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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

TERRY LEROY JONES and GABRIEL CAMPOS, on behalf of themselves and all others similarly situated;

Petitioners/Plaintiffs,

vs.

ANTHONY RAY, in his official capacity as Interim Sheriff of San Diego County, California,

Respondent/Defendant.

CASE NO: 37-2021-00010648-CU-MC-CTL
Action Filed: March 10, 2021

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

Dept.: C-73
Judge: Hon. Joel R. Wohlfeil

Date: December 9, 2022
Time: 9:00am

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I. INTRODUCTION

Nearly three years after the start of the COVID-19 pandemic, as the San Diego County jails endure yet another outbreak, the death toll mounts, and we cross the threshold of four thousand infections at the jails, Defendant Interim Sheriff Anthony Ray ("Defendant") continues to flout public health guidance and take only half-hearted measures to protect incarcerated people from risk of serious harm from the virus. In submitting his motion for summary judgement or adjudication ("Motion") long before the close of discovery, he also tells only half the story. While much of what he does disclose is either disputed or based on inadmissible evidence, the part of the story he does not share reveals his steadfast refusal to implement common-sense measures to reduce risk to those in his custody. On behalf of the classes they represent, Plaintiffs oppose Defendant's Motion.

First, the Court should reject Defendant's meritless exhaustion argument. As this Court has noted, his "administrative remedies are unsuitable to resolve alleged class-wide issues," and there are at least disputed issues "whether other class members have pursued defendant's grievance process." ROA #156 at 4. Indeed, the evidence Defendant failed to disclose reveals that many have.

Second, Defendant fails to submit sufficient admissible evidence to meet his initial burden to negate Plaintiffs' claims. Meanwhile, Plaintiffs' evidence, much of which comes from Defendant and his staff themselves, reveals an extensive number of triable material facts. Regarding Defendant's deliberate indifference to the threat of serious harm posed to class members by COVID-19 alleged in Plaintiffs' first and second causes of action, it is indisputable that Defendant has deliberately rejected certain common-sense policies that would significantly reduce the risk of harm to class members. For the policies Defendant says he has enacted, the evidence points to widespread failures in implementation, and whether these failures are the exception, as Defendants suggest, or the known rule, as Plaintiffs assert, is a quintessential disputed issue for trial. Moreover, Defendant posits the wrong legal standard, proposing he prevails simply because he took some precautions, even if he refuses to implement many other reasonable measures he knows will reduce the risk to class members. But the Court cannot judge reasonableness based on only part of the picture, no matter how glowingly Defendant paints himself in it. Viewing the entire picture, including all Defendant has refused to do, the Motion should be denied as to those claims.

The Motion should also be denied as to Plaintiffs' third and fourth claims. Many of the same disputed facts on Plaintiffs' first two claims similarly abound on their third cause of action alleging Defendant failed to exercise his mandatory authority under Government Code § 8658, and his fourth cause of action alleging Defendant failed to accommodate incarcerated people with disabilities and that his actions and inaction placed them at disproportionate risk of severe illness or death.

Alternatively, Plaintiffs request a continuance under CCP § 437c(h) to allow resolution of their pending motion to compel inspection of Defendant's jail facilities and for time to review recently produced discovery, as they are likely to yield evidence essential to resolving the Motion.

II. UNDISPUTED AND DISPUTED MATERIAL FACTS

Only a small handful of Defendant's asserted facts are undisputed or based on admissible evidence. *See* Plaintiffs' Separate Statement in Opposition to Defendant's Motion ("PSUF") Nos.1-61. Plaintiffs dispute Defendant's assertions that his overall response to abate the risks from COVID-19 has been reasonable or that he has made reasonable accommodations to ensure he does not place disabled inmates at greater risk than the general incarcerated population. Moreover, Plaintiffs set forth 101 additional material facts regarding Defendant's deliberate indifference to the risk of severe harm from COVID-19, the failure to exercise his mandatory § 8658 authority, and his failure to accommodate people with disabilities and the disproportionate harm they face.

A. COVID-19 Poses Serious Risk of Harm in San Diego County Jails.

The BA.5 strain of the Omicron COVID-19 variant is now the predominant strain of COVID-19 in the United States. Omicron variants generally spread far more easily than the original SARS-CoV-2 virus, and the BA.5 subvariant is especially virulent, with greater capacity to evade immune defenses. *Id.* at 64. As of October 15, 2022, there are nearly 39,000 new cases of COVID-19, and more than 325 COVID-19 deaths, in the United States every day. *Id.* at 66. Many experts predict a new surge of cases in the fall and winter. *Id.* at 159. For people who have already had COVID-19, the risk of reinfection rises steadily over time, and "people who are reinfected by the virus face increased risks of a range of medical problems in subsequent months, including heart attacks, strokes, breathing problems, mental-health problems, and kidney disorders." *Id.* at 158.

As of October 26, 2022, the San Diego County jails, which have experienced many waves

of outbreaks, have 13 active COVID-19 cases in custody and another 21 individuals in isolation for precautions, contributing to a total of over 4,600 positive cases in the jails since March, 2020. *Id.* at 68.

B. The Sheriff Has Chosen to Flout Public Health Guidance, Failing to Take Reasonably Necessary Measures to Mitigate the Threat from COVID-19.

On May 3, 2022, the CDC issued updated guidelines on the management of COVID-19 in detention facilities, identifying (1) prevention strategies depending on community risk levels, and (2) every-day strategies regardless of community risk levels. *Id.* at 69. Defendant has consistently failed to implement either, even in the face of a never-ending series of COVID-19 outbreaks.

