# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SEAN BAPTISTE NEAL,

Plaintiff,

v.

DIRECTOR OF CDCR, et al.,

Defendants.

**Case No. 1:14-cv-02067-JLT (PC)**

**FINDINGS AND RECOMMENDATION TO DENY PLAINTIFF'S MOTION TO REMAND ACTION TO STATE COURT**

**(Doc. 12)**

## I. FINDINGS

Plaintiff, Sean Baptiste Neal, is a state prisoner proceeding *pro se* in this civil rights action. On February 4, 2013, Plaintiff filed this action in Kern County Superior Court. (Doc. 1-1.) After a demur was granted, Plaintiff stipulated that he would amend as to all Defendants. (Doc. 1, ¶5.) Plaintiff served the First Amended Complaint ("1stAC") on Defendants on December 1, 2014 and they received it Defendants on December 3, 2014. (*Id.*, at ¶ 6.) Defendants filed their notice of removal in this action on December 22, 2104. (Doc. 1.) On January 26, 2015, Plaintiff filed a motion for remanded. (Doc. 12.) Defendants filed an opposition to which Plaintiff replied. (Docs. 15, 16.) The motion is deemed submitted. L.R. 230(l).

### A. Legal Standards

Section 1441(a) of Title 28 provides that a defendant may remove from state court any

action "of which the district courts of the United States have original jurisdiction." The vast majority of lawsuits "arise under the law that creates the cause of action." *Am. Well Works Co. v. Layne & Bowler Co*., 241 U.S. 257, 260, 36 S.Ct. 585 (1916) (Holmes, J.); *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808, 106 S.Ct. 3229 (1986). Federal courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. However, "a case may [also] arise under federal law 'where the vindication of a right under state law *necessarily* turn[s] on some construction of federal law,' " *Merrell Dow*, 478 U.S. at 808, 106 S.Ct. 3229 (quoting *Franchise Tax Bd. v. Const. Laborers Vac. Trust*, 463 U.S. 1, 9, 103 S.Ct. 2841 (1983) (emphasis added)), but "only [if] . . . the plaintiff's right to relief *necessarily* depends on a substantial question of federal law," *Franchise Tax Bd*., 463 U.S. at 28, 103 S.Ct. 2841 (emphases added).

For removal to be proper, it must be clear from the face of the complaint that federal subject matter jurisdiction exists. *Oklahoma Tax Comm'n. v. Graham,* 489 U.S. 838, 840-41, 109 S.Ct. 1519 (1989) (per curiam). The presence or absence of federal-question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Caterpillar, Inc., v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425 (1987) (quotation marks and citation omitted); *Hunter v. Phillip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009) (citations omitted); *Marin General Hosp. v. Modesto Empire Traction Co.*, 581 F.3d 941, 944 (9th Cir. 2009) (citations omitted); *Hall*, 476 F.3d at 687 (citation omitted).

The removal statute is strictly construed against removal and the defendant bears the burden of establishing grounds for removal. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32, 123 S.Ct. 366 (2002) (citations omitted); *Nevada v. Bank of America Corp.*, 672 F.3d 661, 667 (9th Cir. 2012) (citation omitted); *Fossen v. Blue Cross & Blue Shield of Montana, Inc.*, 660 F.3d 1102, 1107 (9th Cir. 2011) (citation omitted); *Hunter*, 582 F.3d at 1042 (citations omitted). Courts must consider whether federal jurisdiction exists, *Rains v. Criterion Systems, Inc.*, 80 F.3d 339, 342 (9th Cir. 1996) (quotation marks and citations omitted), and must reject federal jurisdiction if there is any doubt as to the right of removal in the first instance, *Duncan v. Stuetzle*,

76 F.3d 1480, 1485 (9th Cir. 1996) (quotation marks and citation omitted); *Hunter*, 582 F.3d at 1042 (citations omitted).

**B. Discussion**

**1. Plaintiff's Motion**

Plaintiff makes three arguments to support his motion to remand: (1) that Defendants' notice of removal was not timely filed since Defendants received the original Complaint on August 12, 2014 which relied on more federal law than the 1stAC did (Doc. 12, p. 4); (2) that the case does not turn on a federal question since the 1stAC does not present a substantial dispute over the effect of a federal law (*id.*, at pp. 5-7); and (3) that Defendants are forum shopping to avoid legal responsibility (*id.*, at p. 7). Plaintiff requests that if remand is not granted, all claims requiring interpretation of California law be severed from this action. (*Id.*, at p. 7.)

Defendants respond that Plaintiff's original Complaint did not invoke federal court jurisdiction (Doc. 15, pp. 2-4); that their removal after receipt of the 1stAC was proper (*id.*, at pp. 4-5); and that they are not forum shopping (*id.*, at pp. 5-6).

**a. Timeliness of Notice of Removal**

Procedures for removal are prescribed by 28 U.S.C. § 1446. If a defendant or defendants desire to remove a civil action from state court to federal court, they must file "a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." 28 U.S.C. § 1446(a).

Subdivision (b) of § 1446 specifies the "notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . ." 28 U.S.C. § 1446(b). Subdivision (b)(3) of that same section states "if the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one

which is or has become removable." Failure to comply with the applicable thirty-day time limit or the unanimity requirement renders the removal procedurally defective. *See Emrich v. Touche Ross & Co.,* 846 F.2d 1190, 1193 n. 1 (9th Cir.1988).

If Plaintiff's original Complaint, which was received by Defendants Lopez and Biter via acknowledgment and receipt on September 25, 2014 and Defendant Kernan on August 12, 2014 (*see* Doc. 1, Removal, 2:1-6), affirmatively revealed on its face the facts necessary for federal court jurisdiction, *see Rea v. Michaels Stores Inc.,* 742 F.3d 1234, 1237-38 (9th Cir. 2014), Defendants' removal of the action to this Court on December 22, 2014 is untimely. If, however, the first notice that Defendants had that this case was removable was upon receipt of the 1stAC on December 1, 2014 (*see id.*, at 2:16-22) Defendants' removal of the action to this Court on December 22, 2014 was timely. Plaintiff argues for remand asserting that neither of his pleadings are subject to federal question jurisdiction.

**2. Plaintiff's Pleadings**

The pivotal question is whether the original Complaint or the 1stAC present a federal question on their face, if at all. *Caterpillar,* 482 U.S. at 392; *Hunter*, 582 F.3d at 1042 (citations omitted); *Marin General Hosp,.*581 F.3d at 944 ; *Hall*, 476 F.3d at 687 (citation omitted). State-law causes of action "invoke[ ] federal-question jurisdiction only if [they] necessarily raise a stated federal issue, actually disputed and substantial." *Nevada*, 672 F.3d at 674 (alteration and internal quotation marks omitted).

Plaintiff argues that he did not intend either of his pleadings to present a federal question, but that if a federal question was presented, it was presented in the original Complaint since he cited five decisions from Ninth Circuit in that pleading which is more indicative of a federal question than that presented in the 1stAC where he did not allege any particular federal or United States rule or procedure that requires federal analysis and simply cited the Eighth Amendment in one of his claims in connection with Article 1, §17 of California's Constitution. (Doc. 12, pp. 5-7.) Plaintiff thus argues that, since the original Complaint, if at all, more likely presented a federal question than the 1stAC, Defendants' notice of removal was untimely since Defendants received the original Complaint on August 12, 2014, but did not file their notice of removal until

after their demurrer was granted and they were served with the 1stAC.[1] (*Id.*) Defendants counter that Plaintiff's claim in the 1stAC which noted the Eighth Amendment was the first time that the basis for removal was ascertainable on the face of Plaintiff's pleading, such that their subsequent notice of removal was timely. (Doc. 15, pp. 2-5.)

The original Complaint and 1stAC must be closely examined to ascertain when Defendants first had notice that this case was removable. (Docs. 1-1, 1-5.) Plaintiff's claims in his pleadings are premised on allegations that he was injured by exposure to excessive amounts of arsenic in the only water provided for inmates to drink at Kern Valley State Prison. (*Id.*)

**a. The Original Complaint**

In the original Complaint, Plaintiff alleged four causes of action: (1) intentional tort; (2) exposure to dangerous conditions; (3) negligence; and (4) declaratory relief. (Doc. 1-1.)

In the first and third causes of action (for intentional tort and negligence) Plaintiff cites various sections of the California Civil Code, the California Code of Civil Procedure, and the California Government Code, and does not cite to any federal case law, statute, or constitutional amendments. (Doc. 1-1, at pp. 6-7, 9.)

In the second cause of action, "Exposure to Dangerous Conditions," Plaintiff states "The exposure to toxic substances can support a claim according to *Wallis*[2] *v. Baldwin*, 70 F.3d 1074, 1076-77 (9th Cir. 1995)" and later states "Plaintiff's allegation that Defendants and each of them were and are aware of the water contamination issue and is presumably responsible for [sic] address the issue at the Prison level and Defendant Biter prepared the Memorandum acknowledging that he is aware of the arsenic drinking water. *Hebbe v. Pliler*[3], 627 F.3d 338, 342 (9th Cir. 2010)." (*Id.*, at p. 8.) Plaintiff's intent in citing *Hebbe* is unclear as it addressed pleading standards for *pro se* inmates, the requirements for an access to court claim based on the First and Fourteenth Amendments of the United States Constitution, and found that allegations of

[1] Plaintiff's assertion that Defendants removed the case to this court for "forum shopping" purposes does not merit discussion. Removal of cases by inmates for violation of their rights by prison employees is a common litigation practice.

[2] In his citation, Plaintiff misspelled this case name as "Walhs." (Doc. 1-1, at p. 8)

[3] In his citation, Plaintiff misspelled this case name as "Phler." (Doc. 1-1, at p. 8.)

being forced to choose between exercising outdoors or using the law library over an eight month period of time suffice to state a claim under the Eighth Amendment of the United States Constitution to survive a motion to dismiss -- which does not have any discernable application to Plaintiff's factual allegations. In *Wallis,* the Ninth Circuit found it "uncontroverted that asbestos poses a serious risk to human health" sufficient to support a claim of deliberate indifference under the Eight Amendment. *Wallis,* 70 F.3d at 1076. The correlation between Plaintiff's allegations and *Wallis,* is that asbestos and arsenic both pose a serious risk to human health. However, Plaintiff's use of *Wallis* is merely as a reference "by way of example" which is "not enough to confer federal-question jurisdiction." *Lippitt v. Raymond James Fin. Servs., Inc.*, 340 F.3d 1033, 1040-41 (9th Cir.2003).

In the fourth cause of action, "Declaratory Relief," Plaintiff cites various sections of the California Civil Code, the California Code of Civil Procedure, and the California Government Code. (Doc. 1-1, at p. 10.) In the first paragraph of the fourth cause of action, Plaintiff states "by doing so, each Defendant is stripped of Government representative character, and must answer tort liability for their crimes according to the case of *Ex Parte Young*, 209 U.S. 123 (1908); *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Gavel v. United States*, 408 U.S. 606 (1972)." (*Id.*, at p. 10.) None of these cases cited by Plaintiff appear to have any application to his factual allegations in the original Complaint. *Ex Parte Young* is a habeas corpus case, *O'Shea* addressed the lack of standing of Plaintiffs who were not injured by the actions complained of, and *Gavel* pertains to motions to quash subpoenas relating to release and dissemination of Pentagon Papers. (Doc. 1-1, at p. 10.) Thus, none of the cases cited in the original Complaint would have put Defendants on notice of federal jurisdiction for Plaintiff's claims in this action.

**b. The 1stAC**

In the 1stAC, Plaintiff alleged the following two causes of action:

(1) failure to conform to California Water laws in violation of California Constitution, Article X, §7, California Health and Safety Code §116555(a)(3), and California Water Code §13000 (Doc. 1-5, pp. 12-13); and

(2) violation of California Constitution, Article I, §17 and the Eighth Amendment of the United States Constitution for failing to bring KVSP water into compliance with

> the California Clean Water Act in which subjected Plaintiff to cruel and unusual punishment in deliberate indifference to Plaintiff's complaints and injuries in intentional infliction of emotional distress (*id.*, at pp. 13-14).

While the first cause of action is exclusively state law based, the second cause of action specifically charges Defendants with violation of "the Eighth Amendment of the United States Constitution." (*Id.*, at p. 13.) Such a cause of action necessarily raises a stated federal issue, actually disputed and substantial which invokes federal-question jurisdiction. *See Nevada*, 672 F.3d at 674. Plaintiff is the master of his claims and could have avoided federal jurisdiction by exclusively relying on state law. *See Caterpillar, Inc.*, 482 U.S. at 392 (citations omitted); *Hunter,* 582 F.3d at 1042. However, since the 1stAC specifically charged Defendants with violation of the Eighth Amendment to the United States Constitution it raised a stated, actually disputed, and substantial federal issue and placed Defendants on notice of federal-question jurisdiction, such that their removal of this action to this court was proper.

It has been clarified "that the thirty day time period [for removal] . . . starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face the facts necessary for federal court jurisdiction." *Rea,* 742 F.3d at 1237-38 quoting *Harris v. Bankers Life & Cas. Co*., 425 F.3d 689, 691–92 (9th Cir.2005) (internal quotation marks omitted).

Thus, since Defendants were served the 1stAC on December 1, 2014, the notice of removal which they filed on December 22, 2014 was timely. 28 U.S.C. § 1446(b)(3). Accordingly, Plaintiff's motion to remand should be denied.

**3. <u>Severance of State Law Claims</u>**

In the conclusion to his motion, Plaintiff requests that if his motion to remand is denied, all claims requiring interpretation of state laws be severed from this action. Defendants did not respond to this part of Plaintiff's motion.

Pursuant to 28 U.S.C. § 1367(a), in any civil action in which the district court has original jurisdiction, the district court "shall have supplemental jurisdiction over all other claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III," except as provided in subsections (b) and (c). "[O]nce judicial power exists under §

1367(a), retention of supplemental jurisdiction over state law claims under 1367(c) is discretionary." *Acri v. Varian Assoc., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). "The district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Supreme Court has cautioned that "if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966). Accordingly, Plaintiff's request to sever all claims under state law should be denied.

## II. RECOMMENDATIONS

Accordingly, the undersigned HEREBY RECOMMENDS that Plaintiff's motion to remand the action to state court, filed January 26, 2015 (Doc. 12), be DENIED.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). **Within 15 days after** being served with these Findings and Recommendations, the parties may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, __ F.3d __, __, No. 11-17911, 2014 WL 6435497, at *3 (9th Cir. Nov. 18, 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **April 8, 2015**

**/s/ Jennifer L. Thurston**
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| CHRISTIAN LEWIS CASTILLO, | CASE NO. 1:09-cv-01474-MJS (PC) |
| Plaintiff, | ORDER DISMISSING PLAINTIFF'S FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A COGNIZABLE CLAIM |
| v. | |
| K. HARRINGTON, et al., | (ECF No. 7) |
| Defendants. | CLERK SHALL CLOSE THE CASE |

_____/

**SCREENING ORDER**

## I. PROCEDURAL HISTORY

On August 21, 2009, Plaintiff Christian Lewis Castillo, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) Plaintiff consented to Magistrate Judge jurisdiction. (ECF No. 5.)

On March 19, 2010, Plaintiff's Complaint was screened and dismissed, with leave to amend, for failure to state a cognizable claim. (ECF No. 6.) Plaintiff's First Amended Complaint (ECF No. 7) is now before the Court for screening.

## II. SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous, malicious," or that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

Section 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

## III. SUMMARY OF FIRST AMENDED COMPLAINT

The amended complaint identifies the following individuals as Defendants in this action: (1) R. Pennington, Appeals Examiner and Facility Captain; (2) K. Harrington, Warden, Kern Valley State Prison (KVSP); (3) G.D. Lewis, Chief Deputy Warden, KVSP; (4) T. Billings, Correctional Counselor II, KVSP; (5) N. Grannis, Chief of Inmate Appeals Branch; (6) R.J. Geller, M.D., M.P.H., California Poison Control System; and (7) S. Lopez, Chief Medical Officer.

Plaintiff alleges the following:

On March 10, 2008, the Environmental Protection Agency (EPA) notified KVSP prison officials that the concentration of arsenic in the prison's water exceeded new standards and was unsafe. The prison video channel reported the water contamination on April 8, 2008. "'Arsenic' is a poison and is known to cause cancer or other illness such as circulatory problems if consumed." (Compl. at 4.) Dr. Geller, of the California Poison Control System, conducted a review of the water at KVSP. He "concluded that the [arsenic] levels were insignificant" and "that 'the expected numbers of health problems, either acute or chronic, caused at KVSP by arsenic at concentrations of 22 [parts per billion] in drinking water is zero.'" (Id.)

Nevertheless, Plaintiff has suffered infections in his kidney and urinary tract as a result of consuming the contaminated water. He also experienced foul smelling urine, constant dry mouth, and problems swallowing. (Id. at 4, 5.) On December 29, 2008, Plaintiff filed an inmate grievance complaining that he had not been provided a clean alternative source of water. (Id. at 4.) Defendants Billings and Lewis reviewed Plaintiff's complaint. (Id. at 5, 6.) Lewis cited determinations made by the Department of Health Services and Dr. Geller in stating that an alternate water supply was not required. The response also indicated that KVSP's water treatment plant was being modified to comply with new EPA standards. (Id. at 20, 24, 25.) Defendant Pennington and Grannis reviewed Plaintiff's grievance at the Director's Level and affirmed the denial of Plaintiff's grievance. (Id. at 6, 17, 18.) The money allocated to improve the water treatment plant at KVSP was diverted for other purposes by Defendants Pennington and Harrington. (Id. at 6.)

Plaintiff contends that the Defendants have denied him safe drinking water in

violation of his Eighth Amendment rights.

## IV. ANALYSIS

### A. Section 1983

To state a claim under Section 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243, 1245 (9th Cir. 1987).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Id. Facial plausibility demands more than the mere possibility that a defendant committed misconduct and, while factual allegations are accepted as true, legal conclusions are not. Id. at 1949-50.

### B. Eighth Amendment

"[W]hile conditions of confinement may be, and often are, restrictive and harsh, they 'must not involve the wanton and unnecessary infliction of pain.'" Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)). The Eighth Amendment, which protects prisoners from inhumane conditions of

confinement, Farmer v. Brennan, 511 U.S. 825, 833 (1994), is violated when prison officials act with deliberate indifference to a substantial risk of harm to an inmate's health or safety, e.g., Farmer, 511 U.S. at 828; Thomas v. Ponder, 611 F.3d 1144, 1151-52 (9th Cir. 2010); Richardson v. Runnels, 594 F.3d 666, 672 (9th Cir. 2010).

Two requirements must be met to show an Eighth Amendment violation. Farmer, 511 U.S. at 834. First, the deprivation must be, objectively, sufficiently serious. Id. (quotation marks and citation omitted). Second, prison officials must have a sufficiently culpable state of mind, which for conditions-of-confinement claims is one of deliberate indifference. Id. (quotation marks omitted). Prison officials act with deliberate indifference when they know of and disregard an excessive risk to inmate health or safety. Id. at 837 (quotation marks omitted).

1. Sufficiently Serious

Plaintiff alleges that the water provided at KVSP is contaminated with arsenic. Exposure to toxic substances can support a claim under section 1983. See Wallis v. Baldwin, 70 F.3d 1074, 1076-77 (9th Cir. 1995) (exposure to asbestos). The exposure must, however, be sufficiently serious so as to pose a substantial risk of harm to health or safety. In this case the concentration of arsenic in the water at KVSP is alleged to exceed new standards set by the EPA. However, Defendant Geller, a state health authority, tested the water and concluded that the arsenic levels would cause "'zero'" health problems. Plaintiff believes that Defendant Geller's findings are incorrect.

Plaintiff's allegation that the water at KVSP does not meet current EPA standards is taken as true at this stage of the case. However, the same can not be said with regard to plaintiff's conclusion that the failure to meet the current EPA standard means that the

water is unsafe for Plaintiff. The Court can not determine from the pleadings the basis for the EPA standard or what population and what potential harm it was designed to protect or what likelihood there is of such harm occurring in individuals situated like Plaintiff. As such the Court can not find that the first element of this Eighth Amendment claim has been met.

2. Deliberate Indifference

Even if Plaintiff had alleged a serious harm, he has not sufficiently alleged that any of the named defendants "[knew] of and disregard[ed] an excessive risk to [Plaintiff's] health or safety." Farmer, 511 U.S. at 837. As discussed, Plaintiff at most identifies a disagreement between the EPA and the state health authority as to safe levels of arsenic concentration. Both agreed as to the concentration of arsenic in the water at KVSP, but only the EPA determined it unsafe. Geller, a state health official, found the water was safe for consumption. Defendants have relied on qualified expert findings and opinion in concluding that denial of Plaintiff's lack of access to alternative water does not pose an excessive risk to Plaintiff's heath or safety. As such, they cannot be said to have acted with deliberate indifference to a risk of harm.

A prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it. Farmer, 511 U.S. at 837-45. Plaintiff has failed to allege that any of the Defendants were actually aware of a risk to Plaintiff. In fact, the amended complaint reflects that Defendants accepted and relied on Dr. Geller's professional conclusion. There are no facts plead to support a claim that either Geller or the remaining Defendants acted with knowledge that

Geller's conclusions were wrong or that the arsenic concentration was in fact dangerous. Plaintiff's allegations show that Defendants did not actually believe the arsenic levels presented a risk to inmate health. Therefore, it can not be said that they acted with deliberate indifference.

"Deliberate indifference is a high legal standard." Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). "Under this standard, the prison official must not only 'be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the inference.'" Id. at 1057 (quoting Farmer, 511 U.S. at 837). "'If a prison official should have been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the risk.'" Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)).

Plaintiff was previously instructed that to state a cognizable claim he would have to allege facts which, if true, would demonstrate that Defendants were actually aware of and disregarded an excessive risk of harm to Plaintiff. His suspicion or personal beliefs on that point are not sufficient to support a claim. Plaintiff's pleading reveals that an apparently qualified expert advised officials that no harm will result from the levels of arsenic in prison water. Though, given an opportunity to amend, Plaintiff has not alleged facts showing Defendants did not justifiably rely upon that expert advice. No useful purpose would be served in once again advising Plaintiff of the applicable standard and giving him yet another opportunity to try to correct this deficiency in his pleading.

## V. CONCLUSION AND ORDER

For the reasons stated above, the Court finds that Plaintiff's First Amended Complaint fails to state a claim upon which relief may be granted and that leave to amend

would be futile. See Noll v. Carson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Accordingly, Plaintiff's First Amended Complaint is DISMISSED WITH PREJUDICE for failure to state a claim. The Clerk shall close the case.

IT IS SO ORDERED.

Dated: October 29, 2012

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CLARENCE LEON DEWS,

Plaintiff,

vs.

STATE WATER SYSTEM, I.D. #1510802, *ET AL.*,

Defendants.

Case No. 1:12-cv-01398-RRB

**DISMISSAL ORDER**

Clarence Leon Dews, a state prisoner appearing *pro se* and *in forma pauperis*, filed a civil rights action under 42 U.S.C. § 1983.[1] Dews is currently incarcerated at the Kern Valley State Prison. This action arises out of an alleged unsafe level of arsenic in the potable water consumed by inmates at the Kern Valley State Prison, North Kern Valley State Prison,

[1] Although this action was ostensibly initiated by six named plaintiffs, it is proceeding solely with Dews as the plaintiff. Also, to the extent that Dews attempts to bring this action under 28 U.S.C. § 2254 it is inappropriate. This action challenges a condition, not a fact of, Dews' incarceration. *Ramirez v. Galaza*, 334 F.3d 850, 856 (9th Cir. 2003) ("Suits challenging the validity of the prisoner's continued incarceration lie within 'the heart of habeas corpus,' whereas 'a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody.' ") (citation omitted). Thus, this Court will address this Complaint solely as a § 1983 civil rights action.

and Wasco State Prison.[2] In this action Dews has sued various California state entities and officials in their individual capacities for injunctive relief and damages caused by his consumption of the contaminated water over a period of several years.[3]

## I. SCREENING REQUIREMENT

This Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity.[4] This Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that "fails to state a claim on which relief may be granted," or that "seeks monetary relief against a defendant who is immune from such relief."[5] Likewise, a

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[2] Dews was incarcerated at the North Kern County State Prison and Wasco State Prison prior to his transfer to the Kern Valley State Prison. These three prisons are physically located within thirty (30) miles of each other.

[3] In addition to the State Water System, Dews has named as defendants: California Prison Industry Authority ("CPIA"); Maurice Junious, Warden, North Kern Valley State Prison; K. Harrington, Warden (A), Kern Valley State Prison; D. Martin Biter, Warden (A), Kern Valley State Prison; John Doe, Warden, Wasco State Prison; E. Borreno, B. Da Veiga, and S. Tallerico.

[4] 28 U.S.C. § 1915A(a).

[5] 28 U.S.C. § 1915(e)(2)(B); 42 U.S.C. § 1997e(c); *see Lopez v. Smith*, 203 F.3d 1122, 1126 & n.7 (9th Cir. 2000) (en banc).

prisoner must exhaust all administrative remedies as may be available,[6] irrespective of whether those administrative remedies provide for monetary relief.[7]

In determining whether a complaint states a claim, the Court looks to the pleading standard under Federal Rule of Civil Procedure 8(a). Under Rule 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[8] "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[9] Failure to state a claim under § 1915A incorporates the familiar standard applied in Federal Rule of Civil Procedure 12(b)(6), including the rule that complaints filed by *pro se* prisoners are to be liberally construed, affording the prisoner the benefit of any doubt, and dismissal should be granted only where it appears beyond doubt that the plaintiff can plead no facts in support of his claim that would entitle him or her to relief.[10]

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[6] 42 U.S.C. § 1997e(a); *see Woodford v. Ngo*, 548 U.S. 81, 93–95 (2006) ("proper exhaustion" under § 1997e(a) is mandatory and requires proper adherence to administrative procedural rules).

[7] *See Booth v. Churner*, 532 U.S. 731, 734 (2001).

[8] Fed. R. Civ. P. 8(a)(2).

[9] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007)).

[10] *Wilhelm v. Rotham*, 680 F.3d 1113, 1121 (9th Cir. 2012).

This requires the presentation of factual allegations sufficient to state a plausible claim for relief.[11] "[A] complaint [that] pleads facts that are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'"[12] Further, although a court must accept as true all factual allegations contained in a complaint, a court need not accept a plaintiff's legal conclusions as true.[13] "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."[14]

## II. GRAVAMEN OF COMPLAINT

The water supply to the three state prisons located in Kern County is provided by the State Water System #151082. That water system has been determined to contain unsafe levels of arsenic and mercury, a condition that has yet to be rectified. Dews contends that as a result of the toxic substances in the water system he has suffered rectal bleeding, hemorrhaging/hemorrhoids, and has cancer of the stomach.

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[11] *Iqbal*, 556 U.S. at 678–69; *see Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting and applying *Iqbal* and *Twombly*).

[12] *Iqbal* 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557).

[13] *Id.*

[14] *Id.* (quoting *Twombly*, 550 U.S. at 555).

Plaintiff seeks: (1) injunctive relief compelling the wardens of North Kern County State Prison, Kern County State Prison, and Wasco State Prison to provide bottled drinking water; (2) compensatory damages of $150,000.00, and (3) punitive damages of $200,000.00.

## III. OTHER ACTIONS PENDING

Dews has three other actions under 42 U.S.C. § 1983 pending in this Court: *Dews v. Kern Radiology Medical Group, Inc.*, 1:12-cv-00242-AWI-MJS (*Dews I*"); *Dews v. County of Kern*, 1:12-cv-00245-AWI-MJS ("*Dews II*"); and *Dews v. Chen*, 1:12-cv-01221-RRB ("*Dews III*").[15]

In *Dews I*, Dews has also sued various officials of the North Kern County Prison for violation of the Eighth Amendment proscription of cruel and unusual punishment in denying him necessary medical treatment for a torn rotator cuff. That action was dismissed during screening with leave to amend; however, in lieu of filing an amended complaint Dews has appealed from the dismissal.

In *Dews II*, Dews has sued various officials of the Wasco State Prison for use of excessive force and denial of necessary medical treatment. That action has not been screened.

In *Dews III*, Dews has sued various prison officials in their official and representative capacities and two California municipalities for deliberate indifference to serious medical

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[15] This Court takes judicial notice of these actions. Fed. R. Evid. 201.

needs in violation of the Eighth Amendment. That action was dismissed by this Court during screening with leave to amend.

## IV. DISCUSSION

Dews Complaint as presently constituted is defective in several respects. Attached to Dew's Complaint is a copy of a CDCR 602 Inmate/Parolee Appeal Form dated June 25, 2012, a month prior to the time this action was filed. Dews has failed to attach any documentation evidencing his appeal was processed through the three levels of appeal provided under California law.[16] As noted above, a prerequisite to bringing an action under § 1983 is that the prisoner must have exhausted his administrative remedies.[17] It is plainly evident that, at the time Dews initiated this action, he not only had not exhausted his available administrative remedies, but could not have exhausted them. Accordingly, this Court must dismiss this action as to Defendants Maurice Junious, Warden, North Kern Valley State Prison; K. Harrington, Warden (A), Kern Valley State Prison; D. Martin Biter,

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[16] Cal. Code Regs. tit. 15, § 3084.1(b) ("Unless otherwise stated in these regulations, all appeals are subject to a third level of review, as described in section 3084.7, before administrative remedies are deemed exhausted. All lower level reviews are subject to modification at the third level of review."). Section 3084.7 provides for three levels of review, the third level conducted by the Secretary of the California Department of Corrections and Rehabilitation, or by a designated representative.

[17] 42 U.S.C. § 1997e(a); *see Woodford v. Ngo*, 548 U.S. 81, 93–95 (2006) ("proper exhaustion" under § 1997e(a) is mandatory and requires proper adherence to administrative procedural rules).

Warden (A), Kern Valley State Prison; John Doe, Warden, Wasco State Prison; E. Borreno, B. Da Veiga, and S. Tallerico for failure to exhaust available state administrative remedies.

A second defect is that the allegations of the Complaint only supports relief against the prison officials in their official, not their individual capacities. A claim against an official in his or her official capacity is treated as a claim against the state itself.[18] To the extent that Dews seeks monetary damages, it is against the State, barred by the Eleventh Amendment.[19] Eleventh Amendment immunity does not, however, preclude the granting of prospective relief.[20] The State Water Board and CPIA, state agencies, are also immune from suit under the Eleventh Amendment.[21] Because the claims against them do seek injunctive relief, the claims against the State Water Board and CPIA will be dismissed without leave to amend.

With respect to Defendants E. Borreno, B. Da Veiga, and S. Tallerico, Dews' complaint suffers from a second defect: he has failed to allege how they are responsible for

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[18] *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (holding that an official capacity claim is simply "'another way of pleading an action against an entity of which an officer is an agent.'") (quoting *Monell v. Dep't of Soc. Svcs.*, 436 U.S. 658, 690 n.55 (1978)).

[19] *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (stating that "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its [Eleventh Amendment] sovereign immunity from suit even though individual defendants are nominal defendants").

[20] *Ex parte Young*, 209 U.S. 123 (1908). The *Young* doctrine "permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

[21] *See, e.g., Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

the quality of the water at the prisons either individually or in their official capacities. Nor, does it appear that Dews could plead a plausible claim against them. Consequently, the claims against those three defendants will also be dismissed without leave to amend.

Finally, to the extent Dews seeks injunctive relief against the wardens of North Kern County and Wasco Prisons, because he is no longer incarcerated in either prison, Dews lacks standing to assert those claims.[22] It is clear that a favorable decision compelling the wardens of the North Kern County and Wasco State Prisons to provide uncontaminated water would not benefit Dews.[23] Accordingly, the claims against them will be dismissed without leave to amend.

## V. ORDER

For the reasons set forth above, the Court hereby **ORDERS** as follows:

1. The Complaint on file herein is hereby **DISMISSED** without prejudice;

2. The Complaint as against the State Water System #1510802; California Prison Industry Authority ("CPIA"); Maurice Junious, Warden, North Kern Valley State Prison;

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[22] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (holding that a plaintiff lacks standing to sue if it is unlikely that the plaintiff's "injury will be 'redressed by a favorable decision.'") (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

[23] *See Friends of the Earth, Inc. v. Laidlaw Envtl. Svcs. (TOC) Inc.*, 528 U.S. 167, 1280–81 (2000) ('to satisfy Article III's standing requirements, a plaintiff must show . . . it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision); *Feldman v. Bomar*, 518 F.3d 637, 643 (2008) (holding that claims are moot when the court lacks "the power to grant effective relief").

D. Martin Biter, Warden (A), Kern Valley State Prison; John Doe, Warden, Wasco State Prison; E. Borreno, B. Da Veiga, and S. Tallerico is **DISMISSED** without leave to amend;

3. On or before **June 17, 2013**, Plaintiff may file an Amended Complaint under 42 U.S.C. § 1983 against K. Harrington, Warden, Kern Valley State Prison, consistent with Part IV, above; *provided however*, that Plaintiff must affirmatively plead and establish either: (1) that he has exhausted his available administrative remedies; or (2) that he is excused from such exhaustion under California law;

4. If Plaintiff has not filed an Amended Complaint by **June 17, 2013**, or such further time as the Court may grant, the Clerk of the Court is directed to enter a judgment of dismissal without further order of the Court.

**IT IS HEREBY ORDERED** this 9th day of May, 2013.

S/RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DARRELL DIETLE,

Plaintiff,

v.

E. BORRERO, et al.,

Defendants.

/

CASE NO. 1:12-cv-00605-MJS (PC)

ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND

(ECF No. 7)

AMENDED COMPLAINT DUE WITHIN THIRTY (30) DAYS

## SCREENING ORDER

## I. PROCEDURAL HISTORY

On April 6, 2012, Plaintiff Darrell Dietle, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 7.) Plaintiff has consented to Magistrate Judge jurisdiction. (ECF No. 17.) His Complaint is now before the Court for screening.

## II. SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief

against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous, malicious," or that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

Section 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

## III. SUMMARY OF COMPLAINT

The Complaint identifies the following officials at Kern Valley State Prison (KVSP) as Defendants: (1) Biter, Warden; (2) S. Lopez, Chief Medical Officer; (3) Ortiz; (4) Dr. Patel, (5) P.A. Maricano; (6) Brewer; (7) J. Todd, Health Care Appeals Coordinator; (8) Gomez, Licensed Vocational Nurse (LVN); (9) E. Noriega, LVN; and ten John Does.

Plaintiff generally alleges that he is being exposed to toxic levels of arsenic through the water supplied at KVSP and that he is being denied adequate treatment for his serious medical needs. Plaintiff asserts that his Eighth Amendment rights have been violated and the Defendants are responsible. (Compl. at 1-3.)

## IV. ANALYSIS

### A. Section 1983

To state a claim under Section 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243, 1245 (9th Cir. 1987).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Id. Facial plausibility demands more than the mere possibility that a defendant committed misconduct and, while factual allegations are accepted as true, legal conclusions are not. Id. at 1949-50.

### B. Insufficient Pleading

Pursuant to Rule 8(a) of the Federal Rules of Civil Procedure, the complaint or amended complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Although the Federal Rules adopt a flexible pleading policy, a complaint must give fair notice and state the elements of the claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).

Plaintiff's factual allegations are vague and span numerous separate filings with the Court. The documents are not filed in order and no one filing contains an entire description of Plaintiff's claims. Plaintiff refers to exhibits, letters, and declarations. The Court will not wade through exhibits to determine the basis of Plaintiff's claims. As pled, the Court can not discern whether Plaintiff's documents contain a viable claim. The Court will provide Plaintiff an opportunity to amend.

Any amended complaint must be complete within itself without reference to any prior pleading. Local Rule 220. Put another way, the Court will assess the amended complaint without consideration to the various documents previously filed by Plaintiff. Plaintiff must allege the facts supporting his claims plainly and simply. The allegations should be in chronological order and identify exactly how each named Defendant participated in the alleged violation of Plaintiff's rights. The following sections of this order include legal standards that may be applicable to Plaintiff's intended claims.

