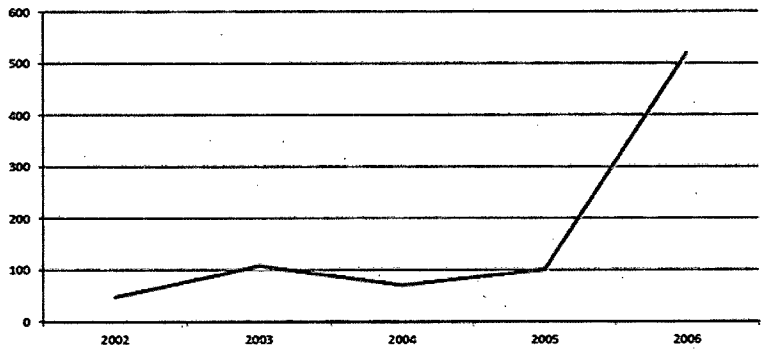


Coccidioidomycosis Incidence Rate
PVSP v. Between Prisons (2006-2010)

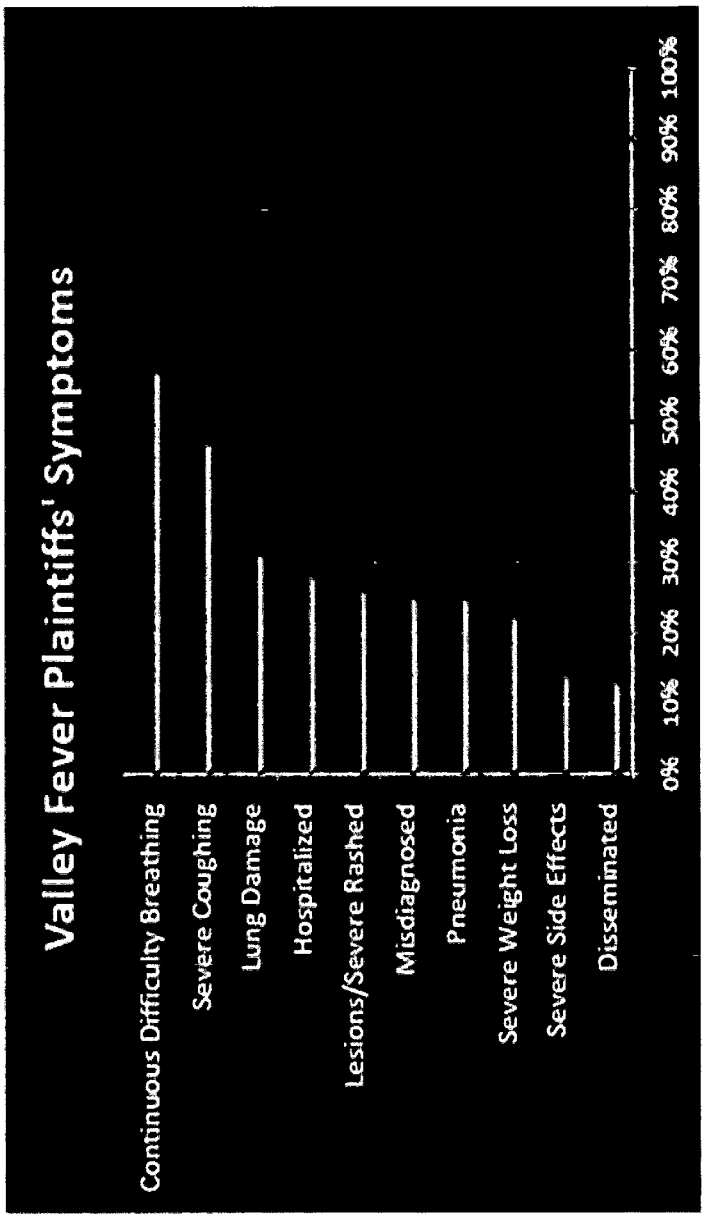


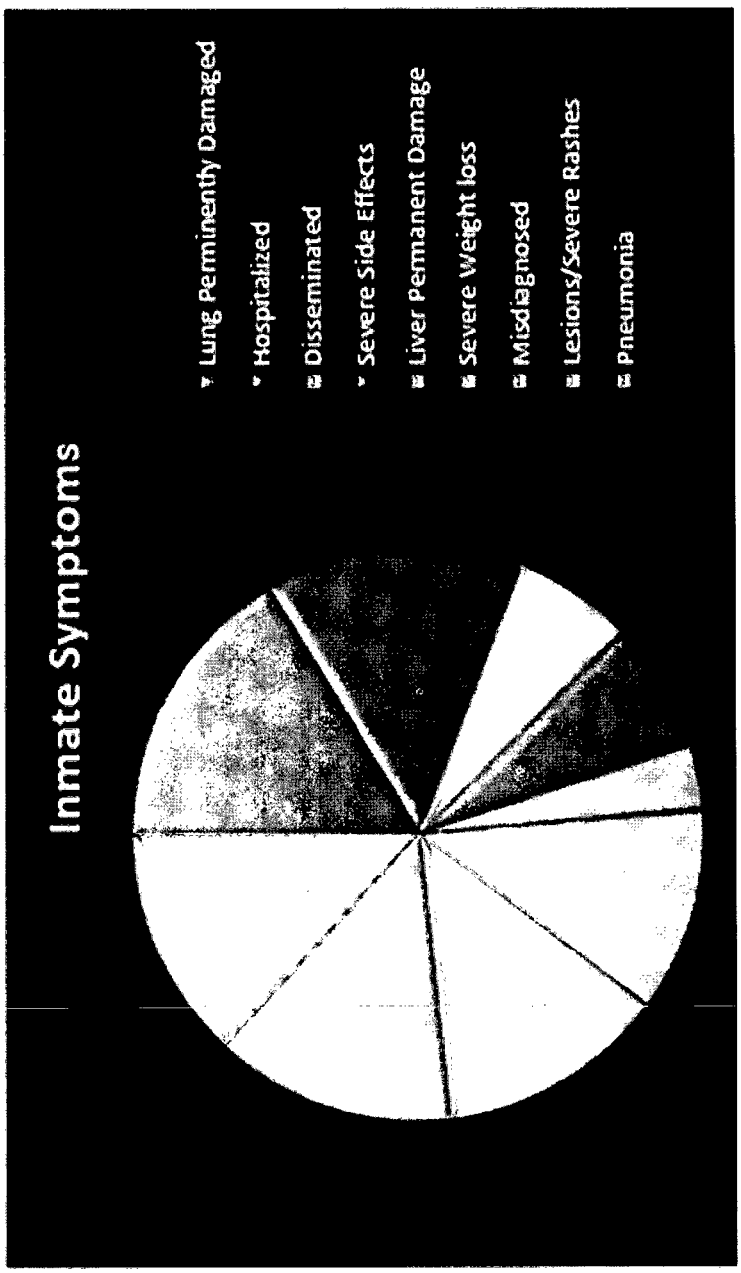
Coccidioidomycosis Incidence Rate PVSP (2002-2006)

