

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
San Francisco Division

MICHAEL HAMPTON, et al.,  
Plaintiffs,  
v.  
STATE OF CALIFORNIA, et al.,  
Defendants.

Case No. 21-cv-03058-LB  
**AMENDED ORDER GRANTING IN  
PART AND DENYING IN PART  
MOTION TO DISMISS**  
Re: ECF No. 27

**INTRODUCTION**

Michael Hampton, a prisoner housed at San Quentin State Prison, died on September 25, 2020, after contracting COVID-19. His widow sued the State of California, the California Department of Corrections and Rehabilitation (CDCR), the prison, and ten officials (including the Secretary of the CDCR, the San Quentin warden, and officials responsible for medical-care policy), alleging that they knew the risks that led to a large-scale outbreak of COVID-19 at San Quentin and — through a botched transfer of at-risk inmates from the California Institute for Men (CIM) to San Quentin and a failure to use basic safety measures — caused Mr. Hampton’s death. She claims (1) inhumane prison conditions in violation of the First, Eighth, and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983, (2) supervisory liability under § 1983, (3) a violation of California’s Bane Act, (4) a violation of Title II of the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act of 1973, and (5) negligence. The defendants moved to dismiss on

1 the grounds that (1) they have qualified immunity because the plaintiffs did not plead facts  
 2 establishing a constitutional violation by the individual defendants or show that the law was clearly  
 3 established, (2) they otherwise have immunity under the Public Readiness and Emergency (PREP)  
 4 Act, 42 U.S.C. § 247d-6d(a)(2) & (b), for their decisions about using countermeasures to COVID-  
 5 19, (3) the plaintiffs did not plausibly plead a claim under the ADA or the Rehabilitation Act, and  
 6 (4) statutory immunities bar the state claims. The court dismisses the ADA/Rehabilitation Act claim  
 7 without prejudice and otherwise denies the motion to dismiss because the plaintiff plausibly pleaded  
 8 the claims, and the immunities do not bar the claims at the pleadings stage.

## 10 STATEMENT

### 11 **1. Allegations in the Operative Complaint about the COVID-19 Outbreak at San Quentin**

12 The genesis of the COVID-19 outbreak at San Quentin was the transfer of 122 inmates from  
 13 CIM to San Quentin on May 30, 2020. At the time, CIM had 600 COVID-19 cases and nine  
 14 deaths, and San Quentin had no reported COVID-19 cases. The transferred inmates allegedly were  
 15 at high risk medically to contract COVID-19, had not been screened for COVID-19 for weeks, and  
 16 were packed onto buses in numbers that exceeded the capacity limits set by the CDCR. Some fell  
 17 ill before they arrived at San Quentin.<sup>1</sup> When they arrived at San Quentin, the former CIM inmates  
 18 were housed in the Badger housing unit, which allegedly had open-air cells open to a shared  
 19 atrium, with common showers and a mess hall.<sup>2</sup> Allegedly, the seven individual defendants from  
 20 CDCR and San Quentin approved the transfer of the CIM inmates and their housing at Badger:  
 21 Secretary of the CDCR Ralph Diaz; CDCR Medical Director R. Steven Tharratt, M.D.; San  
 22 Quentin Warden Ronald Davis; San Quentin Acting Warden Ronald Bloomfield; San Quentin  
 23 CEO of Healthcare Charles Cryer; San Quentin Chief Medical Officer Alison Pachynski, M.D.;  
 24 and San Quentin Chief Physician and Surgeon Shannon Garrigan, M.D.<sup>3</sup> The three remaining

26 <sup>1</sup> First Am. Compl. (FAC) – ECF No. 22 at 11 (¶ 34). Citations refer to material in the Electronic Case  
 27 File (ECF); pinpoint citations are to the ECF-generated page numbers at the top of documents.

27 <sup>2</sup> *Id.* at 11–12 (¶ 35).

28 <sup>3</sup> *Id.* at 11–12 (¶ 35), 27–28 (¶ 72).

1 defendants are at CIM and allegedly approved the transfer decision too: CEO Louie Escobell, RN;  
2 Chief Medical Officer Muhammad Farooq; and Chief Physician and Surgeon Kirk Torres, M.D.<sup>4</sup>  
3 The complaint names the State of California, the CDCR, and San Quentin as defendants in the  
4 ADA and Rehabilitation Act claim.<sup>5</sup>

5 Within days of the transfer, 25 transferees tested positive, leading to an outbreak of COVID-19  
6 at San Quentin and 499 confirmed cases.<sup>6</sup> By July 7, 2020, over 1,300 inmates and 184 staff tested  
7 positive for COVID-19.<sup>7</sup> By July 30, 2021, 2,181 inmates (roughly two-thirds of the prison  
8 population) tested positive.<sup>8</sup> By September 2, 2020, 26 inmates and one correctional officer died  
9 of COVID-19, deaths that (according to the plaintiffs) were preventable.<sup>9</sup>

10 The plaintiffs' claims are predicated on the botched transfer of infected prisoners from CIM and  
11 the defendants' refusal to implement basic safety measures to reduce the spread of COVID-19,  
12 which caused Mr. Hampton's death. At the time of the transfer, the defendants knew the risks of  
13 COVID-19. For example, (1) county shelter-in-place orders were in effect by March 16, 2020, (2) a  
14 state shelter-in-place order was in effect on March 19, 2020, (3) the governor declared a state of  
15 emergency on March 4, 2020, and, on March 24, 2020, suspended the intake of inmates into all  
16 state facilities for 30 days, and (4) statewide mask mandates were in place by April 17, 2020.<sup>10</sup>  
17 Until late May 2020, the California Correctional Health Care Services (CCHCS) opposed the  
18 transfer of inmates between prisons and said that transfer "carries significant risk of spreading  
19 transmission of the disease between institutions."<sup>11</sup> On March 18, 2020, the Habeas Corpus  
20 Resource Center wrote a letter to defendants San Quentin Warden Ron Davis and San Quentin's  
21 Chief Medical Officer Alison Pachynski asking San Quentin to give inmates personal-protective

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23 <sup>4</sup> *Id.* at 27–28 (¶ 72).

24 <sup>5</sup> *Id.* at 33.

25 <sup>6</sup> *Id.* at 11–12 (¶ 35).

26 <sup>7</sup> *Id.* at 15 (¶ 45).

27 <sup>8</sup> *Id.*

28 <sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 8–10 (¶¶ 28–29, 31–33).

<sup>11</sup> *Id.* at 10 (¶ 32).

