IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEROME DUVALL, *et al.,*	*	
Plaintiffs,	*	
v.	*	Civil Action No. ELH-94-2541
LAWRENCE HOGAN, *et al.,*	*	
Defendants.	*	

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PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF EMERGENCY MOTION FOR RELIEF FROM RISK OF INJURY AND DEATH FROM COVID-19[1]

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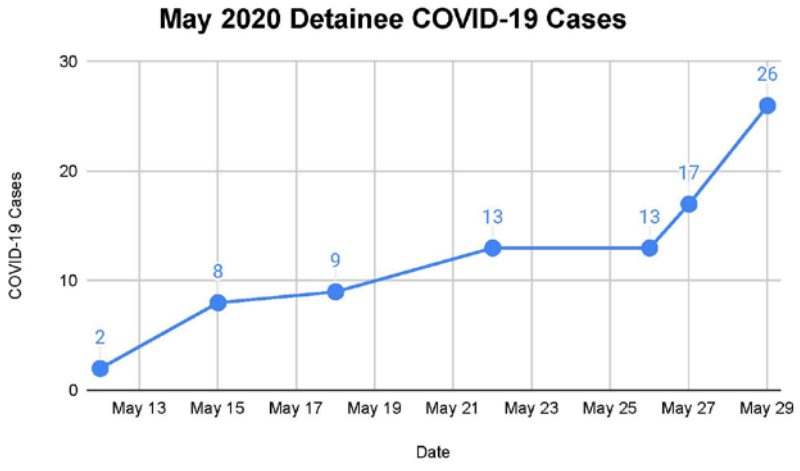
INTRODUCTION

"It is evident that COVID-19 is not contained at [BCDC] and is rapidly spreading." Reply Declaration of Chris Beyrer, M.D., M.P.H., ¶ 4. The following graph, compiled with information supplied by Defendants, shows the accelerating growth in COVID-19 cases among detainees at the Jail since this Motion was filed:



[1] Although the Court ordered Defendants to file their response by May 28, 2020 (Doc. 653), their response brief was filed on May 29 (Doc. 655), and their supporting documents on June 2 (Doc. 657-1 – 657-9).

Defendant Governor Hogan has acknowledged that "[i]n order to reduce the threat to health, welfare, and safety caused by rapid transmission of COVID-19 between residents and staff in congregative correctional custody, and enable social distancing and other mitigation efforts, certain inmates must be removed from these facilities." Order of the Governor of the State of Maryland, No. 20-04-18-01, Implementing Alternative Correctional Detention and Supervision, April 18, 2020 (hereinafter "Hogan Order") (Declaration of David C. Fathi ("Fathi Decl."), Exh. 1, at 1. He has further acknowledged that "[i]t is in the public interest to prevent inmates' exposure to the novel coronavirus by expeditiously moving them to alternative places of confinement, such as in supervised community placement or their homes." *Id.* at 2.[2] Attorney General Brian E. Frosh – whose signature appears on Defendants' brief – has similarly acknowledged that "to prevent a catastrophic outbreak of COVID-19 in our prisons and jails," "we need a broader and faster release of a larger swath of inmates. Such action is necessary to stave off a catastrophe that will not only result in avoidable illness and death in the prisons, but will also put our correctional officers, who already put their lives on the line, at much greater risk." Doc. 645-3 at 2 (April 3, 2020 letter from Attorney General Frosh to Governor Hogan).

There is thus no disagreement between the parties on the urgent need to release incarcerated people from the state's prisons and jails – including BCDC – to protect the health, safety, and lives of detainees, staff, and the community at large. For this reason, and the additional reasons set forth

[2] *See also id.* ("it is necessary that … the occupancy of prisons and other correctional facilities be controlled, and that part of their populations be evacuated"); *id.* ("To mitigate the effects of the spread of COVID-19 and protect the public health, welfare, and safety, especially of vulnerable workers or incarcerated persons at Maryland prisons, it is necessary and reasonable to implement protocols and procedures for transfer out of the State's correctional institutions").

herein and in Plaintiffs' previous filings, Plaintiffs' Emergency Motion for Relief From Risk of Injury and Death From COVID-19 should be granted in its entirety.[3]

