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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO/OAKLAND DIVISION

ALAMEDA COUNTY MALE PRISONERS And Former Prisoners, DANIEL GONZALEZ, et al. on behalf of themselves and others similarly situated, as a Class, and Subclass **PLAINTIFFS,** vs. **ALAMEDA COUNTY SHERIFF'S OFFICE**, et al **DEFENDANTS.**	No. 3:19-cv-07423 JSC **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** DATE: Dec. 31, 2020 TIME: 9:30 a.m. COURTROOM: E, 15th Floor Hon. Jacqueline S. Corley, Presiding

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I. INTRODUCTION

Plaintiffs, male prisoners of Santa Rita Jail, unable to tolerate the unsanitary conditions, the unsafe and unsanitary food engaged in a strike in October, 2019, over these conditions and other conditions. ECF 1 ¶4[1] Following the strike, they initiated this lawsuit in November, 2019. Among their complaints was the unsanitary conditions at Santa Rita Jail, including contaminated and inedible food. ECF 1; ¶¶ 5d, 16, 69, 71, 78, 106. Despite the one year interval, the jail's practices have not improved, and in some instances, deteriorated, particularly the problems with tainted and contaminated food. The issue of contaminated food is not new. It was raised by women prisoners of Santa Rita Jail in the matter of *Mohrbacher et al. v. Alameda County Sheriff's Office, et al.* No. Dist. Cal. Case No: 3:18-cv-00050-JD, which was filed in January, 2018.

The problems of unsanitary food preparation is compounded by poor handling of the food after the preparation, so that too often, food served to inmates is spoiled, or had been left in the warming oven for so long that the food is so dry and hard, it can't be chewed, and is therefore inedible. Lastly, even when all these gauntlets are passed, the lack of quality control results in inadequate portion size, and missing items on the trays. These poor, unsanitary practices coupled with poor organization practices results at significant hunger, weight loss, gastroenteritis, lack of energy and potentially more serious health consequences. This motion does not delve into the issues of the menu itself being insufficient and non-compliant with state standards, when the very basics, such as sanitation, food safety, and being edible are not being met.

Plaintiffs have documented these injuries through multiple personal declarations regarding conditions various prisoners have endured, and the adverse effects of these conditions. The violations of statutory standards are confirmed in the declaration of Lina Garcia Schmidt. Defendants' refusal and failure, despite an extended period of time and opportunity to reform their food preparation system so that food is prepared in a sanitary manner and inmates are provided with sufficient food for health, is deliberate indifference and necessitates this motion. The Plaintiffs will show that the defendants' practices, customs, and policies violate Plaintiffs' who are pretrial

[1] ECF denotes the Northern District's Electronic Case Filing. ECF without a case number denotes the present pending case, Gonzalez, et al. v. Alameda County Sheriff's Office, 3:19-cv-07423 JSC

detainees' Fourteenth Amendment rights because they are not reasonably related to any legitimate, non-punitive governmental objective; and violates Plaintiffs who have been sentenced Eighth Amendment rights, because denial of edible, safe, sanitary food is cruel and unusual punishment.

II. STATEMENT OF FACTS

Alameda County now operates one jail in the county, Santa Rita Jail, located in Dublin California. The jail is known as a "mega-jail" and defendant Alameda County Sheriff's Office (Defendant "ACSO") touts it as "the third largest facility in California and the fifth largest in the nation," with a capacity for 4,000 inmates. https://www.alamedacountysheriff.org/dc_srj.php Based upon the last available data set from California Board of State and Community Correction's in 2015, 80.6% of the inmates at Santa Rita Jail are pretrial detainees, and 91.3% are male.[2]

A. SANTA RITA JAIL KITCHEN. The jail has a large central, industrial kitchen producing at least 12,000 to 16,000 meals per day. All inmates are fed from this kitchen. A robotic system delivers the food from the kitchen to the housing units.[3] In addition to preparing food for inmates at Santa Rita Jail, the jail's kitchen also prepares food for a number of adult detention facilities and one juvenile facility.

The kitchen is currently operated by a for-profit entity, defendant Aramark Correctional Services. The kitchen is staffed by inmates and five (5) Aramark paid employees. (Dec. D. Swain, ¶16) Sometimes not all Aramark employees come to work. The majority of the people working in the kitchen are inmates. There are also some number of sheriff deputies assigned. Inmates work seven days a week. Men work the morning shift from 7 am through 3 pm. Women work the afternoon shift from 3:30 pm to 9-9:30 pm. There can be from 30 to 50 inmates working per shift.

The main work areas where inmates work are the scullery which is where used trays are washed; the lines where the meals and bag lunches are assembled; chiller and freezer where food is moved in and out. Inmates do not do the cooking. There is supposed to be one Aramark employee who is supervising each inmate work station. [Dec. A. Taylor ¶15]

[2] BSCC, Publicly Accessible Data Sets, Alameda County, p. 9-10 for 2011-2015

[3] http://www.acgov.org/sustain/documents/fuelcellfactsheet.pdf

B. FOOD PREPARATION SYSTEM. Aramark runs a "cook-chill" process. The cook-chill method prepares food several days in advance of the food being served. Food, such as beans, rice, oatmeal is cooked in large batches, in metal tubs which hold over 100 gallons. The cooked foods are then loaded into large plastic tubes, approximately 3 feet long and 12 inches wide and sealed. These tubes, filled with hot food, are then placed in a machine that rolls these tubes in tunnels with cold water. After many hours when these tubes have finally cooled, these tubes are then stacked onto pallets and placed in the refrigerator. [Dec. Y. Huang, ¶¶2-4]

The process calls for taking these tubes, and spooning the food onto plastic food trays that have built in cups. Other food, such as bread, is added. This is called the "line". [Dec. Y. Huang, ¶¶2-3] Due to the limited number of workers, and the large number of meal trays prepared, menu items are often missing from the trays. Portion size also appears to fluctuate [Dec. David Misch ¶3-9] There does not appear to be a quality control mechanism for control of portion size, or to insure that all menu items are place on trays.

