JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction of this civil rights class action pursuant to 28 U.S.C. §§ 1331 and 1343. The Defendants-Appellants ("Defendants") appeal from an injunction entered on February 25, 2003. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). The Defendants' notice of appeal was filed on March 24, 2003 (R3. 1697; App. 1507).

STATEMENT OF ISSUES PRESENTED

1. Did the district court correctly determine that the Defendants' failures to protect the Plaintiffs-Appellees ("Plaintiffs") from the risk of fire violated the Eighth Amendment to the Constitution?

2. Are the Defendants barred from challenging the findings of the district court of February 18, 2000 by their failure to appeal from those findings?

3. Did the district court abuse its discretion in determining the appropriate remedy for the Eighth Amendment fire safety violation?

4. Did the district court impose a remedy inconsistent with the requirements of the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)?

5. Did the district court attempt to exercise jurisdiction over facilities not subject to the Consent Decree?

6. Did the district court commit any error, let alone any error that affected a

substantial right of Defendants, by admitting three exhibits?

STATEMENT OF THE CASE

This class action challenging conditions of confinement within Michigan's oldest and largest prison was filed in 1980. At the time, the prison was known as the State Prison of Southern Michigan ("SPSM"). The district court approved a Consent Decree addressing almost all of the issues raised in the complaint, other than certain access to courts issues, on April 4, 1985. The Consent Decree was designed to "assure the constitutionality" of conditions of confinement within the prison. Consent Decree, May 13, 1985 at 1 (R1. 199; App. 336); Order Accepting Consent Decree Judgment, May 13, 1985 (R1. 213; App. 385).[1] Among other issues, the Consent Decree addresses sanitation, health care, fire safety, overcrowding, and food services. Consent Decree at 3-14; 18-29; 31-32 (R1. 199; App. 338-49, 353-64, 366-67). Section VIII of the Consent Decree is distinct from all other sections because it covers all of the State Prison of Southern Michigan, not just the Central Complex of SPSM. This Section requires the Defendants to prepare and implement a management and organization study of the

[1] Some of the proceedings in this case took place in the Eastern District of Michigan, while others took place in the Western District following transfer of parts of the case. In this brief, the designation "R1." refers to a docket number in the Eastern District of Michigan, while "R3." refers to a docket number in the Western District. The designation "R2." refers to the related case of *United States v. Michigan*, No. 1:84-CV-63.

entire SPSM Complex. Id. at 31-32; App. 366-67. This plan is known as the "Break-up Plan" and it involves structural issues such as cellblock compartmentalization. See infra at 7-9.

For a variety of reasons, various issues in this case have been transferred from the Eastern District to the Western District of Michigan at different times. See Knop v. Johnson, 977 F.2d 996, 1014 (6th Cir. 1992) (affirming finding of constitutional violation regarding access to courts, but vacating the judgment and remanding to the Western District for entry of an appropriate remedy); Order of Transfer, June 5, 1992 (R1. 835; App. 456) (transferring medical and mental health issues); Order of Transfer, March 18, 1999 (R1. 1342; App. 483) (transferring structural break-up issues regarding Facility A, which is also known as Egeler, as well as Facility B);[2] Order of Transfer, July 12, 2000 (R1. 1421; App. 486) (transferring various physical plant issues regarding Facility C); Order of Transfer, Nov. 15, 2000 (R1. 1432; App. 488) (transferring fire safety issues regarding Facility D (Parnall) and noting that the fire safety issues involving this facility are the same issues as those previously transferred with regard to Egeler).[3] Injunctive

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[2] In this order, the physical plant issues transferred with regard to Egeler are described as involving the "adequacy of defendants' proposed alternatives to the Break-Up Plan." Id. at 2.

[3] For the purposes of the break-up plan, Facility D included Cellblock 7. See State Prison of Southern Michigan Functional /Operational and

relief related to all issues in the Eastern District has been terminated. Order, June 27, 2001 (R1. 1442; App. 490). The only fire safety issues involved in this appeal concern Egeler (Facility A) and Parnall (Facility D). See Injunction, Feb. 25, 2003 (R3. 1696; App. 1504).

Following the transfer of proceedings involving the Egeler Facility, but prior to the transfer of proceedings involving Parnall, the district court held a hearing on Defendants' motion for termination of relief pursuant to the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626(b). The court thereafter issued findings in which it concluded that the Defendants' failures to implement an appropriate break-up plan, or otherwise address the fire safety dangers at the Egeler Facility, had resulted in current and ongoing constitutional violations. Findings of Fact and Conclusions of Law ("2000 Findings"), Feb. 18, 2000 at 51 (R3. 1372; App.706). The Defendants did not appeal from those findings and conclusions.

Following that hearing, the district court ordered the Defendants to report on their remedial plans to address fire safety. Order, May 2, 2001 at 4 (R3. 1443; App. 766). In the Defendants' response, they failed to propose any remedy for the fire safety violations, taking the position that "there are no fire safety violations in

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Space/Architectural Program for Facility D, July 30, 1993 in Defs.' Exhs. C-D-E, Aug. 20, 1993 at D1-4, D6-2, D6-3; R1. 938; App. 480 (stating that Facility D includes Buildings 7, 8, 9 and 10, and providing cell capacities). Thus, this transfer order also transferred the break-up issues regarding Cellblock 7.

any *Hadix* facility." Defs.' Report on Their Remedial Plans for Fire Safety, Temperature, Ventilation and Facility A, June 8, 2001 at 2 (R3. 1445; App. 770). The court then set a hearing on remedy for January 2002. Order Regarding Discovery, June 22, 2001 (R3. 1452; App. 791). Because the Defendants subsequently requested a postponement in the medical issues set for hearing, the hearing actually took place in May 2002. Defs.' Expedited Mot. to Stay All Proceedings Related to Medical Health Care, to Adjourn the Hearing Pertaining to the Remaining Medical Health Care Provisions Only, and for the Court to Appoint an Independent Medical Monitor, Oct. 22, 2001 (R3. 1487; App. 799).

The district court subsequently issued findings from the hearing. In those findings, the court found a constitutional violation with regard to the lack of fire safety in Cellblocks 7 and 8 of Parnall, and a continued fire safety violation at Egeler. Findings of Fact and Conclusions of Law, Oct. 29, 2002 ("2002 Findings") at 263 (R3. 1658; App. 1444). The district court again ordered further submissions on whether there was any alternative to compartmentalization, consistent with the approach adopted in the approved break-up plan submitted pursuant to Section VIII of the Consent Decree. Id. at 264; App. 1445.

The Defendants responded on December 30, 2002 without proposing any remedy for the fire safety problems found by the court; they simply repeated their

previous arguments that no changes were necessary to address the constitutional violations found by the court. See Defs.' Br. Regarding Alternatives to Compartmentalization to Remedy Alleged Fire Safety Problems and Risks, Dec. 30, 2002 (R3. 1687; App. 1497); see also Defs.' Reply to Pls.' Resp. to Defs.' Br. Regarding Alternatives to Compartmentalization to Remedy Alleged Fire Safety Problems and Risks, Feb. 18, 2003 (R3. 1694; App. 1497). On February 25, 2003, the district court issued an injunction, noting the following:

> The very substantial failures of these facilities to allow for timely egress in the event of a fire, to exhaust smoke, to sprinkle fire, and to unlock doors means, simply, that many inmates in each facility would likely suffer smoke inhalation or death in the event of fire. Simply put, these risks are grave and unacceptable.

Injunction, Feb. 25, 2003 at 1-2. R3. 1696; App. 1504. The district court concluded that the break-up plan of Section VIII of the Consent Decree, if implemented with the additional step of dividing Egeler so that the exit distance from any cell does not exceed 150 feet, would address many of the current constitutional violations. The district court also required the Defendants to correct the deficiencies previously found in the unlocking systems, exhaust systems and sprinkler systems of Blocks 1, 2, 3, 7 and 8 and Administrative Segregation[4] and

[4] This Administrative Segregation unit is now closed, so the question of remedy for this unit is moot. Order, June 17, 2003, R3. 1714; App. 1508.

the Reception and Guidance Center, or adopt other ameliorative changes with equivalent levels of fire protection. Id. at 2 (App. 1505).[5]

STATEMENT OF FACTS

A. The Break-Up Findings

As noted above, Section VIII of the Consent Decree required a management study. That study concluded that the State Prison of Southern Michigan ("SPSM") was unmanageable and should be broken up into smaller facilities.[6]

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[5] The Court further stated that it would allow the Defendants until Dec. 31, 2003 to submit precise plans and a completion schedule. Id. at 3; App. 1506.

[6] As discussed more fully in Section IV of the Argument, infra, under the terms of the Consent Decree, for most purposes, the term "*Hadix* facilities" refers to sections of SPSM that were part of the Central Complex, including the Reception and Guidance Center, which processes newly-admitted prisoners, and it also refers to facilities that provide support services to Central Complex and the

Reception and Guidance Center. The Egeler Facility (formerly called North Complex or SMN and also referred to as Facility A) comprises Cellblocks 1, 2, and 3, of which Cellblock 3 was part of the Central Complex. The Egeler Facility is now entirely used for the Reception and Guidance Center, along with Cellblock 7, which was originally part of the Reception and Guidance Center and at one point planned to be part of Parnall. Cellblocks 8, 9, and 10 are now part of Parnall (Facility D); Cellblock 8 was previously part of the Central Complex. Cellblocks 9 and 10 of Parnall are covered only by Section VIII of the Consent Decree.