1 equipment and cleaning supplies, allow for social distancing, and avoid quarantining inmates testing  
2 positive for COVID-19 in solitary-confinement cells normally used for punitive measures.<sup>12</sup>

3 On June 1, 2020, in a conference call with “Defendants, including Defendant Broomfield” (the  
4 acting warden), Marin County Public Health Officer Matthew Willis, M.D., recommended that  
5 San Quentin sequester the transferred inmates from the existing San Quentin population. Instead,  
6 San Quentin housed the transferred inmates in a shared unit with existing San Quentin inmates.  
7 Dr. Willis recommended masks for exposed inmates and correctional staff and restricting staff  
8 movement between different housing units. The defendants (presumably not the CIM defendants)  
9 knew about the recommendations, did not adopt them, and “agreed . . . [to] inform[.]” Dr. Willis  
10 that local health authorities had no authority to mandate measures in the prisons. On June 3, Dr.  
11 Willis recommended that San Quentin appoint an incident commander with expertise in outbreak  
12 management. The defendants appointed one on July 3, but only after the Marin County Board of  
13 Supervisors appealed directly to Governor Newsom.<sup>13</sup>

14 CCHCS Director J. Clark Kelso is the federal receiver for California’s prison medical-care  
15 system. On June 13, 2020, at his request, medical experts toured San Quentin. In a June 15, 2020,  
16 “Urgent Memo,” they warned that the COVID-19 outbreak at San Quentin could become a “full-  
17 blown epidemic and health care crisis in the prison and surrounding communities” and that  
18 overcrowding and the risk factors at San Quentin created a high risk for a “catastrophic super-  
19 spreader event.” There was a “grave lack of personal protective equipment and masks” for inmates,  
20 and the defendants “refused to provide adequate masks and personal protective equipment” to  
21 inmates or prison staff. Inmates had to make inadequate masks out of cloth, and both inmates and  
22 staff regularly wore no masks or wore them improperly. The defendants knew about and tolerated  
23 these problems. The experts warned that-virus testing delays (five to six days) were too long and  
24 intolerable.<sup>14</sup> They said that quarantine strategies of using cells otherwise used for punishment might  
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26 <sup>12</sup> *Id.* at 10 (¶ 30).

27 <sup>13</sup> *Id.* at 12–13 (¶ 38).

28 <sup>14</sup> *Id.* at 13 (¶ 39).

1 (1) thwart containment because inmates would be reluctant to report symptoms and (2) pose health  
 2 risks to sick inmates because they would be out of the sight of medical staff and face barriers to  
 3 communicating with them.<sup>15</sup> The experts — who met with inmates over the age of 60 with only  
 4 weeks left on their sentences — reported that “[i]t is inconceivable that they are still in this dangerous  
 5 environment.”<sup>16</sup> They recommended measures to be implemented immediately, including large-scale  
 6 release of inmates. The defendants knew about and chose to disregard the recommendations and —  
 7 rather than release significant numbers of high-risk inmates — ordered inmates transferred to  
 8 punitive housing assignments at San Quentin, including solitary confinement.<sup>17</sup> As a result, inmates  
 9 refused to report symptoms and test so that they could avoid punitive incarceration.<sup>18</sup>

10 In March and June 2020, the defendants knew about and refused two offers by the Innovative  
 11 Genomics Institute in Berkeley, California, to provide free COVID-19 testing at San Quentin, and  
 12 they refused two similar offers by UCSF Medical Center in May and June 2020. Mr. Kelso, the  
 13 federal receiver, testified that San Quentin and the CDCR lacked testing resources in March and  
 14 April 2020 and were still unable to provide timely testing results by July 2020. Prison staff were  
 15 “begging” for personal-protective equipment but “were told that to the extent San Quentin had such  
 16 PPE, it was reserved for medical professionals and not frontline correctional officers and  
 17 supervisors.” Officers “were relegated to wearing” inmate-made or homemade masks, were not  
 18 tested for COVID-19, and were not trained about or required to follow safety protocols. The  
 19 defendants knew about, and actually or tacitly approved, these conditions and practices.<sup>19</sup>

20 On July 1, 2020, at a meeting held by the California Senate Commission on Public Safety,  
 21 state senators called the May 2020 transfer from CIM to San Quentin “a horribly botched transfer”  
 22 that reflected a “failure of leadership” that was “abhorrent,” a “fiasco,” and “completely  
 23 avoidable.” Mr. Kelso testified that “what we’ve done to date still is not enough,” and Dr. Mark  
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25 <sup>15</sup> *Id.* at 13–14 (¶ 40).

26 <sup>16</sup> *Id.* at 14 (¶ 41).

27 <sup>17</sup> *Id.* at 10 (¶ 30), 14 (¶ 41).

28 <sup>18</sup> *Id.* at 14 (¶ 41).

<sup>19</sup> *Id.* at 14–15 (¶ 42).

1 Ghaly, who heads California’s Health and Human Services Agency, said “[t]here is no dispute that  
2 more could be and should be done.”<sup>20</sup>

3 On July 6, 2020, Mr. Kelso fired defendant R. Steven Tharratt, M.D., the CDCR Medical  
4 Director.<sup>21</sup> In August 2020, defendant Ralph Diaz, the Secretary of the CDCR, announced his  
5 retirement.<sup>22</sup>

6 On October 20, 2020, the California Court of Appeal issued its opinion in *In re Von Staich*. 56  
7 Cal. App. 5th 53 (2020); *review granted and request for depublication denied sub nom., Von Staich*  
8 *on H.C.*, 477 P. 3d 537 (Cal. 2020) (Court of Appeal must vacate its decision and consider whether  
9 disputes of facts require an evidentiary hearing before it pronounces judgment). The Court of  
10 Appeal’s holdings were as follows: (1) the warden and the CDCR acted with deliberate indifference  
11 to the rights and safety of San Quentin prisoners; (2) public-health experts endorsed conclusions that  
12 inmates could be protected only if the prison released substantial numbers of inmates; (3) CDCR did  
13 not implement the fifty-percent reduction “deemed essential by the Urgent Memo solicited in its  
14 behalf by the federal receiver;” (4) the respondents “concede actual knowledge of the substantial risk  
15 of serious harm to San Quentin inmates;” (5) the failure to reduce the population was not reasonable;  
16 and (6) the continued use of congregate living spaces and double cells was reckless (not merely  
17 negligent) (given the prison’s poor ventilation and inadequate sanitation) and was aggravated by the  
18 respondents’ failure to consider the expedited release of prisoners who were vulnerable to COVID-19  
19 and not likely to recidivate. *Id.* at 58, 63–64, 78–79 (cleaned up).<sup>23</sup>

20 On August 17, 2020, the Office of the Inspector General (OIG) issued the first of three reports  
21 responding to a request by the Speaker of the California Assembly for an assessment of the CDCR’s  
22 COVID-19 policies. It found problems such as poor screening for COVID-19 and inadequate  
23 training. (Forty-seven percent of the screeners at San Quentin had received no training.<sup>24</sup>) In the  
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25 <sup>20</sup> *Id.* at 15 (¶ 43).

26 <sup>21</sup> *Id.* (¶ 44).

27 <sup>22</sup> *Id.* (¶ 46).

28 <sup>23</sup> *Id.* at 15–18 (¶ 47).

<sup>24</sup> *Id.* at 18 (¶ 48).

