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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY LEE O'BRIEN, Plaintiff-Appellant, v. CARLA HACKER-AGNEW, Warden, Warden; et al., Defendants-Appellees.	No. 18-16962 D.C. No. 2:17-cv-00166-GMS-DMF MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, Chief Judge, Presiding

Submitted January 15, 2019**

Before: TROTT, TALLMAN, and CALLAHAN, Circuit Judges.

Arizona state prisoner Terry Lee O'Brien appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging various claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Wilhelm v. Rotman*, 680 F.3d 1113, 1118 (9th Cir. 2012) (dismissal under 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1915A); *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (dismissal under 28 U.S.C. § 1915(e)(2)(B)(ii)). We affirm.

The district court properly dismissed as frivolous O'Brien's constitutional claims relating to the prison's alleged broadcasting of psychotic sounds because these claims lacked any arguable basis in law or fact. *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (under § 1915(e)(2), a 'frivolous' claim lacks an arguable basis either in law or in fact; "[the] term 'frivolous' . . . embraces not only the inarguable legal conclusion, but also the fanciful factual allegation").

The district court properly dismissed O'Brien's retaliation and deliberate indifference claims because O'Brien failed to allege facts sufficient to state a plausible claim. *See Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are to be construed liberally, a plaintiff must present factual allegations sufficient to state a plausible claim for relief); *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (elements of a retaliation claim in the prison context); *Toguchi v. Chung*, 391 F.3d 1051, 1057-58 (9th Cir. 2004) (elements of a deliberate indifference claim).

The district court did not abuse its discretion in denying O'Brien further leave to amend because amendment would have been futile. *See Gordon v. City of Oakland*, 627 F.3d 1092, 1094 (9th Cir. 2010) (setting forth standard of review and explaining that leave to amend may be denied because amendment would be

futile).

The district court did not abuse its discretion in denying O'Brien's motions to supplement the third amended complaint. *See Bias v. Moynihan*, 508 F.3d 1212, 1223 (9th Cir. 2007) (standard of review); *see also* D. Ariz. Loc. R. 3.4 ("All complaints and applications to proceed in forma pauperis by incarcerated persons must be . . . on forms approved by the Court and in accordance with the instructions provided with the forms . . . .").

The district court did not abuse its discretion in denying O'Brien's motion to take depositions as moot. *See Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003) (standard of review).

We reject as meritless O'Brien's contentions that the district court violated his due process rights and was deliberately indifferent to his safety.

We do not consider arguments raised for the first time on appeal, or matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009). We do not consider facts not presented to the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990).

All pending motions are denied.

AFFIRMED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Terry Lee O'Brien,

Plaintiff,

v.

Carla Hacker-Agnew, et al.,

Defendants.

No. CV 17-00166-PHX-GMS (DMF)

ORDER

On January 17, 2017, Plaintiff Terry Lee O'Brien, who was then confined in the Arizona State Prison Complex (ASPC)-Yuma,[1] filed a pro se civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed In Forma Pauperis. In an April 27, 2018 Order, the Court granted the Application to Proceed and dismissed the Complaint because Plaintiff had failed to state a claim. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On May 19, 2017, Plaintiff filed his First Amended Complaint. On July 14, 2017, he filed a Motion to Appoint Counsel. In a July 31, 2017 Order, the Court dismissed the First Amended Complaint for failure to state a claim, denied Plaintiff's Motion to Appoint Counsel, and gave Plaintiff 30 days to file a second amended complaint that cured the deficiencies identified in the Order.

[1] On February 5, 2018, Plaintiff filed a Notice of Change of Address indicating that he had been transferred to the Arizona State Prison-Kingman.