ARGUMENT

I. Defendant Hogan has authority to order release of pretrial detainees from BCDC.

Defendants claim that Defendant Resnick has no authority to release a detainee from pretrial detention. Doc. 655 at 3, 4. Whether true or not, that is irrelevant, as Defendant Hogan has ample authority to do so. *See* Md. Code, Pub. Safety § 14-3A-03(d)(1) ("[t]he Governor may order the evacuation, closing, or decontamination of any facility"), Md. Code, Pub. Safety § 14-106(c)(1) ("the Governor shall consider, on a continuing basis, steps that could be taken to prevent or reduce the harmful consequences of potential emergencies"); Md. Code, Pub. Safety 14-107(d)(1) ("After declaring a state of emergency, the Governor, if the Governor finds it necessary in order to protect the public health, welfare, or safety, may: (i) suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision; (ii) direct and compel the evacuation of all or part of the population from a stricken or threatened area in the State; … [and] (vi) provide for temporary housing").

Governor Hogan has declared a state of emergency as a result of the COVID-19 pandemic, and, as Defendants acknowledge, has exercised his authority under Title 14 of the Public Safety Code to provide for the release of persons in the custody of the Division of Correction to mandatory supervision or home confinement. *See* Fathi Decl. Exh. 1 at 1, 2, 3; Doc. 655 at 4 ("Since March

[3] Defendants claim that Plaintiffs seek release "without regard to … threat to public safety." Doc. 655 at 1-2. This is false; the release order issued by this Court can and should take public safety into account. But "public safety" encompasses not just the hypothetical risk of flight or offense by released detainees; it also encompasses the risk posed by a deadly contagious disease that has killed over 100,000 people in this country in a matter of weeks. Governor Hogan has already taken the position that public safety *requires* the release of some prisoners. *See* Fathi Decl. Exh. 1. He is accordingly estopped from taking a contrary position in this litigation.

13, 2020, the Governor and the Secretary have released 117 prison inmates from the Division of Correction ("DOC") on early mandatory supervision, 144 on regular mandatory supervision, and approved the early parole of 48 inmates"). The Hogan Order provides for COVID-19 screening and self-quarantine for persons so released. Fathi Decl. Exh. 1 at 4.

Defendants entirely fail to explain why Governor Hogan cannot similarly exercise this authority to provide for the release of pretrial detainees. Defendants' statement that these persons have been committed to pretrial detention by state courts is true but irrelevant. Convicted persons have similarly been committed to the Division of Correction by state courts, but Governor Hogan has nevertheless provided for their release. Defendants' citation of various state statutes is similarly of little relevance; as set forth above, Governor Hogan has the authority to "suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision," and has done so to effectuate the release of convicted persons. *See* Fathi Decl. Exh. 1 at 5. It is more than a little anomalous that, having done so for convicted persons, he refuses to do so for pretrial detainees, who are of course presumed innocent and may not be punished. [4]

II. Defendants have failed to take reasonable steps to abate the risk of injury and death from COVID-19.

Defendants claim to have implemented the recommendations of Dr. Michael Puisis, the independent medical monitor in this case. Doc. 655 at 3. But in fact they have completely

[4] Defendants imply that large numbers of detainees have been released from BCDC by state courts, but that is not the case. Only 13 people have been released from BCDC on DPSCS's home detention program since March 13, 2020. The vast majority of the releases described by Defendants during the last several months were routine commissioner bail determinations, district court bail reviews, and circuit court bail redeterminations. Many involved sentenced prisoners with short-term sentences that would ordinarily have been served in the former BCDC and are now served elsewhere, primarily at the Jessup Correctional Institution. *See* Declaration of Debra Gardner. In other words, these releases were not part of any concerted effort to reduce the COVID risk at BCDC and, most importantly, they have not had that effect. *See* Beyrer reply decl. ¶¶ 12-13.

disregarded Dr. Puisis' most urgent recommendation: "I strongly recommend depopulation of the jail to the extent it is safe to release inmates. The jail can't be made safe with respect to current public health recommendations regarding social distancing and sanitation." Doc. 652-1 at 3. *See also id.* at 4 (Dr. Puisis urges that "[t]here are about 100 [medically vulnerable] people who should be targeted for release if possible").