1 second report on October 26, 2020, it concluded that lax enforcement by CDCR supervisors and  
2 managers likely contributed to noncompliance by staff members and inmates with protocols  
3 governing face coverings and social distancing.<sup>25</sup>

4 On February 1, 2021, the OIG released its third report, titled *California Correctional Health*  
5 *Care Services and the California Department of Corrections and Rehabilitation Caused a Public*  
6 *Health Disaster at San Quentin State Prison When They Transferred Medically Vulnerable*  
7 *Incarcerated Persons from the California Institution for Men Without Taking Proper Safeguards*.  
8 The OIG characterized the efforts to prepare for the transfers as “deeply flawed and risked the  
9 health and lives of thousands of incarcerated persons and staff.” CCHCS insisted on a tight transfer  
10 deadline, resulting in the CIM’s ignoring the healthcare staff’s concerns and transferring medically  
11 vulnerable persons who had not been tested for COVID-19. According to emails, a CIM healthcare  
12 executive ordered that incarcerated persons not be retested the day before the transfers, and  
13 “multiple CCHCS and departmental executives were aware of the outdated nature of the tests before  
14 the transfers occurred.” The risks were exacerbated by the “inexplicable decision” to increase the  
15 numbers of persons on the buses. When inmates arrived at San Quentin, two were symptomatic for  
16 COVID-19, but all were housed in one unit with air circulation that flowed throughout the unit. By  
17 the time the prison tested them, the inmates had been housed together for at least six days, and the  
18 virus had spread quickly among them. The prison could not quarantine them, leading to the spread  
19 of the virus throughout the prison.<sup>26</sup> Given that CIM nurses questioned the transfer on grounds of  
20 patient safety and the lack of COVID-19 precautions, the OIG concluded that “[t]he decision to  
21 transfer the medically vulnerable incarcerated persons despite such outdated test results was not  
22 simply an oversight, but a conscious decision made by prison and CCHCS executives.”<sup>27</sup>

23 Also on February 1, 2021, Cal-OSHA cited the CDCR and San Quentin with fourteen  
24 violations (including five serious violations and four “willful-serious” violations), including a lack  
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26 <sup>25</sup> *Id.* at 18–19 (¶ 49).

27 <sup>26</sup> *Id.* at 19–20 (¶ 50).

28 <sup>27</sup> *Id.* at 19–21 (¶¶ 50–51).

1 of training, testing, proper personal-protection equipment, legally required respirators at least as  
 2 effective as N95 respirators, soap in an employee restroom, policies to prevent airborne  
 3 transmission and other decontamination policies, and appropriate transfer and housing policies to  
 4 address the risk (whether within or outside of the facility).<sup>28</sup>

5 As discussed above, seven defendants (at the CDCR and San Quentin) allegedly personally  
 6 approved the transfer of the CIM inmates and their housing at the Badger housing unit, and the  
 7 remaining three medical defendants at CIM allegedly approved the transfer too. All allegedly knew  
 8 about the risks surrounding the transfer and outbreak.<sup>29</sup> Again, as discussed above, on March 18,  
 9 2020, San Quentin Warden Ron Bloomfield and Chief Medical Officer Alison Pachynski, M.D.,  
 10 received letters about personal-protection equipment, cleaning supplies, and social distancing.<sup>30</sup>

## 12 **2. CDCR Submissions About its Response to the Pandemic**

13 In 2006, in *Plata v. Newsom*, No. 01-cv-01351-JST, a Northern District judge appointed a  
 14 federal receiver to administer the CDCR to ensure compliance with the Eighth Amendment's  
 15 standards for medical care. *Hines v. Youseff*, 914 F.3d 1218, 1223 (9th Cir. 2019). According to the  
 16 receiver's testimony at the July 1, 2020, hearing held by the California Senate Commission on  
 17 Public Safety (referenced in the complaint and summarized in part above), the CDCR began  
 18 planning its response to the pandemic in February 2020 and took preventative measures by March  
 19 11, 2020, but COVID-19 numbers spiked anyway by May 2020. The CDCR spent weeks  
 20 considering whether it could move CIM patients safely to the prisons at Corcoran and San Quentin.  
 21 It had a screening-and-testing matrix for patient movement that required a negative test (but did not  
 22 specify the timing of the test, which meant that some tests were two, three, and four weeks old,  
 23 meaning, too old to be reliable). The prison at Corcoran managed the outbreak pretty well, but San  
 24 Quentin did not, in part based on serious resource deficiencies in the physical plant, COVID-19

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 27 <sup>28</sup> *Id.* at 21–22 (¶ 52).

28 <sup>29</sup> *See, e.g., id.* at 3–7 (¶¶ 6–19).

<sup>30</sup> *Id.* at 10 (¶ 30).



1 support, and testing, which contributed to the rapid spread of the virus.<sup>31</sup> In a May 27, 2020, joint  
2 case-management statement submitted by the CDCR and the *Plata* plaintiffs, the CDCR said that  
3 “the Receiver, in conjunction with the Secretary [of the CDCR], has directed that high-risk inmates  
4 who test negative for COVID-19 be transferred to institutions that remain COVID-free.”<sup>32</sup>

### 6 **3. Mr. Hampton’s Death**

7 The CDCR refused to provide Mr. Hampton’s custody records, which have information about  
8 his COVID-19 infection and medical treatment, and thus some information in the complaint about  
9 his medical condition is based on knowledge and belief.<sup>33</sup> (At the hearing on its motion to dismiss,  
10 the CDCR agreed to provide the records.)

11 The defendants had to have known about Mr. Hampton’s high-risk factors for COVID-19  
12 including age (62), obesity, hypertension, hyperlipidemia, prediabetes, and sleep apnea.<sup>34</sup> By early  
13 June 2020, Mr. Hampton had symptoms consistent with COVID-19. On June 24, 2020, he  
14 submitted a Healthcare Services Request Form, writing, “I’ve had a constant cough for a couple of  
15 weeks now all night long — it doesn’t stop — could you give me something for this cough  
16 please.” By June 26, his symptoms had worsened, and he complained of a cough, a loss of his  
17 senses of taste and smell, a loss of appetite, and shortness of breath, and he told San Quentin  
18 medical staff that he had not eaten in three days due to vomiting. (He spoke on the phone with his  
19 wife (the plaintiff) around this time and was coughing badly.) Shortly after the call, the prison  
20 transferred him out of the Main Block housing unit and into the Badger unit, where San Quentin  
21 housed inmates with COVID-19 symptoms. Two days later, Mr. Hampton’s wife learned through

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24 <sup>31</sup> Kelso Test., Ex. E to Request for Judicial Notice – ECF No. 27-2 at 140–45 (pp. 58–63). The court  
25 judicially notices the testimony referenced in this order for completeness and under the incorporation-  
26 by-reference doctrine. *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

27 <sup>32</sup> J. Case-Management Statement, *Plata v. Newsom*, No. 01-cv-01351-JST (May 27, 2020), Ex. C to  
28 *id.* – ECF No. 27-2 at 54 (p. 14). The court judicially notices the public-record statement (but not  
disputed facts in it) and recounts the statement for the fact that it was said, not for the truth of disputed  
facts. *Lee v. Cnty. of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

<sup>33</sup> FAC – ECF No. 22 at 22 (¶¶ 53–54).

