UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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HASSAN CHUNN; NEHEMIAH McBRIDE; AYMAN RABADI by his Next Friend Migdaliz Quinones; and JUSTIN RODRIGUEZ by his Next Friend Jacklyn Romanoff; ELODIA LOPEZ; and JAMES HAIR, individually and on behalf of all others similarly situated,

Petitioners,

-against-

WARDEN DEREK EDGE,

Respondent.

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Civil Action No.
20-CV-1590
(Kovner, J.)
(Mann, M.J.)

RESPONDENT'S POST-HEARING PROPOSED FINDINGS OF FACT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

PRELIMINARY STATEMENT 1

PROPOSED FINDINGS OF FACT 5

I. Petitioners' Allegations 5

II. Pertinent Procedural History 5

III. National Steps Taken by BOP to Address COVID-19 6

A. Action Plan for COVID-19-Phase One 7

B. Action Plan for COVID-19-Phase Two 8

C. Action Plan for COVID-19-Phase Three 9

D. Action Plan for COVID-19-Phase Four 10

E. Inmates considered for home confinement based on March 26, 2020 guidance from the Attorney General 11

F. Action Plan for COVID-19-Phase Five 11

G. The Attorney General's April 3, 2020 Memorandum to BOP 13

H. BOP issues Operations Memorandum dated April 3, 2020 regarding home confinement under the First Step Act 14

I. Action Plan for COVID-19-Phase Six 14

IV. The MDC 14

V. Ongoing Efforts To Address Issues Posed By COVID-19 at the MDC 15

A. Screening of current inmate population 16

1. BOP medical staff members are performing twice-daily medical rounds in all housing units 16

2. BOP medical staff members are performing twice-daily medical rounds in the quarantine and isolation units where they also conduct temperature and wellness check 17

B. The MDC has a robust sick call system 17

1. Inmates have ready access to the sick call system and BOP staff are timely responding to those request 17

2. There is no evidence that allegedly missing sick call requests relate to the named Petitioners 19

C. BOP staff members screen inmates coming into the MDC 21

D. BOP staff members and visitors are screened at the front door 24

E. Placement of inmates on quarantine status or in the isolation unit curb the spread of COVID-19 26

1. Placement of inmates on quarantine status 26

2. Inmates placed in isolation based on "clinical decisions" by medical providers 27

F. BOP staff properly monitor high risk inmates at the MDC 30

G. COVID-19 Testing at the MDC 31

1. Given the limited availability of tests since the onset of the pandemic, the BOP does not have the capacity to test all inmates at the MDC 31

2. BOP staff at the MDC are not tested by the BOP 34

3. BOP announces expansion of testing 34

H. BOP medical staff send inmates with acute conditions to local hospitals for treatment, if necessary 34

I. Inmate and Staff Education relating to COVID-19 35

1. Inmate bulletins and town halls 35

2. BOP informs staff members about personal hygiene best practices 36

J. Cleaning and sanitation 37

1. All inmates receive soap and have access to personal hygiene materials through commissary 37

2. Enhanced sanitation procedures 38

3. Phones and computers are routinely cleaned 40

4. MDC was "deep-cleaned" after inmate tested positive 40

K. All inmates and staff provided with PPE 40

1. Masks have been provided to all inmates and staff 40

2. Staff provided with additional PPE for quarantine, isolation, and screening areas 41

L. Efforts to promote social distancing and reduced group meetings have been successful 42

VI. The BOP has implemented infection control procedures recommended by the CDC 43

VII. Hearing Testimony 46

A. Dr. Homer Venters acknowledges significant steps taken by MDC to control the spread of COVID-19 46

B. Venters's methodology of relying reflexively on inmate allegations is flawed 51

C. Assistant Director Nicole English credibly testified that the allegations in Venters's report were "not accurate" 51

1. Entry point screening -- Ex. 000 at MDC 3. 54

2. Inmate screening tools -- Ex. 000 at MDC 4. 55

3. Sick call procedures -- Ex. 000 at MDC 4. 56

4. Quarantine and isolation units and procedures -- Ex. 000 at MDC 5. 58

5. Infection control practices -- Ex. 000 at MDC 6. 59

6. Staff use of personal protection equipment (PPE) -- Ex. 000 at MDC 6. 59

7. Inmate use of personal protection equipment -- Ex. 000 at MDC 7. 60

8. Sanitation supplies and access -- Ex. 000 at MDC 7. 61

9. Temperature control in the units, cells and common areas -- Ex. 000 at MDC 9. 61

10. Food services procedures -- Ex. 000 at MDC 9. 61

11. Emergency response and preparedness -- Ex. 000 at MDC 9. 62

12. Legal visiting -- Ex. 000 at MDC 9. 62

13. Communications to inmates of CDC guidance through Warden and Town Hall -- Ex. 000 at MDC 10. 63

14. Signage and instructions for procedures and CDC guidance -- Ex. 000 at MDC 11. 64

15. Communication to staff regarding CDC guidance and testing -- Ex. 000 at MDC 12. 64

16. English's Recommendations were implemented "on the spot" by the Warden -- Ex. 000 at MDC 12-13. 65

D. The Court should credit the testimony of Epidemiologist Asma Tekbali that COVID-19 at the MDC is under control. 67

1. Tekbali's current and real experience addressing COVID-19 67

2. Objective data relating to the low number of hospitalizations and deaths reflect that the BOP has successfully controlled the spread of COVID-19 at the MDC and that there is no outbreak at the facility 68

3. Tekbali credibly impeaches Venter's other opinions lacking basis in CDC guidance or the standard of care 69

(i) CDC does not recommend cohorting high risk inmates 70

(ii) Most patients develop only mild symptoms with fever being the most prevalent symptom. 70

(iii) Testing has been limited nationally. 71

(iv) Laundry does not pose any undue risk. 72

(v) BOP's use of PPE is consistent with CDC guidance 72

(vi) Isolation procedures at the MDC comport with CDC guidance 73

(vii) Rodriguez successfully recovered from COVID-19. 73

(viii) COVID-19 is different from influenza. 73

E. The Court should credit the testimony of Prison Management Expert Dr. Jeffrey Beard that the MDC is effectively implementing policies protecting staff and inmates from COVID-19. 74

1. Beard's experience in prison management 74

2. Beard's inspection of the MDC 75

(i) Beard observed medical exam rooms in or near each housing unit he and Venters visited 76

(ii) Beard observed staff and inmates at the MDC wearing masks and other PPE. 76

(iii) Beard observed adequate cleaning supplies for inmate and staff use. 77

3. Beard concludes that the MDC is a well-run detention center 78

4. Beard's conclusions regarding the MDC are more credible than Venters's self-serving observations 79

VIII. The Remaining Petitioners Should Not Be Released from MDC 80

A. Elodia Lopez's claims do not amount to Eighth Amendment violation 80

1. Lopez's Criminal History 80

2. Lopez's pending compassionate release application 81

3. Lopez receives consistent and adequate medical care at the MDC.....81

B. James Hair's claims do not amount to an Eighth Amendment violation 84

1. Hair's Criminal History 84

2. Hair receives consistent and adequate medical care at MDC 85

C. Ayman Rabadi's claims do not amount to an Eighth Amendment violation 89

1. Rabadi's criminal history.....89

2. The Court denies Rabadi's request for compassionate release.....89

3. Rabadi receives consistent and adequate medical care at the MDC 91

D. Justin Rodriguez's claims do not amount to an Eighth Amendment violation and are moot 93

E. The named Petitioners lack commonality and typically with other putative class members 96

IX. The Statements of Non-Party Declarants Do Not Support the Need for a Preliminary Injunction 97

A. The non-party inmate declarations are insufficient to show an Eighth Amendment violation.....97

B. Anthony Sanon's declaration should be afforded no weight 101

CONCLUSION.....106

TABLE OF AUTHORITIES

Federal Cases

Connick v. Thompson, 563 U.S. 51 (2011) 2

Farmer v. Brennan, 511 U.S. 825 (1994) 1, 2

Helling v. McKinney, 509 U.S. 25 (1993) 1

Marlowe v. LeBlanc, No. 20-30276, 2020 WL 2043425 (5th Cir. Apr. 27, 2020) 3, 4

O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) 3

Pesci v. Budz, 935 F.3d 1159 (11th Cir. 2019) 3

Prison Legal News v. Sec'y, Fla. Dep't of Corr., 890 F.3d 954 (11th Cir. 2018) 3

Roman v. Wolf, No. 20-55436, 2020 WL 2188048 (9th Cir. May 5, 2020) 3

Swain v. Junior, No. 20-11622, 2020 WL 2161317 (11th Cir. May 5, 2020) ..... *passim*

Turner v. Safley, 482 U.S. 78 (1987) 2, 3

United States v. Derrilyn Needham, -- F. Supp. 3d. --,
2020 WL 2512105 (S.D.N.Y. May 15, 2020) 103, 104

United States v. Hair, 780 F. App'x 86 (4th Cir. 2019) 86, 87

United States v. Rabadi, No. 13 Cr. 353,
2020 WL 1862640 (S.D.N.Y. Apr. 14, 2020) 92, 95, 97, 98

Valentine v. Collier, 956 F.3d 797 (5th Cir. 2020) 2, 3, 4

Valentine v. Collier, No. 19A1034, 2020 WL 2497541 (U.S. May 14, 2020) 4, 5, 11, 12

Whitley v. Albers, 475 U.S. 312 (1986) 1

Wilson v. Seiter, 501 U.S. 294 (1991) 1, 2

Federal Statutes

18 U.S.C. § 3582 97

18 U.S.C. § 3582(c)(1)(A) 92

18 U.S.C. § 3582(c)(i) 83

18 U.S.C. § 3624 97

18 U.S.C. §§ 1343 91

21 U.S.C. § 841(b)(1)(C) 96

21 U.S.C. §§ 846 82

U.S.C. § 2241 103

U.S.C. § 2255 87

U.S.C. § 3624(c) 98

Federal Regulations

29 C.F.R. § 1910.134 107

PRELIMINARY STATEMENT[1]

In order for the Court to issue the extreme and extraordinary remedy of a preliminary injunction, Petitioners have the heightened burden of showing a substantial likelihood of success on the merits of their Eighth Amendment claim; the likelihood that they will suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in their favor, and that an injunction is in the public interest. Petitioners failed on all accounts.

Rather than proving that Respondent Warden Edge is engaged in or has somehow suborned the "unnecessary and wanton infliction of pain," *Whitley v. Albers*, 475 U.S. 312, 319 (1986), "necessary to establish a violation of their Eighth Amendment rights, Petitioners have shown only that the Federal Bureau of Prisons ("BOP") has taken sufficient steps to effectively control the spread of the coronavirus at the Metropolitan Detention Center in Brooklyn ("MDC").

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments" on those serving criminal sentences. U.S. Const. Amend. VIII. The Supreme Court has determined that "the conditions under which [a prisoner] is confined are subject to scrutiny under the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Helling v. McKinney*, 509 U.S. 25, 31 (1993)); *Wilson v. Seiter*, 501 U.S. 294, 296 (1991) ("lack of due care" or other "error in good faith" is insufficient to constitute cruel and unusual punishment) (citations omitted). But, "a prison official violates the Eighth Amendment only when two requirements"—one objective, the other subjective—"are met." *Farmer*, 511 U.S. at 834, 846. Petitioners have not shown a likelihood of success in establishing either.

The Supreme Court has made clear that the Eighth Amendment must take account of "the

[1] References to exhibits from the preliminary injunction hearing appear as "Ex. __." References to the transcript from the preliminary injunction hearing appear as "Tr. __."

realities of prison administration," *Helling*, 509 U.S. at 37, and the Centers for Disease Control and Prevention ("CDC") has likewise recognized that the COVID-19 response must adapt to reflect those realities. Ex. G (CDC Guidance on Management of COVID-19 in Correctional and Detention Facilities). But the fact that BOP has not taken the precise measures that Petitioners deemed most appropriate does not demonstrate a constitutional violation under the "stringent standard of fault" applicable to Eighth Amendment claims. *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Inmates claiming that the conditions of their confinement violate the Eighth Amendment must show that the prison officials acted with a sufficiently culpable state of mind, which is demonstrated only by the "unnecessary and wanton infliction of pain." *Wilson*, 501 U.S. at 297 (citation omitted). Though it cannot be denied that, "[a]s with every other part of the country, our Nation's correctional facilities have not escaped the reach of COVID- 19," *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020) (*per curiam*), that does not demonstrate deliberate indifference on the part of BOP officials. *Farmer*, 511 U.S. at 844 ("[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted.").

Prison officials' "unenviable task of keeping dangerous men in safe custody under humane conditions," *Farmer*, 511 U.S. at 837, 845 (quotation marks omitted), becomes dramatically more difficult during a pandemic; and BOP officials must balance their efforts to mitigate the virus against innumerable other considerations, including risks to inmate health, public health and public safety from transferring or releasing inmates *en masse*. As the Supreme Court has acknowledged, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 85 (1987). The "formidable

task of running a prison" falls to those other two branches, and "separation of powers concerns counsel a policy of judicial restraint" and "deference to the appropriate prison authorities." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987). Prison officials, not special masters or mediators, are the ones who "make the difficult judgments concerning institutional operations." *Pesci v. Budz*, 935 F.3d 1159, 1166 (11th Cir. 2019) (citing *Turner*, 482 U.S. at 89); *see also Swain v. Junior*, No. 20-11622, 2020 WL 2161317, at *4 (11th Cir. May 5, 2020) ("The injunction hamstrings [jail] officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic."); *Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 965 (11th Cir. 2018) (explaining the "substantial deference to the decisions of prison administrators because of the complexity of prison management, the fact that responsibility therefor is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems.").[2]

Additionally, as the Court noted during the PI hearing (Tr. 551), several Circuit Courts of Appeals have stayed preliminary injunctions requiring officials at prisons or detention centers to take specified actions in response to COVID-19. The Eleventh Circuit, for instance, made clear that the Eighth Amendment leaves room for prison officials to make policy judgments about how to "allocate scarce resources among different … operations necessary to fight the pandemic." *Swain*, 2020 WL 2161317, at *5; *see also Valentine*, 956 F.3d at 802; *Marlowe v. LeBlanc*, No. 20-30276, 2020 WL 2043425, at *2-*3 (5th Cir. Apr. 27, 2020); *Roman v. Wolf*, No. 20-55436, 2020 WL 2188048 (9th Cir. May 5, 2020).

[2] In *Collier v. Sozio*, No. 20-CV-2183 (E.D.N.Y.) (Cogan, J.), wherein petitioner-inmates seek the appointment of a Special Master in connection with a purported COVID-19 outbreak at the Queens Detention Facility, the court denied petitioner-inmates motion for a Temporary Restraining Order on May 18, 2020, and noted that the court is "certainly not inclined to, at this point, appoint a special master to run the prison, nor am I inclined to run the prison myself" as "[t]hat is a very radical test that would require a very strong showing of an Eighth Amendment violation." *Collier*, Dkt. Entry dated May 18, 2020 (referencing transcript).

Like in the Fifth Circuit's decision in *Valentine*, Petitioners here "cited no evidence that [BOP] subjectively believe[s] the measures [it is] taking are inadequate"; "[t]o the contrary, the evidence shows that [BOP] has taken and continues to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus." 956 F.3d at 802; *see also id.* at 801-02 (acknowledging that "infectious diseases generally and COVID-19 specifically can pose a risk of serious or fatal harm to prison inmates," but concluding that precautions generally complying with the CDC's prison-specific recommendations satisfied the Eighth Amendment); *Marlowe*, 2020 WL 2043425, at *3 ("Although the virus has spread within [the facility], given the many prevention measures [the facility] has taken, an increase in infection rate alone is insufficient to prove deliberate indifference."); *Swain*, 2020 WL 2161317, at *4 (recognizing that an "increase in COVID-19 infections" is not itself "proof that the defendants deliberately disregarded an intolerable risk"). On May 14, 2020, the Supreme Court denied a motion to vacate the Fifth Circuit's stay of the district court's preliminary injunction in *Valentine*, thereby leaving the stay in place. *Valentine v. Collier*, No. 19A1034, 2020 WL 2497541 (U.S. May 14, 2020).[3]

Accordingly, for the reasons set forth in Respondent's opposition papers (Dkt. Nos. 79-83) and as established throughout the preliminary injunction hearing, as well as in the Findings of Fact below, Petitioners have failed to meet their heightened burden of establishing that a preliminary injunction is warranted here.

[3] *See Baez v. Moniz*, No. 20-cv-10753 (LTS), 2020 WL 2527865 (D. Mass. May 18, 2020) (denying motion for a preliminary injunction where petitioners failed to show deliberate indifference with respect to claims of Eighth Amendment violations at their facility, as petitioners had not established a likelihood of success on their constitutional claims.).

PROPOSED FINDINGS OF FACT

I. Petitioners' Allegations

1. The gravamen of Petitioners' allegation is that, because of their age and/or medical conditions, they have elevated risk of serious, adverse outcomes if they contract COVID-19 and must be released because detention at the MDC *per se* poses an increased risk of health complications or death from COVID-19. *See* Am. Pet. (Dkt. No. 60).

2. Petitioners request broad and extraordinary relief, including the immediate release of 537 allegedly vulnerable persons (inclusive of the four remaining Petitioners) with undefined "appropriate precautionary public health measures" and the appointment of a "Special Master on an emergency basis to Chair a Coronavirus Release Committee to evaluate Vulnerable Persons and make recommendations for ameliorative action for other persons at the MDC." Am. Pet. 36-37 (Dkt. No. 60). Petitioners also ask the Court to order Respondent "to mitigate" COVID-19-related risk at the MDC, and to certify the Petition as a Class Action. *Id*.

II. Pertinent Procedural History

3. On March 27, 2020, Petitioners commenced this habeas action. Dkt. No. 1.

4. On March 30, 2020, Petitioners moved for a temporary restraining order (TRO). Dkt. No. 12.

5. On April 1, 2020, the Court held a hearing on Petitioners TRO motion. Dkt. Entry dated April 1, 2020.

6. On April 8, 2020, this Court denied Petitioners' TRO motion. Dkt. Entry dated April 8, 2020 Order. The Court denied the TRO motion and noted on the record that: (i) the appointment of a Special Master is not appropriate in connection with the grant of a TRO which is "ordinarily . . . an order of short duration to address imminent harm that's going to occur;" and

(ii) the "extraordinary remedy of a mandatory injunction [ordering Petitioners' release] is [not] warranted [] at this point." April 1, 2020 Hearing Tr. at 21-22.

7. On April 23, 2020, Petitioners filed an Amended Habeas Petition. Dkt. No. 60.

8. On April 24, 2020, Respondent moved to dismiss on the grounds that the Court lacked jurisdiction over Petitioners' claims. Dkt. Nos. 62, 88.

9. On April 30, 2020, Petitioners moved for a preliminary injunction. Dkt. Nos. 71-73. Respondent opposed Petitioners' PI motion. Dkt. No. 79.

10. From May 12-14, 2020, the Court held a preliminary injunction hearing, during which Homer Venters, M.D., testified on behalf of the Petitioners. BOP Assistant Director Nicole English, Asma Tekbali, and Jeffrey Beard, Ph.D., testified on behalf of Respondent.

III. National Steps Taken by BOP to Address COVID-19

11. In January 2020, the BOP became aware of the first identified COVID-19 cases in the United States and quickly took steps to prevent its introduction and spread in BOP institutions, including the MDC. The BOP's response has occurred over six distinct "phases" to date. Ex. YY (Declaration of Lt. Commander D. Jordan, RN/BSN) ("Jordan Decl.") ¶¶ 6-17 (Dkt. No. 47-1).

12. The BOP's national guidance has undergone a number of changes in response to the evolving threat. The BOP has established a COVID-19 resource section ("COVID-19 Resource Section") on its public webpage which is available at: https://www.bop.gov/coronavirus/. This webpage includes updates on the BOP's response to COVID-19 and positive COVID-19 tests among inmates and staff at BOP institutions nationwide. Ex. YY (Jordan Decl.) ¶ 4 (Dkt. No. 47-1).

13. The BOP has issued a series of phases of its national response to the COVID-19 pandemic, which apply generally across all BOP institutions, including the MDC. Ex. YY (Jordan Decl.) ¶ 5 (Dkt. No. 47-1).

14. The BOP has taken and is continuing to take significant measures in response to the COVID-19 pandemic to protect the safety and security of all staff and inmates, as well as members of the public. Ex. YY (Jordan Decl.) ¶ 5 (Dkt. No. 47-1).

A. Action Plan for COVID-19 – Phase One

15. In January 2020, the BOP began Phase One of its Action Plan for COVID-19. Ex. YY (Jordan Decl.) ¶ 7 (Dkt. No. 47-1).

16. Phase One activities included, among other things, seeking guidance from the BOP's Health Services Division regarding the COVID-19 disease and its symptoms, where in the United States infections were occurring, and the best practices to mitigate its transmission. Ex. YY (Jordan Decl.) ¶ 7 (Dkt. No. 47-1); Ex. E (BOP 85-86).

17. The BOP's Health Services Division is responsible for medical, dental, and mental health (psychiatric) services provided to Federal inmates in Bureau facilities, including health care delivery, infectious disease management, and medical designations.[4] Ex. YY (Jordan Decl.) ¶ 7 (Dkt. No. 47-1).

18. In addition, an agency task force was established, to begin strategic planning for COVID-19 BOP-wide. Ex. YY (Jordan Decl.) ¶ 7 (Dkt. No. 47-1).

19. This strategic planning included building on the BOP's existing procedures for pandemics, such as implementing its pre-approved Pandemic Influenza Plan. Ex. YY (Jordan Decl.) ¶ 7 (Dkt. No. 47-1); Exs. C, D, K, L.

20. From January 2020 through the present, the BOP has been coordinating its COVID-19 efforts with subject-matter experts both internal and external to the agency, including implementing guidance and directives from the World Health Organization (WHO), the Centers

[4] https://www.bop.gov/about/agency/org_hsd.jsp.

for Disease Control and Prevention (CDC), the Office of Personnel Management (OPM), the Department of Justice (DOJ), and the Office of the Vice President. Ex. YY (Jordan Decl.) ¶ 7 (Dkt. No. 47-1); Exs. E, G.

B. Action Plan for COVID-19 – Phase Two

21. On March 13, 2020, the BOP implemented Phase Two of its Action Plan. Ex. YY (Jordan Decl.) ¶ 8 (Dkt. No. 47-1).

22. Phase Two put into place a number of restrictions across all BOP facilities over a 30-day period, to be reevaluated upon the conclusion of that time period. Ex. YY (Jordan Decl.) ¶ 8 (Dkt. No. 47-1).

23. Specifically, the BOP suspended the following activities for an initial period of 30 days, with certain limited exceptions: social visits; legal visits; inmate facility transfers; official staff travel; staff training; contractor access; Volunteer visits; and tours. Ex. YY (Jordan Decl.) ¶ 8 (Dkt. No. 47-1).

24. On March 13, 2020, BOP's Central Office issued nationwide guidance regarding modified operations to prevent and mitigate the spread of COVID-19. The guidance has undergone updates since it was first issued. Latest updates available at: https://www.bop.gov/coronavirus/covid19_status.jsp. Exs. TT (Declaration of Associate Warden Milinda King) ("King Decl.") ¶ 26 (Dkt. No. 18-1); Ex. WW at Ex. 3 (Dkt. No. 18-2).