The Eastern District Court thereafter approved a Stipulated Agreement Regarding Plan Element 1 and the Implementation of Paragraphs VIII, E, F, and G of the Consent Judgment, June 8, 1990, calling for the unitization and compartmentalization of each of the cellblocks at SPSM into four parts. That document states as follows:

> The parties agree that unitization and decentralization are critical to the acceptance of Plan Element 1. Unitization has been recommended by the Defendants in their binding proposals to include "dividing each cellblock into four smaller living units which will operate as a management unit....Where Defendants condition implementation of these proposals with expressions such as "if possible" or "where possible" this condition relates to architectural feasibility.

Order Adopting Stipulated Agreement Regarding Plan Element 1 and the Implementation of Paragraphs VIII, E, F, and G of the Consent Judgment, June 8, 1990 (R1. 717; App. 391).

Pursuant to the Stipulated Agreement, Defendants retained the architectural and engineering firms of Rosser Fabrap and Silver Ziskind to evaluate the physical and functional conditions within the *Hadix* facilities and to design the necessary corrective actions in conformity with the Stipulated Order. 2002 Findings at 242 (R3. 1658; App. 1423). The relevant findings of Rosser Fabrap include the following: all of the cellblocks in Egeler violate the " means of egress"

requirements of the BOCA Code.[7] In addition, the stairs that would be used for evacuation in the Egeler cellblocks are inadequate in size, enclosure, location and discharge. Moreover, the five-story mezzanine design in Egeler cellblocks violates the atrium requirements of BOCA. David Sproul, a Project Director employed by the State of Michigan who was responsible for overseeing the mechanical engineering work to correct the deficiencies in Cellblocks 4-6 of the *Hadix* facilities, and who served as Defendants' engineering expert at trial, accepted the Rosser Fabrap findings. Id.; see also T. at 235-36, 244, 246-49(5/7/02); R3. 1633; App. 989.[8]

B. Smoke and Fire Hazards in the Cellblocks

Some cells have footlockers full of books and other papers; there is sufficient fuel load within a cell to burn for fifteen minutes. Smoke caused by a cell fire would be most likely to rise from that cell. As the smoke rose from gallery to gallery, it would gather air and expand, affecting more cells. When the smoke

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[7] The BOCA National Building Code is the statutory building code in the State of Michigan. Pls.' Exh. 95 at 2; App. 1760. The BOCA Code applies to older buildings such as those at SPSM if they are being renovated, and it also requires that existing unsafe buildings be made safe or taken down. 2002 Findings at 252, 256; R3. 1658; App. 1433, 1437.

[8] "Q. So you accepted Rosser Fabrap's findings as to what needed to be done, your concern was what to do about it?

A. Yes." T. at 249 (5/7/02); R3. 1633; App. 996.

reached the top of the block, it would move horizontally through the block and then downward. The space above the occupied cells in a cellblock would be of limited use before the smoke began affecting prisoners attempting to use the upper galleries to exit. Smoke would also form eddies in areas that prisoners on other levels were trying to use as exits. Id. at 257; App. 1438.

A witness described a fire that occurred approximately two years before the hearing in which a prisoner on the first gallery of Cellblock 8 in Parnall put a few papers and a sheet in a trashcan, ignited this material, and placed his mattress over the fire. There was so much smoke produced by the fire that someone in the cell on the other side of the open area could not see cells on the side of the block where the fire had been started. The smoke came up the front of the tiers and into the cells on the opposite side from where the fire had started. Id. at 260; App. 1441.

There are live dry transformers and electrical panels in the basements of Cellblocks 7 and 8.[9] These transformers and electrical panels can catch fire. If they were to catch fire, they would pose a serious hazard. Id. at 249-251; App. 1430-32. These same cellblocks lack automatic sprinklers in the basements, and in the pipe chases, which consist of open catwalks behind the cells. Id. at 247; App.

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[9] There is also substantial combustible material in the quartermaster area of Cellblock 7. Smoke from the quartermaster area could get into the housing unit up the stairs or through the passageway used by prisoners to enter the cellblock. Id. at 260; App. 1441.

1428. Smoke from either a basement fire or a cell fire in Cellblocks 7 and 8 could travel up the unsprinklered pipe chases into other cells. Id. at 249-51, 260; App. 1430-32, 1441. In such an event, smoke would travel vertically through the cellblock tiers to the return air vents at the top of the building and then be exhausted. In the presence of large amounts of smoke, however, the smoke detectors in the air handling units would shut the units down, at which point the smoke would not be recirculated in the building, but it also would not be exhausted. Id. at 247; App. 1428.

The ventilation systems in Egeler and Parnall are not smoke-control systems as described in fire safety codes. In order for Egeler to meet the Life Safety Code, it would need to be able to remove smoke at the rate of 150,000 cubic feet per minute. The ventilation fans are rated for removal of smoke at the rate of 20,000 cubic feet per minute. Id. at 258: App. 1439. To activate these fans, staff must go to the Arsenal to retrieve the key to the lock on the exhaust fans. Id. at 259, App. 1440. Under conditions in a fire as anticipated under the Life Safety Code, a cellblock could fill with smoke at the rate of ten feet per minute, and smoke from the bottom tier could reach the top tier in approximately five minutes. Id. at 258; App. 1439.

C. Evacuation in Case of Fire

The five cellblocks at issue (Cellblocks 1-3 in Egeler and Cellblocks 7 and 8) are each five stories tall and the length of a football field.[10] The travel distances in the event of evacuation exceed the maximum travel distances set by the Life Safety Code. Id. at 248, 256; App. 1429, 1437. To exit from any of the cellblocks, the prisoners must travel up to half the distance of a tier, then descend as many as five flights of stairs, and cross the floor to the exit, in a structure with no effective smoke removal device except space. Id. at 248, 256: App. 1429, 1437. It takes up to twenty minutes to exit from the *Hadix* facilities. Id. at 243; App. 1424.

In Egeler, in the event of a fire, staff would be expected to unlock cells and exit doors, travel back and forth from the Arsenal to get the key for the smoke removal system, and assist disabled prisoners.[11] Id. at 259; App. 1440. Between

[10] The Egeler cellblocks were constructed in 1926. Cellblock 1 has 334 cells; Cellblock 2 has 308; and Cellblock 3 has 351. Id. at 252-53; App. 1433-34. These cellblocks are approximately 276 feet long by 59 feet wide by 42 feet high. They contain five tiers of cells, with back-to-back cells facing outward toward the outer walls of the block. Id. at 253; App. 1434. Cellblocks 7 and 8 of Parnall were constructed in 1928. Cellblock 7 is approximately 362 feet long by 59 feet wide by 51 feet high. Id. at 255; App. 1436. Cellblock 8 resembles the Egeler cellblocks, except that it is 51 feet high. Id. at 257; App. 1438. Cellblocks 7 and 8 consist of five tiers of cells on either outside wall facing each other across an open common area. Id. at 255; App. 1436. Cellblock 7 houses 458 prisoners, and Cellblock 8 houses 356. Id. at 8; App. 1189.

[11] At the time of the hearing, Cellblock 2 at Egeler was double-celled. Id. at 259; App. 1440. As noted above, see supra at 9, the consultants retained by Defendants during the break-up process determined that the stairs that would be used for evacuation in Egeler during an emergency are inadequate in size,

22 and 27 locks must be opened in each Egeler cellblock in order to evacuate in the event of a fire. The Life Safety Code normally permits a facility to be dependent on the opening of no more than ten locks in the event of a fire emergency. Id. at 243; App. 1424. Moreover, a substantial number of cell locking mechanisms do not work properly at any given time. Id. at 255, App. 1436. It takes four minutes just to unlock all of the cells in Cellblocks 7 and 8, not counting the time it takes to travel from the base level through an exit door. Id. at 258, App. 1439.

D. The Code Requirements

The Defendants' fire safety expert, Wayne Carson, theorized that the cellblocks could meet the requirements of the Life Safety Code if they were classified as a single-story building under the Code. Id. at 248-49. In fact, the Life Safety Code would not allow these cellblocks to be classified as single-story buildings because they are not fully sprinklered. The requirement that a building be "fully sprinklered" is absolute, without exception for any unsprinklered areas. Id. at 256; App. 1437.

Moreover, Mr. Carson's theory, even if it were acceptable, would place the

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enclosure, location and discharge. Id. at 242; App. 1423. These findings were made at a time when Cellblock 2 was single-celled; doubling the population of the cellblock obviously exacerbated these dangers. The double-celling of prisoners in Cellblock 2 compounded the risk to safety in a fire emergency. Id. at 262; App. 1443. There is no reason to think that the facilities at issue will not again be double-celled in the future.

Defendants out of compliance with another BOCA code provision, which is that ceiling height not exceed twenty-three feet. The ceiling height in the Egeler cellblocks is 42 feet; in the Parnall cellblocks ceiling height is 51 feet. Accordingly, it is incorrect to treat the cellblocks as single-story buildings for the purposes of applying the Life Safety Code, because such an interpretation of the Code would leave prisoners at risk in the event of a fire. Id. at 248-49; App. 1429-30.