Pleasant Valley State Prison



APPENDIX B


Valley Fever Plaintiffs' Symptoms
Continuous Difficulty Breathing
Severe Coughing
Lung Damage
Hospitalized
Lesions/Severe Rashed
Misdiagnosed
Pneumonia
Severe Weight Loss
Severe Side Effects
Disseminated
0%
10%
20%
30%
40%
50%
60%
70%
80%
90%
100%


Inmate Symptoms
Lung Perminenthy Damaged
Hospitalized
Disseminated
Severe Side Effects
Liver Permanent Damage
Severe Weight loss
Misdiagnosed
Lesions/Severe Rashes
Pneumonia

SUMMARY OF SYMPTOMS

Symptom	Description	No.
Disseminated Coccidioidomycosis	Disease has spread to other parts of their body and they now suffer some combination of infection of the brain or spine, loss of the ability to walk, loss of use of extremities, have undergone spinal surgery, suffer from masses or nodules in their lungs, or live with permanent damage to other organs.	22
Permanent Lung Damage	These include masses, lesions, nodules and other impairments that compromise the function of breathing.	45
Severe Rashes	Half of this pool report severe, disfiguring lesions	42
Hospitalized	Some numerous times, and some were in bed for 20-30 days at a stretch	45
Liver Problems	Liver damage or liver failure, including some who required transplants.	11
Side Effects	Kidney and liver damage, resulting surgery, infections, and painful skin sores.	22

Misdiagnosed/ Undiagnosed	Inmate went undiagnosed or misdiagnosed even with severe & stereotypical valley fever symptoms resulting in future severity and complications.	39
Severe Coughing	25% vomit blood on a regular basis	75
Pneumonia	Infection of the lung inflaming air sacs in lungs causing cough with phlegm or pus, fever, chills, difficulty breathing.	39
Difficulty Breathing	Continuous and often painful	90

CATALOG OF COMPLICATIONS
By Symptom/Inmate

Disseminated Coccidioidomycosis

Baker, Beagle, Bustamonte, Campbell, Chaney, Clark, Duran, Garza, Gregge, Imuta, Infinity, Manning, Maeschack, McDonald, Miller, Morrow, Richardson, Romo, Stewart, Thomas Louis, Westbrook, Williams Xavior

Can't Afford Medication

Barnett, Beagle, Bond, Boyd, Infinity, Mermejo, Montgomery, Romo, Ruggles, Sanchez

Cough Up/Vomit Blood

Call, Clark, Dominguez, Gamboa, Haynes, Masushige, Montgomery, Peav, Rayburn, Sanders, Talamantes Call,

Clark, Dominguez, Gamboa, Haynes, Masushige, Montgomery, Peav, Rayburn, Sanders, Talamantes

Medication Severe Side Effects

Atzet, damaged his liver: Bess dizziness, headaches, vomiting, diarrhea, and indigestion discontinued: Bonds pain in mouth sides & stomach (not sure if discontinued): Burkes discontinued due to side effects: Dallas diflucan too toxic for liver: Franklin infection in hands & feet: Garner skin sores: Masushige bleeding lip; Morales, renal tubular acidosis & hepatotoxicity; Newsom, pigmented macular eruptions: Ripoyla, liver damaged: Stewart, can't walk, 3 blood transfusions: Talamantes, headaches, nausea, coughing up blood, dizziness: Torres Enos, liver damage: Torres Robles allergic reactions: Vasquez side effects: Wiley, Thomas skin discoloration: Wiley William, can't be in sun, surgery on hip & back: Williams Darren severe side effects: Williams Xavior severe side effects: Wood Crohns: Woods severe side effects

Liver Damaged/Failing

Atzet, Beagle, Belardes, Boland, Call, Conley, Dallas, Dominguez liver transplant, Miller, Morales, Ripoyla damaged by medication

