

1 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
2 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
3 frivolous, malicious, fail to state a claim upon which relief may be granted, or that seek monetary
4 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2); 28 U.S.C.
5 § 1915(e)(2)(B)(i)-(iii). If an action is dismissed on one of these three bases, a strike is imposed
6 per 28 U.S.C. § 1915(g). An inmate who has had three or more prior actions or appeals dismissed
7 as frivolous, malicious, or for failure to state a claim upon which relief may be granted, and has
8 not alleged imminent danger of serious physical injury does not qualify to proceed *in forma*
9 *pauperis*. See 28 U.S.C. § 1915(g); *Richey v. Dahne*, 807 F.3d 1201, 1208 (9th Cir. 2015).

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

15 To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a
16 right secured by the Constitution or laws of the United States was violated and (2) that the alleged
17 violation was committed by a person acting under the color of state law. See *West v. Atkins*, 487
18 U.S. 42, 48 (1988); *Ketchum v. Alameda Cnty.*, 811 F.2d 1243, 1245 (9th Cir. 1987). A
19 complaint will be dismissed if it lacks a cognizable legal theory or fails to allege sufficient facts
20 under a cognizable legal theory. See *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699
21 (9th Cir. 1990). “Notwithstanding any filing fee, or any portion thereof, that may have been paid,
22 the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . .
23 fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

24 C. Pleading Requirements

25 1. Federal Rule of Civil Procedure 8(a)

26 The First Amended Complaint is considered in light of Rule 8(a)’s simplified pleading
27 standard which “applies to all civil actions, with limited exceptions,” none of which apply here.
28 *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002); Fed. R. Civ. Pro. 8(a). A complaint

1 must contain “a short and plain statement of the claim showing that the pleader is entitled to relief
2” Fed. R. Civ. Pro. 8(a). “Such a statement must simply give the defendant fair notice of
3 what the plaintiff’s claim is and the grounds upon which it rests.” *Swierkiewicz*, 534 U.S. at 512.

4 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a
5 cause of action, supported by mere conclusory statements,” as Plaintiff found in the First
6 Amended complaint, “do not suffice.” *Iqbal*, 556 U.S. at 678, quoting *Bell Atlantic Corp. v.*
7 *Twombly*, 550 U.S. 544, 555 (2007). For the reasons discussed below, Plaintiff fails to set forth
8 “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on its face.’” *Iqbal*,
9 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 555. Plaintiff’s factual allegations are accepted as
10 true, but legal conclusions which the First Amended Complaint is comprised of, are not. *Iqbal*,
11 556 U.S. at 678; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009);
12 *Twombly*, 550 U.S. at 556-557.

13 While “plaintiffs [now] face a higher burden of pleadings facts . . . ,” *Al-Kidd v. Ashcroft*,
14 580 F.3d 949, 977 (9th Cir. 2009), the pleadings of *pro se* prisoners are still construed liberally
15 and are afforded the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).
16 However, Plaintiff is no longer incarcerated and “the liberal pleading standard . . . applies only to
17 a plaintiff’s factual allegations,” *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989), “a liberal
18 interpretation of a civil rights complaint may not supply essential elements of the claim that were
19 not initially pled,” *Bruns v. Nat’l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997)
20 quoting *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982), and courts are not required to
21 indulge unwarranted inferences, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009)
22 (internal quotation marks and citation omitted). Plaintiff’s allegations are not sufficient as they
23 amount to nothing more than the “sheer possibility that a defendant has acted unlawfully,” such
24 allegations “that are ‘merely consistent with’ a defendant’s liability” fall short of satisfying the
25 plausibility standard. *Iqbal*, 556 U.S. at 678; *Moss*, 572 F.3d at 969.