On August 24, 2017, Plaintiff filed a Second Amended Complaint. He subsequently filed a Motion for Injunctive Relief and to Supplement the Second Amended Complaint, a Motion for Appointment of Counsel, a Motion to Supplement the Second Amended Complaint, and a "Motion: Special Action Order." In a January 29, 2018 Order, the Court denied Plaintiff's Motions and dismissed the Second Amended Complaint for failure to comply with Rule 8 of the Federal Rules of Civil Procedure and Rule 3.4 of the Local Rules of Civil Procedure. Plaintiff was given 30 days to file a third amended complaint that cured the deficiencies identified in the Court's July 31, 2017 Order.

Between February 5, 2018, and May 10, 2018, Plaintiff filed a Motion to Supplement the Second Amended Complaint, a Third Amended Complaint (Doc. 27), a Motion for Preliminary Injunction and Temporary Restraining Order, an Amended Motion for Preliminary Injunction and Temporary Restraining Order, two Motions to Supplement the Third Amended Complaint with proposed supplemental material, and a Supplement to the Third Amended Complaint.

In a May 18, 2018 Order, the Court denied the Amended Motion for Preliminary Injunction and Temporary Restraining Order and denied the Motion to Supplement the Second Amended Complaint as moot. Plaintiff's Motions to Supplement the Third Amended Complaint were granted insofar as he was given 30 days to file a fourth amended complaint that both encompassed all claims for relief and complied with Local Rule of Civil Procedure 3.4. Plaintiff was advised that if he failed to file a fourth amended complaint within 30 days, the Third Amended Complaint would be screened as originally filed.

Plaintiff subsequently filed another Motion for Appointment of Counsel and a Notice of Appeal, in which he also requested reconsideration by this Court of the May 18, 2018 Order. In a June 8, 2018 Order, the Court denied the request for reconsideration and the Motion for Appointment of Counsel.

On June 18, 2018, Plaintiff filed a Motion for Depositions (Doc. 38). On June 20,

2018, he filed a "Notification" (Doc. 41). On August 22, 2018, the Ninth Circuit Court of Appeals affirmed the Court's May 18, 2018 Order denying preliminary injunctive relief. *See O'Brien v. Hacker-Agnew*, No. 18-16009 (9th Cir.), Doc. 10. On August 27, 2018, Plaintiff filed a "Second Notification" (Doc. 44). The Court will dismiss the Third Amended Complaint and this action.

I. Statutory Screening of Prisoner Complaints

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

A pleading 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) (emphasis added). While Rule 8 does not demand detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

"[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is 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.* "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Thus, although a plaintiff's specific factual allegations may be consistent with a constitutional claim, a court must assess whether there are other "more likely explanations" for a defendant's conduct. *Id.* at 681.

But as the United States Court of Appeals for the Ninth Circuit has instructed, courts must "continue to construe *pro se* filings liberally." *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). A "complaint [filed by a pro se prisoner] 'must be held to less stringent standards than formal pleadings drafted by lawyers.'" *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

II. Third Amended Complaint

In his Third Amended Complaint, Plaintiff asserts eleven counts, alleging "abuse or misuse of authority" in violation of his First, Fourth, Eighth, and Fourteenth Amendment rights. He names ASPC-Yuma Warden Carla Hacker-Agnew; Arizona Department of Corrections (ADC) Director Charles Ryan; Officer Rodriguez; Unknown ADC Officers; Corrections Officer III Torres; Corizon Psychiatrist Martin; Corizon Doctors Brisboy, Smalley, and Miller; and Corizon Associate Psychiatrist Valtierrra as Defendants. Plaintiff is seeking injunctive relief and compensatory and punitive damages.

In Count One, Plaintiff alleges that Defendant Ryan tacitly authorized, approved, or accepted the implementation of a "waveboarding" program[2] that exacerbated Plaintiff's psychological damage, schizophrenia, hallucinations, anxiety, emotional distress, paranoia, fixed/false beliefs, disorientation, preoccupation of the mind, and migraine headaches, and "neurological breakdown." (Doc. 27 at 5.)[3] Plaintiff claims that Ryan was aware of, or should have been aware of, his subordinates' "actions or inactions policy or customs of reckless endangerment caused" and the "devastating and overwhelming exacerbated effects" that the waveboarding program was having on Plaintiff. (*Id.*)

In Count Two, Plaintiff lodges similar allegations against Defendant Hacker-Agnew and claims that Hacker-Agnew accepted her subordinates' implementation of a

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[2] Elsewhere in his Third Amended Complaint, Plaintiff describes this program as the broadcasting of "instrumental undertones." (Doc. 27 at 10.)