Once a tray is finished, it goes through a plastic sealing machine. Sealing the trays is important to keep the vermin out and because the food is prepared days in advance. [Dec. L. Zamora ¶6] Plastic sealing does not properly seal trays that are bent or cracked. [Dec. L. Zamora ¶6] These trays are then placed in crates, and placed back into the refrigerator. The kitchen also uses at times, paper trays. The paper trays are smaller than the plastic trays so that the sealing machine frequently fails to seal the paper trays. [Dec. L. Zamora ¶6] [Ex. B, Dec. David Misch] At some point, these food trays for Santa Rita Jail are loaded onto carts. Santa Rita Jail's automatic delivery system, conveys these carts to the various housing units. Breakfast and dinner have a hot tray and a cold tray. Lunch is generally bag lunch and sandwiches.

C. ANIMALS AND INSECTS IN THE KITCHEN. Birds, mice, rats and cockroaches live in the Santa Rita Jail kitchen. (Dec. J. Barajas, ¶2-3; M. Felder, ¶2; Dec. A. Taylor, ¶5; Dec. L. Zamora ¶8-9, 12) The kitchen is open to the exterior because there are no doors separating the kitchen from the outside. (Dec. E. Reeves ¶10) The only separation between the kitchen and the exterior are sheets of plastic, hung vertically. These sheets of plastic do not reach the ground. Inmate kitchen workers have seen birds walk into the kitchen under the plastic. (Dec. E.

Reeves ¶10) Birds living in the kitchen leave bird droppings and feathers on counter surfaces, and the food preparation surfaces on the Line. Bird droppings are caked on the curved security mirrors upon the walls. (Dec. L. Zamora, ¶12)

Food is not properly stored and accessible for infestation. Cakes and baked goods are left out in open trays. Used and dirty trays are left out overnight, providing an ample food source for animals. (Dec. Astrid Taylor, ¶21; Dec. L. Zamora, ¶12)

D. **SCULLERY – TRAY WASHING.** A regular complaint is that the trays are not clean, with residual food on the edges and bottom, and new food is simple dished on top of old crusted food. [Dec. D. Shackleford, ¶5; Dec. D. Misch, ¶13; Dec. M. Felder, ¶2; Dec. E. Rivera, ¶3]. The plastic trays consists of three compartments combined into a tray. [Ex. B, Dec. David Misch] Used dirty trays are collected and left in a tub on the ground. The tub is not secured, so animals, including mice and rats have access. (Dec. Astrid Taylor, ¶21) When the trays are washed, a large sink is filled with soap and water. There is a pump that circulates the water. Trays are dumped into the sink, and swished around, and then pulled out, and run through a sanitizer. (Dec. Astrid Taylor, ¶22) The sanitizer cycle is very short, not more than 5 minutes. There is no rinsing and no drying. David Misch states that sometimes the corn tortillas taste like soap. (Dec. David Misch ¶13) Sometimes trays are wet when food is dished into the trays, so dry cereal, kool-aid packets, bread arrive wet and inedible. (Dec. David Misch ¶13)

E. CLEANING AND SANITIZING SUPPLIES AND ABILITIES. Inmate workers are not provided with the necessary tools nor enough time to clean. There are only two scullery workers, one to wash trays and the other to load the sanitizer. (Dec. Astrid Taylor, ¶22) The sanitizer cycle is approximately five (5) minutes. The inmate workers fish the used trays out of the containers and place approximately 100 trays into a tub of soapy water, so that 100 trays swish around in a tub of soapy water for about five (5) minutes before being fished out and run through the sanitizer. The trays are not scraped prior to submersion into the tub. The women workers would like to clean the trays, but they have neither the proper supplies nor the time. Astrid Taylor states in her declaration that although she is given a green scrub pad, the food is so caked on she really needs steel wool or a putty knife. (Dec. Astrid Taylor, ¶22) The trays are not rinsed afterwards, but

directly stacked and run through the sanitizer. The tubs require so much time to drain and refill, that a tub is only filled, at most, once a work shift, at the start of the work shift. By the end of the shift "there is no way for the trays to get clean because the water is dirty and not warm." (Dec. Astrid Taylor, ¶22)

Leanna Zamora states in her declaration that she would like to pressure wash the line, where the trays are filled, regularly, but she has only been permitted to do so three to four times since April, 2020, and only in preparation for inspections. [Dec. L. Zamora ¶¶2, 8]