25. During Phase Two, inmates were subjected to new screening requirements. Ex. YY (Jordan Decl.) ¶ 9 (Dkt. No. 47-1).

26. Specifically, all newly arriving BOP inmates were screened for COVID-19 symptoms and "exposure risk factors," including, for example, if the inmate had traveled from or through any high-risk COVID-19 locations (as determined by the CDC), or had had close contact with anyone testing positive for COVID-19. Ex. G.

27. Asymptomatic inmates with exposure risk factors were quarantined, and symptomatic inmates with exposure risk factors were isolated and evaluated for possible COVID-19 testing by local BOP medical providers. Ex. YY (Jordan Decl.) ¶ 9 (Dkt. No. 47-1).

28. Staff were also subjected to enhanced health screening in areas of "sustained community transmission," as determined by the CDC, and at medical referral centers. Ex. YY (Jordan Decl.) ¶ 9 (Dkt. No. 47-1).

29. On March 19, 2020, MDC implemented this enhanced screening for staff and contractors at that time. Ex. YY (Jordan Decl.) ¶ 9 (Dkt. No. 47-1).

30. The enhanced screening measures required all staff to self-report any symptoms consistent with COVID-19, as well as any known or suspected COVID-19 exposure, and further required all staff to have their temperature taken upon entry into any BOP facility. Ex. YY (Jordan Decl.) ¶ 10 (Dkt. No. 47-1).

31. In addition to the measures listed above, the BOP implemented national "modified operations" in order to maximize social distancing within BOP facilities. These modifications included staggered meal and recreation times in order to limit congregate gatherings. Additionally, the BOP established a set of quarantine and isolation procedures for known or potential cases of COVID-19. Ex. E; Ex. YY (Jordan Decl.) ¶ 11 (Dkt. No. 47-1).

C. Action Plan for COVID-19 – Phase Three

32. On March 18, 2020, the BOP implemented Phase Three of the COVID-19 Action Plan for BOP locations that perform administrative services (*i.e.*, non-prison locations), which followed DOJ, Office of Management and Budget, and OPM guidance for maximizing telework. Ex. YY (Jordan Decl.) ¶ 12 (Dkt. No. 47-1).

33. In this phase, individuals who had the ability to telework and whose job functions did not require them to be physically present were directed to begin teleworking. Ex. YY (Jordan

Decl.) ¶ 12 (Dkt. No. 47-1).

34. Additionally, and in accordance with the Pandemic Influenza contingency plan, all cleaning, sanitation, and medical supplies were inventoried to ensure an adequate supply. Exs. C, D, E.

35. The MDC has sufficient cleaning, sanitation, and medical supplies. Ex. YY (Jordan Decl.) ¶ 13 (Dkt. No. 47-1).

D. Action Plan for COVID-19 – Phase Four

36. On March 26, 2020, the BOP implemented Phase Four of its Action Plan. Ex. YY (Jordan Decl.) ¶ 14 (Dkt. No. 47-1).

37. In Phase Four, the BOP revised its preventative measures for all institutions. Specifically, the agency updated its quarantine and isolation procedures to require all newly admitted inmates to the BOP, whether in areas of sustained community transmission or not, to be assessed using a screening tool and temperature check. Ex. YY (Jordan Decl.) ¶ 14 (Dkt. No. 47-1).

38. This screening tool and temperature check applied to all new intakes, detainees, commitments, prisoners returned on writ from judicial proceedings, and parole violators, regardless of their method of arrival. Ex. YY (Jordan Decl.) ¶ 14 (Dkt. No. 47-1).

39. Thus, all new arrivals to any BOP institution—even those who were asymptomatic—were placed in quarantine for a minimum of 14 days or until cleared by medical staff. Ex. YY (Jordan Decl.) ¶ 14 (Dkt. No. 47-1).

40. Symptomatic inmates were placed in isolation until they tested negative for COVID-19, or were cleared by medical staff as meeting CDC criteria for release from isolation. Ex. E; Ex. YY (Jordan Decl.) ¶ 14 (Dkt. No. 47-1).

E. Inmates considered for home confinement based on March 26, 2020 guidance from the Attorney General

41. On March 26, 2020, the Attorney General of the United States issued a memorandum directing the BOP to consider "at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities." Pet. (Dkt. No. 1-4) at Ex. E attached to the declaration of Deirdre D. von Dornum. The Attorney General issued the memorandum to "ensure that [the BOP] utilize[s] home confinement, where appropriate, to protect the health and safety of BOP personnel and the people in our custody." *Id.* The Attorney General's Memorandum states in part:

> I am hereby directing you to prioritize the use of your various statutory authorities to grant home confinement for inmates seeking transfer in connection with the ongoing COVID-19 pandemic. Many inmates will be safer in BOP facilities where the population is controlled and there is ready access to doctors and medical care. But for some eligible inmates, home confinement might be more effective in protecting their health.

See Memorandum to the Director of the Federal Bureau of Prisons: Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic (Mar. 26, 2020) (https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf)

42. MDC is open and willing to consider inmates who are appropriate for release to Residential Reentry Centers ("RRC") or home confinement provided they are eligible and do not pose a danger to the community. Exs. TT, UU (King Decl. Ex. 1) (Program Statement, 7310.04) (Dkt. No. 18-2); Ex. TT (King Decl.) ¶ 4 (Dkt. No. 18-1). This review is initially conducted by a unit team to determine whether the inmate is eligible. *Id.* Appropriate candidates are referred to the Residential Reentry Manager for a final determination. *Id.*

F. Action Plan for COVID-19 – Phase Five

43. On March 31, 2020, the BOP ordered the implementation of "Phase 5 of its COVID-19 Action Plan," effective April 1, 2020 (referred to as "Phase 5"). Ex. YY (Jordan Decl.)

¶ 15 (Dkt. No. 47-1); Ex. XX (King Supp. Decl.) ¶ 2 (Dkt. No. 21); *see also* https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

44. For a 14-day period beginning April 1, 2020:

A. All inmates were confined to their living quarters for the majority of the day to decrease the spread of the virus. Ex. XX (King Supp. Decl.) ¶ 4 (Dkt. No. 21).

B. Meals, commissary items, laundry, recreation materials, education materials, medical services and psychology services were delivered directly to inmates' housing units.

C. Inmates were released from their cells in small groups to engage in activities such as showers, exercise, phones, and Trust Fund Limited Computer System (TRULINCS[5]) access. During these time periods, inmates have been directed to maintain appropriate physical distancing.

Ex. YY (Jordan Decl.) ¶ 16 (Dkt. No. 47-1); *see also* Ex. F.

45. MDC has implemented Phase Five. Ex. YY (Jordan Decl.) ¶ 16 (Dkt. No. 47-1); Ex. XX (King Supp. Decl.) ¶ 3 (Dkt. No. 21).

46. BOP guidance, however, instructs that "to the extent practicable, inmates should still have access to programs and services that are offered under normal operating procedures, such as mental health treatment and education." Ex. XX (King Supp. Decl). ¶ 5 (Dkt. No. 21).

47. At the MDC, inmates have been periodically released from their cells in order to shower, to have access to email, and access to the social telephones and dedicated, unmonitored phone lines that dial directly to the Federal Defenders of the Eastern and Southern Districts of New York. Ex. XX (King Supp. Decl.) ¶ 6 (Dkt. No. 21).

48. At the MDC, inmates are permitted to make legal telephone calls, legal calls for court appearances, and legal video-teleconferences. Ex. XX (King Supp. Decl.) ¶ 7 (Dkt. No. 21). Symptomatic inmates are permitted to make legal calls, but do not leave their unit. *Id.*

[5] TRULINCS is the internal Bureau computer and electronic message platform that inmates use to communicate with staff in the institutions and individuals in the community. Through this platform, inmates receive updates, notices, and can read inmate bulletins posted on the system by BOP staff.

49. At the MDC, inmates are permitted limited time to review discovery material outside of their assigned cells as well. These measures have been implemented to ensure inmates retain access to counsel, the courts, and their legal materials. Ex. XX (King Supp. Decl.) ¶ 7 (Dkt. No. 21).

50. Finally, at the MDC, the BOP has permitted limited gathering to facilitate meal preparation in food services, laundry, and commissary access, to the extent practicable. Ex. XX (King Supp. Decl.) ¶ 8 (Dkt. No. 21).

G. The Attorney General's April 3, 2020 Memorandum to BOP

51. On April 3, 2020, the Attorney General issued a memorandum to the Director of the BOP regarding the increasing use of home confinement at institutions most affected by COVID-19. Dkt. No. 32-1 (Attorney's General's April 3, 2020 memorandum to BOP).

52. In the April 3 memorandum, the Attorney General states that "[t]he mission of BOP is to administer the lawful punishments that our justice system imposes" and that "[e]xecuting that mission imposes on us a profound obligation to protect the health and safety of all inmates." Dkt. No. 32-1.

53. The Attorney General notes that the recent passage of the CARES Act now authorizes the Attorney General "to expand the cohort of inmates who can be considered for home release upon [his] finding that emergency conditions are materially affecting the functioning of the Bureau of Prisons." The Attorney General has made that finding and has asked BOP to immediately maximize appropriate transfers to home confinement for appropriate inmates at certain BOP facilities. Dkt. No. 32-1.

54. The Attorney General also reiterated that BOP "cannot simply release prison populations en masse onto the streets." The Attorney General added that "[t]he last thing our massively over-burdened police forces need right now is the indiscriminate release of thousands

of prisoners onto the streets without any verification that those prisoners will follow the laws when they are released, that they have a safe place to go where they will not be mingling with their old criminal associates, and that they will not return to their old ways as soon as the walk through the prison gates." Dkt. No. 32-1.

55. The Attorney General concluded that BOP must continue to make the "careful, individualized determinations [that] BOP makes in the typical case" as "[e]ach inmate is unique and each requires the same individualized determinations we have always made in this context." Dkt. No. 32-1.

H. BOP issues Operations Memorandum dated April 3, 2020 regarding home confinement under the First Step Act

56. On April 3, 2020, the BOP issued an Operations Memorandum regarding home confinement under the First Step Act. Dkt. No. 33-1.

I. Action Plan for COVID-19 – Phase Six

57. On April 13, 2020, the Director of the BOP ordered the implementation of Phase 6 of its COVID-19 Action Plan. Ex. YY (Jordan Decl.) ¶ 17 (Dkt. No. 47-1).

58. Specifically, the Director ordered an extension of the nationwide action in Phase 5, which applies to medical screening, limited inmate gathering, daily rounds, limited external movement, and fit testing, until May 18, 2020. Ex. YY (Jordan Decl.) ¶ 17 (Dkt. No. 47-1).

59. Phase Six has been implemented at MDC. Ex. YY (Jordan Decl.) ¶ 18 (Dkt. No. 47-1).

IV. The MDC

60. The MDC is an administrative facility that houses both pre-trial detainees, holdover inmates, and designated (cadre) inmates, who serve their federal sentence at the institution. Ex. TT (King Decl.) ¶ 2 (Dkt. No. 18-1).

61. As of March 31, 2020, the MDC housed approximately 1,749 inmates, including 38 female inmates, and 101 designated (cadre) inmates. Ex. TT (King Decl.) ¶ 3 (Dkt. No. 18-1); Am. Pet. ¶ 14 (approximately 1700 inmates).

62. The MDC is a high-rise facility with 17 housing units, including a women's only unit. Ex. RR (Beard Report) 10; Ex. 40 (Deposition Transcript of Associate Warden Milinda King ("King Tr.")) 95. The MDC houses inmates with all security classification levels minimum to maximum security. Ex. RR (Beard Report) 9. Inmates at the MDC are divided into separate housing units. Ex. RR (Beard Report) 10. During this pandemic, to avoid the risk of cross-contamination across units, inmates typically do not transfer between housing units at the MDC. Ex. 26 (Health Services Administrator Stacey Vasquez Deposition Transcript) ("Vasquez Tr.") 25, 182, 201; Ex. YYYY (Vasquez Decl.) ¶ 6.

63. The MDC's Health Services unit provides medical care to inmates at the MDC. The Health Services Unit comprises 30 to 35 health care workers on staff at MDC, including nurses, IOP nurses, nurse practitioners, doctors, pharmacists, a Health Services Administrator and dentists. Ex. 26 (Vasquez Tr.) 165-66. The MDC has medical staff coverage twenty-four hours per day, seven days per week. Ex. 26 (Vasquez Tr.) 167-73.

V. Ongoing Efforts To Address Issues Posed By COVID-19 at the MDC

64. In addition to the steps taken at the national level, MDC itself has taken a number of additional measures in response to the COVID-19 pandemic to prevent the introduction and spread of COVID-19 into its facility, including providing inmate and staff education; conducting inmate and staff screening; putting into place testing, quarantine, and isolation procedures in accordance with BOP policy and CDC guidelines; ordering enhanced cleaning and medical supplies; and taking a number of other preventative measures. Ex. YY (Jordan Decl.) ¶ 19 (Dkt. No. 47-1).

A. Screening of current inmate population

1. BOP medical staff members are performing twice-daily medical rounds in all housing units

65. BOP staff members at the MDC are taking a number of measures to screen its current resident inmate population daily. Ex. YY (Jordan Decl.) ¶ 32 (Dkt. No. 47-1).

66. All inmates are encouraged to self-monitor and to report symptoms of illness to unit staff either orally or via a written request to staff. The MDC's Health Services Department, which is staffed with a full complement of medical providers, are required to be present in each MDC housing unit at least twice per day in order to conduct sick call and pill line. Ex. 26 (Vasquez Tr.) 169, 182, 183, 202-04.

67. The presence of medical staff affords inmates further opportunity to report any medical concerns. Ex. YY (Jordan Decl.) ¶ 35 (Dkt. No. 47-1). During these twice-daily medical rounds, inmates are free to identify any symptoms they may be experiencing. Ex. 26 (Vasquez Tr.) 39-40.

68. If an inmate has a fever over 100.4, the inmate is isolated and the medical staff assesses the inmate's symptoms. Ex. 26 (Vasquez Tr.) 41. If the inmate reports symptoms, but has no fever, the medical staff similarly assesses the inmate's symptoms. Ex. 26 (Vasquez Tr.) 41.

69. Further, medical staff carry sick call request forms when they make rounds in the event any inmates seek to make a sick call request. Ex. 26 (Vasquez Tr.) 48-49. Throughout the institution, correctional staff make 30-minute rounds on every unit. Ex. 26 (Vasquez Tr.) 187.

70. Further, MDC institutes pill lines and insulin lines twice per day in every housing unit, and medical staff perform sick call every day on the housing units. Ex. TT (King Decl.) ¶ 18 (Dkt. No. 18-1).

71. In addition, unit staff and other department representatives (including staff from education, commissary, psychology, and recreation) are required to conduct weekly rounds in each MDC housing unit to address any concerns of the inmate population. Ex. YY (Jordan Decl.) ¶ 35 (Dkt. No. 47-1). If an inmate has an issue that he or she wants to bring to the staff's attention, he or she can do so via a written request, commonly known as a cop-out, at any time, or during these rounds with staff. Ex. YY (Jordan Decl.) ¶ 35 (Dkt. No. 47-1).

2. BOP medical staff members are performing twice-daily medical rounds in the quarantine and isolation units where they also conduct temperature and wellness checks

72. With respect to the quarantine and isolation units, MDC medical staff make twice-daily rounds and also conduct temperature and wellness checks on inmates in those units. Ex. 26 (Vasquez Tr.) 26-27, 38-40, 78-79; Ex. LLL (Declaration of Health Services Administrator Stacey Vasquez) ("Vazquez Decl.") p. 3, ¶ 6 (Dkt. No. 80).

73. During the wellness check medical staff ask inmates how they are doing, and, to the extent, inmates only speak Spanish, a number of the medical personnel also speak Spanish, and have access to translation services. Ex. 26 (Vasquez Tr.) 41-44; Ex. LLL (Vasquez Decl.) p. 7 (Dkt. No. 80).

74. MDC's screening protocols are consistent with CDC guidelines. Ex. AA (Tekbali Report) 4-5.

B. The MDC has a robust sick call system

1. Inmates have ready access to the sick call system and BOP staff are timely responding to those requests

75. The MDC has a sick call system by which inmates can request to see medical staff by making a verbal request to staff or submitting either a paper copy or electronic sick call request to MDC medical staff. Ex. 26 (Vasquez Tr.) 186-87.

76. When MDC medical staff receive sick call requests—whether verbally from the

inmate, or by paper or electronic sick call requests—the medical staff triage the requests. Ex. 26 (Vasquez Tr.) 54, 188-90, 194; Ex. RR (Beard Report) 6.

77. If the request reflects an acute or emergent condition, medical staff would respond immediately to the requests. Ex. 26 (Vasquez Tr.) 54, 198. When a sick call request is triaged, if an inmate's condition is acute or emergent, the medical provider would examine the patient immediately and the encounter would not necessarily be placed on the schedule, but would be noted as an encounter in each inmate's own medical records. *See* Declaration of Cdr. Scott A. Griffith, MSN, RN-BC, U.S. Public Health Service, Dkt. No. 97-1.

78. MDC medical staff members are prioritizing immediate medical care for anyone who claims symptoms indicative of COVID-19 infection. Ex. TT (King Decl.) ¶ 22 (Dkt. No. 18-1).

79. Prior to the COVID-19 pandemic, inmates were encourage to utilize primarily the electronic sick call system through TRULINCS. Dkt. No. 89-1 at Ex. A ("Sick Call System" provision from Inmate Admission & Orientation Handbook). However, after implementation of modified procedures as a result of the pandemic, BOP staff allowed inmates to submit paper sick call requests when they did not have access TRULINCS. Tr. 179-80.

80. When medical staff receive the paper sick call requests, they triage the request by either seeing the inmate immediately, if the inmate has acute and emergency symptoms, or place the inmate on the BOP's medical scheduling system to be seen at a later time by a medical professional. Ex. 26 (Vasquez Tr.) 186-87, 195-96.

81. Before April 24th, the sick call requests were the discarded *after* the inmate was seen by medical staff if the inmate had an acute condition, or the inmate was added to the BOP's scheduling system, including recording the nature of the inmate's complaint, regardless of whether

expressed verbally, in writing, or through TRULINCS. Ex. 26 (Vasquez Tr.) 187-191, 196-97. A notation of that encounter is memorialized in the inmate's own medical records. Ex. 26 (Vasquez Tr.) 190-91. Further, the medical records system retains the information about the substance of the inmate's complaint. Ex. 26 (Vasquez Tr.) 188-91.

82. In light of the pandemic, the MDC has additional temporary staff on hand to assist in triaging sick call requests. Ex. 26 (Vasquez Tr.) 194.

83. During the pandemic, inmates have multiple ways to communicate health concerns to medical staff. Medical staff at the MDC are conducting twice-daily medical rounds in the quarantine and isolation units and conducing temperature and wellness checks on all inmates in those units. Ex. LLL (Vasquez Decl.) p. 3. For all other inmates in the general population units, medical staff conduct twice-daily rounds in those units as well. Ex. RR (Beard Report) 6. Inmates have had ample opportunity to meet with and talk to medical staff during those rounds. Correctional staff also conduct rounds every thirty minutes on every housing unit at which time inmates again can raise any emergent medical concerns they may have. Tr. 189.

2. There is no evidence that allegedly missing sick call requests relate to the named Petitioners

84. Petitioners allege that BOP's destruction of paper sick call requests in early April shows a constitutional violation. Dkt. No. 86 (Petitioners' motion *in limine*). However, absent from the record is anything indicating that any of the named Petitioners, or the various declarants made paper sick requests, but had those requests destroyed. Dkt. No. 89 (Respondent's opposition to motion *in limine*).

85. Respondent has produced paper sick call requests since April 24th. Dtk. No. 89.

86. Importantly, on May 19, 2020, Respondent produced paper sick call requests between April 1 and April 24, that had already been processed. Dkt. No. 97-2 (confirming

production of paper sick call requests dated prior to April 24, 2020). MDC Health Services staff confirms that BOP medical providers have indeed reviewed and responded to these paper sick call requests. *Id.*

87. But even assuming other paper sick call records, other than those produced on May 19, 2020, were lost or destroyed, any sick call requests that may have been discarded were discarded *after* the inmate was seen by medical staff if the inmate had an acute condition, or the inmate was added to the BOP's scheduling system. Ex. 26 (Vasquez Tr.) 186-87, 195-96. Regardless, a notation of that encounter is memorialized in the inmate's individual medical records. Further, it is undisputed that they are now being retained, and Respondent has already produced these documents to Petitioners. Dtk. No. 89.

88. Venters claims without reliable evidence that BOP is not timely responding to sick call requests. Tr. 91. Venters's claim is based purely on speculation and self-serving statements from inmates and based on the review of only one inmate's medical file. Tr. 139-40, 140, 141. Venters nonetheless admitted that during his inspection, inmates notified him that they indeed had been seen by medical staff. Tr. 148.

89. On May 19, 2020, Respondent produced to Petitioners a report of sick calls processed between April 1 and May 9, 2020. Dkt. No. 97 (confirming production of the report of sick calls processed).

90. These documents support that the BOP responded to sick call requests in a timely fashion, despite Venters's conclusion to the contrary. Tr. 179-80 (English).

91. In light of the production of the paper sick call requests submitted prior to April 24, 2020, the "Activities Report," and the evidence submitted by the Respondent that the substance of written sick call requests are maintained in the medical record system (Dkt. No. 97), the Court

must reject Petitioners' request for spoliation or, alternatively, an adverse inference for BOP's failure to retain paper sick call requests for the period of April 1 through April 24, 2020.

92. Notably, Petitioners rely upon sick call records in support of their allegation that the sick call system at MDC is not functioning. However, Petitioners did not seek the evidence of responses to these sick call requests. An internal BOP investigation, which did look into these sick call responses, concluded that the sick call system was functioning properly. Tr. 179-80 (English); Ex. OOO. Petitioners argue that the sick call requests indicate that some inmates submitted "multiple" requests, but there is no reason to believe this is the case. There is no way to ascertain the credibility of the allegations in the records, and inmates may believe that their requests have been "ignored" when they have already been scheduled for sick call at another time during the day. Ex. 26 (Vasquez Tr.) 186-87.

C. BOP staff members screen inmates coming into the MDC

93. Due to the "Stay in Shelter" order implemented on April 1, 2020, inmate movement at the MDC is currently highly restricted. Ex. YY (Jordan Decl.) ¶ 24 (Dkt. No. 47-1). Movement in and out of the MDC, and movement within the facility, has been minimized as much as possible. Ex. YY (Jordan Decl.) ¶ 48; Ex. XX (King Decl.) ¶ 4 (Dkt. No. 21).

94. The screening measures for both inmates and staff are currently in place, and will remain in effect even after the "Stay in Shelter" order is lifted, until BOP officials determine that they are no longer necessary to prevent and/or manage the introduction or spread of COVID-19 in the MDC. Ex. YY (Jordan Decl.) ¶ 24 (Dkt. No. 47-1).

95. BOP health services staff members screen all new inmates, as well as any inmate returning to the facility, *e.g.*, from a hospital trip or court. Ex. 26 (Vasquez Tr.) 102-05; Ex. LLL (Vasquez Decl.) ¶ 6 (Dkt. No. 80); Tr. 80 (Venters acknowledges that symptom and temperature checks performed on new inmates to the MDC). These screenings include questions relating to

symptoms consistent with COVID-19, and risk of exposure, including recent travel. Ex. TT (King Decl.) ¶ 5 (Dkt. No. 18-1).