[3] The citation refers to the document and page number generated by the Court's Case Management/Electronic Case Filing system.

waveboarding program rather than ending the program herself or reporting it to the proper authorities. (*Id.* at 6.) Plaintiff alleges that Hacker-Agnew would have heard the sounds of the program when she visited ASPC-Yuma's Cibola and La Paz Units. (*Id.*)

In Count Three, Plaintiff claims that Defendant Rodriguez and a non-party, Officer Avila, endangered Plaintiff by repeatedly stating that he is a "child molester, chomo or child pred[a]tor" in "an open dorm in front of one hundred twelve inmates." (*Id.* at 7.) In addition, Plaintiff claims that Rodriguez made several statements to him in retaliation for a lawsuit he had filed. (*Id.*) Specifically, Rodriguez allegedly told Plaintiff that he "best leave the yard," asked him, "Why don't you just run[?]," and warned him, "You best leave or else you'll find out." (*Id.*) As a result of Rodriguez's conduct, Plaintiff suffered humiliation, degradation, headaches, loss of sleep, extreme anxiety and remorse, emotional distress, anger, hostility, fear, depression, isolation, and loss of friends. (*Id.*)

In Count Four, Plaintiff alleges that on or about February 10, 2017, March 20, 2017, and April 20, 2017, an unknown ADC Officer threw a substance on him while he was sleeping. (*Id.* at 8.) On the last occasion, the officer "swiftly walked away, stumbled up the stairs and threw the cup in the trap . . . intimidating and provoking [Plaintiff]." Plaintiff claims that the Officer was retaliating against him for having filed a lawsuit. (*Id.*)

In Count Five, Plaintiff claims that Defendant Martin "abandoned" Plaintiff's mental health care for sixteen months and then, on January 12, 2018, attempted to involuntarily medicate Plaintiff at a psychotropic medication review board hearing. (*Id.* at 9.) According to Plaintiff, Martin and ten other individuals were ordered at the hearing to investigate the ADC's instrumental waveboarding program but, instead of doing so, they put Plaintiff on a bus to the Kingman Complex, thereby "easing the[ir] exposure to liability from their program." (*Id.*)

In Count Six, Plaintiff alleges that he saw a sergeant and PPS II Officer install four black boxes resembling wireless speakers or security devices in his dorm on September

25, 2016. (*Id.* at 10.) Two days later, Plaintiff began hearing "instrumental undertones." (*Id.*) Because other inmates did not hear the tones, Plaintiff blamed Defendant Martin, who later "abandoned" Plaintiff's mental health services. (*Id.*) On September 20, 2017, Plaintiff heard two ADC officers asking another officer over the phone, "Why isn't Terry reacting[?]" (*Id.*) On September 23, 2017, Plaintiff heard the same Officers state over the phone, "Why isn't Terry reacting? We are going to get in trouble for harassment." (*Id.*) Later on that day, he heard the officers say, "Terry isn't reacting, everyone else is, we need to get rid of those two they are filing too many lawsuits on our yard." (*Id.*) On September 27, 2017, Plaintiff heard the officers telling someone over the phone, "Terry's not going to react, we are all prepared to move forward with this program we're not going to stop it for him." (*Id.*) During these overheard conversations, the instrumental undertones were so "atrocious" that Plaintiff could not read, write, or think. As a result of the waveboarding program, Plaintiff has suffered exacerbated schizophrenia, persistent hallucinations, preoccupation of the mind, extreme emotional distress, fixed false beliefs, paranoia, disorientation, confusion, an inability to read and write normally, a loss of sleep, a neurological breakdown, excessive psychological damage and pain, persistent migraine headaches, and "torture." (*Id.*)

