

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10

11 AMIR SHABAZZ,

12 Plaintiff,

13 vs.

14 JEFFREY A. BEARD, *et al.*,

15 Defendants.
16
17
18

Case No. 1:15-cv-00881-DAD-EPG-PC

**FINDINGS AND
RECOMMENDATIONS
RECOMMENDING THAT THIS
ACTION BE DISMISSED WITH
PREJUDICE FOR FAILURE TO
STATE A CLAIM**

(ECF No. 26)

OBJECTIONS, IF ANY, DUE IN 30 DAYS

19 On October 16, 2014, Amir Shabazz (“Plaintiff”), a state prisoner proceeding *pro per*
20 and *in forma pauperis*, filed the Complaint commencing this civil rights action pursuant to 42
21 U.S.C. § 1983. (ECF No. 1.) Plaintiff alleges that various prison authorities violated the
22 Eighth Amendment by transferring him to a prison that suffered from a Valley Fever epidemic
23 and that he has contracted Valley Fever as a result.

24 The Court screened the Complaint pursuant to 28 U.S.C. §1915A and issued an order
25 on June 26, 2015, dismissing the Complaint with leave to amend. (ECF No. 10.) On July 30,
26 2015, Plaintiff filed the First Amended Complaint, which was again dismissed with leave to
27 amend. (ECF Nos. 13, 19.) Plaintiff has now filed the Second Amended Complaint and it is
28 before the Court for screening. (ECF No. 26.)

1 **I. SCREENING REQUIREMENT**

2 The Court is required to screen complaints brought by prisoners seeking relief against a
3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
4 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
5 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
6 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
7 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
8 paid, the court shall dismiss the case at any time if the court determines that the action or
9 appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

10 A complaint is required to contain “a short and plain statement of the claim showing
11 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
12 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), citing *Bell*
14 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While a plaintiff’s allegations are taken
15 as true, Courts “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores,*
16 *Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). To
17 state a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state
18 a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678-79; *Moss v. U.S. Secret*
19 *Service*, 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as true, legal
20 conclusions are not. *Id.* The mere possibility of misconduct falls short of meeting this
21 plausibility standard. *Id.*

22 **II. SUMMARY OF FIRST AMENDED COMPLAINT**

23 Plaintiff was previously confined at Pleasant Valley State Prison from 2009 to 2011 and
24 at Wasco State Prison from 2011 to 2012. He was then transferred to San Quentin State Prison.
25 His complaint concerns the refusal of prison authorities to transfer him from Pleasant Valley
26 State Prison until after he contracted Valley Fever.
27
28

1 Plaintiff names as defendants Secretary A. Beard, Secretary of California; Paul D.
2 Brazelton, Warden at Pleasant Valley State Prison; Edmund G. Brown, Governor of California;
3 Matthew Cate, Former Secretary of the California Department of Corrections and
4 Rehabilitation (CDCR); Susan L. Hubbard, former director, division of adult operations;
5 Deborah Hysen, Chief Deputy Secretary, Facilities, Planning, Construction and Management;
6 Dr. Felix Igninosa, Medical Director, Pleasant Valley State Prison; J. Clark Kelso, Head of
7 California Corrections Health Care Services; Tanya Rothchild, Former Chief of the
8 Classification Service Unit; Arnold Schwarzenegger, Former Governor of the State of
9 California; State of California, Public Entity; and Dwight Winslow, Former Medical Director.

10 Plaintiff is a 65-year old African American male. Plaintiff was transferred from
11 Lancaster State Prison to Pleasant Valley State Prison in 2009. While in transit through North
12 Kern State Prison en route to Pleasant Valley State Prison, Plaintiff made medical staff aware
13 of his history of having chronic asthma and viral hepatitis C and asked to remain at North Kern
14 State Prison or be transferred to a prison that did not have a Valley Fever epidemic. Plaintiff
15 was nonetheless transferred to Pleasant Valley State Prison and remained there from 2009
16 through 2011.