F. FOOD DELIVERY SYSTEM. Food is delivered from the kitchen to the housing units in plastic cars that are automated. The carts are not refrigerated. Nor do the doors close tightly. The carts run through the main yard, and when they arrive at the housing unit, the housing unit deputy must move the cart into the housing unit. Carts for breakfast arrive in the evening, between 5 pm and 9 pm. Breakfast is served between 6 a.m. the next day. [Upshaw et al. v. Alameda County et al. N.D. Cal. 3:18-cv-07814 JD, ECF 38] The hot trays should be heated for 2 hours prior to being served. (Dec. M. Vargas ¶ 3, J. Barajas ¶6) This would require that the trays be moved from the cart into the warming ovens between 4 and 4 a.m. (Dec. M. Vargas ¶ 3) Inmate pod workers rise at 5 a.m. to serve breakfast, so if trays have to be loaded into the refrigerator before 5 a.m., this task would fall to the deputy. Some deputies, to avoid having to load the trays into the warming ovens themselves, have the inmate workers load the trays into the warming ovens in the evening before lights out. (Dec. M. Vargas ¶ 3) Lights out is at 11:00 p.m. [Upshaw, supra. ECF 38] This means that that food trays are sitting unrefrigerated in the warming ovens for up to 7 hours or more, before the warming oven is turned on. Cold trays, with milk or other perishables are also not refrigerated, but simply stored at room temperature. This practice leads to food spoilage. (Dec. L. Zamora, ¶7; Dec. D. Misch, ¶9-10)

G. FOOD SPOILAGE AND INSUFFICIENT FOOD

Inmates workers report that they are taking the initiative to throw away food they see with mold or which has been contaminated by vermin or rodents. When these issues have been reported to defendant ARAMARK workers, the ARAMARK worker will put these foods back into circulation. Inmate workers report "We have to fight to get Aramark to throw away food that is not

fit to serve. Rather than make all new trays, they try to transfer the old food into a new tray. " (Dec. L. Zamora ¶5).

15 Cal. Code Regs §1242 requires defendants to develop menus, with a "variety of foods thus preventing repetitive meals". These meals have to be evaluated by a registered dietitian. Astrid Taylor states that when she worked the line filling trays, "[i] f the kitchen doesn't have enough of something for what's on the menu, they just change the menu without checking with the dietician. We end up using whatever is leftover or whatever we have already." [Dec. Astrid Taylor, ¶17] Marcus Felder stated, he asked the jail dietician if he ever met with defendant Aramark to insure that the meals met specifications for a proper diet, and the dietician, Tran stated that he does not. (Dec. Marcus Felder, §7)

Vanessa Baca reports that she had a disagreement with defendant Aramark employee Margarita about expired milks. Vanessa reported that she wanted to discard those milks, but employee Margarita stated that the milks should be served even with an expired date because the milk was "cold". [Dec. Lina G. Schmidt, ¶13]

Because the food is often held in the warming oven for excessive lengths of time, the food is heated for hours and becomes dry and inedible. (J. Barajas ¶ 5) "The food then becomes burnt, black, and the food is so tough and dry, you have to scrape it with your fingernail to get it off the tray." (Dec. Miguel Vargas, ¶9,)

H. INSUFFICIENT TIME AND INABILITY TO EAT. Because food trays are left in warming ovens for excessive periods of time, they are very hot when removed. The jail provides inmates with no more than 15 minutes to eat, and due to the excessive temperature of the trays, inmates in fact are limited to 5 minutes for eating, because they have to allow the trays to cool sufficiently or burn their mouths. (Dec. D. Shackelford ¶2)

I. JAIL RESPONSE TO COMPLAINTS. These complaints about the lack of kitchen sanitation are long standing. They were first raised when this complaint was filed in November, 2019. These problems were cited in January 2018, with the filing of *Mohrbacher et al. v. Alameda County Sheriff's Office,* et al., 3:18-cv-00050-JD , Mohrbacher is a pending class action on behalf of women inmates at Santa Rita Jail. Defendants ACSO and Aramark are parties to the

Mohrbacher litigation. The problems with kitchen sanitation are visible and obvious. Defendants ACSO and Aramark are aware that there is no door which separates the Jail Kitchen, because the robot cart system is an integral part of the kitchen's operations. The lack of a door allows rodents and birds to enter. (Dec. E. Reeves ¶10) Jail's policy has been to maintain the existing kitchen structure and processes, and if there are complaints about the food, offer replacement food. However, replacement or supplemental food is not consistently available. (Dec. David Misch ¶5, Dec. Marcus Felder ¶2)

The jail has not installed doors, or other animal proof barriers between the kitchen and the outside. The dishware washing setup in the scullery has not been changed.

