

1 raised claims that are legally “frivolous, malicious,” or that fail to state a claim upon which
2 relief may be granted, or that seek monetary relief from a defendant who is immune from
3 such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion
4 thereof, that may have been paid, the court shall dismiss the case at any time if the court
5 determines that . . . the action or appeal . . . fails to state a claim upon which relief may
6 be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

7 Section 1983 “provides a cause of action for the ‘deprivation of any rights,
8 privileges, or immunities secured by the Constitution and laws’ of the United States.”
9 Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).
10 Section 1983 is not itself a source of substantive rights, but merely provides a method for
11 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94
12 (1989).

13 **III. SUMMARY OF SECOND AMENDED COMPLAINT**

14 The Second Amended Complaint identifies the following Defendants: (1) Sandra
15 Pennywell, Warden, North Kern State Prison; (2) John Doe CCI; (3) John Doe CCII; and
16 (4) John Doe CSR Board. Plaintiff alleges that the Defendants housed him in and
17 around areas where Valley Fever is present with knowledge that Plaintiff is an older
18 African American and is therefore more susceptible to the disease. (Compl. at 3.)

19 **IV. ANALYSIS**

20 **A. Section 1983**

21 To state a claim under Section 1983, a plaintiff must allege two essential
22 elements: (1) that a right secured by the Constitution or laws of the United States was
23 violated and (2) that the alleged violation was committed by a person acting under the
24 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda
25 Cnty., 811 F.2d 1243, 1245 (9th Cir. 1987).

26 A complaint must contain “a short and plain statement of the claim showing that
27 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
28 are not required, but “[t]hreadbare recitals of the elements of a cause of action,

1 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S.Ct.
2 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
3 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is
4 plausible on its face.’” Id. Facial plausibility demands more than the mere possibility
5 that a defendant committed misconduct and, while factual allegations are accepted as
6 true, legal conclusions are not. Id. at 1949-50.

7 **B. Eighth Amendment**

8 The Eighth Amendment protects prisoners from inhumane methods of
9 punishment and from inhumane conditions of confinement. Morgan v. Morgensen, 465
10 F.3d 1041, 1045 (9th Cir. 2006). Extreme deprivations are required to make out a
11 conditions of confinement claim, and only those deprivations denying the minimal
12 civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth
13 Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9 (1992) (citations and
14 quotations omitted). In order to state a claim for a violation of the Eighth Amendment,
15 the plaintiff must allege facts sufficient to support a claim that prison officials knew of and
16 disregarded a substantial risk of serious harm to the plaintiff. Farmer v. Brennan, 511
17 U.S. 825, 847 (1994).

18 A prisoner may state “a cause of action under the Eighth Amendment by alleging
19 that [prison officials] have, with deliberate indifference, exposed him to [environmental
20 conditions] that pose an unreasonable risk of serious damage to his future health.”
21 Helling v. McKinney, 509 U.S. 25, 35 (1993).

22 The Courts of this district have repeatedly found that confinement in a location
23 where Valley Fever¹ is prevalent, in and of itself, fails to satisfy the first element of an
24 Eighth Amendment claim, i.e. that the condition poses an excessive risk of harm. See,
25 e.g., Smith v. Yates, 2012 WL 1498891, *2 (E.D. Cal. Apr. 27, 2012) (citing King v.

26 ¹ Valley Fever, also known as coccidioidomycosis, is “an infectious disease caused by inhalation of a
27 fungus (*Coccidioides*) that lives in the soil of dry, low rainfall areas. It is spread through spores that
28 become airborne when the dirt they reside in is disturbed by digging, construction, or strong winds. There
is no direct person-to-person transmission of infection.” Plata v. Brown, 2013 WL 3200587, *2 (N.D. Cal.
June 24, 2013).

1 Avenal State Prison, 2009 WL 546212, *4 (E.D. Cal. Mar. 4, 2009) ("[T]o the extent that
2 Plaintiff is attempting to pursue an Eighth Amendment claim for the mere fact that he
3 was confined in a location where Valley Fever spores existed which caused him to
4 contract Valley Fever, he is advised that no courts have held that exposure to Valley
5 Fever spores presents an excessive risk to inmate health."); see also Gilbert v. Yates,
6 2010 WL 5113116, *3 (E.D. Cal. Dec. 9, 2010); Willis v. Yates, 2009 WL 3486674, *3
7 (E.D. Cal. Oct. 23, 2009).