**C. Proper Joinder of Multiple Claims And Defendants**

Federal Rule of Civil Procedure 18(a) states that "[a] party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or as alternative claims, as many claims as it has against an opposing party." "Thus multiple claims against a single party are fine, but Claim A against Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated claims against different defendants belong in different suits, not only to prevent the sort of morass [a multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners pay the required filing fees - for the Prison Litigation Reform Act limits to 3 the number of frivolous suits or appeals that any prisoner may file without prepayment of the required fees. 28 U.S.C. § 1915(g)." George v. Smith,

507 F.3d 605, 607 (7th Cir. 2007).

The fact that claims are premised on the same type of constitutional violation(s) (e.g. deliberate indifference) against multiple defendants does not make them factually related. Claims are related when they are based on the same precipitating event or on a series of related events caused by the same precipitating event. Unrelated claims involving multiple defendants belong in different suits. See id.

Rule 18(a) allows multiple claims against a single party. However, multiple defendants is limited by the requirement of Federal Rule of Civil Procedure 20(a)(2) that the right to relief arise out of common events and contain common questions of law or fact.

In order to state a cognizable claim, Plaintiff must either plead facts demonstrating how his claims are related or he must file a separate complaint for each unrelated claim against different defendants. If Plaintiff chooses to file an amended complaint that does not comply with Rules 18(a) and 20(a)(2), all unrelated claims and defendants will be subject to dismissal.

**D. Linkage Requirement**

Under § 1983, Plaintiff must demonstrate that each defendant personally participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). This requires the presentation of factual allegations sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility standard. Id.

The statute requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by the plaintiff. See

Monell v. Department of Social Services, 436 U.S. 658 (1978). Government officials may not be held liable for the actions of their subordinates under a theory of respondeat superior. Iqbal, 129 S.Ct. at 1948. Since a government official cannot be held liable under a theory of vicarious liability in § 1983 actions, Plaintiff must plead sufficient facts showing that the official has violated the Constitution through his own individual actions. Id. at 1948. In other words, to state a claim for relief under § 1983, Plaintiff must link each named defendant with some affirmative act or omission that demonstrates a violation of Plaintiff's federal rights. Defendants may only be held liable in a supervisory capacity if they "participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

Plaintiff may not attribute liability to groups generally. Id. (requiring personal participation in the alleged constitutional violations); Chuman v. Wright, 76 F.3d 292, 294-95 (9th Cir. 1996) (holding instruction permitting jury to find individual liable as member of team, without any showing of individual wrongdoing, is improper). To state a claim under § 1983, a plaintiff must set forth specific facts as to each individual defendant's conduct that proximately caused a violation of his rights. Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988).

**E. Eighth Amendment**

The Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners not only from inhumane methods of punishment but also from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing Farmer v. Brennan, 511 U.S. 825, 847 (1994) and Rhodes v. Chapman, 452 U.S. 337, 347 (1981)) (quotation marks omitted). While conditions of confinement may be, and

often are, restrictive and harsh, they must not involve the wanton and unnecessary infliction of pain. Morgan, 465 F.3d at 1045 (citing Rhodes, 452 U.S. at 347) (quotation marks omitted).

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) (quotation marks and citations omitted), but not every injury that a prisoner sustains while in prison represents a constitutional violation, Morgan, 465 F.3d at 1045 (quotation marks omitted). To maintain an Eighth Amendment claim, inmates must show deliberate indifference to a substantial risk of harm to their health or safety. Farmer, 511 U.S. at 847.

For claims arising out of medical care in prison, Plaintiff "must show [1] a serious medical need by demonstrating that failure to treat [his] condition could result in further significant injury or the unnecessary and wanton infliction of pain," and (2) that "the defendant's response to the need was deliberately indifferent." Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012) (citing Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)).

Deliberate indifference is shown by "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference." Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective recklessness, which entails more than ordinary lack of due care. Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012) (citation and quotation marks omitted); Wilhelm, 680 F.3d at 1122. Deliberate indifference may be shown "when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way

in which prison physicians provide medical care." Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096) (internal quotation marks omitted).

## V. CONCLUSION AND ORDER

Plaintiff's Complaint does not state a claim for relief under section 1983. The Court will grant Plaintiff an opportunity to file an amended complaint. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). If Plaintiff opts to amend, he must demonstrate that the alleged acts resulted in a deprivation of his constitutional rights. Iqbal, 129 S.Ct. at 1948-49. Plaintiff must set forth "sufficient factual matter . . . to 'state a claim that is plausible on its face.'" Id. at 1949 (quoting Twombly, 550 U.S. at 555 (2007)). Plaintiff must also demonstrate that each named Defendant personally participated in a deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

Plaintiff should note that although he has been given the opportunity to amend, it is not for the purposes of adding new claims. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). Plaintiff should carefully read this Screening Order and focus his efforts on curing the deficiencies set forth above.

Finally, Plaintiff is advised that Local Rule 220 requires that an amended complaint be complete in itself without reference to any prior pleading. As a general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once an amended complaint is filed, the original complaint no longer serves any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each defendant must be sufficiently alleged. The amended complaint should be clearly and boldly titled "First Amended Complaint," refer to the appropriate case number, and be an original signed under penalty of perjury.

Plaintiff's amended complaint should be brief. Fed. R. Civ. P. 8(a). Although accepted as true, the "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level . . . ." Twombly, 550 U.S. at 555 (citations omitted).

Accordingly, it is HEREBY ORDERED that:

1. The Clerk's Office shall send Plaintiff a blank civil rights complaint form;

2. Plaintiff's Complaint is dismissed for failure to state a claim upon which relief may be granted;

3. Plaintiff shall file an amended complaint within thirty (30) days; and

4. If Plaintiff fails to file an amended complaint in compliance with this order, this action will be dismissed, with prejudice, for failure to state a claim and failure to comply with a court order.

IT IS SO ORDERED.

Dated: May 6, 2013

/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

# Ford v. California

Decided Apr 2, 2013

CASE NO. 1:10-cv-00696-AWI-GSA PC

04-02-2013

RAY BYRON FORD, Plaintiff, v. STATE OF CALIFORNIA, et al., Defendants.

Gary S. Austin

## FINDINGS AND RECOMMENDATION THAT THIS ACTION BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED

## RESPONSE DUE IN THIRTY DAYS

## I. Screening Requirement

Plaintiff is a former state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that Defendants violated the Safe Drinking Water Act, 42 U.S.C. § 300f *et. seq.* (SWDA). The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii). *2

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## II. Plaintiff's Claims

The events at issue in this action occurred at Kern Valley State Prison KVSP) in Delano, where Plaintiff was housed at the time. Plaintiff names as defendants former Governor Schwarzenegger, along with wardens and former wardens at KVSP. Plaintiff also names the State of California and the California Department of Corrections and Rehabilitation (CDCR). Plaintiff's allegations relate to the water quality at KVSP.

Plaintiff alleges that prior to the opening of KVSP in March of 2005, Defendants knew or should have known of the presence of arsenic in the drinking water supply for KVSP. Plaintiff arrived at KVSP on September 15, 2005. On April 8, 2008, Warden Hedgpeth sent a notice to inmates, informing them that the wells supplying the drinking water exceeded U.S. Environmental Protection Agency (EPA) standards for the preceding four quarters. The notice also informed inmates of the prison's plan to install an arsenic treatment system by June of 2009. The complaint, filed on January 4, 2010, alleges that Plaintiff "must continue to drink contaminated water and

be poisoned." (Compl. ¶ 18.) Plaintiff alleges that the arsenic treatment system has not been installed, due to budget concerns.

**A. Eighth Amendment Claim**

The Eighth Amendment provides that "cruel and unusual punishment [shall not be] inflicted." "An Eighth Amendment claim that a prison official has deprived inmates of humane conditions of confinement must meet two requirements, one objective and the other subjective." Allen v. Sakai, 48 F.3d 1082, 1087 (9th Cir. 1995) cert. denied, 514 U.S. 1065, (1995). The objective requirement is met if the prison official's acts or omissions deprived a prisoner of "the minimal civilized measure of life's necessities.'" Id. (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)). To satisfy the subjective prong, a plaintiff must show more than mere inadvertence or negligence. Neither negligence nor gross negligence will constitute deliberate indifference. Farmer, 511 U.S. at 833, & n. 4; Estelle v. Gamble, 429 U.S. 97, 106 (1976). The Farmer court concluded that "subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause" and adopted this as the test for *3 deliberate indifference under the Eighth Amendment. Farmer, 511 U.S. at 839-40.

In order to hold the individual defendants liable, Plaintiff must allege facts indicating that they knew of an objectively serious condition, and acted with "subjective recklessness" to that condition. The crux of Plaintiff's complaint is that arsenic levels in the water at KVSP exceeded EPA standards for at least four quarters in a row, and Defendants have not installed an arsenic treatment system as they promised to. Plaintiff attaches as an exhibit to his complaint a copy of the Director's Level Decision dated November 24, 2008, regarding his grievance.[1] In his grievance, Plaintiff indicated that KVSP was in violation of state regulations by not providing safe drinking water to the inmates. Plaintiff's grievance was denied at the Director's Level, based on the following findings:

> The First Level of Review indicates that the California Poison Control System has stated that arsenic concentrations below 50 ppb in drinking water are not associated with any acute health problems. Currently, KVSP has a 22 ppb concentration of arsenic in the drinking water. KVSP is in the process of modifying the water treatment plan to bring the water system into compliance with the new EPA rules and compliance is expected by the second quarter of 2009. Doctor Geller indicated that the arsenic levels (22 ppb) in the KVSP water system are insignificant and he expected no acute or chronic health problems as a result of the concentration.

Plaintiff's own submission indicates that, although the arsenic levels in the drinking water supply at KVSP may have been out of compliance with regulatory standards, they were not at a level that was associated with any acute health problems. Aside from Plaintiff's exhibits, there are no allegations that KVSP officials were aware of levels of arsenic that would satisfy the Eighth Amendment standard set forth above. Simply put, a violation of a regulatory standard does not presumptively violate the Eighth Amendment. Further, Plaintiff's conclusory allegations that he suffered from arsenic poisoning are unsupported by specific factual allegations that he was seen by medical officials for his conditions and treated for arsenic poisoning. Plaintiff makes no allegation that he presented to medical for treatment, or

[1] The court is not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint. See Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002); Steckman v. Hart Brewing, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

attempted to seek medical treatment. Plaintiff's
4 Eighth *4 Amendment claim should therefore be dismissed.[2]

[2] Plaintiff also sets forth state law claims on the same allegations. As long Plaintiff sets forth a claim arising under federal law, the district court may adjudicate state law claims that are transactionally related to the federal claim. In federal question cases, a valid federal claim must be pleaded before a federal court can exercise supplemental jurisdiction. Hunter v. United Van Lines, 746 F.2d 635, 649 (9th Cir. 1984). Because Plaintiff has not alleged facts sufficient to state a federal cause of action, the Court declines to exercise supplemental jurisdiction. Should Plaintiff allege facts sufficient to state a cause of action under 42 U.S.C. § 1983, the Court will address Plaintiff's state law claims.

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**B. Immunity**

Plaintiff names as defendants the State of California and the California Department of Corrections and Rehabilitation. "The Eleventh Amendment prohibits federal courts from hearing suits brought against an unconsenting state. Though its language might suggest otherwise, the Eleventh Amendment has long been construed to extend to suits brought against a state both by its own citizens, as well as by citizens of other states." Brooks v. Sulphur Springs Valley Elec. Coop., 951 F.2d 1050, 1053 (9th Cir. 1991); see also Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); Puerto Rico Aqueduct Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993); Austin v. State Indus. Ins. Sys., 939 F.2d 676, 677 (9th Cir. 1991).

The Eleventh Amendment bars suits against state agencies as well as those where the state itself is named as a defendant. See Natural Resources Defense Council v. California Department of Transportation, 96 F.3d 420, 421 (9th Cir. 1996); Brooks, 951 F.2d at 1053; Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (concluding that Nevada Department of Prisons was a state agency entitled to Eleventh Amendment immunity); Mitchell v. Los Angeles Community College District, 861 F.2d 198, 201 (9th Cir. 1989). The State of California and the California Department of Corrections and Rehabilitation should therefore be dismissed.

**C. Safe Drinking Water Act**

The SDWA preempts all other forms of federal relief for a violation of the SDWA, including federal common law nuisance claims and Section 1983 Constitutional right claims. Mattoon v. Pittsfield, 980 F.2d 1 (1st Cir. 1992). Although the statute provides that the Administrator of the U.S. Environmental Protection Agency may bring a civil action to compel SDWA compliance, 42 U.S.C. § 300g - 3(g)(1), any person can file a civil action upon 60 days prior notice to EPA, the
5 public water *5 system, and the state for any violation of the SDWA or to force EPA to perform a required act. SDWA § 1449(b)(1)(A); 42 U.S.C. §300j-8(b)(1)(B). If the EPA, the Attorney General, or the state has commenced and is diligently prosecuting a civil act for compliance, no citizen's suit can be filed. SDWA § 1449(b)(1)(B); 42 U.S.C. §300j-8(b)(1)(B) . A court may award litigation costs, including attorneys' fees, but cannot impose civil penalties under the SDWA in citizens' suits. SDWA § 1449(b)(1)(d); 42 U.S.C. §300j-8(b)(1)(B).

The Supreme Court has construed the identical language in the FWPCA, see 33 U.S.C. § 1365(a), as not authorizing citizens' suits absent a "continuous or intermittent violation." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 64, (1987). "[T]he harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." Id. at 59.

Simply put, the statutory scheme of the SDWA provides a mechanism by which the EPA can enforce clean drinking water standards, and individuals can sue to force EPA to act. The

statute is clear, however, that the individual must provide notice to the EPA and the state. Further, there are no provisions for money damages for individual citizens, only civil penalties payable to the United States. There are no allegations that Plaintiff provided the statutorily required notice to the EPA, the public water system, or the state, as required by statute.

Accordingly, Plaintiff was directed to show cause why this action should not be dismissed for failure to state a claim upon which relief could be granted. In his response, Plaintiff restates generally the allegations of the complaint. Plaintiff does direct the Court to paragraph 25 of his complaint. Plaintiff argues that paragraph 25 "contradicts the Magistrate's statement that plaintiff did not provide the statutory notice." Paragraph 25 alleges that Plaintiff filed a claim with the Victims Compensation and Government Claims Board of the State of California. Plaintiff does attach as an Exhibit to his complaint a copy of a letter he received from the U.S. Environmental Protection Agency, advising Plaintiff of the requirements for providing prior notice of citizen suits under the Safe Drinking Water Act. Plaintiff has failed to allege specific facts indicating that he has complied with the notice requirements set forth in 40 CFR § 135.11(a)(2).

Plaintiff also directs the Court to paragraphs 19 -20 of his complaint, indicating that he has "sustained physical and emotional injuries due to the continual and ongoing ingestion of high levels
6 *6 of arsenic in the drinking water." Paragraphs 19 and 20 indicate generally that Plaintiff has sustained physical and emotional injuries as a result of arsenic poisoning and that he has submitted a Health Care Services Request Form (CDC Form 7362) seeking testing and treatment relative to arsenic poisoning. Plaintiff has not, however, allege any facts suggesting that he has been diagnosed with any illness caused by arsenic poisoning. That Plaintiff may believe he has been poisoned does not subject Defendants to liability.

A complaint is required to contain"a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While Rule 8 does not require detailed factual allegations, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). While factual allegations must be accepted as true, legal conclusions are not entitled to an assumption of truth. Id. at 69. Here, Plaintiff alleges that he requested health care and that he believes he is ill due to arsenic poisoning. Plaintiff fails to allege any facts indicating that he has been diagnosed as being ill due to ingesting contaminated water.

## III. Conclusion and Recommendation

The Court has screened Plaintiff's complaint and finds that it does not state any claims upon which relief may be granted under section 1983 or the Safe Drinking Water Act. Plaintiff's sole claim is that arsenic levels violated regulatory standards. Plaintiff's own exhibits indicate that arsenic levels did not rise to the level of endangering his health. The Court finds that this deficiency cannot be cured by further amendment. Plaintiff has alleged, at most, a violation of regulatory standards. Such an allegation fails to rise to the level of an Eighth Amendment violation. This action should therefore be dismissed. Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) (pro se litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment).

Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed for failure to state a claim upon which relief may be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636 (b)(1)(B). Within thirty days after being served with these findings and
7 recommendations, Plaintiff may file written *7 objections with the court. Such a document should

be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

**Gary S. Austin**

UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GERRY WILLIAMS,

Plaintiff,

v.

MARTIN D. BITER and A. MANASRAH,

Defendants.

1:14-cv-02076-DAD-EPG (PC)

FINDINGS AND RECOMMENDATIONS, RECOMMENDING THAT DEFENDANT'S MOTION TO DISMISS BE GRANTED IN PART

(ECF NO. 25)

ORDER DENYING PLAINTIFF'S MOTION FOR EXTENSION OF TIME

(ECF NO. 30)

OBJECTIONS, IF ANY, DUE WITHIN THIRTY DAYS

Gerry Williams ("Plaintiff") is a state prisoner proceeding *pro se* in this civil rights action filed pursuant to 42 U.S.C. § 1983. This case now proceeds on Plaintiff's First Amended Complaint, filed on May 11, 2015. (ECF No. 13). Plaintiff's First Amended Complaint was screened and the Court found that Plaintiff "stated a claim against Defendant Martin Biter and A. Manasrah based on violations of the Eighth Amendment for his claims related to arsenic in the drinking water, valley fever, and a lack of medical care." (ECF No. 20, p. 1).

On August 17, 2016, Defendants filed a motion to dismiss. (ECF No. 25). On September 6, 2016, Plaintiff filed a statement of non-opposition to Defendants' motion to dismiss for failure to exhaust Plaintiff's hepatitis C claim. (ECF No. 29). On September 29,

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2016, Plaintiff filed an opposition to the motion to dismiss.[1] (ECF No. 31). On October 12, 2016, Defendants filed a reply to Plaintiff's opposition. (ECF No. 34). Defendants' motion to dismiss is now before the Court.

Defendants argue that: 1) Plaintiff's claim that he did not receive proper medical care for his hepatitis C should be dismissed for failure to exhaust; 2) the arsenic in KVSP's water supply was deemed non-dangerous by the California Department of Public Health, and Defendants were not deliberately indifferent in remedying the water; 3) Defendant Manasrah was not personally involved in providing or addressing the water; and 4) Defendants are entitled to qualified immunity because it was not a clearly established violation of the Eighth Amendment to allow inmates to consume non-dangerous levels of arsenic in their drinking water or expose them to a naturally occurring spore (the spore that causes Valley Fever). (ECF No. 25-1, p. 8).

## I. PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff filed his original complaint on December 29, 2014. (ECF No. 1). Magistrate Judge Gary S. Austin[2] screened Plaintiff's complaint and dismissed it with leave to amend. (ECF No. 12). Plaintiff filed his First Amended Complaint on May 11, 2015. (ECF No. 13). In the First Amended Complaint, Plaintiff alleges the following.

On or about 2010, Plaintiff was diagnosed with hepatitis C, which required interferon treatment. Interferon treatment is known to weaken the immune system, increasing the risk of contracting Valley Fever.

On or about April 2012, Plaintiff was transferred to Kern Valley State Prison ("KVSP"), a known Valley Fever hot spot. On or about September 20, 2012, Plaintiff discovered that he was confined at a prison in a hyperendemic zone where inmates are at the highest risk of contracting Valley Fever, and that KVSP had experienced a dramatic increase in

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[1] On September 6, 2016, Plaintiff filed a motion for an extension of time to respond to the motion to dismiss. (ECF No. 30). Because Plaintiff has already filed his opposition, and because Defendants have not argued that Plaintiff's opposition was untimely, the Court will deny this motion.

[2] Magistrate Judge Austin was the magistrate judge assigned to this case until October 13, 2015. (ECF No. 16).

Valley Fever infections.

On September 28, 2012, Plaintiff submitted a health care form requesting to be tested for Valley Fever and to receive treatment. Plaintiff continued to submit health care request forms through December 2, 2014, but did not receive any treatment for Valley Fever or Arsenic. Plaintiff was tested for Valley Fever, but he never received the results. Defendant Manasrah ordered the test.

On or about April 4, 2013, Plaintiff submitted a health care appeal requesting to be transferred to an institution free of Valley Fever. On April 25, 2013, Defendant Manasrah interviewed Plaintiff regarding the appeal. "During the interview, Plaintiff requested to be transferred because of his hepatitis C and whether or not the symptoms he was experiencing was due to Valley Fever."

Defendant Manasrah told Plaintiff that Plaintiff did not have Valley Fever, and that the test Defendant Manasrah conducted was negative for Valley Fever. On November 4, 2013, the director's level of review denied Plaintiff's appeal, indicating that Defendant Manasrah's evaluation revealed negative results.

On December 11, 2014, Plaintiff received a medical classification chrono, which indicates that Plaintiff is infected with Valley Fever. Defendant Manasrah had the authority to order a medical transfer for Plaintiff before Plaintiff became infected with Valley Fever, but failed to do so. As a result, Plaintiff alleges that he contracted Valley Fever. Plaintiff supports this statement by attaching and citing to the medical classification chrono (ECF No. 13, p. 53). However, the chrono does not state that Plaintiff has Valley Fever.

On August 3, 2006, the California Department of Corrections and Rehabilitation ("CDCR") issued a memorandum informing top prison officials and health care providers of the illness caused by the Valley Fever organism, with four inmate-patient deaths attributed to the disease. The memorandum indicated which prisons are located in the Valley Fever endemic areas, which includes KVSP. The memorandum also indicated which inmate-patients are most susceptible to developing Valley Fever, and implemented strategies to prevent the susceptible inmate-patients from being housed in the endemic area.

On or about June 10, 2013, after becoming aware that KVSP is one of the prisons listed as being located in the Valley Fever endemic area, Plaintiff submitted a letter to Defendant Biter indicating his medical conditions and exposure to toxic arsenic tainted drinking water and Valley Fever. No corrective actions were taken.

On March 10, 2008, KVSP was issued a notice of violation by the California Department of Public Health due to an exceedance of the federal arsenic mc/l during the first quarter of 2008, with arsenic levels of 0.014 mg/l and 0.022 mg/l, respectively.

Based on data submitted to the Department of Public Health for wells 1 and 2, the running annual average range for these wells for the first quarter was 0.014 mg/l and 0.022 mg/l, respectively. As a result, KVSP failed to comply with Title 40, the National Primary Drinking Water Regulations, Section 141.62(b)(16), which established the revised federal mc/l for arsenic.

On December 12, 2008, the California Department of Public Health issued another notice of violation, which stated that the KVSP water system was operating wells 1 and 2 that produced water that does not comply with the Primary Drinking Water Standard, that the KVSP water system failed to ensure that a reliable and adequate supply of pure, wholesome, and potable water is provided to all its consumers, and that the water produced by the KVSP water system exceeded the maximum contaminant level of 0.010 mg/l for arsenic and therefore did not comply with the Primary Drinking Water Standard.

On December 12, 2008, KVSP was given notice by the California Department of Public Health that if KVSP failed to perform any of the tasks specified in the order by the time described therein, or by the time subsequently extended pursuant to item 5 of the order, KVSP would be deemed to have not complied with the obligation of the order and may be subjected to additional judicial action, including civil penalties. The order applied to and was binding upon KVSP, its officers, directors, agents, employees, successors, and assignees, which includes Defendant Biter.

On June 8, 2011, through December 13, 2013, Defendant Biter continued to change the proposed date of completion of the necessary repairs to comply with the Drinking Water

Standards.

Plaintiff alleges that the water at KVSP is contaminated and tainted with high levels of arsenic, a fact that Plaintiff was not aware of until after he was transferred to KVSP in or about April 2012. Plaintiff filed an inmate appeal requesting testing for arsenic in his body and to be transferred to an institution free of arsenic contaminated water.

Studies show that African-Americans are among the racial groups most likely to develop the chronic and/or disseminated form of Valley Fever when infected, as well as those with weak immune systems.

It is widely known amongst CDCR employees and leading health experts in California that the city of Delano, where KVSP is located, is a Valley Fever hot spot, where the infection rate is higher than other areas of the San Joaquin Valley. This resulted in the area surrounding KVSP being designated as a Valley Fever endemic area.

While housed at Pleasant Valley State Prison, Plaintiff was diagnosed with hepatitis C. In 2012, Plaintiff was transferred from California State Prison, Los Angeles County, to KVSP, by prison officials with full knowledge of Plaintiff's serious medical condition, and without being informed of the unsafe environmental hazardous conditions of confinement at KVSP. No corrective actions to transfer Plaintiff to a hazard free environment were taken by Defendant Manasrah to allow safe interferon hepatitis C treatment.

While housed at KVSP, Plaintiff sought the hepatitis C treatment, and was denied by Defendant Manasrah. However, the treatment has advantages and disadvantages. Interferon treatment is known to weaken the immune system, and prisoners in the Valley Fever endemic area have been known to contract Valley Fever after beginning interferon treatment, due to the weakened immune system.

Despite Plaintiff's request for a medical transfer, Defendants Biter and Manasrah have failed to secure Plaintiff a medical transfer to a prison where he can obtain the treatment necessary to cure his hepatitis C, or to an environment free of Valley Fever. No corrective actions have been taken by Defendants Biter and Manasrah.

After being transferred to KVSP, Plaintiff noticed that his health was not good and that

he started to incur the following medical conditions: spots on his legs, arms, and body; mucus in his throat; problems breathing; scars on his longs; kidney/bladder problems; prostate problems; blood in urine; coughing; night sweats; fever; and aching joints. Plaintiff filed requests for medical treatment from September 28, 2012, through December 2, 2014, but did not receive adequate treatment.

After screening Plaintiff's First Amended Complaint, the Court found that "Plaintiff has stated a claim against Defendant Martin Biter and A. Manasrah based on violations of the Eighth Amendment for his claims related to arsenic in the drinking water, valley fever, and a lack of medical care." (ECF No. 20, p. 1).

## II. LEGAL STANDARDS

### a. Motion to Dismiss

In considering a motion to dismiss, the court must accept all allegations of material fact in the complaint as true. Erickson v. Pardus, 551 U.S. 89, 93–94 (2007); Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976). The court must also construe the alleged facts in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir.1994) (per curiam). All ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). In addition, *pro se* pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972).

A motion to dismiss pursuant to Rule 12(b)(6) operates to test the sufficiency of the complaint. Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer, 416 U.S. at 236 (1974).

The first step in testing the sufficiency of the complaint is to identify any conclusory

allegations. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678 (citing Twombly, 550 U.S. at 555). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations and quotation marks omitted).

After assuming the veracity of all well-pleaded factual allegations, the second step is for the court to determine whether the complaint pleads "a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556) (rejecting the traditional 12(b)(6) standard set forth in Conley, 355 U.S. at 45-46). A claim is facially plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly, 550 U.S. at 556). The standard for plausibility is not akin to a "probability requirement," but it requires "more than a sheer possibility that a defendant has acted unlawfully." Id.

In deciding a Rule 12(b)(6) motion, the Court generally may not consider materials outside the complaint and pleadings. Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998); Gumataotao v. Dir. of Dep't of Revenue & Taxation, 236 F.3d 1077, 1083 (9th Cir. 2001).

**b. Eighth Amendment and Conditions of Confinement**

The Eighth Amendment, which protects prisoners from inhumane conditions of confinement, Farmer v. Brennan, 511 U.S. 825, 833 (1994), is violated when prison officials act with deliberate indifference to a substantial risk of harm to an inmate's health or safety. E.g., Farmer, 511 U.S. at 828; Thomas v. Ponder, 611 F.3d 1144, 1151–52 (9th Cir. 2010); Richardson v. Runnels, 594 F.3d 666, 672 (9th Cir.2010).

Two requirements must be met to show an Eighth Amendment violation. Farmer, 511 U.S. at 834. "First, the deprivation must be, objectively, sufficiently serious." Id. (internal quotation marks and citation omitted). Second, "prison officials must have a sufficiently culpable state of mind," which for conditions of confinement claims, "is one of deliberate indifference." Id. (internal quotation marks and citation omitted). Prison officials act with

deliberate indifference when they know of and disregard an excessive risk to inmate health or safety. Id. at 837. The circumstances, nature, and duration of the deprivations are critical in determining whether the conditions complained of are grave enough to form the basis of a viable Eighth Amendment claim. Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2006). The exposure to toxic substances can support a claim under section 1983. See Wallis v. Baldwin, 70 F.3d 1074, 1076–77 (9th Cir. 1995) (exposure to asbestos). Mere negligence on the part of a prison official is not sufficient to establish liability, but rather, the official's conduct must have been wanton. Farmer, 511 U.S. at 835; Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

**c. Eighth Amendment and Deliberate Indifference to Serious Medical Needs**

"[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two-part test for deliberate indifference requires the plaintiff to show (1) "'a serious medical need' by demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain,'" and (2) "the defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*) (internal quotations omitted)). Deliberate indifference is shown by "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." Id. (citing McGuckin, 974 F.2d at 1060). Deliberate indifference may be manifested "when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." Id. Where a prisoner is alleging a delay in receiving medical treatment, the delay must have led to further harm in order for the prisoner to make a claim of deliberate indifference to serious medical needs. McGuckin at 1060 (citing Shapely v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985)).

"Deliberate indifference is a high legal standard." Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). "Under this standard, the prison official must not only 'be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the inference.'" Id. at 1057 (quoting Farmer, 511 U.S. at 837. "'If a prison official should have been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the risk.'" Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). "A showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment." Id. at 1060. "[E]ven gross negligence is insufficient to establish a constitutional violation." Id. (citing Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)). Additionally, a difference of opinion between an inmate and prison medical personnel—or between medical professionals—regarding appropriate medical diagnosis and treatment is not enough to establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Toguchi, 391 F.3d at 1058.

**d. Qualified Immunity**

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." Ashcroft v. Al–Kidd, 563 U.S. 731, 735 (2011) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). To be clearly established, a right must be sufficiently clear "that every 'reasonable official would [have understood] that what he is doing violates that right. Reichle v. Howards, 132 S. Ct. 2088, 2090 (2012) (quoting Ashcroft, 563 U.S. at 741) (alteration in original). This immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986).

"Since qualified immunity is a defense, the burden of pleading it rests with the defendant." See Fed.Rule Civ.Proc. 8(c) (defendant must plead any 'matter constituting an avoidance or affirmative defense'); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1271 (1969). It is for the official to claim that his conduct was justified by an objectively

reasonable belief that it was lawful. We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith." Gomez v. Toledo, 446 U.S. 635, 640 (1980).

## III. DEFENDANTS' MOTION TO DISMISS

Defendants argue that: 1) Plaintiff's claim that he did not receive proper medical care for his hepatitis C should be dismissed for failure to exhaust; 2) the arsenic in KVSP's water supply was deemed non-dangerous by the California Department of Public Health, and Defendants were not deliberately indifferent in remedying the water; 3) Defendant Manasrah was not personally involved in providing or addressing the water; and 4) Defendants are entitled to qualified immunity because it was not a clearly established violation of the Eighth Amendment to allow inmates to consume non-dangerous levels of arsenic in their drinking water or expose them to a naturally occurring spore (the spore that causes Valley Fever). (ECF No. 25-1, p. 8).

Plaintiff does not oppose Defendants' motion to dismiss his claim that Defendants failed to treat his hepatitis C, because, according to Plaintiff, he did not allege this claim. (ECF No. 29, p. 2). Plaintiff also states that he never alleged a claim against Defendant Manasrah pertaining to the arsenic laced drinking water. (ECF No. 31, p. 2). According to Plaintiff, the only two claims he alleged against Defendant Biter are for subjecting Plaintiff to Valley Fever and arsenic laced drinking water in violation of the Eighth Amendment, and the only claim he asserted against Defendant Manasrah was for denial of adequate medical treatment in violation of the Eighth Amendment. (Id.). Thus, to the extent that claims other than these were allowed through in screening, the Court will recommend that those claims be dismissed.

As to Defendants' assertion that the arsenic in KVSP's water supply was deemed non-dangerous by the California Department of Public Health, and Defendants were not deliberately indifferent in remedying the water, Plaintiff states that the water is contaminated and that the contamination can lead to health problems. (Id. at pgs. 5-6). Plaintiff also states that Defendant Biter was deliberately indifferent, because Defendant Biter was aware that consuming the contaminated water over a period of years was dangerous, and that he let the

problem go uncorrected for two years without taking reasonable corrective measures. (Id. at p. 7).

As to Defendants' assertion that they are entitled to qualified immunity because it was not a clearly established violation of the Eighth Amendment to allow inmates to consume non-dangerous levels of arsenic in their drinking water or expose them to a naturally occurring spore, Plaintiff states that Defendants violated clearly established law by housing inmates in an area with Valley Fever (Id. at p. 9) and by allowing inmates to consume drinking water contaminated with arsenic (Id. at pgs. 10-11).

## IV. ANALYSIS OF DEFENDANTS' MOTION TO DISMISS

### a. Conditions of Confinement (Arsenic Levels)

Defendants argue that Plaintiff's complaint does not state a claim for deliberate indifference to the arsenic level in KVSP's drinking water. (ECF No. 25-1, p. 17). According to Defendants, "the face of Plaintiff's amended complaint reveals that the arsenic in KVSP's drinking water did not present a sufficiently serious risk of harm to meet the objective element of the Eighth Amendment. Plaintiff's exhibits to the amended complaint show that the water did contain arsenic, but the levels of arsenic were not dangerous to Plaintiff and other inmates for the time period that they were exposed." (Id. at p. 18). Defendants cite to one of Plaintiff's exhibits (ECF No. 13, p. 55), which states that, according to the District Engineer of the Merced District of California, Department of Public Health, Division of Drinking Water and Environmental Management, it was determined that if a person consumed two liters of water per day for 70 years, that person would have an increased cancer risk of 1 in 10,000 to 1 in 1,000,000. (ECF No. 25-1, pgs. 11-12).

Plaintiff argues that the water is contaminated and that the contamination can lead to health problems. (ECF No. 31, pgs. 5-6). Plaintiff mentions a notice distributed by Defendant Biter that stated that the water quality problem was not an emergency, but acknowledged that drinking contaminated water over a period of years could cause serious damage to an individual's health. (Id. at p. 6). Plaintiff also states that Defendant Biter was deliberately indifferent, because Defendant Biter was aware that consuming the contaminated water over a

period of years was dangerous, and that he let the problem go uncorrected for two years without taking reasonable corrective measures. (Id. at p. 7).

Plaintiff's First Amended Complaint essentially alleges that the KVSP water system exceeded the maximum contaminant level of 0.010 mg/l for arsenic and therefore did not comply with the Primary Drinking Water Regulation. Plaintiff appears to be alleging that he suffered symptoms as a result of drinking water that contained a level of arsenic that exceeded the Primary Drinking Water Regulation. Plaintiff attached six notes to the complaint that were signed by Defendant Biter. (ECF No. 13, pgs. 65-70). The notices all state that the level of arsenic in the water is not an emergency, but that "some people who drink water containing arsenic in excess of the MCL over many years may experience skin damage or circulatory system problems, and may have an increased risk to getting cancer." (Id.).

In evaluating this motion to dismiss, in light of the prevalence of this specific complaint by other inmates at KVSP, this Court reviewed decisions of other courts. It is worth noting that the Ninth Circuit has not yet weighed in on this specific issue. Nevertheless, the decisions of other courts provide some guidance as to how other courts have evaluated similar allegations against the same legal standards.