1. Defendant's Failure to Implement Enhanced COVID-19 Prevention Strategies

The CDC guidelines instruct facilities to "add enhanced COVID-19 prevention strategies when the COVID-19 Community Level is medium or high, or when facility-level factors indicate increased risk." *Id*. at 70. Facilities "should" use these strategies "if one or more additional cases are identified after" a facility investigates "any new case of COVID-19 in a staff member or resident" "even if the COVID-19 Community Level is low." *Id.* These enhanced strategies include: (a) requiring all persons in the facility to wear a well-fitting mask or respirator while indoors; (b) enhancements to ventilation; (c) strengthening COVID-19 testing strategies, including routine screening testing for residents and staff, and additional movement-based screening testing before transfer, before/after court appearances, and before release; (d) adding routine observation periods during movement as part of intake, transfer and/or release processes, referred to as "intake quarantine"; and (e) implementing physical distancing strategies where feasible. *Id.* at 73. Defendant has failed to implement any of these strategies adequately, if at all.

a. Defendant Employs Unsafe Masking Policies.

Defendant admits he refuses to issue high-quality masks to most class members, continuing to default to cloth masks that the CDC and California Department of Public Health have made clear are unsuitable for jails, where they instruct well-fitting masks or respirators should be offered and provided to all residents and staff who want them. *Id.* at 56, 74-75. In addition, numerous class members assert Defendant fails to require *any kind* of mask in communal dayrooms and outside of

housing units, including during interfacility transfers, transport to court, and professional visits, and regularly fails to replace lost masks or provide masks upon request, creating disputes about the adequacy and implementation of Defendant's masking policies. *Id.* at 76-77.

b. Defendant Has Not Even Studied the Need for Enhanced Ventilation.

Although it has been clear for years that improving ventilation is crucial for mitigating the risk of COVID-19 transmission, and despite CDC guidance that jails "[p]repare in advance for periods of higher risk by identifying, obtaining, and testing enhanced ventilation interventions [to] be deployed as enhanced prevention strategies when needed," Defendant admits he has failed to even study or assess the potential need to enhance the jail ventilation system, much less actually implement improved ventilation measures per CDC guidance. *Id.* at 78, 79.

c. Defendant Has Failed to Appropriately Strengthen COVID-19 Testing.

Defendant admits he does not conduct routine screening testing for residents and staff, and he does not test residents before transferring them between jail facilities, before court appearances, or before release. *Id.* at 80. Defendant asserts he has a policy for testing prior to all transports, but admits he has not implemented the policy due, in part, to his purported inability to acquire a sufficient testing supply. Motion at 8. Plaintiffs dispute the existence of this policy, as Defendant does not present any evidence of a lack of rapid tests or efforts to obtain more rapid tests. Even more egregiously, Defendant transports people for court hearings even when their housing module is on quarantine for COVID-19 exposure. PSUF at 83. Defendant's decision to transport people to court without testing, even from quarantined units, is startling, given that former Sheriff Gore acknowledged that "[t]ransportation of inmates to court unnecessarily exposes inmates, deputies, the public, and the entire court to risk of infection by this deadly disease." *Id.* at 81. Without adequate testing, Defendant cannot assess the extent of COVID-19 transmission in the jails, identify the reasons for wave after wave of outbreaks, or prevent their recurrence. *Id.* at 84.

d. Defendant Employs an Intake Quarantine that His Own Chief Medical Officer Says is Inadequate, Knowing It Will Increase COVID-19 Outbreaks.

Implemented properly, intake quarantines – which occur as one of the routine observation periods during movement – can minimize potential transmission, and they are especially important

during periods of medium or high transmission. However, the CDC instructs they "should only be used" when the quarantined residents are housed individually or in small cohorts of people who begin quarantine on the same day and are tested at the end of the observation period. *Id.* at 85. Contrary to this guidance, Defendant admits he has no policy to test cohorted residents at the end of the observation period before introducing them into the general population. *Id.* at 86.

The risk posed by Defendant's refusal to implement a policy to test at the end of intake quarantine is compounded by his determination to implement an abbreviated 5-day intake quarantine period. *Id.* at 88. The CDC instructs that the period "should" be "7-10 days if the residents … are not tested at the end of the observation period ." *Id.* at 87. A "shorter period" may now be acceptable in certain conditions, but *only* if residents are tested at the end of the intake quarantine. *Id.* Defendant admits he employs only a 5-day intake quarantine, without requiring testing at the end. *Id.* at 88. Even Defendant's Chief Medical Officer has admitted that jail conditions do not warrant a riskier shortened intake quarantine. Specifically, in February, 2022 (a period of a significant outbreak), he wrote:

> Now that the crisis has passed, we need to change back to the 7 day quarantine at a minimum. … the CDC recommendation was … changed… from 14 to 10, and … our current provision of 5 days is based on 'emergency/crisis' conditions. Since we have previously been able to maintain a 7 day quarantine … we should be able to maintain it now. … it will [also] help us with the ACLU issue.

Id. at 12. Yet, despite the view of his own medical staff, Defendant refuses to implement an intake quarantine with proper safeguards.

In fact, Defendant has consistently ignored CDC guidance regarding the duration of intake quarantine for the entirety of the pandemic, fully aware of the risks. In April, 2021, when the CDC was recommending a 14-day intake quarantine, the same Chief Medical Officer wrote to the Director of Nursing that "If we do not actually have a full 14 day intake quarantine… we will have outbreaks. It is a statistical inevitability." *Id.* at 89. Yet Defendant employed only a 7-day intake quarantine at the time. *Id.* at 90. Sure enough, there was a massive new outbreak at the jails within months, with 208 active cases by late August, 2021. *Id*. at 93. This was no surprise, given that jail medical staff had traced a massive outbreak in February, 2021 to movement and transfers during a patient's infectious period after leaving intake quarantine. *Id.* at 155.

e. Defendant Makes It Impossible to Maintain Safe Physical Distance in Jails.