Severe Weight Loss

Arechiga, 23 lbs: Aubrey, 30lbs: Call, severe: Clark: Cooper: Creswell 20 lbs: Dallas 25-30 lbs: Doss; Ferris; Galloway; Haynes; Jackson; Lewis Cleofas; Lewis, George; Masushige: Milford, Miller, Mitchell, Moody, 30 lbs, Neal 13 lbs in two weeks: Peirce: Rayburn; Richardson: Sanchez: Sepulvada: Smith Kirk: Steels: Thomas Maurice: Utley: Vasquez: Washington Kenneth: Wiley Williams: Williams

Hospitalized

Adams twice; Chaney, Clark 20 times, Corley, Cox, Dallas, Farr, Ferris 30 days, Franklin 3 weeks, Gonzalez, Grant, Haynes, Imuta, Infinity surgery, Jalotjot, Klvana, Manning, Ellis, McDonald (Brandon); McDonald (jeffery): Meza: Milford: Molen: Moody (3 days): Morales: Morrow 41 days; Romero two spine surgeries; Romo: Sanchez 9 days: Spence: Stewart for 4 months: Thomas Josh 1 month: Thomas Maurice: Thompson, Tyrone: Torres-Enos: Villanueva: Wallace a month with 3 different surgeries: West, for emergency testing & Xrays: Westbrook: Wiley William: William Xavior, lung & spine: Wood, blood transfusion 6 days: Wright, 6 months: Yount

Lungs, Mass, Liquid or Permanently Compromised

Adams fluid: Baker compromised; Barnett compromised; Belardes fluid; Boland nodules; Burks pathology; Campbell; Campos heavy spots on lungs; Conley spot & damaged; Cox mass & liquid; Dibble, fluid: Dickson chronic lung inflammation: Dominguez lungs permantly scarred; Duran, drs say partial removal of lung; Farr; Felder; Garza COPD & blood clots in lung; Grant, mass on lung; Harris, lesion on lung: Haynes lesion: Imuta mass; Jackson growth on lung: Jalotjot, fluid on lung: McCloud, lung capacity greatly diminished & copd: McDonald (Brandon), lung problems: McDonald, Jeffery fluid in lungs:Mermejo, fluid in lungs: Montgomery, fluid: Moody (spots on left lung): Ngoun, scar tissue on both lungs & fluid: Ocular, nodules & scar tissue; Pierce spot on lung: Preston, masses on lungs; Romo, scarring & nodule: Ruggles, white section on lungs; Sams pneumonia in right lung: Sanchez, collapsed lung: Sepulvada, permanent lung damage: Spence, right lung removed: Thomas Josh, nodule on

left lung: Tyler lung problems: Torres Robles sharp pain in lungs when breathe: Vasquez lobe pneumonia: Villanueva, lung pain: Washington Kenneth scarred lungs: West upper lobe infiltrated with VF: Williams Rodney scarred lungs: Wood nodule on lung: Woods scar tissue on lung: Wright fluid in lungs: Yount dimished left lung capacity:

COPD

Flowers, Garza, Morales, McCloud, Molen, Washington Ken,

Misdiagnosed; Undiagnosed; Had to Request A VF Test Even with Severe Symptoms; Not Given Treatment; Not Given Medication

Bruce: Bustamonte: Call: Campbell: Carter: Dejesus: Donaldson told too early to test: Duran: Gamboa, pneumonia: Gonzales: Grant ringworm: Hollis: Imuta: Johnson Adrian pneumonia: Klvana told pneumonia: Martinez, given allergy pills; McDonald (Jeffery), cold & pneumonia: Mermejo, flu: Miller, Hep C: Montgomery was refused test: Moody denied test & told allergic reaction to medication, given sinus pills: Morales pneumonia: Morrow, pneumonia: Ngoun diagnosed as gas: Peav, allergies: Penalva, one dr said VF another not: Pierce spot on lung = cancer: Preston, discontinued medication told he was cured: Roach pneumonia: Roberts taken off medication told he didn't have VF anymore: Romo, told nothing wrong: Ruggles told he was white so couldn't get VF, then ignored symptoms: Sherrod, wasn't diagnosed till a year after symptoms: Smith Corey, told medication discontinued when he went to refill or his chart was lost: Smith Leroy no medication prescribed after diagnosis: Thompson Tyrone, didn't implement hospital treatment plan:

Williams Darren, not given any treatment for symptoms until diagnosed: Wright, diagnosed as flu: Yount pneumonia

Blood Clots

Johnson, Daniel: Beagle: Garza: TorresEnos

Kidney Failure

Call: Jones: Maeschack: Morales: Peav: Spence renal failure:

Lesions

Koklich, Baker, Burke, Galloway, Lewis (Asad), Manning; Moody skin boils & lesions in nostrils; Peirce sores & rash on face, hands, feet, legs: Rodriguez: Romo lesions legs & feet: Tillis rashes & lesions: Tyler lesions on chest: Wallace sores & blisters on legs: Wiley Thomas black sores: Wood sores on lower body

Rashes

Adams: Arechiga: Aubrey: Baker: Barnett: Beagle: Bracamonte: Carter: Donaldson: Grant: Kerner: Lewis George: McCloud: Montgomery, rash & scaling skin: Newson: Ocular: Peav: Reyes: Richardson: Roach: Sams, rashes on legs: Smith Corey: Villanueva: Williams Rodney: Williams Xavior: Woods rashes black spots: Yancy rashes

Lost/Amputated Limbs

Martinez Juan lost use of left arm; Miller- lost use of left leg

Seizures

McDonald, Jeffery: Koklich

Heart Problems

Farr, Mcdonald (Jeffery), Meza, Sams (enlarged heart & heart disease), Sanders erratic heart beat: Smith Kirk, heart attack