<sup>34</sup> *Id.* at 26 (¶ 63).

1 a phone call with another inmate that Mr. Hampton had been moved for treatment. She believes  
2 that he spent the two days without medical attention. She did not hear from anyone for about a  
3 week and a half, when she finally reached a liaison, who told her that Mr. Hampton had been  
4 transferred to a hospital but would not provide additional information.<sup>35</sup>

5 On June 27, 2020, prison staff moved Mr. Hampton to Seton Medical Center in Daly City. He  
6 arrived with COVID-19 and pneumonia, and he was in acute hypoxic respiratory distress. The  
7 defendants did not tell the plaintiff about his transfer until June 30. His health continued to  
8 deteriorate. Prison staff did not allow Mr. Hampton’s wife to communicate with him until his  
9 condition worsened several weeks later, and he was moved to the ICU. There, she had daily video  
10 calls with him, where he told her that his fever was so high at San Quentin that he had to lie on the  
11 floor to cool off. He was placed on a ventilator on August 6, 2020, and remained there for one  
12 month, requiring a tracheostomy and a change of medication before the hospital weaned him off the  
13 ventilator. By this time, he had significant scarring on his lungs and multiple pulmonary embolisms.  
14 On September 15, 2020, he transitioned to comfort care, and on September 22, 2020, he was  
15 transferred to Kentfield Hospital for ongoing comfort care. He died three days later.<sup>36</sup>

16 Mr. Hampton was a model inmate and was eligible for release under Proposition 57, “having  
17 served 22 years for burglary, a [non-violent] crime with a maximum sentence of 6 years.” His  
18 parole hearing was set in August 2020.<sup>37</sup>

#### 19 20 **4. Other Relevant Procedural History**

21 Mr. Hampton’s widow sued the State of California, the CDCR, San Quentin the prison, and ten  
22 officials for causing Mr. Hampton’s death.<sup>38</sup> The complaint has five claims:

23 **Claim One:** deliberate indifference in violation of the First, Eighth, and Fourteenth  
24 Amendments to the U.S. Constitution and 42 U.S.C. § 1983 based on (a) inhumane and unsafe

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26 <sup>35</sup> *Id.* at 22–23 (¶¶ 55–56).

27 <sup>36</sup> *Id.*

28 <sup>37</sup> *Id.* at 8 (¶ 26), 22 (¶ 56).

<sup>38</sup> *Id.* at 3–7 (¶¶ 6–19).

1 conditions of confinement that caused Mr. Hampton to contract COVID-19 (against the ten  
2 individual defendants) and (b) interference with the plaintiff's right to familial association when  
3 Mr. Hampton was hospitalized (against defendants Ralph Diaz, the estate of Dr. Tharratt, Wardens  
4 Davis and Broomfield, and medical officials Pachynski and Garrigan);

5 **Claim Two:** supervisory liability under § 1983 (against the ten individual defendants) for the  
6 alleged botched transfer and subsequent actions at San Quentin;

7 **Claim Three:** a violation of California's Bane Act, Cal. Gov't Code § 52.1(b) (against the ten  
8 individual defendants), for deprivation of U.S. Constitutional rights (based on the deliberate  
9 indifference and interference with familial relations), denial of timely medical information to the  
10 family in violation of Cal. Penal Code § 5022 and Cal. Prob. Code §§ 4701 and 4717, and a denial  
11 of rights secured by the California Constitution, Art. 1, § 1;

12 **Claim Four:** a violation of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §  
13 12132, and § 504 of the Rehabilitation Act of 1973, 28 U.S.C. § 794 (against the state of  
14 California, the CDCR, and San Quentin); and

15 **Claim Five:** negligence (against the ten individual defendants).<sup>39</sup>

16 The court held a hearing on the defendants' motion to dismiss on November 4, 2021. All  
17 parties consented to magistrate-judge jurisdiction under 28 U.S.C. § 636.<sup>40</sup>

## 18

## 19 **5. Other Cases**

20 There are other Northern District cases that the parties cited that involve San Quentin's handling  
21 of the pandemic: (1) *Plata*, No. 01-cv-01351-JST (see above); (2) *Ruiz v. California*, No. 21-cv-  
22 01832-JD (deceased inmate; represented by *Hampton* counsel; motion to dismiss pending); (3) *Legg*  
23 *v. CDCR*, No. 21-cv-01963-HSG (deceased inmate; represented by different counsel; partial motion  
24 to dismiss pending); (4) *Love v. California*, No. 21-cv-04095-JD (deceased inmate; represented by  
25 *Hampton* counsel; motion to dismiss filed); (5) *Polanco v. California*, No. 21-cv-06516-CRB

26  
27 <sup>39</sup> *Id.* at 25–37 (¶¶ 61–103).

28 <sup>40</sup> Consents – ECF Nos. 9, 25, 29, 30, 39.

1 (deceased correctional officer; represented by *Hampton* counsel; motion to dismiss filed; order  
2 issued); and (6) *Warner v. California*, No. 21-cv-08154-JD (deceased inmate; represented by  
3 *Hampton* counsel; motion to dismiss filed). At least twenty-six cases in the Northern District involve  
4 claims of exposure to COVID-19 related to the May 2020 transfer of inmates from CIM to San  
5 Quentin. The twenty-six cases (but not *Plata*, *Polanco*, or this case) have been reassigned for limited  
6 purposes to U.S. District Judge William H. Orrick to determine whether (1) Clark Kelso has quasi-  
7 judicial immunity or some other defense, (2) the defendants have immunity under the PREP Act, (3)  
8 the defendants have qualified immunity, and (4) the complaints filed by unrepresented plaintiffs state  
9 a claim. *E.g.*, *Ruiz*, No. 21-cv-01832-JD, Order – ECF No. 70.

#### 11 STANDARD OF REVIEW

12 A complaint must contain a “short and plain statement of the claim showing that the pleader is  
13 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds on  
14 which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A  
15 complaint does not need detailed factual allegations, but “a plaintiff’s obligation to provide the  
16 grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic  
17 recitation of the elements of a cause of action will not do. Factual allegations must be enough to  
18 raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (cleaned up).

19 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which  
20 when accepted as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556  
21 U.S. 662, 678 (2009); *NorthBay Healthcare Grp., Inc. v. Kaiser Found. Health Plan, Inc.*, 838 F.  
22 App’x 231, 234 (9th Cir. 2020). “[O]nly the *claim* needs to be plausible, and not the facts  
23 themselves.” *NorthBay*, 838 F. App’x at 234 (citing *Iqbal*, 556 U.S. at 696). “A claim has facial  
24 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
25 inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The  
26 plausibility standard is not akin to a probability requirement, but it asks for more than a sheer  
27 possibility that a defendant has acted unlawfully.” *Id.* (cleaned up). “Where a complaint pleads facts  
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1 that are merely consistent with a defendant’s liability, it stops short of the line between possibility  
2 and plausibility of entitlement to relief.” *Id.* (cleaned up).