17 Plaintiff cannot exert himself physically without feeling winded. At times, Plaintiff's
18 physical pain is so acute he cannot get out of bed. Plaintiff believes his lungs are permanently
19 compromised and he will suffer painful ailments forever. Plaintiff alleges that he has been
20 subjected to a "Hate Crime" by Defendants and asserts claims under 42 U.S.C. § 1983 and the
21 Federal Tort Claims Act.
22

23 **III. ANALYSIS OF PLAINTIFF'S CLAIMS**

24 The Civil Rights Act, under which this action was filed, provides:

25 Every person who, under color of any statute, ordinance, regulation, custom, or
26 usage, of any State or Territory or the District of Columbia, subjects, or causes
27 to be subjected, any citizen of the United States or other person within the
28 jurisdiction thereof to the deprivation of any rights, privileges, or immunities
secured by the Constitution and laws, shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for redress

1 42 U.S.C. § 1983.

2 “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a
3 method for vindicating federal rights elsewhere conferred.’” *Graham v. Connor*, 490 U.S. 386,
4 393-94 (1989), quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979); see also *Chapman v.*
5 *Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979); *Hall v. City of Los Angeles*, 697 F.3d
6 1059, 1068 (9th Cir. 2012); *Crowley v. Nevada*, 678 F.3d 730, 734 (9th Cir. 2012); *Anderson v.*
7 *Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006).

8 **A. Valley Fever**

9 Plaintiff claims that Defendants violated his rights under the Eighth and Fourteenth
10 Amendments by housing him in a Valley Fever endemic area.

11 **1. Fourteenth Amendment claim.**

12 Plaintiff fails to raise a claim that adequately supports a violation of his rights under the
13 Fourteenth Amendment. “Where a particular amendment provides an explicit textual source of
14 constitutional protection against a particular sort of government behavior, that Amendment, not
15 the more generalized notion of substantive due process, must be the guide for analyzing a
16 plaintiff’s claims.” *Patel v. Penman*, 103 F.3d 868, 874 (9th Cir. 1996) (citations, internal
17 quotations, and brackets omitted) *overruled on other grounds by Unitherm Food Systems, Inc.*
18 *v. Swift -Eckrick, Inc.*, 546 U.S. 394 (2006); *County of Sacramento v. Lewis*, 523 U.S. 833, 842
19 (1998). In this case, the Eighth Amendment “provides [the] explicit textual source of
20 constitutional protection.” *Patel*, 103 F.3d at 874. Therefore, the Eighth Amendment, rather
21 than the Due Process Clause of the Fourteenth Amendment, governs Plaintiff’s claims.

22 **2. Eighth Amendment claim.**

23 “It is undisputed that the treatment a prisoner receives in prison and the conditions
24 under which [the prisoner] is confined are subject to scrutiny under the Eighth Amendment.”
25 *Helling v. McKinney*, 509 U.S. 25, 31 (1993); see also *Farmer v. Brennan*, 511 U.S. 825, 832
26 (1994). The Eighth Amendment, however, is not a mandate for broad prison reform or
27 excessive federal judicial involvement. See *Hallett v. Morgan*, 296 F.3d 732, 745 (9th Cir.
28

1 2002); *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). Conditions of confinement may,
2 consistent with the Constitution, be restrictive and harsh. *See Rhodes v. Chapman*, 452 U.S.
3 337, 347 (1981); *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006); *Osolinski v.*
4 *Kane*, 92 F.3d 934, 937 (9th Cir. 1996); *Jordan v. Gardner*, 986 F.2d 1521, 1531 (9th Cir.
5 1993) (en banc). Prison officials must provide prisoners with “food, clothing, shelter,
6 sanitation, medical care, and personal safety.” *Toussaint v. McCarthy*, 801 F.2d 1080, 1107
7 (9th Cir. 1986), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995);
8 *see also Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000); *Hoptowit v. Ray*, 682 F.2d at
9 1246; *Wright v. Rushen*, 642 F.2d 1129, 1132-33 (9th Cir. 1981).

10 [A] prison official violates the Eighth Amendment only when two requirements
11 are met. First, the deprivation alleged must be, objectively, ‘sufficiently
12 serious[;]’ a prison official’s act or omission must result in the denial of ‘the
13 minimal civilized measure of life’s necessities’[.] . . .

14 As to the subjective prong of the Eighth Amendment analysis, prisoners must
15 establish prison officials’ “deliberate indifference” to unconstitutional
16 conditions of confinement to establish an Eighth Amendment violation. *See*
17 *Farmer*, 511 U.S. at 834; *Wilson*, 501 U.S. at 303. This requirement follows
18 from the principle that ‘only the unnecessary and wanton infliction of pain
19 implicates the Eighth Amendment.’ To violate the Cruel and Unusual
20 Punishments Clause, a prison official must have a ‘sufficiently culpable state of
21 mind.’