In Count Seven, Plaintiff claims that on September 20, 2017, he overheard Defendant Torres tell other inmates in his dorm, "Thank you all for your cooperation, Terry didn't react, it didn't work." (*Id.* at 12.) On October 1, 2017, Torres was allegedly transferred off the Cibola Unit, "most likely[] to ease liability." (*Id.*) On January 12, 2018, Defendant Martin attempted to involuntarily medicate Plaintiff at a psychotropic review board hearing attended by Torres and nine other individuals. (*Id.*) Plaintiff told the "main" psychiatrist that he had signed affidavits from other inmates who had heard instrumental undertones. (*Id.*) In addition, he shared stories of an inmate who had threatened to stab a fellow inmate because of the sound and an inmate who had gone to psychiatric lockdown as a result of the broadcasts. (*Id.*) Defendant Torres "said not one scintilla," however, because she "was in a culpable state of mind." (*Id.*) At the

conclusion of the hearing, the main psychiatrist refused to authorize involuntary medication and ordered that Plaintiff's allegations be investigated. (*Id.*) As a result of Torres's conduct, Plaintiff has suffered exacerbated schizophrenia, persistent hallucinations, fixed false beliefs, preoccupation of the mind, extreme anxiety and emotional distress, paranoia, psychological damage, migraine headaches, disorientation, confusion, loss of control, and a neurological breakdown.

In Counts Eight and Nine, Plaintiff alleges that Defendants Miller and Smalley "stonewalled" his liver cell carcinoma history during multiple telemed appointments, saying "not one scintilla about it" and failing to perform appropriate examinations. (*Id.* at 14, 15.) According to Plaintiff, Miller and Smalley "stonewalled 17 positive lab blood screening results for no just cause. . . . because of organizational demands more interested in cost containment and liability as opposed to a serious risk of terminal liver failure." (*Id.*) As a result of Miller's and Smalley's conduct, Plaintiff has allegedly suffered ongoing liver cell carcinoma, ongoing hepatitis, hepatic steatosis, hepatomegaly, abdominal cortex pain, loss of sleep, and extreme stress and emotional distress.

In Count Ten, Plaintiff alleges that Defendant Brisboy ignored Plaintiff's history of liver cell carcinoma when Brisboy "visual[l]y showed it to [Plaintiff] on Corizon[']s computer." (*Id.* at 16.) Brisboy was "aware that the computer only showed 5 instead of 24 blood lab results," but he "stonewall[ed Plaintiff's] liver cell carcinoma because of organizational demands more interested in cost containment and liability as opposed to terminal liver failure, health and safety." (*Id.*) Plaintiff further alleges that his medical record was missing x-rays and sonograms. As a result of Brisboy's conduct, Plaintiff suffered ongoing liver cell carcinoma, upper abdominal cortex pain, ongoing hepatic steatosis, hepatomegaly, hepatitis and 17 negative blood levels.

In Count Eleven, Plaintiff claims that between September 2016 and October 2017, Defendant Valtierra ignored the impact that the ADC's waveboarding program was having on Plaintiff's mental health. (*Id.* at 17.) According to Plaintiff, after Valtierra was made aware of affidavits in which inmates attested to hearing instrumental

undertones on August 22, 2017, she told another employee in the hallway, "[W]e fucked the wrong person, now we[']re in trouble." (*Id.*) Plaintiff claims that Valtierra was subsequently transferred off the unit "most likely to avoid liability." (*Id.*) As a result of Valtierra's conduct, Plaintiff has suffered excessive psychological damage, exacerbated schizophrenia, preoccupation of the mind, extreme anxiety and emotional distress, disorientation, and a neurological breakdown. (*Id.*)

III. Failure to State a Claim

To prevail in a § 1983 claim, a plaintiff must show that (1) acts by the defendants (2) under color of state law (3) deprived him of federal rights, privileges or immunities and (4) caused him damage. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1163-64 (9th Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d 1278, 1284 (9th Cir. 1994)). In addition, a plaintiff must allege that he suffered a specific injury as a result of the conduct of a particular defendant and he must allege an affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976).