Defendants similarly ignore the urging of Chris Beyrer, M.D., M.P.H., that "[i]t is ... an urgent priority in this time of public health emergency to reduce the number of persons in detention as quickly as possible." Doc. 652-2 at 13. Dr. Beyrer explains that "based upon our knowledge of the virus's propagation in prisons and jails, we can expect COVID-19 to spread rapidly among inmates and staff at BCDC, and from there into the community, unless immediate steps are taken to make social distancing possible." *Id.* at 10.[5]

Defendants have also disregarded the following recommendations by Dr. Puisis:

> I have recommended to [Jail Chief Physician] Dr. Tessema that incoming inmates be tested and consideration should be given to also testing mental health patients who lack executive function to describe symptoms. A low bar for symptoms should be used with respect to testing of any inmate. The same would hold for employees with the exception that they would see their private provider for testing.

Doc. 652-1 at 5.[6]

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[5] Dr. Beyrer is a professor of Epidemiology, International Health, and Medicine at the Johns Hopkins Bloomberg School of Public Health, and an expert on the epidemiology of infectious diseases. Doc. 652-2 at 1. Defendants completely ignore Dr. Beyrer's declaration, and have provided *no* evidence from a public health or epidemiology expert that their management of the escalating COVID-19 outbreak at BCDC is effective or even safe. *See Cameron v. Bouchard*, No. 20-10949, 2020 WL 2569868, at *22 (E.D. Mich. May 21, 2020) ("the Court[] finds it noteworthy that Defendants presented no expert testimony on the adequacy of their COVID-related policies or their implementation of those policies").

[6] Defendants simultaneously argue that "[n]either medical nor societal standards presently require universal testing for COVID-19" (Baucom declaration at 1), and assure the Court that they will conduct universal testing at BCDC at some undetermined time in the future (Resnick declaration at 4).

Defendants admit that BCDC detainees sleep in bunk beds that are 5'6" apart. Abello declaration, ¶ 5. Dr. Beyrer explains that "[t]his distance is insufficient for social distancing – a practice that is critical in preventing the spread of COVID-19." Beyrer reply decl., ¶ 8. Indeed, Defendants' brief contains only a single reference to social distancing – and it pertains to staff, not detainees. *See* Doc. 655 at 12.

Defendants have taken some steps in an effort to combat COVID-19, but as Dr. Beyrer explains, these steps are ineffective and in some cases counterproductive. Warden Abello states that employees will undergo symptom screening and temperature checks when they arrive at work. Abello declaration, ¶ 4.c. "However, the ability of COVID-19 to transmit while individuals are asymptomatic or pre-symptomatic will render this strategy largely ineffective at curbing infection spread." Beyrer reply decl., ¶ 6. Dr. Beyrer further explains that Defendants' quarantine procedures are "insufficient to prevent COVID-19 spread" and may in fact result in new infections. *Id.*, ¶ 7.

Warden Abello states that non-alcoholic hand sanitizer has been made available. Abello decl., ¶ 4.g. "However, non-alcoholic hand sanitizer has not been recommended by the CDC given previous research indicating these sanitizers are less effective or ineffective at killing microbes like COVID-19." Beyrer reply decl., ¶ 10 (footnote omitted).

Defendants state that they will establish a Health Monitoring Facility (HMF) for detainees who test positive for COVID-19. Resnick decl. at 2-3. But Dr. Beyrer explains that "there does not appear to be a clear plan for how BCBIC will house incarcerated people who test positive for COVID-19 if the capacity of HMF is exceeded, which it likely will be. If capacity is exceeded, it is not evident how BCBIC will house those with a COVID-19 infection in a manner that maintains safe distancing from the general incarcerated population." Beyrer reply decl., ¶ 11.

In sum, Dr. Beyrer concludes that "Despite some attempts to achieve social distancing, screening, medical isolation, enhanced hygienic practices and quarantine, BCBIC has not provided assurances that it has implemented or can implement key recommendations to prevent spread of COVID-19 in correctional facilities, or from correctional facilities to the community." Beyrer reply decl., ¶ 12. He further concludes that "It is therefore an urgent priority in this time of public health emergency to reduce the number of persons detained at BCBIC as quickly as possible." *Id.*, ¶ 13.[7]

III. Defendants' legal arguments are without merit.

A. Deliberate indifference.

Defendants argue that Plaintiffs' motion should be denied because they have failed to establish a constitutional violation. But Plaintiffs seek to enforce the existing Settlement Agreement governing health care and environmental health and safety at the Jail. Enforcement of an existing settlement agreement does not require Plaintiffs to establish a new violation of federal law. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 438-39 (2004); *see also Jones-El v. Berge*, 374 F.3d 541, 545 (7th Cir. 2004) ("So long as the underlying consent decree remains valid—and the defendants here have not (yet) made a … motion to terminate or modify the decree—the district court must be able to enforce it").