3 If a court dismisses a complaint, it must give leave to amend unless “the pleading could not  
4 possibly be cured by the allegation of other facts.” *Cook, Perkiss & Liehe, Inc. v. N. Cal.*  
5 *Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990).

### 7 ANALYSIS

8 The plaintiffs alleged that the botched transfer caused Mr. Hampton’s death and claim  
9 violations of the U.S. Constitution, the ADA and Rehabilitation Act, California’s Bane Act, and  
10 common-law negligence. The defendants counter that (1) they are entitled to qualified or statutory  
11 immunity because at most they made difficult decisions about how to address the virus and (2)  
12 they are immune under the PREP Act for their administration of interventions designed to address  
13 the pandemic.<sup>41</sup>

14 Preliminarily, the plaintiffs’ argument — articulated at the hearing — is that the nature of the  
15 decisions involving the transfer meant that the defendants necessarily (given their jobs) had the  
16 requisite knowledge about the decisions. The allegations at the pleadings stage establish that point  
17 for the decisionmakers affiliated with the relevant institutions (San Quentin and CIM), including  
18 Secretary of the CDCR Ralph Diaz, who allegedly was personally involved in the transfer.  
19 *Polanco v. State of California*, No. 21-cv-06156-CRB, 2022 WL 625076, at \*9 (N.D. Cal. Mar. 3,  
20 2022) (reaching similar decision). The court dismisses the ADA/Rehabilitation Act claim without  
21 prejudice and otherwise denies the motion to dismiss.

#### 23 **1. Constitutional Claims: Deliberate Indifference and Supervisory Liability**

24 Deliberate indifference to a prisoner’s serious medical needs amounts to the cruel and unusual  
25 punishment prohibited by the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A  
26 prison official violates the Eighth Amendment when two requirements are met: (1) the deprivation  
27

28 <sup>41</sup> Reply – ECF No. 43 at 7 (summarizing issues).

1 alleged is, objectively, sufficiently serious, and (2) the official is, subjectively, deliberately  
2 indifferent to the inmate's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

3 For the objective prong of the deliberate-indifference test in a medical-care claim, the plaintiffs  
4 "must show a serious medical need by demonstrating that failure to treat a prisoner's condition  
5 could result in further significant injury or the unnecessary and wanton infliction of pain."  
6 *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (cleaned up). For the subjective, or  
7 "deliberate indifference" prong, the plaintiffs must show "(a) a purposeful act or failure to respond  
8 to a prisoner's pain or possible medical need and (b) harm caused by the indifference."  
9 *Id.* (cleaned up); *cf. Farmer*, 511 U.S. at 837 (deliberate-indifference prong requires that "the  
10 official must both be aware of facts from which the inference could be drawn that a substantial  
11 risk of serious harm exists, and he must also draw the inference").

12 "A defendant may be held liable as a supervisor under § 1983 if there exists either (1) [the  
13 supervisor's] personal involvement in the constitutional deprivation, or (2) a sufficient causal  
14 connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v.*  
15 *Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (cleaned up); *see Cunningham v. Gates*, 229 F.3d 1271,  
16 1292 (9th Cir. 2000) (supervisors can be liable for "1) their own culpable action or inaction in the  
17 training, supervision, or control of subordinates; 2) their acquiescence in the constitutional  
18 deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous  
19 indifference to the rights of others").

20 The plaintiffs plausibly allege that the defendants (affiliated with San Quentin or CIM) knew  
21 about the risks related to the transfer and ignored them when they authorized and executed the  
22 transfer in an obviously unsafe way. The defendants contest the facts, but that is an issue for  
23 summary judgment. Moreover, as the plaintiffs point out, there is an asymmetry of information:  
24 the defendants have the decedent's custody file and possess information about the transfer  
25 decisions. Rule 8(a) does not require more under circumstances like these. In sum, the plaintiffs  
26 plausibly plead that the defendants were personally involved, failed to act, and acquiesced in the  
27 constitutional deprivation.

1 As to the second theory of the deliberate-indifference claim (the alleged interference with the  
2 plaintiff's right to familial association when Mr. Hampton was hospitalized), the claim sufficiently  
3 alleges the loss of familial association based on Mr. Hampton's death and illness. To the extent the  
4 plaintiffs alleged a separate theory of liability for the time that she had no information about Mr.  
5 Hampton's medical condition, she cites no cases or facts that support that theory. (That context  
6 may be relevant to damages.)

7 The defendants also assert qualified immunity. Disputed facts preclude qualified immunity.

8 "[T]he doctrine of qualified immunity protects government officials from liability for civil  
9 damages insofar as their conduct does not violate clearly established statutory or constitutional  
10 rights of which a reasonable person would have known." *Mattos v. Agarano*, 661 F.3d 433, 440  
11 (9th Cir. 2011) (en banc) (cleaned up) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)).  
12 Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an  
13 absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mueller v.*  
14 *Auker*, 576 F.3d 979, 992 (9th Cir. 2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).  
15 "Under qualified immunity, an officer will be protected from suit when he or she 'makes a  
16 decision that, even if constitutionally deficient, reasonably misapprehends the law governing the  
17 circumstances.'" *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)).

18 "[Q]ualified immunity protects all but the plainly incompetent or those who knowingly violate  
19 the law." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). "The doctrine of qualified immunity  
20 gives officials breathing room to make reasonable but mistaken judgments about open legal  
21 questions." *Id.* at 1866 (cleaned up). "[I]f a reasonable officer might not have known for certain  
22 that the conduct was unlawful[,] then the officer is immune from liability." *Id.* at 1867.

23 In determining whether an officer is entitled to qualified immunity, courts consider (1) whether  
24 the officer violated a constitutional right of the plaintiff and (2) whether that constitutional right  
25 was "clearly established in light of the specific context of the case" at the time of the events in  
26 question. *Mattos*, 661 F.3d at 440. Courts may exercise their sound discretion in deciding which of  
27 these two prongs should be addressed first. *Id.* (citing *Pearson*, 555 U.S. at 235).

28

1       Regarding the second prong, “clearly established law should not be defined at a high level of  
2       generality,” but instead “must be particularized to the facts of the case.” *White v. Pauly*, 137 S. Ct.  
3       548, 552 (2017) (cleaned up). Although case law “does not require a case directly on point for a  
4       right to be clearly established, existing precedent must have placed the statutory or constitutional  
5       question beyond debate.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).

6       The defendants’ main argument is that the plaintiffs’ claim — the Eighth Amendment gives  
7       inmates protection from communicable diseases, including COVID-19 — is not sufficient to  
8       establish a clearly established constitutional right. Also, they contend that the federal receiver  
9       authorized the transfer.<sup>42</sup>

10       The facts surrounding the federal receiver’s involvement are disputed. At most, the record  
11       supports the conclusion that the federal receiver was involved in the decision to transfer and is  
12       silent on his involvement on the allegedly botched transfer. Thus, qualified immunity is not  
13       warranted on this ground (though the issue may be dispositive at summary judgment).