96. If the inmate is asymptomatic, the inmate is housed in the intake unit and quarantined for 14 days. Ex. 26 (Vasquez Tr.) 103, 109-10. If the inmate is symptomatic with COVID-19 symptoms, the inmate is placed in an isolation unit. Ex. 26 (Vasquez Tr.) 106-07.

97. In accordance with the BOP's Action Plan, few new inmates are expected to arrive at the institution in the near future. Inmate transfers between institutions and air lifts have been canceled, and the MDC is not currently accepting detainees or inmates who voluntarily surrender. Ex. YY (Jordan Decl.) ¶¶ 8, 26 (Dkt. No. 47-1).

98. MDC has been screening inmates for COVID-19 since March 19, 2020. Ex. YY (Jordan Decl.) ¶ 25 (Dkt. No. 47-1).

99. Incoming detainees are initially screened in Receiving and Discharge ("R&D"), not in the intake housing unit or general population. They are then brought to an intake unit where they are quarantined for 14 days to ensure the inmates do not develop symptoms. After the expiration of 14 days, and upon medical clearance, inmates may be released into general population. Ex. TT (King Decl.) ¶ 6 (Dkt. No. 18-1).

100. Specifically, inmates who arrived after March 19, 2020, as well as inmates who may be sent to the institution in the future, were and will be screened immediately upon their arrival in accordance with the following screening protocols, Ex. YY (Jordan Decl.) ¶ 26 (Dkt. No. 47-1):

(1) When inmates arrive, they are met by medical providers from the Health Services Department, who conduct an initial screening in a designated area at the MDC separate from other staff and inmates. The medical providers wear personal protective equipment (PPE) during the screening process. Ex. YY (Jordan Decl.) ¶ 27 (Dkt. No. 47-1).

(2) Inmates are screened for symptoms of COVID-19 (including fever, cough, and shortness of breath), as well as for "exposure risk factors," including whether the inmate has traveled from, or through, any locations identified by the CDC as increasing epidemiologic risk within the past 14 days, or has had close contact with anyone diagnosed with COVID-19 in the post 14 days. Ex. I. The screening takes place in a single, controlled area separate and apart from other inmates and prison staff. Ex. YY (Jordan Decl.) ¶ 28 (Dkt. No. 47-1).

(3) Following this initial screening, inmates are escorted to an isolation/quarantine unit at the MDC. There, they are quarantined for 14 days to ensure that they do not develop any symptoms consistent with COVID-19. If they do not have symptoms or exposure risk factors, they are placed in a quarantine unit. If they do have symptoms or exposure risk factors, they are placed in a separate isolation unit. The isolation unit is used for all symptomatic inmates, inmates with exposure risk factors, and inmates with a pending COVID-19 test. In these quarantine and isolation units, all staff wear PPE; inmates in quarantine or isolation are required to wear a surgical mask. Ex. YY (Jordan Decl.) ¶ 29 (Dkt. No. 47-1).

(4) After the expiration of 14 days, and upon medical clearance, inmates may be released into the general population. Ex. YY (Jordan Decl.) ¶ 30 (Dkt. No. 47-1).

(5) This initial screening procedure at the MDC allows for screening to occur in a controlled environment, and further ensures the rest of the inmate population is not exposed to newly-arrived inmates until they are properly screened and cleared by Health Services Department medical providers. Ex. YY (Jordan Decl.) ¶ 31 (Dkt. No. 47-1).

101. Inmates being transported to court are also screened in accordance with standing administrative orders issued by the Chief Judges of the Eastern and Southern Districts of New York. These orders require that all inmates' temperature be taken, and if he or she registers a body temperature of 100.4 degrees or higher, the inmate will not be produced. Ex. TT (King Decl.) ¶ 7 (Dkt. No. 18-1).

102. Venters testified at the hearing that two inmates claimed to have not been screened upon arrival to MDC, and that MDC failed to keep documentation of this screenings, but in light of the evidence submitted by the Respondent documenting the screening of those two inmates, the

Court should not credit these unsupported allegations. Ex. ZZZZ (Inmate Screening Forms).

D. BOP staff members and visitors are screened at the front door

103. Since March 19, 2020, all individuals entering the MDC (including staff, delivery drivers, or any other visitors) are directed to a single point of entry. Every person entering the institution must undergo a health screening upon entry. Ex. 26 (Vasquez Tr.) 130-31, 138-39. This includes having his or her temperature taken and being asked a number of questions to evaluate his or her risk of exposure, as well as whether he or she has been experiencing any symptoms of illness. Ex. M (Staff Screening Tool); Ex. YY (Jordan Decl.) ¶ 40 (Dkt. No. 47-1); Ex. 26 (Vasquez Tr.) 130; Ex. M (Staff Screening form); Ex. LLL (Vasquez Decl.) p. 6 (Dkt. No. 80).

104. Temperature checks are not the only factor considered when screening staff, as screeners also ask staff if they have signs or symptoms of COVID-19. Ex. 26 (Vasquez Tr.) 130-34; Ex. M (Staff Screening form).

105. The individuals conducting this health screening at the front entrance of the MDC are authorized to recommend denial of entry, subject to review by Health Services staff, to any individual if he or she has a body temperature of 100.4 degrees Fahrenheit, or above, or reports other symptoms consistent with COVID-19 (although they may consult with BOP medical providers in advance of the decision to deny entry). Ex. YY (Jordan Decl.) ¶ 41 (Dkt. No. 47-1); Ex. TT (King Decl.) ¶ 23 (Dkt. No. 18-1).

106. BOP employees at the MDC have also been educated regarding the importance of staying home if they are feeling ill, and are required to self-report any COVID-19 exposure (known or suspected) as well as any positive COVID-19 test. If a BOP staff member is tested for COVID-19, they are not permitted to return to work until after receiving the results of the test. Ex. YY (Jordan Decl.) ¶ 42 (Dkt. No. 47-1).

107. When conducting temperature checks at the front door, BOP screeners may wait until the staff members have acclimated to the indoor temperature before taking temperature checks or they take the temperature from the staff members' necks, which are typically warmer. Ex. 26 (Vasquez Tr.) 135-36; Ex. RR (Beard Report) 5; Tr. 145 (Venters waited for his own temperature check).

108. The BOP has tasked department heads with performing an intake screen on all incoming staff. Only department heads may conduct the screening as they are non-bargaining staff. By limiting the staff who can conduct these temperature checks, the BOP is attempting to limit the unnecessary dissemination of employee information. Additionally, staff tasked with screening incoming staff have been trained on the operation of the thermometer. Ex. WWWW (Declaration of Assistant Human Resource Manager Arlene Ferguson-Houk) ("Ferguson-Houk Decl.") ¶ 28.

109. Staff utilize a screening tool and the same questions are asked of every staff member. These questions are based on the key signs and symptoms of COVID-19. Ex. WWWW (Ferguson-Houk Decl.) ¶ 29 with Attachment A-Staff Screening Tool.

110. Staff are expected to arrive at the institution wearing a facemask in an effort to reduce the introduction of new germs into the institution. The thermometers used are infrared and, as a result, they are subject to environmental factors. If staff test low, they are asked to step aside until their temperature can be taken correctly. Ex. WWWW (Ferguson-Houk Decl.) ¶ 30.

111. Staff have been provided PPE at various intervals during this pandemic. PPE is typically given to staff when they enter the institution. Most recently, staff have been provided with cloth masks made by Unicor. These masks are provide the same level of protection, if not more, than the surgical masks previously issued. Ex. WWWW (Ferguson-Houk Decl.) ¶ 31.

E. Placement of inmates on quarantine status or in the isolation unit curb the spread of COVID-19

112. Inmates who present with symptoms consistent with COVID-19 are evaluated by MDC's Health Services department. Based upon the evaluation, a determination will be made whether isolation[6] and testing is appropriate. Ex. TT (King Decl.) ¶ 8 (Dkt. No. 18-1). Detainees may also be placed in a quarantine setting if exposed to a person with COVID-19, where they will be monitored daily for an incubation period of at least 14 days. Quarantine is only discontinued once 14 days elapse with no inmates developing new symptoms. Ex. TT (King Decl.) ¶ 10 (Dkt. No. 18-1).

1. Placement of inmates on quarantine status

113. MDC uses quarantine to separate asymptomatic inmates who have been in contact with symptomatic inmates during the incubation period, which is up to 14 days for COVID-19. Ex. YY (Jordan Decl.) ¶ 49 (Dkt. No. 47-1). Inmates are housed together during this 14-day period with other asymptomatic inmates in a housing unit. Ex. YY (Jordan Decl.) ¶ 49 (Dkt. No. 47-1). Steps are taken to not add or introduce new inmates to a quarantine housing unit after the 14-day quarantine clock has started. Ex. YY (Jordan Decl.) ¶ 49 (Dkt. No. 47-1). At the end of the 14-day period, the inmates may be released from quarantine if no inmates develop COVID-19 symptoms or are diagnosed with COVID-19. Ex. YY (Jordan Decl.) ¶ 49 (Dkt. No. 47-1). If additional inmates present with symptoms during the incubation period, these symptomatic inmates are isolated and the 14-day quarantine period begins anew. Ex. YY (Jordan Decl.) ¶ 49 (Dkt. No. 47-1).

[6] Isolation means that an inmate is confined to his or her cell, except to place a legal call or to shower. Personal protective equipment ("PPE") will be utilized by staff in either of those circumstances. Quarantine, on the other hand, refers to inmates remaining on their housing unit, cohorted together. They are not required to remain in his or her cell, and may interact and utilize the common area. However, they will not be moved from the housing unit to other areas of the institution.

114. As stated above, inmates receive twice-daily temperature and wellness checks and if any symptoms are reported, they are documented. If an inmate becomes symptomatic or has a temperature of greater than or equal to 100.4 F., the inmate is placed in isolation. Ex. YY (Jordan Decl.) ¶ 49 (Dkt. No. 47-1).

115. If any inmate is isolated, those inmates housed in the same housing unit with him or her will be quarantined pending results of the test, or 14 days, whichever is sooner. Ex. TT (King Decl.) ¶ 9 (Dkt. No. 18-1).

2. Inmates placed in isolation based on "clinical decision" by medical providers

116. The MDC uses isolation to separate inmates who present with symptoms consistent with COVID-like illness from quarantined asymptomatic or general population inmates. Ex. YY (Jordan Decl.) ¶ 48 (Dkt. No. 47-1). If the inmate tests positive, the entire housing unit is placed under quarantine, and the remaining inmates are checked twice per day for symptoms. Ex. 26 (Vasquez Tr.) 24-27, 27-28, 30-31, 85.[7] The inmate who tested positive is then transferred to an isolation unit and housed in a single cell. Ex. 26 (Vasquez Tr.) 26-27, 34, 45; Tr. 120 (single celled).

117. In the absence of a test, the decision to place inmates in the isolation unit is a *clinical decision* made by MDC medical staff based on an inmate's symptoms. Ex. 26 (Vasquez Tr.) 56-58 (emphasis added), 61, 65, 66, 89-90, 120; Ex. LLL (Vasquez Decl.) p. 5 (Dkt. No. 80). Even Venters agrees that the decision to place an inmate in isolation is based in part on a "*clinical decision*." Tr. 154-55 (emphasis added). Venters further agreed that he would not place an inmate

[7] Inmates that come into the institution are placed under quarantine in the intake unit. Ex. 26 (Vasquez Tr.) 25-26; 31. The MDC places inmates in quarantine for 14 days before they are transferred out of the MDC. Ex. 26 (Vasquez Tr.) 25, 29-30. For the past month and a half, approximately seven units at the MDC, at various times, have been under quarantine. Vasquez Tr. 33.

in the isolation unit based on one sign/symptom alone, but anticipates that inmates would have multiple signs/symptoms before they are placed in the isolation unit. Tr. 155.

118. The MDC transfers inmates, suspected of having COVID-19, to the isolation unit immediately without waiting for the tests results given that test results often take 1-2 days to arrive. Ex. 26 (Vasquez Tr.) 61-62, 115.

119. Inmates placed in isolation present with symptoms consistent with COVID-19. Inmates who remain in isolation have either have tested positive for COVID-19 or are "presumed positive." Ex. 26 (Vasquez Tr.) 56, 61-63, 118. If the cellmate of the inmate, who had tested positive, develops symptoms, the cellmate also is transferred to the isolation unit and is "presumed positive." Ex. 26 (Vasquez Tr.) 31, 34, 36-37, 61-63, 77, 85, 90, 118.

120. BOP staff at the MDC follow CDC guidelines in identifying potential COVID-19 symptoms, including fever, cough, shortness of breath. Ex. 26 (Vasquez Tr.) 119-20; Ex. LLL (Vasquez Decl.) pgs. 5-6, ¶¶ 17-19 (Dkt. No. 80).

121. Inmates that are presumed positive, in general, do not receive tests because the clinical management of the inmate is the same whether the inmate has tested positive or is presumed positive. Ex. 26 (Vasquez Tr.) 118-19. Ultimately, the MDC will treat the inmate's symptoms regardless of whether they tested positive or are presumed positive. Ex. 26 (Vasquez Tr.) 118-19.

122. If the cellmate of an inmate, who has tested positive, is asymptomatic, the cellmate remains quarantined in his cell alone.[8] Ex. 26 (Vasquez Tr.) 34, 85. All other asymptomatic inmates remain in their unit and are not placed in isolation. Ex. 26 (Vasquez Tr.) 66. However, if

[8] Other than a cellmate of an inmate that had tested positive, no other inmates on a housing unit are considered a close contact with the inmate that tested positive because all inmates are currently secured in their respective cells. Ex. 26 (Vasquez Tr.) 34-35.

other inmates on the same housing unit develop symptoms, medical staff make a clinical decision whether to presume those inmates as positive as well. Ex. 26 (Vasquez Tr.) 31-32.

123. Per CDC guidelines, asymptomatic inmates are not currently tested. Ex. 26 (Vasquez Tr.) 90, 129; Ex. AA (Tekbali Report) 2; Ex. LLL (Vasquez Decl.) ¶¶ 15-21 (Dkt. No. 80).

124. Given the limited number of tests available, the BOP does not test the symptomatic inmates from the same housing unit as an inmate who has tested positive, but would treat that individual as positive for COVID-19 if he develops symptoms, and monitor the inmate accordingly. Similarly, if an inmate on the same housing unit from which an inmate had a positive test, develops symptoms, then the BOP will presume that inmate as positive as well. Ex. 26 (Vasquez Tr.) 30-31.

125. The BOP's practice has been to isolate inmates who have tested positive for COVID-19 and consider the cellmate presumptively positive, only if symptomatic. The BOP's practice is consistent with CDC guidelines. Ex. AA (Tekbali Report) 5. Further, the BOP practice of isolating inmates, and presuming inmates positive is consistent with the standard of care in the community and given the CDC's guidance limiting the use of widespread testing. Ex. AA (Tekbali Report) 4-5; Ex. G ("CDC Guidance on Management of COVID-19 in Correctional and Detention Facilities"); Ex. III (Flowers Decl.) (Dkt. No. 82) at Ex. A. If the cellmate remains asymptomatic, he remains quarantined in his cell. Ex. 26 (Vasquez Tr.) 34.

126. Venters criticizes the BOP for failing to have a medical exam room inside the isolation unit, but he testified he did not recall if there was clinical space in the unit. Tr. 85. However, consistent with CDC guidance, the medical exam room is located on the same floor and located immediately outside the isolation unit. Tr. 85; Ex. 26 (Vasquez Tr.) 75:16-76:17; Ex. RR

(Beard Report) 7.

127. In the isolation unit, symptomatic inmates are housed in the upper tier of the housing unit; other, non-symptomatic inmates are housed in the lower tier of the housing unit. Venters agrees that housing inmates separately on the upper and lower tier is consistent with CDC guidelines. Tr. 103.

128. Inmates have surgical masks to wear when interacting with staff or leaving the assigned cell and their proximity to staff and other inmates is minimized. Medical staff determine if COVID-19 testing is necessary based on applicable guidelines and community standards. If the inmate's condition merits hospitalization, the inmate will be transported to a local hospital. Ex. YY (Jordan Decl.) ¶ 48 (Dkt. No. 47-1).

129. MDC follows a symptom-based approach to releasing inmates from isolation. Ex. 26 (Vasquez Tr.) 82. Inmates remain in the isolation unit for at least seven days after the onset of symptoms, and until at least 72 hours of improved symptoms, no fever, and no use of antipyretics as per CDC guidelines. Ex. 26 (Vasquez Tr.) 81-82; Ex. AA (Tekbali Report) 5.

F. BOP staff properly monitor high risk inmates at the MDC

130. As part of the ongoing effort to ensure the safety of the inmates at the MDC, Respondent directed BOP staff to create a list of inmates who are most at risk for potential complications for COVID-19. MDC has identified inmates who fall into categories designated by the CDC as higher risk for COVID-19. This list is updated periodically, especially as guidance by the CDC regarding who is at greater risk is updated. Ex. TT (King Decl.) ¶ 25 (Dkt. No. 18-1). Respondent already has taken steps to identify individuals who may be at risk of developing COVID-19 related complications. Ex. RR (Beard Report) 3.

131. BOP staff with the Health Services department reviewed inmate medical records to determine which individuals at MDC were considered "high risk" for complications due to

COVID-19 pursuant to CDC guidelines. Ex. YY (Jordan Decl.) ¶ 34 (Dkt. No. 47-1) (BOP staff took a more conservative approach when compiling its initial list).[9]

132. These guidelines can be found at: https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html. Per CDC guidance, "high-risk" individuals include those over 65 and those with significant underlying medical conditions, such as chronic lung disease, moderate to severe asthma, liver disease, and diabetes. Ex. YY (Jordan Decl.) ¶ 33 (Dkt. No. 47-1); *see also* Tr. 93 (Venters).

133. Any inmate who presents with symptoms consistent with COVID-19 will be evaluated by a medical provider. Based upon this evaluation, a determination will be made whether isolation or testing is appropriate. Ex. YY (Jordan Decl.) ¶ 36 (Dkt. No. 47-1).

134. High-risk detainees are not at any greater risk of contracting the COVID-19 than non-high-risk detainees. Tr. 93, 154 (Venters); *accord* Ex. 26 (Vasquez Tr.) 206-08 (MDC protects all inmates, not just high-risk inmates); Ex. AA (Tekbali Report) 2.[10]

G. COVID-19 Testing at the MDC

135. At the conclusion of the preliminary injunction hearing, the Court noted that it is "disinclined to find deliberate indifference in having failed to conduct earlier testing given [] the supply limitations." Tr. 553.

1. Given the limited availability of tests since the onset of the pandemic, the BOP does not have the capacity to test all inmates at the MDC

136. The CDC has identified four "priority levels" for testing individuals with a

[9] To identify which inmates at the MDC should be considered "high risk," staff searched the Bureau's medical records for (1) all inmates aged 55 and over; and (2) all inmates who have been diagnosed with a condition identified by the CDC as being "high risk." The MDC searched for inmates 55 and over, rather than 65 and older, in an abundance of caution and to be conservative in its approach to assessing risk. Ex. YY (Jordan Decl.) ¶ 34 (Dkt. No. 47-1).

[10] Venters recommends cohorting high-risk detainees together. Tr. 93. The MDC does not cohort higher risk inmates. Ex. 26 (Vasquez Tr.) 208. Further, cohorting is not necessary because the best intervention for higher risk inmates is to limit their contact with other inmates, which the MDC has been doing. Ex. AA (Tekbali Report) 3.

suspected COVID-19 infection. Ex. YY (Jordan Decl.) ¶ 43 (Dkt. No. 47-1); Ex. J. Priority levels one through three include hospitalized patients and healthcare workers with symptoms (Priority Level 1); symptomatic patients in long-term care facilities, individuals 65 years or older, individuals with underlying conditions, and first responders (Priority Level 2); and symptomatic critical infrastructure workers, individuals who do not meet any of the criteria in Priority Levels 1 or 2, healthcare workers and first responders, and individuals with mild symptoms in communities experiencing high numbers of COVID-19 hospitalizations (Priority Level 3). *Id.* The fourth, or non-priority level, is for individuals without symptoms. *Id.*

137. The CDC has made clear that "[n]ot everyone needs to be tested for COVID-19," and "decisions about testing are at the discretion of state and local health departments and/or individual clinicians." Ex. YY (Jordan Decl.) ¶ 44 (Dkt. No. 47-1); Tr. 284; *see also* cdc.gov/coronavirus/2019-ncov/symptoms-testing/testing.html.

138. As is well known, testing within New York City has been extremely limited given the lack of available tests and its status as one of the most densely populated metropolitan area in the country and the comparative lack of available tests for this size of a population. Ex. 26 (Vasquez Tr.) 122. In light of the limited tests available, the CDC has instructed the public to self-quarantine if they develop COVID-19 symptoms. Ex. AA (Tekbali Report) 2.

139. Like the broader community, testing at the MDC has been limited. Ex. 26 (Vasquez Tr.) 82; Ex. YY (Jordan Decl.) ¶ 47 (Dkt. No. 47-1). BOP has made numerous requests to LabCorp weekly for additional tests, but given the limited tests available, LabCorp has been unable to keep up with the demand for tests. Ex. 26 (Vasquez Tr.) 115-17.

140. At the MDC, decisions to test inmates are clinical decisions made by MDC health care professionals. Ex. 26 (Vasquez Tr.) 90, 117; Ex. AA (Tekbali Report) 2 ("decisions to test

are based on clinical presentation and provider's discretion."); Ex. LLL (Vasquez Decl.) pgs. 4, 5; ¶¶ 15-21 (Dkt. No. 80). The decision whether to test an inmate for COVID-19 is made by BOP medical providers based on a number of criteria, which may include, but are not limited to: (1) the nature and severity of the symptoms; (2) the inmate's potential exposure to COVID-19; (3) whether the inmate is considered "high-risk," and (4) whether the inmate is on a work detail, such as food service, that requires the inmate to interact with other inmates or staff. Ex. YY (Jordan Decl.) ¶ 45 (Dkt. No. 47-1).

141. In the event that an inmate develops symptoms in a housing unit, and that individual is the first inmate to present with COVID-19 symptoms, the MDC tests that individual. Ex. 26 (Vasquez Tr.) 117, 119.

142. Importantly, MDC's practice of presuming inmates as positive, rather than testing all symptomatic inmates—given the limited number of tests available both in the community and at the MDC—is consistent with CDC guidelines and the standard of care. Ex. AA (Tekbali Report) 5.

143. As of May 19, 2020, 6 MDC inmates have tested positive for COVID-19 and 39 staff members have tested positive for COVID-19. *See* https://www.nyed.uscourts.gov/pub/bop/MDC_MCC_20200519_045055.pdf (Coronavirus(COVID-19) Information); *see also* Ex. YY (Jordan Decl.) ¶ 46 (Dkt. No. 47-1).

144. Pursuant to BOP Program Statement 6031.04, Patient Care, an inmate may request a clinical service, such as testing, through medical staff who will determine if the clinical service is medically necessary. *See* Ex. N; Ex. YY (Jordan Decl.) ¶ 50 (Dkt. No. 47-1).

145. Due to privacy concerns, the BOP does not inform inmates of a staff member who tests positive, because the staff member typically has not had close, prolonged contact with the

inmate. Ex. 26 (Vasquez Dep.) 157-59, 162-63. In any event, inmates and BOP staff wear masks when they come into close prolonged contact as a pre-cautionary measure. *Id*. at 163.