Multiple courts have screened out similar allegations from other inmates of KVSP based on elevated levels of arsenic, finding that Plaintiff's allegations do not state a claim under the Eighth Amendment. For example, Magistrate Judge Gary S. Austin found that a similar complaint failed to state a claim for the following reasons:

> Here, Plaintiff fails to allege that he was subjected to an objectively serious harm. The fact that the drinking water exceeded an EPA standard by .02 milligrams per liter does not, of itself, subject Plaintiff to an objectively serious harm. Plaintiff's view that he is in danger of serious physical harm is unsupported by the facts alleged. Plaintiff's own allegations indicated that a professional physician and Master of Public Health tested the water, and found the arsenic levels to be "insignificant." Plaintiff fails to allege any facts indicating that he suffered any ill effects, other than his fear of some future harm. Simply put, the fact that the water violated some regulatory standard does not, of itself, subject officials to liability under the Eighth Amendment.

Huerta v. Biter (E.D. Cal., Mar. 10, 2015, No. 113-CV-00916-AWI-GSA) 2015 WL 1062041,

at *4, report and recommendation adopted (E.D. Cal., Oct. 29, 2015, No. 113CV0916AWIEJPPC) 2015 WL 6690042. Magistrate Judge Dennis L. Beck screened out a similar complaint, based on the lack of medical evidence that Plaintiff's health problems were caused by arsenic, and also because it appears that KVSP was in compliance with arsenic regulations at the time of his medical problems. Slaughter v. Biter (E.D. Cal., Dec. 2, 2014, No. 1:14CV00887 DLB PC) 2014 WL 6819501, at *3. See also Ford v. California (E.D. Cal., Apr. 2, 2013, No. 1:10-CV-00696-AWI) 2013 WL 1320807, at *4 ("The Court has screened Plaintiff's complaint and finds that it does not state any claims upon which relief may be granted under section 1983 or the Safe Drinking Water Act. Plaintiff's sole claim is that arsenic levels violated regulatory standards. Plaintiff's own exhibits indicate that arsenic levels did not rise to the level of endangering his health. The Court finds that this deficiency cannot be cured by further amendment. Plaintiff has alleged, at most, a violation of regulatory standards.").

Additionally, other courts have allowed similar claims to proceed past the pleading stage, only to grant summary judgment in favor of the defendants based on similar facts, albeit on a more fully developed record than here. For example, Magistrate Judge Sheila K. Oberto recommended granting summary judgment in favor of prison defendants, and District Judge Anthony W. Ishii adopted her recommendation, based on finding that there was no dispute of fact regarding the deliberate indifference claim related to arsenic level in KVSP's water. In relevant part, the Court explained:

> Plaintiff has not submitted any evidence demonstrating that the exposure to the levels of arsenic in KVSP's water, which ranged between 0.014 and 0.020 mg/L per the six notices posted, for twenty-seven months constituted an objectively serious risk of harm to his health; it is not enough to merely show that the levels exceeded the EPA's new MCL standard of 0.10 mg/L. *Cf. Wallis,* 70 F.3d at 1076 (stating it is uncontroverted that asbestos poses a serious risk to human health and citing statutes in which there was a Congressional finding that medical science has not established any safe minimum level of asbestos exposure) (quotation marks and citations omitted); *Carter,* 2015 WL 4322317, at *8–10 (finding triable issues of fact on objective element of asbestos exposure claim where there was evidence of government findings that medical science has not established any minimum level of exposure to asbestos, but finding no triable issues of fact on objective element of lead paint exposure claim). Regarding Plaintiff's opinion that the water was not safe, Plaintiff is not

> qualified, as a lay witness, to offer his own opinion that the arsenic levels were sufficiently high to create a substantial risk of serious harm to his health. Although Plaintiff submitted evidence demonstrating that he developed several warts and nodules, there is no evidence linking those growths to arsenic in the water at KVSP. Speculation that Plaintiff's medical conditions *could* be linked to the arsenic levels is not sufficient in the first instance, but here, Plaintiff did not submit any admissible evidence that even speculatively links the two, and he is not qualified to offer his own opinion on the issue, as it requires medical and/or toxicological expertise he does not possess. . . .
>
> Having considered Plaintiff's evidence and arguments, the Court finds that Plaintiff failed to produce any evidence demonstrating that [the] level of arsenic in KVSP's water presented a substantial risk of serious harm to his health. It is not enough to show merely that the arsenic levels exceeded the new MCL standard; and Plaintiff's inadmissible lay opinion on the matter cannot be used to establish that the water presented an objective risk of serious harm to his health as a matter of law. Plaintiff also failed to produce any evidence "that the risk of which he complains is not one that today's society chooses to tolerate." *Helling,* 509 U.S. at 35–36.

Nguyen v. Biter (E.D. Cal., Sept. 8, 2015, No. 1:11-CV-00809-AWI) 2015 WL 5232163, at *8–9. The Court also sided with the defendant on the issue of deliberate indifference, explaining:

> Next, Plaintiff fails to make the requisite showing as to the subjective element of deliberate indifference. Plaintiff has shown that Defendant signed six notices regarding arsenic levels in KVSP's water exceeding the EPA's MCL standard but he has not demonstrated that Defendant knowingly disregarded a substantial risk of harm to his health. Bare knowledge of the fact that the arsenic levels were above the EPA's MCL standard is not sufficient. Indeed, the notices signed by Defendant disclaimed any emergency situation or a need to use alternative water sources, such as bottled water. Plaintiff's opinions that the water was dangerous and that Defendant knew it was dangerous but failed to take additional protective measures do not constitute admissible evidence supporting a finding of deliberate indifference. Further, there is no competent evidence that the elevated levels were dangerously high and constituted an obvious health risk. *Farmer,* 511 U.S. at 842; *Foster,* 554 F.3d at 814.

(Id. at *9).

In another case, Magistrate Judge Michael J. Seng reached the same conclusion in findings and recommendations that recommended granting the defendants' motion for summary judgment, which were subsequently adopted by District Judge Anthony W. Ishii. In

relevant part, Judge Seng explained:

> The real issues in dispute here are whether the levels of arsenic (whether organic, inorganic, or a combination of the two) actually found in KVSP's drinking water and consumed by Plaintiff were dangerous and whether Plaintiff's health problems can be attributed to the arsenic. Rather than submit admissible evidence on either of these issues, Plaintiff makes conclusory statements that are not based on personal experience or professional expertise. Moreover, Plaintiff's lay opinion as to the cause of his symptoms is speculative and inconsistent with the qualified opinions from Dr. Geller. And, finally, Plaintiff's emotional distress related to a fear of future harm cannot serve as the basis of an Eighth Amendment claim absent a showing of physical injury. Plaintiff has simply failed to submit any competent evidence that his symptoms are related to arsenic consumption.
>
> Even assuming, *arguendo,* that Plaintiff had established that the levels of arsenic detected in KVSP's water were sufficiently serious to satisfy the Eighth Amendment's first prong and that he was harmed by it, there is no showing of deliberate indifference. Although Defendant was aware that the level of arsenic in prison water exceeded federal standards, the evidence does not suggests he knew of, and disregarded, a risk that consumption of that water posed a serious threat to inmate health. Rather, the undisputed facts establish that Defendant reasonably inquired of and relied upon on the medical expertise of KVSP's CME, Dr. Lopez, who in turn relied on the expert opinion of Dr. Geller, that the water was safe to drink. Indeed, Defendant himself drank the water. There is no deliberate indifference on these facts.
>
> Having thus examined the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff's entire case rests upon his speculation about the type of arsenic found in KVSP's drinking wells, the dangers of the arsenic-contaminated water at the levels found at KVSP, and the cause of his symptoms.

Johnson v. Cate (E.D. Cal., Sept. 10, 2015, No. 1:10-CV-00803-AWI) 2015 WL 5321784, at *11 (footnote omitted).

While recognizing that the standard at the motion to dismiss stage is different from summary judgment, this Court recommends granting Defendants' motion to dismiss Plaintiff's claim of a violation of the Eighth Amendment related to arsenic in KVSP's drinking water based on reasoning similar to these other courts. Although Plaintiff's complaint contains 83 pages of allegations and exhibits, Defendants are correct that it ultimately lacks factual allegations that the arsenic in the water at KVSP posed a serious risk of harm or that Defendants acted with deliberate indifference in addressing that risk. While the drinking water

did not comply with the Primary Drinking Water Regulation, there is no evidence that the levels in KVSP's water posed a serious risk of harm merely because they exceeded the Primary Drinking Water Regulation. Plaintiff's allegations regarding his own medical ailments fail to satisfy this element because they lack the critical link from any test or medical professional that Plaintiff suffered from an elevated arsenic level, or that any of his medical issues were associated with arsenic poisoning. Moreover, there is no evidence of deliberate indifference. Prison officials act with deliberate indifference when they know of and disregard an excessive risk to inmate health or safety, and there are no non-conclusory allegations showing that Defendants knew of and disregarded an excessive risk to inmate health. In fact, the documents provided by Plaintiff (ECF No. 13, pgs. 55-56; 63; 64; 65; 66; 67; 68; 69; and 70) seem to show that prison officials did not believe that the elevated levels of arsenic posed an excessive risk. The notices do mention a potential risk if the exposure is long term, but Plaintiff has not been exposed long term, and there are no allegations that Plaintiff will be exposed long term. In fact, Plaintiff's First Amended Complaint states that "Defendant Biter Continued to Change the proposed date of Completion of the necessary repairs to comply with the Drinking Water Standard." (ECF No. 13, p. 10). This suggests that Defendant Biter is attempting to bring the drinking water into compliance with the Primary Drinking Water Standard.

Given the Court's conclusion above, the Court need not address Defendants' argument regarding qualified immunity to Plaintiff's claim regarding elevated arsenic levels.

**b. Qualified Immunity from Plaintiff's Eighth Amendment Conditions of Confinement Claim Regarding Exposure to Valley Fever**

Defendants argue that they are entitled to qualified immunity from Plaintiff's Eighth Amendment conditions of confinement claim regarding Valley Fever claim. (ECF No. 25-1, pgs. 21). Defendants state that "during the times alleged in this lawsuit (2012 to 2013) no cases held that housing inmates in an area where the spores that cause Valley Fever naturally occur constituted an unconstitutional risk." (Id. at p. 23). Defendants assert that "it has already been determined that there is no binding precedent addressing exposure to Valley Fever. Wiseman v. Cate, No. 1:14CV00831, 2015 WL 8207341, at *5 (E.D. Cal. Dec. 7, 2015)." (Id. at p. 24).

Defendants further assert that "numerous unpublished decisions have held that confinement in a location where valley fever is prevalent, in and of itself, fails to state an Eighth Amendment claim and that public officials have no duty to affirmatively mitigate the risk." (Id.). However, Defendants admit that "[s]ome unpublished cases have held that inmates may state a claim when the inmate alleges that he or she has a greater susceptibility to a risk of infection," and that "[t]he Ninth Circuit is similarly unsettled on the question." (Id. at p. 25).

Plaintiff argues that Defendants violated clearly established law by housing inmates in an area with Valley Fever (ECF No. 31, p. 9). Plaintiff points to Helling v. McKinney, 509 U.S. 25, 35 (1993). In Helling, the plaintiff alleged that he was assigned to a cell with another inmate who smoked five packs of cigarettes a day. Id. at 28. One issue was whether this exposure to environmental tobacco smoke (ETS) could state a valid claim under the Eighth Amendment, even though Plaintiff had not yet suffered harm. Id. at 30. The Supreme Court upheld the decision of the Court of Appeals, finding that the plaintiff stated "a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health." Id. at 35. Plaintiff argues that this case shows that it was clearly established that officials cannot expose prisoners to conditions that pose an unreasonable risk of serious damage to the prisoners' future health, and that Valley Fever is one of those dangerous conditions. (ECF No. 31, pgs. 9-10).

While the law is unsettled, the Court has found Judge Michael J. Seng's analysis in Allen v. Kramer, No. 115CV01609DADMJSPC, 2016 WL 4613360 (E.D. Cal. Aug. 17, 2016) persuasive.[3] Judge Seng notes that:

> In those Valley Fever cases that have reached the question of qualified immunity, the constitutional right has been defined as an inmate's right to be free from exposure to the environmental toxin, coccidiomycosis. See, e.g., Jackson I,

[3] After Judge Seng issued the order finding that qualified immunity did not protect the defendants at the current stage of the proceeding, he issued findings and recommendations, finding cognizable claims against some of those defendants. Allen v. Kramer, 2016 U.S. Dist. LEXIS 130030, *1 (E.D. Cal. Sept. 22, 2016). District Judge Dale A. Drozd adopted the findings and recommendations in full. Allen v. Kramer, 2016 U.S. Dist. LEXIS 162844, *2 (E.D. Cal. Nov. 23, 2016).

2015 WL 5522088, at *17 ("[T]he constitutional right at issue in this case must take into account the specific Valley Fever context in which this case arose"), overruled on other grounds by Jackson II; Smith v. Schwarzenegger, Case No. 1:14-cv-60-LJO-SAB, 137 F. Supp. 3d 1233, 1243 (E.D. Cal. Oct. 7, 2015), appeal docketed Case No. 15-17155 (9th Cir. Oct. 29, 2015) (defining the right in the context of "an inmate's exposure to cocci while incarcerated"); Jackson II, 134 F. Supp. 3d at 1238 (same); Smith, 2016 WL 398766, at *3 (noting "the lack of authority delineating the contours of the rights of inmates vis-à -vis exposure to coccidiomycosis."). See also Hines v. Youssef, Case No. 1:13-cv-0357-AWI-JLT, 2015 WL 2385095, at *9 (E.D. Cal. May 19, 2015), appeal docketed, No. 15-16145 (9th Cir. June 8, 2015) ("[I]n the context of the application of criteria for exclusion from endorsement to prisons in the cocci hyper-endemic zone in 2008, the right to exclusion on account of any factors not previously recommended by an authoritative source or ordered by the receiver prior to the time of endorsement was not clearly established.")

Under this factually specific definition, it is true that there is no controlling authority regarding an inmate's right to be free of exposure to coccidiomycosis, and it is also true that "there has been longstanding disagreement among the judges of this district as to whether and under what circumstances inmates housed at prisons in the San Joaquin Valley, where Valley Fever is endemic, may state an Eighth Amendment claim for being exposed to Valley Fever spores while incarcerated." See Jackson II, 134 F. Supp. 3d at 1240 (citing Jones v. Hartley, Case No. 1:13-cv-1590-AWI-GSA, 2015 WL 1276708, at *2-3 (E.D. Cal. Mar. 19, 2015) (collecting cases)).

But this level of specificity is precisely the type cautioned against by the Supreme Court. Determining whether the contours of a right are sufficiently clear does "not require a case directly on point." al-Kidd, 563 U.S. at 741. Rather, it requires that "existing precedent must have placed the statutory or constitutional question beyond debate." Id. In that regard, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 US 730, 741 (2002). Indeed, the earlier cases need not even have facts that are "fundamentally similar" or "materially similar." See id. Though such cases "can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." Id.

Consistent with other judges in this District, this Court declines to define the constitutional right at a high level of generality. That is to say, the right cannot be defined as the right to be free from mere exposure to all environmental toxins. However, the undersigned also declines to swing the pendulum the other way and define the right at a highly specific level relating only to the particular toxin at issue here, i.e., coccidiomycosis. To be so fact-specific would likely entitle a defendant to qualified immunity in every novel factual scenario. This Court thus settles on a definition that falls somewhere in between.

Allen, No. 115CV01609DADMJSPC, 2016 WL 4613360, at *5-6.

After conducting extensive analysis and evaluation of relevant case law, Judge Seng concluded that the relevant clearly established legal right was that "Plaintiff has a right to be free from exposure to an environmental hazard that poses an unreasonable risk of serious damage to his health whether because the levels of that environmental hazard are too high for anyone in Plaintiff's situation or because Plaintiff has a particular susceptibility to the hazard." Allen, No. 115CV01609DADMJSPC, 2016 WL 4613360, at *6. In coming to this conclusion, Judge Seng relied on Helling: "This definition takes into account the facts of this case without being overly and unnecessarily specific. It also stems directly from the holding of Helling v. McKinney, 509 U.S. 25 (1993), which the Court concludes 'placed the statutory or constitutional question beyond debate.' al-Kidd, 563 U.S. at 741." Allen v. Kramer, No. 115CV01609DADMJSPC, 2016 WL 4613360, at *6. Additionally, as Judge Seng noted:

> Though Helling directly addressed an inmate's exposure to ETS, it tacitly acknowledged other situations in which environmental factors can pose an unreasonable risk to an inmate's health, including exposure to "infectious maladies such as hepatitis and venereal disease" caused by overcrowding, unsafe drinking water, and "toxic or other substances." 509 U.S. at 33, 35. Along these lines, courts have relied on Helling to hold that an inmate has the right to be free from exposure to another environmental toxin, asbestos. In Wallis v. Baldwin, 70 F.3d 1074, 1077 (9th Cir. 1995), for example, the Ninth Circuit was asked to consider whether the district court improperly entered summary judgment for the defendants on plaintiff's Eighth Amendment conditions of confinement claim: "[T]he critical question before the district court was whether the defendants acted with 'deliberate indifference' in exposing Wallis to the asbestos in the [prison's] attics." Id. at 1076 (citing Helling). Noting that "[i]t is uncontroverted that asbestos poses a serious risk to human health," the Court reversed the grant of summary judgment after concluding that the evidence established that the defendants knew of the existence of the asbestos in the attic and the threat to the inmates' health from exposure to it but nonetheless forced plaintiff to clean the attic without protection. Id. See also McNeil v. Lane, 16 F.3d 123 (7th Cir. 1993) (finding that plaintiff's claim of mere exposure to asbestos insufficient to state a claim under Helling); Doyle v. Coombe, 976 F. Supp. 183, 188 (W.D.N.Y. 1997) ("It was not until 1993 that the United States Supreme Court held [in Helling] that an Eighth Amendment claim may be established from exposure to substances which might cause a delayed injury."); Gonyer v. McDonald, 874 F. Supp. 464, 466 (D. Mass. Feb. 1, 1995) (citing Helling in finding a cognizable Eighth Amendment claim for exposure to asbestos); Carter v. Smith, 2015 WL

> 4322317, at *7 (N.D. Cal. July 15, 2015) ("Exposure to toxic substances may be a sufficiently serious condition to establish the first prong of an Eighth Amendment claim, depending on the circumstances of such exposure, as explained by the Supreme Court in Helling .... Although Helling was a second-hand smoke case, the rule also applies to asbestos exposure.")
>
> Helling has also been cited in cases involving exposure to other environmental factors claimed to pose an unreasonable risk of harm to health, including contagious diseases caused by overcrowding conditions, Brown v. Mitchell, 327 F. Supp. 2d 615, 650 (E.D. Va. July 28, 2004); contaminated water, Carroll v. DeTella, 255 F.3d 470, 472 (7th Cir. 2001); compelled use of chemical toilets, Masonoff v. DuBois, 899 F. Supp. 782, 797 (D. Mass. Sep. 11, 1995) ("[I]f the future harm resulting from exposure to second-hand smoke can give rise to an Eighth Amendment violation, then surely daily contact with a hazardous substance which causes rashes, burning, tearing eyes and headaches meets the objective part of the test for a violation of the Eighth Amendment."); paint toxins, Crawford v. Coughlin, 43 F. Supp. 2d 319, 325 (W.D.N.Y. 1999); and other inmates' blood, Randles v. Singletary, 2001 WL 1736881, at *2 (M.D. Fla. Aug. 10, 2001).

Allen, No. 115CV01609DADMJSPC, 2016 WL 4613360, at *7-8 (footnote omitted).

The Court believes that, as laid out in Judge Seng's order (id.), defining the right in this way strikes the appropriate balance between taking into account the facts of this case and the Supreme Court's admonition in Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011) that courts should "not define clearly established law at a high level of generality." Thus, this Court evaluates Defendants' qualified immunity defense against what this Court believes is the right at issue, namely that **"Plaintiff has a right to be free from exposure to an environmental hazard that poses an unreasonable risk of serious damage to his health whether because the levels of that environmental hazard are too high for anyone in Plaintiff's situation or because Plaintiff has a particular susceptibility to the hazard."** Allen, No. 115CV01609DADMJSPC, 2016 WL 4613360, at *6.

The Court then looks to the allegations in Plaintiff's complaint to determine if Plaintiff has alleged conduct that, construing the facts in favor of Plaintiff, violates this right, and that every reasonable official would have understood to violate this right. Here, Plaintiff has alleged that he was exposed to an environmental hazard that poses an unreasonable risk of serious damage to his health (Valley Fever), and that he has a particular susceptibility to that

hazard, i.e., Valley Fever, because of the required treatment for his hepatitis C (ECF No. 13, p. 7)[4], and because he is an African American (ECF No. 13, pgs. 31-33). Plaintiff further alleges that Defendants were aware of this risk, but did nothing to remedy it.

This Court recommends finding, at this stage in the case, that Plaintiff has pled facts showing that his rights were violated. Additionally, based on the case law described above and construing facts liberally in favor of Plaintiff, Plaintiff has pled facts showing that every reasonable official would have understood that their actions violated Plaintiff's rights. Thus, the Court recommends finding that, at this stage in the proceedings, Defendants are not entitled to qualified immunity. However, the Court notes that this finding is based solely on construing the facts alleged as true and in favor of Plaintiff, which the Court must at this stage in litigation. This finding is without prejudice to Defendants asserting this defense at a later stage in the proceeding.

**c. Deliberate Indifference to Serious Medical Needs in Violation of the Eighth Amendment**

The Court found in its screening order that "Plaintiff has stated a claim against Defendant Martin Biter and A. Manasrah based on violations of the Eighth Amendment for his claims related to arsenic in the drinking water, valley fever, and a lack of medical care." (ECF No. 20, p. 1). Defendants moved to dismiss the claim for lack of medical care to the extent that it relied on Plaintiff's treatment (or lack thereof) for hepatitis C. However, Plaintiff has stated that this was never a claim (ECF No. 29, p. 2).

The Court has reviewed the screening order, and it is ambiguous as to what exactly was included in the lack of medical care claim. The screening order simply states "Plaintiff has stated a claim against Defendant Martin Biter and A. Manasrah based on violations of the Eighth Amendment for his claims related to… a lack of medical care." (Id.). Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it

[4] The Court notes that based on the First Amended Complaint it appears that Plaintiff is not receiving treatment for his hepatitis C.

rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). The First Amended Complaint did not provide Defendants with fair notice of what this claim is and the grounds upon which it rests. It appears that neither Defendants nor the Court understood exactly what Plaintiff was attempting to assert. When laying out his claims in his First Amended Complaint, Plaintiff states that "Plaintiff's medical conditions, as described herein, constitute a serious medical need in that the failure to treat these conditions has resulted in further significant injury, and the ongoing failure to treat it is likely to cause more serious injury. Said injuries has [sic] included, but necessary been limited to having Valley Fever, extreme bladder distension, skin pigmentation, blood in urine, scar on lungs, kidney problems, prostate problems, coughing, night-sweats, fever, aching joints, and severe pain." (ECF No. 13, p. 16). Based on these facts, it is unclear exactly what medical conditions Plaintiff is alleging have gone untreated. Defendants apparently believed that Plaintiff was referring to his hepatitis C, although Plaintiff has stated that this was not the case.

Upon reviewing the complaint, it appears that Plaintiff may be alleging that Defendant Manasrah failed to treat his Valley Fever. However, the Court finds that Plaintiff has failed to sufficiently allege that he even has Valley Fever. Plaintiff states that he was tested for Valley Fever, and was told that his test results were negative. Plaintiff then states that he later received a medical classification chrono that indicated that he contracted Valley Fever. However, the medical classification chrono that Plaintiff attached to the complaint does not state that Plaintiff contracted Valley Fever (ECF No. 13, p. 53). Accordingly, based on the facts alleged in the First Amended Complaint, it does not appear that Plaintiff contracted Valley Fever and thus did not suffer harm from a failure to received medical care at this stage.

Additionally, Plaintiff has stated that he only brought this claim against Defendant Manasrah. (ECF No. 31, p. 2). However, when referring to this claim, the First Amended Complaint clearly mentions more than one defendant (e.g., "the defendants have acted intentionally…."; "Defendants' conduct violated 42 U.S.C. § 1983…."; and "As a proximate result of the defendants conduct…." (ECF No. 13, p. 16)).

Accordingly, the Court provided Plaintiff with the applicable law above, and

recommends dismissing Plaintiff's claim against Defendant Manasrah for deliberate indifference to serious medical needs in violation of the Eighth Amendment, with leave to amend. The Court notes that Plaintiff should only file an amended complaint if this recommendation is adopted by District Judge Dale A. Drozd, and if Plaintiff believes he can allege additional true facts that would show that Defendant Manasrah was deliberately indifferent to his serious medical needs.

Additionally, if Plaintiff does file an amended complaint, he is advised that an amended complaint supersedes the original complaint, Lacey v. Maricopa County, 693 F. 3d 896, 907 n.1 (9th Cir. 2012) (*en banc*), and it must be complete in itself without reference to the prior or superseded pleading, Local Rule 220. In this situation, it would be appropriate for Plaintiff to use the current complaint and merely add any additional claims or factual allegations regarding a deliberate indifference to serious medical needs claim against Defendant Manasrah regarding Valley Fever. Once an amended complaint is filed, the prior complaints no longer serve any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each defendant must be sufficiently alleged. The amended complaint should be clearly and boldly titled "Second Amended Complaint," refer to the appropriate case number, and be an original signed under penalty of perjury.

## V. CONCLUSION

Accordingly, based on the foregoing, IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to dismiss (ECF No. 25) be GRAINTED IN PART;
2. To the extent that Plaintiff asserted a claim against Defendants for failure to treat his hepatitis-C in violation of the Eighth Amendment, that claim be DISMISSED;
3. To the extent that Plaintiff asserted a claim against Defendant Biter for deliberate indifference to serious medical needs in violation of the Eighth Amendment**,** that claim be DISMISSED;
4. To the extent that Plaintiff asserted an Eighth Amendment conditions of confinement claim against Defendant Manasrah for exposing Plaintiff to Valley

Fever in violation of the Eighth Amendment, that claim be DISMISSED;

5. To the extent Plaintiff asserted an Eighth Amendment conditions of confinement claim against Defendant Manasrah pertaining to the arsenic laced drinking water, that claim be DISMISSED;
6. Plaintiff's Eighth Amendment conditions of confinement claim related to exposure to high levels of arsenic in the drinking water be DISMISSED;
7. Plaintiff's claim against Defendant Manasrah for deliberate indifference to serious medical needs in violation of the Eighth Amendment be DISMISSED, WITH LEAVE TO AMEND; and
8. Defendants' claim of qualified immunity to Plaintiff's claim of violation of the Eighth Amendment in relation to Valley Fever be DENIED, without prejudice;

These Findings and Recommendations will be submitted to the United States District Court Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1). Within **thirty (30) days** after being served with a copy of these Findings and Recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within **ten (10) days** after service of the objections. The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

Additionally, it is ORDERED that Plaintiff's motion for an extension of time (ECF No. 30) is DENIED.

IT IS SO ORDERED.

Dated: **January 30, 2017**

/s/ Eric P. Grosjean
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK HUERTA,

Plaintiff,

vs.

M. D. BITER, et al.,

Defendants

Case No. 1:13 cv 00916 AWI GSA PC

ORDER DISMISSING COMPLAINT AND GRANTING PLAINTIFF LEAVE TO FILE AN AMENDED COMPLAINT

AMENDED COMPLAINT DUE IN THIRTY DAYS

## I. Screening Requirement

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

"Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions," none of which applies to section 1983 actions. Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002); Fed. R. Civ. P. 8(a). Pursuant to Rule 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a). "Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Swierkiewicz, 534 U.S. at 512. However, "the liberal pleading standard . . . applies only to a plaintiff's factual allegations." Neitze v. Williams, 490 U.S. 319, 330 n.9 (1989). "[A] liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." Bruns v. Nat'l Credit Union Admin., 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982)).

## II. Plaintiff's Claims

Plaintiff, an inmate in the custody of the California Department of Corrections and Rehabilitation (CDCR) at Calipatria State Prison, brings this civil rights action against defendant CDCR officials employed by the CDCR at Kern Valley State Prison, where the event at issue occurred. Plaintiff names the following individual defendants: Warden M. D. Biter; Chief Deputy Warden E. Blanco; Chief, Office of Appeals J. D. Lozano; Captain R. Davis; Correctional Counselor B. Daveiga; Correctional Officer K. Carter. Plaintiff claims that he was subjected to conditions of confinement such that it violated the Eighth Amendment prohibition on cruel and unusual punishment.

Plaintiff alleges that he was transferred to KVSP on April 26, 2010. Plaintiff was notified by a memo authored by the Warden that the prison had recently violated a drinking water standard. Specifically, Plaintiff was informed that the "running average" for wells 1 and 2 violated the U.S. Environmental Protection Agency Standard by .02 milligrams per liter. Plaintiff subsequently submitted health care requests, and was seen on numerous occasions my medical staff. Plaintiff sought information on what adverse effects he may suffer, but could not get any satisfactory answers. In December of 2010, Plaintiff "explained that he had been

consuming the contaminated water since April 2010 and requested to be tested for health problems caused by the high levels of arsenic in the water." Plaintiff received a written response by a registered nurse, who informed Plaintiff that a review of the water was conducted by R.J. Geller, MD, MPH of California Prison Control System and "as per review, level of Arsenic noted in water is insignificant."

On October 27, 2011, Plaintiff filed an inmate grievance, CDC Form 602, regarding the arsenic levels in the water. Plaintiff's appeal was screened out twice, and then rejected as an emergency appeal. Plaintiff's appeal was ultimately accepted, and reviewed through the final, Director's level of review. Plaintiff alleges that in his grievance, he advised officials that "arsenic, as defined in Webster's II New College Dictionary, as, 'a highly poisonous metallic element used in insecticides, weed killers, solid-state devices, and various alloys.'" Officials responded to his grievance, advising Plaintiff that "the documentation and arguments presented are persuasive that the appellant has failed to support his appeal with sufficient evidence or facts to warrant modification of the previous levels of review. The appellant's appeal issue was appropriately addressed by the institution."

**A. Eighth Amendment**

To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison conditions must involve "the wanton and unnecessary infliction of pain . . ." Rhodes v. Chapman, 452 U.S. 337, 347 (1981). Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. Id.; Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). Where a prisoner alleges injuries stemming from unsafe conditions of confinement, prison officials may be held liable only if they acted with "deliberate indifference to a substantial risk of serious harm." Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

The deliberate indifference standard involves an objective and a subjective prong. First, the alleged deprivation must be, in objective terms, "sufficiently serious . . . ." Farmer v.

Brennan, 511 U.S. 825, 834 (1994)(citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Second, the prison official must "know of and disregard an excessive risk to inmate health or safety . . . .Farmer, 511 U.S. at 837. Thus, a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it. Id. at 837-45. Prison officials may avoid liability by presenting evidence that they lacked knowledge of the risk, or by presenting evidence of a reasonable, albeit unsuccessful, response to the risk. Id. at 844-45. Mere negligence on the part of prison official is not sufficient to establish liability, but rather, the official's conduct must have been wanton. Id. at 835; Frost, 152 F.3d at 1128.

Here, the Court finds that Plaintiff's allegations fail to state a claim for relief. In order to hold an individual defendant liable, Plaintiff must allege some fact or facts indicating that he was subjected to an objectively serious harm, and that the individual defendant knew of the harm and acted with deliberate indifference to that harm. Here, Plaintiff fails to allege that he was subjected to an objectively serious harm. That the drinking water exceeded an EPA standard by .02 milligrams per liter does not, of itself, subject Plaintiff to an objectively serious harm. That Plaintiff, in his view, is in danger of serious physical harm is unsupported by the facts alleged. Plaintiff's own allegations indicated that a professional physician and epidemiologist tested the water, and found the arsenic levels to be "insignificant." Plaintiff fails to allege any facts indicating that he suffered any ill effects, other than his fear of some future harm. Simply put, that the water violated some regulatory standard does not, of itself, subject officials to liability under the Eighth Amendment.

To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted under color of state law and (2) the defendant deprived him of rights secured by the Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). "A person deprives another of a constitutional right, where that person 'does an affirmative act, participates in another's affirmative acts, or omits to perform an act which [that person] is legally required to

do that causes the deprivation of which complaint is made.'" Hydrick v. Hunter, 500 F.3d 978, 988 (9th Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). "[T]he 'requisite causal connection can be established not only by some kind of direct, personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'" Id. (quoting Johnson at 743-44). Plaintiff has not specifically charged each defendant with conduct indicating that they knew of and disregarded a serious risk to Plaintiff's health, resulting in injury to Plaintiff. Plaintiff may not hold defendants liable simply by alleging a serious condition of his confinement and then charge defendants with the vague allegation that they subjected him to harm. Plaintiff must allege facts indicating that each defendant was aware of a specific harm to Plaintiff, and acted with deliberate indifference to that harm. Plaintiff has failed to do so here. The complaint should therefore be dismissed. Plaintiff will, however, be granted leave to file an amended complaint.

Plaintiff need not, however, set forth legal arguments in support of his claims. In order to hold an individual defendant liable, Plaintiff must name the individual defendant, describe where that defendant is employed and in what capacity, and explain how that defendant acted under color of state law. Plaintiff should state clearly, in his or her own words, what happened. Plaintiff must describe what each defendant, *by name*, did to violate the particular right described by Plaintiff. Plaintiff has failed to do so here.

## III. Conclusion and Order

The Court has screened Plaintiff's complaint and finds that it does not state any claims Upon which relief may be granted under section 1983. The Court will provide Plaintiff with the opportunity to file an amended complaint curing the deficiencies identified by the Court in this order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff is cautioned that he may not change the nature of this suit by adding new, unrelated claims in his amended complaint. George, 507 F.3d at 607 (no "buckshot" complaints).

Plaintiff's amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what each named defendant did that led to the deprivation of Plaintiff's constitutional or other federal rights, Hydrick, 500 F.3d at 987-88. Although accepted as true, the "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level . . . ." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 554 (2007) (citations omitted).

Finally, Plaintiff is advised that an amended complaint supercedes the original complaint, Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and must be "complete in itself without reference to the prior or superceded pleading," Local Rule 15-220. Plaintiff is warned that "[a]ll causes of action alleged in an original complaint which are not alleged in an amended complaint are waived." King, 814 F.2d at 567 (citing to London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

Accordingly, based on the foregoing, it is HEREBY ORDERED that:

1. Plaintiff's complaint is dismissed, with leave to amend, for failure to state a claim;
2. The Clerk's Office shall send to Plaintiff a complaint form;
3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file an amended complaint;
4. Plaintiff may not add any new, unrelated claims to this action via his amended complaint and any attempt to do so will result in an order striking the amended complaint; and
5. If Plaintiff fails to file an amended complaint, the Court will recommend that this action be dismissed, with prejudice, for failure to state a claim.

IT IS SO ORDERED.

Dated: **February 24, 2014**

**/s/ Gary S. Austin**

UNITED STATES MAGISTRATE JUDGE

# John W. Williams v. Warden K. Harrington

2011 | Cited 0 times | E.D. California | September 19, 2011

ORDER DISMISSING FIRST AMENDED COMPLAINT, FOR FAILURE TO STATE A CLAIM (Doc. 16.) ORDER GRANTING LEAVE TO AMEND THIRTY-DAY DEADLINE TO FILE SECOND IMPLEMENTATION CLAIMS ORDER DISMISSING ALL OTHER CLAIMS ONLY THE RETALIATION AND POLICY AMENDED COMPLAINT AS INSTRUCTED BY THIS ORDER

## I. RELEVANT PROCEDURAL HISTORY

John W. Williams ("Plaintiff") is a state prisoner in the custody of the California Department of Corrections and Rehabilitation ("CDCR"), proceeding pro se and in forma pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on October 16, 2009. (Doc. 1.) On October 29, 2009, Plaintiff consented to the jurisdiction of a Magistrate Judge, and no other parties have appeared. (Doc. 6.) Therefore, pursuant to Appendix A(k)(4) of the Local Rules of the Eastern District of California, the undersigned shall conduct any and all proceedings in the case until such time as reassignment to a District Judge is required. Local Rule Appendix A(k)(3).