14       Given the court’s determination that the defendants violated the Eighth Amendment by not  
15       protecting Mr. Hampton from heightened exposure to a serious communicable disease, the next  
16       issue is whether the right was clearly established at the time of the events in the complaint. The  
17       court concludes that it was: the weight of authority establishes that the unlawfulness of the  
18       defendants’ conduct was beyond debate.

19       There are many cases that hold that an Eighth Amendment claim is established when prison  
20       officials are deliberately indifferent to exposing inmates to serious communicable diseases.  
21       *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (possible future effects of exposure to cigarette  
22       smoke); *Hutto v. Finney*, 437 U.S. 678, 682 (1978) (inmates in punitive isolation were crowded  
23       into cells with inmates with infectious diseases such as hepatitis and venereal disease); *Andrews v.*  
24       *Cervantes*, 493 F.3d 1047, 1050 (9th Cir. 2007) (recognizing a claim under the Eighth Amendment  
25       based on a prison’s lack of a policy to screen inmates for infectious diseases (HIV, Hepatitis C,

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28       <sup>42</sup> Reply – ECF No. 43 at 9–10 (citing the *Plata* case-management statement referenced above, which  
      references the decision generally but not the circumstances surrounding it).



1 and *Heliobacter pylori*) and for housing contagious and healthy inmates during an “epidemic of  
2 hepatitis C”); *Treviso v. Webster*, No. CV 17-5868-MWF (KS), 2018 WL 5917858, at \*4 (C.D. Cal.  
3 Sept. 6, 2018) (an inmate has an Eighth Amendment claim premised on the failure of correctional  
4 officers to remedy a condition of confinement that poses a substantial risk of harm to an inmate’s  
5 future health; “[i]t is well accepted that such ‘substantial risks of harm’ include ‘exposure of  
6 inmates to a serious, communicable disease’”) (quoting *Helling*, 509 U.S. at 33); *Loftin v.*  
7 *Dalessandri*, 3 F. App’x 658, 663 (10th Cir. 2001) (recognizing Eighth Amendment claim for  
8 housing inmate in cell with other inmates who tested positive for TB). Other courts have reached  
9 similar conclusions. *Maney v. Brown*, 516 F. Supp. 3d 1161, 1179–82 (D. Or. 2021) (denying  
10 qualified immunity to prison officials under the Eighth Amendment for exposing inmates to  
11 COVID-19 and collecting cases allowing Eighth Amendment claims for prison officials’ deliberate  
12 indifference to the risk of infecting inmates with contagious diseases); *Polanco*, 2022 WL 625076,  
13 at \*13 (denying qualified immunity to prison officials on a due-process claim for failure to protect  
14 a prison employee from COVID 19 and collecting cases that gave the CDCR/San Quentin  
15 defendants “fair warning” that it violates the Constitution to (1) engage in affirmative conduct that  
16 exposes an employee to foreseeable, actual, and particularized danger from disease while (2) being  
17 deliberately indifferent to that danger).<sup>43</sup>

18 The defendants nonetheless contend that the precedent is not “particularized to the facts of this  
19 case,” particularly with regard to their response to a rapidly evolving pathogen. They assert that  
20 “no persuasive authority would have put every reasonable official on notice, in May and June  
21 2020, that a particular COVID-19 response violated the Eighth Amendment.” To support that  
22 argument, they cite *Hines v. Yousef* as an “analogous” case.<sup>44</sup>

23 *Hines* is not analogous. It involved exposure to Valley Fever, a disease caused by inhaling  
24 fungal spores commonly found in the southwestern United States. 914 F.3d at 1224–26, 1229,  
25 1232. The court found qualified immunity because no evidence suggested that involuntary  
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27 <sup>43</sup> See also Opp’n – ECF No. 40 at 18 (collecting cases); Opp’n – ECF No. 68 at 5–7 (same).

28 <sup>44</sup> Mot. – ECF No. 27-1 at 16–17; Mot. – ECF No. 69 at 2.

1 exposure to the spores violated “current standards of decency” (which was relevant to the  
2 deliberate-indifference standard). *Id.* at 1231. The opinion turned in part on the accepted exposure  
3 to Valley Fever by the millions of people who live in the Central Valley, suggesting a tolerance to  
4 the risk that defeated the claim of a constitutionally impermissible risk. *Id.* at 1232. Also, Valley  
5 Fever was not communicable. *Id.* at 1224, 1229, 1232.

6 By contrast, the allegations here are about a deliberately indifferent response to a known risk  
7 of a communicable disease (not, as the defendants assert, the lack of a “particular COVID-19  
8 response in 2020”).<sup>45</sup> The defendants are of course correct: the pandemic was a novel situation.  
9 And it may be that later, the court will conclude that in light of undisputed facts, the defendants  
10 are entitled to qualified immunity because they made their decisions under other guidelines. Or it  
11 may be that the undisputed facts will show that they could not do more than they did. *Polanco*,  
12 2022 WL 625076, at \*14 (making similar points). But at the pleadings stage, the plaintiffs have  
13 pleaded violations of clearly established law in the form of the prison officials’ deliberate  
14 indifference to heightened exposure of inmates to a serious communicable disease.

## 15 16 **2. PREP Act Immunity**

17 The defendants contend that they are immune under the PREP Act for their administration of  
18 covered countermeasures to a health emergency (the COVID-19 pandemic).<sup>46</sup>

19 The PREP Act immunizes a “covered person” from “suit and liability” for claims for loss  
20 “caused by, arising out of, relating to, or resulting from the administration to or the use by an  
21 individual of a covered countermeasure” if the Secretary of the U.S. Department of Health and  
22 Human Services has made a determination that a public-health condition or threat is (or credibly  
23 risks) a public-health emergency. 42 U.S.C. § 247d-6d(a)(1) & (b).

24 The term “covered countermeasure” means (A) a qualified pandemic or epidemic product  
25 (defined elsewhere in the statute); (B) a security countermeasure (same); (C) drugs, biological  
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27 <sup>45</sup> Reply – ECF No. at 10.

28 <sup>46</sup> *Id.* at 10–12 (referencing earlier arguments in the underlying motion).

1 products, and devices (as the terms are defined in the Federal Food, Drug, and Cosmetic Act) that  
 2 are authorized for emergency use under that Act; or (D) “a respirator protective device that is  
 3 approved by the National Institute for Occupational Safety and Health under [the applicable] . . .  
 4 Code of Federal Regulations (or any successor regulations), and that the Secretary determines to  
 5 be a priority for use during a public health emergency declared under section 247d of this title.”  
 6 *Id.* § 247d-6d(i)(1). “The term ‘covered person’, when used with respect to the administration or  
 7 use of a covered countermeasure, means . . . a person or entity that is— (i) a manufacturer of such  
 8 countermeasure; (ii) a distributor of such countermeasure; (iii) a program planner of such  
 9 countermeasure; (iv) a qualified person who prescribed, administered, or dispensed such  
 10 countermeasure; or (v) an official, agent, or employee of a person or entity described in clause (i),  
 11 (ii), (iii), or (iv).” *Id.* § 247d-6d(i)(2) (formatting altered).