2. BOP staff at the MDC are not tested by the BOP

146. Venters recommends that the BOP test staff who possess risk factors, or have signs or symptoms of COVID-19. Tr. 101. The BOP, however, does not use its limited tests to test staff members at the MDC because staff members may receive testing in the community, on their own. Ex. 26 (Vasquez Dep.) 145-46; Ex. WWWW (Ferguson-Houk Decl.) ¶ 12.

3. BOP announces expansion of testing

147. On May 7, 2020, the BOP announced efforts to expand rapid testing capabilities. *See* https://www.bop.gov/resources/news/pdfs/20200507_press_release_expanding_rapid_testing.pdf.

H. BOP medical staff send inmates with acute conditions to local hospitals for treatment, if necessary

148. During the pandemic, two inmates have been sent to local hospitals due to acute conditions, *not* specifically for COVID-19 symptoms, and those inmates received tests, at the hospital. Ex. LLL (Vasquez Decl.) ¶ 8 (Dkt. No. 80). One tested positive for COVID-19; the other tested negative. Ex. LLL (Vasquez Decl.) ¶ 8 (Dkt. No. 80). However, the hospital did not consider either inmate's conditions serious and discharged both inmates back to the MDC. Ex. 26 (Vasquez Tr.) 185-8; Ex. TT (King Decl.) ¶¶ 27, 28 (Dkt. No. 18-1); Tr. 118-19 (Venters testifying that he was aware of only one inmate that had to go to the hospital due to COVID-19 symptoms).

149. The inmate who originally tested positive is no longer symptomatic, had been isolated, and consistent with CDC and BOP guidance, has been released to general population. Ex. TT (King Decl.) ¶ 29 (Dkt. No. 18-1). The situation is contained, but also continuously monitored for future developments, and further guidance and action as appropriate. Ex. TT (King

Decl.) ¶ 30 (Dkt. No. 18-1).

150. Consistent with Venters's opinion that if a person at MDC gets sick and they need to go to the hospital, they should go to the hospital; this is precisely what is occurring at the MDC. Ex. RR (Beard Report) 5.

151. Even if an inmate were to go to the hospital for COVID-19, it would not, in and of itself, be sufficient to show deliberate indifference. *Swain*, 2020 WL 2161317, at *4 ("court treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk. In doing so, it likely violated the admonition that resultant harm does not establish a liable state of mind.").

I. Inmate and Staff Education relating to COVID-19

152. From the outset of the COVID-19 pandemic, BOP staff members have taken significant steps to educate inmates regarding the pandemic. Ex. III (Flowers Decl.) ¶¶ 3, 19 (Dkt. No. 82); Ex. LLL (Vasquez Decl.) p. 8 (Dkt. No. 80). BOP staff members have provided regular updates to inmates and other staff regarding the virus and the BOP's response, and have educated inmates and staff regarding measures that they themselves should take to stay healthy. Ex. YY (Jordan Decl.) ¶ 20 (Dkt. No. 47-1).

1. Inmate bulletins and town halls

153. BOP staff members have informed inmates about best practices regarding personal hygiene to prevent the spread of COVID-19. Ex. YY (Jordan Decl.) ¶ 21 (Dkt. No. 47-1); Ex. TT (King Decl.) ¶ 13 (Dkt. No. 18-1). Staff have conducted town hall meetings with the inmate population advising them of the symptoms of COVID-19, instructing them to self-monitor for COVID-19 symptoms, and to immediately report such symptoms to sick call. Ex. YY (Jordan Decl.) ¶ 21 (Dkt. No. 47-1). Specifically, Associate Warden Milinda King has met with all inmates at the institution both as a group, initially, and individually going cell to cell through "town halls"

after the implementation of modified operations to educate them about COVID-19. Ex. 40 (King Tr.) 86-87.

154. Executive staff members conducted town halls on March 13, 2020, March 20, 2020, March 21, 2020, March 24, 2020, and March 27, 2020. As guidance changes, BOP staff members will continue to provide updates to the inmate population and staff members. Ex. RRRR; Ex. TT (King Decl.) ¶ 14 (Dkt. No. 18-1).

155. The BOP has posted electronic bulletins on TRULINCS, accessible to all inmates on the computer educating them about infection control practices including wearing masks and social distancing. Ex. 40 (King Tr.) 86-87; Ex. RRRR (inmate bulletins). Ex. YY (Jordan Decl.) ¶ 21 (Dkt. No. 47-1). Information bulletins have been posted on TRULINCS in both English and Spanish about COVID-19, symptoms, and the BOP's response to the pandemic. Ex. TT (King Decl.) ¶ 14 (Dkt. No. 18-1).

156. CDC guidance posters have been placed throughout the institution. Ex. 40 (King Tr.) 86-87; Ex. RR (Beard Report) 6. Information sheets are posted in numerous locations around the MDC, including inmate housing units, the front lobby, on restroom doors, and within all departments. Ex. H; Ex. YY (Jordan Decl.) ¶ 21 (Dkt. No. 47-1).

157. BOP medical providers also have educated inmates on COVID-19 symptoms and safety measures. Ex. YY (Jordan Decl.) ¶ 22 (Dkt. No. 47-1). Department heads, Associate Wardens, and Warden also conduct rounds in the housing units, and are available to answer questions from inmates regarding personal hygiene practices. Ex. YY (Jordan Decl.) ¶ 22 (Dkt. No. 47-1).

2. BOP informs staff members about personal hygiene best practices

158. BOP staff members have explained best practices regarding personal hygiene to prevent the spread of COVID-19 to staff. Staff have been notified via email and in a recall (or all

staff conference calls).[11] Ex. TT (King Decl.) ¶ 13 (Dkt. No. 18-1).

159. Information sheets visible to staff members are posted in numerous locations around the facility, including inmate housing units, the front lobby, and all departments. Staff are also notified of important updates by the BOP alert system known as the ops planner. Ex. VV (information sheets); Ex. TT (King Decl.) ¶ 13 (Dkt. No. 18-1).

160. Medical staff have been trained to appropriately don and remove PPE. This same training has also been made available to all staff at the institution. Ex. YY (Jordan Decl.) ¶ 23 (Dkt. No. 47-1).

J. Cleaning and sanitation

161. The MDC has more than an adequate supply of soap, sinks, water, personal hygiene products, toilet paper, cleaning supplies and PPE. Ex. 40 (King Tr.) 31-34, 38-40, 46-48; *accord* Ex. RR (Beard Report) 6-10; Ex. III (Flowers Decl.) ¶¶ 25-26 (Dkt. No. 82); Ex. ZZ (King Decl.) ¶¶ 7-15 (Dkt. No. 81); Ex. XXXX (Rohlfs Decl.) ¶¶ 4-10, 18. MDC staff conduct daily inventory to ensure an adequate supply of PPE. Ex. 40 (King Tr.) 32.

1. All inmates receive soap and have access to personal hygiene materials through commissary

162. All inmates have access to sinks, water, and soap at all times. Ex. TT (King Decl.) ¶ 11 (Dkt. No. 18-1). New inmates admitted to the MDC receive soap, and all inmates may receive new soap upon request. Ex. YY (Jordan Decl.) ¶ 51 (Dkt. No. 47-1). Soap also is made available to all inmates weekly, and upon request. Ex. 40 (King Tr.) 26-28, 31; Ex. ZZ (King Decl.) ¶¶ 15-18 (Dkt. No. 81).

163. Soap is delivered to all unit teams on a biweekly basis. Ex. TT (King Decl.) ¶ 11 (Dkt. No. 18-1). An inmate may request additional soap from unit team if he or she needs to, or

[11] A recall is another name for a facility-wide meeting that staff are encouraged to attend.

purchase soap from commissary. Ex. TT (King Decl.) ¶ 11 (Dkt. No. 18-1).

164. For inmates without sufficient funds to purchase soap in the commissary, soap is provided at no cost to the inmate. Inmates are able to wash their clothing and linens twice weekly. Ex. YY (Jordan Decl.) ¶ 51 (Dkt. No. 47-1).

165. Additional personal hygiene materials are available to inmates through the commissary that staff members retrieve for inmates. Ex. 40 (King Tr.) 46-48; Ex. ZZ (King Decl.) ¶¶ 3-10 (Dkt. No. 81).

166. Guidance from the BOP's Central Office Health Services Division indicates that any type of soap (whether anti-bacterial or deodorant) is effective as long as proper handwashing procedures are followed. Ex. TT (King Decl.) ¶ 12 (Dkt. No. 18-1). Additionally, hand washing with soap and water is superior to using hand sanitizer. Ex. TT (King Decl.) ¶ 12 (Dkt. No. 18-1). Hand sanitizer is a last resort when soap and water are not available, which they are. Ex. TT (King Decl.) ¶ 12 (Dkt. No. 18-1). Hand sanitizer is available throughout the MDC, and the MDC has sufficient sanitizer in stock. Ex. 40 (King Tr.) 35-37. Staff have regular, consistent access to soap and hand sanitizer. Soap is located in staff restrooms and hand sanitizer is located in various staff common areas. Ex. YY (Jordan Decl.) ¶ 54 (Dkt. No. 47-1).

2. Enhanced sanitation procedures

167. Additional sanitation procedures have been put in place. The BOP has increased sanitation frequency at the MDC. Frequent cleaning of all common area high-contact surfaces is being conducted throughout the day. Common areas outside inmate living areas, including the MDC lobby, bathrooms, are also cleaned with the same disinfectant on a daily basis (and often multiple times per day). Ex. YY (Jordan Decl.) ¶ 52 (Dkt. No. 47-1); Ex. TT (King Decl.) ¶ 15 (Dkt. No. 18-1). Housing units are cleaned daily and more frequently, including high touch areas, by inmate orderlies or staff. Ex. 40 (King Tr.) 40, 52-55. All common areas in inmate housing

units are cleaned daily, and are typically cleaned by inmate orderlies multiple times throughout the day, with a designated disinfectant known to kill human coronavirus. Ex. YY (Jordan Decl.) ¶ 52 (Dkt. No. 47-1).

168. Each housing unit has been stocked with cleaning supplies for use by inmate orderlies and other inmates to clean both the common areas and their individual housing areas on a daily basis. Ex. YY (Jordan Decl.) ¶ 53 (Dkt. No. 47-1).

169. The MDC also uses a strong disinfectant and cleaning solution as result of the pandemic (*i.e.*, HDQC2). Ex. 40 (King Tr.) 40, 53, 60-61; Ex. RR (Beard Report) 6, 8; Ex. III (Flowers Decl.) ¶ 27 (Dkt. No. 82); Ex. LLL (Vasquez Decl.) p. 5 (Dkt. No. 80). The BOP has authorized the use of a stronger cleaning agent made available to all inmates. Ex. LLL (Vasquez Decl.) pgs. 5-6 (Dkt. No. 80). Stronger cleaning supplies have been issued and used by inmates and staff alike. Ex. TT (King Decl.) ¶ 15 (Dkt. No. 18-1).

170. BOP staff members have made disinfectant available to all inmates so that they may use it to clean their own living areas on a regular basis. Ex. YY (Jordan Decl.) ¶ 52 (Dkt. No. 47-1). Inmate orderlies have been provided cleaning materials, and cleaning supplies are available on the housing unit for use by inmates to clean their personal living spaces (cells). Ex. TT (King Decl.) ¶ 16 (Dkt. No. 18-1). Inmates are required to clean their own cells daily, and are provided cleaning supplies that they can keep in their cells. Ex. 40 (King Tr.) 40, 42, 44-46.

171. Inmates are not provided with hand sanitizer due to security concerns. Specifically, inmates are not permitted to have access to alcohol and products containing alcohol because inmates may attempt to remove and consume the alcohol, thereby causing health and safety concerns for inmates and staff. Ex. YY (Jordan Decl.) ¶ 53 (Dkt. No. 47-1).

172. Whether the cleaning is performed by inmates or staff is of no significance as there

is no allegation that the inmates are somehow unable to clean as effectively as others, nor does the standard of care require the use of professional cleaners. Ex. AA (Tekbali Report) 3.

3. Phones and computers are routinely cleaned

173. With respect to phones and computers used by inmates, there are disinfectant spray bottles and wipes next to the phones and computers, which are placed there when inmates are released from their cells on Mondays, Wednesdays and Fridays. Ex. 40 (King Tr.) 40, 57-58; Ex. 26 (Vasquez Tr.) 35; Ex. LLL (Vasquez Decl.) p. 6 (Dkt. No. 80). Inmates are required to disinfect the phones and computers both before and after they are used. Ex. 40 (King Tr.) 56-57; Ex. RR (Beard Report) 6, 8. If the inmate neglects to do so, inmate orderlies will wipe down the phones and computer before the next inmates uses those items.

174. Showers also are disinfected before and after each use. Ex. 40 (King Tr.) 58-59.

4. MDC was "deep-cleaned" after an inmate tested positive

175. Once BOP staff members learned that an inmate tested positive for COVID-19, BOP staff conducted a deep clean of the facility. Ex. TT (King Decl.) ¶ 17 (Dkt. No. 18-1). Inmate orderlies were provided PPE in order to assist in cleaning during this period. Ex. TT (King Decl.) ¶ 17 (Dkt. No. 18-1).

K. All inmates and staff provided with PPE

1. Masks have been provided to all inmates and staff

176. Beginning on or about April 5, 2020 inmates were provided a surgical mask; every inmate at the MDC has a mask, which is distributed once per week; inmates can ask for replacement masks as well. Ex. 40 (King Tr.) 69, 76; Ex. 26 (Vasquez Tr.) 74; Ex. ZZ (King Decl.) ¶¶ 20-25 (Dkt. No. 81); Ex. ZZ (King Decl.) ¶ 20 (Dkt. No. 81); Ex. LLL (Vasquez Decl.) p. 8 (Dkt. No. 80); Ex. YY (Jordan Decl.) ¶ 56 (Dkt. No. 47-1).

177. Two masks are distributed to BOP staff once per week. Ex. 40 (King Tr.) 69, 76;

Ex. LLL (Vasquez Decl.) p. 8 (Dkt. No. 80). BOP staff wear masks unless they are able to social distance. Ex. 40 (King Tr.) 71; Ex. AA (Tekbali Report) 7. Consistent with CDC guidelines, when BOP staff members are able to social distance, from each other, masks are not required. Ex. 40 (King Tr.) 71; Ex. AA (Tekbali Report) 7; Ex. LLL (Vasquez Decl.) pgs. 6, 8 (Dkt. No. 80). Cloth masks have now been issued which will be washed and reused. If there is an issue with one of their cloth masks, inmates can request a replacement. Ex. ZZ ¶ 20. On April 30, 2020, Rabadi received three cloth masks. *Id.* at ¶ 21. On April 30, 2020, Hair received three cloth masks. *Id.* at ¶ 22. On April 28, 2020, Lopez received three cloth masks. *Id*. at ¶ 23.

178. MDC procedures for distributing masks to inmates and staff are consistent with the standard of care. Ex. AA (Tekbali Report) 5.

2. Staff provided with additional PPE for quarantine, isolation, and screening areas

179. BOP staff members have been provided additional PPE to be used in appropriate locations throughout the MDC such as quarantined areas, isolation units, and screening sites. Ex. TT (King Decl.) ¶ 20 (Dkt. No. 18-1); Ex. YY (Jordan Decl.) ¶ 55 (Dkt. No. 47-1).

180. When BOP staff enter the quarantine and isolation units, they have PPE available to them, and if not available, are able to request PPE. Ex. 26 (Vasquez Tr.) 50-51, 59-61, 82-83; Ex. 40 (King Tr.) 81. In the event that staff are expected to come into contact with inmates in those units, they must wear appropriate PPE. Ex. 26 (Vasquez Tr.) 51, 59-61, 82-83; Ex. 40 (King Tr.) 72-74; Ex. RR (Beard Report) 6, 7, 10. On other occasions, because inmates are secured in their cells, the full set of PPE is not necessary. Ex. 26 (Vasquez Tr.) 51; Ex. 40 (King Tr.) 75-76; Ex. LLL (Vasquez Decl.) p. 6 (Dkt. No. 80).

181. BOP staff follow CDC guidance with respect to wearing PPE. Ex. 40 (King Tr.) 86; Ex. AA (Tekbali Report) 5; Ex. LLL (Vasquez Decl.) p. 6 (Dkt. No. 80); Ex. ZZ (King Decl.)

¶ 19 (Dkt. No. 81). For example, BOP staff are not required to wear gloves, but, instead are encouraged to wash their hands, per CDC guidelines, unless they are handling unsafe items, working in the isolation unit or expect to touch inmates. Ex. 40 (King Tr.) 81, 83; Ex. AA (Tekbali Report) 6.

182. Surgical masks are available to all BOP staff members, and for those staff members who have not received fit-testing for N-95 respirator masks, additional testing is being performed if requested by staff. Ex. TT (King Decl.) ¶ 20 (Dkt. No. 18-1).

183. MDC has sufficient PPE on hand, including N-95 respirator masks, surgical masks, and nitrile gloves, to meet its current and anticipated needs, as well as the ability to order additional PPE should the need arise. Ex. YY (Jordan Decl.) ¶ 55 (Dkt. No. 47-1).

L. Efforts to promote social distancing and reduced group meetings have been successful

184. Since approximately April 1, 2020, all inmates at the MDC have been subject to modified operations, including being secured in their cells. Ex. YY (Jordan Decl.) ¶ 15 (Dkt. No. 47-1); Ex. III (Flowers Decl.) ¶ 7 (Dkt. No. 82). Inmates are permitted to exit their cells on Monday, Wednesdays, and Fridays, initially for thirty minutes, but now for one-hour each. Ex. 40 (King Tr.) 87-88. When inmates are permitted to exit their cells, they are required—consistent with CDC guidance—to wear masks.[12] Ex. 40 (King Tr.) 78, 86-87; Ex. LLL (Vasquez Decl.) p. 6 (Dkt. No. 80).

185. To promote social distancing, BOP staff limit the number of inmates that may exit their cells at any given time limiting the number to 10 inmates at staggered periods. Ex. 40 (King Tr.) 87-89. Venters acknowledges that "staggering" is "appropriate" to promote social distancing.

[12] Venters conceded that CDC guidelines do not specify that N-95 masks must be used. Tekbali agrees that the use of N-95 masks for inmates is unnecessary and not consistent with guidelines. Ex. AA (Tekbali Report) 3.

Tr. 145; *accord* Ex. AA (Tekbali Report) 7.[13]

186. Most of the inmates at the MDC are double-celled, except inmates in the isolation unit. Given space and staffing limitations, the MDC is unable to accommodate all inmates in single cells. Ex. 26 (Vasquez Tr.) 34, 38. Regardless, CDC guidance provides for detention centers to cohort inmates in light of space limitations. Ex. 26 (Vasquez Tr.) 34, 38.

187. Further, after the onset of the pandemic, there has been a significant decrease in routine group meetings among inmates and staff. Ex. TT (King Decl.) ¶ 19 (Dkt. No. 18-1).[14]

VI. The BOP has implemented infection control procedures recommended by the CDC

188. The CDC has issued guidance relating to COVID-19 infection control procedures that are considered authoritative. *See, e.g.*, Tr. 130-31 (Venters). Further, the CDC has issued guidance for appropriately mitigating the COVID-19 risk in correctional facilities. Ex. JJJ (Flowers 2-27) (Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities).[15]

189. Guidance from the CDC provides for flexibility depending on the unique circumstances and space limitations of the prisons. "The guidance may need to be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and

[13] Female inmates are housed in a dormitory-style women's unit. Ex. 26 (Vasquez Tr.) 101; Flowers Decl. (Dkt. No. 82) ¶ 15 Although their bunks may be less than six feet away from each other, the MDC has endeavored, where possible, to alternate bed assignments where one inmate sleeps on the top bunk, and the neighboring inmate would sleep on the bottom bunk. Ex. 40 (King Tr.) 96-97. When female inmates arrive, they are initially quarantined and housed individually in single cells. Ex. 26 (Vasquez Tr.) 100. After the quarantine period, assuming the inmate is asymptomatic, the female inmates are then transferred to the women's general housing unit. Ex. 26 (Vasquez Tr.) 100-01. Female inmates are required to wear masks in the unit, if they are unable to social distance. Ex. 40 (King Tr.) 96-97, 101; Ex. 26 (Vasquez Tr.) 102; Ex. III (Flowers Decl.) ¶¶ 17, 22-23 (Dkt. No. 82). Given the size of the housing unit, and the number of female inmates, the inmates in the women's unit are able to engage in social distancing. Ex. 26 (Vasquez Tr.) 102.

[14] Access to legal counsel remains of paramount importance at the MDC. The MDC is mitigating the risk of exposure by increasing the amount and provision of legal calls and now offering video teleconferences (VTC) with attorneys on a limited basis. Ex. TT (King Decl.) ¶ 21 (Dkt. No. 18-1).

[15] https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf.

conditions." Ex. JJJ, Flowers 2; Ex. G.[16] BOP staff at the MDC have implemented many of the guidelines suggested by the CDC, as discussed below:

190. **Staff rounds.** CDC guidance recommends that prisons, "[c]onsider having healthcare staff perform rounds on a regular basis to answer questions about COVID-19." Ex. JJJ, Flowers 13. As for monitoring inmates in quarantine, CDC guidance states "quarantined individuals should be monitored for COVID-19 symptoms twice per day, including temperature checks." Ex. JJJ, Flowers 22. Consistent with CDC guidance, BOP is performing twice-daily medical rounds in isolation and quarantine and conducting temperature and wellness checks during those rounds. The MDC is also conducting twice-daily medical rounds in all other units. Correctional staff also perform rounds in every housing unit every 30 minutes. *See* section V.A.1, above.

191. **Cleaning.** The CDC recommends intensified cleaning and disinfecting procedures to include cleaning and disinfecting surfaces and objects that are frequently touched using cleaners as appropriate for the surface. Ex. JJJ, Flowers 10. The CDC recommends ensuring adequate supplies to support intensified cleaning and disinfection practices, and to have a plan in place to restock rapidly if needed. Ex. JJJ, Flowers 8. The BOP has enhanced cleaning protocols in place along with adequate supplies. *See* section V.J, above.

192. **Social distancing.** The CDC acknowledges that social distancing strategies will need to be tailored to the individual space in the facility and the needs of the population and staff. Ex. JJJ, Flowers 12. Strategies include: suspend group programs where participants are likely to be in closer contact than they are in their housing environment. Ex. JJJ, Flowers 12. The BOP

[16] "At this time, different facility types (*e.g.*, prison vs. jail) and sizes are not differentiated. Administrators and agencies should adapt these guiding principles to the specific needs of their facility." Ex. JJJ, Flowers 4 (emphasis in original)

has suspended group activities and allows inmates out of their cells at staggered times to promote social distancing. *See* section V.L, above.

193. **Testing.** With respect to testing, CDC guidance provides that testing is a clinical decision. "Clinicians should use their judgment to determine if a patient has signs and symptoms compatible with COVID-19 and whether the patient should be tested." *See* Evaluating and Testing Persons for Coronavirus Disease 2019 (COVID-19) (https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-criteria.html), Ex. AA, Tekbali 19. CDC guidance does not contemplate testing all symptomatic inmates before they are placed in isolation. *See id*.

194. Contrary to CDC guidance, Venters advocates testing all MDC inmates regardless of whether they have symptoms, starting with high risk inmates. Tr. 93. Venters's opinion is not supported by CDC guidance.