Internal Bleeding

Penalva

Treatment Complicated Because of Prior Illnesses:

Atzet Hep damage to liver: Belardes Hep C liver degrading: Boland Hep C liver disease: Creswell diabetes: Maeschack chronic kidney disease: Westbrook, cancer: Yancy can't be treated for Hep C:

Urinating Blood

Robinson

Nerve Damage

Dejesus, Romero, Maeschack, Mitchell, Pierce

Pneumonia

Rodriguez, Belardes, Bruce, Burks, Call, Campos, Carter, Castaneda, Chaney, Dallas, Dominguez, Farr, Felder, Franklin, Gamboa, Garza, Hollis, Johnson, Klvana, Maeschack, Masushige, McDonald, Morrow, Preston, Reyes, Roach, Rodriguez, Romo, Sams, Sanders, Smith Corey, Steels, Stewart, Talamantes, Thomas Louis, Torres Enos, Torres Robles, West, Vasquez Roberto

Restricted Mobility

McQuarn wheelchair: Romero: Smith Kirk can't walk: Spence walker: Stewart can't walk: Thompson Tyrone wheelchair: Wiley William can't stand up straight: Wright confined to wheelchair

Spine

Aztet abscess in spine: Campbell, lumbar surgery destroyed disks: Clark: Infinity: Koklich: Robinson: Romero surgery: Peirce deteriorating disks

Surgery

Campbell, lumbar surgery: Romero spine: Wiley William, remove portion of back: Williams Xavior Spine & lung: Infinity removal of cocci mass on left side & spine: Sams spleen removed

Can't See

Wright: Abukar; Garner

SMITH & GREGGE
CONSOLIDATED AMENDED REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SMITH, ET AL.,

Appellants,

v.

SCHWARZENEGGER, ET AL.,

Respondents.

GREGGE,

Appellant,

v.

CATE, ET AL.,

Respondents.

Smith Ninth Circuit Case No.: 15-17155
Gregge Ninth Circuit Case: 15-17201

Smith E.D. No. 1:14-cv-00060-LJO-SAB
Gregge E.D. No. 1:15-cv-00176-LJO-SAB

Consolidated Appeal Case No: 15-16145 (Hines)
Consolidated Appeal Case No: 15-17076 (Jackson)

On Appeal from the United States District Court,
Eastern District of California
Hon. Lawrence J. O'Neill, Judge Presiding

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REPLY INTRODUCTION

Government inaction in the face of an epidemic meets and exceeds the definition of plain incompetence. Defendants here seek not just exoneration for their mistakes but immunity from suit altogether, by claiming they did not have sufficient notice to take precautions. Yet, they ignored a stack of health warnings, three unpublished opinions from this Court, lessons from *Helling v. McKinney* taught 25 years ago, 30 lawsuits by panicked prisoners, and a uniform body of case law going back to the days of disco that informed them to protect prisoners from diseases.

Notice is not the problem here; parsimony is.

Defendants claim a difference between naturally-occurring toxins versus man–made ones. There is none. They argue that because society tolerates some level of exposure to cocci spores, it tolerates exposure at any level. It does not.

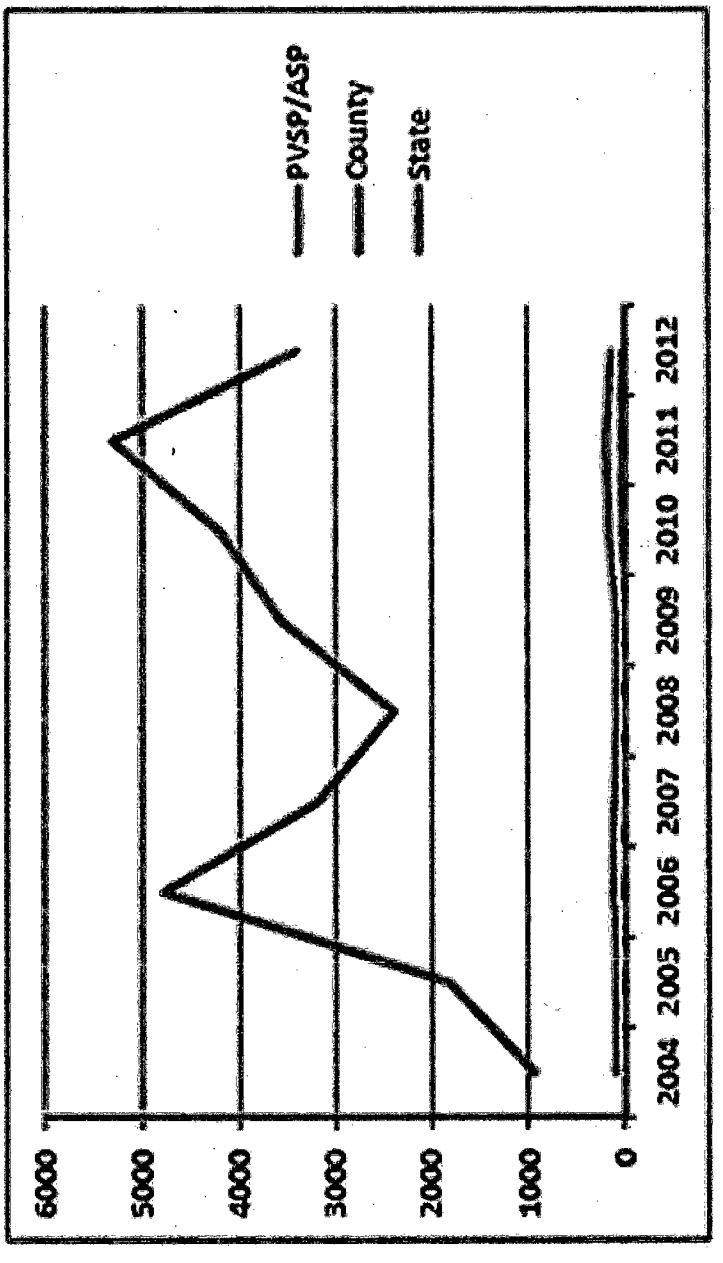
Table 1 below reflects judicially-noticeable rate statistics comparing rates between PVSP/ASP, their surrounding counties and the state. The data reveals that it was 10-50 times more dangerous to be inside the subject prisons than to be in the Central Valley, and 100-500 times more dangerous than the state as a whole. *See* Appendix C [Tables 1, 2, 3, 3A, 4A, 4B, 4C, 4D].)