When rodent droppings are found on trays, defendant Aramark employee, Margarita will "dust off the poop with her bare hands. I have also seen Margarita pull bugs out of the food, with her hands." [Dec. Astrid Taylor, ¶10] Either the offending tray or the food is distributed for consumption. [Dec. Astrid Taylor, ¶9] Defendant Aramark worker pulls trays out of the trash that had been thrown away due to contamination. [Dec. Astrid Taylor, ¶9] When a loaf of bread has been chewed by rodents, the individual slices are removed, but the rest of the loaf is served. When food falls on the floor, it is simply picked up and put back on the Line. [Dec. Astrid Taylor, ¶8] Aramark workers do not wear plastic gloves, and inmate workers are not provided with sufficient time to wash their hands between tasks, so workers go from mopping floors to serving food without washing their hands. (Dec. Astrid Taylor, ¶ 12)

When rodents are in the housing units, sheriff deputies joke that these are "mascots. (Dec. Miguel Vargas, ¶5) Food is not properly secured, and often become contaminated before being sealed. Astrid Taylor found rat feces inside food bags. (Dec. Astrid Taylor, ¶ 13) When there were complaints that there were maggots in the beans, the deputies respond "Whoever doesn't want to eat it - don't eat it", or "this is all you get" without providing any replacement food. (Dec. Miguel Vargas, ¶7)

Defendants are cavalier about sanitation and they are dismissive of the needs of inmates for safe, sufficient food. The outrageous and unacceptable behavior reported herein points to a reckless disregard for the health and welfare of the inmates under their custody.

III. STATUTORY STANDARDS FOR KITCHEN OPERATIONS

County jail food operations are regulated by 15 Cal. Code of Reg §§1230-1245. CCR§ 1245 does not articulate independent standards but adopts California Retail Food Code which is within the California Health and Safety Code.[4] The California Retail Food Code consists of California Health and Safety Code Sections 113700 through 114437.

General Food Safety Requirements

113980. All food shall be manufactured, produced, prepared, compounded, packed, stored, transported, kept for sale, and served so as to be pure and free from adulteration and spoilage; shall have been obtained from approved sources; shall be protected from dirt, vermin, unnecessary handling, droplet contamination, overhead leakage, or other environmental sources of contamination; shall otherwise be fully fit for human consumption; and shall conform to the applicable provisions of the Sherman Food, Drug, and Cosmetic Law (Part 5 (commencing with Section 109875)).

114259. A food facility shall at all times be constructed, equipped, maintained, and operated as to prevent the entrance and harborage of animals, birds, and vermin, including, but not limited to, rodents and insects.

114259.1. The premises of each food facility shall be kept free of vermin.

114099. (a) Manual warewashing sinks, except as specified in subdivision (c), shall have at least three compartments with two integral metal drainboards for manually washing, rinsing, and sanitizing equipment and utensils.

114099.1. (a) During manual or mechanical warewashing, food debris on equipment and utensils shall be scraped over a waste disposal unit, scupper, or garbage receptacle.

(b) If necessary for effective cleaning, utensils and equipment shall be preflushed, presoaked, or scrubbed with abrasives.

114099.2. (b) The temperature of the washing solution shall be maintained at not less than 100°F or the temperature specified by the manufacturer on the cleaning agent manufacturer's label instructions or as provided in writing by the manufacturer.

113099.3 ….

[4] 15 CCR 1245: "(a) Kitchen facilities, sanitation, and food preparation, service, and storage shall comply with standards set forth in Health and Safety Code, Division 104, Part 7, Chapters 1-13, Sections 113700 et seq. California Retail Food Code."

(2) A two-compartment sink shall not be used for warewashing operations where cleaning and sanitizing solutions are used for a continuous or intermittent flow of utensils in an ongoing warewashing process.

114113. Food shall only contact surfaces of equipment and utensils that are cleaned and sanitized.

IV. LEGAL STANDARDS FOR PRELIMINARY INJUNCTIONS

Federal Rule of Civil Procedure 65 governs preliminary injunctions. A preliminary injunction may be issued if a plaintiff establishes: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. See *Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). "Injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." Id. at 22. The Ninth Circuit has held that " 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the Winter test are also met." See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011).

Alternatively, the Ninth Circuit employs a "sliding scale" approach whereby " 'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *All. for the Wild Rockies*, 632 F.3d at 1132. "That is, 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Id. at 1135; see also *Ramos v. Wolf*, 975 F.3d 872, 877-78 (9th Cir. Sept. 14, 2020) (describing sliding scale alternative approach).

If a plaintiff satisfies its burden to demonstrate that a preliminary injunction should issue, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979).

V. ARGUMENT

A. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

1. DEFENDANTS HAVE AN OBLIGATION TO PROVIDE SANITARY, UNCONTAMINATED, SAFE, AND SUFFICIENT FOOD TO SUSTAIN HEALTH.

The Constitution does not mandate that prison conditions be comfortable, "but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). To establish a constitutional claim based on conditions of confinement, an inmate must show that the deprivation alleged was objectively "sufficiently serious" in that the inmate was "incarcerated under conditions posing a substantial risk of serious harm" and the defendant was "deliberate[y] indifferen[t]" to the inmate's health or safety. *Farmer,* 511 U.S. at 834 (citations omitted).

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." In accordance with this directive, it requires that prisoners receive food that is adequate to maintain health. *LeMaire v. Maass*, 12 F3d 1444, 1456 (9th Cir. 1993). Plaintiffs are required to show that the deprivations are "sufficiently serious" to form the basis for an Eighth Amendment Violation. *Wilson v. Seiter,* 501 U.S. 2984, 298 (1991). The Fourteenth Amendment sets a higher standard for the treatment of pretrial detainees than the Eighth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 537 (1979). There can be no "punishment", and if there is no "expressed intent to punish," the analysis "generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Bell*, supra. at 538 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (brackets in original). The condition must be "reasonably related to a legitimate nonpunitive objective, it does not, without more, amount to punishment." Id. at 539-540 Legitimate objectives include both insuring that the pretrial detainee is available for trial and to facilitate the effective management of the jail. *Id.* at 539-540.