195. In the absence of testing, consistent with CDC guidance, inmates at the MDC are evaluated and treated as indicated even if a presumed positive case is identified. Testing does not change BOP's clinical management of the symptoms. Ex. 26 (Vasquez Tr.) 118-19.

196. CDC guidance states: "As soon as an individual develops symptoms of COVID-19, they should wear a face mask (if it does not restrict breathing) and should be immediately placed under medical isolation in a separate environment from other individuals." Ex. JJJ, Flowers 16. *See* section V.E, above, regarding isolation procedures.

197. Similarly, to come off isolation, the CDC does not require testing of those individuals either. "For individuals who will NOT be tested to determine if they are still contagious:

- The individual has been free from fever for at least 72 hours without the use of fever-reducing medications; *and* The individual's other symptoms have improved (*e.g.*, cough, shortness of breath); *and*
- At least 7 days have passed since the first symptoms appeared

Ex. JJJ, Flowers 18 (emphasis added).

198. Further, for inmates in a quarantine unit, CDC contemplates that inmates that become symptomatic need not be tested. CDC guidance provides: "If an individual who is part of a quarantined cohort becomes symptomatic . . . . If the individual is not tested for COVID-19: the 14-day quarantine clock for the remainder of the cohort must be reset to 0." Ex. JJJ, Flowers 22

199. **Medical exam room.** CDC guidance with respect to the location of exam rooms provides: "If possible, designate a room near each housing unit to evaluate individuals with COVID-19 symptoms, rather than having them walk through the facility to be evaluated in the medical unit." Ex. JJJ, Flowers 12; *see also* Ex. JJJ, Flowers 11. Since the onset of the pandemic, BOP medical staff have been providing treatment on every housing unit and every housing unit as a medical exam room on the same floor as the unit. Tr. 85.

VII. Hearing Testimony

A. Venters acknowledges significant steps taken by MDC to control the spread of COVID-19

200. Petitioners relied on the opinion of Venters who admitted in the past to engaging in scientific misconduct by falsifying data to reach his desired conclusions. Tr. 66-69, 128-29. The Court similarly should disregard Venters's opinions that rely nearly exclusively on unchallenged inmate interviews and declarations that support his desired conclusions.

201. Venters has no experiencing dealing with COVID-19 in either a clinical or correctional setting. Venters has not published any scholarly articles in peer-reviewed journals relating to COVID-19. Tr. 126. The only article Venters has written relating to COVID-19 is an op-ed in the Hill advocating for change in the prison system. Tr. 126. Further, Venters admittedly has not seen any patients in the past there years, Tr. 130.

202. Venters has no experience working in a federal correctional system, Tr. 126, and

suggests that his work at the Rikers Island correctional facility applies to the MDC, even though Rikers and the MDC differ significantly in terms of size and inmate population. Tr. 163-64; Ex. RR (Beard Report) 4-5.

203. On April 23, 2020, Venters conducted an inspection of the MDC. Tr. 71-72. Venters visited the intake unit, several housing areas, the Health Services unit, SHU, a cadre unit, a unit under quarantine, and the isolation unit. Tr. 72.

204. During the inspection, Venters talked to 17 inmates, Tr. 72, half of whom were pre-selected by Petitioners' attorneys. Tr. 127, 134-35. Inmates were questioned both by Venters and attorneys appearing on behalf of Petitioners. Tr. 135.

205. **Venters's unreliable recollection of inmate conversations.** His recollection of inmate conversations was unreliable. Venters recounts in detail in his report conversations he had with specific inmates, however, approximately 12 hours earlier during his deposition, Venters could not recall, *inter alia*, the name of a single inmate -- except the first name of one inmate in the isolation unit -- who he had talked to during the inspection. Tr. 132. Further, during his deposition, Venters could not quantify with any precision the number of inmates who raised certain complaints. Tr. 132.

206. As set forth in detail below, Venters admitted to a number of items he observed that underscore the flaws in his opinion. For example, during his inspection, Venters admitted that he observed inmates with soap, Tr. 137, 145; inmates had cleaning supplies and disinfecting solution, Tr. 137, 146; he observed staff and inmates wearing masks, Tr. 146; he saw disinfectant spray bottles and wipes in the housing units, Tr. 146; and he conceded that he is not aware of any inmates at the MDC who should be hospitalized. Tr.153.

207. **Inmates tell Venters that they had been seen by medical staff.** With respect to

Venters's opinion relating to sick call, Venters has no knowledge whether a healthcare provider responded to a sick call request. Tr. 138, 141. Venters's assessment of BOP's response to sick call requests was based primarily on what inmates had told him. Tr. 139-40. But, as set forth in sections VIII and IX, below, information relayed to Venters by inmates is inherently unreliable.

208. Venters's assessment of non-responsiveness to sick calls was based, again, on unreliable representations from inmates, and on his review of only one set of patient records. Tr. 140, 141. Venters's reliance on only one set of inmate records to extrapolate as to the BOP's response to all inmate sick call requests is inherently unreliable especially where, as here, inmates also relayed to him that BOP medical staff had, in fact, responded to sick call requests, and inmates told him that they had been seen by healthcare staff. Tr. 148.

209. Venters's assertion that he observed a nurse, conducting a temperature check on an inmate, but not a wellness check was based on a single nurse he observed for only a "few minutes." Venters then extrapolates from that one brief encounter, his general assertion that BOP staff members were only conducting temperature checks, but not wellness checks. Tr. 142-43.

210. Even assuming medical staff do not ask inmates about symptoms, during wellness checks, which BOP denies, Venters acknowledged that during those encounters, inmates still could self-report any symptoms they may be experiencing to the medical staff. Tr. 144.

211. Nevertheless, Venters admittedly observed temperature checks being performed. Tr. 143. Venters also observed BOP staff members using hand sanitizer before and after donning and doffing PPE. Tr. 146.

212. **Inmates tell Venters they have cleaning supplies.** During the inspection, inmates told Venters that they had cleaning supplies and had cleaned their own cells. Tr. 146. Venters admitted that he did not inspect any of the MDC's inventory during the inspection with respect to

cleaning or disinfectant solutions. Tr. 136.

213. **Venters agrees with BOP procedures.** Venters agreed with the BOP's procedures for denying symptomatic staff from coming to the MDC. Tr. 150. He also agreed with the BOP's procedures for taking inmates off quarantine. Tr. 151.

214. **Venters concedes that his opinion relating to testing is inconsistent with CDC guidance.** Venters advocated for increased testing of both inmates and staff, but admitted his opinion was not supported by any CDC guidance. Tr. 159-162; *see also* section V.G, above (CDC guidance regarding testing). Venters acknowledged that there is no one standard of care when it comes to testing high-risk patients, nor has the CDC provided clear guidelines as to which individuals should be tested or testing as it comes to the correctional setting. Tr. 159-60. Venters further agreed that there has been a shortage of tests. Tr. 160-61.

215. **Venters's claims relating to N-95 masks are inconsistent with CDC guidance.** Venters opined that symptomatic patients should receive an N-95 mask. Tr. 158, 256. However, CDC guidance does not recommend giving inmates N-95 masks. Ex. G (BOP 111); Ex. JJJ, Flowers 26; Tr. 158-59, 268-69; Ex. AA (Tekbali Report) 3. Venters conceded that CDC guidelines do not specify that N-95 masks must be used by patients. Tr. 158-59.

216. Venters further claimed that staff in the isolation unit should wear N-95 masks. Tr. 104. However, Venters's opinion is inconsistent with CDC guidance. As CDC guidelines make clear, N-95 masks are reserved for health care professionals and first-responders. Ex. AA (Tekbali Report) 3; Tr. 271. N-95 masks are readily available to BOP staff at the MDC when needed. Ex. 26 (Vasquez Tr.) 50.

217. **Venters's opinion of cohorting high risk inmates places them at greater risk of COVID-19-related complications.** Venters recommended cohorting high risk inmates. Tr. 93,

95. However, Respondent's expert, Asma Tekbali, credibly testified that cohorting high risk inmates increases, not decreases, their risk of infection and serious complications if they were to contract the virus. Tr. 238, 259. Further, the MDC does not have enough open empty units to move approximately 390 high risk inmates to house together. Ex. 26 (Vasquez Tr.) 209. MDC does appropriately monitor and look at risk factors when units are designated as quarantine based off of a symptomatic inmate being identified.[17] *See* section VII B.2 (dashboard). Further, there are security concerns that may exist in cohorting high risk patients together. Tr. 95 (Venters); Tr. 346-47 (Beard).

218. **Venters observes inmates and staff wearing PPE**. Venters criticized the perceived lack of PPE at the MDC; however, during the inspection, Venters did not ask to see any room that had PPE or the MDC's inventory. Tr. 144-45. Nevertheless, Venters testified that he saw staff with surgical masks. Tr. 105. Venters conceded that PPE, including gowns and masks, are worn when interacting with people who have COVID-19. Tr. 105. However, inmates are locked in their cells and there was no direct contact between staff and inmates at the time of Venters's inspection. Tr. 83-84. Venters further found that most staff members had masks on, and observed inmates wearing masks as well. Tr. 105.

219. **Daily exams of symptomatic patients in a clinical setting is not called for by the CDC.** Venters opined that inmates in the isolation unit need to be seen daily in a clinical setting, rather than in their cell. Tr. 161-62. However, this opinion is not based on any accepted standard of care. Tr. 242 (Tekbali). Further, inmates in the isolation unit are able to be examined in their own cell where BOP staff can check, *inter alia*, an inmate's temperature, and oxygen levels. Tr. 162-63. Venters is also aware that medical staff go into the units 1-2 times per day to

[17] In terms of Venters's recommendations in ¶ 64 of his report, prior to the filing of this action, MDC had already implemented many of his recommendations. Ex. LLL (Vasquez Decl.) pp. 2-8.

see inmates. Tr. 153-54. Further, Venters acknowledged that inmates are sent to a local hospital if BOP staff at the MDC are not able to treat them. Tr. 149.

B. Venters's methodology of relying reflexively on inmate allegations is flawed

220. Throughout his report, Venters relies primarily on inmate allegations to support his findings in the report. For example, he concludes that MDC is not screening inmates arriving at the facility nor are they keeping track of such symptoms based only on the stories of two inmates who, according to Venters, were not screened. Tr. 78-80; Ex. 25 (Venters Report) ¶ 18; Ex. 25 at 7 n. 2. Venters, however, did not review documentation confirming whether the inmates had been screened. Tr. 156-57.

221. The documentary evidence proves otherwise. Both of these inmates were screened and asked about possible symptoms, and those screenings were properly documented by MDC staff. Ex. ZZZZ (inmates screened and symptoms checked; boxes checked or a line drawn through them). Since these inmate allegations are not reliable, the Court should find that Venters's conclusions are not reliable either. The challenges with relying on unsubstantiated inmate recollection is evidenced by Venters's reliance on statements that two inmates were not screened upon entering MDC.[18] *See* sections VIII and IX, below (challenging inmate declarations).

C. Assistant Director Nicole English credibly testified that the allegations in Venters's report were "not accurate"

222. BOP Assistant Director of Health Services Nicole English oversees medical and health services for all of BOP, and is responsible for overseeing the clinical and non-clinical health

[18] Based on these allegations alone, Venters condemned the BOP for not properly screening inmates and added an assumption that they had insufficient documentation where they did. This, of course, fell apart when Respondent introduced exhibit ZZZZ, the records documenting the screenings of the two inmates in question – signed by the medical staff who conducted the screenings. Petitioners' counsel reflexively challenged these documents, but Respondent submits that this argument is not credible; it makes no sense that medical staff would skip required screenings, potentially risking exposure not only to inmates but to themselves and their colleagues because the disease does not discriminate between inmate and staff, and then try some halfhearted cover up. The simpler, and credible, explanation is that these two inmates at issue were simply not accurate in what they reported to Venters, and Respondent submits the same principle applies to many of the inmate allegations upon which Venters's findings rely.

staff. Tr. 166-68. She is heavily involved in proposing and distributing nationwide protocols to combat COVID-19. Tr. 168. She also is familiar with the MDC, having been there on inspections to address previous issues at the institution. Tr. 169.

223. English explained the importance of mitigating the risk posed by COVID-19 by detailing the experience of two other BOP institutions, where, unlike the situation at MDC, there was an outbreak of COVID-19. English described the hallmarks of an outbreak from her description of Elkton, Ohio, where the Ohio National Guard had to be deployed, or Oakdale, Louisiana where the CDC had to come help with inmate treatment on an emergency basis. Tr. 176-77, 197.

224. The BOP took Venters's allegations in his report so seriously that English received a call from the Deputy Director of the BOP -- second in command at the BOP -- and was directed to assemble a team within 90 minutes of the call, and prepare for a surprise, unannounced inspection of the MDC the very next day -- Saturday, May 2, 2020 -- to verify the allegations in Venters's report. Tr. 168-69, 171.

225. English is fully aware of the consequences of an outbreak, and, as a result, was concerned when she reviewed Venters's report setting forth allegations about the state of affairs at MDC, allegations she considered "alarming." Tr. 204-05. English had deep concerns about ensuring that MDC was properly implementing BOP's well thought out COVID-19 protocols and guidelines, which she explained, were based on CDC guidance. Tr. 204.

226. English assembled a team of experts for that tour – Andre Matevousian, who specializes in security and correctional programs; Zachary Kelton, from BOP's General Counsel's office; and [Commander] Michael Bonislawski with the Public Health Service who serves as an emergency response nurse. Tr. 170-71. English selected Bonislawski for her team because she

wanted someone experienced in the daily operations of working in a sick call environment and such expertise was more valuable than a clinic director or physician who does not perform these kind of critical, front line duties. Tr. 202-03. With this team, English ensured she had the knowledge base to obtain an informed view of the current situation at MDC.

227. It was important to English that the inspection be unannounced – English and her team took painstaking steps in this regard. Tr. 169-70, 208. Not only was the Respondent Warden Edge not notified in advance, but neither was his supervisor, the Northeast Regional Director. Tr. 169-70.

228. English and her team met at 11 a.m. on a Saturday, organizing the inspection from a Post Office in yet another effort to avoid advance notice to MDC. Tr. 169-70. The Deputy Director of the BOP then called the Regional Director, and the inspection team arrived unannounced at the MDC at 11:30 a.m. Tr. 169-71. The BOP staff at the MDC did not even have time to tell Warden Edge about the inspection between the team's arrival and their meeting with him – English was the first to tell Warden Edge the inspection was occurring. Tr. 172.

229. Before arriving at MDC, she had deep concerns based on Venters's report, especially since she knew MDC had a new warden and that she had been underwhelmed by MDC's cleanliness in her prior visit in December 2019. Tr. 172-73, 175.

230. English credibly testified that she was "*pleasantly surprised*" to learn staff "were doing what they needed to do to keep themselves and the inmates safe." Tr. 175 (emphasis added).

231. Once inside the MDC, English's team members were assigned to inspect specific areas of the MDC based on their areas of expertise. Matevousian inspected the quarantine, isolation, special housing unit, and several general housing units. Tr. 209. Kelton inspected all of the general housing units, the legal setup for the video conferencing, and a number of common

areas. Tr. 209. Bonislawski spent a majority of the time in the quarantine, special housing and general housing units, and additional time in the Health Services Department looking at BEMR (Bureau Electronic Medical Records), BOP's electronic medical records system, and the sick call processes in the institution. Tr. 209-10. Each one of the staff members sent English their findings that she incorporated into her report (Ex. OOO). Tr. 210. The subject matter experts visited the quarantine and isolation units and SHU. Tr. 173.

232. English spoke to approximately 30 staff members. Tr. 211. She observed the medical rounds and staff members talking to inmates through their cell doors. Tr. 212. In addition, English observed staff taking temperatures during rounds. Tr. 213.

233. English was very impressed by what she saw: namely, how clean the institution was; how the BOP COVID-19 action plan was activated; how screening was employed; how social-distance policies were put in place; how personal protective equipment was used; and infection control practices were put in place. Tr. 175.

234. English testified that while not required to be at MDC on Saturday, Warden Edge was present at the facility when she and her team arrived suggesting that this speaks highly about his leadership and his caring about the safety, security and health needs of those in his institution – the polar opposite of indifference. Tr. 225-26.

235. English and the Warden visited every floor of the institution. Tr. 173. The inspection lasted approximately three and a half hours. Tr. 174.

236. Her detailed report, which she finalized by May 4, 2020, Tr. 174, 200, is found at Exhibit OOO and is summarized below:

1. Entry point screening – Ex. OOO at MDC 3

237. English and her team were screened at the front lobby where they had their temperature checked and were asked a series of questions regarding whether any of them were

symptomatic. Tr. 171, 177-78. The information was annotated on a screening form. Tr. 171, 177-78. English was wearing a mask and was asked whether she wanted to wear gloves. Tr. 171-72. English found that BOP staff members had followed protocols as it related to staff screening at the front lobby. Tr. 177.

238. Specifically, English and her team observed the front lobby officer and the processing of incoming staff to the facility. The officer administered a questionnaire regarding general staff wellness and any symptoms related to the COVID-19 virus. The officer took the staff temperature and recorded all of the data on a screening form. The staff entering were given face coverings or surgical masks upon request, if they were not already wearing a face covering. In addition, disposable gloves were observed on-site for staff use. Ex. OOO (MDC 3).

239. A shift change occurred at 2:00 p.m. English and her team observed staff entering and exiting the secure portion of the institution. In each instance, staff were observed wearing face coverings, and avoiding contact with other staff. Staff minimized their finger/hand contact with high-touch surfaces such as Sallyport doors. Staff entering and exiting were occasionally reminded, "not to touch [their] face," and to use hand sanitizer regularly. Information about COVID-19 and prevention/mitigation strategies was also observed to be easily accessible in the front lobby area. Ex. OOO (MDC 3-4).

2. Inmate screening tools – Ex. OOO at MDC 4

240. English further found that the inmate screening tool was being used appropriately. Tr. 178. Specifically, English reported that protocols established indicated that all new detainees and returning inmates are screened by BOP Health Services staff, using the national inmate screening tool, before entering the institution. Additionally, twice-daily rounds were occurring in all of the units, during which time the inmates have access to medical staff to report medical or mental health issues to be addressed. Ex. OOO (MDC 4).

241. The BOP performs twice-daily temperature and wellness checks on all isolated and quarantined inmates. In order to reduce the spread of COVID-19, MDC staff are performing daily checks at the inmate's cell door, twice a day. Questions regarding wellness and symptomatic criteria are asked at the inmate's cell door. Ex. OOO (MDC 4).

242. English reported that the BOP utilizes dashboards developed to track all isolated and quarantined inmates. The dashboards are utilized locally, regionally and nationally to monitor and analyze all COVID-19 related data. The MDC has approximately 390 high-risk inmates that are monitored through the dashboards. The isolation and quarantine units are utilized to manage those cases if deemed appropriate. Ex. OOO (MDC 4). Specifically, English noted that these COVID-19 inmates are tracked on a dashboard that shows "the cases in isolation, the cases in quarantine," and both asymptomatic and symptomatic positives. Tr. 207, 215-16. The dashboard also tracks high risk inmates. *Id.*

3. Sick call procedures – Ex. OOO at MDC 4

243. English reported that they reviewed the process of "sick call" at the MDC to ensure that inmates had proper access to medical care. A review of the BEMR as well as interviews with staff and randomly selected inmates were conducted. Ex. OOO (MDC 4).

244. English found that a review of BEMR data revealed the Health Services Department during the month of March resolved 686 sick call requests. Ex. OOO (MDC 4); Tr. 214. There were 125 sick calls which were waiting to be seen and scheduled. Ex. OOO (MDC 4); Tr. 214. No cases of urgent/emergent were waiting to be seen. Ex. OOO (MDC 4); Tr. 214-15, 216-17. Further, English found that BOP's responses to sick calls at the MDC was timely and sufficient. Tr. 214-15, 216-17.

245. English further reported that all urgent or emergent requests were attended to depending on severity either immediately or the same day based on medical staff triage and

medical determinations. For all non-urgent/routine requests, the nursing staff was reviewing BEMR data for duplication of requests, need for medication refills or other items which they can resolve. If an inmate needs to be seen by a provider, they are placed on the scheduler for one to two weeks wait time. Ex. OOO (MDC 5).

236. English reported that nurses are assigned to ensure that proper sick call processes are in place and are being reviewed daily. Ex. OOO (MDC 5).

247. During the COVID-19 pandemic, processes have changed due to inmates not having as much access to the electronic messaging system, or TRULINCS. Inmates have continued to submit sick call requests via TRULINCS, as well as submitting their medical issues via paper requests. In all cases, the medical staff are reviewing them. There is a process in place to sort out the paper requests located in the nursing area which clearly states, "Needs reviewed-sick call" and "sick call-completed." Ex. OOO (MDC 5).

248. English reported that correctional staff are picking up sick call forms from the inmates and placing them in the medical treatment rooms. While correctional staff believe they are being helpful, it created a problem for clinical staff to triage medical issues onsite or real time. Ex. OOO (MDC 5).

249. English "saw sick call procedures that were in question actually occurring." Tr. 175. English spoke to more than 50 inmates. Unlike Venters, these inmate conversations were random, not hand-picked by Petitioners' attorneys. English asked each the same "two questions": "are you able to access medical care?" and "do you have any medical concerns?" Tr. 204. The responses did not give English any pause – inmates were being seen by medical staff. Tr. 194-97.

250. Unlike Venters, who criticized MDC's sick call system based solely on self-interested inmate allegations and a look at sick call requests – notably Venters did not look at any

of the sick call responses or records of care given to inmates other than one inmate in the isolation unit – English and her team examined responses to those sick call requests to see the number of completed and scheduled encounters. Tr. 179.

251. English found that "based on the sheer volume" it was "very much apparent there is a process in place" for sick call. Tr. 179. Her observations reflected the COVID-19 response as it was supposed to happen – inmates were seen for sick call and inmates with COVID-19 symptoms were placed on isolation, if medically necessary. Their prior units were placed on quarantine where inmates were given regular temperature checks. Tr. 207, 215-16.

4. Quarantine and isolation units and procedures – Ex. OOO at MDC 5

252. English stated in her report that there are adequate supplies and stock of appropriate PPE for use by all employees. The inmate population had all been supplied a mask. Interviews were conducted with randomly chosen inmates to inquire about access to soap/cleaning supplies and masks. Every inmate she spoke with stated that they have access to proper supplies. Ex. OOO (MDC 5).

253. Supply areas were checked in the Health Services Unit and found to be fully stocked with all types of PPE. Ex. OOO (MDC 5).

254. The isolation room had a cart in the Sallyport with Tyvek suits, gloves and N-95 masks available for use by all people entering the isolation area.[19] Ex. OOO (MDC 5); Tr. 183. There was a trash can available for doffing. The quarantine area was receiving masks and gloves by the Captain at the start of each shift on a cart which they pushed to the location. There was no cart with supplies available at the entrance. Ex. OOO (MDC 5).

[19] Venters noted that during his tour he noted that a PPE cart outside the isolation unit did not contains masks. Tr. 104. However, Venters's finding was inconsistent with the findings of Beard and English who both found adequate PPE outside the isolation unit. Venters further claimed that in the isolation unit, he did not see staff wearing gowns or masks, nor were there gowns in the cart. Tr. 104. However, as Vasquez noted, staff are not required to wear the full set of PPE if they are not coming in contact with inmates. Ex. 26 (Vasquez Tr.) 84, 87, 59-60.

255. All staff during the visit who were observed and questioned in the unit said that they have access to proper PPE. All staff that observed during the visit had proper PPE in use. Ex. OOO (MDC 6).