[7] Defendants' brief is replete with factual claims that are unsupported by declarations or any other evidence. *See*, *e.g.,* Doc. 655 at 2 (claim that "the Baltimore City District and Circuit Courts have considered over 500 requests for bail and other forms of release filed by criminal defendants since March 13, 2020"); *id.* at 8 (claim that "OPD has filed approximately 859 petitions for release in both District and Circuit Court"); *id.* at 11 (claims regarding personal protective equipment). Because "statements of counsel are not evidence," *United States v. Hammer*, 3 F.3d 266, 273 (8th Cir. 1993), such unsupported claims should be disregarded by the Court. *See also I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) ("Counsel's unsupported assertions in respondent's brief" do not establish grounds for relief).

This is particularly so in this case, in which Defendants stipulated, and the Court found, that the Settlement Agreement is "necessary to correct the violation of the federal right" of Plaintiffs. Doc. 577 at 1-2. Given Defendants' chronic noncompliance with the Settlement Agreement, it is clear that the constitutional violation conceded by Defendants and found by the Court in 2016 continues to this day. [8]

But even if Plaintiffs were required to show a new constitutional violation (and even if the pretrial detainee Plaintiffs here are held to the Eighth Amendment standard governing claims by convicted persons (*see* Doc. 645-1 at 12-13 & n. 11)), there are ample grounds for this Court to find such a violation.

In order to show that defendants violated the Eighth Amendment, a plaintiff must show that (1) the plaintiff was exposed to a substantial risk of serious harm, and (2) the defendants knew of and disregarded that substantial risk to the plaintiff's health or safety. *Farmer v. Brennan*, 511 U.S. 825, 834, 837–38 (1994); *Thompson v. Virginia*, 878 F.3d 89, 97-98 (4th Cir. 2017). Prison officials exhibit deliberate indifference if they "know[] that inmates face a substantial risk of serious harm and disregard[] that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847.

Defendants do not dispute that COVID-19 poses a substantial threat of serious harm to Plaintiffs; nor could they, as the disease has thus far killed more than 100,000 Americans, including

[8] It is telling just how little progress Defendants have made in nearly four years of the Settlement Agreement in satisfying its requirements. The Commissioner admits that Defendants have failed to achieve compliance with the significant majority of the requirements of the Settlement Agreement. *See* Fathi Decl., Exh. 3. By Plaintiffs' count, about 80 percent of the provisions of the Settlement Agreement remain in non-compliance. Thus, Defendants' lack of appropriate response to the COVID-19 contagion mirrors Defendants' general failures of performance of their duties under the Settlement Agreement.

at least seven Maryland prisoners.[9] Nor could Defendants claim that they lack knowledge of this risk; on April 18, Defendant Hogan proclaimed that "[b]ecause of inmates' close proximity to each other, employees, and contractors in correctional facilities, the spread of COVID-19 there poses a significant threat to their health, welfare, and safety." Fathi decl., Exh. 1 at 1.

Rather, Defendants argue that because they have taken some steps to address COVID-19, they have acted reasonably cannot be found deliberately indifferent (Doc. 655 at 19). But that is not the law; the mere fact that prison officials have taken *some* action does not foreclose a finding of deliberate indifference. *See De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) ("We do, of course, acknowledge that Appellees have provided De'lonta with some measure of treatment to alleviate her GID symptoms. But just because Appellees have provided De'lonta with *some* treatment consistent with the GID Standards of Care, it does not follow that they have necessarily provided her with *constitutionally adequate* treatment") (emphasis in original). Courts have routinely applied this principle in the context of COVID-19 outbreaks in prisons and jails. A judge of this Court recently found that Prince George's County Jail officials "at a minimum recklessly disregarded the health and safety of the detainees exposed to COVID-19, particularly those at high-risk of complications if infected," while acknowledging that "Defendant took important and proactive steps to control the spread of COVID-19." *Seth v. McDonough*, No. 8:20-CV-01028-PX, 2020 WL 2571168, at *3, 13 (D. Md. May 21, 2020). In *Cameron*, the court similarly found deliberate indifference, although jail officials had taken steps including testing, significant population reduction, and release of some medically vulnerable detainees; "the Court finds that home confinement or early release is the only reasonable response to this unprecedented

[9] https://news.maryland.gov/dpscs/covid-19/ (visited June 3, 2020).