Defendant has declined to implement any meaningful physical distancing strategies, operating several jail facilities at, or even well beyond, capacity. *Id.* at 97. His Detentions Lieutenant admits to these conditions. He testified that, contrary to CDC guidance, Defendant has not created any policies intended to create the possibility of physical distancing in the jails and conceded that it "would be difficult" for residents to maintain six feet of separation from others while in two or three person cells or dorms, that six feet of distance from one stacked bunk to another is impossible under such conditions, and that one detainee "could probably touch an inmate in the next bunk." PSUF at 98. Numerous class members attest to cramped conditions and the impossibility of maintaining distance while sleeping, eating, obtaining medication, during transport, and while in holding cells. *Id.* at 99. At times, facilities have been so crowded that people have been forced to sleep on the floor. *Id.* 96. Defendant admits that George Bailey Detention facility "was filled to 95% of BSCC rated operational capacity at least 75% of the time from October 1, 2021 to April 1, 2022." *Id.* at 104. In February, 2022, during a significant outbreak, Central Jail and George Bailey were each more than 100 people beyond capacity. *See id.* at 100-02. The overall jail population has routinely swelled well above 4,000, even when jail staff have acknowledged the "need[] to maintain our population at under 3900 to allow for proper distancing in the modules and to continue to operate our 7-day intake quarantine." *Id.* at 106-107. While the Department has acknowledged the Sheriff has the authority under Government Code § 8658 to release people to avoid risking their lives, thereby improving other residents' ability to physically distance, Defendant has steadfastly refused to exercise this authority. *Id.* at 105.

Moreover, the Department has willfully created these dangerously crowded conditions. Defendant's predecessor proactively fought against efforts to reduce the jail population, writing to the Judicial Council to "emphatically oppose" the imposition of "an emergency statewide bail schedule with mandates bail to be set at $0 for most crimes," and referring to it as an "unnecessary measure." *Id.* at 108. The Department also sought to expand its Booking Acceptance Criteria to incarcerate more people for a greater array of offenses, even while acknowledging that doing so would mean "physical distancing abilities would be impacted." *Id.* at 110. Confronted with officers

who actively subverted the narrowed booking criteria by "creative[ly]" booking people for offenses they would not have been otherwise charged with, the Department responded not by limiting such "creativity" but by ratifying it, relaxing the booking criteria, and consequently increasing the jail population. *Id.* at 111. Thus, Defendant has *chosen* to expand the jail population throughout the pandemic and render physical distancing impossible, even after the Department's apparently hollow acknowledgment that a reduction of the jail population was "necessary," and that "we must do everything we can to reduce the potential for transmission of this terrible disease." *Id.* at 109.

2. Defendant's Failure to Implement Strategies for Everyday Operations

In addition to the enhanced prevention strategies described above that Defendant has largely ignored, the CDC also provides a series of "Strategies for Everyday Operations" that facilities "should" follow "at all times." *Id.* at 112. Yet Defendant has consistently refused to implement even these more basic COVID-19 mitigation measures, failing to follow basic public health guidance to classify and protect individuals at heightened risk for serious illness or death due to COVID-19, to meaningfully promote COVID-19 vaccination, and to implement basic infection control strategies including recommended cleaning protocols.

a. Defendant Refuses to Protect People at High Risk for Severe COVID-19.

Defendant completely disregards CDC guidance for classifying and protecting individuals at heightened risk for serious illness or death due to COVID-19. The CDC has compiled a non-exhaustive list of conditions that place individuals at such risk, which includes: cancer, chronic kidney disease, chronic liver disease, chronic lung diseases (including moderate to severe asthma), cystic fibrosis, dementia or other neurological conditions, diabetes, selected disabilities, several heart conditions, HIV infection, immunocompromised condition or weakened immune system, certain mental health conditions, overweight and obesity, physical inactivity, pregnancy, sickle cell disease or thalassemia, current or former smoking, solid organ or blood stem cell transplant, stroke or cerebrovascular disease, substance use disorders, and tuberculosis. *Id.* at 113.

However, Defendant admits his "criteria for designating detainees as being at 'high-risk' for severe COVID-19" are "narrower and less inclusive than the CDC's list of conditions," *id.* at 114, flouting CDC and other public health guidance in numerous ways that increase the risk to

members of the medically vulnerable subclasses and disability class. According to Defendant's Person Most Qualified ("PMQ") to testify on the issue, Defendant has created criteria that include only five "high-risk" classifications: people who (1) are 65 or older, (2) are actively being treated for cancer, (3) have diabetes with a high HgbA1c count, (4) have COPD and are receiving breathing treatment, and (5) have hypertension and are 65 or older with blood pressure greater than 160mmHg.[1] *Id.* at 120. People with medical conditions like chronic kidney, liver, and lung disease, cystic fibrosis, HIV, etc. are not included in Defendant's criteria. *Id.* at 120-121.