256. Proper sanitation efforts were being conducted in each unit as well as administrative areas multiple times per week using an electrostatic fog machine. Ex. OOO (MDC 6).

257. When interviewed, inmates stated that they were also cleaning common areas multiple times a day using sanitation spray, which they stated they have full access to. Ex. OOO (MDC 6).

5. Infection control practices – Ex. OOO at MDC 6

258. English reported that every floor and department was visited during the visit. English reported that there are two main buildings of MDC and each floor and every housing unit in the West Building, including the quarantine unit (unit 41), the isolation unit (unit 84), and the Special Housing Unit were visited. The female dormitory unit in the East Building was also visited and inmates were interviewed. In addition, all staff departments and staff offices, where staff were present were visited. It was observed and through interviews with staff and inmates, that each area had a high use of PPE by staff and inmates; signage and posted instructions regarding use of PPE, best practices to prevent the spread of COVID-19, and the details of modified operations were visible; and there were procedures for provision of legal calls for inmates given the restriction on legal visitation. Ex. OOO (MDC 6).

6. Staff use of PPE – Ex. OOO at MDC 6

259. English reported that in each unit visited, unit officers and unit staff were appropriately wearing face coverings and gloves. In response to inquiries about the availability of PPE, no staff reported an inability to access BOP-provided PPE. The institution was well stocked with PPE, in quantities that appeared more than adequate for immediate needs. Ex. OOO (MDC

6); Tr. 181. Although in most areas PPE was reported to be delivered by mobile cart on a known schedule, there was a stationary cart with PPE at the Sallyport to the isolation unit, along with instructions not to remove the cart and a garbage can for doffing PPE upon exiting the unit. Ex. OOO (MDC 6).

260. Hand sanitizer was observed on each floor in various locations, although on one floor the dispenser at the elevator was missing. Staff were observed to regularly use hand sanitizer when passing dispensers. Overall, staff access to, and use of, PPE appeared to be significantly in line with CDC guidance and agency direction. Ex. OOO (MDC 7).

261. English found staff wearing masks and the only people in the institution without masks were the inmates in their cells. Tr. 182.

7. Inmate use of personal protection equipment - Ex. OOO at MDC 7

262. Inmates observed in common areas of units were wearing face coverings, as were inmate workers observed during movement to their work details. Ex. OOO (MDC 7).

263. Inmates secured in their cells in the Special Housing Unit were unsurprisingly not wearing face coverings. Ex. OOO (MDC 7).

264. None of the inmates interviewed reported a lack of PPE or a lack of access to sanitation supplies, although there were concerns raised about the efficacy. The only significant complaints raised by inmates were unrelated to COVID-19; inmates in the Special Housing Unit were more interested in raising issues about their detention than discussing concerns about COVID-19. Ex. OOO (MDC 7).

265. English confirmed that the "inmate population had all been supplied a mask." Tr. 181.

8. Sanitation supplies and access – Ex. OOO at MDC 7

266. English reported that observation in all areas indicated inmates have access to adequate personal hygiene supplies for hand washing, and disinfectant products effective against the virus that causes COVID-19 for daily cleanings. Additionally, inmates had access to showers and access to clean laundry. Inmates are provided with soap upon request, however most inmates choose to buy from commissary based off personal preference. The approved chemical for use on the COVID-19 virus is Hdqc2 and is provided for daily cleaning by all inmates and inmate orderlies. A review of cleaning protocols and inventory of cleaning supplies indicated 9 backpack sprayers were in use as well as 250 gallons of Hdqc2 was on-hand. Ex. OOO (MDC 7-8).[20]

267. English spoke to inmates who reported that they did not have trouble accessing any chemicals or supplies. Tr. 185. During the inspection, English observed sanitizer throughout the facility. Tr. 190.

9. Temperature control in the units, cells and common areas – Ex. OOO at MDC 9

268. English reported that the team did not take temperature readings of each unit to directly measure room temperatures. Gauging on a personal comfort level, the inmate units did not feel unreasonably cold, and units seemed sanitary and bright. Ex. OOO (MDC 9). Further, English did not notice any issues with temperature at the MDC. Tr. 186, 220, 221.

10. Food service procedures – Ex. OOO at MDC 9

269. English observed the preparation of food and she did not see any issues with respect to food service. Tr. 186-87. The meal service was observed in several units. Ex. OOO (MDC 9). All inmates were wearing PPE appropriately. The food was delivered to each cell door with no

[20] Unlike Venters, when English and her team did not see equipment or cleaning supplies, they actually asked where it was and found plenty of accessible supplies including "9 backpack sprayers and 250 gallons of hdq2C cleaner," which is CDC approved to kill COVID-19. Tr. 181-82.

interruption. The food was kept hot in the heated serving equipment. The portions appeared substantial and the quality appeared appetizing. Ex. OOO (MDC 9).

11. Emergency response and preparedness – Ex. OOO at MDC 9

270. English reported that the MDC's command center operations were observed. The command center is staffed 24 hours, 7 days a week, with at least 2 staff. The command center tracks COVID-19 infection rates for staff and inmates, monitors all unit and institution cameras and actively manages any activity with inmate emergencies. Correctional staff make 30 minute rounds each shift in the units to monitor the safety of inmates and physical security. Ex. OOO (MDC 9). English noted that the command center at the MDC had been activated as a result of the pandemic. Tr. 187.

271. With respect to the broken call buttons, Venters faults the MDC for having non-working duress buttons. Tr. 106, 107. But as English testified, medical staff are doing twice-daily rounds; correctional officers make rounds every 30 minutes. Tr. 187, 206. Inmates have multiple ways to summon medical assistance, including by reaching out to a BOP staff member, correctional staff, during the twice-daily medical rounds, Ex. 26 (Vasquez Tr.) 78-79, and through paper or electronic sick call requests. Ex. LLL (Vasquez Decl.) p. 4

12. Legal visiting – Ex. OOO at MDC 9

272. English reported that they observed areas where videoconference appearances/legal visits and for legal phone calls take place. At the time of the inspection, however, no legal calls or video appearances were taking place. Observation of the actual utilization of the space as well as discussion of protocols and practical realities of the process with legal and unit staff were conducted. Ex. OOO (MDC 9).

273. The video units were in conference rooms (or a secured room in the Special Housing Unit) and appeared to be in good working order. The system is touchscreen based, and

if properly sanitized between uses should present a minimal vector for the spreading of infectious diseases. The videoconference areas were behind windowed doors, which were able to provide reasonable audio privacy while allowing appropriate staff supervision. Ex. OOO (MDC 9).

13. Communications to inmates of CDC guidance through Warden and Town Hall – Ex. OOO at MDC 10

274. English reported that there are town halls conducted in the units and fliers handed out weekly to all inmates that address their access to health care. Staff have been briefed multiple times along with regular emails regarding institution operations and current CDC protocols. Ex. OOO (MDC 10).

275. English noted that posters were posted in English and Spanish. The institution has a Spanish speaking medical staff member at the institution seven, (7) days a week. Based on interviews with staff and inmates, there have been no concerns addressed by inmates to staff with regard to Spanish speaking inmates not being able to convey their issues. The institution has a phone line dedicated to assist inmates with translation if there is not an interpreter immediately available. Ex. OOO (MDC 10-11).

276. English further reported that weekly town halls are conducted with psychology services staff. They provide written information or hand-outs to inmates about the pandemic and ways to manage stress related to the virus. Case managers and counselors are also making regular rounds in the units and the special housing unit and are accessible to inmates. Ex. OOO (MDC 11).

277. English found that the BOP had sufficiently communicated to inmates CDC guidance through town hall meetings and communications by the warden. Tr. 188-89. Further various staff were making rounds including chaplaincy staff, case managers, and counselors, all of whom were meeting and talking to inmates. Tr. 189.

14. Signage and instruction for procedures and CDC guidance – Ex. OOO at MDC 11

278. Throughout the institution, at both high-traffic locations and at locations with specific missions (such as the quarantine and isolation units), English observed appropriate and adequate signage reminding staff to take appropriate hygiene precautions and to utilize PPE. Ex. OOO (MDC 11). Further, English saw plenty of signs and posters relating to COVID-19 throughout the MDC. Tr. 189-90.

15. Communication to staff regarding CDC guidance and testing – Ex. OOO at MDC 12

279. English reported that CDC Guidance has been posted on the agency intranet website (Sallyport), indicating staff testing is currently voluntary and must be done locally through state and local resources. Current protocols allow for staff to have their temperature taken and a questionnaire completed for self-assessment of symptoms. Based on responses and symptoms, staff may self-quarantine at home. Ex. OOO (MDC 12).

280. English was also aware of significant communications with BOP staff. Tr. 191. On the issue of testing for COVID-19, English explained that BOP already has a number of Abbott Labs tests deployed at "hotspots" and is planning to deploy machines to MDC to increase capacity. Tr. 226.

16. English's Recommendations were implemented "on the spot" by the Warden. Ex. OOO at MDC 12-13

281. In the "Recommendations" section of her report, English stated that the MDC as observed by the team was not in disarray nor was it failing in its response to the COVID-19 virus pandemic as had been reported in Venters's Report. Ex. OOO (MDC 12).

282. English's report, in evidence at exhibit OOO, and upon which the Court can rely, reads as a point by point rebuttal of Venters's allegations – the report puts it perhaps a bit too diplomatically, "[a]llegations made through outside stakeholders were not … entirely … accurate."

Ex. OOO (MDC 12).

283. English reported that during the unannounced visit, staff and inmates appeared to have and be properly utilizing PPE and sanitation supplies; staff morale appeared to be high; and inmate complaints were minor. Units and transit areas were bright and clean, and hand sanitizer and reminders about PPE and appropriate hygiene were placed at numerous appropriate locations. Ex. OOO (MDC 12).

284. English set forth the following recommendations:

- Protocols should be put into place to ensure sanitization of the phone handsets used for legal phone calls between users is being conducted. Longer term, it is believed that increasing the use of the videoconference units rather than fax machine handsets would be able to achieve reduced viral spread and increased auditory privacy. Ex. OOO (MDC 13).

- Ensure stationary PPE carts be deployed at unit entrances, or at the very least at the entrance to the quarantine unit. While there were no significant concerns raised about availability of PPE for staff, replicating the model used at the isolation unit (stationary cart with supplies and disposal method) would avoid even the appearance that PPE is not being made readily available for staff who need it to enter a unit or open a cell. Ex. OOO (MDC 13).

- Ensure that hand sanitizer and trash cans are available at all times where donning and doffing of PPE takes place. It is also recommended to post CDC donning and doffing picture guides at each location. Place a cart in a secure area in the quarantine unit so staff has access immediately to PPE, the same as it is set up for the isolation unit. These can be found on the COVID-19 Sallyport page. Ex. OOO (MDC 13).

- Provide all staff/visitors a method to decontaminate all equipment (radios, keys, CO) at control when they are leaving. This can be accomplished using the red spray or using alcohol wipes. The equipment is a very likely source of spreading this virus from employee to employee. Ex. OOO (MDC 13).

- Ensure that the HSA holds the nursing staff accountable to their assigned task of reviewing all sick call requests as well as processing the requests daily. Ex. OOO (MDC 13).

- Communicate to Correctional staff to not pick up sick call forms and place them in the medical treatment rooms which are located on each floor. They

should be left for clinical staff to retrieve and triage inmates at the cell door. Ex. OOO (MDC 13).

285. English discussed the recommendations with the Warden immediately following the inspection. English confirmed that the Warden implemented the recommendations immediately. Respondent adopted these recommendations and the identified issues were fixed, to quote AD English, "on the spot." Tr. 180, 192, 199-99.

286. In terms of English's recommendations, English explained that the steps MDC was taking to prevent the transmission of COVID required MDC to revert to an antiquated process – using written sick call requests, resulting in some hiccups, like custody staff bringing the slips to the wrong place in an effort to be helpful to inmates – which is not indifference. Tr. 179-80, 196-97. This, she believed, resulted in a brief delay of a couple of hours receipt of medical care so she recommended that Respondent correct this process.[21] Tr. 179-80; 195-96. English explained that urgent requests were being seen immediately. But, like anything else, the triage depended on the symptoms of the individual inmate and BOP medical staff acted accordingly. Tr. 179-80, 195-97.

287. Further, English recommended that staff provide cleaning solution and alcohol wipes to clean and disinfect equipment that is passed between staff members on shift changes. She recommended consistent placement of PPE equipment. Tr. 191-94.

288. English's credible testimony establishes that BOP and MDC management take seriously the threat of COVID-19, addressing the areas of weakness, as the response to the

[21] Venters recommends "Same-day review of every sick-call slip and electronic submission that will (i) trigger immediate (same day or next morning) assessment for COVID-19 and (ii) provide data that creates a facility wide symptom tracking dashboard that health care staff will use." MDC, however, has nationally set form tracking mechanisms that we are using to track all isolated and quarantined inmates. Any inmates reporting symptoms related to COVID-19 are initially assessed by the medical staff member making rounds. If there is a need to further evaluate the inmate, the inmate is brought out of the cell and assessed further. We are also following our regular sick call procedures for all other issues. Ex. LLL (Vasquez Decl.). Sick call process during these twice-daily rounds, medical staff carry sick call request forms in the event any inmates seek to make a sick call request. Ex. 26 (Vasquez Tr.) 48-49.

pandemic evolves.

289. Petitioners' counsel asked English whether, if true, the issues identified in Venters's report were "alarming" – and she admitted they were. But when asked "Did you see any of those things occurring during your team members' inspection?", English answered succinctly – "no." Tr. 227.

290. Indeed, it is hard to fathom, in light of English's report and her credible, knowledgeable testimony that there is any basis to find that Warden Edge is indifferent to the health and safety of those in his institution, or in any way indifferent to the threats posed by COVID-19.

D. The Court should credit the testimony of Epidemiologist Asma Tekbali that that COVID-19 at the MDC is under control

1. Tekbali's current experience addressing COVID-19

291. Asma Tekbali, an epidemiologist and infection preventionist is on the frontlines of monitoring the spread of coronavirus at Lenox Hill/Northwell Health. Tr. 231-34. Tekbali is responsible for infection prevention control for a major New York City hospital. Tr. 231, 232, 234. The Court recognized Tekbali as an expert in epidemiology and infection control and denied Petitioners' motion to preclude her testimony. Tr. 235, 236, 449.[22]

292. Unlike Venters – who may have prison experience but purports to discuss best practices about a pandemic about which he lacks any in-depth knowledge, has confronted only conceptually and understands mostly by reading guidance posted on the CDC's website -- Tekbali has actual real-life experience battling COVID as she advises health care providers about how to keep themselves and their patients safe. Tr. 234-35.

[22] Petitioners' argument that Tekbali lacks corrections experience is irrelevant as COVID-19 does not discriminate based on setting; infection control experience in any institutional setting is applicable. Tekbali has advised other kinds of institutions on infection control measures in the past, and there is no reason her knowledge and experience about mitigating the spread of this outbreak somehow melts away at a prison's door. Tr. 234-35.

293. While Venters's only COVID-related written work is penning an op-ed in a publication focused on politics pushing his prison reform agenda through the lens of the outbreak, Tekbali has published two peer-reviewed, science-based articles in a prestigious publication on COVID issues, focusing on the risks to pregnant women. Tr. 233-34; Ex. QQ.

294. To the extent Petitioners tried to frame Tekbali as under experienced, her testimony showed otherwise. Tekbali was informed and credible, basing her testimony on a fundamental understanding of COVID-19 and how it spreads. In sum, hers is exactly the kind of front-line clinical hospital experience upon which this Court should rely upon in determining complex issues in a pandemic caused by a novel virus.

2. Objective data relating to the low number of hospitalizations and deaths reflect that the BOP has successfully controlled the spread of COVID-19 at the MDC and that there is no outbreak at the facility.

295. Tekbali opined that based on CDC guidance and her professional experience, infection control policies and procedures within MDC have been adequate in preventing the spread of COVID-19. Tr. 237. Further, the BOP's efforts distributing soap, keeping inmates locked in their cells, and masking throughout the facility have helped significantly decrease the risk of transmission among inmates. Tr. 248-49.

296. As Tekbali credibly testified, epidemiologists look to hospitalization and death rates—both of which are objective statistics—to determine whether infection rates are under control. Tr. 238-39. There were only two visits to the hospital by MDC inmates with acute conditions; both of whom were tested at the hospital. Tr. 239. Only one of whom tested positive, neither of whom required a hospital admission, and, there have been no deaths. Ex. LLL (Vasquez Decl.) ¶ 8; Ex. 26 (Vasquez Tr.) 185-86; Tr. 97 ("nobody has died").

297. A high rate of hospitalizations would indicate an outbreak at the facility with patients that require a higher level of care; low death rates and hospitalizations would correlate

with lower levels of infection. Tr. 239. At the MDC, the rate of hospitalization of inmates has been extremely low. Tr. 239.

298. Venters relies on a chart in his supplemental expert report to show that there is a higher number of staff testing positive for COVID-19 than inmates, while the number of inmate infections has flattened. Ex. 82 (Supplemental Report of Dr. Homer Venters, dated May 11, 2020); Tr. 98 (flattened), 113.

299. Tekbali refutes Venters's claim that the rate of infection among inmates should correlate with the rate of infection of staff members. Tr. 247. Venters assumes that the BOP is under-testing because he assumes the rates of infection between inmates and staff should be increasing at the same time. Tr. 98-99, 115.

300. Tekbali opined that Venters's chart reflecting the total number of positive tests indicates instead that there has not been a widespread infection of COVID-19 within the facility. Tr. 247. Tekbali points out that Venters fails to take into account that staff members are out in the community in New York City -- the epicenter of the pandemic. Tr. 116, 117; Tr. 247.

301. Tekbali opined that an increased rate of staff testing positive, along with a flattening rate of inmates testing positive, more likely indicates that the MDC infection control measures are effective. Tr. 247. Staff continue to get exposed, and potentially infected in the community, while MDC is successful at mitigating the spread within its prison walls. Tr. 247. This, again, is consistent with the objective evidence of a lack of hospitalizations and death.

3. Tekbali credibly impeaches Venters's other opinions lacking basis in CDC guidance or the standard of care

302. Tekbali's testimony exposes the lack of support of Venters's other conclusions as well.

(i) CDC does not recommend cohorting high risk inmates.

303. Tekbali disputes Venters's opinion that high risk inmates should be cohorted together. Tr. 238. Tekbali credibly testified that cohorting high risk patients together is not a common practice particularly where, as here, cohorting high risk patients in light of COVID-19 would increase their risk of developing significant illness. Tr. 238. Tekbali further opined that based on CDC guidance, anyone who is high risk is advised to be isolated alone, not cohorted with other high risk individuals. Tr. 238.

(ii) Most patients develop only mild symptoms with fever being the most prevalent symptom.

304. The most prevalent symptom of COVID-19—93 percent of patients—based on CDC guidance is fever. Tr. 240; Tr. 147, 148 (Venters). Tekbali opined credibly that temperature checks -- an objective test -- is the easiest way to determine if a patient has the most common symptom of COVID-19. Tr. 245, 281. Tekbali also explained that MDC's use of temperature checks of inmates in quarantine is the same technique used in the hospital because most COVID-19 patients present with a fever and it is an easy objective metric to track. Tr. 245, 281. Venters admitted that inmates in the isolation unit receive a temperature check or have their oxygen levels checked. Tr. 84.

305. Most patients—about 80 percent—present with mild symptoms. Tr. 240. For patients with mild symptoms, there is essentially no treatment; such symptoms can be treated with antipyretic and Tylenol to reduce the fever. Tr. 240, 242.

306. That is exactly what MDC accomplishes with their twice-daily temperature and wellness checks for every inmate in isolation.

307. Typically, a patient with mild symptoms would not be hospitalized. Tr. 242. Per CDC guidance, symptomatic patients are advised to isolate and manage their symptoms. Tr. 242.

If the patient's condition deteriorates and begins to experience symptoms such as labored breathing, blue lips or confusion, they are advised to call their medical provider or go to the emergency department. Tr. 242.

308. Patients with mild symptoms are advised to self-isolate and not see their doctor daily, contrary to Venters's opinion that symptomatic patients undergo daily clinical examinations. Tr. 242; Tr. 82 (Venters).

309. Venters opined that any inmate with COVID would require daily medical examinations in a medical office. Tr. 82-83. However, Tekbali states that seeing a doctor daily would have limited utility because providers are not able to treat COVID-19 symptoms, but can only help manage the symptoms. Tr. 242.

310. Petitioners rely on this unfounded opinion for one of their key arguments – that the absence of medical encounters for 9 days for a COVID-19 patient therefore means that he was not provided care. As Tekbali explained, constant medical encounters with a patient with non-urgent symptoms is simply not the standard of care. Tr. 242.

311. Indeed, Venters's demand for frequent and unnecessary medical exams would also increase the risk of infection to staff and other inmates alike. The fact that a particular inmate did not need medical care during his course of COVID-19 does not mean that he was neglected; to the contrary, it demonstrates that the inmate had symptoms for which the only treatment was continued monitoring. Tellingly, Venters met with the inmate in the isolation unit during his inspection and at no time did Venters, a medical doctor, notify anyone that the inmate needed any additional or immediate medical attention.

(iii) Testing has been limited nationally.

312. Testing throughout the country, including New York, has been limited given the lack of available tests for COVID-19. Tr. 241. In the absence of a test, symptomatic patients are

treated the same as patients, who have tested positive, namely that providers would treat or manage the patient's symptoms. Tr. 241. Tekbali explained that limited supplies of PPE and testing are not evidence of indifference, they are consistent with the very challenges facing all medical institutions of all kinds across the country as they continue to develop best practices to manage the pandemic.

(iv) Laundry does not pose any undue risk.

313. Tekbali refutes Petitioners' allegation that laundry at the MDC increases the risk of infection. Tr. 243. However, Tekbali opined that there is low risk of infection through contact with COVID-19 positive linens or patient clothing. Tr. 243.

(v) BOP's use of PPE is consistent with CDC guidance.

314. Tekbali opined that for those going about their daily activities, gloves are not required and, in fact, recommends hand hygiene through hand washing or use of sanitizers. Tr. 243, 244.

315. Venters's opinion regarding N-95 masks for patients is contrary to CDC guidance, and as Tekbali credibly testified his opinion is unheard of in the medical community. Tr. 244. Tekbali further stated that COVID-19 is transmitted primarily through "respiratory droplets" through "close contact," and that it is not an airborne virus. Tr. 244. Thus, use of a negative pressure cell, as advocated by Venters, is unnecessary and, as even Tekbali testified, her own hospital does not use negative pressure rooms for COVID-19 patients. Tr. 245. Further, neither the CDC nor Department of Health recommend placing COVID-19 patients in negative pressure rooms. Tr. 245.

316. Venters also advocated the use of booties and foot covers in his report. However, Tekbali again debunked Venters's opinion stating that booties and foot covers are not recommended as standard PPE for COVID-19 patients. Tr. 245. Further CDC guidance does not

advise use of booties and foot covers for medical staff or inmates. Tr. 245-46.

317. Further, contrary to Venters's claim, Tekbali opined that, given the national PPE shortage, masks can be reused as long as they are not soiled or broken. Tr. 246, 268.

(vi) Isolation procedures at the MDC comport with CDC guidance.

318. Tekbali opined, consistent with the BOP's approach, that a patient should be isolated if they are confirmed or presumed positive for COVID-19. Tr. 246.