26 2. Linkage and Causation

27 Section 1983 provides a cause of action for the violation of Plaintiff’s constitutional or
28 other federal rights by persons acting under color of state law. *Nurre v. Whitehead*, 580 F.3d

1 1087, 1092 (9th Cir 2009); *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006);
2 *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). “Section 1983 is not itself a source of
3 substantive rights, but merely provides a method for vindicating federal rights elsewhere
4 conferred.” *Crowley v. Nevada ex rel. Nevada Sec’y of State*, 678 F.3d 730, 734 (9th Cir. 2012)
5 (citing *Graham v. Connor*, 490 U.S. 386, 393-94 (1989)) (internal quotation marks omitted). To
6 state a claim, Plaintiff must allege facts demonstrating the existence of a link, or causal
7 connection, between each defendant’s actions or omissions and a violation of his federal rights.
8 *Lemire v. California Dep’t of Corr. and Rehab.*, 726 F.3d 1062, 1074-75 (9th Cir. 2013); *Starr v.*
9 *Baca*, 652 F.3d 1202, 1205-08 (9th Cir. 2011). As discussed below Plaintiff’s allegations fail to
10 demonstrate that each defendant personally participated in and caused a violation of his
11 constitutional rights. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

12 DISCUSSION

13 **A. Plaintiff’s Allegations**

14 Plaintiff is no longer in custody, but his allegations are based on the circumstances of his
15 confinement at Wasco State Prison (“WSP”) in 2014 and 2015. Plaintiff names the WSP
16 Warden, a WSP Captain, the Federal Receiver Clark Kelso, and the CDCR as the defendants in
17 this action and seeks monetary damages. The only substantive differences between Plaintiff’s
18 original Complaint and First Amended Complaint are that he dropped any claims under the Equal
19 Protection Clause and he added a WSP Captain and the Federal Receiver and deleted WSP, the
20 Director of Corrections, and the State of California as Defendants.

21 Plaintiff continues to allege that when he was housed at WSP, he contracted Valley Fever.
22 Plaintiff alleges that, as an African American, he is ten times more susceptible to contracting
23 Valley Fever and that the Defendants were “aware” of this statistic at least three years before he
24 arrived at WSP based on memorandums that were circulated and the Departmental Operations
25 Manual. Plaintiff alleges the WSP Warden and a WSP Captain knew that abatement measures
26 were recommended to lower the risk of contracting Valley Fever, but failed to take any such
27 measures and required inmates to attend yard where inmates were required to prone-out when
28 alarms sounded, which occurred daily.

1 As discussed in detail below, Plaintiff fails to state any cognizable claims. Since Plaintiff
2 was previously provided the applicable pleading and legal standards for his claims further
3 amendment would be futile and need not be granted.

4 **B. Immunities**

5 **1. The CDCR**

6 Plaintiff persists in naming the CDCR as a Defendant in this action. The Court previously
7 informed Plaintiff that he may not sustain an action against the state because the Eleventh
8 Amendment bars suits against state agencies. *See Natural Resources Defense Council v.*
9 *California Dep't of Tranp.*, 96 F.3d 420, 421 (9th Cir. 1996); *Brooks v. Sulphur Springs Valley*
10 *Elec. Co.*, 951 F.2d 1050, 1053 (9th Cir. 1991); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.
11 1989) (concluding that Nevada Department of Prisons was a state agency entitled to Eleventh
12 Amendment immunity); *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201
13 (9th Cir. 1989). “Though its language might suggest otherwise, the Eleventh Amendment has
14 long been construed to extend to suits brought against a state by its own citizens, as well as by
15 citizens of other states.” *Brooks*, 951 F.2d at 1053 (citations omitted). “The Eleventh
16 Amendment’s jurisdictional bar covers suits naming state agencies and departments as
17 defendants, and applies whether the relief is legal or equitable in nature.” *Id.* (citation omitted).
18 As stated in the First Screening Order, the CDCR is immune to Plaintiff’s claims under the
19 Eleventh Amendment.

20 **2. The Federal Receiver**

21 Plaintiff added Clark Kelso, the Federal Receiver, as a defendant in the First Amended
22 Complaint. Kelso is the Receiver for CDCR’s health care system. *See Plata v. Schwarzenegger,*
23 *et al.*, C01-1351-TEH (N.D. Cal. Jan. 23, 2008). Upon his appointment in 2008, “[t]he Receiver
24 and his staff [were granted] the status of officers and agents of [the Plata Court], and as such
25 [were] vested with the same immunities as vest with [the Plata] Court.” *Id.* Those judicial
26 immunities extend to immunity from suit. *See Pierson v. Ray*, 286 U.S. 547, 553-54 (1967)
27 (“Few doctrines were more solidly established at common law than the immunity of judges from
28 liability for damages for acts committed within their judicial jurisdiction”); *see also Coleman*