The BOCA Code also would not permit these structures to be treated as one-story buildings, and it would not permit a five-tiered cellblock such as those at Egeler and Parnall. The BOCA Code must be applied to these cellblocks to make them safe. Id. at 248, 256 ; App. 1429, 1437.[12]

E. The Special Characteristics of the Population

If prisoners cannot be evacuated quickly enough in the event of a serious fire, they will likely die. Id. at 255; App. 1436. In a fire, water flowing on the galleries from the affected sprinklers would make some areas more slippery. The narrow galleries through which prisoners must exit have low railings. 2000

[12] As noted supra in note 7, the BOCA Code applies to renovated construction as well as new construction, and it further requires that all unsafe structures be taken down or made safe. Id. at 252, 256; App. 1433, 1437. Egeler qualifies for BOCA Code treatment as a renovated construction, and because it is currently unsafe; Parnall Cellblocks 7 and 8 qualify for BOCA treatment because they are currently unsafe. Id. at 255-256; App. 1435-37.

Findings at 50; App. 755.

In order to assure fire safety, it is necessary to consider the characteristics of the occupants within a facility if they do not fall within the norms of the general population, because prisoners with medical disabilities face even greater hazards in a fire emergency. Id. at 51; App. 756; 2002 Findings at 262; App.1443. Large numbers of prisoners with special medical conditions are confined in the *Hadix* facilities. These prisoners, particularly those with cardiac and pulmonary disease, are at increased risk from smoke and fire. 2002 Findings at 262; App. 1443; see also 2000 Findings at 51; App. 756.

The problem of assuring fire safety to these prisoners is exacerbated because the *Hadix* facilities are completely inadequate to diagnose, treat, or accommodate the needs of patients at risk. See, e.g., 2002 Findings at 45, 79, 110-11, 148, 157, 190; App. 1226, 1260, 1291-92, 1329, 1338, 1371. These ultimate findings of constitutional violations are based on literally hundreds of examples, specifically set forth in the district court's findings, of patients who were denied necessary health care, including a multitude of cases that resulted in death or permanent injury. See id., 76-79, 110-111, 145-148, 156-157, 188-190; App. 1257-60, 1291-92, 1326-29, 1337-38, 1369-71. The failings of the medical system included allowing prisoners with mobility limitations, histories of seizures, and other

problems that interfere with their ability to walk stairs being at times placed on upper tiers, both during the reception process and as a regular housing assignment. See id. at 168; App. 1349; see also id. at 33, 36-37, 40-41, 43, 59, 72, 175-76, 180, 190; App. 1214, 1217-18, 1221-22, 1224, 1240, 1253, 1356-57, 1361, 1371; see also 2000 Findings at 51; App. 756.

The Defendants' fire safety expert was not familiar with the medical issue. Much of the testimony of Defendants' expert has no applicability to the *Hadix* facilities, because of the very substantial number of prisoners who, because of age, physical impairment, medical or mental condition, or medication, are more at risk from smoke than the general population and evacuate more slowly. 2002 Findings at 262; App. 1443.

STANDARD OF REVIEW

The district court's findings of fact are reviewed under the "clearly erroneous" standard. Anderson v. City of Bessemer City, 470 U.S. 564, 572-74 (1985). Whether the district court correctly found a violation of the Eighth Amendment is a mixed question of law and fact. The Supreme Court has noted that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is better positioned than the appellate court to decide

the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (internal quotation marks and citation omitted); see also Farmer v. Brennan, 511 U.S. 825, 842 (1994) (characterizing the decision of whether a prison official acted with "deliberate indifference" under the Eighth Amendment as a "question of fact").

The injunctive remedy imposed by the district court based on the finding of an Eighth Amendment violation is reviewed for abuse of discretion. See Mascio v. Public Employees Retirement System, 160 F.3d 310, 312 (6th Cir. 1998) (affirming grant of preliminary injunction under abuse of discretion standard; "[t]he injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard"); see also Pierce v. Underwood, 487 U.S. 552, 559-62 (1988) (applying "abuse of discretion" standard as consistent with sound judicial administration considerations where a problem is not amenable to a simple rule or narrow guidelines for a district court, based on the diffuseness of the circumstances and the novelty and multifarious considerations that were relevant to resolution of a particular issue, even though the judgment of the district court was ultimately based upon a purely legal issue).

Plaintiffs also note that United States v. Michigan, 940 F.2d 143 (6th Cir. 1991), cited by Defendants at page 25 of their brief, does not support their argument for "plenary review of the entire record." Id. at 152. This Court's comment in that case was in the context of deciding that it had jurisdiction over certain related orders in the case, not in the context of determining the applicable standard of review. In fact, this Court applied an "abuse of discretion" standard in reviewing the injunctive relief granted by the district court in that case. See id. at 159-60. Interpretations of a consent decree are reviewed under a "deferential de novo" standard. Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 146 F.3d 367, 371-72 (6th Cir. 1998).

Finally, the district court's evidentiary rulings are reviewed pursuant to the "harmless error" standard. See Fed. R. Evid. 103(a).

SUMMARY OF ARGUMENT

The district court correctly found that the Defendants are violating the Eighth Amendment by failing to protect prisoners from a significant risk of injury from fire. The district court found that the prisoner cells contain enough fuel that the contents could burn for fifteen minutes. Smoke from such a fire would rise; smoke from the bottom tier would reach the top tier in approximately five minutes. The cellblocks do not have a smoke removal system as the term is used for fire

safety purposes. In the presence of large amounts of smoke in Cellblocks 7 and 8, the smoke detectors would shut down the air exhaust system in order to prevent the system from recirculating smoke, but at that point the smoke would also not be exhausted. The ventilation system in the Egeler cellblocks is rated at less than fourteen percent of what it would need to qualify as a smoke removal system. The cellblocks are also not "fully sprinklered" within the meaning of the applicable building codes.

The cellblocks are each five stories tall and the length of a football field. Travel distances to exits exceed the maximum distances set by the Life Safety Code; it takes up to twenty minutes to exit from these cellblocks. Many prisoners in the cellblocks have special medical needs, such as heart and lung problems, that would affect their ability to exit rapidly in the event of a fire. The independent failures of the medical system at the prison result in prisoners with mobility limitations and other problems that interfere with their ability to climb stairs being placed on upper tiers, both during the reception process and as a regular housing assignment. The cellblocks in Egeler violate "means of egress" requirements. The stairs that would be used for exits in Egeler are inadequate in size, enclosure, location and discharge. In order to make these cellblocks safe, these deficiencies must be remedied.

Defendants challenge none of the findings of the district court, and there is no basis for arguing that these findings are clearly erroneous. The Defendants' factual claims, in contrast, are not based on the findings of the district court and in many cases are not based on citations to the record at all. In addition, many of Defendants' specific factual claims are simply not supported by the record. Because the Defendants failed to appeal from a previous order of February 2000 finding constitutional violations with regard to fire safety, and do not attempt to challenge the findings in connection with that order in their brief, they have waived any challenge to those findings.

This record fully supports the district court's conclusion that Plaintiffs have shown the two elements of a violation of the Eighth Amendment. First, the Defendants have failed in their affirmative duty to protect prisoners from a substantial risk of serious injury. See Farmer v. Brennan, 511 U.S. 825, 834 (1994). The overwhelming factual record from both evidentiary hearings demonstrates the substantial risk. Second, the Defendants have knowledge of the risk and nonetheless have failed to take reasonable measures in response. See id., 511 U.S. at 842. In this case, the Defendants' knowledge of the risk is shown by the fact that the district court had previously made a finding of a constitutional violation, and allowed the Defendants an opportunity to remedy the violation by

themselves, but the Defendants failed to avail themselves of that opportunity. The Defendants also know of the danger because of the report of the Defendants' own consultants, who reported that the facilities had serious fire safety deficiencies that require remediation.

The Eastern District court transferred jurisdiction of the issues relevant to this appeal to the district court below. Section VIII of the Consent Decree required a management study that, in turn, led to the adoption of a plan to break up the facilities. The Eastern District's previous orders regarding that break-up plan are consistent with the injunction issued by the district court below. Indeed, existing orders in the Eastern District, at the time of transfer, required the compartmentalization of the cellblocks in the Egeler Facility.

The district court made all the findings required by the PLRA, 18 U.S.C. § 3626(a). The court provided the Defendants with multiple opportunities, including in the order from which Defendants appeal, to suggest an alternative remedy to compartmentalization. Even in this Court the Defendants do not suggest any alternative remedy to that proposed by the district court.

The district court did not attempt to exercise jurisdiction over non-*Hadix* facilities. In connection with the final judgment accepting the Consent Decree, the district court in the Eastern District of Michigan defined the term "*Hadix*

facilities." The Defendants did not appeal from that final judgment. Under that definition, all of the Egeler Facility, by reason of its usage as part of the reception process, is a *Hadix* facility. In addition, Cellblock 3 of Egeler, and Cellblocks 7 and 8, are part of the original *Hadix* facilities. While the Defendants claim that the district court included other facilities in its order, nothing in the order from which Defendants appeal refers to any other facilities.

