UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KENYON NORBERT, et al.,

Plaintiffs,

v.

SAN FRANCISCO SHERIFF'S DEPARTMENT, et al.,

Defendants.

Case No. 19-cv-02724-SK

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Regarding Docket Nos. 259, 260, 273

This matter concerns conditions at the jail for men for the City and County of San Francisco, located in San Bruno, California. Specifically, Plaintiffs plead that they have no access to outdoor exercise and insufficient time out of their cells, and that these conditions violate the Fourteenth Amendment of the U.S. Constitution and analogous provisions of the California Constitution.

Parties filed cross-motions for summary judgment on all remaining claims. (Dkt. Nos. 259, 273.) The Court GRANTS IN PART and DENIES IN PART Defendant's motion for summary judgment. The Court DENIES Plaintiffs' motion for summary judgment. The Court GRANTS Defendant's motion to strike Plaintiffs' prayer for damages. Additionally, the Court SUSTAINS IN PART and OVERRULES IN PART both Defendant's objections to Plaintiff's evidence and SUSTAINS Plaintiff's objection to Defendant's evidence. The Court DENIES Plaintiffs' motion for a continuance.

OBJECTIONS TO EVIDENCE

The parties object to various evidence submitted by the other party.

A. Plaintiffs' Objections to McConnell Declaration

Plaintiffs object to Paragraph 3, lines 2:15-21 of Defendant's Declaration of Captain Kevin

McConnell. (Dkt. Nos. 266 at 24, 259-6 (McConnell Dec. at 2).) Plaintiffs contend this evidence is inadmissible hearsay. The quote in question states:

> I asked an inspector regarding recreation facilities made available to the inmates. He informed me that the plans for the jail would not have been approved without a waiver or variance [of California Code of Regulations Title 15 and 24], which allows for alternative modes of compliance. The BSCC determined that County Jail No. 5 met all state criteria.

(Dkt. No. 259-6 (McConnell Dec. at 2).) To the extent this quote means to prove the underlying fact – that the jail received a waiver and was in compliance – the objection is SUSTAINED.

B. Defendant's Objection to Czeisler Reports

Defendant objects to two reports of Charles A. Czeisler, Ph.D, M.D., Plaintiffs' expert witness. Czeisler is the Frank Baldino, Jr. Ph.D. Professor of Sleep Medicine, Professor of Medicine and Director of the Division of Sleep Medicine at the Harvard Medical School. (Dkt. No. 284 (Compendium Ex. 1 at 2.)) Czeisler submitted two reports on September 2, 2022 (the "first Czeisler report") and November 1, 2022 (the "second Czeisler report"). The Court SUSTAINS IN PART and OVERRULES IN PART the objections.

1. Untimeliness of Second Czeisler Report

Defendant objects to Czeisler's second report because it was submitted late. Expert reports were due September 2, 2022. (Dkt. Nos. 241, 254.) Czeisler's second report is dated November 1, 2022. (Dkt. No. 284 (Compendium Ex. 2).) Fed.R.Civ.P. 37(c)(1) authorizes the exclusion of an expert report if the party proffering it failed to comply with Fed.R.Civ.P. 26(a). Plaintiffs argue that Fed.R.Civ.P. 26(e) allows a supplement or correction of a previous expert report "if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.]"[1] Plaintiffs fail to show, though, how this rule applies, because Plaintiffs do not show that there was any additional or corrective information that

[1] Plaintiffs make this argument in a supplemental brief not allowed under the Federal Rules of Civil Procedure and not authorized by the Court. Nonetheless, the Court considers this argument because Plaintiffs are a vulnerable class and should not be punished by Counsel's tardiness. Not only were Plaintiffs late in submitting the second Czeisler report, but Plaintiffs were also late in attempting to provide a justification for the late disclosure.

was material in nature that Plaintiffs learned at a later date. Here, the October 31, 2022 report was not timely, and the Court SUSTAINS the objection to the second Czeisler report.

2. First Czeisler Report – Objections based on Violation of Court's Orders

Defendant argues that Czeisler relied upon evidence in his first report in the form of psychological surveys and questionnaires that Plaintiffs' counsel collected from inmates in violation of this Court's Orders. In this case, Plaintiffs initially sought to collect data from inmates in the form of psychological evaluations and other medical tests. There was a significant amount of briefing and several Orders on this issue, starting in October 2019. (Dkt. Nos. 63, 64, 77, 80, 86, 107, 251.) The Court made clear that, if Plaintiffs collected such information, the parties would be required to have equal access to any evidence obtained from inmates. (Dkt. No. 86.) The Court also made clear that, for Plaintiffs to obtain medical information in the form of blood draws from inmates, the parties would be required to submit a consent form for the inmates to inform them specifically of the risks and rewards of participating and to warn them that the information would not be collected anonymously. (Dkt. No. 107.) The Court also ordered Plaintiffs to provide more information about any survey or psychological information and thus denied Plaintiffs' motion to collect that information, without prejudice to a renewed motion. (Dkt. No. 107.) Later, Plaintiffs renewed their motion and argued that they had a right to medical treatment, and the Court denied the request again without prejudice. (Dkt. No. 251.) Plaintiffs did not again ask the Court for permission to conduct psychological testing or surveys.

After the Court had ruled and unbeknownst to both the Court and to Defendant, Plaintiffs' counsel then worked with Czeisler and Jess Ghannam, Ph.D., a clinical professor of psychiatry and global health services at the University of California – San Francisco School of Medicine, to oversee a graduate student in psychology from the Wright Institute, Juliana di Miceli, to collect data. (Dkt. Nos. 284 (Compendium Ex. 1), 307.) Czeisler describes the process in his first report. (Dkt. No. 284 (Compendium Ex. 1).) Di Miceli and a group of 18 other unidentified graduate students, all from the Wright Institute, "were recruited and paid to interview inmates . . . via videoconference (Zoom) during the month of August 2022." (*Id.* at 70.) The Wright Institute graduate students interviewed a total of 26 inmates, "with 11 fully completing the interviews and

15 still in progress as of Wednesday, August 31, 2022." (*Id.*) The Wright Institute graduate students conducted two to three scheduled interviews. (*Id.*)

Czeisler describes the interviewing and testing:

> The interview material consisted of nine openended questions, four separate questionnaires (Pittsburgh Sleep Quality Index, PTSD Checklist for DSM-5 (PCL-5), Beck Anxiety Inventory (BAI), and Beck's Depression Inventory (BDI)), and a fifth, compiled questionnaire with two sections: one section designed to assess Sleep and Circadian Rhythms [Item 19 of the Morningness-Eveningness Questionnaire (1 item), Jail Sleep Assessment (JSA-40), Restorative Sleep Questionnaire (REST-Q-9), Karolinska Sleepiness Scale (KSS-1), Prison Environment Sleep Questionnaire (PESQ-16), Sleep Hygiene Index (SHI-13), Sleep Condition Indicator (SCI-8), Sleep Disorders Screen (SDS-5), Berlin Questionnaire (10 items), Dysfunctional Beliefs and Attitudes About Sleep (DBAS-16), Epworth Sleepiness Scale (ESS-8)]; and the other designed to assess Mental Health [Patient Health Questionnaire (PHQ-9), Generalized Anxiety Disorder (GAD-7), Kessler Psychological Distress Scale (K10), Brief Psychiatric Rating Scale (BRPS-24)].

(*Id.*) The information was then collated in an anonymous matter so that Czeisler did not have the names of the individual inmates. (*Id.*, Dkt. No. 307.)

Despite Czeisler's description of the questions and questionnaires, he does not provide them in full, and Plaintiffs do not provide them in full elsewhere. Additionally, Czeisler and Plaintiffs do not provide Defendant or the Court the results of surveys and testing – only the summaries as reported by Czeisler.

Defendant argues that Plaintiffs' actions in seeking this information violated the Court's previous Orders. The Court agrees that Plaintiffs violated the Court's Orders and SUSTAINS the objection to any information or opinion contained in the Czeisler first report that relies upon the data collected by the graduate students from the Wright Institute. The violation of the Court's Orders is prejudicial to Defendant, because Defendant has no way to examine the underlying data. As noted above, the Court ordered that, if Plaintiffs collected data from inmates through the surveys, the information would be shared with Defendant. Although Plaintiffs offered at the hearing on December 12, 2022 to provide the information to Defendant, that offer is simply too late. This case has been litigated for over three years, and discovery closed months ago.

In addition, the collection of this data in violation of the Court's Orders may harm the

inmates who participated in the survey. The Wright Institute graduate students obtained an unidentified "verbal consent" from the inmates who participated in the surveys and testing. (Dkt. No. 284 (Compendium Ex. 1 at 70).) There is no indication that the Wright Institute graduate students who spoke with inmates gave any warning about the manner in which the information would be used other than a vague description that they told the inmates the "purpose of the interview." (*Id.*) One of the concerns that the Court expressed earlier was how the information from the evaluation and testing would be used, and both the Federal Public Defender and San Francisco County Public Defender, who submitted *amici curiae* briefs, stated their concerns about the potential effect of those tests on pending criminal cases. (Dkt. Nos. 107, 93, 95.) There is no indication that the graduate students warned the subjects of the possible use of their data in any ongoing criminal cases. There is also no indication that Czeisler or Ghannam obtained consent from their respective academic institutions (Harvard for Czeisler and USCF for Ghannam), to conduct human subjects testing in this manner. The Court had earlier ruled that there was a need to obtain consent from a home academic institution if an academic is involved in this case, since those institutions usually have ethical standards for working with human subjects. Although Plaintiffs claim that the information obtained will be used only in this case, the Court remains concerned that the information obtained will be used outside this litigation – either in academic literature or in the criminal proceedings of the inmates. Thus, the Court ORDERS that no person affiliated with this case may use any information obtained from inmates through the process described by Czeisler in his first report (i.e. the surveys and interviews by the Wright Institute graduate students) in any manner outside this litigation. The Court also ORDERS Plaintiffs' counsel to provide a copy of this Order to any people who have had or have access to the data that the Wright Institute graduate students collected from the inmates at County Jail 3.

