



1 having yet to receive Plaintiff's second amended complaint, the Court issued an order to  
2 show cause why Plaintiff's case should not be dismissed for failure to obey a Court  
3 order. (ECF No. 20.) After Plaintiff's second amended complaint was filed with the Court  
4 (ECF No. 19) the Court discharged its order to show cause (ECF No. 21.)

5 **II. Motion to Amend**

6 Concurrent with his second amended complaint, Plaintiff filed a motion seeking  
7 leave to file said complaint. (ECF No. 18.) As Plaintiff was already granted leave to file a  
8 second amended complaint (ECF No. 13) this motion is appropriately construed as a  
9 third request for an extension of time to file his second amended complaint, and on that  
10 ground will be granted.

11 **III. Screening Requirement**

12 The Court is required to screen complaints brought by prisoners seeking relief  
13 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
14 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has  
15 raised claims that are legally "frivolous, malicious," or that fail "to state a claim upon  
16 which relief may be granted," or that "seek monetary relief from a defendant who is  
17 immune from such relief." 28 U.S.C. § 1915A(b)(1), (2). "Notwithstanding any filing fee,  
18 or any portion thereof, that may have been paid, the court shall dismiss the case at any  
19 time if the court determines that . . . the action or appeal . . . fails to state a claim on  
20 which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

21 **IV. Pleading Standard**

22 Section 1983 "provides a cause of action for the 'deprivation of any rights,  
23 privileges, or immunities secured by the Constitution and laws' of the United States."  
24 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).  
25 Section 1983 "is not itself a source of substantive rights,' but merely provides 'a method  
26 for vindicating federal rights conferred elsewhere.'" Graham v. Connor, 490 U.S. 386,  
27 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144, n. 3 (1979)).  
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1 To state a claim under Section 1983, a plaintiff must allege two essential  
2 elements: (1) that a right secured by the Constitution and laws of the United States was  
3 violated and (2) that the alleged violation was committed by a person acting under the  
4 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); see also Ketchum v.  
5 Cnty. of Alameda, 811 F.2d 1243, 1245 (9th Cir. 1987).

6 A complaint must contain “a short and plain statement of the claim showing that  
7 the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
8 are not required, but “[t]hreadbare recitals of the elements of a cause of action,  
9 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.  
10 662, 678 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff  
11 must set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
12 plausible on its face.’” Id. Facial plausibility demands more than the mere possibility  
13 that a defendant committed misconduct and, while factual allegations are accepted as  
14 true, legal conclusions are not. Id.

#### 15 **V. Plaintiff’s Allegations**

16 At all times relevant to this suit, Plaintiff was housed at Pleasant Valley State  
17 Prison (“PVSP”) in Coalinga, California. He names the following Defendants: Edmund G.  
18 Brown, Governor of California; Scott Kernan, CDCR Secretary; Jeffrey Beard, former  
19 CDCR Secretary; Matthew Cate, former CDCR Secretary; Scott Frauenheim, Warden of  
20 PVSP; Paul D. Brazelton, former Warden of PVSP; Donald B. McElroy, Chief Medical  
21 Officer at PVSP; O. Onyeje, Chief Physician at PVSP; and J. Chokatos, M.D.

22 Defendants Brown and Kernan are sued in their individual and official capacities.  
23 Defendants Beard, Cate, Frauenheim, Brazelton, McElroy, Onyeje, and Chokatos are  
24 sued in their individual capacities only.

25 Plaintiff’s essential allegations can be summarized as follows:

26 The coccidioidomycosis virus, commonly referred to as “Valley Fever,” is a  
27 serious disease contracted through the inhalation of a fungus called *Coccidioides*  
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1 Immitis. Once the spores of the fungus are inhaled, they lodge themselves in the victim's  
2 respiratory system. From there, the virus can spread throughout other tissues and  
3 organs, resulting in "disseminated Valley Fever." The fungus is extremely prevalent in  
4 the soil of the San Joaquin Valley of California.