12 As the defendants acknowledge, no courts have applied the PREP Act to prisons.<sup>47</sup> In any  
 13 event, claims based on a failure to act, as opposed to purposefully allocating countermeasures, can  
 14 fall outside the PREP Act protections. *See, e.g., Estate of Heim v. 1495 Cameron Ave.*, No. 21-cv-  
 15 6221-PA (ADSx), 2021 WL 3630374, at \*1–4 (C.D. Cal. Aug. 17, 2021) (claims “based on  
 16 alleged inaction on the part of Defendants” were not necessarily barred by the PREP Act); *Stone v.*  
 17 *Long Beach Healthcare Ctr., LLC*, No. CV 21-326-JFW, 2021 WL 1163572, at \*4 (C.D. Cal.  
 18 March 26, 2021) (“There is only immunity for inaction claims when the failure to administer a  
 19 covered countermeasure to one individual has a close causal relationship to the administration of  
 20 that covered countermeasure to another individual.”) (cleaned up).<sup>48</sup>

21 At the pleadings stage, the plaintiffs plausibly plead that Mr. Hampton died because the  
 22 defendants botched his transfer and did not use basic safety measures (including many that are not  
 23 covered countermeasures) to reduce the risk of COVID-19.<sup>49</sup> Also, the plaintiffs’ allegations that  
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26 \_\_\_\_\_  
 27 <sup>47</sup> Mot. – ECF No. 27-1 at 18.

28 <sup>48</sup> *See also* Opp’n – ECF No. 40 at 24–25 (collecting and analyzing cases).

<sup>49</sup> *Id.* at 22 (citing the complaint’s listing of safety measures that are not covered countermeasures).

1 reference covered countermeasures generally are about a failure or refusal to use them.<sup>50</sup> Finally,  
 2 the facts are disputed about whether the defendants purposely allocated countermeasures or failed  
 3 to act. The court denies the motion to dismiss.

### 4 5 **3. ADA and Rehabilitation Act Claim**

6 Mr. Hampton suffered from sleep apnea, obesity, hypertension, hyperlipidemia, and prediabetes,  
 7 and he had medical issues (such as a constant cough) that — he contends — sleep apnea may have  
 8 exacerbated.<sup>51</sup> The defendants assert that the plaintiffs did not plead that Mr. Hampton’s sleep  
 9 apnea substantially limited major life functions or that he put the prison officials on notice of his  
 10 need for accommodation.<sup>52</sup> Given that the defendants did not produce Mr. Hampton’s custody file  
 11 (and the resulting asymmetry of information), the plaintiffs sufficiently pleaded his disability, and  
 12 the fact issues about whether it substantially limited a major life function are better resolved at  
 13 summary judgment. But the court dismisses the claim because the plaintiffs did not plausibly plead  
 14 that the defendants intentionally discriminated against Mr. Hampton.

15 Under Title II of the ADA, “[n]o qualified individual with a disability shall, by reason of such  
 16 disability, be excluded from participation in or be denied the benefits of the services, programs, or  
 17 activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132.  
 18 The ADA prohibits public entities from discriminating against the disabled and also prohibits public  
 19 entities from excluding the disabled from participating in or benefitting from a public program,  
 20 activity, or service “solely by reason of disability.” *Lee v. City of Los Angeles*, 250 F.3d 668, 690–  
 21 691 (9th Cir. 2001). “Discrimination includes a failure to reasonably accommodate a person’s  
 22 disability.” *Sheehan v. City & Cnty. of San Francisco*, 743 F.3d 1211, 1231 (9th Cir. 2014).

23 “To recover monetary damages under Title II of the ADA, a plaintiff must prove intentional  
 24 discrimination on the part of the defendant.” *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138 (9th  
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26 <sup>50</sup> *Id.* at 23 (citing the complaint’s listing of failures to use available, and sometimes free,  
 countermeasures).

27 <sup>51</sup> *Id.* at 26 (citing Compl. – ECF No. 22 at 22 (¶¶ 54–55)).

28 <sup>52</sup> Reply – ECF No. 43 at 12.

1 Cir. 2001). To prove intentional discrimination, the plaintiffs must show defendants acted with  
 2 “deliberate indifference,” which “requires both some form of notice . . . and the opportunity to  
 3 conform to [statutory] dictates.” *Id.* at 1139 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389  
 4 (1989) (O’Connor, J., concurring)). The plaintiffs must identify “specific reasonable” and  
 5 “necessary” accommodations that the defendant failed to provide. *Id.* “When the plaintiff has  
 6 alerted the public entity to his need for accommodation (or where the need for accommodation is  
 7 obvious, or required by statute or regulation), the public entity is on notice that an accommodation  
 8 is required, and the plaintiff has satisfied the first element of the deliberate indifference test.” *Id.*

9 “[D]eliberate indifference does not occur where a duty to act may simply have been  
 10 overlooked.” *Id.* “Rather, in order to meet the second element of the deliberate indifference test, a  
 11 failure to act must be a result of conduct that is more than negligent, and involves an element of  
 12 deliberateness.” *Id.*

13 The two issues are whether the plaintiffs plausibly pleaded Mr. Hampton’s disability and the  
 14 defendants’ intentional discrimination.

15 First, they plausibly pleaded his disability. An impairment (such as sleep apnea) that substantially  
 16 limits one or more major life activities (such as sleeping) can be a qualifying disability. 42 U.S.C. §  
 17 12102(1)(A) & (2)(A).<sup>53</sup> Relevant authority suggests that the issue in this case is better addressed at  
 18 summary judgment because the substantial limitation of a major life activity turns on facts. *Phillips v.*  
 19 *PacifiCorp*, 304 F. App’x 527, 529 (2008) (affirming summary judgment in a wrongful-termination  
 20 case in favor of the employer when the former employee’s diagnosed disabilities — sleep apnea and  
 21 chronic-obstructive pulmonary disease — were impairments that were mitigated by her later use of a  
 22 CPAP machine and oxygen; thus, during the relevant time period, she did not have an impairment  
 23 that substantially limited the major life activity of sleeping).

24 Second, the plaintiffs did not plausibly plead that the defendants intentionally discriminated  
 25 against Mr. Hampton. The complaint has no facts about notice to the defendants about the  
 26 disability and necessary accommodations. *Duvall*, 260 F.3d at 1138. The court dismisses the claim  
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28 <sup>53</sup> Opp’n – ECF No. 40 at 26 (collecting and analyzing authorities).

1 with leave to amend. The court does not set a deadline to amend because the forthcoming custody  
2 file and medical records likely are necessary to plead a claim plausibly.

#### 3 4 **4. State-Law Statutory Immunities**

5 The state claims are the Bane Act claim and common-law negligence. The defendants contend  
6 that they are immune from liability under five state statutes: (1) Cal. Gov't Code § 855.4 (for their  
7 decisions to prevent the spread of COVID-19); (2) Cal. Gov't Code § 845.2 (for the failure to  
8 provide sufficient equipment, personnel, or facilities); (3) Cal. Gov't Code § 8658 (for transferring  
9 the inmates from CIM to San Quentin); (4) Cal. Gov't Code § 820.2 (for their discretionary acts in  
10 weighing safety concerns and making decisions to ensure inmate safety); and (5) Cal. Gov't Code  
11 § 8659(a) (for providing medical services during an emergency).<sup>54</sup> The immunities do not bar the  
12 state claims, at least at the pleadings stage.