Plaintiffs argue that the class members are entitled to submit evidence on their own behalf. They are correct that they may do so, in the proper format of declarations under penalty of perjury and not in anonymous surveys. Some individual inmates submitted declarations, such as the declarations submitted by Nicky Garcia, Jose Poot, Joshua Beloy, Montrail Brackens, and Troy McAllister. (*See, e.g.*, Dkt. Nos. 268, 268-1, 268-2, 268-3, 268-4.) Some of these inmates who

submitted declarations for this motion are named class representatives, and some are not. The Court can and will consider the evidence in their declarations submitted under penalty of perjury. The Court will not consider evidence collected in violation of the Court's Orders and presented on an *anonymous* basis. If Plaintiffs had followed the procedure set forth by the Court to collect data, the Court could be assured both that the process would yield credible data and that the rights of the inmates would be protected.

Some of the Czeisler first report depends on or cites the excluded data, and some does not. The first few pages of the Czeisler first report (1-16) list his qualifications and general information about sleep and the Circadian rhythm consistent with expert witness Jamie M. Zeitzer's previous, admissible opinions. (Dkt. No. 284 (Compendium Ex. 1 at 1-16).) The Court OVERRULES the objection to pages 1-16. The next pages (58-69) discuss the light readings provided by Zeitzer. (*Id.* at 58-69.) The Court OVERRULES the objection to page 58-69. The next pages (70-106) discuss the study that violated the Court's Orders. (*Id.* at 70-106.) The Conclusions and opinions (pages 107-114) state that they are based on "materials provided to" Czeisler, which presumably include the data that was collected in violation of the Court's Orders. (*Id.* at 107-114.) The Court SUSTAINS Defendant's objection to pages 70-114.

3. First Czeisler Report – Objections based on Relevance

Defendant also argues that Czeisler's opinions are not relevant to this case because he opines on matters outside the scope of this case. Czeisler wrote in his first opinion:

> A number of environmental and biological factors that affect sleep and circadian rhythms by inducing acute and chronic sleep deficiency, circadian misalignment, or recurrent circadian disruption can thereby contribute to increased risk of adverse physical health, mental health, safety and neurobehavioral performance consequences, and to the risk of sleep-related or fatigue-related impairments of health and performance. These environmental and biological factors include: ambient lighting conditions; environmental noise; ambient temperature; sleep surface; meal timing and nutritional content; genetic polymorphisms; underlying medical condition, particularly chronic medical conditions such as sleep disorders, metabolic disorders, cardiovascular disorders, immune disorders, neurologic disorders, and cancer; age; sex; and use of medications.

(*Id.* at 107.) Czeisler then opined that "the environmental conditions and schedules to which

inmates in the San Francisco County Jail are exposed" are harmful to inmates' sleep, disrupts their Circadian rhythm, increases the risk of obesity and diabetes, hypertension, and other diseases, and adversely affects inmates' cognitive abilities. (*Id.* at 111.) Nowhere in Czeisler's report does he separate the effects of lack of outdoor exercise or denial of out-of-cell time from the other conditions in the jail.

Here, the Court, after the parties stipulated to class certification, authorized two classes of plaintiffs: (1) inmates who were denied outdoor access, and (2) inmates who were given fewer than one hour per 24-hour period out of their cells. (Dkt. No. 238.) Czeisler opines on many issues that are not directly at issue in this case in his opinions. For example, he discusses at length issues regarding timings of meals, underlying medical conditions on inmates, environmental noise, "sleep surface and bedding," and ambient temperature and the harm those conditions cause. ((Dkt. No. 284 (Compendium Ex. 1 at 107-114).)

Czeisler's opinions overall are not directly relevant to the two key issues in this case: denial of outdoor exercise and time inmates spend out of their cells. To the extent that Czeisler discusses the jail's lighting schedule, sleep disruptions, sleep surface and bedding, and sleep deprivation, those issues may only be tangentially relevant to the claim for lack of outdoor access because of the theory that exposure to bright light in the form of direct sunlight is the most effective way to reach the balance needed between bright light and dark, given the jail's lighting schedule. But the opinions about timing of meals, noise, sleep surface and bedding, and sleep deprivation are not only irrelevant to this case but also the subject of another case. *Poot v. San Francisco Cnty. Sheriff's Dept*., Case No. 4-19-02722-YGR (N.D. Cal. May 20, 2019). The Court in *Poot* denied a request to consolidate this case with *Poot* because the claims the claims in the two cases are different. (Case No. 4-19-02722-YGR at Dkt. No. 80.) Specifically, the Court in *Poot* found that *Poot* dealt with sleep disruption resulting from noise and light policies, whereas this case "concerns outside recreation policies and the availability of sunlight given the jail's structure." (*Id*. at 3) The Court in *Poot* entered judgment after the parties entered into a settlement agreement governing the use of nighttime safety checks, noise at night, and use of lights at night. (Case No. 4-19-02722-YGR at Dkt. Nos. 72-2, 100.) The issues in the cases are

different, and the first Czeisler report is directed to the issues in *Poot* and not to the issues in this case. For that reason, his opinions are not relevant and not helpful to this case. In addition, many pages (17-57) discuss the effects of sleep deprivation on driving – not an issue relevant to this case. (Dkt. No. 284 (Compendium Ex. A at 17-57.) The Court SUSTAINS Defendant's objection as to pages 17-57 relevance. As discussed above, the Court SUSTAINS Defendant's objection to pages 70-114 because they are based on the data collected in violation of the Court's Orders, but the Court also SUSTAINS the objections to those pages based on relevance.

C. Defendant's Objections to Zeitzer's Evidence

Plaintiffs object to the report and declaration of Jamie M. Zeitzer, Ph.D. ("Zeitzer"), Plaintiff's expert witness, that he submitted in support of Plaintiffs' motion for summary judgment. Zeitzer is an Associate Professor and Health Science Specialist in Psychiatry and Behavioral Sciences at Stanford University. (Dkt. No. 8-3 (Zeitzer Curriculum Vitae).) Zeitzer has supplied five pieces of evidence regarding this case:

(1) a declaration for the preliminary injunction (the "Zeitzer P.I. declaration") (Dkt. No 8-3 (Zeitzer Dec. Ex. A));

(2) testimony for the preliminary injunction (the "Zeitzer P.I. testimony") (Dkt. No. 75) ;

(3) an initial report for the motion for summary judgement ("Zeitzer report") (Dkt. No. 284 (Compendium Ex. 5));

(4) a deposition related to the motion for summary judgment ("Zeitzer deposition") (Dkt. No. 296-7 (Berdux Dec. Ex. AB)); and

(5) a declaration in support of Plaintiff's motion for summary judgment (the "second Zeitzer Declaration") (Dkt. No. 267-5 (Zeitzer Dec.)).

1. Zeitzer's Declaration and Testimony for Preliminary Injunction

Zeitzer submitted the Zeitzer P.I. declaration in support of Plaintiffs' motion for a preliminary injunction on June 27, 2019. (Dkt. No 8-3 (Zeitzer Dec. Ex. A).) Zeitzer also testified before the Court at the evidentiary hearing held on October 23, 2019. (Dkt. No. 75 (Zeitzer Hearing FTR at 9:41).) The Court will consider the evidence Zeitzer submitted for the preliminary injunction for this motion. *See, e.g.*, Federal Rule of Civil Procedure 56(c)(1)(A)

(evidence can include "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.")

2. Zeitzer Report

Zeitzer submitted the Zeitzer report as an expert witness for summary judgment on September 9, 2022. (Dkt. No. 284 (Compendium Ex. 5).) In that report, Zeitzer provides no opinions but merely provides measurements of light in different cells at the jail. (*Id.*) Although Defendant objects to this testimony because it lacks opinions, an expert is not barred from testifying in forms other than opinion. As the Advisory Committee Notes to Fed.R.Evid 702 note:

> Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.

The Court OVERRULES Defendant's objection to the Zeitzer report.

3. Zeitzer Deposition

Defendant then deposed Zeitzer on October 28, 2022. (Dkt. No. 296-7 (Berdux Dec. Ex. AB).) In that deposition, Zeitzer explained that his testimony would be limited solely to the speaking "about [his] report and anything contained therein." (*Id.* at 17: 17-22.) He also confirmed that he had not been asked to testify at trial about opinions that were not contained in the report. (Dkt. No. 296-7 (*Id.* at 17: 17-25.) Zeitzer specifically disclaimed any intent to provide an opinion on the physical or emotional harm on Plaintiffs. Defense counsel and Zeitzer exchanged the following colloquy:

> Q. Okay. Let me just confirm the areas that you -- and subject matters that you will not be offering expert testimony about. You're not offering any opinion about whether the plaintiffs suffered any physical harm as a result of the jail conditions or the defendants' action; [sic] right?
>
> A. That's correct.

> Q. You're not offering any opinion about whether any of the plaintiffs or inmates suffered any emotional harm from the defendants' conduct or jail conditions; right?
>
> A. That's correct.
>
> Q. You're not offering any opinion about the apportionment of any alleged harm between the lighting conditions in jail or other jail conditions or biological conditions; right?
>
> A. That's correct.