and deadly pandemic." *Cameron*, 2020 WL 2569868, at *24, 25. *See also Wilson v. Williams*, No. 4:20-CV-00794, 2020 WL 1940882, at *1–3, *8 (N.D. Ohio Apr. 22, 2020) (finding deliberate indifference despite the fact that the prison had "implemented health screening measures" and "modified operations to somewhat reduce inmate contact with each other"). [10]

Defendants' continuing failure to take reasonable and effective action to address the lethal threat from COVID-19 – detailed in section II, *supra*, and in Plaintiffs' previous briefing – is ample evidence of deliberate indifference. Most egregious is Defendant Hogan's continuing refusal to use his authority to remove detainees from the Jail, despite his public acknowledgment that release is essential to protect their health and safety, as well as the health and safety of staff and the public at large. *See* Fathi Decl. Exh. 1; *Cameron*, 2020 WL 2569868 at *25 ("failure to make prompter, broader, and more meaningful use" of release authority constitutes deliberate indifference).[11]

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[10] The *Seth* court ordered extensive injunctive relief, requiring defendants to produce comprehensive written plans addressing identification, monitoring, treatment, and housing of medically vulnerable detainees (including single-celling); COVID-19 testing; social distancing and sanitation; and staff training. *See* Fathi Decl., Exh. 2. The Court should order similar relief here. But in this case the parties have already worked diligently to achieve some of this relief by agreement. The primary remaining issue for the Court to resolve is whether it is necessary, as Plaintiffs argue, to require the Defendants to reduce the population in the Jail in order to provide a constitutional level of safety. In *Seth*, the court has not as yet explicitly required such relief, but it remains to be seen whether the plans and protocols required by the court in that case will have to include such steps to satisfy constitutional standards. In the case before this Court, the evidence is now clear – given Defendant Hogan's statements regarding the need for population reduction; the steps Defendants have already taken, which though important are insufficient; the immutable limitations of the physical facility; and the experts' consensus -- that the Court must order Defendants to develop a plan for the release of detainees.

[11] Defendants cite *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993), for the proposition that a prisoner "must produce evidence of a serious or significant physical or emotional injury" to establish an Eighth Amendment violation. Doc. 655 at 19-20. But *Strickler* was a damages case. To the extent that it purports to impose a "serious or significant physical or emotional injury" requirement on cases, like this one, seeking only injunctive relief, it does not survive the Supreme Court's later decision in *Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms"). Finally, despite Defendants' jaw-dropping assertion that "there is no evidence to

B. The Prison Litigation Reform Act.

Defendants inexplicably claim that this entire case should be dismissed because Plaintiffs have not exhausted administrative remedies pursuant to the Prison Litigation Reform Act (PLRA). Doc. 655 at 16. The PLRA's exhaustion requirement provides as follows:

> No action shall be *brought* with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (emphasis added). By its plain language, this requirement applies when an action is *brought*. But the present action was brought decades ago – indeed, well before the PLRA's enactment in 1996. The exhaustion requirement does not apply to a request for further relief in an existing lawsuit that was filed before enactment of the PLRA. *See Clark v. California*, 739 F. Supp. 2d 1168, 1232 (N.D. Cal. 2010) ("The PLRA only requires exhaustion when a new 'action' is brought and a post-PLRA motion in a case filed before the PLRA went into effect is not subject to the 1997a(a) [sic] requirement").[12]

Even if the exhaustion requirement presumptively applied here – and it does not – exhaustion is not required when administrative remedies are unavailable. *Ross v. Blake*, 136 S.Ct. 1850, 1855 (2016). Administrative remedies are unavailable here for two independent reasons. First, Defendants have failed to show that their administrative remedy scheme addresses detainee requests for release.[13] *See Cameron*, 2020 WL 2569868 at *16 (remedies unavailable where "the

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support that any member of the plaintiff class suffered injury" (Doc. 655 at 20), the 26 class members who have thus far tested positive for an incurable and deadly disease have certainly suffered a significant injury.

[12] Defendants state that *Seth* "acknowledged that exhaustion applies to cases in which plaintiffs seek relief under § 1983." Doc. 655 at 16. This is false; the *Seth* opinion does not mention the PLRA's exhaustion requirement at all. *See* 2020 WL 2571168.

[13] Failure to exhaust is an affirmative defense, which defendants have the burden of pleading and proving. *Jones v. Bock*, 549 U.S. 199, 216 (2007).