5 The majority of individuals infected with Valley Fever display minor symptoms that  
6 resolve themselves within a few weeks. About 1-5% of those infected, however, will  
7 develop disseminated Valley Fever, a serious infection that is progressive, painful, and  
8 debilitating, and if left untreated may lead to meningitis and death. Once an individual  
9 has been affected by disseminated Valley Fever, there is no cure besides excision of the  
10 affected tissue and bone. Certain medications may manage symptoms, but they are  
11 costly and must be taken daily for life.

12 California officials have known about the prevalence of Valley Fever in the San  
13 Joaquin Valley for more than fifty years.<sup>1</sup>

14 Filipinos, Hispanics, African-Americans, and American Indians, as well as  
15 individuals with a compromised immune system, face an increased risk of infection with  
16 Valley Fever. They are also more likely to develop disseminated Valley Fever. Experts,  
17 including those within the CDCR, recommend numerous preventative measures to help  
18 combat the spread of the cocci fungus spores, by, for example, adding landscaping or  
19 paving, stabilizing the soil, restricting construction and excavation, limiting prisoner time  
20 outdoors in windy conditions, and providing face masks for prisoners when outside.  
21 Experts also recommend screening out at-risk inmates and transferring them out of San  
22 Joaquin Valley prisons.

23 In 2008, in response to an executive order issued by then-Governor Arnold  
24 Schwarzenegger directing California agencies to restrict water usage in light of the

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25  
26 <sup>1</sup> Plaintiff asks the Court to take judicial notice of information included in Exhibit A to his FAC (ECF No.  
27 12), including statistics and reports drawn from various memoranda on Valley Fever. Because the Court is  
28 unable to conclude that the facts in the exhibit are not subject to reasonable dispute, it will not take judicial  
notice under Fed. R. Evid. 201. Moreover, Plaintiff was advised that his amended complaint had to be  
complete in itself without reference to any prior pleading. (See ECF No. 13 at 12.) Thus, the Court will  
disregard references to earlier versions of his complaint.

1 severe drought, CDCR officials stopped watering and maintaining grass cover at PVSP,  
2 thereby significantly increasing the risk that PVSP inmates would contract Valley Fever.  
3 Governor Brown continued this directive when he took office, despite knowing that grass  
4 cover was the only remedial measure in place at PVSP to reduce the spread of the virus.

5 Each Defendant was aware that housing inmates in the hyper-endemic region of  
6 the San Joaquin Valley posed a substantially increased risk that these inmates would  
7 develop Valley Fever. Defendants were aware that individuals of Hispanic descent such  
8 as Plaintiff were at higher risk of developing disseminated Valley Fever. Defendants  
9 were further aware that Plaintiff could have been tested for “host-immunity” to determine  
10 whether he could be safely housed in PVSP. Despite knowing this, Defendants failed to  
11 so test Plaintiff and caused him to be transferred to PVSP, where he contracted Valley  
12 Fever. Defendants also failed to disclose to Plaintiff the risks he faced if transferred to  
13 PVSP.

14 Defendant Brown, as the Governor of California, is responsible for supervising  
15 and overseeing the conduct of his subordinates. He is the ultimate authority over the  
16 care and treatment of California prisoners, including Plaintiff.

17 Defendant Kernan, as Secretary of the CDCR, oversees the management and  
18 operation of all prison facilities and makes decisions regarding staff deployment and  
19 training directly impacting Plaintiff’s ability to receive adequate medical care. As such, he  
20 should have known that the presence of Valley Fever in and around CDCR facilities  
21 posed a substantial risk to prisoners, including Plaintiff.

22 Defendants Beard and Cate, as former Secretaries of the CDCR, knew or should  
23 have known that the presence of Valley Fever in and around CDCR facilities posed a  
24 substantial risk to prisoners, including Plaintiff.