(*Id.* at 61: 18 – 63: 19.)[2]

4. Second Zeitzer Declaration

Despite Zeitzer's statements at his deposition, he then provided those opinions in the second Zeitzer declaration, dated November 7, 2022 and filed with the Court on the same date, only a few days after his deposition. (Dkt. No. 267-5 (Zeitzer Dec.).) Zeitzer opines as follows:

> It was my opinion in June 2019, and it remains my opinion, that the reports of total lack of natural sunlight, limited nighttime sleep period, and continuous nighttime illumination will be associated with a variety of both short- and long-term impairments. Short term deficits likely include a reduced ability to regulate mood, changes in appetite and associated hormones, reduced memory and cognitive ability, and impaired immune function. Longer-term deficits likely include increased depression and anxiety, development or worsening of diabetes, dementia-like symptoms, increased incidence or recurrence of breast or colon cancer1, increased vulnerability to communicable diseases, and a decline in mental function. There are very few if any aspects of biology that are untouched by sleep duration.

(*Id.* at ¶ 5).) Zeitzer does not identify the source of the "reports" of lack of sunlight, limited nighttime sleep period, and continuous illumination. He also opines in that declaration:

> The introduction of regular exposure to natural sunlight with the reduction or absence of nocturnal light would also contribute to a healthier circadian rhythm, which would have effects similar to those expected after improving sleep. In addition to reducing the obvious fatigue during the daytime, improving sleep in these inmates would also likely improve their ability to self-regulate their emotions and reduce interpersonal conflict, as well as improve their overall mental and physical well-being.

(*Id.*)

He also attaches, as Exhibit 4, light readings taken by another person between October 4,

[2] The parties do not proffer Zeitzer's deposition testimony in support of their cross-motions for summary judgment. Defendant provided this testimony solely to support the objection to the second Zeitzer declaration.

2022 and October 26, 2022. (Dkt. No. 284 (Compendium Ex. 4).) It is not clear whether Plaintiffs had produced these light readings to Defendant by the time of Zeitzer's deposition or before the second Zeitzer declaration was filed.

The record shows clearly that Zeitzer disclaimed any intent to opine on the effect of the conditions of lighting at the jail on Plaintiffs but then provided those opinions in a declaration after his deposition – giving no chance for Defendant to explore his testimony on these new opinions that he claimed that he would not provide. Given this sequence of events, the Court SUSTAINS Defendant's objections to the second Zeitzer declaration.

D. Objections to Statements by Bernstein and Fogarty

Defendant objects to the expert witness reports and declarations of Robert Bernstein, M.D., and Lucas Fogarty, a physician's assistant, based on relevance. (Dkt. No. 296 at 32.) The Court SUSTAINS Defendant's objections to both Bernstein's and Fogarty's reports and declarations. (Dkt. No. 284 (Compendium Exs. 9, 18).) Bernstein's and Fogarty's opinions relate to the access Brackens has to medical care in the jail, not to access to exercise or sunlight. (Dkt. No. 284 (Compendium Ex. 9).) Access to medical care is not the subject of this lawsuit and is therefore not relevant.

E. Objections to References to California Evidence Code

Finally, Defendant objects to Plaintiffs' reliance on California Education Code § 46148 due to relevance, citing the fact that Plaintiffs are neither adolescents nor students. (Dkt. No. 296 at 34.) The Court SUSTAINS Defendant's objections to California Education Code § 46148.

PROCEDURAL HISTORY

Plaintiffs filed a complaint on May 20, 2019 concerning two San Francisco jails that housed male inmates, County Jail 4 and County Jail 3, formerly known as County Jail 5. (Dkt. No. 1.) At the time the Complaint was filed, the named plaintiffs were split between County Jails 3 and 4. (Dkt. No. 1.) Currently, all Plaintiffs are incarcerated in County Jail 3 located in San Bruno. (*Id.*) Although Plaintiffs originally challenged conditions in County Jail 4, it closed in October 2020. (Dkt. No. 259 at 1.) County Jail 5, located in San Bruno, California, was re-named

"County Jail 3."[3] (*Id.* at 1 n.1.)

Plaintiffs have been incarcerated for various amounts of time, with one Plaintiff, Brackens, having been incarcerated for ten years. (Dkt. No. 266 at 5.)[4]

Plaintiffs initially brought causes of action against several defendants under the Eighth Amendment, Fourteenth Amendment, California Constitution, with common law claims for negligence and intentional infliction of emotional distress. (Dkt. No. 1.) The sole remaining claims are now under the Fourteenth Amendment and Article I, § 7 and § 17 of the California Constitution. (Dkt. No. 110 (dismissing Eighth Amendment claims and common law claims.) The original named Plaintiffs were Norbert, Brackens, Poot, Marshall Harris, Armando Carlos,[5] Michael Brown, and McAllister ("Plaintiffs").[6] (Dkt. No. 1.) The Court dismissed all claims brought by Norbert, Carlos, Harris, and Brown on January 10, 2023. (Dkt. No. 317.) Thus, the sole remaining representative Plaintiffs are Brackens, Poot, and McAllister, who serve as class representatives. (Dkt. No. 238.) The only remaining defendants are the City and County of San Francisco and Sheriff Paul Miyamoto in his official capacity (collectively, "Defendant"). (Dkt. No. 313.)

Plaintiffs filed a motion for preliminary injunction on June 27, 2019. (Dkt. No. 8.) Defendant filed a motion to dismiss on August 30, 2019. (Dkt. No. 37.) The Court granted in part and denied in part the preliminary injunction and granted in part and denied in part the motion to dismiss on January 31, 2020. (Dkt. No. 110.)[7] The Court held that confining inmates in County

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[3] For purposes of this Order, all references will be to "County Jail 3," but earlier orders referred to "County Jail 5."

[4] As explained in the Order regarding the first preliminary injunction, pretrial detainees may be incarcerated for lengthy periods of time. As discussed in that Order "It is not clear why Plaintiffs here have been incarcerated as pretrial detainees for such long periods of time. However, Norbert explained in his declaration for the preliminary injunction that he is "fighting" the criminal charges against him because he is "factually innocent." (Dkt. 8-8 (Norbert Dec. ¶ 1).) This indicates that his criminal process is lengthier because he is strenuously contesting the charges against him. (Dkt. No. 110 at 6 n.6.)

[5] Carlos is no longer a Plaintiff in this matter due to the parties' class certification stipulation that the class would only include pretrial detainees. (Dkt. No. 237.) Carlos was a post-conviction detainee at the time of Plaintiffs' initial Complaint. (Dkt. No. 1.)

[6] The Court notes that McAllister's name is alternatively spelled McAlister or McAllister in Parties' briefing and declarations. For consistency, the Court will use "McAllister."

[7] Plaintiffs filed a second motion for preliminary injunction on January 11, 2021. (Dkt. No. 197.) The Court denied this motion on March 23, 2021. (Dkt. No. 208.)

Jail 4 for 23 ½ hours per day violated the Fourteenth Amendment. (*Id.*) The Court ordered Defendant to provide inmates with exercise "at least one hour a day, five days a week, unless there are disciplinary reasons or other emergency situations that prevent compliance." (*Id.* at 47.) The Court declined to rule as to whether an inmate generally has the right of access to direct sunlight. (*Id.* at 57.) However, the Court ordered that inmates in County Jail 3 that have been confined for more than four years must be given access to direct sunlight for at least one hour a week. (Dkt. No. 110 at 47-48.) Defendant stated in a hearing held on December 12, 2022 that County Jail 3 had not provided access to direct sunlight for inmates due to the exigent circumstances of the novel coronavirus disease 2019 ("COVID-19.")

On appeal, the Ninth Circuit upheld the Court's order, dismissed the City's appeal as moot, and affirmed the Court's finding that inmates failed to establish likely success on the merits for a constitutional right to outdoor exercise and did not plead sufficient facts to show harm from a lack of access to sunlight. *Norbert v. City and County of San Francisco*, 10 F.4th 918, 928, 934 (9th Cir. 2021) ("We need not and do not consider in this case the contours of any claimed right to direct sunlight…because even assuming such a right is cognizable, the plaintiffs on this record did not come forward with evidence sufficient to demonstrate a causal connection between their claimed constitutional right and claimed harm.")

On July 25, 2022, the parties submitted a stipulation for class certification, and on July 27, 2022, the Court certified a class of plaintiffs as follows:

> (a) Class 1 ("Outdoor Class"): All inmates who are pretrial detainees and have been incarcerated in San Francisco County Jail 3 . . . located in San Bruno, California, at any point during the time period May 20, 2017 to the present, and who do not have outdoor access as part of their incarceration at San Francisco County Jail 3.
>
> (b) Class 2 ("Confinement Class"): All inmates who are pretrial detainees and have been incarcerated in County Jail 3 . . . at any point during the time period from May 20, 2017 to the present, and who have fewer than one (1) hour per 24 hour period of time out of their cells as part of their incarceration at San Francisco County Jail 3.

(1) Subclass 1 ("Confinement Subclass 1"): All inmates in the Confinement Class who are classified by the San Francisco County Sheriff's Office in general population housing.

(2) Subclass 2 ("Confinement Subclass 2"): All inmates in the Confinement Class who are classified by the San Francisco County Sheriff's Office in administrative segregation housing.

(Dkt. No. 238.)

ANALYSIS

A. Defendant's Motion to Strike Plaintiffs' Prayer for Damages

Plaintiffs seek both injunctive relief and damages under the Fourteenth Amendment. (Dkt. No. 1) Defendant moves to strike Plaintiffs' prayer for damages.[8] (Dkt. No. 259 at 19-22.) The Court GRANTS Defendant's motion to strike Plaintiffs' prayer for damages.

1. Damages Available under Class Certification Under 23(b)(2)

On December 4, 2020, Plaintiffs originally filed a motion for class certification pursuant to Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2). (Dkt. No. 191.) Plaintiffs did not seek certification under Rule 23(b)(3). (*Id*.) On January 4, 2021, Defendant responded. (Dkt. No. 196.) Defendant specifically pointed out that certification under Rules 23(b)(1) and 23(b)(2) was improper because Plaintiffs sought individualized recovery. (*Id*.) In their Reply on July 12, 2021, Plaintiffs requested that the Court "permit an amendment of the motion for class certification, to amend to include a request for damages as a Rule 23(b)(3) damages class." (Dkt. No. 218.) The hearing on the motion was held on August 30, 2021. The Court denied the motion for class certification without prejudice and ordered the parties to meet and confer either to submit a stipulation for class certification or, if they did not agree to class certification, to a stipulation with a proposed schedule for briefing and a hearing for a renewed motion. (Dkt. No. 228.)