Although pro se pleadings are liberally construed, *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), conclusory and vague allegations will not support a cause of action. *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). Further, a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pleaded. *Id.*

A. Waveboarding Claims (Counts One, Two, Six, Seven, and Eleven)

Pursuant to 28 U.S.C. § 1915A(b)(1), the Court must dismiss a case proceeding in forma pauperis if the Court determines that the action or complaint is "frivolous." When evaluating claims under this standard, the Court "is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations." *Denton v. Hernandez*, 504 U.S. 25, 32 (1992).

"[A] court may dismiss a claim as factually frivolous only if the facts alleged are 'clearly baseless,' a category encompassing allegations that are 'fanciful,' 'fantastic,' and

'delusional.'" *Id.* at 32-33 (citations omitted). "[A] finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible." *Id.* at 33. The Court finds that Plaintiff's claims regarding a waveboarding program are factually frivolous and subject to dismissal under § 1915A(b)(1). Alternatively, the Court, drawing on its judicial experience and common sense, finds these allegations implausible under *Iqbal.* 556 U.S. at 1950. Accordingly, the Court will dismiss Counts One, Two, Six, Seven, Eleven.

B. Threat to Safety (Count Three)

To state a claim for a threat to safety under the Eighth Amendment, an inmate must allege facts to support that he was incarcerated under conditions posing a substantial risk of harm and that prison officials were "deliberately indifferent" to those risks. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To adequately allege deliberate indifference, a plaintiff must allege facts to support that a defendant knew of, but disregarded, an excessive risk to inmate safety. *Id.* at 837. That is, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* (emphasis added). Deliberate indifference is a higher standard than negligence or lack of ordinary due care for the prisoner's safety. *Id.* at 835.

A supported allegation that a correctional official made statements intending to incite inmates to attack another inmate may state a claim under the Eighth Amendment. *See, e.g., Northington v. Jackson*, 973 F.2d 1518, 1525 (10th Cir. 1992) (allegation that officer intended to harm inmate by inciting inmates to beat him may constitute an excessive force claim; if inmate is able to prove such intent, "it is as if the guard himself inflicted the beating as punishment"); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1139 (9th Cir. 1989) (labeling of plaintiff as a "snitch" in presence of other inmates was material to § 1983 claim for denial of right not to be subjected to physical harm). Here, however, Plaintiff has failed to allege sufficient facts to support a claim against Rodriguez for labeling him a child molester. Plaintiff does not describe where Rodriguez

was in relation to the other inmates when she made these statements. Nor does he allege any other facts to show that Rodriguez intended for the other inmates to hear her comments or show that the comments were, in fact, overheard.

To the extent Plaintiff is attempting to seek recourse for threats purportedly made by Rodriguez, "verbal harassment or abuse . . . is not sufficient to state a constitutional deprivation." *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (internal citation and quotation marks omitted); *see also McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir. 1983) (mere threatening language and gestures do not, even if true, amount to constitutional violations); *Johnson v. Glick*, 481 F.2d 1028, 1033 n.7 (2d Cir. 1973) (the use of words, no matter how violent, does not constitute a § 1983 violation). Accordingly, Plaintiff has failed to state a claim against Defendant Rodriguez in Count Three and this count will be dismissed.

C. First Amendment Retaliation (Counts Three and Four)

A viable claim of First Amendment retaliation contains 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 (or that the inmate suffered more than minimal harm) and (5) did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *see also Hines v. Gomez*, 108 F.3d 265, 267 (9th Cir. 1997) (retaliation claims requires an inmate to show (1) that the prison official acted in retaliation for the exercise of a constitutionally protected right, and (2) that the action "advanced no legitimate penological interest"). The plaintiff has the burden of demonstrating that his exercise of his First Amendment rights was a substantial or motivating factor behind the defendants' conduct. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989).