The Court screened the Complaint pursuant to 28 U.S.C. 1915A and entered an order on November 22, 2010, requiring Plaintiff to either file an amended complaint or notify the Court of his willingness to proceed on the claims found cognizable by the Court. (Doc. 13.) On January 11, 2011, Plaintiff filed the First Amended Complaint, which is now before the Court for screening. (Doc. 16.)

## II. SCREENING REQUIREMENT

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). "[P]laintiffs [now] face a higher burden of pleadings facts . . ," Al-Kidd v. Ashcroft, 580 F.3d 949, 977 (9th Cir. 2009), and while a plaintiff's allegations are taken as true, courts "are not required to indulge unwarranted inferences," Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility standard. Id.

III. SUMMARY OF FIRST AMENDED COMPLAINT

Plaintiff is presently incarcerated at Salinas Valley State Prison ("SVSP") in Soledad, California. The events at issue occurred at Kern Valley State Prison ("KVSP") in Delano, California, while Plaintiff was incarcerated there. Plaintiff names as defendants K. Harrington, Warden at KVSP; J. Castro, Associate Warden; M. Biter, Chief Deputy Warden; and T. Billings, Correctional Counselor II ("Defendants").

Plaintiff alleges as follows in the First Amended Complaint.

Contaminated Drinking Water In April 2005, the California Department of Health Services issued a permit to the CDCR to operate two water wells at KVSP, the sole supply of drinking water to inmates at KVSP, including Plaintiff. The permit requires compliance with all statutory and regulatory drinking water requirements. On April 10, 2008, KVSP was notified by the Department of Public Health that the water wells at KVSP contained more than the allowed maximum level of arsenic, and on December 12, 2008, KVSP was issued a compliance order for violation. (Exhs. A and B to First Amended Complaint ("ACP"), Doc. 16 at 41-48.)

Upon his arrival at KVSP on August 12, 2009, after drinking from KVSP's contaminated water wells, Plaintiff immediately "suffered retch, nausea, stomach cramps, pain, and headache." (ACP, Doc. 16 at 5:8-9.) Plaintiff attributes his illness to elevated levels of arsenic in the water. Between August 12, 2009 and August 27, 2010, Plaintiff was forced to drink contaminated water and consume low levels of arsenic, causing illness and loss of energy. Plaintiff holds defendants Harrington, Biter and Castro liable for harm to Plaintiff, based on their refusal to comply with the Safe Drinking Water Act.

Prison Appeals Process

On August 21, 2009, Plaintiff submitted an emergency inmate grievance related to the contaminated drinking water, directly to Warden Harrington. Warden Harrington forwarded the grievance to defendant Billings for processing. Defendant Billings returned the grievance to Plaintiff with an attached notice stating, "Lift on water restriction at Kern Valley State Prison," signed by defendant Billings on August 24, 2009. (ACP, Doc. 16 at 6 ¶10.) Plaintiff alleges that defendant Billings' actions deliberately defied CDCR policy to frustrate Plaintiff's appeal efforts. On September 9, 2009, Plaintiff returned the grievance to defendant Billings, through Warden Harrington. Defendant Billings retaliated against Plaintiff by conspiring to deprive him of his rights to appeal, by making a request to Administrator N. Grannis to place Plaintiff on an extended appeal restriction, restricting Plaintiff to one grievance a month for six months. Defendant Billings falsified information to restrict

Plaintiff's appeals concerning the drinking water, in conspiracy with defendants Harrington, Biter and Castro, in an attempt to conceal the fact that the water was contaminated.

After Plaintiff was placed on appeal restriction status, defendant Billings rejected Plaintiff's emergency grievance a second time on or about September 24, 2009, directing Plaintiff to obtain an Informal Level response, despite knowing that the issue could not be resolved in that manner. When defendant Castro received the grievance, he forwarded it back to defendant Billings who on October 5, 2009 returned the grievance to Plaintiff with notice that the grievance could not be processed due to Plaintiff's appeal restriction. Plaintiff maintains that the Defendants acted to prevent his exhaustion of remedies and deny Plaintiff access to the courts.

Loss of Prison Job

Defendants Harrington, Biter and Castro promulgated and implemented a policy which authorized defendant Billings to deliberately block KVSP inmates, including Plaintiff, from challenging deficient policies. Also, between January and April 2010, defendants Harrington, Biter and Castro ratified a policy which extended preferential treatment to Hispanic inmates at KVSP with respect to job assignments.

In October 2009, Plaintiff was given a prison job assignment as food handler. On or about March 19, 2010, Plaintiff was admitted into crisis care due to a suicide attempt, and upon discharge from crisis care, Plaintiff learned that his job position had been taken. Plaintiff wrote to defendant Harrington concerning the loss of his job assignment. On or about March 30, 2010, Plaintiff was interviewed by defendant Castro's wife, Lieutenant ("Lt.") Castro. Lt. Castro informed Plaintiff that the policy which took away Plaintiff's job assignment was being imposed to afford Hispanic inmates from Northern California access to job assignments because of prison gang disruptive activity involving Southern Hispanic California inmates. Lt. Castro also told Plaintiff that he was also rehoused and unassigned "because they don't want people who cut their wrists working in the kitchen." (ACP, Doc. 16 at 10 ¶20.) Plaintiff asserts that CDCR policy requires notice and a classification hearing before an inmate is unassigned from a prison job, yet he was not given this due process, violating his rights to equal protection because of his race and mental disability.

On May 1, 2010, Plaintiff filed a grievance concerning this dispute, and defendant Billings rejected it as untimely. Plaintiff returned the grievance explaining that any violation of time restraints was the result of the six-month appeal restriction imposed on Plaintiff by defendant Billings. The grievance was never processed, responded to, or returned to Plaintiff.

Policy Decisions

Defendants Harrington, Biter and Castro promulgated and implemented a policy which authorized defendant Billings to retaliate against KVSP inmates, including Plaintiff, by blocking and rejecting

inmate grievances based on bogus and arbitrary reasons contrary to CDCR policy, and by placing inmates on appeal restriction to prevent exhaustion of remedies. In August 2009, when Plaintiff participated in a class-action grievance, represented by inmate D. Boult, against defendant Billings. Defendants Harrington and Biter intentionally frustrated the grievance process until inmate

D. Boult was paroled, and then refused to process the class action grievance altogether, so that defendant Billings could continue to use deficient policies. Defendant Billings learned that Plaintiff had authored the class action grievance, which motivated defendant Billings' retaliatory acts against Plaintiff.

On March 13, 2010, Plaintiff filed a grievance concerning defendant Billing's retaliatory schemes. To ensure that the deficient policies were not disturbed, defendants Harrington and Biter permitted the union representative [for the California Peace Officer Association] to conduct a counterfeit inquiry, finding no wrongdoing by defendant Billings.

Plaintiff requests injunctive, declaratory, and monetary relief.

IV. PLAINTIFF'S CLAIMS

The Civil Rights Act under which this action was filed provides:

Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997) (internal quotations omitted).

In the Court's first screening order entered on November 22, 2010, the Court found that Plaintiff had alleged facts, liberally construed, stating cognizable claims in the original Complaint against defendants Harrington and Castro for implementation of policy, and defendant Billings for retaliation. (Doc. 13.) The Court found that Plaintiff had not stated any other cognizable claims in the original Complaint. Id.

Now, the Court has thoroughly reviewed the First Amended Complaint and finds that Plaintiff fails to state any cognizable claims in the First Amended Complaint. Upon review, the Court The Court shall separately address each of Plaintiff's claims. With regard to Plaintiff's claims for retaliation and unconstitutional policy implementation, the Court used the screening procedure as directed by the Ninth Circuit in Iqbal. In light of the fact that the Court used a more restrictive standard of review when screening these two claims, Plaintiff shall be granted leave to amend these claims, as discussed below.

A. Official Capacity

Plaintiff brings this action against Defendants in their official and individual capacities. Plaintiff may not bring suit for damages against Defendants in their official capacities. "The Eleventh Amendment bars suits for money damages in federal court against a state, its agencies, and state officials in their official capacities." Aholelei v. Dept. of Public Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) (citations omitted). However, the Eleventh Amendment does not bar suits seeking damages against state officials in their personal capacities. Hafer v. Melo, 502 U.S. 21, 30 (1991); Porter v. Jones, 319 F.3d 483, 491 (9th Cir. 2003).

"Personal-capacity suits . . . seek to impose individual liability upon a government officer for actions taken under color of state law." Hafer, 502 U.S. at 25; Suever v. Connell, 579 F.3d 1047, 1060 (9th Cir. 2009). Where a plaintiff is seeking damages against a state official and the complaint is silent as to capacity, a personal capacity suit is presumed given the bar against an official capacity suit. Shoshone-Bannock Tribes v. Fish & Game Comm'n, 42 F.3d 1278, 1284 (9th Cir. 1994); Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1991).

Accordingly, Plaintiff fails state a claim for damages against any of the Defendants in their official capacities, and these claims shall be dismissed.

B. Personal Participation and Supervisory Liability

Plaintiff brings allegations against Warden Harrington, Associate Warden Castro, and Chief Deputy Warden Biter, who all hold supervisory positions at KVSP. Under section 1983, Plaintiff must demonstrate that each defendant personally participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002) (emphasis added). Plaintiff must demonstrate that each defendant, through his or her own individual actions, violated Plaintiff's constitutional rights. Iqbal, 129 S.Ct. at 1948-49.

Liability may not be imposed on supervisory personnel under section 1983 on the theory of respondeat superior, as each defendant is only liable for his or her own misconduct. Iqbal, 129 S.Ct. at 1948-49; Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009). A supervisor may be held liable only if he or she "participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr v. Baca, No. 09-55233, 2011 WL 2988827 at *4-5 (9th Cir. July 25, 2011); Corales v. Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Preschooler II v. Clark County School Board of Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997).

Therefore, Plaintiff fails to state any claims against any of the Defendants as merely supervisory personnel, and these claims shall be dismissed.

C. Eighth Amendment - Failure to Protect

Plaintiff alleges that Defendants failed to protect him from harm arising from contaminated drinking water. Although prison conditions may be restrictive and harsh, prison officials must provide prisoners with food, clothing, shelter, sanitation, medical care, and personal safety. Id; Toussaint v. McCarthy, 801 F.2d 1080, 1107 (9th Cir. 1986); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). Where a prisoner alleges injuries stemming from unsafe conditions of confinement, prison officials may be held liable only if they acted with "deliberate indifference to a substantial risk of serious harm." Frost, 152 F.3d at 1128. Thus, a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it. Id. at 837-45.

"Deliberate indifference is a high legal standard." Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). "Under this standard, the prison official must not only 'be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the inference.'" Id. at 1057 (quoting Farmer v. Brennan, 511 U.S. 825, 837, 114 S.Ct. 1970 (1994)). "'If a prison official should have been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the risk.'" Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). "A showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment. Id. at 1060. "[E]ven gross negligence is insufficient to establish a constitutional violation." Id. (citing Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)).

Plaintiff alleges that KVSP's drinking water supply does not comply with the standards for maximum arsenic contaminant level, and that KVSP was notified of this noncompliance on April 10, 2008 and December 12, 2008. Plaintiff holds defendants Harrington, Castro, and Biter liable for failing to comply with the standards and for failing to comply with the Safe Water Act. However, Plaintiff fails to allege any facts demonstrating that any of these defendants personally acted with deliberate indifference.

Therefore, Plaintiff fails to state any claims against defendants Harrington, Castro, and Biter for failure to protect Plaintiff from harm caused by contaminated water, and these claims shall be dismissed.

D. Conspiracy

Plaintiff alleges that Defendants conspired under §§ 1983 and 1985 to violate his constitutional rights. § 1983

In the context of conspiracy claims brought pursuant to section 1983, a complaint must "allege

[some] facts to support the existence of a conspiracy among the defendants." Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992); Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 626 (9th Cir. 1988). Plaintiff must allege that defendants conspired or acted jointly in concert and that some overt act was done in furtherance of the conspiracy. Sykes v. State of California, 497 F.2d 197, 200 (9th Cir. 1974).

A conspiracy claim brought under section 1983 requires proof of "'an agreement or meeting of the minds to violate constitutional rights,'" Franklin v. Fox, 312 F.3d 423, 441 (9th Cir. 2001) (quoting United Steel Workers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540-41 (9th Cir. 1989) (citation omitted)), and an actual deprivation of constitutional rights, Hart v. Parks, 450 F.3d 1059, 1071 (9th Cir. 2006) (quoting Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121, 1126 (9th Cir. 1989)). "'To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy.'" Franklin, 312 F.3d at 441 (quoting United Steel Workers, 865 F.2d at 1541).

Plaintiff has not alleged any facts supporting the existence of an agreement or meeting of the minds among Defendants to violate Plaintiff's constitutional rights. Therefore, Plaintiff fails to state a claim for conspiracy for which relief can be granted under §§ 1983 or 1985 against any of the Defendants.

§ 1985

Section 1985 proscribes conspiracies to interfere with an individual's civil rights. To state a cause of action under section 1985(3), plaintiff must allege: (1) a conspiracy, (2) to deprive any person or class of persons of the equal protection of the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, property damage or deprivation of any right or privilege of a citizen of the United States. Gillispie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980); Giffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). Section 1985 applies only where there is a racial or other class-based discriminatory animus behind the conspirators' actions. Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992).

In interpreting these standards, the Ninth Circuit has held that a claim under § 1985 must allege specific facts to support the allegation that defendants conspired together. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988). A mere allegation of conspiracy without factual specificity is insufficient to state a claim under 42 U.S.C. § 1985. Id.; Sanchez v. City of Santa Anna, 936 F.2d 1027, 1039 (9th Cir. 1991).

Plaintiff does not allege facts to support the allegation that any of the Defendants entered into a conspiracy. Therefore, Plaintiff fails to state a claim for conspiracy for which relief can be granted under § 1985 against any of the Defendants.

Accordingly, Plaintiff's conspiracy claims shall be dismissed.

E. Inmate Appeals Process

Plaintiff alleges that all of the Defendants failed to respond properly to his inmate appeals. Defendants' actions in responding to Plaintiff's appeals, alone, cannot give rise to any claims for relief under section 1983 for violation of due process. "[A prison] grievance procedure is a procedural right only, it does not confer any substantive right upon the inmates." Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993) (citing Azeez v. DeRobertis, 568 F. Supp. 8, 10 (N.D. Ill. 1982)); see also Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of appeals because no entitlement to a specific grievance procedure); Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) (existence of grievance procedure confers no liberty interest on prisoner); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). "Hence, it does not give rise to a protected liberty interest requiring the procedural protections envisioned by the Fourteenth Amendment." Azeez, 568 F. Supp. at 10; Spencer v. Moore, 638 F. Supp. 315, 316 (E.D. Mo. 1986). Actions in reviewing a prisoner's administrative appeal cannot serve as the basis for liability under a section 1983 action. Buckley, 997 F.2d at 495. Thus, since he has neither a liberty interest, nor a substantive right in inmate appeals, Plaintiff fails to state a cognizable claim for the processing and/or reviewing of his 602 inmate appeals, and Plaintiff's claims regarding the inmate appeals process shall be dismissed.

F. Denial of Access to Courts

Plaintiff alleges that Defendants frustrated his efforts to file prison grievances and exhaust his administrative remedies when they failed to respond properly to his appeals and restricted him to filing one grievance a month for six months, thus denying him access to the courts.

While Plaintiff has a constitutional right to access the courts, the interferences complained of by Plaintiff must have caused him to sustain an actual injury. Christopher v. Harbury, 536 U.S. 403, 415, 122 S.Ct. 2179 (2002) Lewis v. Casey, 518 U.S. 343, 351, 116 S.Ct. 2174 (1996); Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010); Phillips v. Hust , 588 F.3d 652, 655 (9th Cir. 2009); Jones v. Blanas, 393 F.3d 918, 936 (9th Cir. 2004). The absence of an injury precludes an access claim, and Plaintiff's First Amended Complaint is devoid of any facts suggesting any injury occurred. Harbury, 536 U.S. at 415-16; Jones, 393 F.3d at 936. Therefore, Plaintiff fails to state a claim for denial of access to the courts, and this claim shall be dismissed.

G. Retaliation

"Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

Plaintiff asserts that defendant Billings thwarted his attempts to file grievances and exhaust remedies by falsifying information to place Plaintiff on restricted appeal status, in retaliation for Plaintiff filing inmate grievances that he had been harmed by KVSP's contaminated drinking water. Plaintiff also alleges that defendants Harrington, Castro and Biter conspired with defendant Billings to interfere with Plaintiff's rights to file grievances because they wanted to conceal the fact that they had not complied with the Safe Water Act, and they wanted to stop Plaintiff from complaining about deficient CDCR policies.

In the Court's November 22, 2010 order screening the original Complaint, the Court found that Plaintiff alleged facts, liberally construed, that defendant Billings had retaliated against Plaintiff by imposing an appeal restriction in response to Plaintiff's filing of an inmate grievance. (Order, Doc. 13 at 6 ¶II.B.) The Court now screens the retaliation claim using the Iqbal standard as directed by the Ninth Circuit.

Under Iqbal, the court is directed to begin the screening analysis by identifying conclusory allegations that are not entitled to the assumption of truth, such as bare assertions and "formulaic recitation of the elements" of a claim. Iqbal, 129 S.Ct. at 1951. Plaintiff's statement that "Defendant Billings imposed retribution and retaliation against plaintiff by conspiring to deprive [him] of rights to petition the court for redress of grievance in effort to attempt [to] conceal the contaminated drinking water at CSP-KV" falls into this category. (ACP at 7 ¶11.) Here, Plaintiff only recites elements of a retaliation claim and makes a conclusory statement about defendant Billings' purpose in depriving Plaintiff of his rights. Plaintiff makes other conclusory allegations as well, such as "Defendants Billings, Biter, and Harrington conspired to impose retribution on Plaintiff in retaliation for pursuing a grievance challenging Defendants' violation of the Safe Drinking Water Act" and "Defendant Billings deliberately defyed (sic) this CDCR policy in order to fustrate (sic) Plaintiff's appeal efforts by returning this grievance..." (ACP, Doc. 16 at 6 ¶10, 8 ¶15.) Such statements are not entitled to be assumed true. Iqbal, 129 S.Ct. at 1951.

Iqbal next directs the court to "consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief." Id. The factual allegations are to be taken as true. Id. at 1951. Here, Plaintiff satisfies the first element of a retaliation claim -- an assertion that a state actor took some adverse action against an inmate -- when he alleges that Defendants, employees of the CDCR, improperly rejected his grievances and placed him on restricted appeals status, limiting him to one grievance per month for six months. The third element -- that the prisoner engaged in protected conduct -- is satisfied because Plaintiff alleges he was attempting to file prisoner grievances, and the Ninth Circuit has long held that filing prison grievances is conduct protected by the First Amendment. See Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003).

With respect to the second element -- that Defendants acted against Plaintiff because of his protected conduct -- Plaintiff alleges that Defendants interfered with his attempts to file grievances to stop him from bringing attention to KVSP's contaminated water and the CDCR's deficient

policies. However, Plaintiff has not alleged any facts showing a nexus between Defendants' behavior and the subject matter of his complaints. Plaintiff cites no behavior or statements by Defendants, no suspect timing, or any other evidence, to plausibly suggest that Defendants took issue with the subject matter of Plaintiff's complaints. Plaintiff makes only a bare assertion that the supervisory defendants, Warden K. Harrington, Associate Warden J. Castro, and Chief Deputy Warden M. Biter, wanted to conceal the fact that they failed to comply with the Safe Water Act. Plaintiff has not alleged facts to support a reasonable inference that Defendants objected to Plaintiff's grievances because he complained about the water or CDCR's policies. Plaintiff's own evidence shows that KVSP's water was determined to be safe, and the restriction on drinking the water had been lifted, at the time Plaintiff was filing his appeals. (ACP, Exh. C.) Plaintiff's evidence also shows that his appeals were rejected for valid reasons such as untimeliness and failure to obtain an Informal Level review. To succeed on this claim, Plaintiff must allege facts demonstrating that Defendants' actions did not reasonably advance a legitimate correctional goal.

Assuming that the improper rejection of appeals, and the imposition of a restriction on filing appeals would chill an inmate's First Amendment Rights, Plaintiff has satisfied the fourth element. The fifth element -- the action did not reasonably advance a legitimate correctional goal -- is also satisfied with respect to the appeal restriction by Plaintiff's allegations, taken as true, that the appeal restriction was imposed on him based on falsified information.

Because Plaintiff fails to satisfy the second element of a retaliation claim under the Iqbal standard, Plaintiff fails to state a cognizable claim against any of the Defendants for retaliation. In light of the fact that the Court had previously found that Plaintiff stated a claim for retaliation in the original Complaint, but now having reviewed this claim in the First Amended Complaint under the more restrictive Iqbal standard, Plaintiff shall be granted leave to amend the retaliation claim to cure the deficiencies found by the Court.

H. Due Process

Plaintiff alleges that Defendants violated his rights to due process when they took away his prison job assignment without notice and a hearing.

The Due Process Clause protects against the deprivation of liberty without due process of law. Wilkinson v. Austin, 545 U.S. 209, 221, 125 S.Ct. 2384, 2393 (2005). In order to invoke the protection of the Due Process Clause, a plaintiff must first establish the existence of a liberty interest for which the protection is sought. Id. Liberty interests may arise from the Due Process Clause itself or from state law. Id. The Due Process Clause itself does not confer on inmates a liberty interest in avoiding "more adverse conditions of confinement." Id. Under state law, the existence of a liberty interest created by prison regulations is determined by focusing on the nature of the deprivation. Sandin v. Conner, 515 U.S. 472, 481-84, 115 S.Ct. 2293 (1995). Liberty interests created by state law are "generally limited to freedom from restraint which . . . imposes atypical and significant hardship on

the inmate in relation to the ordinary incidents of prison life." Id. at 484; Myron v. Terhune, 476 F.3d 716, 718 (9th Cir. 2007).

Plaintiff does not have a liberty interest in his prison job[1] , Sandin, 515 U.S. at 484, and Plaintiff does not have a property interest in his job. See Vignolo v. Miller, 120 F.3d 1075, 1077 (9th Cir. 1997); Rizzo v. Dawson, 778 F.2d 527, 531 (9th Cir. 1995). Because Plaintiff has neither a liberty interest nor a property interest in his prison job, he was not entitled to any procedural due process protections in conjunction with his removal from the job. Because Plaintiff fails to establish the existence of a protected liberty or property interest, his due process claim fails as a matter of law and shall be dismissed.

I. Equal Protection

Plaintiff alleges that Defendants discriminated against him based on his race and mental disability when they took away his job position based on a policy that favored giving jobs to Hispanic inmates, after he was admitted into a crisis care center due to a suicide attempt.

The Equal Protection Clause requires that persons who are similarly situated be treated alike. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439, 105 S.Ct. 3249 (1985); Shakur v. Schriro, 514 F.3d 878, 891 (9th Cir. 2008). An equal protection claim may be established by showing that Defendants intentionally discriminated against Plaintiff based on his membership in a protected class, Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 702-03 (9th Cir. 2009); Serrano v. Francis, 345 F.3d 1071,1082 (9th Cir. 2003), Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001), or that similarly situated individuals were intentionally treated differently without a rational relationship to a legitimate state purpose, Engquist v. Oregon Department of Agr., 553 U.S. 591, 601-02, 128 S.Ct. 2146 (2008); Village of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S.Ct. 1073 (2000); Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 592 (9th Cir. 2008); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

Plaintiff has not alleged any facts demonstrating that he was intentionally discriminated against on the basis of his membership in a protected class, or that he was intentionally treated differently than other similarly situated inmates without a rational relationship to a legitimate state purpose. In fact, Plaintiff submits evidence that he lost his job assignment partly "because they don't want people who cut their wrists working in the kitchen," (ACP, Doc. 16 at 10 ¶20), and that the policy for Hispanic inmates was imposed to manage prison gang disruptive activity, (Id. at ¶19), which is evidence of a rational relationship to a legitimate state purpose. Therefore, Plaintiff fails to state a claim for relief for violation of his right to equal protection, and this claim shall be dismissed.

J. ADA and RA

Plaintiff claims that Defendants violated his rights under the Americans With Disabilities Act

("ADA") and the Rehabilitation Act ("RA").

"Title II of the ADA and § 504 of the RA both prohibit discrimination on the basis of disability." Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002). Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity." 42 U.S.C. § 12132. Section 504 of the RA provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U. S. C. § 794. Title II of the ADA and the RA apply to inmates within state prisons. Pennsylvania Dept. of Corrections v. Yeskey, 118 S.Ct. 1952, 1955 (1998); see also Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997); Duffy v. Riveland, 98 F.3d 447, 453-56 (9th Cir. 1996).

"To establish a violation of Title II of the ADA, a plaintiff must show that (1) [he] is a qualified individual with a disability; (2) [he] was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities; and (3) such exclusion or discrimination was by reason of [his] disability." Lovell, 303 F.3d at 1052. "To establish a violation of § 504 of the RA, a plaintiff must show that (1) [he] is handicapped within the meaning of the RA; (2) [he] is otherwise qualified for the benefit or services sought; (3) [he] was denied the benefit or services solely by reason of [his] handicap; and (4) the program providing the benefit or services receives federal financial assistance." Id.

"'Title II of the ADA prohibits discrimination in programs of a public entity or discrimination by any such entity.'" Roundtree v. Adams, No. 1:01-CV-06502 OWW LJO, 2005 WL 3284405, at *8 (E.D.Cal. Dec. 1, 2005) (quoting Thomas v. Nakatani, 128 F.Supp.2d 684, 691 (D. Haw. 2000)). "The ADA defines 'public entity' in relevant part as 'any State or local government' or 'any department, agency, special purpose district, or other instrumentality of a State or States or local government.'" Roundtree, 2005 WL 3284405, at *8 (citing 42 U.S.C. § 12131(1)(A)-(B)). Public entity, "'as it is defined within the statute, does not include individuals.'" Id. (quoting Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999)).

Because individual liability is precluded under Title II of the ADA, any claim Plaintiff might intend to make under the ADA against Defendants, all who are individuals, is not cognizable. Moreover, in order to state a claim under the ADA and the RA, Plaintiff must show that he qualifies as handicapped within the meaning of the ADA or RA, and has been "improperly excluded from participation in, and denied the benefits of, a prison service, program, or activity on the basis of his physical handicap." Armstrong, 124 F.3d at 1023. Plaintiff has alleged no such exclusion or denial because of a qualified handicap. Thus, Plaintiff fails to state a claim under the ADA or the RA, and these claims shall be dismissed.

K. Violation of State Laws

Plaintiff seeks to hold Defendants liable for their violation of state laws, such as CDCR policy and procedures, the Department Operations Manual, and requirements imposed by the California Department of Public Health.

Plaintiff is informed that violation of state tort law, state regulations, rules and policies of the CDCR, or other state law is not sufficient to state a claim for relief under § 1983. To state a claim under § 1983, there must be a deprivation of federal constitutional or statutory rights. See Paul v. Davis, 424 U.S. 693 (1976). Although the court may exercise supplemental jurisdiction over state law claims, Plaintiff must first have a cognizable claim for relief under federal law. See 28 U.S.C. § 1367.

L. Declaratory and Injunctive Relief

In addition to money damages, Plaintiff seeks injunctive relief and declaratory relief. Plaintiff is currently housed at SVSP, and the past events at issue in this action occurred at KVSP. When an inmate seeks injunctive relief concerning the prison where he is incarcerated, his claims for such relief become moot when he is no longer subjected to those conditions. Nelson v. Heiss, 271 F.3d 891, 897 (9th Cir. 2001); Dilley v. Gunn, 64 F.3d 1365, 1368 (9th Cir. 1995); Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991).

Moreover, any award of equitable relief is governed by the Prison Litigation Reform Act ("PLRA"), which provides in relevant part, "Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Based on the nature of the claims at issue in this action, which involve past conduct, Plaintiff is not entitled to injunctive relief and is therefore confined to seeking money damages for the violations of his federal rights.

With regard to declaratory relief, "[a] declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest."

Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948). "Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and settling the legal relations in issue nor terminate the proceedings and afford relief from the uncertainty and controversy faced by the parties." United States v. Washington, 759 F.2d 1353, 1357 (9th Cir. 1985). In the event that this action reaches trial and the jury returns a verdict in favor of Plaintiff, that verdict will be a finding that Plaintiff's constitutional rights were violated. A declaration that defendant violated Plaintiff's rights is unnecessary.

M. Allegations Arising After the Complaint was Filed

Plaintiff brings allegations against Defendants arising in 2010. Plaintiff may not supplement the complaint with allegations of events occurring after the original complaint was filed, without leave of court, and Plaintiff has not made such request to the Court. Fed. R. Civ. P. 15(d).

When considering whether to allow a supplemental complaint, the Court considers factors such as whether allowing supplementation would serve the interests of judicial economy; whether there is evidence of delay, bad faith or dilatory motive on the part of the movant; whether amendment would impose undue prejudice upon the opposing party; and whether amendment would be futile. See San Luis & Delta-Mendota Water Authority v. United States Department of the Interior, 236 F.R.D. 491, 497 (E.D. Cal. 2006) (citing Keith v. Volpe, 858 F.2d 467 (9th Cir. 1988), Foman v. Davis, 371 U.S. 178 (1962), and Planned Parenthood of S. Ariz. v. Neely, 130 F.3d 400 (9th Cir. 1997)).

Moreover, Plaintiff may not proceed in one action on a myriad of unrelated claims against different staff members. "The controlling principle appears in Fed. R. Civ. P. 18(a): 'A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.' Thus multiple claims against a single party are fine, but Claim A against Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated claims against different defendants belong in different suits, not only to prevent the sort of morass [a multiple claim, multiple defendant] suit produce[s], but also to ensure that prisoners pay the required filing fees-for PLRA limits to 3 the number of frivolous suits or appeals that any prisoner may file without prepayment of the required fees. 28 U.S.C. § 1915(g)." George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007).

Plaintiff is advised that the exhaustion requirement also applies to supplemental claims. Pursuant to the PLRA, "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).

Accordingly, Plaintiff's allegations in the First Amended Complaint against Defendants arising after the complaint was filed shall be dismissed. Plaintiff should consider the instructions above before deciding whether to request leave to file a supplemental complaint.

N. Policy Claims

Plaintiff alleges that Defendants Harrington, Castro, and Biter promulgated and implemented policies at KVSP which authorized prison officials to frustrate Plaintiff's attempts to file appeals and remove Plaintiff from his job assignment. Plaintiff maintains that Defendants' policies authorized defendant Billings to reject Plaintiff's grievances for bogus and arbitrary reasons contrary to CDCR

policy and to place Plaintiff on appeal restriction in order to prevent exhaustion of remedies and conceal the fact that drinking water at KVSP was contaminated.

In the Court's November 22, 2010 order screening the original Complaint, the Court found that Plaintiff had alleged facts, when liberally construed, that defendants Harrington and Castro implemented a policy responsible for the unconstitutional restriction on his right to file inmate grievances. (Doc. 13 at II.C.) The Court now screens the policy claims using the Iqbal standard as described above at ¶4.G.

Defendants Harrington, Castro and Biter hold supervisory positions at KVSP. To state a policy claim based on supervisory liability, Plaintiff must allege facts that Defendants personally participated in the alleged deprivation of constitutional rights; knew of the violations and failed to act to prevent them; or promulgated or "implemented a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.'"

Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

Plaintiff has not specified any policy promulgated or implemented by Defendants that

authorized constitutional violations against Plaintiff. It is not enough to allege that a policy authorizes behavior, such as the rejection of appeals, which can be used improperly in a retaliatory manner. Plaintiff has not alleged facts demonstrating that any policy was a "repudiation of constitutional rights" or "the moving force" of the constitutional violation against him. Therefore, Plaintiff fails to state a claim against Defendants for the promulgation and implementation of policies that infringe upon Plaintiff's exercise of his First Amendment rights. In light of the fact that the Court previously found that Plaintiff stated a claim for implementation of policy in the original Complaint, and has now employed the more restrictive Iqbal standard to screen this claim in the First Amended Complaint, Plaintiff shall be granted leave to amend the policy claim to cure the deficiencies found by the Court.

V. CONCLUSION AND ORDER

The Court finds that Plaintiff's First Amended Complaint fails to state any claims upon which relief can be granted under § 1983 against any of the Defendants. Therefore, the First Amended Complaint shall be dismissed. Under Rule 15(a) of the Federal Rules of Civil Procedure, "leave to amend 'shall be freely given when justice so requires.'" The Court will provide Plaintiff with time to file a Second Amended Complaint to amend only the retaliation and policy claims, curing the deficiencies identified above. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir.2000). The Court finds that the deficiencies outlined above for Plaintiff's other claims are not capable of being cured by amendment, and therefore further leave to amend those claims shall not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii);

Lopez, 203 F.3d at 1127; Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

The Second Amended Complaint should be brief, but must state what each named defendant did that led to the deprivation of Plaintiff's constitutional or other federal rights. Fed. R. Civ. P. 8(a); Iqbal, 129 S.Ct. at 1948-49; Jones, 297 F.3d at 934. Plaintiff is reminded that there is no respondeat superior liability, and each defendant is only liable for his or her own misconduct. Iqbal, 129 S.Ct. at 1948-49. Plaintiff must set forth "sufficient factual matter . . . to 'state a claim that is plausible on its face.'" Id. at 1949 (quoting Twombly, 550 U.S. at 555). Plaintiff must also demonstrate that each defendant personally participated in the deprivation of his rights. Jones, 297 F.3d at 934 (emphasis added).

Plaintiff is advised that a short and simple statement of his claim will speed the screening of his case, and will help the litigation proceed in a more efficient manner. While exhibits are permissible if incorporated by reference, Fed. R. Civ. P. 10(c), they are not necessary in the federal system of notice pleading, Fed. R. Civ. P. 8(a). Plaintiff is advised that under Rule 8 of the Federal Rules of Civil Procedure, Plaintiff is only obligated to provide "a short and plain statement of [his] claim." Plaintiff is not obligated to prove the allegations in his complaint at this stage. Attaching a large number of exhibits to a complaint may result in the complaint being dismissed for failure to comply with Rule 8, as it will render the complaint to be neither a "short" nor "plain" statement of Plaintiff's claims.

Plaintiff should also note that although he has been given the opportunity to amend, it is not for the purposes of adding unrelated claims or amending any claims other than the retaliation and policy claims. In addition, Plaintiff should take care to include only those claims for which he has exhausted his administrative remedies.

Finally, Plaintiff is advised that Local Rule 220 requires that an amended complaint be complete in itself without reference to any prior pleading. As a general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once an amended complaint is filed, the original complaint no longer serves any function in the case. Therefore, in an amended complaint, as in an original complaint, each claim and the involvement of each defendant must be sufficiently alleged. The amended complaint should be clearly and boldly titled "Second Amended Complaint," refer to the appropriate case number, and be an original signed under penalty of perjury.

Based on the foregoing, it is HEREBY ORDERED that:

1. Plaintiff's First Amended Complaint, filed on January 11, 2011, is dismissed for failure to state a claim, with leave to amend only the retaliation and policy claims, as instructed by this order;

2. All other claims are DISMISSED from this action, without leave to amend; 3. Plaintiff's official capacity claims, supervisory liability claims, claims for failure to protect, conspiracy, deficient inmate appeals process, violation of rights to due process and equal protection, violations of the ADA and RA, for declaratory and injunctive relief, and claims arising after the date the complaint was filed, are

DISMISSED from this action, without leave to amend.

4. The Clerk's Office shall send Plaintiff a civil rights complaint form; 5. Within thirty (30) days from the date of service of this order, Plaintiff shall file a Second Amended Complaint amending only the retaliation and policy claims, curing the deficiencies identified by the Court in this order, as instructed by this order;

6. Plaintiff shall caption the amended complaint "Second Amended Complaint" and refer to the case number 1:09-cv-01823-GSA-PC; and

7. If Plaintiff fails to comply with this order, this action will be dismissed for failure to state a claim upon which relief may be granted.