The parties then submitted a stipulation to certify a class of Plaintiffs pursuant to Rule

[8] Plaintiffs' requests for damages applies only to the claim for violation of the Fourteenth Amendment, as Plaintiffs conceded that they seek only injunctive relief for their claim under the California Constitution. (Dkt. No. 110 (Order) at page 54.)

23(b)(2). The classes described are as follows:

> (a) Class 1 ("Outdoor Class"): All inmates who are pretrial detainees and have been incarcerated in San Francisco County Jail 3 (formerly known as County Jail [3]) located in San Bruno, California, at any point during the time period May 20, 2017 to the present, and who do not have outdoor access as part of their incarceration at San Francisco County Jail 3.
>
> (b) Class 2 ("Confinement Class"): All inmates who are pretrial detainees and have been incarcerated in County Jail 3 (formerly known as County Jail [3]) located in San Bruno, California, at any point during the time period from May 20, 2017 to the present, and who have fewer than one (1) hour per 24 hour period of time out of their cells as part of their incarceration at San Francisco County Jail 3.
>
> (1) Subclass 1 ("Confinement Subclass 1"): All inmates in the Confinement Class who are classified by the San Francisco County Sheriff's Office in general population housing.
> (2) Subclass 2 ("Confinement Subclass 2"): All inmates in the Confinement Class who are classified by the San Francisco County Sheriff's Office in administrative segregation housing.

The stipulation also provided:

> 2. Plaintiff TROY MCALISTER will serve as a representative of the Confinement Subclass
>
> 3. Plaintiffs MONTRAIL BRACKENS will serve as a representative of the Confinement Subclass
>
> 4. Plaintiff JOSE POOT will serve as a representative of the Confinement Subclass 1 and 2.
>
> 4. The parties will separately enter a stipulation for named Plaintiffs KENYON NORBERT, MARSHALL HARRIS, ARMANDO CARLOS, and MICHAEL BROWN to dismiss their claims against Defendants without prejudice. The dismiss will change the status of named Plaintiffs KENYON NORBERT, MARSHALL HARRIS, ARMANDO CARLOS, and MICHAEL BROWN from being named plaintiffs but they will remain members of the class.

The Court signed the proposed Order on July 27, 2022. (Dkt. No. 238.)

At the hearing for the cross-motions for summary judgment on December 12, 2022, Plaintiffs first argued that they can seek damages "incidental" to the injunctive relief under Rule

23(b)(2), but asked, for the first time, that, if the Court finds that damages are not allowed under Rule 23(b)(2), the Court certify a "sub-class" under Rule 23(b)(3) to allow Plaintiffs to assert damages. (Dkt. No. 310.) The Court DENIES the oral motion to certify a class pursuant to Rule 23(b)(3). As noted above, the Court gave Plaintiffs ample opportunity to file a motion for damages under Rule 23(b)(3). First, Plaintiffs filed their initial motion in 2020. When Defendant pointed out that the damages that Plaintiffs seek are not allowed under Rule 23(b)(2), the Court gave Plaintiffs an opportunity to file a renewed motion for class certification or stipulate to a class. Plaintiffs chose to stipulate to a class under Rule 23(b)(2). The Court will not, after discovery has closed and after the parties have filed extensive briefing for their cross-motions for summary judgment, re-open this issue. As such, Plaintiffs can potentially recover only incidental damages.

In 23(b)(2) class actions, damages are traditionally limited to incidental damages. *Kanter v. Warner-Lambert Co*., 265 F.3d 853, 860 (9th Cir. 2001). Because of the "group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members." *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 413 (5th Cir. 1998). As such, individualized forms of damages like compensatory damages are generally not appropriate for 23(b)(2) classes. *Id.* Incidental damages are defined as those "'that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief.'" *Carter v. City of Los Angeles*, 224 Cal.App.4th 808, 824 (2014) (quoting *Molski v. Gleich*, 318 F.3d 937, 949 (9th Cir. 2003)). Further "incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established…. That is, the recovery of incidental damages should typically be concomitant with, not merely consequential to, class-wide injunctive or declaratory relief." *Allison v*, 151 F.3d 4at 415. Damages are not incidental because they are of a low or negligible value. *Carter*, 224 Cal.App.4th at 826.

Finding incidental damages is a narrow test, and the Ninth Circuit rarely finds damages to be incidental. In *Probe v. State Teachers' Ret. System*, the Court found damages requested by Plaintiffs were incidental. 780 F.2d 776, 780 (9th Cir. 1986). There, the injunctive relief

requested by Plaintiffs was a prohibition of sex-based mortality tables for retirement funds, and the damages requested directly flowed from creating equity between retirement funds. *Id.* No individualized analysis was necessary. By contrast, in *Wal-Mart Stores, Inc. v. Dukes***,** the Court found that even backpay was not incidental, because each backpay award would be individualized to the specific amount owed to each Plaintiff. 564 U.S. 338, 360–61 (2011) ("[23(b)(2) class certification] does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.") Generally, incidental damages "should not require additional hearings to resolve the disparate merits of each individual's case." *Allison*, 151 F.3d at 415. In *Allison v. Citgo Petroleum Corp*, the court held that compensatory damages for emotional and punitive damages cannot be incidental. *Id.* at 416–17 . Compensatory damages for emotional distress necessitate specific individualized proof, necessarily creating a subjective standard. *Id.* The Court in *Allison* similarly found that punitive damages cannot qualify as incidental damages. *Id.*

In their complaint, Plaintiffs request compensatory and punitive damages. (Dkt. No. 1 at 24.) Plaintiffs argue in response to Defendant's request to strike their damages that they are entitled to compensatory damages as part of their Fourteenth Amendment claims under 42 U.S.C. §§ 1981, 1983 *et seq.*, and § 1988 (Dkt. No. 266 at 22-23.) Plaintiffs assert in their summary judgment briefing that there are issues of "material fact as to physical and emotional damages caused by the actions of Defendants." (*Id.* at 23.) Plaintiffs further argue that Defendant's motion for summary judgment regarding damages is a case management issue, not an issue for summary judgment. (*Id*. at 24.) In supplemental briefing, Plaintiffs argue that, since all class members suffered the same alleged injuries – denial of access to sunlight and outdoor recreation – there are common questions of law or fact to the entire class. (Dkt. No. 307 at 4.) This statement is true and allowed for the class to be certified under 23(b)(2). However, the shared *cause* of injury does not entitle the class to compensatory damages, nor does it transform the compensatory damages requested into incidental damages.

Plaintiffs state that cases that denied compensatory damages, such as, differ from the present case because damages in other cases were not ascertainable. Although damages in the

present case may be ascertainable, as Plaintiffs readily admit, they differ from individual party member to party member. Plaintiffs state in support of their plea for damages,

> Montrail Brackens is now a 30 year old in a much older body, obese and —suffering from full blown, insulin dependent diabetes, a serious, chronic illness. Mr. Brackens now needs insulin three times a day and glucose monitoring more often. He suffered diabetic ketosis which was life threatening and was hospitalized earlier this year…. This is not a "nominal" injury. Likewise, Kenyon Norbert's physical illnesses cited by Defendants… include developing, while in custody: prediabetes, circulatory problems, and cardiovascular impairment with feet swelling, as just some of his problems

Id. at 5-6. These damages described are individualized, despite their shared cause. Determining these damages would require individualized analysis and proof. Plaintiffs have not described any damages that would flow directly out of the injunctive relief they seek.

The Court GRANTS Defendant's motion to strike Plaintiffs' prayer for compensatory damages.

2. Punitive Damages

Defendant requests that the Court strike Plaintiffs' request for punitive damages. Plaintiffs do not contest the request on substantive grounds. The Court GRANTS Defendant's request to strike punitive damages. A municipal entity and the Sheriff in an official capacity cannot be held liable for punitive damages. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); see also *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (official capacity suit is an action against the entity the officer represents). And even if Plaintiffs were able to maintain a claim for punitive damages against Defendant, Defendant points out that Plaintiffs fail to establish any facts to support punitive damages because Plaintiffs point to no facts showing fraud, oppression, or malice, which are required for punitive damages. For claims brought under 42 U.S.C. § 1983, the Ninth Circuit has held:

> The standard for punitive damages under § 1983 mirrors the standard for punitive damages under common law tort cases. . . . [M]alicious, wanton, or oppressive acts or omissions are within the boundaries of traditional tort standards for assessing punitive damages and foster "deterrence and punishment over and above that provided by compensatory awards." . . . Such acts are therefore all proper predicates for punitive damages under § 1983.

Dang v. Cross, 422 F.3d 800, 807 (9th Cir. 2005) (citing *Smith v. Wade*, 416 U.S. 30, 49(1983)). Plaintiffs fail to point to any facts showing malicious, wanton, or oppressive acts or omissions to support their claim for punitive damages. Thus, Plaintiffs fail to meet their burden. Instead of addressing the substance of the argument, Plaintiffs argue that the Court should reject the request because Defendant made the request in the form of a motion for summary judgment and not a motion to strike. Plaintiffs cite no evidence for the proposition that a court can consider a request to eliminate punitive damages only upon a motion to strike. Rule 56(g) of the Federal Rules of Civil Procedure specifically addresses a court's ability to eliminate a portion of damages on a motion for summary judgment. Rule 56(g) states:

> Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case.

Rule 56(g) clearly grants authority to the Court to address punitive damages in a motion for summary judgment.