"Adequate food is a basic human need protected by the [Constitution]." *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996) (citing *Hoptowit v. Ray*, 682 F.2d at 1246), amended by 135 F.3d 1318 (9th Cir. 1998).

"Food that is spoiled … would be inadequate to maintain health." *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996). See also *Doreh v. Rodriguez*, 723 Fed. Appx. 530, 531 (9th Cir. 2018) (the provision of expired food can state a claim when plaintiff alleges resultant injury). "When 'the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates … ,' the court must conclude that the conditions violate the Constitution." *Rhodes v. Chapman*, 452 U.S 337, 364 (1981).

The failure and refusal of defendants to provide non-spoilt, and non-contaminated food that is edible has no legitimate penological purpose and is sufficient to constitute a Fourteenth Amendment violation of the 85% of pretrial detainees in Santa Rita Jail. And the denial of sufficient edible food to constitute an Eighth Amendment violation for the remaining 15% of inmates incarcerated in Santa Rita Jail who have been sentenced.

a. Defendants Fail To Maintain Sanitary Food Preparation Practices

"A sanitary environment is a basic human need that a penal institution must provide for all inmates." *Toussaint v. McCarthy*, 597 F. Supp. 1388, 1411 (N.D. Calif. 1984), reversed on other grounds. Sanitation includes "the control of vermin and insects, food preparation, … clean places for eating … ." *Rhodes v. Chapman*, 452 U.S. 337, 364 (1981) (Brennan, J., concurring). Food provided to inmates must not only be "nutritionally adequate," but also "prepared and served under conditions which do not present an immediate danger to the health and well-being of the inmates who consume it." *Ramos v. Lamm*, 639 F.2d 559, 570–71 (10th Cir. 1980).

Plaintiffs allege that Aramark maintains operational practices that have "had a devastating impact on the quantity and quality of food provided to prisoners at SRJ." SAC ¶ 57. The allegations that Aramark's operational practices have resulted in appalling, filthy conditions in the kitchen, where rats and mice are seen daily, and where birds roost and cockroaches roam, are supported by sworn declarations submitted by current inmates in support of this motion. SAC ¶ 61. (Dec. M. Felder, ¶2; Dec. A. Taylor, ¶5; Dec. L. Zamora ¶8-9, 12) There are animal droppings on all of the counter surfaces, including food preparation surfaces. (Dec. L. Zamora, ¶8, Dec. D. Swain ¶5) Birds feed on the bread trays, which are left uncovered on open racks. Id. SAC ¶¶ 62-63. (Dec. L. Zamora, ¶12) Rats bite through plastic bags to eat the bread stored therein; the bitten pieces are

thrown away and the rest of the bread is served to prisoners. SAC ¶ 62. The food itself is stored so improperly that, while fruit and vegetables are purchased by Aramark, it is often so wilted or slimy that it becomes inedible. SAC ¶ 74. (Dec. D. Misch, ¶9)(Dec. E. Rivera, ¶6)(Dec. D. Mellion, ¶6)

There is also a consistent problem with the washing and storage of food trays. Used trays are stacked on the ground against one wall in the kitchen, open and accessible to rats and mice. SAC ¶ 64. (Dec. D. Swain, ¶21) They are then dumped into a large wash basin (approx. 100-150 gallons) that is filled with soapy water, which is changed often only once a shift. SAC ¶¶ 66, 68. . (Dec. D. Swain, ¶22) note: Swain says the water is not changed often, I don't think she specifically says once a shift A prisoner moves the trays around with a large paddle and then dumps the "washed" trays onto a counter. SAC ¶ 68. There is no rinsing . (Dec. D. Swain, ¶22) Another prisoner stacks the trays onto a conveyer belt that takes them through a machine for sanitization, a process that takes less than five minutes. (Dec. D. Swain, ¶22) This system fails to consistently or reliably remove old food from the trays, leaving food particles to dry and harden into the trays. SAC ¶ 66. (Dec. D. Shackleford, ¶5)(Dec. D. Misch, ¶13)(Dec. M. Felder, ¶2)(Dec. E. Rivera, ¶3). The Corn tortillas served by the jail taste like soap, largely because the trays soaked in soapy water, are not rinsed. (Dec. David Misch ¶13)

As a result of the cumulative effect of these operational practices, the food served by Aramark is "infested with rodents, rodent droppings, and bird droppings," SAC ¶ 6.1.1(a); the unrinsed trays taint the food to taste like soap; and the fresh food is tainted by the residual food, baked into the trays and doused with soap and sanitizer, resulting in insufficient food.

b. <u>Defendants Fail To Provide Edible Food</u>

"[I]nmates rely on prison officials to provide them with adequate sustenance on a daily basis." *Foster v. Runnels*, 554 F.3d 807, 814 (9th Cir. 2009)). The "repeated and unjustified failure" to provide inmates adequate sustenance "'amounts to a serious depr[i]vation'" in violation of the Eighth Amendment. *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1259 (9th Cir. 2016), 836 F.3d at 1259 (quoting Foster, 554 F.3d at 814). The Eighth Amendment's requirement that prisoners are provided food adequate to maintain health arguably also prohibits providing inmates with expired food. *LeMaire*, 12 F.3d at 1456 (Eighth Amendment requires that prisoners receive food adequate to

maintain health). "The more basic the need, the shorter the time it can be withheld." *Hoptowit*, supra. 682 F.2d at 1259; Insufficient food and water for all inmates during a 19 hour period satisfy the objective prong of an Eighth Amendment violation. *Johnson v. Lewis*, 217 F.3d 726, 732 (9th Cir. 2000).