1 *v. Schwarzenegger*, 2007 WL 4276554 (E.D. Cal. Nov.29, 2007) (holding that a receiver who was
2 “imbued with the power and authority to act in the name of the Court as the Court's officer” and
3 who “acts as a ‘surrogate’ of the court” had quasi-judicial immunity). “[J]udicial immunity is not
4 overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be
5 resolved without engaging in discovery and eventual trial.” *Mireles v. Waco*, 502 U.S. 9, 11
6 (1991). There are two primary exceptions to the absolute judicial immunity: first, where the
7 judge’s action is “not taken in the judge’s judicial capacity”; and second, where the judge’s
8 action, “though judicial in nature, is taken in the complete absence of all jurisdiction.” *See id.* at
9 11-12.

10 Plaintiff acknowledges that, as the federally appointed Receiver, Kelso is “the head over
11 the CDCR Medical Health” based on failures in CDCR’s health care system to deliver timely and
12 appropriate treatment to inmates. (Doc. 18 at p. 7.) Plaintiff claims that Kelso has acted in some
13 undescribed manner which denied him proper preventative measures that would have prevented
14 his contraction of Valley Fever. Plaintiff, thus seemingly asserts that Kelso failed to act properly
15 in his role as Receiver. There is no allegation that Kelso acted “in the complete absence of all
16 jurisdiction.” Based thereon, the Court finds that Kelso is entitled to quasi-judicial immunity and
17 suit may not be maintained against him.¹

18 **C. Eighth Amendment -- Deliberate Indifference**

19 In the context of conditions of confinement, prison officials violate the Eighth
20 Amendment if they are “deliberate[ly] indifferen[t] to [a prisoner’s] serious medical needs.”
21 *Peralta v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) citing *Estelle v. Gamble*, 429 U.S. 97,
22 104 (1976). This standard contains both an objective and subjective element. *See Helling v.*
23 *McKinney*, 509 U.S. 25, 35-36 (1993) (discussing objective and subjective elements of Eighth
24 Amendment Claim). In the context of exposure to disease, the objective element asks whether
25 prison officials have exposed the prisoner to a serious medical risk of disease. To determine
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27 ¹ To the extent Plaintiff attempts to amend his complaint to allege that Kelso was aware of plaintiff's medical needs
28 and failed to act upon that knowledge, the Court finds that those allegations would similarly entitle Kelso to absolute
quasi-judicial immunity because plaintiff would again be alleging that Kelso failed to act within his capacity as the
Receiver of CDCR’s health care system.

1 whether the risk to which Plaintiff is exposed is serious, the court considers whether the “risk the
2 prisoner complains of [is] so grave that it violates contemporary standards of decency to expose
3 anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which
4 he complains is not one that today’s society chooses to tolerate.” *Id.* at 36 (italics in original).

5 The subjective element of an Eighth Amendment violation asks whether the prison official
6 acted with “deliberate indifference” in denying medical care or exposing the prisoner to the risk
7 of disease. For conduct to qualify as “deliberately indifferent” in the context of conditions of
8 confinement, the conduct must be shown to be “wanton.” “[T]he constraints facing the *official*”
9 must be considered when determining whether conduct is wanton. *Wilson v. Seiter*, 501 U.S. 294,
10 303 (1991). A deprivation of a treatment or the exposure to a hazard may be wanton only if it
11 was within the official’s ability at the time to avoid the exposure to risk or deprivation of care.
12 “Wantonness consist[s] of ‘acting sadistically and maliciously for the purpose of causing harm.’”
13 *Id.*, quoting *Whitley v. Albers*, 475 U.S. 312, 321-322 (1986).