##### 13 **4.1 Cal Gov't Code § 855.4 — Decisions to Prevent Spread of COVID-19**

14 Under § 855.4(a), public entities and employees are immunized from liability “for an injury  
15 resulting from the decision to perform or not to perform any act to promote the public health of the  
16 community by preventing disease or controlling the communication of disease within the  
17 community if the decision whether the act was or was not to be performed was the result of the  
18 exercise of discretion vested in the public entity or the public employee, whether or not such  
19 discretion be abused.” Under § 855.4(b), public entities and employees are not “liable for an injury  
20 caused by an act or omission in carrying out with due care a decision described in subdivision (a).”

21 Here, even under a heightened pleading standard, the plaintiffs pleaded sufficient facts to  
22 overcome the statutory immunity at the pleadings stage. *Cf. Ayala v. City of S. San Francisco*, No.  
23 C 06-02061 WHA, 2006 WL 2482292, at \*4 (declining to apply a heightened pleading standard  
24 in federal court). The plaintiffs are not challenging the defendants’ decision to transfer and instead

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26 <sup>54</sup> Mot. – ECF No. 27-1 at 27-1 at 27-30 (also raising immunity under Cal. Gov't Code § 820.8  
27 (because the plaintiffs did not plead any facts connecting the defendants to Mr. Hampton’s contracting  
28 COVID-19); Reply – ECF No. 43 at 14–17 (omitting the § 820.8 argument). For the reasons that the  
plaintiffs plausibly pleaded the defendants’ personal participation in the conduct giving rise to the §  
1983 claim, the defendants’ § 820.8 argument fails.

1 challenge their acts surrounding the transfer as deliberately indifferent to the rights and safety of  
 2 inmates and staff. The defendants respond that the plaintiffs have not connected any acts or  
 3 omissions to particular defendants.<sup>55</sup> But as the court held above, at the pleadings stage, the  
 4 plaintiffs have alleged sufficiently the defendants' individual involvement in the challenged acts.

5 **4.2 Cal. Gov't Code § 845.2 — Failure to Provide Sufficient Personnel or Facilities**

6 Under § 845.2, public entities and employees are immunized from liability “for failure to  
 7 provide sufficient equipment, personnel, or facilities.” It ensures that “essentially budgetary  
 8 decisions . . . [are not] subject to judicial review in tort litigation.” *Zelig v. Cnty. of Los Angeles*,  
 9 27 Cal. 4th 1112, 1142 (2002). Here, the plaintiffs do not suggest that the decisions were caused  
 10 by budgetary issues. The immunity does not apply here.

11 **4.3 Cal. Gov't Code § 8658 — Transfer of Inmates**

12 Under § 8658, “the person in charge” of a prison can remove an inmate from an institution  
 13 “[i]n any case in which an emergency endangering the lives of inmates . . . has occurred or is  
 14 imminent. . . . Such person shall not be held liable, civilly or criminally, for acts performed  
 15 pursuant to this section.” The defendants contend only that CDCR Secretary Ralph Diaz is  
 16 immune.<sup>56</sup> If he is the decisionmaker, then that may be correct. But if someone else made the  
 17 decision, then he may not be immune (as the plaintiffs posit).<sup>57</sup> The plaintiffs pleaded plausibly  
 18 that each defendant knew about the risks of outbreak at San Quentin and, in the exercise of their  
 19 ministerial authority, were deliberately indifferent during the transfer and subsequent housing of  
 20 the inmates. The immunity does not apply at the pleadings stage.

21 **4.4 Cal. Gov't Code § 820.2 — Discretionary Decisions**

22 Under § 820.2, “a public employee is not liable for an injury resulting from his act or omission  
 23 where the act or omission was the result of the exercise of discretion vested in him, whether or not  
 24 such discretion was abused.” This immunity applies to decisions at the planning level, not the  
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26 \_\_\_\_\_  
 27 <sup>55</sup> Mot. – ECF No. 27-1 at 27.

28 <sup>56</sup> *Id.* at 26.

<sup>57</sup> Opp'n – ECF No. 40 at 31.

1 operational level. *Johnson v. State*, 69 Cal. 2d 782, 794 (1968); *Taylor v. Buff*, 172 Cal. App. 3d 384,  
2 387 (1984). A planning function involves a basic policy decision, not merely a ministerial decision to  
3 implement a policy that is already formulated. *Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995).

4 Here, as discussed in the Eighth Amendment analysis, the plaintiffs plausibly pleaded  
5 deliberately indifferent acts regarding the transfer of inmates and their subsequent housing at  
6 San Quentin, all involving the inmates' exposure to a serious communicable disease. The  
7 allegations plausibly establish that the state-law claims are not subject to § 820.2 immunity. It  
8 might be that as a matter of fact, some decisions — like the decision to transfer CIM inmates to  
9 San Quentin — were discretionary decisions that could trigger immunity under § 820.2. But other  
10 decisions — such as the transfer on overcrowded buses without appropriate testing and screening  
11 and subsequent housing decisions that did not involve quarantining — are ministerial decisions  
12 that are not immune. “It is these ministerial decisions, the deliberately indifferent manner in which  
13 the Defendants exposed Mr. Hampton to harm, that form the crux of Plaintiffs’ claims.”<sup>58</sup> The  
14 immunity does not bar the state claims at the pleadings stage.

15 **4.5 Cal. Gov’t Code § 8659(a) — Provision of Medical Services During an Emergency**

16 Under § 8659(a), medical professionals who “render services during . . . any state of  
17 emergency at the express or implied request of any responsible state . . . official or agency” are  
18 immune from liability for “any injury sustained by any persons by reason of [their] services,  
19 regardless of how or under what circumstances or by what cause those injuries are sustained.” The  
20 immunity does not “apply in the event of a willful act or omission.” The defendants contend only  
21 that the plaintiffs did not connect any act to any particular defendant.<sup>59</sup> Again, the court has held  
22 that the plaintiffs plausibly pleaded the individual defendants’ involvement.

23 \* \* \*

24 The immunity issues do not preclude the state claims at the pleadings stage.

27 <sup>58</sup> *Id.* at 29.

28 <sup>59</sup> Mot. – ECF No. 27-1 at 28.



**CONCLUSION**

The court dismisses the ADA/Rehabilitation claim against all defendants without prejudice. The court otherwise denies the motion to dismiss. Because Mr. Hampton’s custody file had not been produced, the court previously thought it best to defer the deadline to amend until after some discovery. But the parties’ case-management filings suggested that they might want to settle the pleadings. They must confer within one week and provide their joint view on their preferred process. Any new complaint must have as an attachment a blackline of the amended complaint against the current complaint.

**IT IS SO ORDERED.**

Dated: March 20, 2022



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LAUREL BEELER  
United States Magistrate Judge

United States District Court  
Northern District of California

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