When the food that is served cannot be consumed or is inedible, then the prison necessarily fails to provide adequate sustenance to maintain the inmates' daily nutritional needs. Stemming from Aramark's unsanitary food preparation and service practices is the repeated provision of inedible food. Food is inedible when it is spoiled, rotten, expired, mixed with food that has been soaked in soap and sprayed with sanitizer, or food that has been infected with vermin or feces. Food is inedible when it is burnt so hard that you have to scrape it off with a fingernail. "Food that is spoiled … would be inadequate to maintain health." *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996); cf. Chavis v. Fairman, 1994 WL 55719, at *3 (N.D. Ill. Feb. 22, 1994) ("[P]roviding inmates with vermin infested food clearly rises to the level of a constitutional infraction…").

Plaintiffs' declarations show that the complaints outlined in the SAC regarding inedible food is ongoing. These same problems issues have persisted since the plaintiffs in Mohrbacher filed their complaint in January, 2018. The provision of cold food, and inadequate food (an apple and lunchmeat) for 8 months, even without weight loss, where inmate complained of stomach pain and dizziness, is sufficient to sustain an Eighth Amendment violation. *Chappell v. Piller,* 2:04-cv-1183 TLN DM P (ED Cal. 1/24/2017) *19 (Adopting Report and Recommendation) (Mar. 1, 2017)

Inedible food, is the same as insufficient food.

c. <u>Defendants Failed To Provide Sufficient Quantity Of Food</u>

Serving inmates a diet with insufficient calories for an extended period raises serious constitutional concerns. *Hutto v. Finney*, 437 U.S. 678 (1978); see also *Phelps v. Kapnolas*, 308 F.3d 180, 186 (2d Cir. 2002) (the deprivation of a nutritionally adequate diet for multiple days may underlie an Eighth Amendment claim).

In addition to the provision of inedible food, Aramark also repeatedly fails to provide the required portion of food mandated by the County's nutritional requirements, and failed to provide prescribed diet meals. This practice also fails to meet the plaintiffs' nutritional needs. See *Salas v.*

Gomez, 2016 WL 3971206, at *11 (N.D. Cal. Jul. 25, 2016) (the provision of only half the portion size of a diet can state a constitutional claim). The declarations and careful notes of David Misch documenting repeated missed meals, insufficient quantity of items (½ cup of cold cereal, and half the allotted quantity of milk) and missing meal items (the protein item, peanut butter, is missing 25% of the time), resulting in the loss of 70 pounds between January and August, 2020. Marcus Felder has submitted a sworn declaration that in March, he wrote a grievance stating that in the prior 60 days, he had missed over 20 meals. In April he missed 22 meals and did not eat for those 22 meals. In June the jail failed to give him 22 meals, and in July, he missed 14 meals. Marcus Felder stated that between the time of his incarceration in October, 2020 and April, 2020, he lost 25 pounds due in part to the missed meals.

2. DEFENDANTS HAVE ACTED WITH DELIBERATE INDIFFERENCE

A prison official exhibits deliberate indifference when he knows of and disregards a substantial risk of serious harm to inmate health or safety. *Farmer v. Brennan,* 511 U.S. 825, 837 (1994).

An Eighth Amendment inquiry into official conduct "that does not purport to be the penalty formally imposed for a crime" requires inquiry into the prison officials' "state of mind. *Wilson v. Seiter*, 501 U.S. 294, 302 (1991); *Jordan v. Gardner*, 986 F.2d 1521, 1527 (9th Cir. 2012). "It is obduracy and wantonness ... that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Jordan*, 986 F.2d at 1527. "Thus, where an inmate alleges that the conditions of confinement inflict unnecessary suffering upon him or her, to establish wantonness the inmate must show only that the prison officials were deliberately indifferent to the inmate's suffering." Id. at 1528. "Undoubtedly deprivations inflicted upon all prisoners are, as a policy matter, of greater concern than deprivations inflicted upon particular prisoners…." *Wilson,* 501 U.S. at 300.

The Fourteenth Amendment protects a pretrial detainee from "unconstitutional conditions of confinement." *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124 (9th Cir. 2018), cert. denied sub nom. *Cty. of Orange, Cal. v. Gordon,* 139 S. Ct. 794 (2019). All such claims require a showing that the defendants had the requisite state of mind that preceded or accompanied the violation—defined by "an objective deliberate indifference standard." Id. at 1124-25. Under this standard, the court

analyzes whether there was "a substantial risk of serious harm to the plaintiff that could have been eliminated through reasonable and available measures that the [defendant] did not take, thus causing the injury that the plaintiff suffered." *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 602 (9th Cir. 2019). Unlike the Eighth Amendment standard for convicted felons, for pretrial detainees' claims, "[t]here is no separate inquiry into [a defendant's] subjective state of mind." Id.