8 Thus, Plaintiff cannot state an Eighth Amendment claim based solely upon mere
9 exposure to, or contraction of, Valley Fever. There are circumstances however where
10 exposure to Valley Fever could conceivably give rise to an Eighth Amendment claim.
11 Smith v. Schwarzenegger, 393 F. App'x. 518 (9th Cir. 2010) (citing Helling, the Court
12 held that it was not inconceivable that the Plaintiff could allege a cognizable claim based
13 on Valley Fever exposure).

14 Courts have deemed the first prong of an Eighth Amendment claim satisfied
15 where the plaintiff has identified a factor responsible for either increasing the risk of
16 contraction or the severity of infection. See, e.g., Stevens v. Yates, 2012 WL 2520464,
17 *3 (E.D. Cal. June 28, 2012) (nearby construction disturbed soil); Owens v. Trimble,
18 2012 WL 1910102, *2 (E.D. Cal. May 25, 2012) (asthma); Whitney v. Walker, 2012 WL
19 893783, *2-4 (E.D. Cal. Mar. 15, 2012) (immune system compromised by cancer);
20 Thurston v. Schwarzenegger, 2008 WL 2129767, *2 (E.D. Cal. May 21, 2008) (various
21 medical conditions, including asthma, and race); see also Plata v. Brown, 2013 WL
22 3200587, *7 n. 10, *14 (N.D. Cal. June 24, 2013) (finding that the following groups are at
23 an increased risk of harm from Valley Fever infection and should therefore be excluded
24 from Pleasant Valley State Prison and Avenal State Prison: inmates designated as
25 medically high-risk; "[p]atients with impaired cellular immunity, such as those with solid
26 organ transplants, those with HIV infection, and those with chronic obstructive pulmonary
27 disease, chronic renal failure, congestive heart failure, diabetes; patients receiving TNF
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1 inhibitors (medications used in the treatment of arthritis); Filipino and African-American
2 men; and pregnant women in the 2nd or 3rd trimester."").

3 Plaintiff alleges that he is an African American male and is therefore at an
4 increased risk of harm from Valley Fever. This is sufficient to satisfy the first element of
5 Plaintiff's Eighth Amendment claim. Plata, 2013 WL 3200587, *7 n. 10, *14. However,
6 the amended complaint does not set forth sufficient factual matter to state a claim that is
7 plausible on its face. Iqbal, 129 S.Ct. at 1949. Quite simply, despite having been twice
8 before instructed as to what has been lacking in his pleadings, Plaintiff has now failed in
9 this, his third attempt, to supply that which is needed. He does not include any
10 allegations explaining how the named Defendants, or any of them, participated in the
11 Eighth Amendment violation. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). He
12 says nothing about who did what when and where that caused him to be housed as he is
13 or why he believes that any Defendant acted knowingly, i.e., was aware of his increased
14 risk of harm, and was in a position to do something to avoid or correct it.

15 For these reasons, the Second Amended Complaint fails to state a cognizable
16 claim. Plaintiff has been instructed twice previously as to what is necessary to state a
17 claim. His continued inability to do so is evidence he cannot. Further leave to amend
18 would serve no useful purpose.

19 **V. CONCLUSION AND RECOMMENDATION**

20 Plaintiff's Second Amended Complaint does not state a cognizable claim against
21 the named Defendants. Accordingly, it is HEREBY RECOMMENDED that this action be
22 dismissed with prejudice for failure to state a claim.

23 These Findings and Recommendations will be submitted to the United States
24 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
25 636(b)(1). Within thirty (30) days after being served with these Findings and
26 Recommendations, Plaintiff may file written objections with the Court. The document
27 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."
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1 Plaintiff is advised that failure to file objections within the specified time may waive the
2 right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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IT IS SO ORDERED.

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Dated: December 28, 2013

1st Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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