IT IS SO ORDERED.

1. In Sandin v. Connor, the Supreme Court abandoned earlier case law which had held that states created protectable liberty interests by way of mandatory language in prison regulations. Sandin , 515 U.S. at 481-84. Instead, the Court adopted an approach in which the existence of a liberty interest is determined by focusing on the nature of the deprivation. Id. In doing so, the Court held that liberty interests created by prison regulations are limited to freedom from restraint which "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 484.

**John W. Williams v. Warden K. Harrington**

2011 | Cited 0 times | E.D. California | September 19, 2011

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GARRISON S. JOHNSON,

Plaintiff,

v.

MATHEW CATE, et al.,

Defendants.

CASE NO. 1:10-cv-0803-AWI-MJS (PC)

**ORDER GRANTING IN PART PLAINTIFF'S MOTION TO STAY PROCEEDINGS ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

**(ECF No. 95)**

**THIRTY (30) DAY DEADLINE**

## I. PROCEDURAL HISTORY

Plaintiff is a state prisoner proceeding pro se in this civil rights action brought pursuant to 42 U.S.C. § 1983. (ECF No. 1.) The action proceeds against Defendant Harrington on Plaintiff's Eighth Amendment claim for cruel and unusual punishment and his California state law negligence claim. (ECF Nos. 20 & 23.) Specifically, Plaintiff claims that Defendant was deliberately indifferent to a serious risk of harm to Plaintiff from arsenic-contaminated water at Kern Valley State Prison ("KVSP") where Plaintiff was housed. (ECF No. 19.)

Defendant filed a motion for summary judgment. (ECF No. 66.) Plaintiff filed an opposition (ECF No. 85), and Defendant filed replies (ECF Nos. 90, 91, 92.) Defendant also filed objections to some of Plaintiff's evidence, and moved to strike that evidence. (ECF No. 93.)

Thereafter, Plaintiff filed a purported Notice of Errata with additional exhibits (ECF No. 94), a sur-reply (ECF No. 96), and a response to Defendant's evidentiary objections and motion to strike (ECF No. 97). Plaintiff also filed a motion to stay proceedings on the motion for summary judgment to allow him to obtain additional evidence. (ECF No. 95.) Defendant moved to strike Plaintiff's sur-reply (ECF No. 99), replied to Plaintiff's opposition to Defendant's motion to strike (ECF No. 100), and opposed the motion to stay (ECF No. 101). Plaintiff opposed the motion to strike his sur-reply (ECF No. 103), and replied to Defendant's opposition to his motion to stay (ECF No. 104).

Although numerous filings relating to the summary judgment motion are pending before the Court, the Court herein addresses only Plaintiff's motion to stay. (ECF No. 95.) The matter is deemed submitted. Local Rule 230(*l*).

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 56(d) permits the Court to delay consideration of a motion for summary judgment to allow parties to obtain discovery to oppose the motion. When a motion for summary judgment is filed "before a party has had any realistic opportunity to pursue discovery relating to its theory of the case," a Rule 56(d) motion should be freely granted. Burlington N. Santa Fe R.R. Co. v. Assiniboine and Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 773 (9th Cir. 2003).

A party asserting that discovery is necessary to oppose a motion for summary judgment "shall provide a specification of the particular facts on which discovery is to be had or the issues on which discovery is necessary." Local Rule 260(b). However, where "no discovery whatsoever has taken place, the party making a Rule 56[(d)] motion cannot be expected to frame its motion with great specificity as to the kind of discovery likely to turn up useful information, as the ground for such specificity has not yet been laid." Burlington N., 323 F.3d at 774. "The Courts which have denied a Rule 56[(d)] application for lack of sufficient showing to support further discovery appear to have done so where it was clear that the evidence sought was almost certainly nonexistent or

was the object of pure speculation." VISA Int'l. Serv. Ass'n v. Bankcard Holders of Am., 784 F.2d 1472, 1475 (9th Cir. 1986) (citation omitted).

## III. DISCUSSION

This case involves Plaintiff's allegation that Defendant was deliberately indifferent to a serious risk of harm to Plaintiff from arsenic in the water at KVSP. (ECF No. 19.) In support of the motion for summary judgment, Defendant submits a declaration from retained expert R. Geller, M.D., stating that the levels of arsenic Plaintiff was exposed to were insufficient to harm Plaintiff's health and, in any event, Plaintiff's health complaints are not associated with arsenic poisoning. (ECF No. 71.)

Plaintiff filed a declaration in opposition. In paragraphs ten through twelve, Plaintiff states that he was forced to drink water containing poisonous, inorganic arsenic, and that long term exposure to such contaminant may, and in Plaintiff's case did, have various health effects. (ECF No. 85 at 25-26.) Attached as Exhibit A to Plaintiff's declaration is a letter from the Department of Health and Human Services, addressed to Plaintiff, discussing effects of inorganic arsenic. (ECF No. 85 at 80-81.) Attached as Exhibit E to Plaintiff's declaration is a brochure from the Department of Health and Human Services, entitled "ToxGuide for Arsenic." (ECF No. 85 at 111-12.) Attached as Exhibit M to Plaintiff's declaration is a webpage printout from the Centers for Disease Control and Prevention containing a definition of "arsenic (inorganic)." (ECF No. 85 at 46.)

Defendant moved to strike the foregoing evidence presented by Plaintiff on various grounds. (ECF No. 93.) Relevant here, Defendant moved to strike the specified portions of Plaintiff's declaration as unqualified expert testimony. Defendant moved to strike the specified exhibits as containing hearsay, lacking foundation, and lacking authentication.

Plaintiff seeks a stay to obtain a declaration from "someone of the Center for Disease Control and Prevention" in support of his claims. (ECF No. 95.) Plaintiff states that he previously was unable to afford a retained expert, but now has funds to do so.

Additionally, or alternatively, Plaintiff seeks additional time to serve subpoenas on the Center for Disease Control and Prevention and the Department of Health and Human Service requiring officials there to produce affidavits to authenticate Exhibits A, E, and M. (ECF No. 104.) Plaintiff again states that he was foreclosed from seeking such subpoenas previously due to his indigence. If the stay is granted, Plaintiff requests the Court send him two subpoenas duces tecum.

Defendant's motion for summary judgment has been pending for over nine months. Extensions of time have been granted to both parties. Discovery has concluded and the motion is fully briefed. In light of these circumstances, the Court is unwilling to stay these proceedings for ninety days on the speculative prospect that Plaintiff may be able to obtain evidence in support of his cause. At the same time, the Court is unwilling to limit Plaintiff's ability to address the merits of his case solely based on defects caused by Plaintiff's indigence and pro se status, if there is a possibility of such defects being cured.

Accordingly, the Court will grant Plaintiff a limited stay of thirty days to consult with any proposed expert witness. At the conclusion of thirty days, Plaintiff may seek additional time by making a further showing that evidence bearing on his claims is forthcoming. However, absent a declaration from a prospective expert providing some indication that relevant evidence bearing on the motion for summary judgment is forthcoming, the Court is unlikely to entertain further requests to stay.

The Court will not grant additional time for Plaintiff to pursue subpoenas to require officials to authenticate his documents by way of affidavit, nor will the Court issue subpoenas for such purpose. Such a request is outside the scope of Federal Rule of Civil Procedure 45. That rule permits subpoenas to "attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises." It does not permit a subpoena for the purpose of requiring a person to create an affidavit on a litigant's behalf. The Court will review Plaintiff's exhibits and Defendants' objections in

the course of ruling on the motion for summary judgment, and will give the exhibits such weight as they are due at this stage of the proceedings. See Block v. City of Los Angeles, 253 F.3d 410, 418-19 (9th Cir. 2001) ("To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56.").

**IV. ORDER**

Based on the foregoing, Plaintiff's motion to stay (ECF No. 95) is hereby GRANTED IN PART AND DENIED IN PART. Proceedings on Defendants' motion for summary judgment are stayed for thirty days from the date of this order.

IT IS SO ORDERED.

Dated: July 2, 2015

/s/ *Michael J. Seng*
UNITED STATES MAGISTRATE JUDGE

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANTHONY NGUYEN,

Plaintiff,

v.

M. D. BITER,

Defendant.

_____/

Case No. 1:11-cv-00809-AWI-SKO (PC)

FINDINGS AND RECOMMENDATIONS RECOMMENDING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BE DENIED AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BE GRANTED

(Docs. 114 and 142)

Objection Deadline: 30 days
Response Deadline: 15 days

## I. Background

Plaintiff Anthony Nguyen ("Plaintiff"), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on May 18, 2011. This action is proceeding against Defendant M. D. Biter ("Defendant") for violation of the Eighth Amendment of the United States Constitution. Plaintiff's claim arises from his alleged exposure to arsenic-contaminated water while he was at Kern Valley State Prison ("KVSP") in Delano, California. During the relevant twenty-seven month time period, Defendant was first the Chief Deputy Warden, then the Acting Warden, and finally the Warden, a position he still presently holds.

On September 15, 2014, Plaintiff filed a motion for summary judgment, and on September 29, 2014, Plaintiff filed a supplement to his motion.[1] Fed. R. Civ. P. 56(c). (Docs. 114, 117.) Following resolution of numerous discovery motions and motions for terminating sanctions, to amend the pleadings, and for modification of the scheduling order, Defendant timely filed his opposition and cross-motion for summary judgment on July 20, 2015.[2] (Doc. 142.) On August 3, 2015, Plaintiff filed a response to Defendant's motion, entitled objections, and separate supplemental objections. (Docs. 147, 148.) Defendant filed a reply on August 17, 2015, and the cross-motions for summary judgment have been submitted on the record without oral argument pursuant to Local Rule 230(*l*).

## II. Summary Judgment Standard

Any party may move for summary judgment, and the Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); *Washington Mut. Inc. v. U.S.*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular parts of materials in the record, including but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider other materials in the record not cited to by the parties, but it is not required to do so. Fed. R. Civ. P. 56(c)(3); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); *accord Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

[1] Plaintiff's supplemental motion is confined to pages 1 through 8 of document 117. Pages 9 through 52 were Plaintiff's opposition to Defendant's motion for terminating sanctions, which was addressed by the Court on January 27, 2015. (Doc. 131.)

[2] Concurrently with his motion for summary judgment, Defendant served Plaintiff with the requisite notice of the requirements for opposing the motion. *Woods v. Carey*, 684 F.3d 934, 939-41 (9th Cir. 2012); *Rand v. Rowland*, 154 F.3d 952, 960-61 (9th Cir. 1998).

In resolving cross-motions for summary judgment, the Court must consider each party's evidence. *Tulalip Tribes of Washington v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011). Plaintiff bears the burden of proof at trial, and to prevail on summary judgment, he must affirmatively demonstrate that no reasonable trier of fact could find other than for him. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Defendant does not bear the burden of proof at trial and in moving for summary judgment, he need only prove an absence of evidence to support Plaintiff's case. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).

In judging the evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, *Soremekun*, 509 F.3d at 984 (quotation marks and citation omitted), and it must draw all inferences in the light most favorable to the nonmoving party and determine whether a genuine issue of material fact precludes entry of judgment, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted). Additionally, Plaintiff is entitled to liberal construction of his filings because he is a prisoner proceeding pro se. *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010) (citations omitted).

## III. Discussion

### A. Plaintiff's Eighth Amendment Conditions-of-Confinement Claim

#### 1. Legal Standard

Plaintiff's Eighth Amendment claim arises from his exposure to allegedly unsafe levels of arsenic in the drinking water at KVSP, where he was incarcerated between November 2009 and February 2012.[3] The Eighth Amendment's prohibition against cruel and unusual punishment protects prisoners not only from inhumane methods of punishment but also from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994) and *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392 (1981)) (quotation marks omitted). While conditions of confinement

[3] Plaintiff is presently incarcerated at California State Prison-Centinela in Imperial.

may be, and often are, restrictive and harsh, they must not involve the wanton and unnecessary infliction of pain. *Morgan*, 465 F.3d at 1045 (citing *Rhodes*, 452 U.S. at 347) (quotation marks omitted). Thus, conditions which are devoid of legitimate penological purpose or contrary to evolving standards of decency that mark the progress of a maturing society violate the Eighth Amendment. *Morgan*, 465 F.3d at 1045 (quotation marks and citations omitted); *Hope v. Pelzer*, 536 U.S. 730, 737, 122 S.Ct. 2508 (2002); *Rhodes*, 452 U.S. at 346.

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) (quotation marks and citations omitted), but not every injury that a prisoner sustains while in prison represents a constitutional violation, *Morgan*, 465 F.3d at 1045 (quotation marks omitted). To maintain an Eighth Amendment claim, a prisoner must show that prison officials were deliberately indifferent to a substantial risk of serious harm to his health or safety. *E.g., Farmer*, 511 U.S. at 847; *Thomas*, 611 F.3d at 1150-51; *Foster v. Runnels*, 554 F.3d 807, 812-14 (9th Cir. 2009); *Morgan*, 465 F.3d at 1045; *Johnson*, 217 F.3d at 731; *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

**2. Objective Element – Substantial Risk of Serious Harm**

To prevail on his unsafe conditions-of-confinement claim, Plaintiff must first show a deprivation which is objectively sufficiently serious. *Farmer*, 511 U.S. at 834. Courts have long recognized that exposure to environmental conditions which pose a health risk, either present or future, can support a claim under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 33-35, 113 S.Ct. 2475 (1993) (environmental tobacco smoke); *Wallis v. Baldwin*, 70 F.3d 1074, 1076 (9th Cir. 1995) (asbestos); *Carter v. Smith*, No. C-13-4373 EMC (pr), 2015 WL 4322317, at *7-11 (N.D.Cal.2015) (lead paint and asbestos); *Yellen v. Olivarez*, No. CIV S-94-1298 GEB DAD P, 2012 WL 3757373, at *8 (E.D.Cal. 2012) (contaminated water), *adopted in full*, 2012 WL 4210030 (E.D.Cal. 2012); *Rouse v. Caruso*, No. 06-CV-10961-DT, 2011 WL 918327, at *24-25 (E.D.Mich. 2011) (contaminated water), *adopted in full*, 2011 WL 893216 (E.D.Mich. 2011). Plaintiff is required to demonstrate that he was exposed to unreasonably high levels of arsenic in the water at KVSP, which requires a scientific and statistical inquiry into the seriousness of the

potential harm and the likelihood that such injury to health will actually be caused by the exposure to the arsenic in KVSP's water. *Helling*, 509 U.S. at 35-36 (quotation marks omitted). In addition, Plaintiff "must show that the risk of which he complains is not one that today's society chooses to tolerate." *Id.* at 36.

**3. Subjective Element – Deliberate Indifference**

The second element of an Eighth Amendment claim is subjective deliberate indifference, which involves two parts. *Lemire v. California Dep't of Corr. and Rehab.*, 726 F.3d 1062, 1078 (9th Cir. 2013). Plaintiff must demonstrate first that the risk was obvious or provide other circumstantial evidence that Defendant was aware of the substantial risk of serious harm to his health or safety, and second, that there was no reasonable justification for exposing him to that risk. *Lemire*, 726 F.3d at 1078 (citing *Thomas*, 611 F.3d at 1150) (quotation marks omitted).

"[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as the infliction of punishment." *Id.* at 838. However, prison officials are not free to ignore obvious dangers to inmates. *Farmer*, 511 U.S. at 842; *Foster*, 554 F.3d at 814. Prisoners "need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842; *Foster*, 554 F.3d at 814.

"In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm

ultimately was not averted." *Farmer*, 511 U.S. at 844. "A prison official's duty under the Eighth Amendment is to ensure reasonable safety, a standard that incorporates due regard for prison officials' unenviable task of keeping dangerous men in safe custody under humane conditions." *Id.* at 844-45 (internal quotation marks and citations omitted). "Whether one puts it in terms of duty or deliberate indifference, prison officials who acted reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 845.

**B. Plaintiff's Motion for Summary Judgment**[4,5]

Plaintiff claims that Defendant violated his rights under the Eighth Amendment by knowingly disregarding a substantial risk of serious harm to his health posed by the prison's water, which he alleges was contaminated by unsafe levels of arsenic. Plaintiff arrived at KVSP on November 2, 2009, and he was incarcerated there until February 2012, subjecting him to the water for twenty-seven months. Plaintiff moves for summary judgment on his claim on the grounds that KVSP's water was unsafe due to arsenic levels which exceeded the United States Environmental Protection Agency's Maximum Contaminant Level ("EPA" and "MCL"), and that Defendant, as the warden, knew of the unsafe arsenic levels but failed to take reasonable measures to protect Plaintiff and other inmates from being harmed by the contaminated water.

In support of his motion, Plaintiff submits six notices entitled "IMPORTANT INFORMATION ABOUT YOUR DRINKING WATER," which were signed by Defendant between September 8, 2010, and January 6, 2012. (Doc. 114, Motion, Pl. Ex. 1.) The notices stated that the running annual average of arsenic in KVSP wells 1 and 2 ranged between 0.014 to 0.020 mg/L (milligrams per liter), which exceeded the EPA MCL of 0.010 mg/L. (*Id.*) The notices stated that it was not an emergency and that inmates did not need to use an alternative water source such as bottled water, but that "some people who drink water containing arsenic in

[4] Plaintiff did not provide a Statement of Undisputed Facts in compliance with Local Rule 260(a). However, Plaintiff is proceeding pro se and the Court is able to consider his arguments and evidence without the benefit of the statement. *Thomas*, 611 F.3d at 1150. Also, Defendant was able to sufficiently address Plaintiff's evidence. Therefore, the Court will reach the parties' motions on their merits rather than denying Plaintiff's motion on procedural grounds.

[5] Plaintiff's original and supplemental complaints are verified and they function as declarations to the extent the allegations are based on personal knowledge of facts admissible in evidence. *Jones v. Blanas*, 393 F.3d 918, 922-23 (9th Cir. 2004).

excess of the MCL over many years may experience skin damage or circulatory system problems, and may have an increased risk to getting cancer." (*Id.*)

Plaintiff alleges that as a result of arsenic exposure, he developed warts on the palms of his hands, and hyperkeratosis or keratosis on his hands, mouth, and head; and he submits several medical records in support of his allegation that he developed these skin abnormalities as a result of the arsenic in KVSP's water.[6] In a medical record dated December 6, 2011, Dr. DiLeo noted three 2 mm warts on Plaintiff's palm; and a pathology report related to the biopsy of tissue taken from Plaintiff's right soft palate on January 31, 2013, resulted in the finding of "hyperkeratosis and hyperplasia of squamous mucosa, mild chronic inflammation and fibrosis, no evidence of dysplasia or malignancy." (*Id.*, Pl. Exs. 2, 4.) Finally, on August 20, 2014, Plaintiff was seen by Dr. Ortiz regarding a skin growth or papule on his forehead. (Doc. 117, Supp. Motion, Ex. B.) Plaintiff was referred to the Minor Procedure Clinic for evaluation and consideration for a potential biopsy. (*Id.*)

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[6] Defendant's authentication and hearsay objections to Plaintiff's prison medical records are overruled. Fed. R. Evid. 803(6); Fed. R. Evid. 901(b)(4); *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 533 (9th Cir. 2011); *U.S. v. Hall*, 419 F.3d 980, 987 (9th Cir. 2005). However, as discussed in section III(D)(1), Plaintiff lacks the requisite expertise to interpret his medical records. Fed. R. Evid. 701, 702.

### C. Defendant's Motion for Summary Judgment

#### 1. Undisputed Facts[7,8,9]

##### a. Arsenic Levels in Drinking Water

Arsenic is the twentieth most abundant element on earth, and it is impossible to find drinking water in the environment that is free of arsenic; all public drinking water in the United States contains arsenic at some concentration. Arsenic is not necessarily poisonous. The difference between a medicine and a poison is the dose, and arsenic trioxide, for example, is a Food and Drug Administration-approved intravenous pharmaceutical. Long-term consumption of very large amounts of arsenic in drinking water can cause disease, but these diseases are limited to very specific skin lesions; cancers of the skin, bladder and lung; cardiovascular and cerebrovascular diseases; and diabetes mellitus. These diseases also typically require both exposure periods of twenty years or more and exposure to drinking water with arsenic concentrations of generally more than 200 micrograms per liter ("mcg/L") or 200 parts per billion ("ppb"). There is no scientific evidence that predicts illness from ingestion of drinking water at 26 ppb (0.026 mg/L), such as KVSP's water; and no epidemic of skin changes, internal organ cancers, or neurological and cardiac damage resulting from drinking water at or below an arsenic MCL of 50 mcg/L was ever identified in the United States.

In 2001, the EPA lowered the MCL to 0.010 mg/L (or 10 ppb or 10 mcg/L) of arsenic. This standard did not become effective until 2006, and on November 28, 2008, the State of

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[7] Defendant's request for judicial notice of (1) CDCR, Quarterly Status Report of Capital Outlay Projects for the CDCR, Arsenic Removal Water Treatment System (March 31, 2013), and (2) State Water Resources Control Board, Division of Water Quality GAMA Program, Groundwater Information Sheet, Arsenic (revised July 6, 2010) is granted. Fed. R. Evid. 201; *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010); *Siebert v. Gene Security Network, Inc.*, 75 F.Supp.3d 1108, 1111 n.2 (N.D.Cal. 2014). (Doc. 142.)

[8] Defendant's cross-motion is supported by the declarations of Defendant; Dr. Rick Gellar, a physician and medical toxicologist; Dr. S. Lopez, an osteopathic physician and surgeon who is the Chief Medical Executive at KVSP; G. Wright, the Associate Director of the Project Management Branch for CDCR's Facility Planning; and T. Wise, the Correctional Plant Manager II. Defendant also submits Plaintiff's deposition testimony.

[9] Plaintiff responded to Defendant's motion with numerous objections but none sufficed to bring Defendant's evidence into dispute. Of specific note, Plaintiff's disagreement with Dr. Gellar's report neither creates disputed issues of fact nor provides a basis for any legitimate evidentiary objections; and Plaintiff's objections to counsel's arguments are misplaced. (Docs. 147, 148.) While Plaintiff is correct that defense counsel's arguments are not evidence, counsel is arguing the evidence, as is appropriate.

California adopted the EPA's new arsenic MCL standard. Prior to 2001, the EPA's original 0.050 mg/L, or 50 ppb, MCL standard for arsenic in water had stood for many years; and the standard was lowered not in response to documented clinical illness caused by arsenic in drinking water between 10 and 50 mcg/L, but in an attempt to protect Americans from one type of disease: cancer.

KVSP's wells provide the water for the entire facility, and they provide the same drinking water to inmates and staff, including Defendant, who drank the water provided by the wells. KVSP has always tested the drinking water produced by its two wells and continues to do so to this day. During the time Plaintiff was incarcerated at KVSP between November 2009 and February 2012, KVSP's wells were well under the former MCL standard of .050 mg/L. Both wells ranged between 0.012 and 0.021 mg/L (12 and 21 ppb), which was in compliance with the prior standard. As of July 2010, 1,375 of all active wells tested in California had arsenic above the new MCL, and the majority of those wells were located in Kern County, which is home to KVSP, as well as in San Joaquin and San Bernardino Counties.

While Plaintiff was at KVSP, it provided the test results for the water drawn from its wells to the California Department of Public Health ("CDPH"). During that time, KVSP also posted quarterly notices reporting the arsenic levels. These notices conformed to the ones provided and required by CDPH. The quarterly notices CDPH required KVSP to post stated that the arsenic levels were not an emergency, and that inmates and staff did not need to use an alternative water source. KVSP also provided annual consumer confidence reports to inmates and staff.

Even if a resident of Kern County drank water similar to KVSP's containing between 13 to 26 ppb of arsenic for an entire lifetime, it is unlikely that any adverse health effects related to arsenic would occur because arsenic has not been scientifically established to be toxic in amounts below 50 mcg/L, as shown by the absence of apparent adverse effects on the many millions of Americans living for decades with this standard. There are several studies that investigate regions in the United States where arsenic concentrations in local drinking water are higher than in other areas of the country. The Central Valley in California, where KVSP is located, is frequently

mentioned, along with Fallon, Nevada; Michigan; and New Hampshire, but even in those areas there are no cohorts of people seeking treatment for the adverse effects of arsenic.

**b. Health Concerns Related to Arsenic Level in KVSP's Water**

Dr. Lopez, the Chief Medical Executive ("CME") at KVSP, has not observed any increased incidents in the inmate population of medical conditions, including skin conditions and cancers, attributable to high levels of arsenic in drinking water. As the CME, she closely monitored the different medical conditions diagnosed in the inmate population, and would be aware of any clusters of conditions that fell outside those normally expected in the inmate population, including conditions caused by environmental factors. In 2008, after inmates began to ask about the health effects of the arsenic in the water, Dr. Lopez contacted the California Poison Control System, Fresno/Madera, to inquire as to the possible health concerns raised by the levels of arsenic detected in the water at KVSP. Dr. Geller, M.D., M.P.H., from the California Poison Control System, responded and informed Dr. Lopez that there were zero expected health problems, acute or chronic, presented by arsenic at a concentration of 22 ppb, such as in KVSP's water. He also stated that there was no need for other public-health actions as a result of the findings, just a regulatory need to get the arsenic level below 10 ppb. Defendant was informed of Dr. Lopez's inquiry and Dr. Geller's determination that there were no expected health concerns from KVSP's water supply.

Plaintiff was provided with reasonable access to drinking water containing arsenic in concentrations that were safe to drink. There is no scientific evidence that Plaintiff was exposed to arsenic in the drinking water provided to him at KVSP in sufficient amounts to cause the skin and other conditions he complains of. Typically, the skin conditions complained of by Plaintiff are seen in individuals that consume concentrations of over 200 ppb for twenty years, but Plaintiff only consumed water with a maximum level of 26 ppb (0.026 mg/L) for twenty-seven months. The wart/corns, oral keratosis, and low lymphocyte and neutrophil counts that Plaintiff alleges he suffered are not specific to arsenic exposure, and there is no evidence in Plaintiff's medical records showing that he suffered any medical conditions caused by drinking KVSP's water. Moreover, there is no evidence that he was exposed to arsenic in high enough doses for a long

enough time period to suffer any harm. Plaintiff's future health will not be seriously adversely affected from consuming drinking water provided to him at KVSP between November 2, 2009, and February 1, 2012; and he does not have any appreciable or determinable risk of future illness, including cancer, from the arsenic in the drinking water at KVSP. Plaintiff had Dr. DiLeo examine his warts/corns, but Dr. DiLeo did not note that they were caused by the arsenic in KVSP's water, and none of Plaintiff's doctors with California Department of Corrections and Rehabilitation ("CDCR") have informed him that any of his medical conditions were caused by the arsenic in KVSP's water.

**c. Installation of Arsenic Removal Plant at KVSP**

The process of installing an arsenic removal plant at KVSP began around the time that KVSP was constructed in 2005 and continued until it was completed between December 2012 and January 2013. The installation of an arsenic removal plant is a long, complicated process that required capital outlay budget change proposals to fund the preliminary plan, working drawings, and construction of the facility. It required input from consultants, engineers, CDCR and facility officials, and a number of state agencies. KVSP's plant required funding through a capital outlay, which is an expenditure for fixed assets such as buildings and plants that requires a special request for funding that must proceed through the Department of Finance. The original funding allocated for the plant was insufficient based on the preliminary plans and was returned, but in May 2009, the Public Works Board approved funds from General Fund AB 900 to modify the drawings and complete construction.

As the Warden, Defendant did not have the personal authority to authorize a project the size of the arsenic removal plant. Any alternative plan, such as alternative water sources and point-of-use filtration systems, would have required the allocation and expenditure of funds. Defendant had the power to authorize expenditures up to $5,000, but any amount over that would require additional authorization, possibly including legislative authorization.

When Defendant became the acting Warden, the decision had already been made that the best approach to bringing the water into compliance with the revised MCL was to install an arsenic removal plant at KVSP. At that point, consideration of other options was no longer

necessary because that option had been chosen; the arsenic removal plant was in the design and planning stage; and Defendant had been informed that the water was not dangerous. Defendant would generally defer to the expertise of KVSP and CDCR's staff on matters regarding arsenic; and KVSP's plant operations staff and other staff involved in the process would report back to Defendant regarding the progress of the planning, design, and installation of the plant. Further, while KVSP was out of compliance with the MCL, it was never ordered to provide alternative water, and it never had its permit revoked.

KVSP had previously considered drilling new wells or installing point-of-use filters at the prison, but those alternatives were not viable because of cost, feasibility, and lack of a health risk. CDCR had also considered the possibility of connecting to the City of Delano's water system. During the design phase, a cost-benefit analysis was conducted to determine if connecting to the City of Delano's system would be better than building a stand-alone plant at KVSP. The cost-benefit analysis concluded that the KVSP stand-alone plant was the most beneficial option for a number of reasons, including the speed at which the plant could be installed.

KVSP's staff provided input on the design of the arsenic removal plant, and during the design phase, other arsenic removal facilities were toured in order to determine the type of facility that would be best for KVSP. A pilot test of the technology chosen for the plan was conducted at KVSP to make sure that the future plant would meet KVSP's filtration needs. Construction on the arsenic removal plant at KVSP began in October 2011, and continued until finished in December 2012. The plant was completed and the project closed in January 2013.

KVSP's plant uses a coagulation/filtration process, which is considered a best-available technology. Since completion of the KVSP arsenic removal plant, KVSP has been in compliance with the current MCL standard; and KVSP continues to transmit the testing results to CDPH and post the annual consumer confidence reports.

**2. Summary of Arguments**

Relying on these facts, Defendant argues that he is entitled to summary judgment because Plaintiff failed to demonstrate either the existence of a substantial risk of serious harm from the level of arsenic in KVSP's water or that he acted with deliberate indifference. Defendant contends

that the water at KVSP was suitable to drink and was in compliance with the prior MCL standard of 0.50 mg/L. Defendant contends that there is no scientific evidence that arsenic levels below 0.50 mg/L cause disease, and arsenic becomes poisonous in much higher levels – 200 ppb – when consumed for twenty years or more. Plaintiff's exposure involved much lower levels of arsenic for a much shorter period of time. Further, Defendant contends that Plaintiff failed to show he suffered any actual harm from the water and while he complained of warts or corns and keratosis, there is no evidence that they resulted from exposure to arsenic in the water. There is also no evidence Plaintiff will suffer any future harm to his health.

Further, Defendant contends that Plaintiff cannot prove the risk is one society chooses not to tolerate, given that arsenic is an abundant natural element which is generally present in most drinking water in the United States and is generally safe for consumption. Both staff and inmates consumed the water at KVSP; and CDPH, which required the prison to post the notices signed by Defendant, did not suspend or revoke KVSP's water permit or order it to provide water from another source.

Finally, Defendant contends that Plaintiff cannot establish that he was deliberately indifferent or acted with deliberate indifference. Defendant had been informed that the water supply was safe and the notices he signed stated the arsenic levels in the water did not constitute an emergency. During the relevant events, CDCR and KVSP officials were actively involved in installing an arsenic removal plant to bring the water into compliance with the new MCL standard. It had been determined that the plant was the best option to address the arsenic in the water and Dr. Lopez had been informed by the California Poison Control System that the water posed no risk to inmate health, a determination which was shared with Defendant. Given the facts, Defendant contends that there was no risk to inmate health of which he was aware and that prison officials acted reasonably in moving to bring KVSP's water into compliance with the new MCL standard.

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**D. Findings**

**1. Plaintiff's Motion**

**a. Objective Element**

Turning first to Plaintiff's motion for summary judgment, Plaintiff bears the burden of demonstrating that no reasonable trier of fact could find other than for him. *Soremekun*, 509 F.3d at 984. With respect to the objective element, Plaintiff must show that he was exposed to unreasonably high levels of arsenic in the water. *Helling*, 509 U.S. at 35. As previously set forth, this requires both "scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to [arsenic in the water]," and that the risk "is not one that today's society chooses to tolerate." *Id.* at 36.

Plaintiff has not submitted any evidence demonstrating that the exposure to the levels of arsenic in KVSP's water, which ranged between 0.014 and 0.020 mg/L per the six notices posted, for twenty-seven months constituted an objectively serious risk of harm to his health; it is not enough to merely show that the levels exceeded the EPA's new MCL standard of 0.10 mg/L. *Cf. Wallis*, 70 F.3d at 1076 (stating it is uncontroverted that asbestos poses a serious risk to human health and citing statutes in which there was a Congressional finding that medical science has not established any safe minimum level of asbestos exposure) (quotation marks and citations omitted); *Carter*, 2015 WL 4322317, at *8-10 (finding triable issues of fact on objective element of asbestos exposure claim where there was evidence of government findings that medical science has not established any minimum level of exposure to asbestos, but finding no triable issues of fact on objective element of lead paint exposure claim). Regarding Plaintiff's opinion that the water was not safe, Plaintiff is not qualified, as a lay witness, to offer his own opinion that the arsenic levels were sufficiently high to create a substantial risk of serious harm to his health. Although Plaintiff submitted evidence demonstrating that he developed several warts and nodules, there is no evidence linking those growths to arsenic in the water at KVSP. Speculation that Plaintiff's medical conditions *could* be linked to the arsenic levels is not sufficient in the first instance, but here, Plaintiff did not submit any admissible evidence that even speculatively links the two, and he

is not qualified to offer his own opinion on the issue, as it requires medical and/or toxicological expertise he does not possess.[10]

Plaintiff also submitted some written information on arsenic, apparently obtained from the internet and perhaps a book, to which Defendant objected. (*Id.*, Ex. 3.) However, the information addresses arsenic at a broader level; the information is hearsay; and both the interpretation of the information and the relation of that information to the arsenic levels in KVSP's water would require toxicological and/or medical expertise, which has not been offered.[11] Fed. R. Evid. 801(c), 802. (*Id.*)

Having considered Plaintiff's evidence and arguments, the Court finds that Plaintiff failed to produce any evidence demonstrating that level of arsenic in KVSP's water presented a substantial risk of serious harm to his health. It is not enough to show merely that the arsenic levels exceeded the new MCL standard; and Plaintiff's inadmissible lay opinion on the matter cannot be used to establish that the water presented an objective risk of serious harm to his health as a matter of law. Plaintiff also failed to produce any evidence "that the risk of which he complains is not one that today's society chooses to tolerate." *Helling*, 509 U.S. at 35-36.

**b. Subjective Element**

Next, Plaintiff fails to make the requisite showing as to the subjective element of deliberate indifference. Plaintiff has shown that Defendant signed six notices regarding arsenic levels in KVSP's water exceeding the EPA's MCL standard but he has not demonstrated that Defendant knowingly disregarded a substantial risk of harm to his health. Bare knowledge of the fact that the arsenic levels were above the EPA's MCL standard is not sufficient. Indeed, the notices signed by Defendant disclaimed any emergency situation or a need to use alternative water sources, such as

[10] Even if the Court were to consider the letter purportedly sent to Plaintiff by someone at the EPA in response to his inquiry, the letter undercuts rather than supports his position, as the author stated that "[h]yperpigmentation and keratosis can occur from exposure to elevated levels of arsenic, such as 0.1-1.0 milligrams per day," but the water at KVSP was much lower in arsenic, and it was doubtful Plaintiff's warts were caused by the water. (Doc. 114, Motion, Pl. Ex. 4, p. 22.) The Court notes the letter, which is missing a signature, was not authenticated, lacks foundation, and is hearsay. Fed. R. Evid. 802; *Millenkamp v. Davisco Foods Intern, Inc.*, 562 F.3d 971, 980-81 (9th Cir. 2009).