Table 1

Showing the raw rates from Columns 2-4 above:

Year	CA State Rate/ 100K	Central Valley Rate/ 100K	PVSP-ASP Rate/ 100K	PVSP-ASP/ State Rate	PVSP-ASP/ Central Valley	Severity	Action Taken
2003-04	6.7	88.6	936	139x	11x	Epidemic	None
2005	8	83.5	1822	228x	22x	Epidemic	None
2006	8.7	107.7	4784	550x	44x	Epidemic	None
2007	8.2	104.9	3192	389x	30x	Epidemic	Policy (narrow)
2008	7	71.0	2397	342x	34x	Epidemic	None
2009	6.7	70.0	3561	531x	51x	Epidemic	None.
2010	12.4	159.7	4203	338x	26x	Epidemic	None
2011	14.6	188.7	5306	363x	28x	Epidemic	"Soil sealant"
2012	11.7	131.3	3412	292x	26x	Epidemic	None

RATE/100K


PVSP/ASP
County
State
6000
5000
4000
3000
2000
1000
0
2004 2005 2006 2007 2008 2009 2010 2011 2012

Thus, to validate the State's "society" argument, this Court would have to agree that the Central Valley population would accept a risk of contracting coccidioidomycosis if residents were 10-50 times more likely to contract it—if, effectively, they would be willing to live on the blue line in PVSP/ASP's epidemic.[1]

State officials contend more generally that they were not given specific enough guidance from the courts in terms of how to handle the matter.[2] Yet, it is not the courts' function to micromanage safe prison practices. Officials were liberally provided health warnings, scientific reports and professional recommendations to guide them.

Notice is not the problem in this situation. State prison authorities have been defying the courts for 15 years on issues relating to inmate health, most prominently in the *Plata* action, but not insignificantly with respect to injunctive relief ultimately obtained in that action relating to this epidemic.

The sheer magnitude of the health risks in this case—and documented physical consequences, *see* Appendix B in the opening brief—satisfy all of the

---

[1] These events have been described as an "epidemic" by the California Department of Health (RJN 39), Judge Henderson (RJN 274) and the New York Times (RJN 93). There was an epidemic formally declared in Kern County in 1990, when rates reached 572/100K. Rates at PVSP/ASP were 2-20 times higher. *See* Appendix C, Tables 4A, 4B.

[2] "DAB" refers Dr. Winslow and Dr. Igbinosa's Answering Brief, the "medical officials." The remaining defendants are identified as the "prison officials" and "SAB" for State's Answering Brief. When reference is to all Defendants, Plaintiffs use the term "Defendants," "officials," or "state officials."

various deferential formulations delineated in the case law that otherwise might insulate officials based on the doctrine of qualified immunity:

- no reasonable officer could think that inaction in response to what was clearly an epidemic would comply with the 8th Amendment. *Pearson v. Callahan*, 555 U.S. 223, 244 (2009).
- prison officials had "fair warning" to act over the epidemic's 10-year course, given numerous warnings and reports provided to them early on. AOB 24.
- officials' made no "mistake" of law, mistake of fact, or other reasonable mistake (*Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011); *Blankenhorn v. Orange*, 485 F.3d 463, 471 (9th Cir. 2007)). Officials, well aware of the epidemic, nevertheless decided that inmate safety was not a priority. 4 AER 572-581.
- the contours of the Eighth Amendment were "sufficiently clear" to alert every reasonable state official that protective action was required in response to the spread of disease at this pace, given explanatory standards stated in the *Helling* and *Farmer* opinions;
- the volitional refusal to take any serious, precautionary action in light of the magnitude of this danger cannot be classified as anything but "plain incompetence." *Ashcroft v. al–Kidd*, 563 U.S. 731, 743 (2011);
- and prison officials "knowingly" violated the Eighth Amendment by exposing inmates to cruel and unusual punishment, given their intentional

> decision to subject mass numbers of prisoners to what is an indisputably serious respiratory disease. 4 AER 585-586.

No matter how many iterations of analysis may emanate from the original principles undergirding the qualified immunity doctrine, no deferential standard will ever so abrogate principles of responsible penology as to validate the decision of prison officials to ignore an epidemic.

STATEMENT OF FACTS

A statement of Facts Was Set Forth in the Opening Brief. Plaintiffs Note a Few Undisputed Matters.

Neither the prison officials nor the medical officials dispute that for over 50 years, employers in the area have taken precautions for people working in the area. State officials did not.