Jail's grievance procedures do not appear to provide an avenue for medically-vulnerable inmates to seek release on the basis of the serious and deadly risk COVID-19 poses"). Second, Defendants' four-step grievance procedure – which, for example, sets no deadline for officials to respond to a first-level appeal – cannot provide timely relief for a disease which can cause serious illness or death in a matter of days. *See McPherson v. Lamont*, No. 3:20CV534 (JBA), 2020 WL 2198279, at *10 (D. Conn. May 6, 2020) (finding remedies unavailable where exhaustion could take up to 105 business days; "[b]ecause COVID-19 spreads 'easily and sustainably', Plaintiffs risk contracting the disease while … attempting to exhaust the DOC's administrative grievance procedure, which occurs in four stages and involves an informal resolution process, the filing of an initial formal complaint, and two rounds of appeals").

In a single sentence, Defendants assert that an order directing release or transfer of medically vulnerable detainees would be subject to the PLRA's provisions governing "prisoner release orders." Doc. 655 at 16. This unsupported claim is meritless. As Plaintiffs have explained, those statutory provisions are explicitly limited to situations in which "crowding is the primary cause" of the constitutional violation to be remedied. 18 U.S.C. § 3626(a)(3)(E)(i). They do not apply where, as here, release or transfer is sought to protect detained persons from COVID-19 or other disease. *See Cameron*, 2020 WL 2569868 at *27-28, and cases cited therein. Plaintiffs have cited multiple cases to this effect (Doc. 652-1 at 8 n. 4); Defendants fail to address or even acknowledge that authority.[14]

[14] Defendants claim that "[t]he Supreme Court has not yet determined that a release of pretrial detainees is a remedy for a violation of rights under § 1983." Doc. 655 at 2. In *Brown v. Plata*, 563 U.S. 493, 502 (2011), the Supreme Court affirmed a prisoner release order in a § 1983 case brought by convicted state prisoners after finding that release was necessary to abate an ongoing violation of the Eighth Amendment. Defendants do not explain why federal courts have power to release sentenced prisoners but not pretrial detainees.

CONCLUSION

Plaintiffs' Motion should be granted in its entirety.

Respectfully submitted this 3rd day of June 2020.

/s/David C. Fathi
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REPLY DECLARATION OF CHRIS BEYRER, M.D., M.P.H.

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I, Chris Beyrer, M.D., M.P.H., declare as follows:

1. I am over the age of 18, have personal knowledge of the facts set forth herein, and, if called as a witness, I could and would testify competently as set forth below.

2. I am a professor of Epidemiology, International Health, and Medicine at the Johns Hopkins Bloomberg School of Public Health, where I regularly teach courses in the epidemiology of infectious diseases. This current semester, I am teaching the epidemiology course on emerging infections at Hopkins. I am a member of the National Academy of Medicine, a former President of the International AIDS Society, and a past winner of the Lowell E. Bellin Award for Excellence in Preventive Medicine and Community Health. I have been active in infectious diseases Epidemiology since completing my training in Preventive Medicine and Public Health at Johns Hopkins in 1992. Over the course of my career, I have at various times studied and published on the spread of infectious diseases within prisons. A copy of my curriculum vitae has previously been provided to the Court. Doc. 645-8.

3. I am currently actively at work on the COVID-19 pandemic in the United States. Among other activities I am the Director of the Center for Public Health and Human Rights at Johns Hopkins, which is active in disease prevention and health promotion among vulnerable populations, including prisoners and detainees, in the US, Africa, Asia, and Latin America.
4. On May 18, 2020, there were 23 inmates, officers, and vendor employees who had tested positive for COVID-19 at the Baltimore City Central Booking & Intake Center (BCBIC).[1] As of June 1, 2020 this number has risen to 52 cases (26 among inmates and 15 among officers).[1] This means that the number of cases at this facility more than doubled in two weeks. It is evident that COVID-19 is not contained at BCBIC and is rapidly spreading.
5. Individuals can have COVID-19 without experiencing symptoms of the disease, or before they eventually develop symptoms. Studies estimate that 35-81% of individuals with COVID-19 are asymptomatic.[2] The CDC also estimates that 40% of COVID-19 transmission occurs before symptom onset.[3]
6. Written testimony from Frederick Abello, Warden at BCBIC, indicates that employees will undergo symptom screening and temperature checks when they arrive at work. However, the ability of COVID-19 to transmit while individuals are asymptomatic or pre-symptomatic will render this strategy largely ineffective at curbing infection spread.
7. Upon intake, BCBIC is isolating individuals in a 14-day quarantine area. However, some of these new detainees are housed in double-celled areas. This means that new detainees