[11] Plaintiff also submitted an article on arsenic and Napoleon's death. (Doc. 114, Motion, Pl. Ex. 5.) The article is hearsay and irrelevant, as Defendant contends. Fed. R. Evid. 401, 801(c), 802.

bottled water. Plaintiff's opinions that the water was dangerous and that Defendant knew it was dangerous but failed to take additional protective measures do not constitute admissible evidence supporting a finding of deliberate indifference. Further, there is no competent evidence that the elevated levels were dangerously high and constituted an obvious health risk. *Farmer*, 511 U.S. at 842; *Foster*, 554 F.3d at 814.

In his motion, Plaintiff contends that Defendant admitted he was deliberately indifferent, and that by stating in response to an interrogatory that he would not recommend his family consume water deemed unfit for human consumption by the EPA, he demonstrated he was in a position to provide Plaintiff with safe drinking water but elected not to do so. However, the "admission" Plaintiff refers to is an excerpt from an argument Defendant made in a reply to Plaintiff's opposition to his motion to dismiss for failure to state a claim. (Doc. 86, Reply, 3:20-21.) Arguments made in briefs are not evidence, *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 762 (9th Cir. 1987), and review of the paragraph in which the sentence was made is entirely consistent with Defendant's response that the word "not" was omitted due to a drafting error. (Doc. 86, Reply, 3:15-22.) Regarding Defendant's interrogatory response, there is no evidence that KVSP's water was unfit for human consumption, and Defendant's response that he would not recommend his family drink water unfit for human consumption is of no assistance in demonstrating that he knowingly disregarded a substantial risk of harm to Plaintiff with respect to KVSP's water.

Accordingly, the Court finds that Plaintiff has failed to produce evidence demonstrating that Defendant knew of a substantial risk of serious harm to his health but disregarded it. Because Plaintiff's motion for summary judgment fails as to both elements, the Court recommends that it be denied.

**2. Defendant's Motion**

**a. Objective Element**

Regarding Defendant's motion for summary judgment, he need only prove an absence of evidence to support Plaintiff's case. *In re Oracle Corp. Sec. Litig.*, 627 F.3d at 387. Defendant has presented evidence from medical and toxicology experts establishing that although the arsenic

in KVSP's water exceeded the new EPA MCL standard, it was within the range acceptable under the prior EPA MCL; and that the change in the regulatory standard was not prompted by documented clinical illness caused by arsenic levels between 10 and 50 mcg/L in drinking water. Moreover, all public drinking water in the United States contains arsenic but even in those areas where the concentration of arsenic is higher than in other areas, the former of which includes the Central Valley, there are no cohorts of people seeking treatment for adverse effects from arsenic. One study in particular compared the population of a town in Kern County, where the arsenic concentration in the drinking water was 390 mcg/L, to a town in Wyoming where the concentration was 1 mcg/L, and researchers found no differences in the health statuses of the two populations.

Dr. Gellar, a physician who is board certified in internal medicine, emergency medicine, and medical toxicology, and who is employed by the California Poison Control System as the Medical Director and Managing Director, attested that in his expert opinion, even if one drank water containing between 13 and 26 ppb of arsenic for an entire lifetime, it would be unlikely that any adverse health effects related to the arsenic would occur. Dr. Gellar also attested that arsenic has not been established to be toxic in amounts below 50 mcg/L.

With respect to Plaintiff's medical conditions, Defendant points to the lack of any evidence that they were caused by KVSP's water. Plaintiff complained of low lymphocyte and neutrophil counts, but Dr. Gellar attested that there is no indication they were caused by arsenic exposure. Dr. Gellar also attested that a shift in lymphocyte levels is associated with viruses and a low neutrophil count has many different causes, but Plaintiff's blood counts were normal during incarceration with the exception of one time, and that abnormality was transient and of no medical significance. Plaintiff's right soft palate biopsy showed hyperkeratosis, a non-specific medical term that does not refer to a condition specific to arsenic exposure. Keratosis refers to any skin condition where there is an overgrowth and thickening of the corneal epithelium. Arsenical keratosis is one of numerous types of keratosis, and is the rarest type in the United States. Dr. Gellar opined that oral lesions such as Plaintiff's are generally not associated with or caused by arsenical keratosis, and there is no evidence that arsenical keratosis has ever been seen in the

California state prison population. Additionally, the warts or corns on Plaintiff's palms were barely visible to the eye, and there is no indication they were caused by arsenic exposure.

The Court finds that Defendant has met his burden on summary judgment by producing evidence that drinking water containing arsenic in concentrations less than 50 mcg/L is safe to consume, that there is an absence of any evidence that Plaintiff's exposure to water containing arsenic between 0.012 and 0.021 mg/L posed a risk to his health, and that there is an absence of any evidence linking Plaintiff's medical conditions to the arsenic levels found in KVSP's drinking water. Given Plaintiff's failure to submit any evidence raising a triable issue of fact regarding whether the arsenic levels in KVSP's water posed a substantial risk of serious harm to his health; caused him any health issues, present or future; or constituted a risk society is not willing to tolerate, Defendant is entitled to judgment on the objective element of Plaintiff's claim.

**b. Subjective Element**[12]

Defendant attested that the drinking water at KVSP is provided from wells, the same water is provided to both inmates and staff, bottled water was not provided to staff in response to the levels of arsenic in the water, and he has generally consumed the well water. Further, once inmates began inquiring about possible health concerns in response to the notices being posted, Dr. Lopez, the CME at KVSP, contacted the California Poison Control System for information and Dr. Gellar informed her that the expected health problems caused by KVSP's water were zero and there was no need for any public-health actions. Dr. Gellar's opinion, and Dr. Lopez's concurrence with it, was circulated to staff in 2008; and this information directly formed the basis for Defendant's belief that the level of arsenic in KVSP's water did not present any danger to staff or inmates, including Plaintiff.

Further, Defendant and other prison officials took action in response to the arsenic levels in KVSP's water and were moving forward with a plan to bring KVSP's water into compliance with the new MCL standard through an arsenic removal plant. The process was lengthy and complicated, beginning in 2005 and ending in 2013; and other options were considered and

[12] Although the failure of proof as to the objective element is fatal to Plaintiff's claim, the Court elects to address the subjective element as well. *Helling*, 509 U.S. at 35.

rejected, including drilling new wells to find a different water source, installing point-of-use filters, and tying into the City of Delano's water system. However, it was determined that the likelihood of finding a compliant source of water was minimal; filters were not a viable option due to feasibility, cost, and absence of any health risk; and the cost-benefit analysis showed that a stand-alone arsenic removal plant at KVSP was the most beneficial option.

The Court finds that based on the evidence presented, Defendant has demonstrated that he was unaware of any substantial risk of serious harm to Plaintiff's health presented by KVSP's water, having specifically been informed that the water was safe by medical and toxicology experts. Further, Defendant did not disregard any substantial risk. At the time Defendant became the Acting Warden, an arsenic removal plant was already in the works and it was completed in 2013. Due to the complexity of the project, it took years to plan and execute, and it had been determined to be the most viable option for addressing the arsenic in KVSP's water. Given the lack of any evidence that the arsenic levels in KVSP's water presented a risk of harm to staff and inmates, Defendant has demonstrated that reliance on the in-progress arsenic removal plant to bring KVSP's water into compliance with the EPA's new MCL standard was reasonable and no other shorter-term solutions, such as bottled water, were necessary or required.

Although Plaintiff argues that Defendant's deliberate indifference is evidenced by the notices he signed, this argument lacks merit in light of the showing that the quarterly informational notices were posted in conformity with CDPH requirements and the notices specifically stated that it was not an emergency and there was no need to use bottled water. Plaintiff has not submitted any evidence showing that the water at KVSP was unsafe to consume due to the arsenic levels or refuting Defendant's position that he was informed by Dr. Lopez that there were no health concerns due to the water. Plaintiff also failed to submit any evidence demonstrating that reliance on the arsenic removal plant was unreasonable. *Farmer*, 511 U.S. at 844-45. Plaintiff's argument that because Defendant had the authority to authorize expenditures up to $5,000, he should have done something more has no merit given the evidence regarding the lack of risk and the on-going progression toward an arsenic removal plant. In light of Plaintiff's failure to produce any evidence that Defendant was aware of any risk of harm from the water or

that Defendant failed to act reasonably in response to the risk presented, Defendant is also entitled to judgment on the subjective element of Plaintiff's Eighth Amendment claim.

## IV. Conclusion and Recommendation

As discussed herein, the Court finds that Plaintiff did not meet his burden on summary judgment in that he failed to affirmatively demonstrate that no reasonable trier of fact could find other than for him. In contrast, Defendant met his burden on summary judgment by producing evidence that the water at KVSP did not present an objectively substantial risk of serious harm to Plaintiff's health and that Defendant did not know of and disregard any risk of harm to Plaintiff's health. Because Plaintiff did not produce any evidence that creates disputed issues of material fact as to either element of his claim, Defendant is entitled to judgment.[13]

Accordingly, for the reasons set forth herein, the Court RECOMMENDS that:

1. Plaintiff's motion for summary judgment, filed on September 15, 2014, be DENIED;
2. Defendant's motion for summary judgment, filed on July 20, 2015, be GRANTED; and
3. Judgment be entered in favor of Defendant, thus concluding this action in its entirety.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within **thirty (30) days** after being served with these Findings and Recommendations, the parties may file written objections with the Court. Local Rule 304(b). The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Responses, if any, are due within **fifteen (15) days** from the date the objections are filed. Local Rule 304(d). The parties are advised that failure to file objections within the specified time may result in the waiver of rights on

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[13] Given the determination that Defendant is entitled to judgment on the merits, the Court does not reach Defendant's alternative argument that he is entitled to qualified immunity.

appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **September 7, 2015**

**/s/ Sheila K. Oberto**
UNITED STATES MAGISTRATE JUDGE

# O'Connell v. Kern Valley State Prison, 2012 U.S. Dist. LEXIS 77977



United States District Court for the Eastern District of California

June 5, 2012, Decided; June 5, 2012, Filed

CASE NO. 1:11-cv-02163-BAM PC

**Reporter**
**2012 U.S. Dist. LEXIS 77977 *** | 2012 WL 2027141

KEVIN P. O'CONNELL, Plaintiff, v. KERN VALLEY STATE PRISON, et al., Defendants.

**Subsequent History:** Request denied by O'Connell v. Kern Valley State Prison, 2012 U.S. Dist. LEXIS 148200 (E.D. Cal., Oct. 15, 2012)

**Prior History:** O'Connell v. Kern Valley State Prison, 2012 U.S. Dist. LEXIS 1832 (E.D. Cal., Jan. 5, 2012)

## Core Terms

amended complaint, deliberate indifference, prison, deprivation, exhibits, rights, inmate, cause of action, prison official, allegations, unrelated, federal right

**Counsel:** **[*1]** Kevin P. O'Connell, Plaintiff, Pro se, Ione, CA.

**Judges:** Barbara A. McAuliffe, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** Barbara A. McAuliffe

## Opinion

ORDER DISMISSING COMPLAINT, WITH LEAVE TO AMEND

THIRTY-DAY DEADLINE

**I. Screening Requirement**

Plaintiff Kevin P. O'Connell is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. §

1983. Currently before the Court is the complaint, filed December 30, 2011. (ECF No. 1.)

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that "fails to state a claim on which relief may be granted," or that "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere **[*2]** conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)).

Prisoners proceeding pro se in civil rights actions are still entitled to have their pleadings liberally construed and to have any doubt resolved in their favor, but the pleading standard is now higher, Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted), and to survive screening, Plaintiff's claims must be facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable for the misconduct alleged, Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The "sheer possibility that a defendant has acted unlawfully" is not sufficient, and "facts that are 'merely consistent with' a defendant's liability" falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949; Moss, 572 F.3d at 969.

Further, under section 1983, Plaintiff must demonstrate that each defendant personally participated in the deprivation of his rights. **[*3]** Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Although a court must accept as true all factual allegations contained in a complaint, a court need not accept a plaintiff's legal conclusions as true. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (quoting Twombly, 550 U.S. at 555, 127 S. Ct. 1955).

## II. Discussion

Plaintiff is in the custody of the California Department of Corrections and Rehabilitation and is incarcerated at Mule Creek State Prison. The incidents alleged in the complaint occurred while Plaintiff was housed at Kern Valley State Prison. Plaintiff brings this action against Defendants T. Rodriguez, M. Northcutt, L. Howard, M. Betzinger, S. Lopez, C. Chen, H. Kandhorva, Huang, Marksman, A. Vilches, N. Patel, S. Schaefer, A. Shittu, M, Spaeth, J. Clark Kelso, and two unidentified individuals ("John Doe" and "Jane Doe") alleging unrelated incidents of excessive force and deliberate indifference to his Hepatitis and back pain. Additionally, Plaintiff complains that the water at the prison contains high levels of arsenic.

### A. Joinder Requirements

As an initial **[*4]** matter, Plaintiff may not bring unrelated claims against unrelated parties in a single action. Fed. R. Civ. P. 18(a), 20(a)(2); Owens v. Hinsley, 635 F.3d 950, 952 (7th Cir. 2011); George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). Plaintiff may bring a claim against multiple defendants so long as (1) the claim arises out of the same transaction or occurrence, or series of transactions and occurrences, and (2) there are commons questions of law or fact. Fed. R. Civ. P. 20(a)(2); Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997); Desert Empire Bank v. Insurance Co. of North America, 623 F.2d 1371, 1375 (9th Cir. 1980). Only if the defendants are properly joined under Rule 20(a) will the Court review the other claims to determine if they may be joined under Rule 18(a), which permits the joinder of multiple claims against the same party. Plaintiff is advised that the fact that many of Plaintiff's claims allege deliberate indifference by medical providers does not make the claims related.

Accordingly, Plaintiff's complaint shall be dismissed for violating Federal Rules of Civil Procedure 8, 18, and 20. In his amended complaint, Plaintiff shall choose which claims he wishes to pursue **[*5]** in this action. If Plaintiff does not do so and his amended complaint sets forth unrelated claims which violate joinder rules, the Court will dismiss the claims it finds to be improperly joined.

### B. Plaintiff's Legal Claims

Plaintiff shall be given the opportunity to file an amended complaint curing the deficiencies described by the Court in this order. In the paragraphs that follow, the Court will provide Plaintiff with the legal standards that appear to apply to his claims. Plaintiff should carefully review the standards and amend only those claims that he believes, in good faith, are cognizable.

**1. Excessive Force**

To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison conditions must involve "the wanton and unnecessary infliction of pain." Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59 (1981). The inquiry as to whether a prison official's use of force constitutes cruel and unusual punishment is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." Hudson v. McMillian, 503 U.S. 1, 6-7, 112 S. Ct. 995, 998, 117 L. Ed. 2d 156 (1992); Whitley v. Albers, 475 U.S. 312, 320, 106 S. Ct. 1078, 1085, 89 L. Ed. 2d 251 (312).

"The **[*6]** objective component of an Eighth Amendment claim is . . . contextual and responsive to contemporary standards of decency." Hudson, 503 U.S. at 8, 112 S. Ct. at 1000 (internal quotation marks and citations omitted). A prison official's use of force to maliciously and sadistically cause harm violates the contemporary standards of decency. Wilkins v. Gaddy, U.S. , 130 S. Ct. 1175, 1178, 175 L. Ed. 2d 995 (2010). However, "[n]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action." Wilkins, 130 S. Ct. at 1179 (quoting Hudson, 503 U.S. at 9, 112 S. Ct. at 1000). Factors that can be considered are "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted." Whitley, 475 U.S. at 321, 106 S. Ct. at 1085; Marquez v. Gutierrez, 322 F.3d 689, 692 (9th Cir. 2003). Although the extent of the injury is relevant, the inmate does not need to sustain serious injury. Wilkins, 130 S. Ct. at 1178-79; Hudson, 503 U.S. at 7, 112 S. Ct. at 999.

**2. Failure to Intervene**

Prison officials are required "to take reasonable steps to protect inmates from physical abuse." Hoptowit v. Ray, 682 F.2d 1237, 1250 (9th Cir. 1982) **[*7]** (abrogated on other grounds by Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)). A prisoner's rights can be violated by a prison official's deliberate indifference by failing to intervene. Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995). Additionally, an officer can only be held liable for failing to intercede if he had a realistic opportunity to intercede and failed to do so. Cunningham v. Gates, 229 F.3d 1271, 1289-90 (9th Cir. 2000).

**3. Deliberate Indifference to Medical Care**

"[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show "deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251 (1976)). The two part test for deliberate indifference requires the plaintiff to show (1) "a 'serious medical need' by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain,'" and (2) "the defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096.

Deliberate indifference is shown where the official is aware of a serious medical **[*8]** need and fails to adequately respond. Simmons v. Navajo County, Arizona, 609 F.3d 1011, 1018 (9th Cir. 2010). "Deliberate indifference is a high legal standard." Simmons, 609 F.3d at 1019; Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). The prison official must be aware of facts from which he could make an inference that "a substantial risk of serious harm exists" and he must make the inference. Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811 (1994).

A difference of opinion between a prisoner and prison medical authorities as to proper treatment does not give rise to a claim. Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981); Mayfield v. Craven, 433 F.2d 873, 874 (9th Cir. 1970). Additionally, a difference of opinion between medical providers regarding treatment does not amount to deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). To state a claim under these conditions requires the plaintiff "show that the course of treatment the doctors choose was medically unacceptable under the circumstances, . . . and . . . they chose this course in conscious disregard of an excessive risk to plaintiff's health." Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

An **[*9]** allegation by a prisoner that a physician has been merely indifferent or negligent or has committed medical malpractice in diagnosing or treating a medical condition does not state a constitutional claim. Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980); Toguchi, 391 F.3d at 1057. "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106, 97 S. Ct. at 292. Additionally, a delay in treatment would not rise to the level of deliberate indifference unless the delay causes substantial harm. Hallett v. Morgan, 296 F.3d 732, 746 (9th Cir. 2002); Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Shapley v. Nevada Board of State Prison Commissioners, 766 F.2d 404, 407 (9th Cir. 1984).

**4. Conditions of Confinement**

To prove a violation of the Eighth Amendment, the plaintiff must "objectively show that he was deprived of something 'sufficiently serious,' and make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety."

Thomas v. Ponder, 611 F.3d 1144, 1150 (9th Cir. 2010) (citations omitted). Deliberate indifference requires a showing that "prison **[*10]** officials were aware of a "substantial risk of serious harm" to an inmate's health or safety and that there was no "reasonable justification for the deprivation, in spite of that risk." Id. (quoting Farmer v. Brennan, 511 U.S. 825, 837, 844, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). Officials may be aware of the risk because it is obvious. Thomas, 611 F.3d at 1152. The circumstances, nature, and duration of the deprivations are critical in determining whether the conditions complained of are grave enough to form the basis of a viable Eighth Amendment claim." Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2006).

**5. Grievance Procedure**

The prison grievance procedure does not confer any substantive rights upon inmates and actions in reviewing appeals cannot serve as a basis for liability under section 1983. Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993). To the extent that Plaintiff is attempting to state a claim based upon the processing of inmate appeals, he would have to show that the defendant was deliberately indifferent to a serious risk of harm to Plaintiff and failed to act. Simmons, 609 F.3d at 1018.

**6. Supervisory Liability**

Government officials may not be held liable for the actions of their subordinates under **[*11]** a theory of *respondeat superior*. Iqbal, 129 S. Ct. at 1948. Since a government official cannot be held liable under a theory of vicarious liability for section 1983 actions, Plaintiff must plead that the official has violated the Constitution through his own individual actions. Id. at 1948. In other words, to state a claim for relief under section 1983, Plaintiff must link each named defendant with some affirmative act or omission that demonstrates a violation of Plaintiff's federal rights.

**7. Official Capacity**

"The Eleventh Amendment bars suits for money damages in federal court against a state, its agencies, and state officials acting in their official capacities." Aholelei v. Dep't of Pub. Safety, 488 F.3d 1144, 1147 (9th Cir. 2007). A suit brought against prison officials in their official capacity is generally equivalent to a suit against the prison itself. McRorie v. Shimoda, 795 F.2d 780, 783 (9th Cir. 1986). Therefore, prison officials may be held liable if "'policy or custom' . . . played a part in the violation of federal law." McRorie, 795 F.2d at 783 (quoting Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985). The official may be liable where the act or **[*12]** failure to respond reflects a conscious or deliberate choice to follow a course of action when various alternatives were available. Clement v. Gomez, 298 F.3d 898, 905 (9th Cir. 2002) (quoting City of Canton v. Harris, 489 U.S. 378, 389, 109 S. Ct. 1197, 1205, 103 L. Ed. 2d 412 (1989); see Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); Waggy v. Spokane County Washington, 594 F.3d 707, 713 (9th Cir. 2010). To prove liability for an action policy the plaintiff "must . . . demonstrate that his deprivation resulted from an official policy or custom established by a . . . policymaker possessed with final authority to establish that policy." Waggy, 594 F.3d at 713. Liability for failure to act requires that Plaintiff show that the "employee violated the plaintiff's constitutional rights;" the agency "has customs or policies that amount to deliberate indifference;" and "these customs or policies were the moving force behind the employee's violation of constitutional rights." Long, 442 F.3d at 1186.

**8. State Law Claims**

The California Tort Claims Act 1 requires that a tort claim against a public entity or its employees be presented to the California Victim Compensation and Government Claims **[*13]** Board, formerly known as the State Board of Control, no more than six months after the cause of action accrues. Cal. Gov't Code §§ 905.2, 910, 911.2, 945.4, 950-950.2 (West 2010). Presentation of a written claim, and action on or rejection of the claim are conditions precedent to suit. State of California v. Superior Court, 32 Cal. 4th 1234, 13 Cal. Rptr. 3d 534, 90 P.3d 116, 119 (Cal. 2004); Shirk v. Vista Unified School District, 42 Cal.4th 201, 209, 64 Cal. Rptr. 3d 210, 164 P.3d 630 (2007). To state a tort claim against a public employee, a plaintiff must allege compliance with the California Tort Claims Act. Cal. Gov't Code § 950.6; Bodde, 90 P.3d at 123. "[F]ailure to allege facts demonstrating or excusing compliance with the requirement subjects a compliant to general demurrer for failure to state a cause of action." Bodde, 90 P.3d at 120.

**a. Medical Malpractice**

"The elements of a medical malpractice claim are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the

negligent conduct and resulting injury; and (4) actual loss or damage resulting from the professional's negligence." Avivi v. Centro Medico Urgente Medical Center, 159 Cal.App.4th 463, 468, n.2, 71 Cal. Rptr. 3d 707 (Ct. App. 2008) (internal quotations and citation omitted); Johnson v. Superior Court, 143 Cal.App.4th 297, 305, 49 Cal. Rptr. 3d 52 (2006).

**b. Negligence**

A public employee is liable for injury "proximately caused by his negligent or wrongful act or omission." Cal. Gov't Code § 844.6(d) (West 2009). Under California law "[t]he elements of a negligence cause of action are: (1) a legal duty to use due care; (2) a breach of that duty; (3) the breach was the proximate or legal cause of the resulting injury; and (4) actual loss or damage resulting from the breach of the duty of care." Brown v. Ransweiler, 171 Cal.App.4th 516, 534, 89 Cal. Rptr. 3d 801 (Ct. App. 2009).

**9. Injunctive Relief**

Plaintiff is seeking injunctive relief granting **[*15]** him proper F.D.A. telaprevir treatment and pain management medication and placement on the liver donor/transplant list. The federal court's jurisdiction is limited in nature and its power to issue equitable orders may not go beyond what is necessary to correct the underlying constitutional violations which form the actual case or controversy. 18 U.S.C. § 3626(a)(1)(A); Summers v. Earth Island Inst., 555 U.S. 488, 494, 129 S. Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103-04, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); City of Los Angeles v. Lyons, 461 U.S. 95, 101, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983); Mayfield v. United States, 599 F.3d 964, 969 (9th Cir. 2010).

Additionally, the Prison Litigation Reform Act places limitations on injunctive relief. Section 3626(a)(1)(A) provides in relevant part, "Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the **[*16]** Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A).

The Court lacks jurisdiction to order that Plaintiff be placed on the donor/transplant list or to order prison officials at Mule Creek State Prison, who are not parties to this action, to provide Plaintiff with the relief requested. Accordingly, the injunctive relief Plaintiff is seeking is not cognizable.

**III. Amended Complaint**

**A. Rule 8**

The Court advises Plaintiff of the following requirements under the Federal Rules of Civil Procedure regarding the general formatting of his complaint. Plaintiff's complaint must contain "a short and plain statement of the claim showing that [Plaintiff] is entitled to relief." Federal Rule of Civil Procedure 8(a)(2). Plaintiff's complaint is neither short nor plain. Plaintiff's complaint is thirty two pages, includes approximately sixty pages of exhibits, and contains multiple unrelated incidents.

"Each allegation must be simple, concise, and direct." Federal Rule of Civil Procedure 8(d)(1). **[*17]** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances." Federal Rule of Civil Procedure 10(b). "[E]ach claim founded on a separate transaction or occurrence . . . must be stated in a separate count." Federal Rule of Civil Procedure 10(b).

The function of the complaint is not to list every single fact relating to Plaintiff's claims. Because Plaintiff's complaint is not in compliance with Rule 8(a), the Court declines to expend its already taxed resources with attempting to sort out his claims. Plaintiff must submit a complaint to the Court that meets the requirements of Rule 8. It is Plaintiff's job, not the Court's, to state a claim for each defendant.

If Plaintiff chooses to amend the complaint, the amended complaint may not exceed twenty-five pages in length, and it will be stricken from the record if it violates this page limitation.

**B. Exhibits**

If Plaintiff feels compelled to submit exhibits with any such amended complaint, he may do so, but is reminded that such exhibits must be attached to the complaint and must be incorporated by reference. Fed. R. Civ. Pro. 10(c). Thus, if Plaintiff attaches exhibits **[*18]** to any amended complaint that he might file, each exhibit must be specifically referenced. For example, Plaintiff must state

"see Exhibit A" or something similar in order to direct the Court to the specific exhibit Plaintiff is referencing. Further, if the exhibit consists of more than one page, Plaintiff must reference the specific page of the exhibit (i.e. "See Exhibit A, page 3"). With regard to exhibits that are properly attached to any such amended complaint, Plaintiff is cautioned that it is the Court's duty to evaluate the factual allegations within a complaint, not to wade through exhibits, to determine whether cognizable claims are, or might be able to be stated.

Finally, for screening purposes, the Court must assume that Plaintiff's factual allegations are true. Therefore, it is generally unnecessary for Plaintiff to submit exhibits in support of the allegations in a complaint, nor need Plaintiff go into detail regarding his attempts to exhaust his administrative remedies. If Defendants bring a motion to dismiss for failure to exhaust, Plaintiff will be able to address the issue of exhaustion in his opposition to the motion.

**IV. Conclusion and Order**

Plaintiff's complaint shall **[*19]** be dismissed for failing to comply with Federal Rules of Civil Procedure 8, 18, and 20. Plaintiff is granted leave to file an amended complaint within thirty days. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff may not change the nature of this suit by adding new, unrelated claims in his amended complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no "buckshot" complaints).

Plaintiff's amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what each named defendant did that led to the deprivation of Plaintiff's constitutional or other federal rights, Iqbal, 129 S. Ct. at 1948-49. "The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988). Although accepted as true, the "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level . . . ." Twombly, 550 U.S. at 555 (citations omitted).

Finally, an amended complaint supercedes the original complaint, Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); **[*20]** King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and must be "complete in itself without reference to the prior or superceded pleading," Local Rule 220. "All causes of action alleged in an original complaint which are not alleged in an amended complaint are waived." King, 814 F.2d at 567 (citing to London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

Based on the foregoing, it is HEREBY ORDERED that:

1. The Clerk's Office shall send Plaintiff a civil rights complaint form;

2. Plaintiff's complaint, filed December 30, 2011, is dismissed for failing to comply with Federal Rules of Civil Procedure 8, 18, and 20;

3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file an amended complaint;

4. Plaintiff's amended complaint shall not exceed twenty five pages in length; and

5. If Plaintiff fails to file an amended complaint in compliance with this order, this action will be dismissed, with prejudice, for failure to state a claim.

IT IS SO ORDERED.

**Dated: June 5, 2012**

**/s/ Barbara A. McAuliffe**

UNITED STATES MAGISTRATE JUDGE

**Footnotes**

1 2The Court recognizes that in City of Stockton v. Superior Court, 42 Cal.4th 730, 742, 68 Cal. Rptr. 3d 295, 171 P.3d 20 (Cal. 2007), California's Supreme Court adopted the practice of referring to California's Tort Claims Act as the Government Claims Act. However, given that the federal government has also enacted a Tort Claims Act, 28 U.S.C. § 2671, the Court here refers to the Government Claims Act as the California Tort Claims Act in **[*14]** an effort to avoid confusion.

# Reed v. Harrington, 2013 U.S. Dist. LEXIS 53638



United States District Court for the Eastern District of California

April 13, 2013, Decided; April 15, 2013, Filed

1:11-cv-01883-AWI-GSA-PC

**Reporter**

**2013 U.S. Dist. LEXIS 53638 *** | 2013 WL 1627622

TYRONE REED, SR., Plaintiff, vs. K. HARRINGTON, et al., Defendants.

**Prior History:** Reed v. Harrison, 2012 U.S. Dist. LEXIS 62977 (E.D. Cal., May 4, 2012)

## Core Terms

arsenic, deprivation, factual allegations, drink water, indifference, allegations, rights

**Counsel:** **[*1]** Tyrone L. Reed, Sr., Plaintiff, Pro se, DELANO, CA.

**Judges:** Gary S. Austin, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** Gary S. Austin

## Opinion

FINDINGS AND RECOMMENDATIONS, RECOMMENDING THAT THIS ACTION BE DISMISSED, WITH PREJUDICE, FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED (Doc. 11.)

OBJECTIONS, IF ANY, DUE IN 30 DAYS

**I. BACKGROUND**

Tyrone Reed, Sr. ("Plaintiff") is a state prisoner proceeding pro se with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on November 14, 2011. (Doc. 1.) On May 4, 2012, the Court dismissed the Complaint for failure to state a claim, with leave to amend. (Doc. 9.) On May 30, 2012, Plaintiff filed the First Amended Complaint, which is now before the Court for screening. (Doc. 11.)

On June 14, 2012, the Court issued an order requiring Plaintiff to file a more definite statement of the facts involved in this action. (Doc. 13.) On July 9, 2012, Plaintiff filed a more definite statement. (Doc. 14.)

**II. SCREENING REQUIREMENT**

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must **[*2]** dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

A complaint is required to contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007)). While a plaintiff's allegations are taken as true, courts "are not required to indulge unwarranted inferences," Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) **[*3]** (internal quotation marks and citation omitted). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal 556 U.S. at 678. While factual allegations are accepted as true, legal conclusions are not. Id.

To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility standard. Id.

**II. PLAINTIFF'S ALLEGATIONS**

The events at issue in this action occurred at Kern Valley State Prison (KVSP) in Delano, California, where Plaintiff is now incarcerated. Plaintiff names as defendants Warden K. Harrington, State Water System ID#1510800, Governor Jerry Brown, and the Mayor of Delano. Plaintiff's factual allegations follow. 1

Plaintiff has been housed at KVSP since July 29, 2009. On April 1, 2012, the California **[*4]** Department of Corrections and Rehabilitation issued a notification explaining that during the past four quarters, the arsenic level in KVSP's drinking water exceeded the EPA's maximum contaminant level. (Exhibit to First Amd Cmp, Doc. 11 at 6.)

Warden Harrington is in charge of KVSP and is at fault for arsenic in the water.

The State Water System ID#1510802 (SWS) was responsible for E.coli being present in KVSP's drinking water in 2009, before the arsenic situation. Now, SWS has behaved indifferently by placing arsenic in the water above the maximum level.

The Mayor of Delano is aware of the arsenic situation and has done nothing in four years to correct the situation.

Governor Jerry Brown knew of the situation and did nothing for four years to correct it.

Plaintiff suffers from stomach pain which began in 2010 when he was drinking water contaminated with E.coli. Plaintiff was examined most recently by Dr. R. Lopez, who found white blood cells in Plaintiff's urine and diagnosed him with some type of stomach infection. In 2010, Plaintiff was given antibiotics for the infection, but he still has white blood cells in his urine.

Plaintiff requests appointment of counsel and assistance from the **[*5]** Court to proceed in this action.

**III. PLAINTIFF'S CLAIMS**

The Civil Rights Act under which this action was filed provides:

> Every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997) (internal quotations omitted). "To the extent that the violation of a state law

amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the federal Constitution, Section 1983 offers no redress." Id.

To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted under color of state law and (2) the defendant deprived him of rights secured by the Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). "A person 'subjects' another to the deprivation of a constitutional **[*6]** right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). "The requisite causal connection can be established not only by some kind of direct, personal participation in the deprivation, but also by setting in motion a series of acts by others which the actors knows or reasonably should know would cause others to inflict the constitutional injury." Johnson at 743-44).

**A. Eighth Amendment Deliberate Indifference**

The Eighth Amendment provides that "cruel and unusual punishment [shall not be] inflicted." U.S.Const. amend. VIII. "An Eighth Amendment claim that a prison official has deprived inmates of humane conditions of confinement must meet two requirements, one objective and the other subjective." Allen v. Sakai, 48 F.3d 1082, 1087 (9th Cir. 1995) cert. denied, 514 U.S. 1065, 115 S. Ct. 1695, 131 L. Ed. 2d 559, (1995). The objective requirement is met if the prison official's acts or omissions deprived a prisoner of "the minimal civilized measure of life's necessities.'" Id. (quoting Farmer v. Brennan, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). **[*7]** To satisfy the subjective prong, a plaintiff must show more than mere inadvertence or negligence. Neither negligence nor gross negligence will constitute deliberate indifference. Farmer, 511 U.S. at 833, & n. 4; Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). The Farmer court concluded that "subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause" and adopted this as the test for deliberate indifference under the Eighth Amendment. Farmer, 511 U.S. at 839-40.

In order to hold the individual defendants liable, Plaintiff must allege facts indicating that they knew of an objectively serious condition, and acted with "subjective recklessness" to that condition. The crux of Plaintiff's complaint is that arsenic levels in the water at KVSP exceeded EPA standards for at least four quarters in a row, and Defendants have not corrected the situation.

Plaintiff's own exhibit indicates that, although the arsenic levels in the drinking water supply at KVSP were out of compliance with regulatory standards, they were not at a level that was associated with any acute health problems. 2 There are no allegations **[*8]** that officials were aware of levels of arsenic that would satisfy the Eighth Amendment standard set forth above. Simply put, a violation of a regulatory standard does not presumptively violate the Eighth Amendment. Moreover, Plaintiff provides no facts supporting his allegations that the Defendants acted with deliberate indifference to a risk of serious harm.

Plaintiff's conclusory allegations that he is suffering from arsenic poisoning are unsupported by specific factual allegations that he was diagnosed with and treated for arsenic poisoning. In fact, Plaintiff claims that his symptoms arose during the time E.coli was present in the drinking water, and he was treated with antibiotics for a stomach infection.

**B. Fourteenth Amendment**

Plaintiff purports to bring a claim under the Fourteenth Amendment. The Fourteenth Amendment prohibits the States from "mak[ing] or enforc[ing] any law which shall abridge the privileges or immunities **[*9]** of citizens of the United States, from "depriv[ing] any person of life, liberty, or property, without due process of law" and from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S.Const. amend. XIV § 1. Plaintiff fails to allege facts demonstrating that any of the Defendants violated Plaintiff's rights under the Fourteenth Amendment. Therefore, Plaintiff fails to state a Fourteenth Amendment claim.