There is no dispute that rates started climbing as early as 2003 and that the 2004 Kanan memo alerted officials about the severity of the problem. Defendants do not dispute that they were provided a litany of warnings in relation to the epidemic. There is no debate that construction of the state hospital next to PVSP aggravated the situation and partly explains the spike of infections. There is no challenge to the fact that rates at PVSP peaked at 1000 times the broader California state rate, 600 times the rate of Fresno County and 38 times the City of Coalinga.

They do not deny that a wave of inmate lawsuits were filed complaining of unlawful contraction prior to the initiation of the instant litigation. *See* Appendix E.

They do not deny that the district court did not seriously consider the facts of this case in making his rulings, instead deferring to the holdings of other district courts in other valley fever cases, which were uniformly pled by unsophisticated litigants.

In terms of the disease's seriousness, no one denies that the disease is incurable. The medical officials do not dispute that coccidioidomycosis is serious and prison officials have twice admitted as much. Neither challenges that mitigation requires powerful anti-fungal drugs, with significant side effects.

There is no debate that expert recommendations included spending $750,000 to install ground cover, which was found to work well in a study for the military in the 1940's, but was declined by PVSP's warden, James Yates, citing cost. Instead, the state spent $23M/year treating the infections.

APPENDIX C

CONTRACTION RATE/100K (PVSP/ASP, COUNTY, STATE)

APPENDIX C-TABLE 1

YEAR	CA State Rate/ 100K[1]	Central Valley Rate/ 100K[2]	PVSP-ASP Rate/ 100K[3]	PVSP ASP/ State Rate[4]	PVSP ASP/ Central Valley[5]
2003-04[6]	6.7	88.6	936	139x	11x
2005	8	83.5	1822	228x	22x
2006	8.7	107.7	4784	550x	44x
2007	8.2	104.9	3192	389x	30x
2008	7	71.0	2397	342x	34x
2009	6.7	70.0	3561	531x	51x
2010	12.4	159.7	4203	338x	26x
2011	14.6	188.7	5306	363x	28x
2012	11.7	131.3	3412	292x	26x

1 Derived from Table 2.

2 Derived from Table 3A.

3 Derived from Table 4C.

4 Derived by combining data (rates) from Tables 4A and 4B and dividing by State Rate.

5 Derived by combining data (rates) from Tables 4A and 4B and dividing by CV Rate.

6 Averaged, given constraints of the data.

RATE/100K OF VALLEY FEVER CASES
CALIFORNIA STATEWIDE

APPENDIX C-TABLE 2

Year	California Population	VF Cases all of CA[2]	CA Rate #/100K[3]
2003	35,253,159[1]	2,091[2]	6
2004	35,574,576[1]	2,641[2]	7.4
2005	35,827,943[1]	2,885[2]	8
2006	36,021,202[1]	3,131[2]	8.7
2007	36,250,311[1]	2,991[2]	8.2
2008	36,604,337[1]	2,597[2]	7
2009	36,961,229[1]	2,488[2]	6.7
2010	37,253,956[1]	4,622[2]	12.4
2011	37,536,835[1]	5,475[2]	14.6
2012	37,881,357[1]	4,431[2]	11.7
2013	38,239,207[1]	3,272[2]	8.5
2014	38,567,459[1]	2,243[2]	5.8
Average	36,830,964	3,239	8.79

1 Census data derived from U.S. Census Bureau (RJN 315 [Ex 89].) (URL [as of 06/04/2016]: https://www.census.gov/popest/data/intercensal/state/state2010.html)

2 Figures derived from Center for Disease Control, VF Statistics (RJN 310-311 [Ex. 88].) (URL [as of 06/04/2016]:
http://www.cdc.gov/fungal/diseases/coccidioidomycosi

s/statistics.html); see also Epidemiologic Summary of Coccidioidomycosis in California, 2009-2012 (RJN 241 [Ex. 79].)

NUMBER OF VF INFECTIONS BY YEAR WITH POPULATION FIGURES BY COUNTY

APPENDIX C-TABLE 3

	FRESNO COUNTY	Rep't Rate/ 100K	Avg. Rate/ 100K	KINGS COUNTY	Avg. Rate/ 100K	KERN COUNTY	Avg. Rate/ 100K
	#Cases / Population			#Cases / Population		#Cases / Population	
2003	141[2]/ 853,057	16.4[2]	16.4	50[4]/ 140,688	35.5[4]	1232[2]/ 728,872	169.0[2]
2004	122[1] 132[2]/ 866,058[1]	14.1[1] 15.1[2]	14.6	72[4]/ 143,607	50.1[4]	1463[2]/ 750,969	194.8[2]
2005	291[1] 338[2]/ 897,128[1]	32.4[1] 37.9[2]	36.3	127[4]/ 146,045	86.9[4]	1518[2]/ 774,062	196.1[2]
2006	744[1] 680[2]/ 893,088[1]	83.3[12] 74.7[2]	79.7	231[4]/ 148,933	155.1[4]	1037[2]/ 795,982	130.2[2]
2007	450[1] 417[2]/ 906,521[1]	49.6[1] 44.9[2]	47.8	138[4]/ 151,106	91.3[4]	1391[2]/ 812,830	171.1[2]
2008	309[1] 323[2]/ 918,560[1]	33.6[1] 34.1[2]	34.4	183[4]/ 151,816	120.5[4]	848[2]/ 825,503	102.7[2]
2009	518[1] 513[2]/ 929,758[1]	55.7[1] 53.2[2]	56.1	202[4]/ 152,717	132.2[4]	626[2]/ 837,074	74.7[2]
2010	726[1] 729[2]/ 936,089[1]	77.6[1] 74.1[2]	77.7	380[4]/ 152,533	249.1[4]	1979[2]/ 844,480	234.3[2]
2011	720[1] 723[3] 699[5] / 943,509[1]	76.3[1] 77.0[3] 75.1[5]	75.6	373[3] 376[1] 353[5]/ 151,774	242.0	2573[3]/ 2568[5] 849,982	302.4
2012	502[1] 479[3]/ 475[6]/ 953,179[1]	52.7[1] 50.5[3] 50.1[6]	50.9	220[6] 237[3]/ 151,127	151.2	1859[6] 1860[3]/ 861,164	215.7
2013	312[1] 307[3]/ 964,040[1]	32.3[1] 32.1[3]	32.1	89[3]/ 150,181	59.3[3]	1659[3]/ 873,092	190.0[3]