25 Defendant Frauenheim, as Warden of PVSP, was responsible for the health and  
26 welfare of the prisoners housed in the prison, including Plaintiff. He knew or should have  
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1 known that the presence of Valley Fever in and around PVSP posed a substantial risk to  
2 Plaintiff and other inmates.

3 Defendant Brazelton, as former Warden of PVSP, knew or should have known  
4 that the presence of Valley Fever in and around PVSP posed a substantial risk to  
5 Plaintiff and other inmates.

6 Defendant McElroy, as medical director at PVSP, is responsible for the health of  
7 the inmates at PVSP.

8 Defendant Onyeje, as the chief physician and surgeon at PVSP, should have  
9 known that the presence of Valley Fever in and around PVSP posed a substantial risk to  
10 Plaintiff and other inmates.

11 Defendant Chokatos, as a medical doctor at PVSP, was responsible for Plaintiff's  
12 care. He knew or should have known that the presence of Valley Fever at PVSP posed a  
13 substantial risk to Plaintiff and other inmates.

14 Plaintiff alleges violations of the Eighth Amendment's cruel and unusual  
15 punishments clause, as well as a violation of the Fourteenth Amendment Equal  
16 Protection clause by Defendants Brown, Kernan, Beard, Cate, Frauenheim and  
17 Brazelton for transferring African-American and Filipino inmates out of PVSP while  
18 forcing Hispanic inmates to remain. He seeks only monetary damages.

## 19 **VI. Analysis**

20 For the reasons set forth below, the Court will recommend Plaintiff's case be  
21 dismissed without further leave to amend.

### 22 **A. Linkage**

23 Under § 1983, in order to state a claim against an official in his personal capacity,  
24 a plaintiff must demonstrate that each named defendant *personally* participated in the  
25 deprivation of his rights. Iqbal, 556 U.S. at 676-77; Simmons, 609 F.3d 1011, 1020-  
26 21(9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones  
27 v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff may not attribute liability to a  
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1 group of defendants, but must “set forth specific facts as to each individual defendant’s”  
2 deprivation of his rights. Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988); see also  
3 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Liability may not be imposed on  
4 supervisory personnel under the theory of *respondeat superior*, as each defendant is  
5 only liable for his or her own misconduct. Iqbal, 556 U.S. at 676-77; Ewing, 588 F.3d at  
6 1235. Supervisors may only be held liable if they “participated in or directed the  
7 violations, or knew of the violations and failed to act to prevent them.” Lemire v. Cal.  
8 Dept. of Corrections & Rehabilitation, 726 F.3d 1062, 1074-75 (9th Cir. 2013) (“A prison  
9 official in a supervisory position may be held liable under § 1983 . . . ‘if he or she was  
10 personally involved in the constitutional deprivation or a sufficient causal connection  
11 exists between the supervisor’s unlawful conduct and the constitutional violation.’”)  
12 (quoting Lolli v. Cty. of Orange, 351 F.3d 410, 418 (9th Cir. 2003)); Starr v. Baca, 652  
13 F.3d 1202, 1205-08 (9th Cir. 2011); Corales v. Bennett, 567 F.3d 554, 570 (9th Cir.  
14 2009); Preschooler II v. Clark Cty. Sch. Bd. of Trs., 479 F.3d 1175, 1182 (9th Cir. 2007);  
15 Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997). Where a plaintiff alleges a  
16 defendant failed to intervene to stop the abuses of subordinate staff, he must allege that  
17 the supervisor defendant failed to intervene after being placed on notice of ongoing  
18 constitutional violations by subordinate staff. Starr, 652 F.3d at 1205-08.