**IV. CONCLUSION AND RECOMMENDATIONS**

The Court finds that Plaintiff's First Amended Complaint fails to state any claims upon which relief can be granted under § 1983 against any of the Defendants. In this action, the Court previously granted Plaintiff an opportunity to amend the complaint, with ample guidance by the Court. Plaintiff has now filed two complaints without alleging facts against any of the defendants which state a claim under § 1983. The Court finds that the deficiencies outlined above are not capable of being cured by amendment, and therefore further leave to amend should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

Therefore, **IT IS HEREBY RECOMMENDED** that pursuant to 28 U.S.C. § 1915A **[*10]** and 28 U.S.C. § 1915(e), this action be dismissed with prejudice for failure to state a claim upon which relief may be granted under § 1983, and that this dismissal be subject to the "three-strikes" provision set forth in 28 U.S.C. § 1915(g). Silva v. Vittorio, 658 F.3d 1090, 1098 (9th Cir. 2011).

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **April 13, 2013**

**/s/ Gary S. Austin**

UNITED STATES MAGISTRATE JUDGE

**Footnotes**

1 Plaintiff's allegations include those in the First Amended Complaint, filed on May 30, 2012, and those in Plaintiff's More Definite Statement, filed on July 9, 2012. (Docs. 11, 14.)

2 The Court is not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint. See Lovell v. Chandler, 303 F.3d 1039, 1052 (9th Cir. 2002); Steckman v. Hart Brewing, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| LAMAR SINGLETON, SR.,<br><br>Plaintiff,<br><br>vs.<br><br>M.D. BITER, et al.,<br><br>Defendants. | 1:12cv00043 AWI DLB PC<br><br>FINDINGS AND RECOMMENDATIONS REGARDING DISMISSAL OF CERTAIN CLAIMS<br><br>THIRTY-DAY OBJECTION DEADLINE |

Plaintiff Lamar Singleton, Sr., ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action. Plaintiff filed his complaint on January 9, 2012. He names Kern Valley State Prison ("KVSP") Warden M. D. Biter and Chief Medical Officer Sherri Lopez as Defendants.

## A. LEGAL STANDARD

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.

§ 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. Id.

**B. SUMMARY OF PLAINTIFF'S ALLEGATIONS**

Plaintiff arrived at KVSP on September 1, 2010, as a chronic care patient suffering from diabetes, hepatitis C, high blood pressure, nerve damage and a history of infections.

Plaintiff contends that the arsenic levels in the water at KVSP are above federal standards, and that since 2008, KVSP has been in violation of the maximum arsenic contamination level. He alleges that Defendant Biter has a "history of non-compliance and delays even in the face of vigorous enforcement." Compl. 3. Plaintiff alleges that he has a right to access clean water and now suffers from tumors on each kidney, nervousness, nausea and stomach pain. Plaintiff further alleges that Defendant Biter has refused to implement a system to screen chronic care patients who are at high risk from contamination of arsenic-laced water.

Plaintiff underwent an MRI and ultrasound at Truxton Radiology that revealed tumors on both kidneys. The first biopsy was unsuccessful and he was told that the condition could be life-threatening, and to return in fourteen days. During Plaintiff's next visit to Dr. Patel on D-Yard,

he was told that the next few tests would be critical for diagnosis. Dr. Patel told Plaintiff that he was very concerned because of lab results. Over a month later, Plaintiff underwent another biopsy on the left side that revealed a benign tumor. Dr. Patel told Plaintiff that he would be ordering at least three additional tests, in addition to a biopsy on the right side. On his next visit to Dr. Patel, he was told that Defendant Lopez cancelled all further MRIs and biopsy procedures, and that the only option Plaintiff had was the removal of both kidneys. Dr. Patel told Plaintiff that he was very sorry but that it was out of his hands.

Finally, Plaintiff contends that Defendant Lopez is aware that the water at KVSP contains high levels of arsenic. Plaintiff has been a high risk chronic care inmate in CDCR for twelve years. He appealed to KVSP for transfer/medical appeal, but Defendant Lopez denied the request.

Plaintiff alleges claims under the Eighth and Fourteenth Amendment based on (1) Defendant Biter's failure to provide clean water; (2) Defendant Biter's failure to implement a system to ensure that chronic care patients are not exposed to water with high arsenic levels; (3) Defendant Lopez's decision to cancel further MRIs and biopsies; and (4) Defendant Lopez's refusal to transfer Plaintiff.

**C. ANALYSIS**

1. *Eighth Amendment- Medical Claim*

To maintain an Eighth Amendment claim based on medical care in prison, a plaintiff must show deliberate indifference to his serious medical needs. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)) (quotation marks omitted). The two-part test for deliberate indifference requires the plaintiff to show (1) a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain, and (2) the

defendant's response to the need was deliberately indifferent. Jett, 439 F.3d at 1096 (quotation marks and citation omitted).

Plaintiff's complaint states a claim for deliberate indifference to a serious medical need against Defendants Biter and Lopez. Plaintiff will be instructed on service in a separate order.

2. *Eighth Amendment- Conditions of Confinement*

The Eighth Amendment protects prisoners from inhumane methods of punishment and from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). Extreme deprivations are required to make out a conditions of confinement claim, and only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct. 995 (1992) (citations and quotations omitted). In order to state a claim for violation of the Eighth Amendment, the plaintiff must allege facts sufficient to support a claim that prison officials knew of and disregarded a substantial risk of serious harm to the plaintiff. E.g., Farmer v. Brennan, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994); Thomas v. Ponder, 611 F.3d 1144, 1151-52 (9th Cir. 2010); Foster v. Runnels, 554 F.3d 807, 812-14 (9th Cir. 2009); Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

Plaintiff's complaint states a claim for inhumane conditions of confinement against Defendants Biter and Lopez. Plaintiff will be instructed on service in a separate order.

3. *Due Process*

Plaintiff's due process claim is not cognizable. Plaintiff was not deprived of a protected interest entitling him to procedural process, Wilkinson v. Austin, 545 U.S. 209, 221 (2005), and any substantive due process claim is barred because the Eighth Amendment provides protection against the condition at issue, County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998). The deficiency is not curable through amendment and the claim should be dismissed. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

**D. CONCLUSION AND RECOMMENDATION**

The Court finds that Plaintiff's complaint states a claim under the Eighth Amendment against Defendants Lopez and Biter. It does not, however, state a claim under the Fourteenth Amendment. This deficiency cannot be cured. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). As explained above, Plaintiff will be instructed on service in a separate order.

Accordingly, it is HEREBY RECOMMENDED that the Fourteenth Amendment claims in this action be DISMISSED WITHOUT LEAVE TO AMEND for failure to state a claim under section 1983.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **February 11, 2013**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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|---|---|
| ANTOINE SLAUGHTER,<br><br>Plaintiff,<br><br>vs.<br><br>MARTIN BITER, et al.,<br><br>Defendants. | 1:14cv00887 DLB PC<br><br>ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND<br><br>THIRTY-DAY DEADLINE |

Plaintiff Antoine Slaughter ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action. Plaintiff filed this action on June 11, 2014. He names Kern Valley State Prison ("KVSP") Warden Martin Biter, KVSP Chief Deputy Warden D. Davey, Secretary of Corrections Scott Kerman,[1] and KVSP Chief Medical Doctor S. Lopez as Defendants.[2]

## A. LEGAL STANDARD

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are

[1] Plaintiff spells his last name as "Kerman," though it appears the correct spelling is "Kernan."

[2] Plaintiff consented to the jurisdiction of the United States Magistrate Judge on June 25, 2014.

legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. Id.

Section 1983 provides a cause of action for the violation of Plaintiff's constitutional or other federal rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d 1087, 1092 (9th Cir 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff's allegations must link the actions or omissions of each named defendant to a violation of his rights; there is no respondeat superior liability under section 1983. Iqbal, 556 U.S. at 676-77; Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones, 297 F.3d at 934. Plaintiff must present factual allegations sufficient to state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

**B. SUMMARY OF PLAINTIFF'S ALLEGATIONS**

Plaintiff is incarcerated at KVSP in Delano, California, where the events at issue occurred.

According to Plaintiff's allegations and his exhibits, he filed an administrative grievance complaining of a toxic amount of arsenic in the drinking water at KVSP on June 6, 2013. As a result of the arsenic levels, Plaintiff suffered from severe "circulatory system reactions," which caused shortness of breath, rashes and overwhelming anxiety.

Plaintiff had been seen by Nurse M. Francis in May 2013, who confirmed the diagnosis and referred Plaintiff for further evaluation of stomach pains, headaches and vomiting.

Plaintiff alleges that Defendants Biter and Davey are legally responsible for the operations of KVSP, and for the welfare of all KVSP inmates. He contends that Defendants Biter and Davey "made or carried out" a policy or practice that led to a widespread health and safety problem. Plaintiff alleges that this problem created an unreasonable risk of serious harm, in violation of the Eighth Amendment.

Plaintiff further alleges that the wrongful actions of Defendants Lopez and Kerman deprived him of his right to be free from arsenic.

**C. DISCUSSION**

1. Defendants Lopez and Kerman

As noted above, detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1949 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are not. Id.

Here, Plaintiff alleges that the wrongful actions of Defendants Lopez and Kerman deprived him of his right to be free from arsenic. He does not include any further allegations against them. These conclusory allegations are not sufficient to state a claim against either Defendant Lopez or Defendant Kerman.

2. Eighth Amendment Conditions of Confinement

The Eighth Amendment protects prisoners from inhumane methods of punishment and from inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006). Extreme deprivations are required to make out a conditions of confinement claim, and only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9 (1992) (citations and quotations omitted). In order to state a claim for violation of the Eighth Amendment, the plaintiff must allege facts sufficient to support a claim that prison officials knew of and disregarded a substantial risk of serious harm to the plaintiff. E.g., Farmer v. Brennan, 511 U.S. 825, 847 (1994); Thomas v. Ponder, 611 F.3d 1144, 1151-52 (9th Cir. 2010); Foster v. Runnels, 554 F.3d 807, 812-14 (9th Cir. 2009); Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

Plaintiff alleges that his health problems are related to Defendants' inaction, and that as a result of the arsenic levels, he suffered from severe "circulatory system reactions." These reactions caused shortness of breath, rashes and overwhelming anxiety. In support of his allegations, he states that Nurse Francis confirmed the diagnosis in May 2013 and referred him for further evaluations.

Plaintiff attaches medical records from May 2013, to his complaint. On May 20, 2013, Plaintiff asked to be seen because he threw up twice in the morning, and had stomach pain and headaches from drinking arsenic water. ECF No. 1, at 14. RN Francis saw Plaintiff on May 20, 2013, and referred him to "TTA" for further evaluation. ECF No. 1, at 15. A May 21, 2013,

progress note states that Plaintiff was seen in TTA for abdominal pain and constipation. Plaintiff said all symptoms were resolved. ECF No. 1, at 17.

Plaintiff's medical records do not show that he was denied the minimal civilized measure of life's necessities, or that prison officials knew of and disregarded a substantial risk of serious harm. In fact, Plaintiff received treatment for his stomach problems and states that they were resolved the next day.

Moreover, there is no indication that Plaintiff's medical problems, even if severe, were caused by the arsenic. Plaintiff's inmate appeal was submitted in June 2013, apparently after he was seen for stomach problems in May 2013. However, while Plaintiff believes that his health problems were caused by arsenic in the drinking water, his exhibits show that the levels had been in compliance since the beginning of 2013.[3] Plaintiff does not appear to allege that the water after the beginning of 2013 was non-compliant. Rather, his complaints relate to an alleged delay in proper remediation long before his May 2013 medical issue.[4]

Pro se litigants are entitled to have their pleadings liberally construed and to have any doubt resolved in their favor, Wilhelm v. Rotman, 680 F.3d 1113, 1121-23 (9th Cir. 2012); Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010), but Plaintiff's claims must be facially plausible to survive screening, which requires sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable for the misconduct alleged, Iqbal, 556 U.S. at 678 (quotation marks omitted); Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). Plaintiff's allegations do not meet this standard and he therefore fails to state a claim under the Eighth Amendment.

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[3] Plaintiff attaches a March 28, 2013, memorandum written by Defendant Biter. The memo sets forth the compliance issues and states that KVSP has been compliant since the beginning of 2013. ECF No. 1, at 13.

[4] In explaining why he was dissatisfied with the Second Level response, Plaintiff states that he has been at KVSP since May 2010, and that Warden was aware of the contamination was responsible for fixing it. He states that the Warden kept changing the projected repair date, which went from June 2010 to October 2011. ECF No. 1, at 10.

3. Defendants Biter and Davey

Supervisory personnel may not be held liable under section 1983 for the actions of subordinate employees based on *respondeat superior,* or vicarious liability. Crowley v. Bannister, 734 F.3d 967, 977 (9th Cir. 2013); accord Lemire v. California Dep't of Corr. and Rehab., 726 F.3d 1062, 1074-75 (9th Cir. 2013); Moss v. U.S. Secret Service, 711 F.3d 941, 967-68 (9th Cir. 2013); Lacey v. Maricopa County, 693 F.3d 896, 915-16 (9th Cir. 2012) (en banc).

"A supervisor may be liable only if (1) he or she is personally involved in the constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." Crowley, 734 F.3d at 977 (citing Snow, 681 F.3d at 989) (internal quotation marks omitted); accord Lemire, 726 F.3d at 1074-75; Lacey, 693 F.3d at 915-16. "Under the latter theory, supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of a constitutional violation." Crowley, 734 F.3d at 977 (citing Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989)) (internal quotation marks omitted).

In his complaint, Plaintiff attempts to state a claim against Defendants Biter and Davey based on his contention that they "made or carried out" a policy or practice that led to a widespread health and safety problem. However, as explained above, Plaintiff fails to state a claim under the Eighth Amendment. He is therefore unable to state claim by arguing that Defendants Biter and Davey implemented a policy "so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of a constitutional violation." Crowley, 734 F.3d at 977 (internal citations omitted).

Plaintiff therefore fails to state a claim against Defendants Biter or Davey.

**D. CONCLUSION AND ORDER**

Plaintiff's complaint does not state a cognizable claim against any Defendant.

The Court will provide Plaintiff with the opportunity to file an amended complaint, if he believes, in good faith, he can cure the identified deficiencies. Akhtar v. Mesa, 698 F.3d 1202, 1212-13 (9th Cir. 2012); Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). If Plaintiff amends, he may not change the nature of this suit by adding new, unrelated claims in his amended complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007).

If Plaintiff files an amended complaint, it should be brief, Fed. R. Civ. P. 8(a), but under section 1983, it must state what each named defendant did that led to the deprivation of Plaintiff's constitutional rights and liability may not be imposed on supervisory personnel under the mere theory of *respondeat superior*, Iqbal, 556 U.S. at 676-77; Starr v. Baca, 652 F.3d 1202, 1205-07 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2101 (2012). Although accepted as true, the "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level. . ." Twombly, 550 U.S. at 555 (citations omitted).

Finally, an amended complaint supercedes the original complaint, Lacey v. Maricopa County, 693 F.3d 896, 907 (9th Cir. 2012) (en banc), and it must be "complete in itself without reference to the prior or superceded pleading," Local Rule 220.

Based on the foregoing, it is HEREBY ORDERED that:

1. The Clerk's Office shall send Plaintiff a complaint form;
2. Within **thirty (30) days** from the date of service of this order, Plaintiff must file an amended complaint curing the deficiencies identified by the Court in this order; and

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3. If Plaintiff fails to comply with this order, this action will be dismissed, without prejudice, for failure to obey a court order.

IT IS SO ORDERED.

Dated: **December 2, 2014**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

# UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| MICHAEL J. SULLIVAN,<br><br>Plaintiff,<br><br>v.<br><br>M. D. BITER, et al.,<br><br>Defendants. | Case No. 1:15-cv-00243-DAD-SAB-PC<br><br>FINDINGS AND RECOMMENDATIONS REGARDING DEFENDANT'S MOTION TO DISMISS<br><br>[ECF No. 27]<br><br>**THIRTY (30) DAY DEADLINE** |

Plaintiff Michael J. Sullivan is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983.

## I.

## BACKGROUND

This action proceeds on Plaintiff's claim of conditions of confinement in violation of the Eighth Amendment against Defendant Biter, arising out of allegations of arsenic-contaminated drinking water at Kern Valley State Prison ("KVSP").

Currently before the Court is Defendant's motion to dismiss, filed on September 28, 2017. (ECF No. 43.) Defendant also filed a request for judicial notice in support of the motion. (ECF No. 44.) After being granted several extensions of time, Plaintiff filed an opposition to the motion to dismiss on January 2, 2018. (ECF No. 49.) Defendant filed a reply, also on an extension of time, on January 23, 2018. (ECF No. 52.) The motion is deemed submitted for review without oral argument. Local Rule 230(l).

## II.

## LEGAL STANDARDS

A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim, and dismissal is proper if there is a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (quotation marks and citations omitted). In resolving a 12(b)(6) motion, a court's review is generally limited to the operative pleading. Daniels-Hall v. National Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010); Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007); Schneider v. California Dept. of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (quotation marks omitted); Conservation Force, 646 F.3d at 1242; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The Court must accept the factual allegations as true and draw all reasonable inferences in favor of the non-moving party, Daniels-Hall, 629 F.3d at 998; Sanders, 504 F.3d at 910; Morales v. City of Los Angeles, 214 F.3d 1151, 1153 (9th Cir. 2000), and in this Circuit, pro se litigants are entitled to have their pleadings liberally construed and to have any doubt resolved in their favor, Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012); Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012); Silva v. Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011); Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010).

## III.

## DISCUSSION

### A. Summary of Plaintiff's Relevant Allegations

Plaintiff alleges that when he arrived at KVSP in 2010, the drinking water was contaminated with toxic levels of arsenic and "cancer causing agents." (Compl. ¶ 29.) Plaintiff alleges that he has "preexisting chronic life threatening liver disease, a kidney tumor and stomach problems." (Id.) Plaintiff alleges that he has "confronted" the prison officials with knowledge of the tainted water by the filing of inmate grievances. As to Defendant Warden

Biter, Plaintiff alleges that each year since October 1, 2010, Warden Biter has issued a notice "acknowledging that the drinking water was contaminated and also acknowledging the risk of adverse health effects including but not limited to increased risk of getting cancer and can or may cause circulatory system problems." (Id. at ¶ 30.)

The notice, attached as an exhibit to Plaintiff's complaint, was signed by Defendant Biter on September 23, 2010, and notified Plaintiff that the running annual average level of drinking water contaminants for wells 1 and 2 exceeded the United States Environmental Protection Agency ("USEPA") standard by .004 and .01 mg/L over the last four quarters. The notice informed Plaintiff that Defendant Biter, along with KVSP staff, was working on planning and construction of an arsenic treatment system to resolve the problem. The notice indicates that Defendant Biter anticipated resolving the problem by October 2011. (Id. at p. 35.)

On December 3, 2010, Plaintiff filed an inmate grievance, requesting that he be provided with bottled water. Plaintiff alleges that on May 11, 2011, Health Program Specialist Bluford and Chief Medical Executive Lopez failed to correct or remedy Plaintiff's concerns by denying Plaintiff's grievance.

**B. Discussion**

**1. Arguments**

In Defendant's motion to dismiss, he acknowledges that the Court issued a very thorough screening order in this case, including a review of documents attached to the complaint. Nevertheless, Defendant asserts that certain attachments to the complaint support dismissing Plaintiff's claim in this case because the documents show that the level of arsenic in the water at KVSP did not present a significant risk of harm. Further, Defendant argues that the exhibits attached to the complaint show that he was not aware that the water was substantially dangerous and could not have drawn that inference, and he did not ignore the issue of arsenic levels in the water. Finally, Defendant argues that he is entitled to qualified immunity, because he did not violate any clearly established right regarding the drinking water provided to Plaintiff.

Plaintiff opposes the motion, arguing that the notice signed by Defendant admits sufficient facts for him to state a claim, when his allegations are liberally construed in his favor.

Further, he asserts that he suffered specific injuries caused by the polluted water. Plaintiff also argues that he has sufficiently shown deliberate indifference because bottled drinking water was available to staff but not provided to inmates, despite the hazardous levels of arsenic in the inmates' drinking water. Finally, Plaintiff argues that the case law cited by Defendant is not binding or controlling, and that the circumstances and allegations in this case differ from those cases, making them distinguishable.

In reply to Plaintiff's opposition, Defendant argues that Plaintiff cannot plead facts in his opposition or offer speculation to oppose the motion to dismiss. Defendant further argues that the language that Plaintiff relies on in the notice is vague and general, whereas other language in the notice shows that the water did not present an emergency at KVSP, and that there was no expectation of harm.

**2. Failure to State a Claim**

The Eighth Amendment requires prison officials to provide human conditions of confinement, including adequate food, clothing shelter, and medical care, and to take reasonable measures to guarantee the safety of inmates. Farmer v. Brennan, 511 U.S. 825, 832-33 (1994); Hearns v. Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). A prisoner seeking relief for an Eighth Amendment violation must show that the official acted with deliberate indifference to a threat of serious harm or injury to an inmate. Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002). "Deliberate indifference" has both subjective and objective components. A prison official must "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and . . . must also draw the inference." Farmer, 511 U.S. at 837. Liability may follow only of a prison official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. at 837.

As noted above, when the legal sufficiency of a complaint's allegations is tested by a motion under Rule 12(b)(6), "[r]eview is limited to the complaint." Cervantes v. City of San Diego, 5 F.3d 1273, 1274 (9th Cir. 1993). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996). "[F]actual challenges to a plaintiff's complaint

have no bearing on the legal sufficiency of the allegations under Rule 12(b)(6)." Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001).

Although the Court generally may not consider materials beyond the pleading in ruling on a Rule 12(b)(6) motion to dismiss, there are limited exceptions. For example, a court may consider materials attached to the complaint. See Lee, 250 F.3d at 688-89; Hal Roach Studies, Inc. v. Richard Feiner and Co., Inc., 896 F.2d 1542, 1155 n.19 (9th Cir. 1989) (copy of assignment attached to appellant's counterclaim as an exhibit properly considered by the court in ruling on a Rule 12(b)(6) motion). Nevertheless, the ultimate question on a motion to dismiss is whether plaintiff has alleged sufficient facts to state a plausible claim for relief, drawing all inferences from his allegations in his favor. Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 923-26 (9th Cir. 2001) (declining to consider evidence outside the pleadings in deciding a Rule 12(b)(6) motion to dismiss).

In this case, Plaintiff attached exhibits to his complaint, including a notice signed by Defendant Biter, on September 23, 2010. (Compl. 35.) The notice states that data gathered from monitoring KVSP's wells "over the last four quarters" shows that "the running annual average for wells 1 and 2 is 0.016 mg/L and 0.020 mg/l respectively. This is above the USEPA standard of maximum contaminant level (MCL) of 0.010 mg/L." (Id.) The notice further states that "some people who drink water containing arsenic in excess of the MCL over many years may experience skin damage or circulatory system problems, and may have an increased risk to getting cancer." (Id.) According to the notice, an arsenic treatment system was planned to resolve the issue, and officials anticipated it being resolved by October 2011. Plaintiff relies upon this exhibit in stating his claim.

Plaintiff also alleged that he arrived at KVSP in October 2010, and that the water remained polluted through sometime in 2014. According to Plaintiff, he suffered from pre-existing diseases, including liver disease, a tumor on his kidney, and stomach problems, and forcing him to drink the tainted water aggravated his medical conditions, caused problems with his digestive system and circulatory problems, and gave him an increased risk of cancer. Plaintiff specifically alleges that being forced to drink the water over a prolonged period of years that he

was housed at KVSP "[a]ccelerated and escalated his chronic liver disease." (Id.) He confronted prison officials and requested clean, bottled water to drink, but was denied this request. Based on these allegations, the Court found that Plaintiff sufficiently stated a claim for deliberate indifference to a serious medical need against Defendant.

Defendant points out that the notice states in part that the water contamination was "not an emergency." (Id.) Further, Defendant points to certain language in a May 11, 2011 second-level response to Plaintiff's administrative grievance regarding the denial of his request for bottled water, which was attached to the complaint. That response briefly discusses an arsenic study by R.J. Geller, MD, MPH, of the California Poison Control System. (Id. at 33.) The response states that Dr. Geller found the arsenic levels were insignificant, and quotes Dr. Geller's opinion that he expected no health problems, acute or chronic, to be caused at KVSP by the drinking water. (Id.) Defendant argues that the brief notation about Dr. Geller's opinion clarifies the notice's statement that the water did not present an emergency, and that these exhibits undermine Plaintiff's claim that the water presented a serious risk of harm in violation of the Eighth Amendment.

The documents attached to the complaint, including the portions of the notice discussing the lack of an emergency and the excerpts of Dr. Geller's opinion, might support an inference that Plaintiff was unlikely to suffer harm from his exposure to arsenic. However, on a Rule 12(b)(6) motion to dismiss, the Court must draw all reasonable inferences from Plaintiff's factual allegations in his favor. Liberally construed, Plaintiff has pleaded facts showing that he was forced to drink water tainted with elevated arsenic levels beyond the USEPA's maximum-allowed contaminant levels for a period of several years, and was injured as a result. Plaintiff alleges that the statements by prison officials regarding the arsenic contain "double speak and misleading statements" used to avoid addressing the problem, and that they put off the implementation of the water treatment facility "year after year." (Compl. 29.) Plaintiff further alleges that none of the staff drank the contaminated water and instead drank bottled water, and only the prisoners were forced to drink the contaminated water. (*Id.* at 32.) These allegations, when taken as true as they must be on a Rule 12(b)(6) motion to dismiss, and when construing

all reasonable inferences in Plaintiff's favor, are sufficient to show a plausible serious risk to Plaintiff's health in violation of the Eighth Amendment.

In support of Defendant's argument that Plaintiff's allegations are insufficient to state a claim in this case, Defendant cites several other district court cases in which the allegations by those plaintiffs were found to be insufficient. The Court finds that those cases are distinguishable. Defendant cites Huerta v. Biter, No. 1:13–cv–00916–AWI–GSA–PC, 2015 WL 1062041 (E.D. Cal. Mar. 10, 2015) findings and recommendations adopted 2015 WL 6690042 (E.D. Cal. Oct. 29, 2015). In Huerta, the plaintiff failed "to allege any facts indicating that he suffered any ill effects, other than his fear of some future harm," and therefore the fact that the water violated a regulatory standard was insufficient, by itself, to subject officials to liability under the Eighth Amendment. 2015 WL 1062041 at *4. As noted above, in this case Plaintiff has alleged specific health issues caused or worsened by his exposure to elevated arsenic levels in the water at KVSP. See Valson v. Cate, No. 1:14-cv-01420-DAD-EPG-PC, 2017 WL 4174919, at *3 (E.D. Cal. Sept. 21, 2017) (distinguishing Huerta where plaintiff pleaded physical health issues allegedly suffered from elevated arsenic levels). Likewise, in Ford v. California, No. 1:10-cv-00696-AWI-GSA-PC, 2013 WL 1320807 (E.D. Cal. Apr. 2, 2013), the plaintiff made conclusory allegations that he had sustained "physical and emotional injuries" without any facts in support, unlike Plaintiff in this case. Id. at *4. See also Reed v. Harrington, No. 1:11-cv-01883-AWI-GSA-PC, 2013 WL 1627622, at *3 (E.D. Cal. Apr. 15, 2013) (plaintiff made conclusory unsupported allegations of injury, other than a stomach infection, but also alleged exposure to E. coli bacteria as a competing cause of the infection and admitted to receiving treatment for the infection).

Defendant next argues that the notice attached to the complaint shows that he was not aware of any allegedly serious risk of harm, because the notice states that the water contamination was not an emergency. The notice also discusses the plan for the water treatment system, which Defendant argues shows that he was not deliberately indifferent to the contaminated water. Defendant also seeks for the Court to take judicial notice of a March 31, 2013 Quarterly Status Report ("Report") regarding the construction of the arsenic treatment

system at KVSP. The Report states that construction was completed, except the punch list items, by December 31, 2012, and that the punch list items were completed and the project closed out on January 26, 2013. (ECF No. 44-1, at p. 3.)

Plaintiff's claim in this case is based on allegations that Defendant knowingly requiring him to drink the arsenic-contaminated drinking water at KVSP for several years, including by refusing to provide bottled or clean water to drink while the contamination problem was being addressed. Although the notice attached to Plaintiff's complaint contains a statement that the arsenic levels were not an emergency, the notice also acknowledges that the water was contaminated with arsenic above the drinking water standard, and that there were risks of adverse health effects from prolonged exposure. Plaintiff alleges that Defendant continued to issue these notices annually, and that Plaintiff in fact suffered injury from his prolonged exposure. As discussed above, Plaintiff also alleged that the implementation of the water treatment system was put off for years, and that staff, but not inmates, were drinking bottled water in the meantime.

At best, there may be some competing inferences from the exhibits attached to the complaint here, but as discussed above, all reasonable inferences must be construed in the non-movant Plaintiff's favor when deciding a Rule 12(b)(6) motion to dismiss. Therefore, the Court finds Plaintiff has sufficiently pleaded knowing, deliberate indifference in this case. "It is a plausible inference from those allegations that defendants, knowing of elevated levels of arsenic in the drinking water and the risks it posed to plaintiff, 'recklessly disregarded [those] risk[s]' by failing to provide drinking water with safe levels of arsenic while the problem was being remedied." Valson, 2017 WL 4174919, at *3 (quoting Farmer, 511 U.S. at 836); see also id. at *2 n.1.

Defendant has presented some evidence which Plaintiff may have difficulties in overcoming. But at this early stage in the case, Plaintiff does not yet bear the burden of presenting evidence in support of his claim. For these reasons explained above, the Court finds that Plaintiff has sufficiently pleaded the elements of a claim against Defendant for deliberate indifference to a serious risk of harm in violation of the Eighth Amendment.

**3. Qualified Immunity**

The Court next addresses Defendant's arguments regarding the defense of qualified immunity. Under the qualified immunity doctrine, government officials acting in their official capacities are immunized from civil liability unless their actions "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231 (2009) (citations omitted). When engaging in qualified immunity analysis, district courts are required to consider the law at the time that the plaintiff's injury occurred. Robinson v. Prunty, 249 F.3d 862, 866 (9th Cir. 2001). In resolving these issues, the court must view the evidence in the light most favorable to plaintiff and resolve all material factual disputes in favor of plaintiff. Martinez v. Stanford, 323 F.3d 1178, 1184 (9th Cir. 2003).

Defendant argues that it was not clearly established that it violates the Eighth Amendment to provide water to Plaintiff that was above the USEPA's Maximum Contaminant Level ("MCL") but was nevertheless not dangerous. Defendant relies on the notice and the brief references to Dr. Geller's study, discussed above, to show that he did not believe the water to be dangerous to Plaintiff, and that it was not in fact contaminated at dangerous levels.

At this early stage in the case, the Court cannot assume that the water was not dangerous despite containing arsenic exceeding the MCL, or that Defendant had any specific knowledge or beliefs that the water was not dangerous. These are disputed facts which must be viewed in Plaintiff's favor. The question at issue is instead based on Plaintiff's allegations. Here, Plaintiff alleges that Defendant knowingly forced him to drink unsafe, arsenic-contaminated drinking water by failing to take reasonable actions.

The Supreme Court has long held that prison officials must ensure that inmates receive adequate food and water. Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quoting Hudson v. Palmer, 468 U.S. 517, 526–527 (1984)). More specifically, it has been long established that prison officials may not knowingly subject prisoners to polluted, unhealthy water which presents a serious risk to their health. Helling v. McKinney, 509 U.S. 25, 33 (1993) ("We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery."); Jackson v. Arizona, 885 F.2d 639 (9th Cir. 1989)

(allegations of unsanitary food handling and polluted water which could lead to diseases and death arguably stated an Eighth Amendment violation); McKinney v. Anderson, 924 F.2d 1500, 1507–08 (9th Cir. 1991) ("We have held that . . . polluted water can also violate prisoners' Eighth Amendment rights."); Keenan v. Hall, 83 F.3d 1083, 1091 (9th Cir. 1996) ("Food that is spoiled and water that is foul would be inadequate to maintain health.").

Defendant argues that the Valley Fever litigation is instructive on this issue. The Court does not find that litigation to be analogous enough to provide specific guidance here. This Court has discussed that the Valley Fever litigation it has reviewed concerned exposure to a naturally occurring fungus that lives in the soil in the Central Valley, which posed the same risks to the surrounding community and was accepted by society, including because prison officials, prison visitors, and the people living in the Central Valley were equally exposed to the risk of contracting Valley Fever. Smith v. Schwarzenegger, No. 1:14-CV-00060-LJO-SA, 2015 WL 2414743, at *15-19 & n.6 (E.D. Cal. May 20, 2015), report and recommendation adopted, 137 F. Supp. 3d 1233 (E.D. Cal. 2015). In contrast, this case concerns allegations of Defendant knowingly forcing the inmate Plaintiff to be exposure to water tainted with arsenic, a well-known and admitted carcinogen, which officials were on notice violated USEPA standards. The problem was supposed to be addressed by a water treatment system that Plaintiff argues was much-delayed, resulting in prolonged exposure and injuries caused by that exposure. Further, he has alleged that prison officials drank safe, clean, bottled water, while inmates could only drink the contaminated water. Given the issue presented at this stage, the Court does not recommend granting dismissal based on qualified immunity.

## IV.

## RECOMMENDATIONS

Based on the foregoing, it is HEREBY RECOMMENDED that Defendant's motion to dismiss pursuant to Rule 12(b)(6) be denied, in its entirety.

These findings and recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **thirty (30) days** after being served with these findings and recommendations, the parties may file

written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **April 25, 2018**

UNITED STATES MAGISTRATE JUDGE

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

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| SILUS M. VALSON,<br><br>Plaintiff,<br><br>v.<br><br>J. CLARK KELSO, et al.,<br><br>Defendants. | Case No. 1:14-cv-01420-DAD-EPG<br><br>FINDINGS AND RECOMMENDATIONS, RECOMMENDING THAT DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS BE GRANTED<br><br>(ECF NO. 15)<br><br>OBJECTIONS, IF ANY, DUE WITHIN THIRTY DAYS |

## I. BACKGROUND

Silus M. Valson ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff is proceeding on his First Amended Complaint ("FAC"), (ECF No. 9), which asserts a claim for violation of the Eighth Amendment against Defendants Matthew Cate and Marin Biter ("Defendants") based on knowingly providing Plaintiff and other prisoners with water containing elevated levels of arsenic.

Defendants moved to dismiss the complaint on August 5, 2016, on the ground that exhibits attached to the complaint contradict Plaintiff's allegations because they demonstrate that the water was not unsafe and did not in fact harm Plaintiff, and also on the ground that Defendants have qualified immunity. (ECF No. 15). Plaintiff opposed Defendants' motion on August 30, 2016. (ECF No. 18). Defendants filed a reply on September 6, 2016 (ECF No. 19).

This case is one of many filed by inmates of Kern Valley State Prison ("KVSP") following announcements that KVSP's water tested for higher levels of arsenic than permitted by

the EPA, per EPAs revision to permissible levels issued in 2001. Although KVSP took steps to treat the water, there were several years where the arsenic levels exceeded the revised standards. Plaintiff suffered health problems during the time of the higher arsenic levels, which he claims included symptoms associated with arsenic poisoning, although no medical professional or test has ever suggested, let alone concluded, that he suffered arsenic poisoning.

Although the Court initially screened Plaintiff's complaint to allow the claims to proceed, it now recommends granting Defendants' motion to dismiss. Based on the motion to dismiss, the Court has made a detailed review of the extraordinary lengthy complaint and exhibits, as well as the decisions of other courts facing this issue. Setting aside conclusory statements, Plaintiff's allegations do not establish that there was a serious risk of harm or deliberate indifference on the part of Defendants by permitting inmates to drink water that contained arsenic levels in excess of regulations while KVSP worked on an arsenic treatment system.

## II. SUMMARY OF PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff alleges that he was exposed to inorganic arsenic at KVSP for approximately three years, from 2009 to 2012. KVSP regularly tested the drinking water as required by state and federal regulations. A 2005 consumer confidence report showed that for the year 2005, arsenic exceeded maximum contaminant levels. The report summarized that "some people who drink water containing arsenic in excess of the mcl [maximum contaminant level] over many years could experience skin damage or problems with their circulatory system, and may have an increased risk of getting cancer."