22 *Farmer*, 511 U.S. at 834 (citations omitted); *see also Hope v. Pelzer*, 536 U.S. 730, 737-38
23 (2002); *Wilson v. Seiter*, 501 U.S. 294, 299-300 (1991) (discussing subjective requirement).

24 Courts in this district have generally found claims arising from the housing of prisoners
25 in a Valley Fever endemic area to be insufficient to state a constitutional violation under
26 Section 1983:

27 “[T]o the extent that Plaintiff is attempting to pursue an Eighth Amendment
28 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.” *King v. Avenal State Prison*, 2009 WL 546212, *4 (E.D. Cal.,
Mar 4, 2009); *see also Tholmer v. Yates*, 2009 WL 174162, *3 (E.D. Cal. Jan.
26, 2009) (“To the extent Plaintiff seeks to raise an Eighth Amendment
challenge to the general conditions of confinement at PVSP, Plaintiff fails to
come forward with evidence that Yates is responsible for the conditions of
which Plaintiff complains.”) More recently, in addressing a claim that CDCR
officials are responsible for the contraction of Valley Fever by knowingly
housing an African American inmate with a history of asthma in an endemic

1 area, it has been held that “unless there is something about a prisoner’s
2 conditions of confinement that raises the risk of exposure substantially above
3 the risk experienced by the surrounding communities, it cannot be reasoned that
4 the prisoner is involuntarily exposed to a risk that society would not tolerate.”
5 *Hines v. Yousseff*, 2015 WL 164215, *5 (E.D. Cal. Jan. 13, 2015).

6 *Williams v. Biter*, Case No. 1:14-cv-02076-AWI-GSA (PC), 2015 WL 1830770, at *3 (E.D.
7 Cal. Apr. 9, 2015); *see also Smith v. State of California*, Case No. 1:13-cv-0869-AWI-SKO
8 (PC), 2016 WL 398766, *1 (E.D. Cal. Feb. 2, 2016) (“It has long been the position of this court
9 that a constitutional right, whether under the Eighth or Fourteenth Amendments, is not violated
10 where a prisoner or detainee is subjected to a condition that is no more dangerous than what the
11 people in the community where the confinement occurs freely tolerate.”); *Cunningham v.*
12 *Kramer*, Case No. 1:15-cv-01362-AWI-MJS (PC), 2016 WL 1545303 (E.D. Cal. Apr. 15,
13 2016) (discussing history of case law in Valley Fever cases).

14 Furthermore, in *Jackson v. Brown*, this court found that even if prison officials had
15 violated inmates’ Eighth Amendment rights to be housed in correctional facilities where they
16 were not exposed to harmful Valley Fever spores, prison officials were qualifiedly immune
17 because these rights were not clearly established, given lack of any controlling case law
18 recognizing such a right. *Jackson v. Brown*, 134 F. Supp. 3d 1237, 1237 (E.D. Cal. 2015);
19 *accord Smith v. Schwarzenegger*, F.Supp 3d. 1233, 1252 (E.D. Cal. 2015), *citing Wilson v.*
20 *Layne*, 526 U.S. 603, 617 (1999) (no “consensus of cases” has emerged “such that a reasonable
21 [prison official] could not have believed that his actions were lawful.”).

22 Plaintiff does not allege that the risk to Plaintiff is higher than the risk facing those
23 similarly situated in the surrounding community where the prison is located. Plaintiff received
24 a transfer out of the area after he was diagnosed with the disease. Under the law cited above,
25 Plaintiff fails to state a cognizable claim against any of the Defendants for violation of his
26 Eighth Amendment right to be housed in a correctional facility where he was not exposed to
27 harmful Valley Fever spores.