The Court GRANTS Defendant's motion to strike Plaintiffs' prayer for damages. Given this ruling, the only issues before the Court for trial will be the current state of County Jail 3 and injunctive relief based on the current state of conditions for inmates in County Jail 3.

B. Claims for Violation of Fourteenth Amendment of U.S. Constitution and California Constitution for Insufficient Out-of-Cell Time

Plaintiffs allege that the amount of time they spend out of their cells is insufficient under the U.S. Constitution and California Constitution. In order to evaluate this claim, it is necessary to understand the configuration of County Jail 3 and the time spent in each area. Even before the preliminary injunction issued, "most inmates in [County Jail 3 spent] eight hours per day out their cells." *Norbert*, 10 F.4th at 933. During the COVID-19 lockdown, circumstances changed drastically, and today, there is conflicting evidence about how much out-of-cell time inmates in County Jail 3 have. After the Court ruled on Plaintiffs' motion for preliminary injunction, the worldwide pandemic caused by COVID-19 began. As a result, conditions within the County Jail 3 have differed from the conditions at the time the Court issued the preliminary injunction.

1. Configuration of County Jail 3

The configuration of County Jail 3 has remained the same since the preliminary injunction issued. County Jail 3 is located in San Bruno and can hold a maximum of 772 inmates. (Dkt. No. 67.) Within County Jail 3, there are three types of housing: "general population," "administrative segregation," and "restricted housing." (Dkt. No. 67; Dkt. 11-1 (McConnell Dec. ¶¶ 4, 8).) Housing units at County Jail 3 are referred to as "pods." (*Id.*) The Ninth Circuit succinctly summarized the conditions of the prison as follows:

> CJ5 was opened in 2006. It is a "pod-style" jail that houses male felony inmates, more than 90% of whom are pretrial detainees. It is organized into 16 identical pods, each of which has 24 two-person cells arranged in two tiers. Each cell has a window on the back wall, which looks onto a semi-transparent wall consisting of stripes of clear and frosted panes, which in turn allows into cells natural light from the outside while providing visual access to the outdoors.
>
> The cells in CJ5 all face a central common area, or "day room." Each cell door has clear plastic that allows inmates to see into the day room, but cell doors are kept open during day room time. The day rooms contain phones, a shower, a television, tables, and stools. The district court found that while the day rooms "are not large enough for vigorous exercise," they "do allow some space for some limited exercise."
>
> Connected to each day room is a gym, which is around half the size of a basketball court and is available for inmates to exercise. Each gym has two large grates on the sidewall that allow in fresh air and provide an "occluded sky view" that allows some light to enter the gym. The grates are not covered by glass but are rather open to the ambient air outside. There are 16 gyms total in CJ5.
>
> CJ5 has no secure outdoor space for inmate recreation, so inmate exercise occurs indoors. When CJ5 was built, it replaced the old San Bruno Jail, a "linear-style" jail that did have an outdoor exercise yard. The San Bruno Jail had several security features (like a "cat-walk" and guard tower) that permitted effective oversight of the exercise yard. These features no longer exist in the current facility. The San Bruno Jail also housed a population of inmates who were considered lower security risks than the current population of CJ5, which made it possible for inmates to use the yard with more minimal safety protocols. The old yard has not been used or maintained for over a decade.

Norbert, 10 F.4th at 922–23.

Defendant argues that inmates have the space within their cells to perform "large muscle exercises." (Dkt. No. 296 at 2.) However, the Court previously held that, based on observations

during the site inspection, "the cells are too small to allow inmates to exercise in a meaningful way." (Dkt. No. 110 at 12.)

2. Out-of-Cell Exercise Since COVID-19 Pandemic Began

The parties both spend significant time addressing the conditions of County Jail 3 during the COVID-19 pandemic. As noted above, because the only issue before the Court now is injunctive relief, the only relevant assessment is to determine the current state of conditions in County Jail 3. It is helpful to discuss the change in circumstances caused by the COVID-19 pandemic to understand why the evidence of conditions today is so confusing.

Before the onset of COVID-19, inmates in the general population in County Jail 3 had access to access the common areas for four and a half hours each weekday and eight hours each weekend day. (Dkt. No. 11-2 (Freeman Dec. ¶ 6).) Inmates in administrative segregation were able to use the gym for at least 30 minutes a day, seven days a week, with another 30 minutes per day in the common area. (Dkt. No. 81 at page 4.)

Beginning on March 15, 2020, "SFSO suspended recreation at County Jail [3] to prevent the spread of COVID-19." (Dkt. No. 296 at 6.) During this time, inmates remained free to exercise in their cells. According to Defendant, pod gyms were only reopened in February 2021, eleven months after initially being closed. (*Id.*)

Plaintiffs contend generally that, beginning in March 2020, all inmates were confined in their cells for at least 23 hours per day, with confinement of up to 32 hours at times. (Dkt. No. 266 at 3.) Plaintiffs state those in administrative segregation only received two, 30 minute releases from their cells per week, exclusively for showers. (*Id.*)

Individual Plaintiff statements on how much time they were allowed out of their cells gives a conflicting version of events, illustrating inconsistent policy and testimony. Two inmates in the general population, McAllister and Beloy, gave declarations on November 3, 2022. A third inmate in general population, Garcia, gave a statement on November 7, 2022. (Dkt. No. 268 (Garcia Dec.).) Beloy states that, beginning March 25, 2020 those in general population have only been allowed out of their cells for one hour per day. (Dkt. No. 274-2 (Beloy Dec. at ¶ 2).) Both McAllister and Beloy agree that the official policy expanded the out-of-cell time for the general

population's inmates to 2 ½ hour per day during the summer of 2022. (Dkt. No. 274-4 (McAllister Dec. at ¶ 2); .Dkt. No. 274-2 (Beloy Dec. at ¶ 3).) However, McAllister stated in a deposition in July 2022 that throughout COVID-19, out-of-cell time has fluctuated from an hour or an hour and a half per day at varying times. (Dkt. No. 259-16 (Berdux Dec. Ex. O at 65-66).) Additionally, Beloy states that the policy only lasted for one to two months before inmates were placed in intermittent full lockdowns and then put back on the one hour per day out-of-cell schedule. (Dkt. No. 274-2 (Beloy Dec. at ¶ 3).) McAllister began tracking these lockdowns in June 2022 and finds that between June and November 2022, inmates in general population were held in full lockdown for a total of 49 days. (Dkt. No. 274-4 (McAllister Dec. at ¶ 3).) Beloy states that the hour of out-of-cell time cycles between morning and afternoon shifts, meaning every other day inmates were kept in their cell for 28-30 hours. If there was a lockdown for a day, this extended to 52 hours. (Dkt. No. 274-2 (Beloy Dec. at ¶ 7).) Beloy further states that, even the daily hour is sometimes reduced, depending on whether guards choose to bring inmates back to their cells early. (Dkt. No. 274-2 (Beloy Dec. at ¶ 8).)

By contrast, Garcia states that since summer 2022 to at least November 2022, the official policy was to allow inmates out of their cells twice a day for around two hours and 45 minutes total. (Dkt. No. 268 (Garcia Dec. at ¶ 10).) However, Garcia states there have been frequent lockdowns and that the out-of-cell time does not actually reflect policy because "the deputies say they don't have enough staffing." (*Id.*)

Initially, the gym was completely closed, and exercise was not permitted in any common areas. (Dkt. No. 274-2 (Beloy Dec. at ¶ 4).) Both Beloy and McAllister state that exercise is still barred in common areas. (*Id* at ¶ 6.; Dkt. No. 274-4 (McAllister Dec. at ¶ 4).) Both inmates state that, as of November 2022, Defendant allowed 24 inmates out of their cells at a time, but only allowed 8 to use the gym, meaning that not everyone was able to exercise. (Dkt. No. 274-4 (McAllister Dec. at ¶ 6); Dkt. No. 274-2 (Beloy Dec. at ¶ 3).) Beloy states that the single hour of out-of-cell time is the only time he has to shower and call his family, and this frequently takes up his time. (Dkt. No. 274-2 (Beloy Dec. at ¶ 6).)

Two inmates in administrative segregation, Brackens and Poot, gave declarations on

November 1, 2022 and November 3, 2022, respectively. Both state that since the beginning of COVID-19 they have been in lockdown 24 hours a day except for 15-minute showers twice a week.[9] (Dkt. No. 274-1 (Poot Dec. at ¶ 1); Dkt. No. 274-3 (Brackens Dec. at ¶ 9).) However, Brackens states that he has recently intermittently been allowed out for one hour on some days. (Dkt. No. 274-3 (Brackens Dec. at ¶ 5).) He has access to the gym at this time and this is the only time he is able to shower and make phone calls. (*Id.*) Poot states he is still in his cell 24 hours a day aside from shower breaks. (Dkt. No. 274-1 (Poot Dec. at ¶ 1).)

Plaintiffs and Defendant disagree on the amount of time inmates have been allowed of their cells since the onset of COVID-19 and what access if any they have had to the gym. Defendant claims that, after February 2021, inmates in general population had access to one hour of out-of-cell time per day. (Dkt. No. 259 at 6.) At some point in this time, walking groups were implemented, where small groups of inmates could leave their cells and move throughout the jail. (*Id.* at 7.) Walking groups were not initially available for all inmates, but eventually, at an unspecified date, the jail made walk groups available for all inmates. (*Id.* at 7.) Defendant states that, as of October 24, 2022, Defendant allowed those in general population out for two and a half to three hours a day and those in administrative segregation out for 30 to 45 minutes per day for "walking groups". (*Id.* at 7, 15; Dkt. No. 296 at 4-5.) Defendant further states as of the date of the brief, the gym is open during out-of-cell time. (Dkt. No. 259 at 16.) Defendant has noted that the amount of time Plaintiffs spend out of their cells has fluctuated with resurgences of COVID-19. (*Id.* at 7.)