On April 8, 2008, the California Department of Corrections and Rehabilitation ("CDCR") at KVSP released information about inmates' drinking water, noting KVSP has levels of arsenic above the drinking water standard, and above standards issued by the Environmental Protection Agency ("EPA"). The CDCR also noted that some people who drink water containing arsenic in excess of the MCL over many years may experience skin damages or circulatory system problems and may have an increased risk of cancer. It indicated that KVSP had been working to install an arsenic treatment system. The CDCR anticipated resolving the problem by June 2009.

The plan to fix the arsenic in the water was obstructed and further delayed while seeking

Mathew Cate's approval. In the interim, neither the secretary of the CDCR nor the warden, Defendant Biter, approved a safe alternative.

On January 26, 2011, Plaintiff tested positive for Helicobacter Pylori, and was issued various medications. When he was retested in on May 9, 2011, all results were within normal.

On June 17, 2011, Plaintiff's blood was tested, revealing low abnormal results for bun and creatinine ratios.

On June 23, 2011, a doctor noticed Mees' lines on Plaintiff's nails and questioned whether it might be from overtreatment of medication for the H. Pylori disease.

In the meantime, the plans to construct an arsenic treatment plant encountered further delays. On April 1, 2012, Defendant Biter, warden of KVSP, distributed information indicating the KVSP arsenic levels remained above the drinking standard and continued to violate EPA standards.

On April 5, 2012, Plaintiff sought medical attention for severe headache, stomach pain, diarrhea, vomiting, and dark urine. The next day, he was transferred to Mercy Hospital. After evaluation, Plaintiff was transferred to the intensive care unit. He was later diagnosed with cardiomyopathy. He received treatment. Later, Plaintiff's skin began falling off. Plaintiff received treatment and was released back to the general population on April 26, 2012.

On August 16, 2012, Plaintiff sought medical attention for Mees' lines on his nails, "which is physically known for arsenic deposits."

Plaintiff received additional care and learned soon after that his heart issue had resolved.

The next portion of Plaintiff's complaint consists of 19 pages of specific scientific information about arsenic. Plaintiff alleges that arsenic has been a poison since ancient time and is associated with various maladies. Plaintiff lists various ailments identified in various studies of populations exposed to high levels of arsenic. Plaintiff describes a number of tests that can be performed to identify arsenic poisoning, such as blood and urine analysis. Plaintiff also describes various methods to remove arsenic from drinking water. Plaintiff also lists various maladies associated with arsenic, in detailed scientific terms.

Following the complaint are 147 pages of exhibits. These consist of medical records

related to Plaintiff, which discuss the problems listed above. Notably, none of the records indicate that Plaintiff had elevated arsenic levels, or that his medical ailments were caused by arsenic. The exhibits also contain KVSP notices of elevated levels of arsenic, FDA information about the revisions of EPA guidelines and associated FDA regulations for arsenic in drinking water, and information about arsenic poisoning generally from sources such such as Wikipedia.

## III. ARGUMENTS PRESENTED IN MOTION TO DISMISS

### A. Defendants' Motion to Dismiss

Defendants moved to dismiss on the ground that the exhibits to Plaintiff's complaint reveal that Defendants were not deliberately indifferent to the arsenic in KVSP's water. Moreover, Defendants argue that they are entitled to qualified immunity.

Defendants begin with a recitation of the facts regarding the arsenic issue at KVSP and the prison's response to the issues raised. Defendants cite to a number of notices to inmates that stated that KVSP did not need to use alternative water and that it was not an emergency. (ECF No. 15-1, at p. 7). Defendants describe the efforts to install an arsenic treatment plant, including hiring a contractor and requesting approval from the California Legislature for funding, planning, and construction of the plant. (Id.).

Defendants also describe Plaintiff's alleged ailments over this period, as described in his complaint. Defendants then argue that Plaintiff's exhibits attached to the complaint reveal that the ailments were never connected with arsenic:

> Plaintiff attached a significant number of his medical records to the first amended complaint and none of those documents list the cause of his medical conditions as arsenic or poisoning of any kind. (*Id*. at pp. 65-113.) In fact, On August 16, 2012, Plaintiff submitted a health care request form complaining that he had Mees lines in his finger and toenails and excreting granular substances in his urine that he stated were caused by arsenic poisoning. (*Id*. at p. 107.) However, a health care examination from a registered nurse showed his finger and toenails looked normal and no abnormal lines were noted. (*Id*. at p. 107, 20:2-7.) A September 5, 2012, primary care provider examination confirmed that Plaintiff did not have skin changes due to arsenic poisoning, had healthy normal nails, and did not have arsenic poisoning. (*Id*. at 108.) On January 24, 2013, a doctor ordered a heavy metal test to determine whether there was arsenic present in Plaintiff's body. (*Id*. at p. 110.) Plaintiff's arsenic blood test was normal. (*Id*. at p. 112.)

(ECF No. 15-1, at pgs. 8-9).

**IN THE UNITED STATES DISTRICT COURT FOR THE**

**EASTERN DISTRICT OF CALIFORNIA**

**OSCAR H. VILLANUEVA,**

Plaintiff,

v.

**M. D. BITER, Warden at Kern Valley State Prison; S. Lopez, Chief Medical Executive at Kern Valley State Prison,**

Defendants.

_____/

1:11-cv-1050-AWI-SAB

**ORDER DENYING DEFENDANTS MOTION TO DISMISS**

## I. Introduction

Plaintiff Oscar H. Villanueva, a state prisoner appearing *pro se*, proceeds on this civil rights claim pursuant to 42 U.S.C. § 1983, alleging that Defendants M. D. Biter and S. Lopez ("Defendants") have violated the Eighth Amendment by failing to act to remedy the arsenic-contaminated water at Kern Valley State Prison ("KVSP"). Defendants have filed a motion to dismiss, arguing that each is entitled to qualified immunity. The only question presented to this Court is whether the right at issue was clearly established. For the following reasons, the question presented is foreclosed by the mandate issued in the case. Defendants' motion to dismiss will be denied.

## II. Background

In 2001, the Environmental Protection Agency ordered a reduction in the maximum level of arsenic in drinking water from 50 parts per billion to 10 parts per billion. Compl. at 3.

According to Plaintiff, when KVSP opened in 2005, it was known that a serious arsenic exposure problem existed. *Id.* Plaintiff specifically contends that Defendants Biter and Lopes both knew about the risk posed by the arsenic level and disregarded that risk. *Id.* at 3-4.

On December 20, 2010, Defendant Biter notified all KVSP inmates of the status of the arsenic levels in the drinking water. Doc. 1 at 18. It was reported that the average for the two wells that service the prison had 15 parts per billion and 19 parts per billion, respectively. *Id*. The inmates were informed that the contamination level "is not an emergency," and that an alternative water supply was not necessary. *Id*. Inmates were further informed that KVSP was working to install an arsenic treatment system to completely resolve the problem. *Id*.

**III. Legal Standard**

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Where the plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face," the complaint may be dismissed for failure to allege facts sufficient to state a claim upon which relief may be granted. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007); *see* Fed. R. Civ. P. 12(b)(6). "A claim has facial plausibility," and thus survives a motion to dismiss, "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 663 (2009). On a Rule 12(b)(6) motion to dismiss, the court accepts all material facts alleged in the complaint as true and construes them in the light most favorable to the plaintiff. *Knievel v. ESPN,* 393 F.3d 1068, 1072 (9th Cir. 2005). However, the court need not accept conclusory allegations, allegations contradicted by exhibits attached to the complaint or matters properly subject to judicial notice, unwarranted deductions of fact or unreasonable inferences. *Daniels-Hall v. National Educ. Ass'n,* 629 F.3d 992, 998 (9th Cir. 2010).

**IV. Discussion**

The defense of qualified immunity protects "government officials...from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800,

818 (1982). At the 12(b)(6) phase, "dismissal is not appropriate unless [the court] can determine, based on the complaint itself [(or an material attached thereto or incorporated therein)], that qualified immunity applies." *O'Brien v. Welty*, 818 F.3d 920, 936 (9th Cir. 2016) (quoting *Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001).

The Supreme Court established a two-step inquiry for determining whether qualified immunity exists. First, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201 (2001). If no constitutional right was violated under the facts as alleged, the inquiry ends and defendants prevail. *See id.* If, however, "a violation could be made out on a favorable view of the [plaintiff's complaint], the next, sequential step is to ask whether the right was clearly established." *Id.* at 201. A government official violates clearly established law when, "at the time of the challenged conduct, 'the contours of [the] right [were] sufficiently clear' that every 'reasonable official would have understood that what he [or she] [was] doing violate[d] that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

In this instance, the Court is only asked to consider the second step—whether the right at issue was clearly established. However, the Ninth Circuit has made clear in this case that water contamination issues that Plaintiff presented are "'sufficient to warrant ordering [defendants] to file an answer.'" Doc. 25 at 2 (quoting, *inter alia*, *Wilhelm v. Rotman*, 680 F.3d 1113, 1116 (9th Cir. 2012) (holding that an inmate had alleged deliberate indifference to a serious medical need, requiring reversal of the Magistrate Judge's § 1915A screening decision)). The Ninth Circuit's reversal of the Magistrate Judge's § 1915A screening—applying the same standard as used for 12(b)(6) motions, *see Wilhelm,* 680 F.3d at 1121—does not leave room for Defendants to seek a determination that entitlement to qualified immunity is clear from the face of the complaint. *See Chavez v. Robinson*, 817 F.3d 1162, 1168-1169 (9th Cir. 2016) (Section 1915A "allow[s] a court to dismiss sua sponte a prisoner complaint that 'seeks redress from [an] … employee of a governmental entity' on the grounds of [qualified] immunity.")) The Ninth Circuit noted that it reviewed the Magistrate Judge's screening order de novo. Doc. 25 at 2. It was permitted to

"affirm on any basis supported by the record." *Valdez v. United States*, --- Fed.Appx. ---- 2016 WL 3144005, *1 (9th Cir. June 6, 2016); *Columbia Pictures Indus. v. Fung,* 710 F.3d 1020, 1030 (9th Cir. 2013). Yet, the Ninth Circuit decided that the Magistrate Judge's determination should be reversed and the Defendants should be required "to file an answer." Doc. 25 at 2. That reversal is inconsistent with qualified immunity being evident from the face of the complaint.[1] The rule of mandate does not allow this Court to revisit any determination clearly foreclosed by that mandate. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012); *accord Stacy v. Colvin*, ---F.3d ----, 2016 WL 3165597,*3 (9th Cir. June 7, 2016). This Court may only execute the Ninth Circuit's mandate. *Id*. In this case, a conclusion that qualified immunity is clear from the face of the complaint is clearly foreclosed by mandate.[2]

Defendants ask the Court to take judicial notice of a "Groundwater Information Sheet" made publicly available by the State Water Resources Control Board.[3] *See* Doc. 33-2 ("RJN"). The Court "may judicially notice a fact that is not subject to reasonable dispute because it … can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The court may take "judicial notice of records of state agencies and other undisputed matters of public record." *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004) (citing, *inter alia*, *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001)). The State Water Resources Control Board's arsenic groundwater information sheet is appropriately judicially noticed. That said, the only fact contained in that report the Defendants direct the Court to is "1,034 of [the 7,804] active wells tested in California" (139 of which were located in Kern County) are contaminated with arsenic. Doc. 33-1 at 9; RJN at 6. Defendants ignore the remainder of that report, detailing that "[a]rsenic is a known human carcinogen, and ingestion of arsenic has been reported to increase the risk of cancer in the liver, bladder, kidney, lung and skin," and that "the lifetime risk of developing bladder or lung cancer from arsenic in tap water (assuming 2 liters consumption per day) is

[1] Granting Defendants' Rule 12(b) motion is also inconsistent with requiring Defendants to file an answer.

[2] This order should not be read to speak to whether Defendants could succeed in asserting qualified immunity in a motion for summary judgment.

[3] Available at http://www.waterboards.ca.gov/water_issues/programs/gama/docs/coc_arsenic.pdf, last accessed July 14, 2016.

greater than 3 in 1,000 for an arsenic level of 10 µg/L." RJN at 10. Defendants' suggestions the Court could conclude from the arsenic groundwater information sheet that Defendants were unaware of a serious risk of harm or that no such risk existed are unavailing. Insofar as this Court could depart from the Ninth Circuit's order based on information presented that was not before the Ninth Circuit, it is not justified here. Defendants' motion will be denied on that basis.

**V. Order**

Based on the foregoing, Defendants' motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated: July 15, 2016

SENIOR DISTRICT JUDGE

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

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| CHESTER RAY WISEMAN,<br><br>Plaintiff,<br><br>v.<br><br>MATTHEW CATE, et al.,<br><br>Defendants. | Case No.: 1:14-cv-00831-LJO-SAB (PC)<br><br>FINDINGS AND RECOMMENDATIONS REGARDING PLAINTIFF'S MOTIONS FOR TEMPORARY RESTRAINING ORDERS<br><br>[ECF Nos. 17, 26] |

Plaintiff Chester Ray Wiseman is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

On March 16, 2015, and April 9, 2015, Plaintiff filed motions for a temporary restraining order. (ECF Nos. 17, 26.)

In both filings, Plaintiff seeks a temporary restraining order and a preliminary injunction to ensure that he receives proper Hepatitis C Interferon Treatment in a safe environment free of exposure and contraction of Valley Fever. Plaintiff is proceeding against Defendants Biter and Trimble for alleged Eighth Amendment violations based on Plaintiff's alleged exposure to Valley Fever and arsenic tainted water. Plaintiff contends he is entitled to a temporary restraining order requiring Defendants to arrange for an examination and a plan of treatment by a qualified specialist, and a preliminary injunction requiring Defendants to transfer Plaintiff to another prison that is not located in a Valley Fever endemic area.

## I.

## DISCUSSION

The analysis for a temporary restraining order is substantially identical to that for a preliminary injunction, Stuhlbarg Intern. Sales Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001), and "[a] preliminary injunction is an extraordinary remedy never awarded as of right." Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 24 (2008) (citation omitted). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Id. at 20 (citations omitted). An injunction may only be awarded upon a clear showing that the plaintiff is entitled to relief. Id. at 22 (citation omitted) (emphasis added).

In cases brought by prisoners involving conditions of confinement, any preliminary injunction must be narrowly drawn, extend no further than necessary to correct the harm the Court finds requires preliminary relief, and be the least intrusive means necessary to correct the harm. 18 U.S.C. § 3626(a)(2).

The determination of whether Defendants were deliberately indifferent to Plaintiff relating to his exposure to Valley Fever and arsenic tainted water are disputed issues of fact that are the pivotal point of Plaintiff's claims. "In deciding a motion for a preliminary injunction, the district court is not bound to decide doubtful and difficult questions of law or disputed questions of fact." Int'l Molder & Allied Workers Local Union No. 164 v. Nelson, 799 F.2d 547, 551 (9th Cir. 1986). Certainly at this point in the action based on the limited record, the Court cannot resolve the factual dispute, and Plaintiff has not demonstrated a likelihood of success on the merits. Indeed, it is noteworthy that the relief Plaintiff is requesting is extensive and would require a very intrusive order concerning the provision of medical care and placement of inmates within the California Department of Corrections and Rehabilitation.

In addition, although the claims in this action are similar to those raised in the present motions, Plaintiff has not met the standard of showing irreparable harm. Plaintiff's allegations in the present motion are based on his claim that he is at high risk of contraction of Valley Fever because he suffers

from Hepatitis C and is presently housed at Kern Valley State Prison where Valley Fever is endemic. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-102 (1983) (plaintiff must show "real and immediate" threat of injury, and "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief …. If unaccompanied by any continuing, present, adverse effects."). Plaintiff has not alleged an immediate threatened injury. Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1201 (9th Cir. 1980).

Even if Plaintiff could show that the balance of hardship tips in his favor, this factor alone, absent a showing of likelihood of success on the merits and irreparable injury, is insufficient to warrant imposition of a temporary restraining order.

Although it is in the public interest to ensure an inmate's safety while housed in a state facility, in this instance, the record presently does not support the finding that a temporary restraining order is justified to ensure such public interest. Accordingly, Plaintiff's motion for a temporary restraining order should be denied.

## II.

## RECOMMENDATION

Based on the foregoing, IT IS HEREBY RECOMMENDED that Plaintiff's motions for a temporary restraining order and preliminary injunction be DENIED.

This Findings and Recommendation will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(l). Within **thirty (30) days** after being served with this Findings and Recommendation, Plaintiff may file written objections with the Court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Plaintiff is advised that failure to file objections within the specified time may

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result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **April 23, 2015**

UNITED STATES MAGISTRATE JUDGE

Defendants also discuss two of Plaintiff's exhibits that contradict Plaintiff's claim that the water at KVSP was dangerous and caused his illnesses. (Id. at p. 9).

Defendants then argue that, based on the exhibits attached to Plaintiff's complaint: (1) KVSP's water did not present a serious risk of harm; (2) Plaintiff did not in fact suffer from any harm from the arsenic; and (3) the CDCR and Defendants were not indifferent to the harm.

Additionally, Defendants argue that they are entitled to qualified immunity because "it would [not] have been clear to a reasonable official that it was unconstitutional to provide water to inmates that is above the maximum contaminant level but that Defendants believed to be non-dangerous."

Defendants cite to a number of cases that, faced with similar issues regarding KVSP's arsenic level, found no Eighth Amendment violation. Some of these cases were dismissed at the screening level, and some were dismissed at summary judgment on the basis that "because the arsenic in KVSP's water was not dangerous and [the defendants] were not aware of a dangerous situation and acted reasonably by installing an arsenic removal plant." (ECF No. 15-1, at p. 17).

**B. Plaintiff's Opposition to Motion to Dismiss**

In his opposition, Plaintiff argues that the attached exhibits do not contradict his pleading regarding the dangerousness of KVSP's arsenic levels. (ECF No. 18). He points to facts including that the EPA changed the maximum contaminant level because studies have shown long-term exposure to arsenic in drinking water may result in multiple ill effects such as cancer. The FDA similarly changed its rules for arsenic in bottled water. Plaintiff argues that Defendants were aware of the EPA standards and risk of harm of non-compliance.

Plaintiff argues that the exhibits support that he suffered from arsenic poisoning. Plaintiff lists a number of medical symptoms, such as "some mottling of the lower extremity and nonpleuritic erythematous rash on the arms, trunk, and lower extremities." (Id. at p. 7). He does not specifically connect these symptoms with any medical findings related to arsenic, but refers generally to the materials listing various symptoms. For example, Plaintiff claims that on April 6, 2012, Plaintiff's skin had some mottling of the lower extremity and nonpleuritic erythematous rash on the arms, trunk, and lower extremities. Some had pustular appearance, which the

examiner thought could be early appearance of petechial rash, and on April 7, 2012, Plaintiff's "impression" was cardiogenic shock, acute myocarditis with severe cardiomyopathy, acute renal failure secondary to low cardiac output, ischemic hepatitis, lactic acidosis secondary to low output state.

Regarding white Mees' lines on his nails, which is one indication of arsenic poisoning, Plaintiff states that on August 17, 2012, RN M. Francis acknowledged seeing white lines in Plaintiff's finger and toe nails, although the primary care provider denied seeing such lines. Plaintiff states that no testing was ever done on his nails.

Plaintiff claims that he was never given a specific test to measure arsenic. (Id. at p. 9). Plaintiff alleges that he showed symptoms of arsenic exposure, and refers generally to his complaint.

Plaintiff then reviews the history of the EPA changing its standards, and a notice from KVSP informing inmates that "some people who drink water containing arsenic in excess of the MCL over many years may experience skin damage or circulatory system problems, and may have an increased risk to getting cancer." (Id. at p. 14). He also cites to a consumer confidence report from 2005 reporting that KVSP had exceeded MCL of arsenic in drinking water, and that some people who drink water containing arsenic in excess of the MCL over many years could experience skin damage or problems with their circulatory system, and may have an increased risk of getting cancer. (Id.).

Regarding qualified immunity, Plaintiff cites to various Eighth Amendment law, as well as law holding that exposure to toxic substances can support a claim under section 1983. Plaintiff then recites the facts about knowledge of the changed EPA levels and delays in implementing an arsenic treatment plant. Plaintiff argues that Defendants' conduct was reckless. Plaintiff then argues that Defendants knew of the risk of harm and failed to take action, in violation of settled constitutional law standards.

## IV. LEGAL STANDARDS

### A. Legal Standards for Motion to Dismiss

In considering a motion to dismiss, the court must accept all allegations of material fact in

the complaint as true. Erickson v. Pardus, 551 U.S. 89, 93–94 (2007); Hosp. Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976). The court must also construe the alleged facts in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236, overruled on other grounds by Davis v. Scherer, 468 U.S. 183 (1984); Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir.1994) (per curiam). All ambiguities or doubts must also be resolved in the plaintiff's favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). In addition, *pro se* pleadings are held to a less stringent standard than those drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

A motion to dismiss pursuant to Rule 12(b)(6) operates to test the sufficiency of the complaint. Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer, 416 U.S. at 236 (1974).

The first step in testing the sufficiency of the complaint is to identify any conclusory allegations. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678 (citing Twombly, 550 U.S. at 555). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations and quotation marks omitted).

After assuming the veracity of all well-pleaded factual allegations, the second step is for the court to determine whether the complaint pleads "a claim to relief that is plausible on its face." Iqbal, 556 U.S. at 678 (citing Twombly, 550 U.S. at 556) (rejecting the traditional 12(b)(6) standard set forth in Conley, 355 U.S. at 45-46). A claim is facially plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly, 550 U.S. at 556). The standard for plausibility is not akin to a "probability requirement," but it requires "more than a sheer

possibility that a defendant has acted unlawfully." Id.

In deciding a Rule 12(b)(6) motion, the Court generally may not consider materials outside the complaint and pleadings. Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998); Gumataotao v. Dir. of Dep't of Revenue & Taxation, 236 F.3d 1077, 1083 (9th Cir. 2001).

**B. Legal Standards for Eighth Amendment Violation**

The Eighth Amendment, which protects prisoners from inhumane conditions of confinement, Farmer v. Brennan, 511 U.S. 825, 833 (1994), is violated when prison officials act with deliberate indifference to a substantial risk of harm to an inmate's health or safety. E.g., Farmer, 511 U.S. at 828; Thomas v. Ponder, 611 F.3d 1144, 1151–52 (9th Cir. 2010); Richardson v. Runnels, 594 F.3d 666, 672 (9th Cir.2010).

Two requirements must be met to show an Eighth Amendment violation. Farmer, 511 U.S. at 834. "First, the deprivation must be, objectively, sufficiently serious." Id. (internal quotation marks and citation omitted). Second, "prison officials must have a sufficiently culpable state of mind," which for conditions of confinement claims, "is one of deliberate indifference." Id. (internal quotation marks and citation omitted). Prison officials act with deliberate indifference when they know of and disregard an excessive risk to inmate health or safety. Id. at 837. The circumstances, nature, and duration of the deprivations are critical in determining whether the conditions complained of are grave enough to form the basis of a viable Eighth Amendment claim. Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2006). The exposure to toxic substances can support a claim under section 1983. See Wallis v. Baldwin, 70 F.3d 1074, 1076–77 (9th Cir. 1995) (exposure to asbestos). Mere negligence on the part of a prison official is not sufficient to establish liability, but rather, the official's conduct must have been wanton. Farmer, 511 U.S. at 835; Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

**V. ANALYSIS OF DEFENDANTS' MOTION TO DISMISS**

Although Plaintiff's complaint, which stretches 190 pages including exhibits, includes voluminous facts about each of his medical visits and various studies regarding arsenic health threats generally, Plaintiff's specific allegations regarding the risk of harm by KVSP's water is basically the following:

- On January 22, 2001, "the EPA published a final rule establishing a maximum contaminant level for arsenic in public drinking water . . . in part, because studies have shown long-term exposure to inorganic arsenic in drinking water may result in increased risk of cancer (e.g., skin, bladder, lung, kidney, liver, prostate, and nasal passage) and is associated with noncancer effects such as alterations in gastrointestinal, cardiovascular, hematological (e.g., anemia, pulomary, neurological, immunological, and reproductive/developmental function." (ECF No. 9, p. 121).
- In response to the EPA rulemaking, the FDA published a rule on June 9, 2005, that the "allowable level established by FDA for arsenic in bottled water is 10 micrograms (0.010 milligrams) per liter of water." (ECF No. 9, p. 121).
- KVSP released statements, including on April 8, 2008, and April 1, 2012, stating "Kern Valley State Prison has Levels of Arsenic Above the Drinking Water Standard," and explaining "Our water system recently violated a drinking water standard. Although this is not an emergency, you have a right to know what you should do, what happened, and what we are doing to correct this situation. We routinely monitor for the presence of drinking water contaminants. Based on data gathered through monitoring our wells over the last four quarters, the running annual average for wells 1 and 2 is 0.013 mg/L and 0.022 mg/L [*in the 2008 notice, or*] 0.014 mg/L and 0.019 mg/L respectively [*in the 2012 notice*]. This is above the USEPA standard or maximum contaminant level (MCL) of 0.010 mg/L." The notice also stated "You do not need to use an alternative water supply (e.g., bottled water). This is not an emergency. If it had been, you would have been notified immediately. However, some people who drink water containing arsenic in excess of the MCL over many years may experience skin damage or circulatory system problems, and may have an increased risk to getting cancer." (ECF NO. 9, pgs. 50, 64).
- A public health statement from August 2007 states that "If you have arsenic in

> your drinking water at levels higher that [sic] the EPA's MCL, an alternative source of water should be used for drinking and cooking should be considered." (ECF No. 9, at p. 130).

Moreover, taking Plaintiff's allegations as true, Plaintiff exhibits symptoms that could be associated with arsenic poisoning, but he was never diagnosed with arsenic poisoning.

In evaluating this motion to dismiss, in light of the prevalence of this specific complaint by other inmates at KVSP, this Court reviewed decisions of other courts. It is worth noting that the Ninth Circuit has not yet weighed in on this specific issue. Nevertheless, they provide some guidance as to how other courts have evaluated similar allegations against the same legal standards.

Multiple courts have screened out similar allegations from other inmates of KVSP, finding that Plaintiff's allegations do not state a claim under the Eighth Amendment. For example, Magistrate Judge Gary S. Austin found that a similar complaint failed to state a claim for the following reasons:

> Here, Plaintiff fails to allege that he was subjected to an objectively serious harm. The fact that the drinking water exceeded an EPA standard by .02 milligrams per liter does not, of itself, subject Plaintiff to an objectively serious harm. Plaintiff's view that he is in danger of serious physical harm is unsupported by the facts alleged. Plaintiff's own allegations indicated that a professional physician and Master of Public Health tested the water, and found the arsenic levels to be "insignificant." Plaintiff fails to allege any facts indicating that he suffered any ill effects, other than his fear of some future harm. Simply put, the fact that the water violated some regulatory standard does not, of itself, subject officials to liability under the Eighth Amendment.

Huerta v. Biter (E.D. Cal., Mar. 10, 2015, No. 113-CV-00916-AWI-GSA) 2015 WL 1062041, at *4, report and recommendation adopted (E.D. Cal., Oct. 29, 2015, No. 113CV0916AWIEJPPC) 2015 WL 6690042. Magistrate Judge Dennis L. Beck screened out a similar complaint, based on the lack of medical evidence that Plaintiff's health problems were caused by arsenic, and also because it appears that KVSP was in compliance with arsenic regulations at the time of his medical problems. Slaughter v. Biter (E.D. Cal., Dec. 2, 2014, No. 1:14CV00887 DLB PC) 2014

WL 6819501, at *3. See also Ford v. California (E.D. Cal., Apr. 2, 2013, No. 1:10-CV-00696-AWI) 2013 WL 1320807, at *4 ("The Court has screened Plaintiff's complaint and finds that it does not state any claims upon which relief may be granted under section 1983 or the Safe Drinking Water Act. Plaintiff's sole claim is that arsenic levels violated regulatory standards. Plaintiff's own exhibits indicate that arsenic levels did not rise to the level of endangering his health. The Court finds that this deficiency cannot be cured by further amendment. Plaintiff has alleged, at most, a violation of regulatory standards.").

Additionally, other courts have allowed similar claims to proceed past the pleading stage, only to grant summary judgment in favor of KVSP based on similar facts, albeit on a more fully developed record than here. For example, Magistrate Judge Sheila K. Oberto recommended granting summary judgment in favor of prison defendants, and District Judge Anthony W. Ishii adopted her recommendation, based on finding that there was no dispute of fact regarding the deliberate indifference claim. In relevant part, the Court explained:

> Plaintiff has not submitted any evidence demonstrating that the exposure to the levels of arsenic in KVSP's water, which ranged between 0.014 and 0.020 mg/L per the six notices posted, for twenty-seven months constituted an objectively serious risk of harm to his health; it is not enough to merely show that the levels exceeded the EPA's new MCL standard of 0.10 mg/L. *Cf. Wallis,* 70 F.3d at 1076 (stating it is uncontroverted that asbestos poses a serious risk to human health and citing statutes in which there was a Congressional finding that medical science has not established any safe minimum level of asbestos exposure) (quotation marks and citations omitted); *Carter,* 2015 WL 4322317, at *8–10 (finding triable issues of fact on objective element of asbestos exposure claim where there was evidence of government findings that medical science has not established any minimum level of exposure to asbestos, but finding no triable issues of fact on objective element of lead paint exposure claim). Regarding Plaintiff's opinion that the water was not safe, Plaintiff is not qualified, as a lay witness, to offer his own opinion that the arsenic levels were sufficiently high to create a substantial risk of serious harm to his health. Although Plaintiff submitted evidence demonstrating that he developed several warts and nodules, there is no evidence linking those growths to arsenic in the water at KVSP. Speculation that Plaintiff's medical conditions *could* be linked to the arsenic levels is not sufficient in the first instance, but here, Plaintiff did not submit any admissible evidence that even speculatively links the two, and he is not qualified to offer his own opinion on the issue, as it requires medical and/or toxicological expertise he does not possess. . . .
>
> Having considered Plaintiff's evidence and arguments, the Court finds that Plaintiff failed to produce any evidence demonstrating that [the] level of arsenic in

> KVSP's water presented a substantial risk of serious harm to his health. It is not enough to show merely that the arsenic levels exceeded the new MCL standard; and Plaintiff's inadmissible lay opinion on the matter cannot be used to establish that the water presented an objective risk of serious harm to his health as a matter of law. Plaintiff also failed to produce any evidence "that the risk of which he complains is not one that today's society chooses to tolerate." *Helling,* 509 U.S. at 35–36.

Nguyen v. Biter (E.D. Cal., Sept. 8, 2015, No. 1:11-CV-00809-AWI) 2015 WL 5232163, at *8–9.

The Court also sided with the prison defendant on the issue of deliberate indifference, explaining:

> Next, Plaintiff fails to make the requisite showing as to the subjective element of deliberate indifference. Plaintiff has shown that Defendant signed six notices regarding arsenic levels in KVSP's water exceeding the EPA's MCL standard but he has not demonstrated that Defendant knowingly disregarded a substantial risk of harm to his health. Bare knowledge of the fact that the arsenic levels were above the EPA's MCL standard is not sufficient. Indeed, the notices signed by Defendant disclaimed any emergency situation or a need to use alternative water sources, such as bottled water. Plaintiff's opinions that the water was dangerous and that Defendant knew it was dangerous but failed to take additional protective measures do not constitute admissible evidence supporting a finding of deliberate indifference. Further, there is no competent evidence that the elevated levels were dangerously high and constituted an obvious health risk. *Farmer,* 511 U.S. at 842; *Foster,* 554 F.3d at 814.

(Id. at *9).

Magistrate Judge Michael J. Seng reached the same conclusion in recommending granting Defendants' motion for summary judgment, which was subsequently adopted by District Judge Anthony W. Ishii, including the following analysis:

> The real issues in dispute here are whether the levels of arsenic (whether organic, inorganic, or a combination of the two) actually found in KVSP's drinking water and consumed by Plaintiff were dangerous and whether Plaintiff's health problems can be attributed to the arsenic. Rather than submit admissible evidence on either of these issues, Plaintiff makes conclusory statements that are not based on personal experience or professional expertise. Moreover, Plaintiff's lay opinion as to the cause of his symptoms is speculative and inconsistent with the qualified opinions from Dr. Geller. And, finally, Plaintiff's emotional distress related to a fear of future harm cannot serve as the basis of an Eighth Amendment claim absent a showing of physical injury. Plaintiff has simply failed to submit any competent evidence that his symptoms are related to arsenic consumption.
>
> Even assuming, *arguendo,* that Plaintiff had established that the levels of arsenic detected in KVSP's water were sufficiently serious to satisfy the Eighth Amendment's first prong and that he was harmed by it, there is no showing of deliberate indifference. Although Defendant was aware that the level of arsenic in

> prison water exceeded federal standards, the evidence does not suggests he knew of, and disregarded, a risk that consumption of that water posed a serious threat to inmate health. Rather, the undisputed facts establish that Defendant reasonably inquired of and relied upon on the medical expertise of KVSP's CME, Dr. Lopez, who in turn relied on the expert opinion of Dr. Geller, that the water was safe to drink. Indeed, Defendant himself drank the water. There is no deliberate indifference on these facts.
>
> Having thus examined the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff's entire case rests upon his speculation about the type of arsenic found in KVSP's drinking wells, the dangers of the arsenic-contaminated water at the levels found at KVSP, and the cause of his symptoms.

Johnson v. Cate (E.D. Cal., Sept. 10, 2015, No. 1:10-CV-00803-AWI) 2015 WL 5321784, at *11 (footnote omitted).

While recognizing that the standard at the motion to dismiss stage is different from summary judgment, this Court recommends granting Defendants' motion to dismiss in this case for reasons similar to those expressed by the above courts faced with similar facts. Although Plaintiff's complaint contains 190 pages of allegations and exhibits, it ultimately lack factual allegations that the arsenic in the water at KVSP posed a serious risk of harm or that Defendants acted with deliberate indifference in addressing that risk. Although levels exceeded the revised EPA standards for a certain amount of time, there is no evidence that the levels in KVSP's water posed a serious risk of harm. Merely being above standards is insufficient to establish such a serious risk of harm. Plaintiff's allegations regarding his own medical ailments fail to satisfy this element because they lack the critical link from any test or medical professional that Plaintiff suffered from an elevated arsenic level, or that any of his medical issues were associated with arsenic poisoning.

Moreover, there is no evidence of deliberate indifference on the part of defendants. Prison officials act with deliberate indifference when they know of and disregard an excessive risk to inmate health or safety, and there are no non-conclusory allegations showing that Defendants knew of and disregarded an excessive risk to inmate health. In fact, the notices provided by Plaintiff seem to indicate that prison officials did not believe that the elevated levels of arsenic posed an excessive risk. The notices do mention a potential risk if the exposure is long term, but, possibly in an attempt to mitigate this risk, a treatment plant was eventually installed. This may

have taken longer than Plaintiff would have liked, but it was ultimately completed. Additionally, there are no factual allegations establishing that the delay was due to any decision by any individual that deliberately ignored a serious risk to inmate health.

Given the Court's conclusion above, the Court need not address Defendants' argument regarding qualified immunity.

## VI. CONCLUSION AND RECOMMENDATIONS

Therefore, Defendants' motion to dismiss should be granted in full.

Accordingly, based on the foregoing, **IT IS HEREBY RECOMMENDED** that:

1) Defendants' motion to dismiss be granted in full;
2) The case be dismissed with prejudice; and
3) The Clerk of Court be directed to close this case.

These Findings and Recommendations will be submitted to the United States District Court Judge assigned to this action pursuant to the provisions of 28 U.S.C. § 636 (b)(1). Within **thirty (30) days** after being served with a copy of these Findings and Recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within **ten (10) days** after service of the objections. The parties are advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **December 14, 2016**

**/s/** Eric P. Grosjean
UNITED STATES MAGISTRATE JUDGE