28 ///

///

1 **B. Supervisory Liability**

2 Plaintiff names defendants who hold supervisory positions, such as Secretary A. Beard,
3 Secretary of California; Paul D. Brazelton, Warden at Pleasant Valley State Prison; Edmund G.
4 Brown, Governor of California; Matthew Cate, Former Secretary of the California Department
5 of Corrections and Rehabilitation (CDCR); and, Arnold Schwarzenegger, Former Governor of
6 the State of California. Plaintiff does not identify individuals who are directly responsible for
7 his transfer beyond being in a supervisory capacity. Such supervisory individuals cannot be
8 sued under Section 1983:

9 “[G]overnment officials may not be held liable for the actions of their
10 subordinates under a theory of *respondeat superior*. *Ashcroft v. Iqbal*, 556 U.S.
11 662, 673 (2009). Since a government official cannot be held liable under a
12 theory of vicarious liability for section 1983 actions, Plaintiff must plead that
13 the official has violated the Constitution through his own individual actions. *Id.*
14 at 673. In other words, to state a claim for relief under section 1983, Plaintiff
15 must link each named defendant with some affirmative act or omission that
16 demonstrates a violation of Plaintiff’s federal rights.”

17 Plaintiff has failed to link any of the defendants with an affirmative act or omission that
18 demonstrates a violation of Plaintiff’s federal rights, and thus Plaintiff’s complaint is subject to
19 dismissal on this basis as well.

20 **C. Federal Tort Claims Act**

21 Plaintiff devotes a significant portion of the Second Amended Complaint to the
22 discussion of claims under the Federal Tort Claims Act. In particular, Plaintiff contends that
23 Defendants breached duties to him imposed on them by California state law and that they are
24 thus liable to Plaintiff pursuant to the Act. But “[t]he United States is the only proper
25 defendant in an FTCA action.” *Lance v. United States*, 70 F.3d 1093, 1095 (9th Cir. 1995),
26 citing *Woods v. United States*, 720 F.2d 1451, 1452 n. 1 (9th Cir. 1983). None of the
27 Defendants in this case were acting as employees, officials, or agents of the United States at the
28 time of the alleged actions. Nor, for that matter, has Plaintiff alleged that he has fulfilled the
claim presentation requirements of the FTCA, which require a prospective plaintiff to present a
claim to the appropriate federal agency before filing suit based on that claim. *Gillespie v.*

1 *Civiletti*, 629 F.2d 637, 640 (9th Cir. 1980) (“The timely filing of an administrative claim is a
2 jurisdictional prerequisite to the bringing of a suit under the FTCA, and, as such, should be
3 affirmatively alleged in the complaint. A district court may dismiss a complaint for failure to
4 allege this jurisdictional prerequisite.”). Plaintiff does not have a claim under the FTCA.

5 To the extent Plaintiff is alleging separate state causes of action under California law,
6 the Court declines to exercise supplemental jurisdiction over those claims. *United Mine*
7 *Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (“if the federal claims are dismissed
8 before trial, . . . the state claims should be dismissed as well.”); *Acri v. Varian Assoc., Inc.*, 114
9 F.3d 999, 1000 (9th Cir. 1997) (“[O]nce judicial power exists under § 1367(a), retention of
10 supplemental jurisdiction over state law claims under 1367(c) is discretionary.”).

11 **IV. CONCLUSION AND RECOMMENDATIONS**

12 The Court finds that Plaintiff’s Second Amended Complaint fails to state any
13 cognizable claims upon which relief may be granted. The Court previously granted Plaintiff
14 leave to amend the complaint. Plaintiff has now filed three complaints without stating any
15 claims upon which relief may be granted. The Court finds that the deficiencies outlined above
16 are not capable of being cured by amendment. Therefore, further leave to amend should not be
17 granted. 28 U.S.C. § 1915(e)(2)(B)(ii); *Lopez*, 203 F.3d at 1127.

18 Accordingly, **IT IS HEREBY RECOMMENDED** that, pursuant to 28 U.S.C. § 1915A
19 and 28 U.S.C. § 1915(e), this action be dismissed without leave to amend for failure to state a
20 claim upon which relief may be granted, and that this dismissal be subject to the “three-
21 Strikes” provision set forth in 28 U.S.C. § 1915(g). *Silva v. Vittorio*, 658 F.3d 1090, 1098 (9th
22 Cir. 2011). To the extent Plaintiff is asserting state law claims, those claims be dismissed
23 without prejudice.

24
25 These Findings and Recommendations will be submitted to the United States District
26 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
27 **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may
28

1 file written objections with the Court. The document should be captioned “Objections to
2 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file
3 objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v.*
4 *Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014), citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394
5 (9th Cir. 1991).

6
7 IT IS SO ORDERED.

8
9 Dated: October 31, 2016

/s/ Eric P. Groj
10 UNITED STATES MAGISTRATE JUDGE
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28