Finally, the Defendants' evidentiary challenge to admission of three of Plaintiffs' exhibits has no arguable merit. One exhibit was a report to Defendants prepared by the architectural firm that Defendants had hired in connection with the break-up plan. The Defendants' Project Manager, testifying as Defendants' engineering expert at the hearing, stated that he accepted the recommendations of the architectural consultants. As such, the report qualified as an admission under several different sections of Fed. R. Evid. 801(d)(2). The other two exhibits are one-page architectural drawings. Both of these exhibits were also prepared by the Defendants' consulting architectural firm, and constitute admissions. One of these drawings involves cellblocks that are not involved in these appeals, and the exhibit was not cited by the district court in its findings. The other exhibit simply shows a fact that Defendants admit in their brief: the Eastern district court had ordered the compartmentalization of the Egeler Facility. Accordingly, in any event, admission

of these exhibits could not have been more than harmless error.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND A VIOLATION OF THE EIGHTH AMENDMENT

A. The District Court's 2002 Findings Are Not Clearly Erroneous

The district court's findings of fact are not to be set aside unless clearly erroneous. Fed. R. Civ. P. 52(a). Plaintiffs' Statement of Facts is drawn entirely from the district court's findings of October 29, 2002. While the Defendants in their brief give their own version of the facts, the Defendants fail to challenge a single one of the specific findings of the district court as clearly erroneous.

Instead, the Defendants provide their own version of the facts, at best cited to their own testimony and exhibits. See Defs.' Br. at 12-24. At most, the Defendants' approach could demonstrate that there are two plausible views of the evidence in this case, but such a demonstration would be legally insufficient to challenge the district court's factual findings. See Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985) (citations omitted):

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id.[13]

Moreover, the Defendants' purported summary of the evidence itself demonstrates why the district court rejected their view of the evidence. For example, at page 15 of Defendants' brief, they claim that their fire safety expert, Wayne Carson, testified that they were conducting "proper" fire drills. In fact, Mr. Carson did no more than review the Defendants' reports, and state that "it appears" that regular fire drills were being conducted on each shift. He did not testify that these were "proper" fire drills. See T. at 260 (5/7/02); R3. App. 1005. Similarly, the Defendants appear to be criticizing Plaintiffs' fire safety expert Michael DiMascio on the basis that he "never witnessed an evacuation drill at any of the subject facilities" (Defs.' Br. at 15), although their own expert similarly did not testify on the basis of observation of an actual fire drill. See T. at 260 (5/7/02); R3. App. 1005.

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[13] The Plaintiffs' fire safety expert, Michael DiMascio, had a decree in civil engineering from the Worchester Polytechnic Institute and had graduate education in fire safety. He is a registered professional fire protection engineer in the State of Massachusetts. Among other professional committee memberships, he has been a member of the National Fire Protection Association Technical Committee, Guide for Fire and Explosion Investigations; Code for Safety to Life in Buildings and Structures, Subcommittee on Detention and Correctional Occupancies; and Building Code, Subcommittee on Detention and Correctional Occupancies. He has worked on twenty-two detention and correctional building projects, including auditing various facilities for code compliance on behalf of the State of Massachusetts. See Pls.' Exh. 5; App. 1716.

Defendants also state, at page 17 of their brief, that Mr. Carson looked at "typical" prisoner clothing in calculating the average amount of combustible property (fuel load) in a cell. Mr. Carson did not testify that he looked at "typical" prisoner clothing; he looked only at the clothing issued by Defendants. T. 263 (5/7/02); App. 1008. Defendants further argue that their policy limits the amount of property in cells, citing their trial exhibit 36. That policy defines only state-issued clothing and furnishings; it does not address limits on overall property. See Defs.' Exh. 36; App. 1710.

Based on these inappropriate assumptions about property limitations, Mr. Carson purported to calculate the fuel load in a typical occupied prisoner cell. In fact, Mr. Carson testified that he made a "generous allowance" of ten pounds for prisoner personal property in making his calculation. T. at 264 (5/7/02); App. 1009. Plaintiffs' affirmative evidence, however, demonstrated that Mr. Carson's calculations were not based on accurate assumptions; typical prisoner personal property was perhaps 250 pounds. 2002 Findings at 245; App. 1435.

Similarly, the Defendants refer to the "only multi-tiered open cell block fire that Mr. Carson's research disclosed." Defs.' Br. at 18. In fact, Mr. Carson's research was deficient. See T. at 354-55 (5/7/02); App. 1056-57. (Plaintiffs' architectural expert Curtiss Pulitzer describing various fatal fires in prison multi-

tiered facilities). Nor is it correct that all of these fatalities took place 20 or 25 years ago. See id.

Moreover, the Defendants cite Mr. Carson's testimony that the large open space in the cellblocks would act to absorb smoke and thus decrease the risk. See Defs.' Br. at 16. As noted above, however, Mr. Carson's testimony on this point was undermined because he used an inaccurate fuel load calculation on which to base his conclusions. See Pls.' Br., supra, at 25. Mr. Carson also conceded that he did not attempt to calculate the volume of smoke that would be produced in the event of a fire in Cellblock 7 or 8. T. at 288 (5/7/02); App. 1033.

In contrast, it was the conclusion of Plaintiffs' fire safety expert Michael DiMascio that the fuel load he personally observed in prisoner cells was sufficient to sustain a fire for fifteen minutes. See 2002 Findings at 257; App. 1438; T. 388-89 (5/7/02); App. 1067-68. He also testified that, in the event of a fire, smoke would fill the cellblock at the rate of ten feet per minute; in view of the ceiling heights in these cellblocks, smoke from the base tier would reach the ceiling in approximately five minutes. 2002 Findings at 258; App. 1439; T. 366-68 (5/7/02); App. 1061-63.[14] Given that in fire drills (without the panic or confusion produced

[14] In summary, Mr. DiMascio, Plaintiffs' fire safety expert, disagreed with Mr. Carson because, Mr. DiMascio testified, a plume of smoke from a fire in one of the cellblocks would rise vertically, broadening as it rose. When the plume reached the top, the smoke would then begin to fill the cellblock down from the

by actual smoke or fire), it can take up to twenty minutes to evacuate the cellblocks,[15] there is currently a deadly gap in fire safety that requires remediation.

The Defendants also state that Mr. Carson testified that the transformers in the basement of Cellblocks 7 and 8 are "not a problem" and "there is nothing in the basement that is combustible." Defs.' Br. at 19. On cross-examination, Mr. Carson admitted that the basements contained a live dry transformer, live circuit breaker panels and an inactive wet (oil-filled) transformer. The oil-filled

transformer is a few feet from the active dry transformer, which is not completely enclosed. Mr. Carson described the dry transformers and the circuit breaker panels as not "much of a problem" but did not attempt to deny that the oil-filled transformer was combustible. T. 286-87 (5/7/02); App. 1031-32.

The portions of the record cited by Defendants in support of the statement at page 20 of their brief that the "Life Safety Code does not require smoke evacuation with sprinklers" do not support that proposition. See T. 272-76 (5/7/02); App.

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top. There would be a very limited time before the fire would start affecting people attempting to exit from the cellblock. Smoke and hot products of combustion would go into the area being used to exit by prisoners on other levels. The exhaust fans in the Egeler cellblock would be able to clear such smoke at the rate of 20,000 cubic feet per minute, but adequate smoke exhaustion would require a unit capable of removing 150,000 cubic feet per minute. T. 365-68 (5/7/02); App. 1060-63.

[15] 2002 Findings at 243; App. 1424.

1017-21; Defs.' Exh. 4 and 5; App. 1559, 1677. The Defendants' description of the effects of smoke in the unsprinklered pipe chases in Cellblocks 7 and 8 is confusing and unclear. See Defs.' Br. at 20. As Defendants' expert Mr. Carson testified, smoke could go up through the pipe chases and enter additional cells. T. 286 (5/7/02); App. 1031. The district court accurately summarized the uncontested evidence regarding the effects of the air-handling units in the event of a fire producing smoke. See Pls.' Br., supra, at 10-11, citing 2002 Findings at 247, 249-51, 260; App. 1428, 1430-32, 1441.

The Defendants' citation of Mr. Carson's testimony for the assertion that the cellblocks are fully-sprinklered within the intent of the Life Safety Code, see Defendants' Brief at 21, is contradicted by the testimony and expert report of Plaintiffs' expert. See T. 371-72 (5/7//02); App. 1064-65; Pls.' Exh. 5 at 2, 4, 6; App. 1717, 1719, 1721. Moreover, the uncontradicted evidence indicates that the BOCA Code applies, not just to new or renovated structures, but when necessary to make an existing structure safe. See 2002 Findings at 248, 256; App. 1429, 1437. Indeed, the consultants hired by Defendants to advise them about the break-up process suggested that the BOCA Code applied to these facilities because of the BOCA provision requiring its application to existing unsafe structures. See Pls.' Exh. 95 at 2; App. 1760.

Although Mr. Carson noted that the Egeler cellblocks have a mechanical remote release system, he admitted that, notwithstanding that system, correctional officers at Egeler, in the event of a fire, would have to undo twenty-two locks to allow prisoners to exit. T. 282-83 (5/7/02); App. 1027-28.