To satisfy this objective deliberate indifference standard, plaintiffs must prove that: (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries. *Gordon,* 888 F.3d at 1125. As to the third element, plaintiffs must "prove more than negligence but less than subjective intent—something akin to reckless disregard." Id.

a. Defendants Were Aware of These Long Standing Problems

The problems with food were brought to defendants' attention in multiple ways,:

i) pending litigation, *Mohrbacher et al. v. Alameda County Sheriff's Office,* et al., 3:18-cv-00050-JD (Dkt. 10, ¶ 6); in which defendants ACSO and Aramark are both parties.

b) defendants voiced verbal complaints and submitted written grievances ; (Dec. K. Paschal, ¶ 3; D. Misch, ¶2; E. Rivera, ¶1; D. Mellion, ¶2, J. Baras §2, 3;); See, generally, SAC ¶¶ 70, 78, 82, 85, 86, 90.

ii) inmate strike; SAC ¶ ,

iii) group grievance letters; SAC Exhibits A & B, and,

iv) this present complaint filed one year ago.

b. Defendants Have Not Taken Measures to Abate These Problems

The written grievances did not cause defendant ACSO or Aramark to changes its procedures. SAC ¶70. Plaintiff Larry Gerrans submitted a grievance about finding rat feces on his sandwich bread, and later learned that Deputy Wong had destroyed the feces instead of submitting them. SAC

78 As this problem continued, the jail began refusing to accept grievances about the food, stating that the issue was not grievable because food was not a jail responsibility. SAC 84. And then the defendant ACSO's response became, that the issue was resolved if the inmate was offered a replacement tray, even if the cause of the problem was never addressed. (See Dec. K. Paschal, ¶3; Dec. D. Mellion, ¶2; E. Rivera, ¶1). In the case of Kajuan Paschal, who found pieces of razor in his oatmeal, a replacement tray does not ameliorate the hazard and dangers of that batch of oatmeal being contaminated by razor pieces, so a replacement with the same oatmeal does nothing to prevent or reduce the harm.

Defendant ACSO has not effective steps to abate the rodent problem. Rodents have access to the ACSO kitchen because the kitchen open to the exterior. Defendant ACSO has taken no affirmative steps to comply with California Health & Safety Code §114259, which would require replacing the hanging plastic sheets with a solid barrier outdoors to prevent the entry of vermin, rodents and birds. Defendant ACSO has not implemented practices to improve sanitation, consistent refrigeration, or excessive heating of the trays.

Defendant Aramark made intentional decisions regarding its food-related practices at SRJ; these practices have resulted in conditions that place the plaintiffs at substantial risk of suffering serious harm from missed meals, spoiled food, and inadequate nutrition; and Aramark failed to take reasonable available measures to abate that risk, including some easy to implement,, inexpensive and simple actions such as making sure that deposits of left over food are scraped off so that trays can actually be washed and sanitized; changing the wash water more frequently; complying with Health & Safety Code statute by maintaining the wash water at 100 degrees, rinsing all the trays. A reasonable official would have appreciate the high degree of risk involved of perpetual, left over food on trays being reused to serve meals.

Neither defendants have implemented quality control mechanisms to insure that portions are consistent and that all menu items are included in every tray, that food is consistently refrigerated and not overheated. The submitted declarations show that these problems continue to this day.

Because defendants ACSO and Aramark have not made any necessary corrections and continues disregarding the Santa Rita Jail inmates' basic human need for edible sustenance

guaranteed by the U.S. Constitution, said defendants have demonstrated wantonness over an extended period of time.

B. PLAINTIFFS WILL SUFFER FURTHER IRREPARABLE HARM IF IMMEDIATE RELIEF IS NOT GRANTED

David Misch and Marcus Felder have submitted declarations stating significant weight loss due to the insufficient food they receive. David Misch stated that some of the food upsets his stomach; the apples are so sour they hurt his mouth to eat, and he has had two bouts of gastroenteritis, caused by spoilt or contaminated food. Both David Misch and Marcus Felder both described the regular hunger they experience. David Misch stated that he is are always hungry, Marcus Felder states he is constantly hungry, even after meals, and that the hunger makes him short tempered. Both these men, class members, have described serious injuries. And out of 103 days, only eight (8) of those days, did David Misch receive fruit with his lunch, and when he did receive vegetables, 15% of the time, the vegetables were spoilt.

Kajuan Paschal was injured when he swallowed a piece of metal razor which contaminated his oatmeal. Even if the razor did not perforate his intestines, the incident resulted in the danger of imminent harm. Ebony Reeves described eating a cockroach in her sandwich, which caused her to throw up. Banning rodents and their attendant rodent feces are important public health concerns because rodent feces are a cause of hantavirus, which causes a sometimes fatal pulmonary disease. Cockroaches are banned by public health due to the role of cockroaches in spreading microorganisms and pathogens. There is no justification for spoilt, unsafe, and contaminated food, produced under unsanitary conditions.

Defendants' conduct violates California Health and Safety Codes, which are implemented to protect the public, and many are commonsense laws. [Dec. Lina Garcia-Schmidt ¶¶ 3-9] Food should not touch surfaces unless the surfaces are cleaned and sanitized. H&C 114113. As an example of the serious of the potential harm, kitchen workers pick up food that has fallen on the floor and put them back into circulation to serve inmates.

C. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST TIP HEAVILY IN THE PLAINTIFFS' FAVOR

"A court must 'balance the interests of all parties and weigh the damage to each' in determining the balance of the equities." *CTIA – The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 852 (9th Cir. 2019) (quoting *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)). Rather than approaching the public interest assessment as a "balancing of the hardships, it is better seen" as a separate element with an inquiry on the "impact on non-parties rather than parties." See *id*. at 766. Where the government is a party, the two factors merge. *Drakes Bay Oyster Co. v. Jewell* 747 F3d 1073, 1092 (9th Cir. 2014), citing *Nken v. Holder,* 556 U.S. 418, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009).

The Alameda County Sheriff's Office, a governmental entity, has no legitimate interest in depriving inmates of food, or in serving unsanitary or unsafe food. "[I]t cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbin*s, 715 F.3d 1127, 1145 (9th Cir. 2013). And, any argument defendants raise to the effect that comporting with the Constitution will require resources is, by definition, not compelling. Complaints that a preliminary injunction is "prohibitively burdensome" on the government, have been considered flawed even where there are "severe logistical difficulties", involved in government avoiding practices that may run afoul of the Constitution. *Id* at 1145. Protection of constitutional rights such as the Plaintiffs' under the Eighth and Fourteenth Amendments is a recognized compelling public interest, *see United States v. Raines,* 362 U.S. 17, 27 (1960), which "weighs heavily in the balancing of harms, for the protection of those rights is not merely a benefit to plaintiff but to all citizens." *Int'l Society for Krishna Consciousness v. Kearnes,* 454 F.Supp. 116, 125 (E.D. Cal. 1978).

Conditions of confinement that which threaten serious injury to health pose Eighth Amendment violations. See *Franklin v. State of Or., State Welfare Division*, 662 F. 2d 1337, 1346-1347 (9th Cir. 1991)[placement in cell with a heavy cigarette smoker caused a serious danger to health]. Based upon *Franklin, Id*, there does not need to be proof of an actual harm. A demonstration of a serious danger, suffices. Rodent feces is the primary source of hantavirus pulmonary syndrome, a severe, sometimes fatal respiratory disease. Cockroaches are an acknowledged carrier of micro-organisms that may cause disease, which at the minimum create gastrointestinal problems. And the regular insufficiency of the food, whether from small portions or

the inedible nature of the food, produces an acknowledged negative impact on heath. A preliminary injunction is warranted where the balance of hardships tips in the moving party's favor. *Warsoldier v. Woodford*, 418 F.3d 989, 993-94 (9th Cir. 2005). Providing sufficient food for health is a basic and fundamental obligation of defendants, and defendants cannot escape that responsibility by claiming that there are attendant burdens.

D. PLAINTIFFS LACK AN ADEQUATE REMEDY AT LAW

To be clear, the offer of a replacement tray is not an adequate remedy. A dead mouse cooked into a pot of beans affects all of the beans, not just the one tray the mouse ends up in. Having dead mice, metal or mouse feces in food trays demonstrates the continuing lack of basic health and safety practices. Simply swapping out a tray has not, and does not change the fundamentally unsanitary conditions and the chronic, insufficient quality control in the Santa Rita Jail kitchen and food handling.

The only way to stop Defendants' routine and daily conduct, which has continued for almost three years, uncorrected, is to enjoin Defendants' conduct. Defendants have shown that they are resistant to correcting these harmful actions. Money damages are inadequate to address the harms the Plaintiffs have and will suffer because the conditions giving rise to their injuries would nevertheless continue unabated, and there is no legal basis to continue and sanction the imposition of cruel and unusual punishment. Money damages cannot ameliorate the daily hunger the prisoners experience. Timely enforcement of statutory standards of sanitation is urgently needed to protect and sustain plaintiffs' basic health. "[I]t is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol Inc. v. Whiting,* 732 F.3d 1006, 1029 (9th Cir. 2013)(quoting *U.S. v. Arizona,* 641 F.3d 339, 366 (9th Cir. 2011)); *Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017). Furthermore, administrative remedies through the prison grievance process, despite repeated applications, have proven futile. Only by enjoining Defendants' wrongful conduct, will additional injuries cease.

VI. CONCLUSION

There is no justification for defendants ACSO and ARAMARK's conduct. There is no excuse for this conduct having gone on for over three years, and most likely longer.

Therefore, Plaintiffs request that the Court issue a preliminary injunction requiring Defendants, except in exigent circumstances, to:

1. Implement and maintain a jail kitchen that is constructed, equipped and operated in a clean and sanitary manner and is free of animals, birds, rodents, insects and vermin;
2. All dishware and trays shall have residual food scrapped off, washed, rinsed and sanitized per California Code and no dishware or tray shall be reused unless said dishware and tray is free of food residue and has been washed, rinsed and sanitized;
3. Institute procedures and quality control processes to insure that <u>all food served is sanitary and edible</u> including:
4. No spoiled food;
5. No food with foreign objects – particularly non-food objects;
6. No food which has been contaminated by animals, birds, rodents, insects and vermin; and,
7. All food is properly handled, refrigerated and heated, without excessive heating;
8. Quality controls are implemented to insure that trays meet portion size and has all items called for in the menu;
9. Food production adheres to menus; and,
10. Special diet trays are provided

Such other and further relief as the case requires and the Court deems just and proper.

DATED: November 17, 2019

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