Given this conflicting information, it is unclear how much time inmates in County Jail 3 spend out of their cells and whether that amount of time is Constitutionally sufficient. This is thus not an issue that can be resolved on summary judgment. The Ninth Circuit in this case reiterated the finding in *Pierce v. County of Orange*, 526 F3d 1190 (9th Cir. 2005) that allowing "only

[9] Defendant states that Poot's Declaration stated he had 1.5 hours per day of out-of-cell time while in administrative segregation. (Dkt. No. 296 at 5.) However, Poot states that he had 1.5 hours per day out-of-cell time when he was in Unit 8b, which was a mixed general population and administrative segregation unit. He states that he was in this unit during the summer of 2022, when other inmates state the jail briefly implemented longer out-of-cell time for inmates. (Dkt. No. 274-1 (Poot Dec. at ¶ 1).) At the time of his declaration, he was no longer in Unit 8b. (*Id.*)

ninety minutes of exercise per week – less than thirteen minutes a day – does not comport with constitutional standards." *Norbert*, 10 F.4th at 930 (citing *Pierce*, at 1208, 1212). Here, because this Court has already found that the cells are too small for meaningful exercise. Thus, if the current policy is to allow inmates to be out of their cells only 90 minutes a week, that policy violates the Fourteenth Amendment unless there is some other reason to justify that amount of time. On the one hand, Defendant presented evidence about "walking groups" that potentially satisfy the Fourteenth Amendment, but Plaintiffs submitted evidence to the contrary. Because it is not clear whether inmates receive the amount of exercise found to comply with the Constitution, the Court cannot grant summary judgment to either side.

In addition, even if the amount of time Defendant currently allow Plaintiffs out of their cells in the manner that Plaintiffs describe, there may be a reason for doing so that satisfies the Constitution. Defendant argued that the COVID-19 emergency conditions were ongoing at the time Defendant filed its briefs regarding summary judgment and that ongoing lockdowns and exercise restrictions were based on the ongoing emergency. (Dkt. No. 259.) Plaintiffs argued that budgeting and staffing shortages led to the choices that Defendant made, including total lockdowns and completely barring access to a reasonably exercise space. (Dkt. No. 266 at 13-18.) There is a factual dispute about the reasons for limiting inmates' access out of their cells.

Whether the COVID-19 pandemic justified the specific measures Defendant took is also a question for a trier of fact, given that Defendant's actions must be measured against a standard of rational review. The Fourteenth Amendment bars "punishment" of pretrial detainees. *Norbert*, 10 F.4th at 928. What amounts to punishment is something that causes a "harm or disability" and where the "purpose of the governmental action" was to punish the detainee. *Norbert*, 10 F.4th at 928 (quoting *Demery* v. Arpaio, 378 F.3d 1020, 1029 (9th Cir. 2004.) However, showing purpose does not require showing intentional harm by the government, but only reckless indifference by the government. *Id.* This is subject to rationality review under the Fourteenth Amendment and the government regulation must be "rationally related to a legitimate nonpunitive governmental purpose and [not] appear excessive in relation to that purpose." *Pierce*, 526 F.3d at 1213. Budgeting concerns, inconvenience, and even some safety concerns generally do not serve as

legitimate government objectives. *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) ("The cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment [here, the denial of exercise].") Further, even where the government provides an interest in safety, this still may not serve as enough of a legitimate government interest if it would mean there would be "no meaningful vindication of the constitutional right to exercise for this entire category of detainees." *Pierce*, 526 F.3d at 1212 (holding that institutional security concerns do not serve as a legitimate government interest for curtailing inmates' exercise to 90 minutes per week); *Lopez v. Smith*, 203 F.3d 1122, 1133 (9th Cir. 2000) (upholding summary judgment for Plaintiff that defendant was deliberately indifferent for barring outdoor exercise for an inmates "own protection" while he recovered from an injury); *Allen v. Sakai*, 48 F.3d 1082, 1088 (9th Cir. 1994) (holding that logistical concerns regarding ensuring a guard was available to monitor inmates during exercise did not serve as a legitimate government objective greater than Plaintiff's need for exercise.) "Genuine emergency" can serve as a rational basis for complete lockdown and deprivation of right to exercise. *Hayward v. Procunier*, 629 F.2d 599, 603 (9th Cir. 1980). There are situations in which emergencies can serve as a rational basis for a limited term of lockdown in cells, such that there was no violation of Constitutional rights. *Id.* (describing a six-month lockdown, where outdoor exercise was allowed within one month of lockdown); *Labatt v. Twoomey*, 513 F.2d 641 (7th Cir. 1975) (involving a nine-day lockdown in response to an emergency); *Hoitt v. Vitek*, 497 F.2d 598 (1st Cir. 1974) (finding rational basis for a three to eight-week lockdown but holding that injunctive relief could be granted if an emergency time span was open-ended or unlimited).

Based on the evidence supplied by Plaintiffs and Defendant, there remains questions of fact as to the constitutionality of time Plaintiffs are allowed out of their cells and whether Defendant's restrictions satisfy rational basis review. The Court cannot grant summary judgment to either side on this issue.

C. Access to Sunlight and Light in General

Both before the preliminary injunction issued, during the COVID-19 lockdown, and today, none of the inmates at Jail 3 have had access to direct sunlight – i.e., sunlight without a window.

(Dkt. Nos. 310, 273 at 11.) There is no dispute that inmates in County Jail 3 do not have access to sunlight because they never leave the jail other than to attend court appearances, that there is no outdoor exercise yard, and that the only sunlight they have is through a window.

Each cell in County Jail 3 has a window that "provides a view to the outside and allows every inmate access to natural light." (Dkt. No. 296 at 5.) Inmates in the jail also have access to fresh air through individual air handler units with efficiency filters. (*Id.* at 3.) Windows into individual inmates cells do not lead directly outside and instead lead to a plumbing chase that then has a window to the outside. (*Id.* at 6.) Individual gyms have grate-covered windows that allow air to enter the gyms. (*Id.* at 5.) However, there is no place in County Jail 3 where inmates can receive direct sunlight, unfiltered through glass or grating. (Dkt. No. 273 at 5.)

As noted above, Zeitzer submitted the Zeitzer P.I. declaration in support of Plaintiffs' motion for a preliminary injunction and testified before the Court at the evidentiary hearing held on October 23, 2019. In summary, Zeitzer explained that a person needs variation between light and dark to maintain the Circadian clock, and failure to maintain that can cause insomnia, depression, diabetes, cancer, and cognitive impairment. There is no conclusive evidence that lack of exposure to sunlight – as opposed to sufficiently bright light – causes these problems.

In the January 31, 2020 Order regarding Plaintiffs' motion for preliminary injunction, the Court provided more detail about Zeitzer's testimony:

> In his written testimony he explained that "[t]he Circadian clock, which is located in the brain, is responsible for the temporal organization (timing) or a variety of biological activities, including sleep, mood, metabolism, immune function, and cognition." (Dkt. No. 8-3 (Zeitzer Dec.).) "A properly timed and functioning Circadian clock is dependent on exposure to regular light-dark cycle." (*Id.*) Individuals with disrupted Circadian rhythms can eventually develop pathologies, including insomnia, depression, diabetes, cancer, and cognitive impairment. (*Id.*) "Exposure to sunlight is an important component in the setting and regulation of the human Circadian rhythm." (*Id.*) This is true because "[t]he more robust the difference between the brightness of light during the day and night, the stronger the signal to the Circadian clock." (*Id.*)
>
> Zeitzer explained during the evidentiary hearing that it is possible to measure ambient light levels using a light detector unit ("LDU") calibrated by the National Institute of Standards and Technology. (Dkt. 75 (Zeitzer Hearing FTR at 9:41).)…. Zeitzer explained that the LDU takes in light readings and normalizes them to a unit of measure

referred to as "lux," which corresponds to the amount of light taken in by the human eye and consciously seen by the human brain. (Dkt. 75 (Zeitzer Hearing FTR at 9:42; Zeitzer Hearing Transcript at 12:3-9).) Zeitzer clarified that the further a person is from a light source, the lower the intensity of the light the person receives, with the normal calculation being 1 divided by the square root of the distance from the light. (Dkt. 75 (Zeitzer Hearing FTR at 9:43).)

According to Zeitzer, "anything under 10 lux" represents "very dim lighting." (Dkt. 75 (Zeitzer Hearing Transcript at 12:11).) In the United States, indoor lighting in a typical home varies between 100 lux during the day and 50 lux in the evening. (*Id.* at 12:11-14.) In contrast, "a well-lit office" might be 200 to 300 lux, and the light outside on a nice day would be anywhere from 10,000 to 100,000 lux. (*Id.* at 12:15-17.) Zeitzer testified that the type of light received inside "doesn't completely recapitulate what you would get outside" for health purposes, due to color spectrum differences in the composition of the types of light and how those types of light are variously perceived by the light-responsive cells in the human eye and brain. (*Id.* at 16:2-17:6.) Zeitzer explained that generally, the source or type of light (sunlight vs. artificial light) did not make a difference unless there was a complete absence of "blue light." (*Id.* at 50:15-20.) Sunlight filtered through windows supplies sufficient light unless the window is a special type that blocks certain types of light. (*Id.* at 65:2-19.) A person can receive the proper differential between light during the day and light during the night from access to natural light from a window instead of being outside. [(*Id.* at 23:8-11.)] And that differential can also be established from [artificial light boxes at 10,000 lux as opposed to natural light. (*Id.* at 23:14-22.)]….