Similarly, although Mr. Carson testified that the ventilation systems in the cellblocks would help remove smoke, he acknowledged that they are "not a smoke controlled system as encompassed in the codes." Id. at 284-85; App. 1029-30. As the district court found, in the Parnall cellblocks, in the event of a fire, the ventilation system would first draw smoke up into the tiers to the return air vents. In the presence of large amounts of smoke, however, these units would shut down, at which point the smoke would not be recirculated, but it would also not be exhausted. In Egeler, the ventilation units have only a small fraction of the exhaust capacity that is required by the Life Safety Code to exhaust smoke. 2002 Findings at 247, 258; App. 1428, 1439. Accordingly, the ventilation system does not make a significant contribution to fire safety in either Egeler or Parnall.

The Defendants attack, at page 24, the unwillingness of Plaintiffs' expert Mr. DiMascio to rely solely on the automatic sprinklers within prisoner cells. He explained that his opinion is based on the fact that this is a prison. T. 389 (5/7/02); App. 1068. In light of the fact that every fire within the *Hadix* facilities referred to

in testimony was deliberately set by prisoners,[16] it is reasonable to assume that a prisoner intent on setting the fire could also disable the sprinkler within his cell. Moreover, the individual sprinkler heads are not supervised. T. 390 (5/7/02); App. 1069.

The Defendants, at page 24, do not cite evidence supporting the availability of manual fire suppression by staff; Defendants' counsel simply suggested to Plaintiffs' expert that such suppression would be available. See T. at 389 (5/7/02); App. 1068. Although some manual suppression capacity presumably exists, the Defendants made no attempt to introduce evidence explaining staff's capabilities in the matter, or how requiring staff to attempt to suppress a fire would affect their ability to assist in the evacuation of the cellblock. Similarly, the Defendants' citations offer no support for their claim that there are smoke detectors in the basement at Egeler, or that there are two exhaust fans constantly operating in Cellblock 2 at Egeler. See Defs.' Br. at 24, citing T. 399 (5/7/02).

B. The Defendants' Failure to Appeal from the February 2000 Findings Bars Them from Challenging Those Findings Now

The Defendants did not appeal from the district court's findings and order,

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[16] See T. at 623-24 (5/8/02); App. 1081-82 (describing fire on the first gallery (first tier level above the base) in Cellblock 8 in 1999 or 2000); T. 265-66 (5/7/02); App. 1010-11 (indicating that several fires had been set in Egeler during prison disturbances in 1981).

entered on February 18, 2000, determining that they were violating the Constitution by failing to protect prisoners from the danger of fire. R3. 1373; App.764.[17] This order was issued as a result of Defendants' Motion for Immediate Termination of Consent Decree, June 11, 1996 (R3. 715) and Supplemental Motion to Terminate Consent Decree, Sept. 13, 1999 (R3. 1278), both filed pursuant to the termination provisions of PLRA, 18 U.S.C. § 3626(b). As a result of the court's determination that there were current and ongoing constitutional violations with regard to failure to protect from the risk of fire at Egeler, see 2000 Findings at 51 (R3. 1372; App. 706), the court refused Defendants' request for immediate termination. Pursuant to 28 U.S.C. § 1292(a)(1), the order refusing immediate termination was appealable because it constituted an interlocutory order "continuing" or "refusing to dissolve or modify injunctions."

Comparable circumstances arose in Keyes v. Sch. Dist. No. 1, Denver, Colo., 895 F.2d 659 (10th Cir. 1990). In that case, the school defendants filed a notice of appeal in a school desegregation case from the denial of a motion seeking a declaration that the school system had achieved unitary status. The plaintiffs

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[17] The Defendants assert jurisdiction only under 28 U.S.C. § 1292(a)(1), allowing appeal from certain interlocutory orders. No final judgment is involved here. Accordingly, the rule that appeal from a final judgment ordinarily draws into question prior non-final rulings and orders (see Int'l Union, UAW v. United Screw & Bolt Corp., 941 F.2d 466, 471 (6th Cir. 1991)), does not apply.

challenged the jurisdiction of the court of appeals to hear the case, but the court of appeals held that the denial of the defendants' motion for a declaration of unitariness, which would have had the consequence of terminating injunctive relief, constituted an interlocutory order "continuing" an injunction as that term is used in 28 U.S.C. § 1292(a)(1). Accordingly, the order of the district court was immediately appealable. Id. at 663.

Similarly here, the district court's finding in February 2000 that there were current and ongoing violations of the Constitution had the effect of continuing the injunctive relief provided pursuant to the Consent Decree and was therefore appealable pursuant to §1292(a)(1). See also Kerwit Med. Prod., Inc. v. N. & H. Instruments, Inc., 616 F.2d 833, 835-36 (5th Cir. 1980) (holding that denial of a motion to vacate consent decree was appealable as interlocutory order continuing or refusing to dissolve an injunction; rejecting claim that the order was a final decision appealable pursuant to 28 U.S.C. § 1291).

The Defendants did not include a reference to the February 18, 2000 order in their current Notice of Appeal. See R3.1661; App. 1449. Nor did the Defendants' opening brief include any argument challenging the findings of the district court related to the February 18, 2000 order. Accordingly, the Defendants have waived any challenge to those findings. See United States v. Universal Mgmt. Servs. Inc.,

191 F.3d 750, 756-57 (6th Cir. 1999) (holding that where notice of appeal referred only to order granting summary judgment, not order denying motion for reconsideration, court of appeals could not review issues raised in motion for reconsideration). In reliance on that waiver, Plaintiffs have not briefed the correctness of the district court's findings in February 2000.[18]

While this Court has held that some failures to specify in the notice of appeal those orders for which the appellant seeks review were no more than harmless error, whenever the Court has done so, the failure of the appellant did not prejudice the opposing party. See Inge v. Rock Fin. Corp., 281 F.3d 613, 618 (6th Cir. 2002) (characterizing error in notice of appeal as harmless because both parties fully briefed issue); Crawford v. Roane, 53 F.3d 750, 752-53 (6th Cir. 1995) (rejecting argument that court of appeals lacked jurisdiction over order because appellees were on notice that appellant sought review of order and because appellees suffered no prejudice because of failure to specify order in notice of appeal); Caldwell v. Moore, 968 F.2d 595, 598 (6th Cir. 1992) (reviewing order not

[18] It would take substantial briefing to defend the district court's 2000 Findings, and Plaintiffs could not do so in this brief without shortening other important arguments. Unlike the 2002 Findings, not all of the 2000 Findings are cited to the specific record evidence supporting the findings. See, e.g., 2000 Findings at 51; App. 756 (finding that fire safety hazards are particularly exacerbated for persons with significant medical disabilities who are inappropriately housed on an upper tier).

named in notice of appeal because the appellees identified no prejudice from the omission). In contrast, here the failure of the Defendants to specify that they were appealing from the February 18, 2000 order, combined with their failure to brief that issue, would prejudice the Plaintiffs if the Court were to review that order. Accordingly, the Plaintiffs rely on the district court's findings of fact and its conclusions of law at the earlier hearing that the Defendants' practices resulted in an Eighth Amendment violation with respect to the failure to protect prisoners in Egeler from the risk of fire.[19]

C. The Failure of Defendants to Protect Prisoners from the Risk of Fire Violates the Eighth Amendment

The Eighth Amendment places an affirmative duty on prison officials to provide humane conditions of confinement to prisoners; prison officials must ensure that prisoners receive basic necessities, such as medical care, and they must take "reasonable measures to guarantee the safety of the inmates." Farmer, 511 U.S. at 832 (internal quotations and citations omitted); see also DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989) (stating that

[19] At page 38, the Defendants claim that fire safety concerns had previously been dismissed by Judge Feikens in Eastern District and in the Western District in the related case of United States v. Michigan, G84-63 (W.D. Mich.) (R2). United States v. Michigan was dismissed on stipulation of the parties, not as a result of litigation. Moreover, it is simply not true that Judge Feikens terminated the fire safety issues currently before this Court. See supra at 2-5.

when the government restrains a person's liberty to the extent that he or she is unable to take care of basic human needs, such as food, clothing, shelter, medical care and reasonable safety, the government must provide for those needs, and a failure to do so violates the Eighth Amendment and Due Process Clause). Failure to protect a prisoner from a substantial risk of serious harm violates the objective component of the Eighth Amendment. Farmer, 511 U.S. at 834.

Failing to provide necessary fire safety poses a substantial risk of serious harm. "Prisoners have the right not to be subjected to the unreasonable threat of injury or death by fire and need not wait until actual casualties occur in order to obtain relief from such conditions." Hoptowit v. Spellman, 753 F.2d 779, 784 (9th Cir. 1985); see also Gates v. Collier, 501 F.2d 1291, 1300, 1303 (5th Cir. 1974) (prisoners are entitled to relief under the Eighth Amendment from a threat to their personal safety posed by a lack of adequate firefighting equipment), cited with approval, Helling v. McKinney, 509 U.S. 25, 33-34 (1993).