(vii) Rodriguez successfully recovered from COVID-19.

319. Tekbali was aware that Petitioner Rodriguez had a positive antibody test after he left the MDC. Tr. 246. Tekbali opined that the positive test demonstrates that Rodriguez successfully recovered from COVID-19, while under the BOP's care, without complications. Tr. 246-47.[23]

(viii) COVID-19 is different from influenza.

320. Tekbali acknowledged that the BOP initially framed its COVID-19 response based on its influenza pandemic plan. Tr. 248. However, as the CDC and researchers learned more about COVID-19, they recognized that the influenza and COVID-19 are different viruses, present differently and required different isolation and PPE protocols. Tr. 248. Tekbali challenges Venters's opinion that the BOP should apply influenza protocols to COVID-19. Tr. 248.

* * *

321. Tekbali concluded that BOP's response to the pandemic at the MDC was adequate from an infection control perspective, and in line with best practices and CDC guidance – isolating inmates to the extent possible, providing masks, encouraging proper hand hygiene practices, ensuring that staff wear masks in the facility.

[23] Rodriguez's specific claims, which are now moot, are addressed *infra*.

E. The Court should credit the testimony of Prison Management Expert Dr. Jeffrey Beard that the MDC is effectively implementing policies protecting staff and inmates from COVID-19

322. Beard provided expert testimony regarding the positive steps BOP has taken at the MDC in response to the COVID-19 virus. Tr. 304-419; Ex. RR 1.

323. Petitioners failed to proffer any expert testimony from a prison management expert.

1. Beard's experience in prison management

324. Dr. Jeffrey Beard testified at the preliminary injunction hearing as a prison management expert. Tr. 304-419. Beard's expert report and CV is also in evidence. Ex. RR.

325. Beard has over forty years of experience working in correctional institutions. Tr. 305-16; Ex. SS.

326. After obtaining his Ph.D. in counseling, Beard worked as a psychological services associate, a supervisor, a deputy superintendent, and a superintendent in the Pennsylvania Department of Corrections ("PDOC"). Tr. 308-09; Ex. SS. As an acting superintendent and superintendent, Beard's role was "the same as a warden in the Bureau of Prisons"; he was "essentially a manger of a small city" and was "running the whole institution." Tr. 309; Ex. SS. He was responsible for the "inmates' care, the staff safety, and just [the] running of the whole place." Tr. 312; Ex. SS.

327. Beard then worked as a Regional Deputy and Executive Deputy of Supervision for the PDOC, where he had oversight of all of the prisons in Pennsylvania. Tr. 309. For the last ten years of his career at PDOC, he served as Secretary of PDOC, where he ran "the entire corrections department" for the state. Tr. 309. Beard was appointed to that position by Governor Tom Ridge and reappointed to that position by Governor Ed Rendell. Tr. 309. Beard oversaw a $1.8 billion budget at PDOC. Tr. 312.

328. After working as a consultant and working at the Justice Research Center at Penn State University, Governor Jerry Brown appointed Beard to be the Secretary of Corrections in California ("CDOC"). Tr. 309-11; Ex. SS. At CDOC, Beard oversaw dozens of facilities, 130,000 inmates, more than 30,000 parolees, and more than 50,000 employees. Tr. 311-12. Beard oversaw at $10 billion budget at CDOC. Tr. 312.

329. Beard, who is a member of various correctional professional organizations and has received numerous awards,[24] testified that he is "well aware" of what prisons should look like and how they should be operated, in light of his experience inspecting prisons, which includes 700 to 800 visits to prisons, and experience with emergency planning, riots and disturbances. Tr. 312, 315-16; 319-20.

330. Beard testified that he reviewed over a thousand pages of documents filed in this action, including depositions, declarations and MDC purchase orders and invoices for soap and cleaning supplies. Ex. 87; Tr. 315-20.

331. In addition to the documents reviewed, Beard conducted a site visit of the MDC, during which he inspected the same housing units that Venters visited. Ex. RR at 6-7; *see also* Tr. 326-41. During Beard's tour of the MDC on April 28, 2020, he spoke with inmates and staff. Ex. RR at 5-7; Tr. 329-30; 337.

2. Beard's inspection of the MDC

332. As set forth in his expert report, Beard testified that, when he first arrived at the MDC on April 28, 2020, he was medically screened by a staff member before entering the facility. Tr. 322-23; Ex. RR at5. The staff member took his temperature and asked him a series of questions

[24] Beard has received numerous professional awards, including the Carl Robinson Award for the Middle Atlantic States, a Lifetime Achievement Award from the Pennsylvania Prison Wardens Association, the Michael Frankie Award which is the top award given out by the Association of State Correctional Administrators, and the Distinguished Achievement Award for the Center for Evidence-Based Policy from George Mason University. Ex. SS; Tr. 313.

from a preprinted form relating to whether he suffered any COVID-19 symptoms or was exposed to anyone who had COVID-19, in addition to his recent travel to potential COVID-19 hotspots. Tr. 323. The staff member conducting the screening wore a mask, and added Beard's completed screening form to a booklet which included, as Beard observed, additional completed screening forms. Tr. 324; Ex. RR at 5.

333. Like Venters, Beard visited the health services area, the cadre unit which houses inmate who are assigned to MDC as workers, a quarantine unit, the isolation unit, and the Special Housing Unit ("SHU"). Ex. RR at 6; Tr: 325.

(i) Beard observed medical exam rooms in or near each housing unit he and Venters visited.

334. Beard began his tour of the MDC at the health services area of the facility where he observed a number of exam rooms, dental clinic, eye exam room, x-ray and treatment areas. Ex. RR at 5; Tr. 326-27. Based on his conversations with Ms. Vasquez, Beard learned that, "just as in the community at large, routine dental, and eye exams were not being conducted." Ex. RR 5. Inmates were being seen their unit's private medical exam rooms instead of the health services facility. Ex. RR 5.

335. Consistent with his expert report, Beard testified that in the housing units that he and Venters both visited, each had medical exam rooms either inside the unit or within a few feet of the unit's entrance. Tr. 323-34; 336; 337; Ex. RR at 5.

(ii) Beard observed staff and inmates at the MDC wearing masks and other PPE.

336. Beard observed that all inmates wore masks when they were outside their cells. Tr. 332; 336-37; 339; Ex. RR at 6. Similarly, Beard observed that all staff members wore masks when they were outside of their office. Tr. 326; 332; Ex. RR at 6.

337. Consistent with his expert report, Beard testified that, based on his observations during the MDC tour, nurses wore PPE including a gown, face shield, gloves and a mask while preparing to see inmates and saw another nurse enter a housing unit with a car containing both medical supplies and PPE. Ex. RR at 6; Tr. 323; 328. The quarantine unit had a sign on the door of each cell noting the date the inmate started his quarantine and they date they would complete quarantine. Ex. RR at 7: Tr. 331-32.

(iii) Beard observed adequate cleaning supplies for inmate and staff use.

338. Specifically, and consistent with his expert report and review of the documentary evidence, Beard testified that he observed bar soap in all the cells he looked into, in addition to other cleaning materials including spray bottles and liquid soap for inmates' use. Tr: 329; 332; 335; 337; 338; Ex. RR at 8. Beard also testified that inmate workers showed him the supplies MDC provides inmates to clean the common areas and their cells. Tr. 329; 331; 337; Ex. RR at 8. Beard testified that staff members showed him cleaning supplies for the inmates' use, and inmates also showed him cleaning supplies, consistent with the purchase orders and invoices. Ex. RR at 6; Tr. 316; 328; 335; 342.

339. Beard observed hand sanitizer located throughout the areas he visited for staff use, and signs regarding best practices to protect against COVID-19 was "present everywhere," in addition to substantial supplies of soap consistent with the purchase orders and invoices. Tr. 316; 328; 334-35; 342; Ex. RR at 6.

340. Beard testified that inmates and staff in all four housing units showed him "large spray bottles of what was HDQC2,"[25] in addition to "another disinfectant" used to "clean the

[25] HDQC2 is recognized by the State of New York and the Environmental Protection Agency as a disinfectant that may be used to clean surface areas to prevent the spread of the coronavirus. *See* https://www.dec ny.gov/docs/materials_minerals_pdf/covid19.pdf

common areas, to clean the computers … and the telephones between uses, and in the showers." Tr. 330; Ex. RR at 6-7. Beard also witnessed a storage room in the Special Housing Unit in which a large quantity of soap was contained. Tr. 338-39. In every unit he visited, staff reported to Beard that inmates had access to these cleanings supplies to clean their cells, and adequate cleaning supplies in general.

3. Beard concludes that the MDC is a well-run detention center

341. Beard explained that as a detention center, MDC faces unique challenges, including a transient inmate population (which includes pre-trial and post-trial inmates); inmates who are on appeal for sentences; "low, medium, minimum, [] maximum security inmates"; "gang members"; mentally ill inmates; sex-offenders; "high profile inmates." Tr. 322, 347. Beard added that transient facilities can easily show wear and damage to the facility. Tr. 322. Notwithstanding these challenges, as a result of his assessment, Beard came to the conclusion that the MDC was a "pretty darn well-run facility." Tr. 340.

342. Beard testified that based on his inspection, discussions with staff and inmates, and review of the documents in this case, that the MDC-Brooklyn is effectively implementing practices that protects inmates and staff alike from the coronavirus and that it is a clean, well-run correctional facility with dedicated professional staff with adequate PPE for staff and inmates. Tr. 340-43; Ex. Ex. RR at 10. Beard found staff "knowledgeable" regarding the MDC's response to the COVID-19 threat. Tr. 330; 331; 337; 342. Beard found the interactions between inmates and staff as positive, and indicative of inmates viewing MDC staff as resources. Tr. 330; 339. For example, in SHU, Beard witnesses inmates calling out to an MDC captain because "they obviously knew him and wanted to talk to him" and that same captain knew the inmates' names as he responded to the inmates. Tr. 339-40.

4. Beard's conclusions regarding the MDC are more credible than Venters's self-serving observations

343. Beard testified that he disagreed with Venters's opinion that staff did not wear masks, and that MDC inmates did not have masks. Tr. 343; Ex. RR at 8.

344. Beard disagreed with Venters's methodology of relying exclusively on the statements of seventeen inmates relating to the availability of soap, masks and cleaning supplies instead of taking time to "look around." Tr. 343-44; Ex. RR at 8. Beard noted that Venters did not speak with the inmates responsible for cleaning the common areas in the housing units, whereas Beard did speak to inmates who showed him their cleaning supplies. Ex. RR at 8.

345. Beard testified that the isolation unit does have a medical exam room in the immediate proximity to the isolation unit, despite Venters's conclusion that the isolation unit lacks an exam room. Ex. RR at 9.

346. Beard testified that, based on his forty-years of experience in corrections, Venters's recommendation that the MDC place hundreds of high-risk inmates in a cohort regardless of security classifications as not feasible, and from "a security perspective, it would be almost impossible to do." Tr. 347. Consistent with his report, Beard testified that the diverse nature of the MDC inmate population would make this impractical, and that he "had a serious problem with" Venters's recommendation. Tr 346; Ex. RR at 9. Beard testified that the MDC, as a detention center, has pretrial inmates, inmates with differing security classifications, cadre inmates, minimum, low, medium and maximum-security inmates, including gang members who may need to be separated, in addition to sex offender inmates, mentally ill inmates, and others may be vulnerable or in a high-profile case. Ex. RR at 9. Beard, based on his decades-long career in prison management, testified that if, per Petitioners' allegation that "maybe 20 to 25 percent of the

population [is] high risk [for COVID-19 infection] to now to try to cohort them all together and to maintain things from a security perspective, it would be almost impossible to do." Tr. 347.

347. Nor could Beard comment on Venters's statement that he was able to place adolescent inmates in a cohort in facilities maintained at Rikers Island because Venters had not quantified the size of the cohort in his testimony. Instead, Beard concluded that placing 20-25 percent of the MDC's population, as the Petitioners ask this Court to order the MDC to do, in a cohort was not feasible based on security concerns. Tr. 347.

VIII. The Remaining Petitioners Should Not Be Released from MDC

348. At the conclusion of the preliminary injunction hearing, the Court noted that it "would be disinclined to order the release of the [inmate Petitioners]." Tr. 549. The Court added:

> I just don't think the record suggests, setting aside any type of PLRA obstacles or other obstacles that might exist. I wouldn't conclude from this record that there are no things in the [MDC] that could be safe for the individuals at the MDC[;] that's not even something that Dr. Venters argued[.] [T]hat's not a conclusion that I'm inclined to draw at this point in this case.

Tr. 549.

A. Elodia Lopez's claims do not amount to an Eighth Amendment violation

1. Lopez's Criminal History

349. Lopez, who is 55 years old, arrived at the MDC on January 15, 2020. Lopez is scheduled to be released on July 28, 2020. Am. Petition, Prayer for Relief.

350. On June 22, 1994, Lopez pled guilty to conspiracy to possess with intent to distribute and distribute marijuana, in violation 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(C). Ex. VVV. At the time of her guilty plea, Lopez was free on bail, but she failed to appear for sentencing, and remained a fugitive from December 30, 1994 until her arrest on June 13, 2019. Ex. VVV.

2. Lopez's pending compassionate release application

351. By email request dated March 24, 2020 addressed to "AW Custody," Lopez requested compassionate release complaining of untreated pain in her left toe, sensitivity to cleaning materials and not knowing what is inside the "sprays" the inmates clean with, need for a mask, and fear that her lungs may collapse. Ex. UUUU.

352. On April 9, 2020, the Federal Defenders filed an emergency motion to reduce Lopez's sentence under 18 U.S.C. § 3582(c)(i) before her sentencing judge, Judge Frederick J. Scullin, Jr. in the Northern District of New York. *United States v. Elodia Lopez*, No. 93-cr-306 (N.D.N.Y.), Ex. WWW; Ex. QQQ.

353. Initially, the Government opposed Lopez's motion for compassionate release because she had not exhausted her remedies before the BOP. Ex. VVV. As of April 30, 2020, the date the BOP denied Lopez's request for compassionate release, Lopez's motion for compassionate release became ripe for her sentencing judge's consideration. Ex. UUU. To date, the court has not issued his decision. *United States v. Elodia Lopez*, No. 93-cr-306 (N.D.N.Y.).

3. Lopez receives consistent and adequate medical care at the MDC

354. Lopez's medical records demonstrate that she has received consistent and adequate medical care at the MDC.

355. BOP completed Lopez's intake screening at MDC on January 15, 2020. Her history and physical evaluation was conducted on February 7, 2020. Ex. ZZZ at MDC 78-109. [redacted]

356. [redacted]

[redacted]

357. [redacted]

[redacted]

358. [redacted]

[redacted]

359. [redacted]

[redacted]

[26] Lopez was counseled as to how to use the sick call system and is aware of how to use it. Ex. XXX at MDC 72.

[redacted]

360. [redacted]

[redacted]

361. [redacted]

[redacted]

362. [redacted]

[redacted]

[redacted]

363. Petitioners' statement during summations on May 14, 2020 that Lopez is experiencing "flu-like symptoms" has no evidentiary support in Lopez's medical records. Tr. 489.

[redacted]

Petitioners have put forth no evidence that Lopez complains of flu-like symptoms at the MDC, because none exist.

364. Accordingly, Lopez has complained of no untreated COVID-19 symptoms and Petitioners' counsel's statement during summation that Lopez runs the risk of not receiving medical care at the MDC, despite receiving consistent care since she arrived in January 2020, is without any basis in the record.

365. Lopez has access to soap, cleaning supplies, and masks for her use. Lopez received a surgical mask in early April and three cloth masks on April 28. Ex. ZZ at 4. Lopez has made multiple purchases in the commissary, including soap, so she knows she has that option. Lopez has not made any recent soap purchases which establishes that she has a sufficient supply of soap for her to use. Ex. GGG.[27]

B. James Hair's claims do not amount to an Eighth Amendment violation

1. Hair's Criminal History

366. Hair is twenty-nine years old. Am. Pet. ¶ 13. His term of incarceration is set to expire on August 15, 2026. Am. Pet. ¶ 94.

367. Following his guilty plea to conspiracy to distribute and possess with intent to distribute cocaine, Hair was sentenced to 117 months imprisonment and a five-year supervised

[27] In her Declaration, Associate Warden Caryn Flowers stated that because Lopez is a volunteer laundry orderly, she is permitted to shower before and immediately after her shift and is given gloves for her work. Ex. III.

release term. *United States v. Hair*, 780 F. App'x 86 (4th Cir. 2019). On October 21, 2019, the Fourth Circuit dismissed Hair's appeal of his conviction ruling that Hair "knowingly and voluntarily waived his right to appeal his conviction and sentence, except as to any sentence in excess of the statutory maximum." *Id.*

368. On April 20, 2020, Hair filed a 28 U.S.C. § 2255 habeas petition to set aside his conviction on ineffective assistance of counsel grounds. *United States v. James Hair*, No. 93 CR 306 (FJS) (D. Md.), Dkt. No. 60.

2. Hair receives consistent and adequate medical care at the MDC

369. Hair's medical records demonstrate that he has received consistent and adequate medical care at the MDC. Ex. NNNN.

370. Hair reports having multiple sclerosis. Am. Pet. ¶ 94. [redacted]

371. [redacted]

372. [redacted]

[28] In July 2019, at a prior BOP facility, Hair failed to report to health care services for his scheduled appointment in response to his sick call request. Ex. NNNN at MDC 419, 421.

[redacted]

373. [redacted]

374. [redacted]

375. [redacted]

376. [redacted]

377. [redacted]

378. [redacted]

379. [redacted]

380. [redacted]

[redacted]

381. [redacted]

382. [redacted]

383. [redacted]

384. [redacted]

385. [redacted]

386. [redacted]

C. Ayman Rabadi's claims do not amount to an Eighth Amendment violation

387. As discussed further below, Rabadi is scheduled to be released from the MDC this week, at which point he will be transferred to a residential reentry center, commonly referred to as a halfway house. Ex. AAAA. Rabadi remains at the MDC under quarantine until he leaves this week. Ex. AAAA. Rabadi's habeas petition will be moot once he leaves the MDC.

1. Rabadi's criminal history

388. As background, on October 19, 2018, U.S. District Judge Kenneth M. Karas of the Southern District of New York issued an arrest warrant for Rabadi based on a Petition for Violation of Supervised Release. Rabadi had been serving a term of supervised release after having served a three-year term of imprisonment for his conviction, in June 2014, of engaging in a wire fraud scheme that involved impersonating a federal officer. *United States v. Rabadi*, No. 13 Cr. 353 (KMK), Dkt. No. 87 (hereinafter "Rabadi Dkt. No. __").

389. On May 31, 2019, Rabadi pled guilty to violating the terms of his supervised release by committing wire fraud in violation of 18 U.S.C. §§ 1343 and was sentenced to twenty-four months in prison for the violation of supervised release, which was the statutory maximum. Rabadi Dkt. Nos. 82, 94.

2. The Court denies Rabadi's request for compassionate release

390. On April 3, 2020, Rabadi filed a motion seeking compassionate release based on his concerns related to being exposed to COVID-19 at the MDC before Judge Karas, who had previously sentenced Rabadi. Rabadi Dkt. No. 84.

391. On April 14, 2020, Judge Karas denied Rabadi's motion without prejudice after determining that the court lacked authority to order the relief Rabadi sought under the compassionate release statutory provision, 18 U.S.C. § 3582(c)(1)(A), because he had failed to exhaust his administrative remedies. Rabadi Dkt. No. 94; *United States v. Rabad*i, No. 13 Cr. 353, 2020 WL 1862640, at *1 (S.D.N.Y. Apr. 14, 2020). The court denied Rabadi's "application without prejudice to renewal if the BOP does not act upon his request within thirty days of its receipt." *Id.* at *4.

392. On May 4, 2020, Rabadi filed a letter renewing his motion for compassionate release. Rabadi Dkt. No. 95.

393. On May 9, 2020, the Government informed Judge Karas that Rabadi was scheduled to be transferred from the MDC to a halfway house on or about May 19, 2020, and that in anticipation of his transfer, Rabadi had been placed in quarantine for 14 days. Rabadi Dkt. No. 98.

394. On May 11, 2020, Rabadi responded by asking that Judge Karas place him in home confinement immediately and to cut short his quarantine at the MDC. Rabadi Dkt. No. 100. In support, Rabadi complained of a recent, untreated, heart-attack like symptoms at the MDC. *Id.*

395. In response, the Government filed Rabadi's redacted medical records reflecting his May 5, 2020, MDC encounter with health services. Rabadi Dkt. No. 101-2. Rabadi's counsel had failed to provide these records to Judge Karas. Rabadi Dkt. No. 101-2.

396. Rabadi's medical records establish that the MDC evaluated Rabadi on May 5 regarding his chest pain and reflected, "[d]iagnosis could have possibly been anxiety vs. cardiac," he was "stable enough to return to the housing unit," and an EKG was performed which showed "no significant changes since last one on file from 08/09/2015." Rabadi Dkt. No. 101-2. Moreover, Rabadi acknowledges that he declined to go to the hospital to rule out cardiac disease, as is documented in the same records, including in a form in which Rabadi expressly stated that he was rejecting medical advice. Rabadi Dkt. No. 101-3.

397. On May 12, 2020, Judge Karas denied Rabadi's May 11 motion to be released to home confinement and in advance of his quarantine's conclusion at the MDC. Rabadi Dkt. No. 102. Judge Karas held that:

> [g]iven the fact that BOP is transferring Mr. Rabadi to an RRC on May 19, 2020, that he will then be set up by Probation for home confinement, and that he is to be in quarantine until then, the only question is whether he should be released before May 19. The argument he makes is that he can quarantine at home. However, that suggestion ignores the risk that releasing Mr. Rabadi before the end of his quarantine time would jeopardize the employees at the RRC and at the Probation Department. While Mr. Rabadi has been complaining of chest pains, there is no evidence that his complaints are being ignored. Therefore, the application to expedite Mr. Rabadi's release before 5/19/20 is denied.

Rabadi Dkt. No. 102.

398. Since Judge Karas has already denied Rabadi's request for release based on his conditions of confinement, the Petitioners' request that this Court order Rabadi's release based on the conditions of his confinement is now moot. As acknowledged by Judge Karas, there is no dispute that Rabadi received medical care at the MDC. *Id.*

3. Rabadi receives consistent and adequate medical care at the MDC

399. Rabadi's medical records demonstrate that he has received consistent and adequate medical care at the MDC. Ex. QQQQ.

400. Rabadi arrived at the MDC on December 12, 2019. Ex. QQQQ. [redacted]

[redacted]

401. [redacted]

402. [redacted]

403. [redacted]

404. [redacted]

405. [redacted]

406. [redacted]

407. [redacted]

[29] T[redacted]

[redacted] On May 5, 2020, Rabadi was seen by the MDC in connection with his complaint for chest pains with a diagnosis that Rabadi's complaints "could have possibly been anxiety vs. cardiac," he was "stable enough to return to the housing unit," and an EKG was performed which showed "no significant changes since last one on file from 08/09/2015." Rabadi Dkt. No. 101-2. Rabadi executed a form showing he refused to be sent to a hospital in connection with his chest pains. Rabadi Dkt. No. 101-3.

D. Justin Rodriguez's claims do not amount to an Eighth Amendment violation and are moot

408. At the time this action was commenced, Rodriguez was twenty-six years old and his term of incarceration was set to expire on June 9, 2020. Am. Pet. ¶¶ 11; 89. Rodriguez alleges he is at risk for a COVID-19 infection because of his "significant health problems," namely, asthma. Pet. ¶ 89.