These narrow criteria pose unreasonable short-term and long-term risk to members of the disability class and medically vulnerable subclasses. For example, although the CDC considers everyone with HIV to be at heightened risk for COVID-19, Defendant does not designate such individuals as high risk unless they have what Defendant considers a sufficiently high viral load count. *Id.* at 115. Consequently, Defendant has refused to place medically vulnerable people in high-risk housing even when they have requested such placement out of concern for their own vulnerability to infection.[2] *Id.* at 116; *see also id.* at 117 (Defendant declined to place person with cancer in high-risk housing). Unfathomably, even when Defendant identifies people who fit his narrow "high risk" criteria, he still denies them any additional protection *for approximately the first two weeks* of their incarceration, forcing them to first spend five days in intake quarantine, followed by a minimum of seven days in the general population, *before* moving them to the protection of high-risk housing. *Id.* at 122.

Rather than protect people who the CDC identifies as particularly vulnerable to COVID-19, Defendant has rejected CDC criteria because acknowledging them would require offering

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[1] Although these criteria are from an undated training bulletin, his PMQ testified that these are the criteria Defendant employs. Indeed, Defendant has seemingly narrowed the criteria even further, apparently no longer considering HIV a high-risk condition, regardless of T-cell count or viral load. *Id.* at 19. Defendant's criteria are also considerably narrower than California Department of Public Health Criteria. *Id.* at 113.

[2] On at least one occasion, this predictably resulted in Defendant forcing a HIV+ class member into close contact with someone infected with COVID-19, causing the class member to contract COVID-19 himself. *Id.* at 117. In addition to the unreasonable risk this imposed while in Defendant's custody, that individual continues to experience symptoms consistent with long-COVID months after release, including inability to breathe deeply and coughing fits. *Id.*

greater protection to a larger proportion of the jail population. Defendant baselessly claims that CDC criteria are "vague and overbroad," but offers no medical explanation for that determination. *Id.* at 124. Defendant's refusal to recognize that a significant percentage of people incarcerated in his jails are at high risk for severe COVID-19 needlessly jeopardizes the health of members of the medically vulnerable subclasses and disability class. *Id.* at 125.

b. Defendant Has Failed to Adequately Promote COVID-19 Vaccination.

CDC guidance instructs that detention facilities "should" "promote COVID-19 vaccination by educating staff and residents on the effectiveness, safety, and importance of vaccines" and develop "effective ways to increase vaccination uptake, informed by input from residents and staff about why they may not wish to receive the vaccine." *Id.* at 126. To combat vaccine hesitancy, the CDC directs facilities to a website containing materials for "building confidence in COVID-19 Vaccines." *Id.* at 127. Defendant's Chief Medical Officer admits that the need to encourage "patients to be more accepting of the vaccine … is a commonly identified issue both in custody as well as in the community" and agreed that "encourage[ing] people to receive the vaccine or be more accepting of receiving the vaccine," including by addressing common vaccine misconceptions, is important. *Id.* at 129.

Fully aware of the need to increase vaccination rates in the jails, Defendant waited over a year, until early April, 2022, to produce, post, or distribute any written materials addressing vaccine hesitancy, including vaccine efficacy, side effects, or common concerns, myths, and misinformation.[3] *Id.* at 135. When Defendant did finally procure such materials, he chose wildly inappropriate flyers, with hyperlinks to websites to address questions or concerns, even though there is no way for an incarcerated population to access those sites. *Id.* at 136. The flyers also included highly technical language Defendant's Director of Nursing acknowledged would be too "in depth for a lay population," and "harder to understand." *Id.* at 137. Moreover, Plaintiffs dispute whether Defendant even distributed or posted the flyers, as numerous class members report they

[3] Defendant did provide the manufacturer's vaccine information sheet, which is provided to patients only *after* they have accepted a vaccination offer and are about to be administered the vaccine. *Id.* at 135.

have still not seen or received any written materials regarding vaccine hesitancy. *Id.* at 138.

As a result of Defendant's lackluster vaccination efforts, it is unsurprising that by early July, 2022, a paltry 40 percent of people incarcerated in the jails had received at least one dose of an approved vaccine, compared to 77 percent in the San Diego community at large.[4] *Id.* at 130. In addition, the jails have been extraordinarily unsuccessful at distributing vaccines, with a current acceptance rate of under 1 percent. *Id.* at 160. Defendant's failure to provide meaningful information about vaccine efficacy and side effects or to otherwise combat vaccine hesitancy likely accounts for the abysmally low vaccination acceptance rate. *Id.* Indeed, several people have testified they would have been more likely to accept vaccinations had they been provided with more information about the vaccines. *Id.* at 140. Based on class member testimony, Plaintiffs dispute Defendant's claim that meaningful vaccine "counseling" is available on demand from "jail nurses." *Id.* at 53; Motion at 10:8-9. Because Defendant controls access to information for people who are incarcerated in the San Diego County jails, his decision not to provide basic information about COVID-19 vaccines leaves detained individuals without the resources necessary to make informed decisions about their medical care. This increases the risk of vaccine hesitancy, thereby also exacerbating the overall risk of COVID-19 transmission throughout the jails.

Beyond failing to provide crucial information about vaccination to residents, residents report that Defendant has, at times, failed to offer vaccination, and that his staff has explicitly refused to provide booster shots. PSUF at 143. As late as December, 2021, his Director of Nursing acknowledged "we are getting way to [sic] many patients at GB and EM that haven't been offered a vaccine." *Id.*

c. Defendant's Filthy Jails Violate Basic Infection Control Strategies.

The CDC emphasizes the importance of maintaining regular cleaning and disinfection practices. *Id.* at 144. Despite this guidance, numerous class members testify to the filthy conditions in the jails and to staff's refusal to provide cleaning supplies. *Id.* at 145. Staff have refused to clean bathrooms even when residents have complained about horrendous conditions involving worms

[4] Even that modest 40 percent figure likely inflates Defendant's contributions, as it necessarily includes a large percentage of people who were vaccinated before incarceration. *Id.* at 130.

coming out of drains, water backed up to people's ankles in the showers, black mold in showers, and toilets overflowing with dirty water and feces. *Id.* at 146.