At the evidentiary hearing, Zeitzer elaborated on the meaning of lux readings. He explained that "the critical part about lighting is that we create a difference between the daytime lighting and the nighttime lighting." (*Id.* at 21:5-7.) Health benefits of appropriate lighting are based not only on "the absolute amount of light that one is getting" but on the difference between the light during the day and the light at night. (*Id.* at 21:7-9.) As Zeitzer explained: "[I]f you don't have this difference between day and night, then you have a lot of negative health consequences." (*Id.* at 21:10-11.) Thus, if a person "were to sleep in absolute hundred percent darkness," [daylight between 50 to 200 lux would be adequate. (*Id.* at 22:20-24; 39:4-11.) However, Zeitzer states that the "indoor lighting doesn't completely recapitulate what you would get outside." (*Id.* at 16:2-6.)] Circadian rhythm problems due to inadequate light will be "completely obviated" if a person gets sufficient exposure to daylight; Zeitzer notes that "the typical clinical recommendation is 30 minutes […] of natural lighting exposure." (*Id.* at 23:5, 12-15.)

Zeitzer further hypothesized that some exposure to high intensity sunlight one to two times a week might also be sufficient to ameliorate Circadian problems in people who generally are exposed to poor lighting conditions. (Dkt. 75 (Zeitzer Hearing Transcript at 28:10-19.) [Later in the testimony, Zeitzer clarified that he still believed that a consistent lack of access to sunlight could lead to conditions such as insomnia. (*Id.* at 55:8-15.)] However, Zeitzer also pointed out the difficulty in conducting direct studies of sunlight deprivation, as

> depriving people of sunlight over the long term would pose ethical problems, "given what we know about the risk of extended light deprivation or extended exposure to minimal light." (*Id.* at 24:8-25.)

(Dkt. No. 110 at 18-19.)

In the Zeitzer P.I. declaration, Zeitzer stated that, based on the limited information available from studying individuals living in the polar region during winter, for those people, "there is increased incidence of depression, lowering of optimal cognitive and metabolic performance, with evidence of insulin resistance and elevated triglycerides, risk factors for heart disease." (Dkt. 8-3 (Zeitzer Dec. at 5).) Further, "[a]s the length of time of exposure to only artificial indoor lighting is extended, the likelihood of disruption to sleep and Circadian rhythms increases, as do the downstream consequences on heart, metabolic, immune, and mental health." (Dkt. 8-3 (Zeitzer Dec. at 5).)

For this motion, Zeitzer provided updated evidence relating to lighting access in County Jail 3 in the Zeitzer report. Based on lux readings in County Jail 3, Zeitzer found that there was a broad range of lighting conditions, with bottom bunks only receiving 30-31 lux during the day, a fraction of outdoor sunlight, and top bunks receiving between 140 and 813 lux during the day, depending on bed position and head angle. (Dkt. No. 284 (Compendium Ex. 5).) Maximum light in one cell was measured at 1345 lux, when placing a sensor a few inches away from the artificial light, and 1800 lux with the sensor directly pressed against a window. (Dkt. No. 284 (Compendium Ex. 5).) However, in a different cell, light when pressed against a window was only measured at 356 lux.[10] (*Id.*) Monitoring at night found that lighting on the top bunk was at 30 lux, and there was no detectable lighting on the bottom bunk. (*Id.*) When standing in a cell, light measured between 55-274 lux for one cell, depending on head angle and position in the cell, and between 70-413 lux for a second cell. (*Id.*) In the basketball court, lighting conditions ranged from 22 to 116 lux in a horizontal angle. (*Id.*) Finally, outdoor light at County Jail 3 ranged from 10,000 to 40,000 lux, depending on angle. (*Id.*)

The second Zeitzer declaration provides no analysis or opinions based on this data and

[10] For this cell, the brightest point of lighting was found in the top bunk, facing the interior window leading to the common area, where the light level was 657 lux. For the sake of this order, we assume that those sleeping the bottom bunk cannot access this light. (*See* Figure 1.)

instead merely reported that data. Included with the report are 505 pages of incomprehensible, unexplained raw data. (Dkt. No. 284 (Compendium Ex. 4.).) The Court notes that it is not required "'to scour the record in search of a genuine issue of triable fact,'" *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.1996) (citations omitted), but rather "may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1030 (9th Cir.2001).

Based on Zeitzer's testimony during the preliminary injunction, the Court finds that, to avoid adverse health effects, inmates should have a significant degree of variation between lighting at night and during the day, with those who sleep with 0 lux of having a minimum of 50-200 lux during the day. (Dkt. No. 75 (Zeitzer Hearing Transcript at 22:20-24; 39:4-11.) Further, inmates should have access to light that either mimics the color spectrum of outdoor lighting or should have access to sunlight exposure. (Dkt. No. 75 (Zeitzer Hearing Transcript at 16:2-17:6; 50:15-20.) Based on Zeitzer's lux findings, all inmates have access to lighting that exceeds this lux level within their cell, with the lowest possible lighting available to inmates being 356 lux. (*See* Figure 1) Zeitzer provided no information regarding how much lux variation someone should receive if they sleep with 30 lux of lighting, as inmates in top bunks have. Zeitzer's report also does not discuss if the lighting conditions in the cells had a color spectrum to mimic outdoor light. The only definitive information the Court can gather from Zeitzer's Report is that detainees who sleep on the bottom bunk *do* have enough variation in their lighting conditions.

FIGURE 1

	Top Bunk	**Bottom Bunk**
Night Lux Level in Bunk	30 lux	0 lux
Day Lux Level in Bunk	140-830 lux	30-31 lux
Day Lux Level in Cell while standing	55-274 or 70-413 lux	55-274 or 70-413 lux
Day Lux Level in Gym	22-116 lux	22-116 lux

Brightest Lux Level in Cell	657 lux or 1800 lux	356 lux[11] or 1800 lux
Zeitzer's Recommended minimum day lux level for respective night lux level	N/A – Zeitzer never provided a recommendation	50-200 lux
Compliance with Zeitzer's Recommendation	N/A – Zeitzer never provided a recommendation	Yes

Zeitzer testified for the preliminary injunction that the "type of light – whether sunlight or artificial light – is not significant" as an isolated factor in determining physical health risk to individuals. (Dkt. No. 110 at 20.) He also opined that "the difference between light at night and light during the day is significant for health." (*Id.*) Based on the data provided by Zeitzer, those in bottom bunks have sufficient access to variation in lighting between night and day. However, Zeitzer did not give sufficient testimony for the Court to find whether or not those in top bunks have sufficient access to variation in lighting. Thus, Plaintiffs have not met their burden of demonstrating that the access to light that inmates have, even if they are confined to their cells all day, causes problems for their health.

This finding does not foreclose the possibility that lack of access to sunlight can cause psychological harm. Even without evidence from a medical expert, Plaintiffs may allege "garden variety" emotional distress and prove that harm through their own testimony. Garden variety emotional distress is "ordinary or common place emotional distress that is 'simple or usual.'" *Fitzgerald v. Cassil*, 216 F.R. D. 632, 637 (N.D. Cal. 2003). Garden variety emotional distress has been described as "'the distress that any healthy, well-adjusted person would likely feel as a result of being victimized;' 'the generalized insult, hurt feelings and lingering resentment which anyone could be expected to feel given the defendant's conduct;' and general pain and suffering that is not serious enough to require psychological treatment or disrupt of affect the claimant's life activities." *Curry v. United States*, 2018 WL 347661, *2 (E.D. Cal. Jan. 9, 2018) (citing *Flowers v. Owens*, 274 F.R.D. 218, 225-26 (N.D. Ill 2011) (internal citation and quotations omitted)). To show garden variety emotional distress, Plaintiff need not show any medical records or medical

[11] *See supra*, n. 5.

expert testimony. *Wilson v. Decibels of Oregon, Inc.*, No. 1:16-CV-00855-CL, 2017 WL 393602, at *1 (D. Or. Jan. 26, 2017). Emotional distress can be "harm" under the Fourteenth Amendment without any reference to medical records or medical expert testimony. *Vazquez v. County of Kern*, 949 F.3d 1153, 1163 (9th Cir. 2020).

Here, Plaintiffs present evidence that they are suffering from harm based on lack of access to direct sunlight. Inmates have self-reported various medication conditions and psychological impacts that have occurred since their incarceration. Based on statements filed on November 7, 2022 and in prior motions, Plaintiffs' conditions are as described below:

1) Garcia is a pretrial detainee who has been incarcerated for over six years. (Dkt. No. 268 (Garcia Dec. at ¶ 2).) Garcia states that he has not seen the sun in this time, aside from coming on or off the bus when heading to Court. *Id.* at ¶ 13. He states that seeing the sun would "help [him] cope." *Id.* He states that his eyesight has degraded over the time he has been incarcerated and he believes that the constant exposure to artificial lighting has caused this. *Id* at ¶ 14. Garcia further states that he has not been able to fall asleep due to artificial lighting at night and being woken by guards. *Id.* at ¶ 17. Garcia believes these conditions of confinement are so difficult that they led to three inmates committing suicide in 2022. *Id.* at ¶ 15.
2) Poot is a pretrial detainee who has been incarcerated for six and a half years and is currently in administrative segregation. (Dkt. No. 268-1 (Poot Dec. at ¶ 1).) Poot states that he is suffering from depression and has headaches every day and that he never previously dealt with depression. *Id.* at ¶¶ 2, 11. He states that he cannot sleep due to lighting in his cell and due to deputies waking him up at 11pm and 4am. *Id.* at ¶¶ 3-5. In a declaration on June 21, 2019, Poot stated "For 1,103 days, I have not been in the sun. I am tired and listless…. I am depressed and easily get angry. It is hard to be patient. I am easily irritable. It's hard to be in these small cells locked up all day with so many guys, to always be indoors." (Dkt. No. 8-9 (Poot Dec. at ¶ 10).)
3) Beloy is a pretrial detainee who has been in custody for over 4 years. (Dkt. No 268-2 (Beloy Dec. at ¶ 2).) Beloy reports that due to lack of access to sunlight he cannot fall

asleep and struggles to wake up. *Id.* at ¶¶ 14-16. He states he is suffering from a weakened immune system leading to staph infections, digestion issues including constipation, and inflamed sinuses from lint in the air. *Id.* at ¶¶ 17-19. Beloy states he has feelings of desperation related to not being able to see the sun. (Dkt. No. 274-2 (Beloy Dec. at ¶ 20).)