14 As to the objective component, Plaintiff alleges no facts to indicate that the risk of
15 exposure to the spores of *Coccidioides immitis* spores at WSP was any higher than in the
16 surrounding community. It is worth noting that the attention of courts and official policymakers
17 regarding the risk of Valley Fever have focused on Pleasant Valley State Prison and Avenal State
18 Prison. These facilities have drawn particular state and district court attention because, although
19 eight California correctional facilities are located in the endemic area, these two facilities account
20 for 85% of the occurrence of reported cases of Valley Fever in California. *See Plata v. Brown*,
21 2013 WL 3200587 (N.D. Cal. 2013) at *2. However, an individual who lives out of custody
22 anywhere in the Southern San Joaquin Valley, also runs a relatively high risk of exposure to
23 *Coccidioides immitis* spores. Likewise, as noted by Dr. Jeffrey Gunzenhauser, Los Angeles
24 county’s interim health officer, the Antelope Valley, where Plaintiff has resided since February of
25 this year (*see* Doc. 13), has been included as an endemic area with high incident rates because it
26 has environmental conditions similar to the Central Valley which may encourage growth of cocci
27 spores.

28 Unless there is something about a prisoner’s conditions of confinement that raise the risk

1 of exposure substantially above the risk experienced by the surrounding community, it cannot be
2 said that the prisoner is forcibly and knowingly exposed to a risk the society would not tolerate to
3 meet the objective component of a claim under the Eighth Amendment. *See Hines v. Youssef*, No.
4 1:13-cv-00357-AWI-JLT, 2015 WL 164215, at *4 (E.D. Cal. Jan. 13, 2015) (rejecting African-
5 American asthmatic prisoner’s Eighth Amendment claim arising from exposure to and
6 contraction of Valley Fever); *accord Williams v. Biter*, No. 1:14 cv 02076-AWI-GSA PC 2015
7 WL 1830770, at *3 (E.D. Cal. Apr. 9, 2015); *contra Beagle v. Schwarzenegger*, No. 1:14-cv-430-
8 LJO-SAB, 2014 U.S. Dist. LEXIS 107548 (E.D. Cal. Jul. 25, 2014).

9 Plaintiff also fails to state allegations to meet the subjective component of an Eighth
10 Amendment claim. Despite receiving the standards in the First Screening Order, Plaintiff has still
11 not shown (and in all likelihood is unable to do so) that any individual Defendants acted *wantonly*
12 in formulating the policies and procedures which resulted in Plaintiff’s placement at WSP. As
13 noted above, the State of California has eight of its correctional facilities -- and therefore a
14 substantial proportion of its inmate capacity -- located in the Southern San Joaquin Valley. If
15 Plaintiff’s allegations, (which are wholly, solely based on his placement at WSP) were
16 cognizable, the State of California would not be able to house any inmates at WSP, SATF, PVSP,
17 or ASP, and maybe not even at any of the eight facilities located in the endemic area.

18 Further, to meet the initial pleading burden Plaintiff must state allegations showing “the
19 particular features of that institution that resulted in dangerous conditions, or the practices or
20 procedures within the CDSH-C that may have resulted in increased risk.” *Smith v. State of*
21 *California*, 2016 WL 398766, *2 (2016). “[T]he mere allegation that Plaintiff was confined in a
22 community that happens to be in an endemic area for Valley Fever is not sufficient to show that
23 he was, in fact, exposed to an increased risk or that the individuals responsible for his placement
24 or housing there would have known or had reason to know that Plaintiff was being exposed to a
25 heightened danger of disease.” *Id.* Thus, Plaintiff fails and appears unable to allege facts
26 sufficient to state a cognizable claim under the Eighth Amendment.

27 **II. CONCLUSION & RECOMMENDATION**

28 Plaintiff’s First Amended Complaint fails to state any cognizable claims. Given that the

1 First Amended Complaint suffers from defects similar to the original Complaint, it appears futile
2 to allow further amendment. Plaintiff should not be granted leave to amend as the defects in his
3 pleading are not capable of being cured through amendment. *Akhtar v. Mesa*, 698 F.3d 1202,
4 1212-13 (9th Cir. 2012).

5 Accordingly, the Court **RECOMMENDS** that this entire action be dismissed with
6 prejudice. The Clerk of the Court is directed to assign a district judge to the action.

7 These Findings and Recommendations will be submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within 21**
9 **days** after being served with these Findings and Recommendations, Plaintiff may file written
10 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
11 Findings and Recommendations.” Plaintiff is advised that failure to file objections within the
12 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
13 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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15 IT IS SO ORDERED.

16 Dated: November 21, 2018

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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