Indeed, a "remedy for unsafe conditions need not await a tragic event." Helling, 509 U.S. at 33 (finding that prisoner's claim of exposure to unhealthy levels of second-hand tobacco smoke stated an Eighth Amendment claim). Prison authorities may not ignore a condition of confinement creating an unreasonable risk merely because no harm has yet occurred. Id.; see also Hill v. Marshall, 962

F.2d 1209, 1211, 1215 (6th Cir. 1992) (holding that failure to provide prophylactic medication to prevent the possible future development of active tuberculosis is "actual injury," even though prisoner did not develop active tuberculosis).[20]

Moreover, when prison officials fail to provide for a basic human need as a result of "deliberate indifference," they violate the Eighth Amendment's ban on cruel and unusual punishments. Wilson v. Seiter, 501 U.S. 294, 300-03 (1991).[21] In order to show deliberate indifference in a case challenging a failure to protect from harm, a prisoner need not show that prison officials acted or failed to act believing that harm would actually befall prisoners; all that must be shown is that the prisoner was incarcerated under conditions posing a substantial risk of serious harm, and that prison officials acted or failed to act despite knowledge of the substantial risk of serious harm. Farmer, 511 U.S. at 834, 842. Deliberate indifference may be shown by circumstantial evidence, and the fact finder may conclude that prison officials knew of a substantial risk from the very fact that the risk is obvious. Id. at 842. Nor does the prison official need to know that the

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[20] Because, under Helling and Hill, an unreasonable risk of future harm can qualify as a constitutional violation, the Defendants' citation of Lewis v. Casey, 518 U.S. 343 (1996), is irrelevant. By showing a constitutional violation, Plaintiffs by definition showed an "actual injury."

[21] See also Farmer, 511 U.S. at 832, 834 (including "reasonable measures to guarantee the safety of inmates," along with supplying adequate food, clothing, shelter and medical care, as affirmative duties of prison officials).

person injured was especially likely to suffer harm and "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." Id. at 843.[22]

In this case, the Defendants had direct knowledge of the substantial risk to prisoners because the district court had previously found a constitutional violation with respect to the failure to protect prisoners from the risk of fire, as well as by reason of the findings of their own consultants.[23] No clearer notice of the constitutional violation could possibly have been provided. "If, for example, the evidence before a district court establishes that an inmate faces an objectively intolerable risk of serious injury, the defendants could not plausibly persist in claiming lack of awareness, any more than prison officials who state during the litigation that they will not take reasonable measures to abate an intolerable risk of which they are aware could claim to be subjectively blameless for purposes of the Eighth Amendment[.]" Id. at 846 n. 9.

Moreover, the duty of prison officials, when they know of the risk, is to take

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[22] Although Farmer arose in the context of a failure to protect a prisoner from sexual assault, the Court makes clear that its discussion of deliberate indifference applies generally to Eighth Amendment claims regarding conditions of confinement. See id. at 832-840.

[23] See supra at 4-5; 13-16.

"reasonable measures to abate it." Id. at 847. Thus, as a necessary corollary, the fact that prison officials have taken some action with regard to a known risk does not by itself defeat an Eighth Amendment claim, if the actions were not reasonable under the circumstances. See LeMarbe v. Wisneski, 266 F.3d 429, 434-40 (6th Cir. 2001) (holding that the facts could support a finding of deliberate indifference in light of affidavit that any general surgeon encountering the surgical complication experienced by plaintiff would have known that the patient needed to be sent immediately to a specialist who could address the complication if the surgeon himself could not succeed in doing so), cert. denied, 535 U.S. 1056 (2002). In this case, however, the Defendants provided no evidence that they had taken any steps subsequent to the hearing to address the fire safety problems shown in the record.

The primary error in the Defendants' legal argument is that they make no attempt to demonstrate a connection between the law they cite and the facts of this case. For example, although they discuss the requirement of actual knowledge of the risk to prisoners (see Defendants' Brief at 30-31), they make no attempt to link this discussion to some plausible claim that they lacked actual knowledge of the risk in view of the district court's previous findings, as well as the findings of their own consultants.

In addition, the Defendants make several specific legal arguments that

cannot be supported. The Defendants at page 31 of their brief cite Hicks v. Frey, 992 F.2d 1450 (6th Cir. 1993), for the proposition that a prison official's conduct "must demonstrate deliberateness tantamount to an intent to punish." Id. at 1455. In light of the intervening decision in Farmer, this quotation, of course, is no longer authoritative. Rather, the Supreme Court made clear in Farmer that "an Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate..." 511 U.S. at 842.

Similarly, at page 32 of their brief, the Defendants cite United States v. Michigan, 940 F.2d at 158, 168, for the proposition that mere differences of opinion do not violate the Constitution. What this Court actually said was that, in a situation when both validation plans for a housing classification policy were "equally effective and comparable," the district court should have deferred to prison administrators. Id. at 158. Aside from the obvious differences between classification and fire safety issues, this is not a situation in which the Defendants' failure to propose any remedy is "equally effective and comparable" to the remedy adopted by the district court.

II. THE DISTRICT COURT APPROPRIATELY REQUIRED A FIRE SAFETY REMEDY PURSUANT TO THE BREAK-UP PLAN

The Defendants first state that "[n]o hearing was ever held demonstrating

constitutional violations mandating the necessity of any "break-up" plan." Defs.' Br. at 34. Obviously, that statement is incorrect; the hearings regarding fire safety leading to the 2000 and the 2002 findings demonstrated the need for the break-up plan or some equally effective remedy; yet the Defendants have not offered any remedy. In addition, the Defendants allege that "the Decree merely required MDOC officials to prepare a management plan that addressed the recommendations from the study once it was completed." Defs.' Br. at 33. The Consent Decree required not only preparation of a plan, but implementation of an appropriate plan. Consent Decree, R1. 199 at 31-32; App. 366-67.

Nor are the Defendants correct that the non-*Hadix* facilities that were part of the old State Prison of Southern Michigan ("SPSM") are not subject to the Consent Decree in this regard. See Defs.' Br. at 33. While the non-*Hadix* facilities are generally not subject to the Consent Decree, § VIII of the Consent Decree, requiring the break-up plan, covers all of SPSM. See Consent Decree, R1. 199 at 31-32; App. 366-67; see also Order Granting in Part and Denying in Part Defendants' Motion to Reconsider and Alter November 27, 1992 Order, Jan. 12, 1993 at 1; R1. 892; App. 478.

A. Cellblocks 7 and 8

In response to the requirements of Section VIII of the Consent Decree, the

parties negotiated, and the Eastern District court approved, the Stipulated Agreement Regarding Plan Element One and the Implementation of Paragraphs VIII, E, F, and G of the Consent Decree, June 8, 1990. That plan called for the unitization and compartmentalizaton of each of the cellblocks of SPSM into four parts. R1. 717; App. 391. As a result of that Stipulation, the Defendants hired a consulting firm, Rosser Fabrap, to evaluate the existing facilities and design necessary corrective action in conformity with the Stipulation. Rosser Fabrap performed that evaluation and determined that fire safety deficiencies in the facilities required remediation. 2002 Findings at 242; R3. 1658; App. 1423.

The Defendants ultimately submitted a request in the Eastern District of Michigan on October 13, 1992 (R1. 862; App. 460) to proceed without compartmentalizing Parnall including Cellblock 7. The Honorable John Feikens in the Eastern District of Michigan granted that request. Opinion, Nov. 27, 1992, R1. 882; App. 467. Significantly, however, Judge Feikens held that he could approve the Defendants' request without modifying the parties' Stipulation, based on information from Defendants about the proposed usage of these cellblocks. The court decided that it was premature to consider any modification "until the shape of a final order emerges." Id. at 7; App. 473. Moreover, the court found that Defendants had not met their evidentiary burden to justify modification. Id. At the

same time, the court said:

> While the Court does not find a basis for modification of the June 8, 1990 Stipulation, the Court does not believe that the parties intended to enslave the parties and the Court to the substantive provisions of the June 8, 1990 or the April 7, 1989[24] Stipulations, when better plans and ideas emerge.

Id. at 4; App.470. Based on the facts presented to the Eastern District court at the time, including the expectation that the prisoners in these cellblocks would be Level One (low security), the court determined that, if these facilities held only low security prisoners, they would not violate the break-up plan. Id. at 4-6; App. 470-72.

Significantly, this order by Judge Feikens did not consider any medical issues related to the break-up, because all medical and mental health issues had already been transferred to the Western District. Order of Transfer, June 5, 1992, R1. 835; App.456. Indeed, Judge Feikens recognized that the break-up issues had to be considered in light of health and safety concerns regarding the current usage of the *Hadix* facilities, and for that reason he subsequently transferred these issues to the Western District. See Order of Transfer, March 18, 1999 at 2, R1. 1342;

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[24] The reference is to the Stipulation Regarding Implementation of Consent Decree Provisions VIII, E, F, and G, April 7, 1989, R1. 609; App. 387. This Stipulation covered procedural issues regarding implementation of the break-up plan.

App. 483) (transferring to the Western District issues regarding the adequacy of the Defendants' proposed alternatives to the break-up plan to determine whether Defendants' proposed substitution endangered the health of prisoners); Order of Transfer, Nov. 15, 2000 at 2, R1. 1432; App. 488 (transferring to the Western District "the fire safety issues which are the same as those concerning Facility A previously transferred to the Western District" with regard to Facility D (Parnall)).