3. Consequences of Defendant's Decisions to Disregard Public Health Guidance

By declining to implement "essential" and "key" principles of COVID-19 mitigation strategies, including provision of well-fitting masks, proper housing for medically vulnerable people, and robust testing procedures during periods of medium or high transmission, Defendant has ensured there "will be ongoing COVID-19 transmission within the Jail[s], with possibilities of large outbreaks, severe illness and death." *Id.* at 147.

III. LEGAL STANDARD

"The summary judgment procedure is drastic and should be used with caution so that it will not become a substitute for a full trial." *Hayman v. Block*, 176 Cal. App. 3d 629, 639 (1986). The movant "bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 850 (2001). A defendant moving for summary judgment bears the initial burden to show plaintiff cannot establish one or more elements of a cause of action or that there is a complete defense to the action. CCP § 437c(o), (p). If the "[d]efendant fails to make this initial showing, it is unnecessary to examine the plaintiff's opposing evidence and the motion must be denied." *Kerkeles v. City of San Jose*, 199 Cal. App. 4th 1001, 1009 (2011) (citation omitted). Only if defendant meets his initial burden does "the burden then shift[] to the plaintiff to make a prima facie showing" of "a triable material factual issue." *Id.*; *see also Clendening v. Shipton*, 149 Cal. App. 3d 191, 196 (1983). A court must consider all evidence and inferences reasonably drawn therefrom, viewing them in the light most favorable to non-moving party. CCP § 437c(c); *Ingham v. Luxor Cab Co.*, 93 Cal. App. 4th 1045, 1049 (2001). If affidavits submitted in opposition to summary judgment demonstrate that essential facts may exist but for good reason cannot be presented, the court may order a continuance to permit the completion of discovery. CCP § 437c(h).

IV. ARGUMENT

Defendant's Motion should be denied for at least two reasons. First, Plaintiffs were not required to exhaust administrative remedies prior to bringing this lawsuit because: those remedies

can only address individualized issues, not class-wide policies and procedures; class members have filed myriad grievances related to COVID-19 protocols to no avail; and Defendant's refusal to adopt the COVID-19 mitigation measures sought indicate the grievance procedure would be futile.

Second, on the merits, Defendant has not met his initial burden of producing evidence "negating all causes of action upon all theories." *Hayman*, 176 Cal. App. 3d at 639. Even if he has produced enough evidence to shift the burden, Plaintiffs dispute the vast majority of Defendant's asserted facts. Thus, Defendant has not eliminated "all issues of fact" as to Plaintiffs' first and second causes of action that he has been deliberately indifferent to the risk posed by COVID-19, in violation of their constitutional rights to due process and to be free from cruel and unusual punishment, or as to their third and fourth causes of action alleging his failure to provide for the safety of incarcerated individuals in violation of Government Code § 8658, and that he has employed unnecessary policies, practices, criteria or methods of administration that have the effect of excluding or discriminating against persons with disabilities, or that he has failed to make reasonable modifications to avoid such discrimination, in violation of Government Code § 11135.

Alternatively, Plaintiffs request the Court grant a continuance because a jail inspection that is the subject of a pending discovery dispute and additional discovery currently being produced by Defendant are likely to provide evidence essential to resolving the Motion.

A. Plaintiffs Were Not Required to Exhaust Administrative Remedies, and Class Members have Pursued the Grievance Process in Any Event.

If administrative "remedies do not provide class-wide relief, then no plaintiff need exhaust them before suing." *Tarkington v. California Unemployment Ins. Appeals Bd.*, 172 Cal. App. 4th 1494, 1510 (2009). By its own terms, Defendant's "inmate grievance procedure is designed to address" individualized issues "that directly and personally affect[] the inmate grievant," PSUF at 61, and is, as this Court noted in granting class certification, "unsuitable to resolve alleged class-wide issues." ROA #156 at 4. Because the grievance "scheme" has no "provision for class relief" and "does not contemplate class actions," there is no requirement for any class member to have filed a grievance, because no "[r]emedy for class relief" exists. *Ramos v. Cnty. of Madera*, 4 Cal. 3d 685, 690–91 (1971). Regardless, the purpose of exhaustion is served when "the putative class contains

members who have already exhausted their administrative remedies." *Tarkington*, 172 Cal. App. 4th at 1509. Here, class members have filed thousands of sick call requests and dozens of grievances regarding COVID-19, cleaning, and sanitation. PSUF at 148. Defendant's responses to those grievances did not result in changes in policies and procedures that would mitigate the COVID-19 transmission risk, necessitating this litigation.

Moreover, there is no exhaustion requirement where administrative procedures would clearly be futile, such that "the petitioner can positively state that the [defendant] has declared what its ruling will be in a particular case." *Doyle v. City of Chino*, 117 Cal. App. 3d 673, 683 (1981) (cleaned up). Here, Defendant and his predecessor made clear before this litigation ensued they believe their response to the pandemic has been sufficient, and that any appeal for systemic changes would be futile. PSUF at 63 (noting that, before this lawsuit was filed, former Sheriff Gore vigorously defended his purported COVID-19 policies and squarely rejected a request to exercise his "authority under Government Code 8658 to release inmates in cases where it is necessary to do so to avoid imminent danger."). Indeed, Defendant's staff told one class member who filed a grievance about the impossibility of social distancing, the lack of face masks and COVID-19 testing, and unsafe transfers in April, 2020, that these "are not grievable offenses" and summarily closed the matter. *Id.* at 61. Thus, by the time they filed suit in March, 2021, Plaintiffs could "positively state" that Defendant had "declared" that he would not provide the relief requested in this case and that use of his grievance procedures would have been futile. *Doyle*, 117 Cal. App. 3d at 683.