409. Rodriguez was released from the MDC on April 26, 2020, and is currently in home confinement. Ex. 76. Although he is not incarcerated at the MDC, Petitioners' counsel decided not to call Rodriguez to testify at the preliminary injunction hearing.

410. On or about July 25, 2016, Rodriguez was charged in a 12-person superseding indictment for participating in a drug-trafficking organization that operated in and around the New York City area. Rodriguez was charged in two counts: conspiracy to distribute and to possess with the intent to distribute 5 kilograms and more of cocaine, 280 grams and more of crack cocaine, a detectable quantity of heroin, and marijuana, in violation of Title 21, United States Code, Sections 841(b)(1)(A), (C), (D), and 846 (Count One); and, firearms trafficking, in violation of Title 18, United States Code, Section 922(a)(1)(A) (Count Two). *United States v. Justin Rodriguez*, SDNY, 16-Cr.-167, ECF No. 47 (hereinafter "Rodriguez Dkt. __").

411. On June 21, 2017, Rodriguez pled guilty to a lesser-included offense of Count One of Indictment S1, and admitted to participating in a conspiracy to distribute cocaine, in violation of 21 U.S.C. § 841(b)(1)(C) and 846. Rodriguez Dkt. 6/21/17 Entry. On September 29, 2017, the court sentenced Rodriguez to 57 months' imprisonment. Rodriguez Dkt. 179. The court explained that Rodriguez's conduct was "exceeding[ly] serious," because of the "incredible danger" posed by his activity, *i.e.*, "this defendant possessed a loaded firearm, threatened violence in connection with drug dealing, and sold firearms to other members of the community." Rodriguez Dkt. No. 179, Sentencing Tr. 10-11.

412. On March 27, 2020, Rodriguez submitted a letter to the Respondent requesting home confinement to reside with his mother in Staten Island, New York, under 18 U.S.C. § 3624. Rodriguez Dkt No. 329- 2.

413. Respondent denied the request because Rodriguez was ineligible for home confinement based on his status as a holdover inmate. *Id.* Construing Rodriguez's request as one for compassionate release under 18 U.S.C. § 3582, Respondent denied it finding that Rodriguez had not identified any significant changes to his medical condition reflecting a "terminal or debilitated medical condition." *Id.*

414. On April 5, 2020, Rodriguez filed a motion for compassionate release under The First Step Act, 18 U.S.C. § 3582(c)(1)(A)(i), or, in the alternative, home confinement, and sought "to modify his sentence to time served or immediately release him to home confinement for the remainder of his term of incarceration to be followed by the previously imposed period of supervised release" based on the threat of COVID-19. Rodriguez Dkt. No. 329 at 1.

415. In his compassionate release motion, Rodriguez did not allege that the MDC failed to provide him with adequate medical care.

416. By Order dated April 14, 2020, Judge Preska denied Rodriguez's motion. Rodriguez Dkt. No. 335. Judge Preska noted that Rodriguez had been disciplined multiple times during his incarceration at MDC. *Id.* at 4. Judge Preska noted that:

> [Rodriguez] has offered no evidence to suggest the MDC and the BOP more broadly are not taking seriously the pandemic or his own personal medical history. To the contrary, as set out in the Government's papers, the BOP has made significant efforts to respond, and these measures have provided quite successful so far. As of April 7, the MDC – where Rodriguez is housed – reported a total two inmates who tested positive for COVID-19. The MDC houses 1,734 total inmates. [] That means that approximately 0.12% of MDC inmates have been confirmed to have COVID-19.

Id. at 7.

417. Furthermore, Judge Preska recounted the steps BOP and the MDC has taken to address the COVID-19 threat and concluded that:

> [The steps taken by BOP] belie any suggestion that the BOP is failing meaningfully to address the risks posed by COVID-19 or take seriously the threat the pandemic poses to current inmates. To the contrary, it shows that the BOP has taken the threat very seriously, and has mitigated it to an extraordinary degree.

Id. at 8.

418. The court then concluded that Rodriguez had "not set forth a basis to believe that there are extraordinary and compelling reasons for him to be released early" because "[a]ll he has done is to note that he has asthma, he is in prison, and there is a COVID-19 outbreak nationwide" which "is not enough." *Id.* at 9.

419. With respect to Rodriguez's request for home confinement, Judge Preska denied that request concluding that BOP "not the [c]ourt, has the sole authority to prescribe home confinement post-incarceration" under 18 U.S.C. § 3624(c). *Id.* at 11.

420. In addition, Judge Preska ruled that BOP:

> with its professional medical staff and its systemic measures to address the spread of COVID-19, is well situated to make a determination as to whether Rodriguez

> should be eligible for home confinement, consistent with the Attorney General's Memorandum for Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic (March 26, 2020), or could otherwise be accommodated at the facility. This is especially so because the BOP staff at the MDC are uniquely situated to understand the circumstances in the facility; the risk to Rodriguez; and whether, if other defendants who are deemed at high risk of COVID-19 and who would qualify under other release programs are released to home confinement, there is a way to accommodate Rodriguez at the MDC in a safe manner.

Id. As Rodriguez has been released, his claims are moot.

E. The named Petitioners lack commonality and typicality with other putative class members

421. Each named Petitioner stands in a unique procedural and factual posture. Ex. LLL (Vasquez Decl.) (Dkt. No. 80) ¶¶ 24-42, 43-66, 67-76.

422. Indeed, the proposed class members do not even have similar medical backgrounds, as they all have vastly different risk profiles for COVID-19 based on preexisting conditions, age, and a host of other factors. *See* CDC Guidance, People Who are at Higher Risk for Severe Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html. The Court acknowledged these myriad issues at the April 1st TRO hearing; this Court questioned if Petitioners' action could be "an appropriate class action when there are . . . individual issues that would go to release, individual issues that could go to the medical circumstances." *See* April 1, 2020 Tr. 113:3-6.

423. Three of the named Petitioners (Chunn, Rodriguez, and McBride) are not even members of the proposed class, as they have been released from the MDC.

424. It would thus be impossible to objectively ascertain the members of this proposed class, particularly since the class as defined by Petitioners is not limited to certain inmates at MDC, but instead defines the class as "all current *and future people* detained at MDC and the subclass of all current *and future medically vulnerable people* detained at MDC." Pet. Mot. 31 (Dkt. No. 73). This requirement makes the proposed class a moving target, especially as consideration for

inmates' requests for bail, compassionate release, or other forms of relief from incarceration remain ongoing, and inmates are receiving such relief from their sentencing judges.[30]

IX. The Statements of Non-Party Declarants Do Not Support the Need for a Preliminary Injunction

A. The non-party inmate declarations are insufficient to show an Eighth Amendment violation

425. The non-party inmate declarations are vague and contain hearsay (and often double, or even triple, triple) hearsay. Indeed, a number of the declarants refer to unnamed inmates who allegedly had symptoms without any information relating to when they had symptoms.

426. At the same time, many non-party inmate declarations confirm that staff are wearing masks, and that the declarants themselves receive both masks and cleaning supplies. Many of the non-party declarants confirm that they do not, and have not, suffered any untreated COVID-19 symptoms. Below is a response to Petitioners' assortment of non-party inmate declarations:

427. On April 20, inmate Judie Olivera claims an officer watching us overnight "had COVID-19" and was still allowed to work because "she heard about it" from "another officer talking on the phone." Ex. 29 at ¶ 9. Olivera otherwise confirms she has no untreated COVID-19 symptoms. Ex. 29.

428. Former named Petitioner Hassan Chunn, who was released from MDC on April 8, 2020, confirms that he received a mask on April 5, "medical staff had face shields and gowns" and staff wore surgical masks. Ex. 66 at ¶¶ 9, 16. Chunn stated that he received a mask on April 5, three days before he left the MDC, and confirms that staff wore masks. Ex. 66 at ¶ 16, 9. The parties have agreed that Chunn's claims are moot and that he should be dismissed from this case.

[30] Respondent incorporates his opposition to Petitioners' motion for class certification herein. Dkt. Nos. 79-83.

Dkt. Entry dated May 13, 2020.

429. According to a statement provided by inmate Rasheen Richardson (Ex. 60 at 1), dated April 20, 2020, addressed to Petitioners' counsel who, apparently, had solicited "information [from MDC inmates] in regards to the condition here at MDC," Richardson does not complain of any untreated COVID-19 symptoms, but instead confirms that medical staff "comes around 1 to 2 times a day to check temperatures" Ex. 60 at 2.

430. By declaration dated April 20, 2020, inmate Cesar Castillo complains of not having a mammogram performed, but does not complain about untreated COVID-19 symptoms. Ex. 59 at 1.

431. By declaration dated April 29, 2020, inmate Latie Whitley complains of no COVID-19 symptoms or lack of medical care, and does not know if inmates in his unit have symptoms. Ex. 57 at ¶¶ 5, 14.

432. By declaration dated April 28, 2020, inmate Marco Batista writes that most staff wear masks; Batista has a mask; staff in his unit do not seem sick; and Batista complains of no untreated COVID-19 symptoms or sick calls he has placed in connection with COVID-19 symptoms to which he has received no response. Ex. 53 at ¶¶ 5, 14.

433. By declaration dated April 27, 2020, inmate Jason Singer confirms that once a week inmates are given masks; Singer adds that he was tested at the MDC for COVID-19 and his test was negative. Ex. 54 at ¶¶ 12, 7.

434. By declaration dated April 17, 2020, inmate Radhys Molina writes that "[o]rderlies are coming to collect garbage and are wearing masks" and staff "are wearing masks"; Molina complains of no untreated COVID-19 symptoms. Ex. 52 at ¶¶ 12, 14.

435. By declaration dated April 24, 2020, inmate Jamel Roberts confirms that inmates

in his unit "get new masks once a week"; reports no untreated COVID-19 symptoms (despite having asthma); and also reports having completed a period in quarantine because his cell was next to two inmates whom he believes tested positive for COVID-19. Ex. 56 at ¶¶ 5, 7.

436. By declaration dated April 29, 2020, inmate Thomas J. Miller does not complain of untreated COVID-19 symptoms, and confirms that, as an orderly, he was given a gown and gloves and goggles, and has separately received soap and masks. Ex. 47 at ¶ 6. Miller's declaration merely refers to an unnamed inmate "transferred into the unit from outside the facility" who coughed and complained of COVID-10 symptoms but gives no other identifying information such as date. Ex. 47 at ¶ 4.

437. On May 4, 2020, inmate Dino Sanchez complains of no untreated COVID-19 symptoms. Ex. 51.

438. By declaration dated April 21, 2020, inmate Dana Dray McCann confirms that he receives soap and a mask each week and that staff wear mask. Ex. 50 at ¶¶ 6, 8, 12. In addition, McCann confirms that orderlies in his unit wear masks and that trash bags are available for inmates' trash. Ex. 50 at ¶ 11.

439. By declaration dated April 17, 2020, inmate Hector Soria does not complain of untreated COVID-19 symptoms. Ex. 48.

440. By declaration dated April 20, 2020, inmate Hugh Brian Haney confirms the MDC gives him a mask each week and expressly stated he has no COVID-19. Ex. 49 at ¶¶ 8, 13.

441. By declaration dated April 20, 2020, inmate Ronell Watson complains of no untreated COVID-19 symptoms and confirms that he has received soap and masks. Ex. 45 at ¶¶ 8, 10.

442. By declaration dated April 21, 2020, inmate Richard Drayton complains of no

untreated COVID-19 symptoms and confirms receipt of masks and receipt of cleaning disinfectant. Ex 42. Drayton states that he "heard that an inmate" was taken to SHU with symptoms of the virus, but provides no further detail. Ex. 42 at ¶ 11.

443. By declaration dated April 24, 2020, inmate Kawain Nelson confirms that inmates in his unit that show symptoms consistent with COVID-19 "are taken off the unit." Ex. 36 at ¶ 14. He confirms receipt of a mask. *Id.* at ¶ 10.

444. Yasser Andre Platt confirms that he received a mask and receives a new one weekly, and complains of no untreated COVID-19 symptoms. Ex. 37 at ¶¶ 8, 11.

445. By declaration dated April 28, 2020, Derrilyn Needham, an inmate in the female housing unit, confirms that she has received masks, and as of April 28, Needham states that the MDC will give female inmates one mask each day. Ex. 33 at ¶ 10. Needham confirms that orderlies in the unit receive "large yellow cleaning gloves" to clean the female housing unit. *Id.* at ¶ 11. Needham also receives weekly soap, and several bottles of cleaning solution to clean the dormitory area. *Id.* at ¶¶ 12, 15. Needham requested a COVID-19 test but was denied an exam after being examined by MDC medical staff. *Id.* at ¶¶ 19-27. Needham, through counsel, sought a court order compelling the MDC to test her for COVID-19. *Id.* at ¶¶ 24-29. On May 15, 2020, Judge William H. Pauley, III, denied Needham's request for emergency medical attention in the form of a COVID-19 test. *United States v. Derrilyn Needham*, -- F. Supp. 3d. --, 2020 WL 2512105, at *1 (S.D.N.Y. May 15, 2020). Judge Pauley construed her request as one brought under 28 U.S.C. § 2241, and ruled that venue did not lie in the Southern District of New York, but even if it did, the court declined to disturb the BOP's decision regarding Needham's medical treatment at the MDC. *Id.* at *3. In response to Needham's April 28, and April 29 requests for a COVID-19 test, and her April 24 request for emergency medical attention at the MDC, Judge

Pauley also noted that Ms. Needham had received medical care from MDC staff on April 27, May 1, May 2, and May 3 and at each exam, providers using their clinical judgment, determined that Needham did not meet the diagnostic criteria for COVID-19 testing. *Id.* at *1. Judge Pauley reasoned that "[g]ranting Needham's request would interfere with the internal management of MDC" and that the "BOP has its own protocols for managing infectious diseases" and that medical care for inmates includes "the sort of issues that the Supreme Court has instructed courts to ordinarily defer to corrections officials' expert judgment." *Id*. at *3 (internal citations omitted).

B. Anthony Sanon's declaration should be afforded no weight

446. Petitioners rely on the declaration of Senior Officer Specialist Anthony Sanon ("Sanon") to support their allegations. As discussed below, Sanon's declaration should be afforded no weight by the Court.

447. Sanon did not report to work at MDC from December 1, 2019, through February 18, 2020. Ex. WWWW at ¶ 17. Since February 2020, Sanon's access to the MDC has been limited because, at Sanon's request, he was placed on "Limited Light Duty" ("LLD"). Ex. WWWW at ¶¶ 20-21.

448. LLD is a type of assignment offered to staff who have suffered an injury and who cannot fulfill the obligations of their assigned post. LLD assignments help ensure the safety of staff, inmates, and the institution by acknowledging staff may be ill-equipped to respond to emergencies due to health issues. Ex. WWWW at ¶ 20. All LLD assignments for staff are based on the medical concerns each employee presents and is designed to ensure their own safety, as well as all staff present in the institution. Ex. WWWW at ¶ 21.

449. On February 6, 2020, Sanon was offered an LLD assignment at MDC in response to his claim that he sustained an on-the-job injury/illness on September 11, 2019. Ex. WWWW at ¶ 21. Sanon accepted this LLD assignment on February 19, 2020. Ex. WWWW at ¶ 21.

450. As part of his LLD assignment, BOP assigned Sanon to the West Front Lobby as a "#3 Officer." The #3 Officer typically interfaces with incoming individuals. This includes greeting visitors and attorneys, issuing lockers for personal effects, checking the roster program to make sure visitors are approved. There is limited mobility required by this position and it allows Sanon an opportunity to rest in accordance with his medical needs. Ex. WWWW at ¶ 21.

451. Under the terms of his LLD assignment, Sanon is prohibited from entering the secure confines of the institution and responding to emergency situations and he is legally bound to abide by his medical restrictions at all times. Ex. WWWW at ¶ 22.

452. Since his return to work on February 19, 2020, and pursuant to his LLD status, Sanon is not permitted to enter MDC whether on official union time or during his assigned shift. Ex. WWWW at ¶ 23.

453. Sanon's schedule has been adjusted to prevent him from having to proceed past the control center, into the secure confines of the MDC, including inmate housing units. All LLD assignments for all staff are based on the medical concerns each employee presents and is designed to ensure their own safety, as well as all staff present in the institution. Ex. WWWW at ¶ 23.

454. According to MDC's Acting Safety Manager, Tristan Rohlfs, who provided a declaration dated May 11, 2020 in response to Sanon's allegations regarding the lack of PPE for staff at the MDC (Ex. XXXX), the MDC's safety department orders and provides surgical masks, N-95 respirator masks, soap, hand sanitizer, and disinfecting chemicals for the institution and institutional staff. Ex. XXXX at ¶ 1.

455. In November 2019, MDC's safety department purchased more than 80 cases of hand soap for staff. Each case contains twelve 1,000 mL cartridges of soap. As of May 11, 2020, at least 30 cases remain, and there is no current need to purchase additional hand soap.

Accordingly, contrary to Sanon's allegations, MDC has ample soap in stock to provide to staff in common areas of the institution. Ex. XXXX at ¶ 4.

456. MDC received 75 hand sanitizer dispensers on April 7, 2020 from a vendor. Staff installed and filled them simultaneously during the week of April 7, 2020. Since their installation, the safety department refills the dispensers periodically, by request or on an as needed basis. Contrary to Sanon's allegations, these dispensers were not filled for the first time on April 22, 2020. Instead, they were filled three weeks before the date he claims, and as needed thereafter. Ex. XXXX at ¶ 75.

457. As of March 11, 2020, MDC's inventory of PPE included 1,000 surgical masks and 6,500 N-95 respirator masks. Ex. XXXX at ¶ 6.

458. The safety department has provided, and continues to provide, surgical masks to the correctional services department for distribution to all staff. Ex. XXXX at ¶ 7.

459. During and throughout this pandemic, MDC's safety department has obtained at least 15,000 surgical masks from the Northeast Regional Office. These masks are distributed to staff, and they must sign to acknowledge receipt. Ex. XXXX at ¶ 8.

460. MDC's safety department has obtained cloth masks from UNICOR -- the BOP's prison industry -- to distribute to staff. During the week of April 27, 2020, three cloth masks were issued to staff. These masks have been issued BOP-wide in accordance with CDC guidelines. They are washable and reusable. Since these were provided, MDC has slowed down on the provision of surgical masks to staff in an effort to guard the supply for potential future needs. Ex. XXXX at ¶ 9.

461. During and throughout this pandemic, MDC's safety department has purchased at least 1,000 additional N-95 respirator masks. MDC's safety department has also obtained at least 1,000 N-95 respirator masks from the BOP's Northeast Regional Office. Ex. XXXX at ¶ 10.

462. These N-95 respirator masks are provided by the safety department to the correctional services department for distribution to fit-tested individuals working housing units subject to isolation and quarantine. Ex. XXXX at ¶ 11.

463. The Occupational Safety and Health Administration ("OSHA") mandates that fit testing occur before staff can be issued an N-95 respirator mask. Ex. XXXX at ¶ 12.

464. OSHA's Respiratory Protection Standard is codified in 29 C.F.R. § 1910.134. This standard requires three elements for staff to properly utilize an N-95 respirator mask: (1) medical clearance, (2) training; and (3) fit-testing. Currently, at MDC, staff have the opportunity to be fit-tested by Safety staff four days per week. Ex. XXXX at ¶ 13.

465. Staff must first fill out a questionnaire, providing information to a licensed health care provider regarding any conditions that would preclude them from wearing a respirator. Ex. XXXX at ¶ 14. Once medically cleared, staff will then receive training on proper donning and offing procedures, types of respirator masks, limitations of the respirator masks, and other relevant information. Ex. XXXX at ¶ 14. Finally, staff must complete a fit-test with the same make, model, and type of respirator that would be provided by the facility. Ex. XXXX at ¶ 14. Fit-testing ensures that users are receiving the expected level of protection by minimizing any contaminant leakage into the facepiece. Ex. XXXX at ¶ 14.

466. The OSHA respirator standard prohibits tight-fitting respirators to be worn by workers who have facial hair that comes between the sealing surface of the facepiece and the face of the wearer. Facial hair that lies along the sealing area of a respirator, such as beards, sideburns,

or some mustaches, will interfere with respirators that rely on a tight facepiece seal to achieve maximum protection. Ex. XXXX at ¶ 15.

467. Upon information and belief, Sanon has not been properly fit-tested in at least the last three years at MDC. Sanon has indicated that he has not shaved—and will not shave—in order to be fit-tested. Ex. XXXX at ¶ 16.

468. MDC cannot accept donated PPE because the safety department cannot verify the protection factor or proper fit of the equipment provided. Ex. XXXX at ¶ 17.

469. In May 2020, the safety department has provided disinfectant wipes to be placed outside both the East and West Control Centers, so staff may sanitize any equipment obtained and utilized during their assigned shift. Staff have been advised that equipment can and should be disinfected throughout the day, but at a minimum, staff can utilize these disinfectant wipes prior to turning their equipment in at the end of their assigned shift. Ex. XXXX at ¶ 18.

470. Sanon alleges that there is "no system in place to warn Correction Officers when they have worked closely with other staff who test positive." Ex. 79 at ¶ 9. But Sanon's allegation is unsupported. When a staff member tests positive, MDC's Health Services is responsible for conducting contact investigations of the close contacts of the positive staff member. Ex. YYYY at ¶ 3. Through this investigation, BOP informs those who may have had close contacts with the positive individual of the potential for infection. Ex. YYYY at ¶ 3. MDC's Health Services advise the staff members they should self-monitor for symptoms while at home and at work. Ex. YYYY at ¶ 3. Additionally, MDC asks staff members to conduct temperature checks twice daily, monitor their symptoms, practice good hand hygiene, and wear a mask. MDC asks staff members to tell their supervisor immediately, and to go home if their condition changes while at work. Ex. YYYY, ¶ 3. Consistent with privacy regulations, the MDC does not share information regarding the

identity of staff members who test positive for COVID-19 with other staff (including Sanon) or inmates. Ex. YYYY at ¶ 4.

471. Sanon's lack of knowledge of the work of BOP officials in response to COVID-19 renders his declaration meritless.

CONCLUSION

The credible evidence in this action establishes that Respondent has not been deliberately indifferent to the needs of Petitioners and that Petitioners cannot meet any of the standards for the preliminary injunctive relief that they seek. For the foregoing reasons, the Court should deny Petitioners' motion for a preliminary injunction, deny Petitioners' request for class certification and grant the Respondent any such other and further relief as this Court may deem proper and just.

Dated: Brooklyn, New York
May 19, 2020

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May 19, 2020

By ECF (w/ enclosure)

Honorable Rachel P. Kovner
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Chunn, et al. v. Warden Derek Edge,*
Civil Action No. 20-cv-1590 (Kovner, J.) (Mann, M.J.)

Dear Judge Kovner:

Enclosed please find Respondent's Post-Hearing Proposed Findings of Fact. Respondent respectfully informs the Court that this filing contains a limited number of redactions; these redactions are displayed where the proposed Findings of Fact reference the contents of exhibits containing confidential medical information, which have already been submitted to the Court under seal. *See* Transcript of Preliminary Injunction Hearing, p. 431:5-9 (filing certain medical records under seal).

Respondent will file, under separate cover, a motion requesting leave to file an unredacted version of his Proposed Findings of Fact under seal.

Respectfully submitted,

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