As currently operated, prisoners in Cellblock 7 are in the reception process and represent a variety of different security levels, not just Level One prisoners. See supra at 7. Accordingly, because Cellblock 7 is not being used to provide housing in the manner that Judge Feikens approved in the November 1992 order, that order is consistent with the injunction at issue here, particularly because Judge Feikens did not modify the break-up requirement but rather decided that the requirement was met in light of the then-contemplated uses of the facilities.

Cellblock 8 contains large numbers of medically fragile prisoners. See 2002 Findings at 262-63; App. 1443-44. In fact, Parnall contains 476 prisoners on the monthly accommodations list for prisoners with special medical needs, and 274 Parnall prisoners are on the list of prisoners at special risk for heat injury (typically prisoners with heart or lung problems). Defs.' Filing of Information Requested by the Court at the May 6-8, 2002 Hearing, May 17, 2002, R3. 1629; App. 846. The

total population of Parnall in May 2002 was 1023. See 2002 Findings at 8; App. 1189. Although the Defendants claim that there has been no change in the number of medically-compromised prisoners housed in Parnall, the only citation they provide for this surprising statement is a citation to their own brief on the issue, filed on February 18, 2003. See Defs.' Br. at 37-38, citing R3. 1694; App. 1497 (Defs.' Reply to Pls.' Resp. to Defs.' Br. Regarding Alternatives to Compartmentalization to Remedy Alleged Fire Safety Problems and Risks).[25] In that brief, at page 3, the Defendants make the same claim, but cite nothing to support it. Id. at 3; App. 1499. As previously noted, however, the district court specifically found, in the unappealed 2000 findings, that the *Hadix* facilities are used to house "many of the sickest patients in the prison system." 2000 Findings at 50, R3. 1372; App. 755.

Given the change in circumstances, nothing in the Eastern District's order of November 27, 1992 is inconsistent with the district court's determination, in the order from which Defendants appeal, that the constitutional violation regarding

[25] See also Defs.' Br. at 34-36, repeatedly citing docket entry 1687, which is Defendants' Brief Regarding Alternatives to Compartmentalization to Remedy Alleged Fire Safety Problems and Risks, December 30, 2002. That brief has the same text as the corresponding section of Defendants' Brief, and it contains no record citations. Compare Defs.' Br. at 34-37 to Defs.' Br. Regarding Alternatives to Compartmentalization to Remedy Alleged Fire Safety Problems and Risks, Dec. 30, 2002 at 2-4, R3. 1687; App. 1450.

fire safety justifies a further order, in light of current circumstances, requiring the compartmentalization of Cellblocks 7 and 8. See United States v. Montgomery Co. Bd. of Educ., 395 U.S. 225, 231-32, 235 (1969) (approving entry of more specific order after initial order had failed to cure constitutional violation).

B. Egeler

As the Defendants admit, existing orders in this case entered in the Eastern District, prior to the 1999 and 2002 hearings, required compartmentalization in the Egeler facility. See Defs.' Br. at 36-37. Although Defendants claim that the primary reason for compartmentalization in Egeler was security issues, they give no record citations for that claim. See Defs.' Br. at 36-37. Nor is it particularly relevant if the "primary" reason for the break-up plan was security, in light of the district court's finding of a constitutional violation. The break-up plan, pursuant to Section VIII of the Consent Decree, covers structural issues relating to the facilities, and the compartmentalization of Egeler, as ordered by the district court, is an appropriate remedy to address the constitutional violation that the court found.

III. THE REMEDY ENTERED BY THE DISTRICT COURT WAS APPROPRIATE UNDER THE PLRA

The district court made every finding required by the PLRA, 18 U.S.C.

§3626(a), in the injunction from which Defendants appeal:

> This remedy, if implemented, cures all of the constitutional violations related to fire safety found by this Court. This remedy also meets the requirements of 18 U.S.C. § 3626(a): it is narrowly drawn, limited to the minimum necessities, least restrictive and cognizant of the impact on the systems of criminal justice and law enforcement. It extends no further than necessary to correct the constitutional violation because, absent a suggestion from Defendants as to an alternative solution, nothing other than compartmentalization will cure the constitutional violations as to fire safety and fire egress, given the needs of the inmate population. The relief is also the least intrusive means necessary to correct the constitutional violations because, to the extent possible, it adopts the remedy that Defendants themselves proposed, and modifies that remedy only minimally.

Injunction, Feb. 25, 2003 at 2-3; R3. 1696; App. 1504. Although the Defendants purport to challenge the district court's findings under the PLRA, the Defendants make no attempt to argue that the remedy imposed by the district court was more extensive or more intrusive than an appropriate alternative remedy. <u>See</u> Defs.' Br. at 40-48. As noted above, in the district court the Defendants refused multiple opportunities, including an invitation in the order from which they appeal, to propose an appropriate alternative remedy to their original proposed break-up plan. Even in this Court Defendants do not offer a single suggestion of what an appropriate remedy would be. In short, this section of Defendants' Brief is simply

a rehash of their argument that no Eighth Amendment violation exists.

Moreover, it is important to remember that the PLRA does not purport to change the constitutional standard under the Eighth Amendment, as Congress does not have the power to redefine the Constitution. See City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (noting that Congress lacks the power to determine what constitutes a constitutional violation). Indeed, PLRA does not even change the substance of remedial standards. See Gilmore v. California, 220 F.3d 987, 1006 (9th Cir. 2000) (stating that, at least in the context of contested decrees, the general standard for granting prospective relief differs little from the standard set forth in 18 U.S.C. § 3626(b) for terminating relief);[26] Smith v. Arkansas Dep't of Corr., 103 F.3d 637, 647 (8th Cir. 1996) (stating that 18 U.S.C. § 3626(a) merely codifies existing law and does not change the standards for determining whether to grant an injunction); Williams v. Edwards, 87 F.3d 126, 133 n. 21 (5th Cir. 1996) (same).

Once again, this section of Defendants' brief is cited almost entirely to their own previous briefs, and their previous briefs contain essentially the same text with no record citations in support of their claims. See Defs.' Br. at 42-43 (citing R. 1687, which is the Defendants' Brief Regarding Alternatives to

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[26] The standards relating to granting relief under 18 U.S.C. § 3626(a) are identical to the standard under 18 U.S.C. § 3626(b) for determining whether existing relief should terminate.

Compartmentalization to Remedy Alleged Fire Safety Problems and Risks, Dec. 30, 2002 at 4-6). Statements of counsel are not evidence. Brown v. INS, 775 F.2d 383, 388 (D.C. Cir. 1985) ("But these allegations, upon analysis, were just that. They were assertions of counsel, not evidence"). Because the Defendants are not citing to the record, and because of the generality of Defendants' claims, they are impossible to evaluate and certainly no basis for a conclusion that the specific findings of fact of the district court are clearly erroneous.

For example, Defendants say, without any record citation, that "[t]here is fuel control so that fire will not develop quickly and become large." Defs.' Br. at 42. As discussed above, the district court had substantial and persuasive evidence in the record to conclude that sufficient fuel exists in the individual cells to burn for fifteen minutes, which is more than enough time for the cellblock to fill with smoke and cause harm, particularly because it takes up to twenty minutes to evacuate a cellblock. See supra at 12.

Similarly, the Defendants say that the "district court fails to acknowledge the evidence that smoke production would be slowed or stopped by the sprinklers and smoke cooled by the sprinklers would probably not rise." No citation is given for these claims. Defs.' Br. at 44. In fact, the testimony of Plaintiffs' fire safety expert provided persuasive reasons for concluding that sprinklers, particularly in this

prison, are not sufficient in the absence of a smoke removal system and exits that are close enough to all cells. See supra at 9-10.

The Defendants also state that cell doors can be remotely unlocked in Egeler. See Defs.' Br. at 42-43. This statement is substantially misleading because, as noted supra at 12-13, in the event of a fire, multiple locks would have to be opened in each cellblock of Egeler to accomplish an evacuation, and a substantial number of cell locking mechanisms do not work correctly at any given time.

The Defendants also claim that the smoke detection system is tied to the exhaust system. Defs.' Br. at 43. This is a surprising statement because, according to the uncontradicted evidence at trial, in Egeler, in the event of a fire, staff would be expected to unlock the cells and exit doors, and travel back and forth from the Arsenal to get the key to unlock the switch to the smoke purging system. 2002 Findings at 259; App. 1440.

As yet another example, Defendants state that there are no combustibles stored in the basements. Defs.' Br. at 43. This statement contradicts a finding to the contrary of the district court, and that finding is not clearly erroneous. See supra at 27-28; see also 2002 Findings at 258; App. 1439.

The Defendants also attempt to make much of the presence of smoke

detectors in the cellblocks. See Defs.' Br. at 43. Smoke detectors are a method of identifying fires. The problems in these cellblocks involve what happens after a fire is known. These cellblocks do not have a smoke removal system and travel distances are excessive, particularly in light of the characteristics of the population; the ability to identify a fire does not address these failings.