4) Brackens is a pretrial detainee who has been in custody for 10 years who is in administrative segregation. (Dkt. No. 268-3 (Brackens Dec. at ¶¶ 1-2).) Brackens has developed diabetes and high blood pressure since his incarceration. (*Id*. at ¶¶ 1-2) Brackens states with his limited time available out of his cell he does not have enough time to exercise. (*Id.* at ¶ 5.) Mirroring Poot's statement, in a declaration on June 24, 2019, Brackens stated, "For 2,384 days, I have not been in the sun…. I am easily irritable. I am tired and listless." (Dkt. No. 8-5 (Brackens Dec. at ¶ 15).)

5) McAllister is a pretrial detainee who was previously incarcerated from 2015-2019 and has currently been incarcerated since December 2020. (Dkt. No. 268-4 (McAllister Dec. at ¶ 1).) He states that, since returning to jail, he has put on substantial weight. (*Id*. at ¶ 4.)

6) Harris is a pretrial detainee who has been in custody since August 2017. (Dkt. No. 197-9 (Harris Dec. at ¶ 2).) In a declaration for Plaintiff's renewed preliminary injunction on January 7, 2021, Harris stated that sun never entered his cell due to his window facing plumbing and electricity. (*Id.* at ¶ 11.) He stated that being indoors without the sun and sky all day was "such punishment" and that he was struggling to stay emotionally balanced. (*Id.* at ¶¶ 16, 19.)

Defendant provides no response regarding Plaintiffs' allegations of emotion distress.

There is no case law addressing whether the lack of access to direct sunlight is a violation of the Constitution. The Ninth Circuit in this case addressed the issue of "outdoor exercise" and found that it can be required when there is no "otherwise meaningful recreation" available. *Norbert*, 10 F.4th at 929. The Ninth Circuit recognized that there is no *per se* requirement of *outdoor* exercise. *Id*. at 930. The Ninth Circuit specifically ruled that the circumstances of the

case control whether there is a need for outdoor exercise. *Id*. Thus, the analysis here is simply whether failure to provide access to direct sunlight is a violation of the Fourteenth Amendment to the U.S. Constitution and the California Constitution.

Defendant argues that its policies during the COVID-19 pandemic were created "to protect inmates, staff, and the general public." (Dkt. No. 259 at 5.) Plaintiffs argue that COVID-19 was not the primary basis and rationale for inmates' exercise and outdoor access restrictions over the past three years and that the policies were created by staffing shortages and Defendant's refusal to build an outdoor exercise yard. (Dkt. No. 273 at 12.) Plaintiffs argue that the lockdowns and extended periods without exercise were "a direct consequence of [Defendant's] deliberate design and construction choices, including [Defendant's] deliberate choice to violate regulatory building code requirements." (Dkt. No. 273 at 12-13.) Again, these past policies are not relevant for the Court's determination about injunctive relief for the future, based on current conditions. What is relevant is Defendant's alleged rationale at the present time for failure to provide any access to direct sunlight. In responding to this argument during the preliminary injunction, Defendant argued that, although County Jail 3 originally had an outdoor exercise yard, it was abandoned and now not secure for use. (Dkt. No. 11 at 9.) Defendant also argued that there is no safe way to transport the inmates from County Jail 3 to the unused exercise yard and that the outdoor exercise yard is no longer secure for the current inmates, who have more serious charges and a more serious criminal history. (Dkt. No. 11 at 9.) The conditions of the unused exercise yard are unchanged and Defendant's argument for the lack of accessibility to the exercise yard is unchanged. (Dkt. No. 259 at 2-3.)

As noted above, Plaintiffs must show that lack of direct access to sunlight is punishment, to prove a violation of the Fourteenth Amendment. *Norbert*, 10 F.4th at 928. To prevail, Defendant must show that its policy is "rationally related to a legitimate nonpunitive governmental purpose and [not] appear excessive in relation to that purpose." *Pierce*, 526 F.3d at 1213. Here, the issue of whether Defendant poses a rational reason for creating a situation in which inmates have no access to direct sunlight is fact-dependent, and Plaintiffs contend that budgetary concerns alone are not sufficient for rational review. Further, as discussed, *supra*, cost savings or

inconvenience alone are not sufficient "alternative purposes" for a constitutional restriction. *Spain*, 600 F.2d at 200; *Allen*, 48 F.3d 1082, 1088 (9th Cir. 1994). Thus, the Court cannot grant summary judgment to either Plaintiffs or Defendant on this issue and DENIES the cross-motions for summary judgment on this issue.

D. Claims Pursuant to the California Constitution

Defendant moves for summary judgment on Plaintiffs' Article I § 7 Claim and Plaintiffs' Article I § 17 Claim. (Dkt. No. 259 at 18.) Article I Section 7 of the California Constitution mirrors the Fourteenth Amendment, and Defendant's motion is DENIED for the same reasons above. Similarly, Plaintiffs motion for summary judgement on this claim is DENIED.

Article I § 17 of the California Constitution mirrors the Eighth Amendment. Plaintiffs do not oppose summary judgment on this claim. Because there are no longer any Plaintiffs who are convicted among the class representatives, none of the current class Plaintiffs can represent any inmate who has been convicted of a crime but awaiting sentencing and transfer to a state prison. This Court has already found that the Eighth Amendment does not apply in this case. (Dkt. No. 110 at 50.) Thus, the Court GRANTS Defendant's motion for summary judgment as to the claim for violation of Article I § 17 of the California Constitution.

F. Requests for Judicial Notice

On October 24, 2022, Defendant submitted a request for judicial notice concerning two pieces of information: 1) Title 24, Section 1231.2.10 of the California Board of State and Community Corrections, which states that the minimum exercise area must not be less than 900 square feet; and 2) Title 15, Section 1065 of the California Board of State and Community Corrections, which sets a minimum jail recreation time of 3 hours per week. (Dkt. No. 260.)

The Court takes Judicial notice of Fact 2. Defendant submitted copies of Title 24 Section 1231.2.10 and Title 15 Section 1065 of the California Board of State and Community Corrections. (Dkt. Nos. 260-1, -2.) Neither of these documents are subject to reasonable dispute. However, regarding Defendant's assertion about the statement in Title 24, Section 1231.2.10, is incorrect. Exhibit A (Dkt. No. 260-1) shows that Title 24 states that the minimum exercise area must not be less than 600 square feet and that the area must be outdoor. Thus, the Court GRANTS the motion

to take judicial notice of the two statutes but does not interpret Title 24, Section 1231.2.10, as Defendant suggests.

Plaintiffs submitted a request for judicial notice concerning six pieces of information:

1) the existence and content of the 2001 California Building Code, Section 470A;

2) the existence and content of the 2007 California Building Code, Section 1231;

3) the existence and content of the 2013 Title 24 Minimum Standards for Local Detention Facilities;

4) the existence and content of the 2021 Final Proposed Revisions of Title 24;

5) the history of the California Building Standards Code, Title 24; and

6) the fact of staffing shortages resulted in reduced programming and over 23 hours per day time in cells. (Dkt. No. 300.)

The Court GRANTS the motion for judicial notice of facts 1-5. These facts are supported by copies of California Code, and a California government website detailing the history of this code. (Dkt. No. 284, Exs. 11-14; https://www.dgs.ca.gov/BSC/About/History-of-the-California-Building-Standards-Code---Title-24.) These documents are not subject to reasonable dispute.

The Court DENIES the motion to take judicial notice of fact 6. Plaintiffs' assertion in fact 6 is subject to dispute. The exhibit provided by Plaintiffs is an article including statements by members of the Sheriff's department which concludes that staffing shortages led to the lockdowns. (Dkt. No. 284, Ex. 19.) However, Defendant disputes this fact throughout its briefing, arguing the that the out-of-cell time regulations were based on COVID-19, not staffing. (Dkt. No. 259 at 5-9.)

G. Plaintiffs' Request for Continuance

Plaintiffs also requested a continuance of their summary judgement briefing because discovery took place during the time that Plaintiffs were preparing their motion for summary judgment and opposition to Defendant's motion. (Dkt. No. 266 at page 24.) The Court DENIES this request. This case has been pending since May 20, 2019. (Dkt. No. 1.) To the extent that Plaintiffs believe that there are violations of the U.S. and California Constitution that are affecting them adversely, speedy resolution of this case is paramount. The Court has granted several requests to extend discovery. (Dkt. Nos. 34, 185 (non-expert discovery to be completed by July 9,

2021 and expert discovery to be completed by September 10, 2021), 216 (non-expert discovery to be completed by January 28, 2022 and expert discovery to be completed by April 1, 2022), 232, 233 (non-expert discovery to be completed by July 29, 2022 and expert discovery to be completed by October 7, 2022), 241 and 247 (non-expert discovery to be completed by august 19, 2022 and expert disclosures to be made by September 2, 2022); 254 (expert discovery to be completed by November 9, 2022).

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's motion to strike Plaintiffs' prayer for damages, GRANTS IN PART and DENIES IN PART Defendant's motion for summary judgment, DENIES Plaintiffs' motion for summary judgment, GRANTS IN PART and DENIES IN PART Defendant's and Plaintiffs' motions for judicial notice, GRANTS IN PART and DENIES IN PART Defendant's objections to evidence, GRANTS Plaintiffs' objection to evidence, and DENIES Plaintiffs' motion for a continuance of briefing for this motion.

IT IS SO ORDERED.

Dated: April 5, 2023

Sallie Kim

SALLIE KIM
United States Magistrate Judge

United States District Court
Northern District of California