19 Other than Plaintiff’s allegation that Governor Brown failed to rescind the water  
20 restriction directive, Plaintiff alleges nothing to indicate what he feels each Defendant  
21 personally did or did not do to violate his rights. Plaintiff was advised that he must  
22 include more than a blanket statement that Defendants “knew” of the dangers posed by  
23 Valley Fever and did nothing. He must explain how each individual knew, whether by  
24 virtue of his or her position or otherwise, of the danger faced by Plaintiff, was in a  
25 position where he or she could have done something about it, and yet knowingly took no  
26 action or took actions that he or she knew would harm Plaintiff. The instant complaint  
27 adds little; it broadly alleges each was responsible for the health and well-being of PVSP  
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1 inmates, knew or should have known of the risks posed by Valley Fever, failed to  
2 ameliorate those risks, and as a result caused Plaintiff to contract Valley Fever. As  
3 Plaintiff has been advised, such conclusory allegations are insufficient to place a  
4 Defendant on notice of his alleged violations.

5 Plaintiff twice before was advised of what he must plead to assert a cognizable  
6 claim in a case such as this, and yet he persists here in alleging nothing more than that  
7 the various Defendants should have known of the risk and should have done something  
8 about it. It is reasonable to conclude that he is unable to cure the deficiencies and plead  
9 more specifically which Defendants knew of the risk, how they knew of it, and that each  
10 could have done something about it and yet chose to do nothing. No useful purpose  
11 would be served by again pointing out the same deficiencies and pleading requirements  
12 and giving yet another opportunity to try to state a cognizable claim. Plaintiff should not  
13 be given further leave to amend.

14 **B. Official Capacity Claims**

15 Plaintiff was previously advised that he cannot recover money damages from  
16 individuals sued in their official capacities. (See ECF No. 13 at 8-9.) (citing Aholelei v.  
17 Dept. of Pub. Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) and Wolfson v. Brammer, 616  
18 F.3d 1045, 1065-66 (9th Cir. 2010). Therefore, his official capacity claims will be  
19 dismissed. As Plaintiff was advised of this deficiency and did not correct it, he should not  
20 be given further leave to amend.

21 **C. Eighth Amendment Conditions of Confinement**

22 The standards for an Eighth Amendment Claim are set forth in detail in the prior  
23 screening order and will not be repeated herein. (ECF No. 13 at 9-10.)

24 As discussed in the Court's prior screening order, it is uncontroverted that Valley  
25 Fever can pose a serious risk to human health. (Id. at 10.) Plaintiff's allegations are  
26 sufficient to establish that Plaintiff suffered from a serious medical condition when he  
27 contracted Valley Fever.  
28



1 This Court proceeds on the presumption that, where a Plaintiff demonstrates  
2 Defendants knew of but were deliberately indifferent to a substantial risk that Plaintiff  
3 would contract Valley Fever if housed at PVSP, he has sufficiently alleged a cognizable  
4 Eighth Amendment claim. See Allen v. Kramer, No. 15-cv-01609-DAD-MJS, 2016 WL  
5 4613360, at \*6 (E.D. Cal. Aug. 17, 2016) (“Plaintiff has a right to be free from exposure  
6 to an environmental hazard that poses an unreasonable risk of serious damage to his  
7 health whether because the levels of that environmental hazard are too high for anyone  
8 or because Plaintiff has a particular susceptibility) (relying on Helling v. McKinney, 509  
9 U.S. 25, 33-35 (1993)), *findings and recommendations adopted*, Order Adopting, Allen v.  
10 Kramer, No. 15-cv-01609-DAD-MJS, E.D. Cal. Nov. 23, 2016, ECF No. 13. Therefore, in  
11 order to state a claim, Plaintiff must allege facts (not mere assumption or speculation)  
12 reflecting that each Defendant was aware that Plaintiff, due to his race or other personal  
13 characteristic, was at high risk of contracting Valley Fever; that PVSP was situated and  
14 managed so as to expose its inmates to excessively high or dangerous levels of cocci  
15 fungus spores; that each Defendant could have but failed to take available steps to  
16 protect Plaintiff from the spores; and that the result was that Plaintiff did in fact contract  
17 Valley Fever or suffer some other cognizable harm.