[1] https://news.maryland.gov/dpscs/covid-19/
[2]Ing AJ, Cocks C, Green JP. COVID-19: in the footsteps of Ernest Shackleton *Thorax* Published Online First: 27 May 2020. doi: 10.1136/thoraxjnl-2020-215091
Yang R, Gui X, Xiong Y. Comparison of Clinical Characteristics of Patients with Asymptomatic vs Symptomatic Coronavirus Disease 2019 in Wuhan, China. *JAMA Netw Open.* 2020;3(5):e2010182. doi:10.1001/jamanetworkopen.2020.10182
[3] https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html

may be exposed to COVID-19 from close proximity to their cellmate. This practice is insufficient to prevent COVID-19 spread. There are also no indications that new detainees are tested for COVID-19 upon entry into BCBIC, although individuals with symptoms are quarantined in a separate area. Again, due to asymptomatic spread, infected individuals may still transmit the infection to their cellmate despite these precautions.

8. I understand that detainees sleep in bunk beds that are 5'6" apart at BCBIC. This distance is insufficient for social distancing—a practice that is critical in preventing the spread of COVID-19.

9. Furthermore, research suggests that speech droplets which carry the virus that causes COVID-19 can linger in the air in closed environments for 8 to 14 minutes.[4] This means that the built environment in which incarcerated persons live at BCBIC would make them susceptible to infection, especially while housed in a room that does not allow for them to remain at minimum six feet apart. A study currently under review found that among 1,245 cases during the COVID-19 outbreak in China, there was only one case of COVID-19 transmission that was in an outdoor environment, highlighting the overwhelming predominance of COVID-19 transmission in indoor environments like BCBIC.[5]

10. The CDC recommends hand washing with hand sanitizer that contains at least 60% alcohol.[6] Mr. Abello's declaration specifies that non-alcoholic hand sanitizer has been placed in every housing unit and every floor. However, non-alcoholic hand sanitizer has

[4] Valentyn Stadnytskyi, Christina E. Bax, Adriaan Bax, Philip Anfinrud. The airborne lifetime of small speech droplets and their potential importance in SARS-CoV-2 transmission. *PNAS.* May 2020, 202006874; DOI: 10.1073/pnas.2006874117

[5] https://www.medrxiv.org/content/10.1101/2020.04.04.20053058v1

[6] https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fprepare%2Fprevention.html

not been recommended by the CDC given previous research indicating these sanitizers are less effective or ineffective at killing microbes like COVID-19.[7]

11. BCBIC does not have sufficient plans for housing and isolating incarcerated individuals who have been infected with COVID-19. The Health Monitoring Facility (HMF) has the capacity to hold 30 detainee patients who have tested positive for COVID-19. However, given that there are already 26 detainees who have tested positive for COVID-19 as of June 1, 2020, I estimate that this facility will be filled to capacity in coming weeks. Mr. Gary McLhinney stated in his written declaration: "There are no empty buildings within the Department that meet correctional standards for housing any inmates or detainees." Mr. Michael Resnick testified that if there is an overflow of incarcerated people with COVID-19 infection in the Baltimore region, they may be transferred to other institutions, however "these contingencies are fluid in nature, because inmates from other regions may be moved there as well." In sum, there does not appear to be a clear plan for how BCBIC will house incarcerated people who test positive for COVID-19 if the capacity of HMF is exceeded, which it likely will be. If capacity is exceeded, it is not evident how BCBIC will house those with a COVID-19 infection in a manner that maintains safe distancing from the general incarcerated population.

12. Despite some attempts to achieve social distancing, screening, medical isolation, enhanced hygienic practices and quarantine, BCBIC has not provided assurances that it has implemented or can implement key recommendations to prevent spread of COVID-19 in correctional facilities, or from correctional facilities to the community.

[7] https://www.cdc.gov/handwashing/show-me-the-science-hand-sanitizer.html#sixteen

13. While every effort should be made to reduce exposure in detention facilities, this will likely be extremely difficult to achieve and sustain. It is therefore an urgent priority in this time of public health emergency to reduce the number of persons detained at BCBIC as quickly as possible.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of June, 2020.

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CHRIS BEYRER, M.D., M.P.H.