At minimum, there are triable issues of material fact as to whether administrative remedies could provide class-wide relief, whether class members attempted to employ those remedies, and whether any such efforts would have been futile. Exhaustion therefore fails to provide an appropriate basis for granting Defendant's motion. *Aguilar*, 25 Cal. 4th at 850.

B. Triable Issues of Material Fact Prevent Summary Judgment or Summary Adjudication on the Due Process and Cruel and Unusual Punishment Claims.

As this Court has noted in overruling Defendant's demurrer, to prevail on their Due Process and Cruel and Unusual Punishment claims under Article 1 of the California Constitution, Plaintiffs must show deliberate indifference, and they are entitled to relief:

> [i]f (a) Defendant made an intentional decision with respect to the conditions under which they are confined; (b) those conditions put Plaintiffs at substantial risk of suffering serious harm; (c) Defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved; and (d) by not taking such measures, Defendant caused Plaintiffs' injuries.

ROA #23 at 1–2 (citing *Gordon v. County of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018)). "To satisfy the fourth element, a plaintiff need only prove a 'sufficiently imminent danger … because a remedy for unsafe conditions need not await a tragic event." *Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) (cleaned up). Plaintiffs need not prove Defendant "believe[ed] that harm would befall an inmate," but only demonstrate disputed issues whether "the official acted or failed to act despite [his or her] knowledge of a substantial risk of serious harm."[5] *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). Specifically, the inquiry centers "on whether [jail] officials 'recklessly disregarded [the] risk of' COVID-19." *Valentine v. Collier*, 993 F.3d 270, 281-82 (5th Cir. 2021).

Defendant's primary response to the deliberate indifference claim is to assert that he has implemented a so-called "lengthy" series of COVID-19 mitigation efforts and that, despite some errors over time, his overall mitigation efforts have been "extraordinary." Motion at 14:10-28. However, Plaintiffs dispute whether these measures have been effective, the extent to which they have been implemented at all, and whether it was reasonable to decline to take other available measures to abate the risk, including measures recommended by public health experts and his own medical staff. Thus, disputed issues of material facts abound as to whether Defendant has deliberately disregarded the substantial risk of COVID-19 in the jails and whether his refusal to take reasonable available measures to mitigate that risk actually exacerbated it.

The purported evidence demonstrating the success of Defendant's efforts comes in the form of an expert report by Colleen Kelly, whose analysis and conclusions are disputed by Plaintiffs' expert, Dr. Joseph Amon. PSUF at 59, 149. Despite Defendant's assurance that "[t]he sources of data Dr. Kelly used … are described thoroughly" in her declaration and "more extensively" than her

[5] Persons detained before trial are protected by due process and need not show officials were "subjectively aware of the risk involved." *Gordon*, 888 F.3d at 1122; *Cortez v. Skol*, 776 F.3d 1046, 1052 (9th Cir. 2015). The distinction is immaterial here, because the record shows Defendant is subjectively aware of the need for additional protective measures.

previous declaration, Motion at 15:14-17, Dr. Kelly has once again failed to provide some of the data supposedly supporting her analysis. PSUF at 149. "[A]n expert's opinion based on assumptions of fact without evidentiary support or on speculative or conjectural factors has no evidentiary value." *Jennings v. Palomar Pomerado Health Sys., Inc.*, 114 Cal. App. 4th 1108, 1117 (2003) (cleaned up). Accordingly, the Court should disregard parts of Dr. Kelly's declaration. *See Hayman*, 176 Cal. App. at 639 ("Matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or impermissible opinions, must be disregarded in supporting affidavits."). In contrast, Dr. Amon's analysis relies on government sources, which he provides, to conclude that class members are several times more likely to contract COVID-19 than people in the County's general population. *Id.* at 150. Thus, even if Defendant meets his initial burden, Dr. Amon's report demonstrates triable issues of material fact as to whether class members are unreasonably at far higher risk for COVID-19 than people in the County's general population.

Next, Defendant's attempts to minimize the toll of COVID-19 in the jails by claiming that "only three San Diego County inmates have died due to COVID-19" also fail to meet his burden. Deliberate indifference claims do not turn on deaths or hospitalizations, but on the intentional disregard of reasonable protective measures that could abate substantial risk of serious harm. ROA #23 at 1-2. COVID-19 can cause serious harm short of hospitalization and death. PSUF at 158. Courts, including the Supreme Court, have regularly recognized the viability of deliberate indifference claims for risks of harm that may be remote in time and rarely require hospitalization. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding inmate states a claim for exposure "to levels of ETS [environmental tobacco smoke] that pose an unreasonable risk of serious damage to his future health"). Moreover, the inquiry turns on the unnecessary *risk* of harm, not the number of harmful incidents, and courts have rejected Defendant's proposed ends-justify-the-means inquiry. *Id.* at 34 (rejecting "petitioners central thesis that only deliberate indifference to current serious health problems of inmates is actionable under the Eighth Amendment."); *White v. Napoleon,* 897 F.2d 103, 111 (3rd Cir. 1990) (prisoner states Eighth Amendment claim even if medical condition did not worsen). Thus, Defendant fails to meet his initial burden regarding the risk of harm.