1 County of Fresno CPRA Response Letter, October 29, 2014. (RJN 285 [Ex 84]).

2 California Department of Health, Coccidioidomycosis Yearly Summary Report 2001-2010 (RJN 166 [Ex. 72].)

3 California Department of Public Health, "Yearly Summaries Of Selected General Communicable Diseases In California, 2011-2014" (RJN 292 [Ex. 85].)

4 CDH Yearly Disease Statistics 2001-2010 (RJN 176 [Ex. 73].)

5 CDH Yearly Summary of Coccidioidomycosis in California, 2011 (RJN 180 [Ex. 74].)

6 CDH Yearly Summary of Coccidioidomycosis in California, 2012 (RJN 237 [Ex. 78].)

NUMBER OF VF INFECTIONS BY YEAR WITH POPULATION FIGURES BY COUNTY

APPENDIX C-TABLE 3A

YEAR	TOTAL CV CASES[1]	CENTRAL VALLEY POPL'N[1]	RATE/ 100K
2003	1423	1,722,617	82.6
2004	1662	1,760,634	94.2
2005	1518	1,817,235	83.5
2006	1980	1,838,003	107.7
2007	1962	1,870,457	104.9
2008	1347	1,895,879	71.0
2009	1343	1,919,549	70.0
2010	3086	1,932,343	159.7
2011	3669	1,944,618	188.7
2012	2579	1,964,524	131.3

1 Derived from combining figures in Table 3.

NUMBER OF VF INFECTIONS BY YEAR PVSP

APPENDIX C-TABLE 4A

YEAR	PVSP	PVSP AVG	POPL'N	RATE/ 100K
2003	67[4] 107[1] 127[2] 128[5]	107	4479	2389
2004	70[1] 71[1] 67[4] 71[4]	70	5038[11]	1389
2005	100[1] 194[4] 194[4] 150[2] 150[5] 166[4] 241[4] 184[4]	172	4851[11]	3546
2006	520[1] 514[2] 514[5]	516	5096[11]	10125
2007	323[8]	323	5294[11]	6101
2008	193[8] 194[7]	194	5084[11]	3816
2009	301[8] 311[7]	306	4868[11]	6286
2010	311[8] 315[7]	313	4574[11]	6843
2011	317[3] 341[7]	329	4572[3]	7196
2012	164[7]	164	3644[12]	4501

1 Kern County Health Department Handout (within June 2007 SMD Report (Attachment 1) (RJN 69 [Ex 63].)

2 Kern County Health Department Handout (within June 2007 SMD Report (Attachment 2) (RJN 70 [Ex 63].)

3 Wheeler, Rates and Risk Factors for Coccidioidomycosis among Prison Inmates, Emerging Infectious Diseases, Vol. 21, No. 1, January 2015 (RJN 297 [Ex. 86].)

4 Letter to the Record, California Department of Health, January 12, 2007 (RJN 52 [Ex 5, p. 72].)

5 Fresno County Grand Jury Final Report 2007-2008 (RJN 121 [Ex. 67, p. 153].)

7 County of Fresno CPRA Response Letter, October 29, 2014 (RJN 285 [Ex. 84].)

8 "Coccidioidomycosis in California Department of Corrections and Rehabilitation Institutions," (October 2012) (RJN 209, 221 [Ex 77].)

11 "California Prisoners & Parolees" (2004-2010) (RJN 17 [2004], 25 [2005], 33 [2006], 102 [2007], 141 [2008], 155 [2009], 163 [2010]; Exs. 59, 60, 61, 66, 68, 70, 71.)

12 Department of Corrections and Rehabilitation, Monthly Population Report (January 3, 2013) (RJN 246, Ex. 80)

NUMBER OF VF INFECTIONS BY YEAR ASP
APPENDIX C-TABLE 4B

YEAR	ASP[1]	ASP AVG[5]	ASP POP.	ASP RATE/ 100K
2003-04	22[2]	22[5]	7104[11]	310
2005	47[2]	47[5]	7172[11]	655
2006	91[2]	91[5]	7591[11]	1199
2007	81[8]	81[5]	7363[11]	1100
2008	85[8]	85[5]	6556[11]	1297
2009	109[8]	109[5]	6786[11]	1606
2010	127[8]	127[5]	5894[11]	2154
2011	218[3 9]	218[5]	5738[3]	3799
2012	140[7] 121[4]	130[5]	4973[12]	2614

1 Number of reported ASP cases by year.

2 Kern County Health Department Handout (within June 2007 SMD Report (Attachment 2) (RJN 70 [Ex 63].)

3 Wheeler, Rates and Risk Factors for Coccidioidomycosis among Prison Inmates, Emerging Infectious Diseases, Vol. 21, No. 1, January 2015 (RJN 297 [Ex. 86].)