At page 46, the Defendants claim that the cost of compartmentalization would be approximately eight million dollars per cell block. For this claim, they cite trial testimony of Plaintiffs' architectural expert Curtiss Pulitzer. He actually estimates that the total price tag for all the facilities involved would be $3,668,000. See T. 356-57 (5/7/02). Aside from that issue, budget constraints are not a defense to liability. See Rufo v. Inmates of Suffolk Co. Jail, 502 U.S. 367, 392 (1992) (stating that "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations..."); Harris v. Thigpen, 941 F.2d 1495, 1509 (11th Cir. 1991) (stating that lack of funds allocated to prison by state legislature will not excuse failure to provide necessary medical services sufficient to avoid an Eighth Amendment violation).

IV. THE DISTRICT COURT DID NOT EXERCISE JURISDICTION OVER NON-*HADIX* FACILITIES

The introductory paragraph of the Consent Decree in this case states the

following:

> This was an action brought pursuant to 42 USC 1983 and other applicable statutes seeking declaratory and equitable relief with respect to the conditions of confinement at the Central Complex of the State Prison of Southern Michigan, including the Reception and Guidance Center (hereinafter referred to as SPSM-CC.

Id. at 1; R1. 199; App. 336. At the time the Consent Decree was signed Cellblock 3 (now part of Egeler) and Cellblock 8 (now part of Parnall) were part of the Central Complex. See Defs.' Br. at 49. Cellblock 7 was part of the Reception and Guidance Center,[27] and therefore also part of the Central Complex as defined in the Consent Decree itself.

Accordingly, because Cellblocks 3, 7 and 8 were part of *Hadix* as defined in the Consent Decree, the only remaining question involves Cellblocks 1 and 2 of the Egeler facility. At the time that the Consent Decree was entered, the *Hadix* facilities were defined as "all areas within the walls of the State Prison of Southern Michigan at the time this cause commenced and all areas which will supply support services under the provisions of the Consent Judgment." Order Accepting Consent Judgment, May 13, 1985 at 2 (R1. 213; App. 385). The portion of SPSM "within the walls" was known as the Central Complex. The Defendants did not appeal

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[27] See id.

from this order, which was a final appealable order.

Subsequently, an issue arose in the Eastern District as to whether the Duane Waters Hospital, located within Egeler, is a *Hadix* facility. Duane Waters Hospital was contemplated but not built at the time the Consent Decree was signed; provisions of the Consent Decree regulated the hospital's staffing and required the hospital to include a licensed 21-bed psychiatric unit. Consent Decree, May 13, 1985 at 10-11, 17 (R1. 199; App. 345-46, 352). Accordingly, the Consent Decree specifically contemplated that the hospital would provide services to *Hadix* prisoners. Pursuant to the definition in the Order Accepting Consent Judgment, the district court held that Duane Waters Hospital was a *Hadix* facility. Order Regarding Jurisdiction over the Egeler Facility, Oct. 5, 1989 (R1. 656; App. 390). The Defendants did not appeal from this order, although it was an appealable order because it affected the scope of the injunction required under the Consent Decree.

Similarly, as noted above, the Consent Decree specifically states that it includes the Reception and Guidance Center (Consent Decree, at 1 (R1. 199; App.336)), and it describes various reception functions that the Defendants are required to perform for *Hadix* prisoners. See id. at 8 (App. 343) (describing medical and dental screening required upon entry) & 18 (App. 353) ("All inmates upon initial entry at the Reception and Guidance Center *at SPSM* shall be given a

psychological examination...").[28] All male prisoners admitted to the Michigan system now go through the reception process at the Jackson complex, a function expanded to include the Egeler Facility. See Defs.' Br. at 35-36.

For the same reasons that Duane Waters Hospital, which is outside the physical boundaries of the old Central Complex, is nonetheless a *Hadix* facility because it provides services specifically contemplated under the Consent Decree to *Hadix* prisoners, the Egeler Facility (now known as the Charles Egeler Reception and Guidance Center), is also a *Hadix* facility. Accordingly, the district court held that Cellblock 3 of Egeler is a *Hadix* facility because it was part of the Central Complex, and Cellblocks 1 and 2 of Egeler are covered by the Consent Decree now because they provide support services to *Hadix* facilities. Opinion, April 18, 2002 at 3-4 (R3. 1612; App. 830).

Although the Defendants' Brief at page 50 states that the district court has expanded the definition of "*Hadix* facilities" to include Building C at Egeler[29] and Cellblocks 9 and 10 at Parnall, no such order appears in the injunction from which

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[28] The reference to the Reception and Guidance Center within SPSM, rather than within SPSM-Central Complex, precludes any argument that changing the location of the reception process within SPSM removes the reception function from the purview of the Consent Decree.

[29] Although Building C comes within the definition of a *Hadix* facility, this Court need not resolve the issue because it is irrelevant to this appeal.

Defendants appeal; the injunction clearly states that it applies to Cellblocks 1, 2 and 3 of Egeler, Cellblock 7 of the Reception Complex and Cellblock 8 of Parnall. See Injunction, Feb. 25, 2003 at 2; R3. 1696; App. 1505. Accordingly, the injunction does not include any facilities outside the scope of the Consent Decree.

V. THE DISTRICT COURT DID NOT ERR IN ADMITTING THREE EXHIBITS

The Defendants claim that the district court committed error by admitting three Plaintiffs' exhibits, but they fail to describe the exhibits, or make any effort to argue that admission of the exhibits affected a substantial right, the standard set by Fed. R. Evid. 103(a). See Defs.' Br. at 48.

Plaintiffs' Exhibit 83 involves excerpts from the architectural schematics for the Egeler Facility, Phase 300. App. 1733. Plaintiffs' Exhibit 84 contains mechanical riser diagrams for the duct work systems in Cellblocks 4 and 5 of JMF. App. 1753. Both of these documents bear the names of the State Prison of Southern Michigan and Rosser Fabrap, the consultant hired by Defendants to design break-up plans, and the date August 6, 1993. See T., Hearing re Monitor's Report (10/24/91) at 2, 8-13; R1. 796; App. 385, 401-06 (indicating that the State of Michigan contracted with Rosser Fabrap to prepare plans for the break-up, including the functional and operational programs, space program and concept

designs, so that Defendants could proceed with the break-up plan).

Plaintiffs' Exhibit 95 is the Rosser Fabrap letter report to Defendants. As noted above, the architectural firm of Rosser Fabrap had been hired as consultants by Defendants in connection with the break-up plan. Defendants' Project Manager, who testified as Defendants' engineering expert, testified that he accepted the findings of the Rosser Fabrap report. See supra at 9. This report qualified as a non-hearsay admission under Rule 801, on various grounds. First, the report is "a statement by a person authorized by [defendants] to make a statement concerning the subject." Fed. R. Evid. 801(d)(2)(C); Santana, Inc. v. Levi Strauss and Co., 674 F.2d 269, 275 n. 1 (4th Cir. 1982) (party's expert report admissible under Rule 801(d)(2)(C)); see also Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1306-07 (9th Cir. 1983) (report and deposition of party's expert admissible); Collins v. Wayne Corp., 621 F.2d 777, 782 (5th Cir. 1980) (holding that report and deposition of defendant's expert were admissions by defendant's agent admissible against defendant). In addition, it is a "statement by [defendants'] agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D); Robert R. Jones Assocs., Inc. v. Nino Homes, 858 F.2d 274, 276 (6th Cir. 1988) (statement by architect retained by defendant admissible against

defendant under Rule 801(d)(2)(D)). Finally, because David Sproul, an employee as well as testifying expert of Defendants, accepted the findings of the Rosser Fabrap report, the report is admissible against Defendants as an adoptive admission. Fed. R. Evid. 801(d)(2)(B); Schering Corp. v. Pfizer Inc., 189 F.3d 218, 239 (2d Cir. 1999) (report by outside consultant admissible because defendants' employee relied on report and manifested her belief in its reliability).

The only use the district court made of Plaintiffs' Exhibit 83 was to indicate that it "reflect[ed] a solution to the problems identified" in the Rosser Fabrap report and that it was incorporated into the break-up plan. See 2002 Findings at 241; App. 1422. Defendants admit that the approved break-up plan called for the cellblocks in the Egeler facility to be compartmentalized. See Defs' Br. at 36.[30] Plaintiffs' Exhibit 84 involves Cellblocks 4 and 5 (JMF). These facilities are not at issue in this appeal, and the district court made no findings citing this exhibit. For the same reasons given supra regarding Plaintiffs' Exhibit 95, these diagrams

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[30]At most, the diagram could be relevant only to the precise form of the compartmentalization to remedy the constitutional violation at Egeler, particularly because the district court had found that a constitutional violation existed in the 2000 Findings that Defendants did not appeal. The district court, as noted above at 4-6, provided the Defendants with multiple subsequent opportunities, which they declined, to propose an alternative remedy. The district court also ordered the Defendants to submit their specific remedial plans in the future. See Injunction, Feb. 25, 2003, at 3; R3. 1696; App. 1506. Accordingly, the Defendants were not hindered in any way by the admission of this drawing.

constitute admissions. In any event, however, any conceivable error in connection with these exhibits is necessarily harmless under the facts. See Fed. R. Evid. 103(a).

CONCLUSION

For the above reasons, Plaintiffs request that the Court affirm and remand to the district court.