18 Plaintiff identifies several instances of what he considers deliberate indifference  
19 on the part of Defendants, including: 1) his transfer to PVSP, a prison located in an area  
20 endemic for Valley Fever, even though he is Hispanic and therefore more susceptible to  
21 Valley Fever; 2) the lack of remedial measures in place at PVSP to reduce the spread of  
22 the fungus that causes Valley Fever; 3) the failure of Defendants to maintain, as the sole  
23 remedial measure in place at PVSP, grass ground cover; 4) the failure to warn Plaintiff of  
24 the risk he faced from Valley Fever; and 5) the failure to test Plaintiff for “host-immunity”  
25 before he was transferred to PVSP. However, as noted above, Plaintiff continues to put  
26 forth nothing more than speculative, conclusory allegations that each Defendant, by  
27 virtue of his position of authority and control, knew of the risks Plaintiff faced from Valley  
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1 Fever and failed to abate them. Such speculation, essentially a claim that “surely they  
2 must have known,” is insufficient. Except as to Governor Brown, Plaintiff does not link  
3 an instance of deliberate indifference to any particular person, and, as to the Governor,  
4 the decision to continue water restrictions in a severe drought does not reflect deliberate  
5 indifference to the possibility Plaintiff might contract Valley Fever. Again, Plaintiff fails to  
6 allege a basis for attributing actual knowledge of risk to any one Defendant or allege a  
7 basis for alleging that any one of them had the authority or otherwise was in a position to  
8 take measures to protect Plaintiff from the risk.

9 This claim should be dismissed. As further leave to amend would be futile, it will  
10 be denied.

#### 11 **D. Fourteenth Amendment Equal Protection**

12 The Equal Protection Clause of the Fourteenth Amendment requires that persons  
13 who are similarly situated be treated alike. City of Cleburne v. Cleburne Living Center,  
14 Inc., 473 U.S. 432, 439 (1985). An Equal Protection claim may be established in two  
15 ways. The first method requires a plaintiff to show that the defendant has intentionally  
16 discriminated against the plaintiff on the basis of the plaintiff's membership in a protected  
17 class. Thornton v. City of St. Helens, 425 F.3d 1158, 1167 (9th Cir. 2005); Lee v. City of  
18 Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001). The second requires that Plaintiff have  
19 received disparate treatment compared to other similarly situated inmates without a  
20 rational basis for that difference in treatment. Village of Willowbrook v. Olech, 528 U.S.  
21 562, 564 (2000). For either theory, Plaintiff must show evidence of discriminatory intent.  
22 See Washington v. Davis, 426 U.S. 229, 239-40 (1976); Serrano v. Francis, 345 F.3d  
23 1071, 1082 (9th Cir. 2003).

24 Plaintiff's Equal Protection claim is based on the theory that prison officials  
25 transferred African-American and Filipino inmates out of PVSP but did not transfer out  
26 the Hispanic inmates. Aside from the fact that Plaintiff fails to link any individual  
27 Defendant or Defendants to these actions, his allegations are vague and conclusory.  
28

1 The Equal Protection claim should be dismissed as well.

2 **VII. Conclusion**

3 Plaintiff's second amended complaint fails to state a claim, and the Court finds  
4 that granting further leave to amend would be futile.

5 Based on the foregoing, IT IS HEREBY ORDERED THAT:

- 6 1. Plaintiff's motion for an extension to file a second amended complaint (ECF  
7 No. 18) is GRANTED;

8 And IT IS HEREBY RECOMMENDED THAT:

- 9 2. This case be DISMISSED, with prejudice, for failure to state a claim.

10 The findings and recommendation are submitted to the United States District  
11 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within  
12 **fourteen** (14) days after being served with the findings and recommendation, Plaintiff  
13 may file written objections with the Court and serve a copy on all parties. Such a  
14 document should be captioned "Objections to Magistrate Judge's Findings and  
15 Recommendation." Failure to file objections within the specified time may result in the  
16 waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)  
17 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).  
18

19 IT IS SO ORDERED.

20 Dated: September 27, 2017

21 /s/ Michael J. Seng  
22 UNITED STATES MAGISTRATE JUDGE  
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