4 Extrapolated as a second estimate for 2012 ASP cases by relative percentages of PVSP/ASP cases over time, per Table 4D.

5 Average number of ASP cases (2012 is the only year with multiple reports to average).

7 "Coalinga considers putting unused, costly jail up for sale" Fresno Bee, December 3, 2014 (RJN 283 Ex 83) (This figure was extrapolated in an even downward trajectory based on 757 cases reported by the Dept. of Health from 2008-2013 and 6 cases as of December, 2014.)

8 "Coccidioidomycosis in California Department of Corrections and Rehabilitation Institutions," (October 2012) (RJN 221 [Ex 77].)

9 Kings County Health Dept., Epidemiology of Coccidioidomycosis - 15 Counties 2007-2011, p. 31 reported 648 cases from 2007-2011, which was comparable to the total from the CCHCS report in that period, 620. (RJN 194 [Ex. 75].)

11 "California Prisoners & Parolees" (2004-2010) (RJN 17 [2004], 25 [2005], 33 [2006], 102 [2007], 141 [2008], 155 [2009], 163 [2010]; Exs. 59, 60, 61, 66, 68, 70, 71.)

12 Department of Corrections and Rehabilitation, Monthly Population Report (January 3, 2013) (RJN 246, Ex. 80)

VF INFECTIONS BY YEAR PVSP-ASP COMBINED

APPENDIX C-TABLE 4C

YEAR	PVSP+ ASP[1]	PVSP+ ASP POPL'N[1]	PVSP- ASP RATE/ 100K
2003-04	111	11863	936
2005	219	12023	1822
2006	607	12687	4784
2007	404	12657	3192
2008	279	11640	2397
2009	415	11654	3561
2010	440	10468	4203
2011	547	10310	5306
2012	294	8617	3412

1 Derived from Tables 4A and 4B.

EXTRAPOLATING A SECOND FIGURE
FOR ASP 2012 INFECTIONS

APPENDIX C-TABLE 4D

RELATIVE CONTRACTION CHART
ASP/PVSP–BY YEAR

1	2	3	4	5
YEAR	**PVSP AVG[1]**	**ASP[1]**	**ASP/ PVSP%[2]**	**Avg'd Increase[3]**
2005	172	47	27.3	9.14
2006	516	91	17.6	18.28
2007	312	81	25.9	27.42
2008	194	85	43.8	36.56
2009	306	109	35.6	45.70
2010	313	127	40.5	54.84
2011	329	218	66.2	64.98
2012	164	**121[4]**		**74.12**

1 Taken from Tables 4A and 4B in Appendix C.

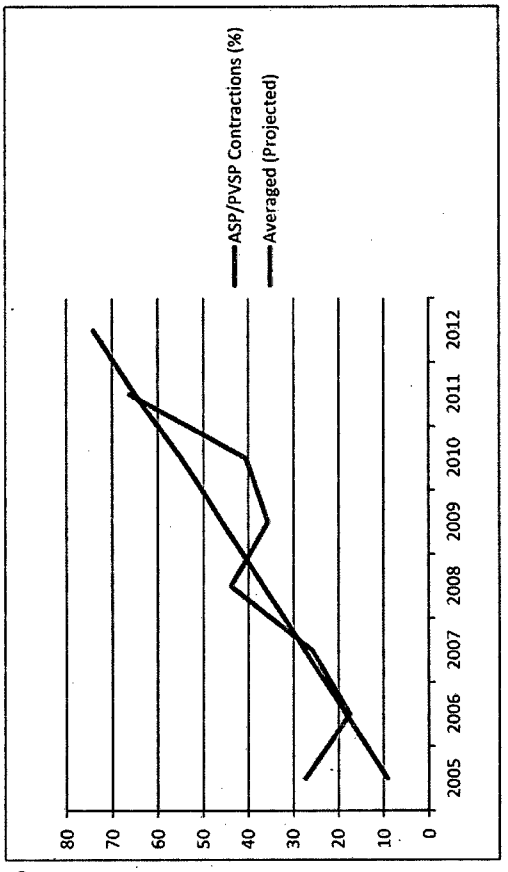
2 Percentage of cases ASP/PVSP per year (*e.g.*, 2005: 47/172 = 27.3%).

3 Projection based on evening out the slope in Column 4. *See* Table 4E.

4 Column 4 (ASP/PVSP%) reflects the percentage of ASP cases compared to PVSP cases, in a given year. That percentage can be graphed on a line chart, in blue. (*See* Chart 4D below). A more consistent line reflecting the average slope increase of the Column 4 data, derived from even calculations in Column 5, is drawn in red in Chart 4D. Based on an extrapolation from Column 5's red line, ASP was projected to suffer 74.12% as many contractions as PVSP in 2012. Based on PVSP's absolute 2012 number, 164, that translates

to 121 ASP contractions. This figure, 121, was ultimately averaged with the estimate of 140 from Table 4B (note 7) to reach Appellant's best estimate of 130 infections for year 2012 at ASP.

APPENDIX C-CHART 4D
ASP/PVSP PERCENTAGE RATIO CHART
PERCENTAGE OF ASP/PVSP CASES—GRAPHED BY YEAR



Blue [dark]: Appendix F1, Column 4 graphed.
Red [light]: Line extrapolated based on averaging the figures in Table 4D, Column 4 into one consistent trajectory.