Even considering actual harm instead of risk, Plaintiffs raise serious disputes regarding the

scale of class members' suffering. For instance, Defendant's website now acknowledges at least six, not three, COVID-19 related in-custody deaths. Some of these individuals may have been medically vulnerable under CDC criteria, but not Defendant's, raising disputes as to whether they were adequately protected. PSUF at 162. Defendant also concedes the Medical Examiner has not yet determined the cause of death for all who have died in Defendant's custody since the start of the pandemic. *Id.* at 151-152. Hospitalizations are an inadequate measurement for the additional reason that Defendant controls who gets hospitalized, and numerous class members attest to suffering serious COVID-19 symptoms without hospitalization while in Defendant's custody. *Id.* at 161. Defendant's success narrative is dependent not only on disregarding the value of the decedents' lives or the toll on their families, but also upon completely ignoring the suffering endured by the thousands of class members who have contracted COVID-19 while incarcerated in the Jails. *See id.*

Defendant also engages in the logical fallacy of equating the *quantity* of COVID-19 mitigation efforts with the *quality* of those efforts, while ignoring the risks posed by failing to take additional reasonable steps. The appropriate legal standard requires consideration of the measures Defendant has refused to take and the risks caused by such refusal, not simply whether Defendant has half-heartedly implemented only the easiest measures. It is unreasonable for Defendant to refuse to take crucially important steps to protect people from the risk of COVID-19 simply because he has chosen to take some other steps, especially where consistent implementation is disputed, and wave after wave of COVID-19 outbreaks conclusively demonstrate (and at minimum create triable issues), that the steps he has purportedly taken have failed to abate the risk of transmission.

Indeed, Defendant has conceded that "an alleged lack of precautions taken to reduce exposure or spread of COVID-19" would "appropriately" provide the basis for a deliberate indifference claim. ROA #93 at 9-10: 27-1. Yet he has consistently refused to follow public health guidance concerning COVID-19. Most importantly, Defendant has consistently declined to follow central elements of CDC COVID-19 guidance for detention facilities, without implementing alternative measures that could eliminate the need to follow that guidance. To be clear, Plaintiffs do not argue that the CDC Guidelines are mandatory or the legally required minimum. The law only requires Defendant to make—and ensure compliance with—an adequate plan to abate known risks

to safety in the jails. But when a jail system's supposed plan results in outbreak after outbreak, yielding thousands of positive cases, it is appropriate to look to CDC guidelines to ascertain whether the system has taken all reasonably necessary precautions, because

> implementation (and proper execution) of guidelines that express an expert agency's views on best practices are certainly relevant to an objective reasonableness determination. . . This is particularly true here, where the CDC Guidelines provide the authoritative source of guidance on prevention and safety mechanisms for a novel coronavirus in a historic global pandemic where the public health standards are emerging and changing.

Mays v. Dart, 974 F.3d 810, 823 (7th Cir. 2020), cert. denied, 142 S. Ct. 69 (2021); *see also Ahlman v. Barnes*, No. 20-55568, 2020 WL 3547960, *3–4 (9th Cir. 2020) (recognizing importance of CDC guidelines in evaluating defendants' response to COVID-19); *Valentine*, 993 F.3d at (holding prison's COVID-19 "policy was a reasonable response because it set forth safety measures in accordance with the CDC guidelines").

Thus, while it may not be strictly necessary for jails to follow all CDC guidelines, they must at least take "significant action to address the health risks posed by COVID-19," *Plata v. Newsom*, No. 21-16696, 2022 WL 1210694, at *1 (9th Cir. Apr. 25, 2022). In *Plata*, the Ninth Circuit found the California Department of Corrections and Rehabilitation was not deliberately indifferent to the threat of COVID-19 because it had taken a series of steps to mitigate the threat that have not been taken by Defendant here, including, for example,

> enacting policies to encourage and facilitate staff and prisoner vaccination … ensuring unvaccinated staff members regularly test for COVID-19 … enhanced cleaning in the facilities … upgrading ventilation; establishing quarantine protocols for medically vulnerable patients; and testing, masking, and physical distancing among inmates.

Id.[6] Here, in contrast, Defendant has failed to take basic, common-sense steps to mitigate the risk of COVID-19 transmission. He has: declined to provide high-quality masks to class members or

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[6] *Plata* was also based on very different facts. *Plata* involved CDCR's failure to impose a COVID-19 vaccination requirement for staff because it was unclear how much more effective the mandate would be as compared to the existing measures taken by CDCR, especially because the prison estimated the mandate might lead to the retirement of as many as 700 correctional officers. *Plata*, No. 21-16696, 2022 WL 1210694, at *2. Here, in contrast, Defendant's decisions to disregard essential public health guidance have placed the jail population at dramatically higher risk, ensuring there "will be ongoing COVID-19 transmission within the jail[s], with possibilities of large outbreaks, severe illness and death." PSUF at 147, and Defendant has not proffered any admissible evidence that implementation of the CDC guidelines he has flouted would disrupt jail operations.

rigorously enforce mask requirements; failed to even study the need for improved ventilation; failed to strengthen COVID-19 testing; implemented an inadequate intake quarantine; resisted efforts to reduce the jail population and allow some degree of physical distancing; placed medically vulnerable class members at heightened risk by refusing to classify them as "high-risk" or promptly place them in protective housing; failed to adequately promote COVID-19 vaccination; and violated basic infection control strategies by frequently failing to clean or provide access to cleaning supplies, creating horrendously unsafe and unhygienic environments.

These issues strike at the core of a reasonable COVID-19 mitigation effort. Whether assessed individually or collectively, there are triable issues whether these failures have dramatically increased the risk of COVID-19 transmission within the jails, ensuring the possibility "of large outbreaks, severe illness and death." PSUF at 147. Defendant's knowing refusal to take these affirmative steps to substantially mitigate the risk of COVID-19 to class members raises triable issues of fact as to "whether [jail] officials recklessly disregarded the risk of COVID-19." *Valentine*, 993 F.3d at 281-82 (cleaned up). Because Defendant's purported evidence does not eliminate "all issues of fact" regarding Plaintiffs' deliberate indifference claims, the Court should deny summary judgment on Plaintiffs' first and second causes of action. *See Hayman*, 176 Cal. App. 3d at 639.

C. Triable Issues of Material Facts Prevent Summary Judgment in Defendant's Favor on Plaintiffs' Claims Under Government Code §§ 8658 and 11135.

The Court already assessed and rejected Defendant's arguments about Government Code §§ 8658 and 11135 when it overruled Defendant's demurrer.[7] Defendant provides no basis for reconsidering the Court's decision. First, the Court determined that "[a]s alleged, Defendant's failure to act during the COVID-19 pandemic violates the constitutional rights of inmates … [and] as alleged, this failure is an abuse of discretion such that a writ of mandamus could issue" to compel the removal or release of inmates pursuant to section 8658. ROA #23 at 2. Defendant simply revives his previous legal argument, without any additional evidence not already addressed above. If

[7] Plaintiffs hereby incorporate by reference their arguments regarding Government Code §§ 8658 and 11135 from their Opposition to Demurrer, ROA #17 at 15-19.

Defendant wishes to move to reconsider that holding, he may do so, but summary judgment is not the vehicle for re-hashing previously resolved arguments. Thus, as a result of Defendant's same failure identified above to demonstrate undisputed material facts regarding Plaintiffs' constitutional claims, Defendant fails to meet his burden to negate Plaintiffs' third cause of action, alleging Defendant has failed to exercise his mandatory authority under Government Code § 8658.

Second, the Court has similarly ruled that, as alleged, Defendant's policies "place disabled inmates at greater risk for illness or death, as compared to the general incarcerated population," and "[t]hese allegations are sufficient" to state a claim under Government Code § 11135. *Id*. at 3. Defendant has provided no evidence to indicate any steps or reasonable modifications he has taken to abate that risk for all but a few class members with heightened vulnerability to COVID-19, failing to meet his initial burden. Meanwhile, Plaintiffs have provided undisputed evidence that members of the medical subclasses and the disability class are at greater risk for severe illness or death due to COVID-19 as compared to the general incarcerated population. PSUF at 113. Indeed, the same triable issues that preclude summary judgement on Plaintiffs' constitutional claims also defeat summary adjudication of their disability discrimination claims. Most notable of these issues are Defendant's woefully underinclusive criteria for designating people as high-risk, and his practice requiring even those designated as high-risk to spend nearly two weeks in intake quarantine and general population before being moved to protective high-risk housing. *See*, *e.g.*, *id*. at 156. Thus, there are triable issues of material fact as to whether Defendant (1) has placed members of the disability class at heightened risk, (2) has failed to make reasonable modifications necessary to ensure equal access to jail services and release for disability class members who face higher risk from COVID-19, or (3) employs methods of administration that discriminate against members of the disability class by placing them at heightened risk of severe illness or death. Each of these would violate § 11135. The Court should therefore deny the Motion as to Plaintiffs' fourth cause of action. *See Fry v. Saenz*, 98 Cal. App. 4th 256, 261, 268 (2002) (addressing § 11135's incorporation of ADA and Rehabilitation Act requirements as applied to state-funded programs).

V. ALTERNATIVE REQUEST FOR CONTINUANCE UNDER CCP § 437c(h)

If an affidavit submitted in opposition to summary judgment demonstrates "that facts

essential to justify opposition may exist but cannot, for reasons stated, be presented," the court shall either "deny the motion, order a continuance" for more "discovery to be had, or make any other order as may be just." CCP § 437c(h). "Where the opposing party submits an adequate affidavit showing that essential facts may exist but cannot be presented timely," denial or continuance of the motion is "virtually mandated." *Dee v. Vintage Petroleum, Inc.*, 106 Cal. App. 4th 30, 34-35 (2003).

Defendant filed his Motion on March 24, 2022, while there were numerous outstanding discovery requests. Since then, the parties have successfully resolved a number of discovery disputes, but Plaintiffs have needed to file a Motion to Compel (filed Nov. 1, 2022) to address Defendant's refusal to allow inspection of two specific facilities where much of Defendant's most egregious conduct occurs. Without the ability to investigate these facilities, Plaintiffs are unable to gather essential evidence necessary to address Defendant's claims about the implementation of key COVID-19 protocols, including cleaning and physical distancing. *Id.* Defendants' claims about those matters cannot properly be considered undisputed as long as Defendant's stonewalling prevents them from being tested. *See* CCP§ 437c(e) (a court may deny summary judgment "if the only proof of a material fact offered in support of the summary judgment is an affidavit or declaration made by an individual who was the sole witness to that fact"). Plaintiffs are also vigorously reviewing tens of thousands of very recently produced documents, but require additional time given the volume. Thus, Plaintiffs alternatively request that the Court grant a continuance under § 437c(h) to allow a complete record for adjudication.

VI. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny the Motion, or alternatively continue the hearing until the Court resolves the site inspection dispute and Plaintiffs have had sufficient time to review recently disclosed documents.

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ACLU FOUNDATION OF SAN DIEGO & IMPERIAL COUNTIES

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