Plaintiff fails to allege any facts to support his claim of retaliatory intent on the part of Rodriguez or the unknown ADC Officer. It is not even clear from the Third

Amended Complaint that these individuals were aware of the lawsuit that allegedly formed the basis for their actions. In addition, Plaintiff has failed to allege sufficient facts to show that the conduct in question caused his First Amendment rights to be chilled or that it caused him to suffer more than minimal harm. Accordingly, Plaintiff has failed to state a retaliation claim in Counts Three and Four, and these counts will be dismissed.

D. Mental Health and Medical Care Claims (Counts Five, Eight, Nine, Ten)

Not every claim by a prisoner relating to inadequate medical or mental health treatment states a violation of the Eighth Amendment. "To establish unconstitutional treatment of a medical condition, including a mental health condition, a prisoner must show deliberate indifference to a 'serious' medical need." *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994); *accord Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

"Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004). To act with deliberate indifference in the medical context, a prison official must both know of and disregard an excessive risk to inmate health; "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Deliberate indifference may be shown by a purposeful act or failure to respond to a prisoner's pain or possible medical need and harm caused by the indifference. *Jett*, 439 F.3d at 1096. Deliberate indifference may also be shown when a prison official intentionally denies, delays, or interferes with medical treatment or by the way prison doctors respond to the prisoner's medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Jett*, 439 F.3d at 1096.

Deliberate indifference is a higher standard than negligence or lack of ordinary due care for the prisoner's safety. *Farmer*, 511 U.S. at 835. "Neither negligence nor gross negligence will constitute deliberate indifference." *Clement v. California Dep't of Corr.*, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*,

622 F.2d 458, 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or "medical malpractice" do not support a claim under § 1983). "A difference of opinion does not amount to deliberate indifference to [a plaintiff's] serious medical needs." *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to state a claim against prison officials for deliberate indifference. *See Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial. The action must rise to a level of "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 105.

The allegations in Count Five are too vague and conclusory to state a claim against Defendant Martin based on deliberate indifference. Plaintiff states that Martin "abandoned" his mental health treatment, but he does not allege any facts regarding the nature of this abandonment. He does not describe how long he had been receiving treatment from Martin, what the nature of that treatment was, whether that treatment ceased, whether he received treatment from others at relevant times, whether he attempted to contact Martin after she abandoned him, and what response he received from her, if any. In the absence of such facts, Plaintiff cannot state a claim under the Eighth Amendment for deficient mental health treatment.

Plaintiff's allegations in Counts Eight, Nine, and Ten are similarly deficient. Plaintiff repeatedly states that Defendants "stonewalled" his liver cell carcinoma history, but he does not allege any underlying facts to show how Defendants Miller, Smalley, and Brisboy became aware of his condition, what each of these Defendants did or failed to do, and how each Defendant's conduct contributed to his injury. It is not even clear from the Third Amended Complaint whether Plaintiff is currently suffering from a liver condition, what that condition is, and whether he is receiving any treatment for that condition. Accordingly, Plaintiff has failed to state a claim in Counts Eight, Nine, and Ten, and these counts will be dismissed.

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IV. Dismissal Without Leave to Amend

Because Plaintiff has failed to state a claim in his Third Amended Complaint, the Court will dismiss his Third Amended Complaint. "Leave to amend need not be given if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). The Court's discretion to deny leave to amend is particularly broad where Plaintiff has previously been permitted to amend his complaint. *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). Repeated failure to cure deficiencies is one of the factors to be considered in deciding whether justice requires granting leave to amend. *Moore*, 885 F.2d at 538.

Plaintiff has made multiple attempts to craft a viable complaint and appears unable to do so despite specific instructions from the Court. The Court finds that further opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss Plaintiff's Third Amended Complaint without leave to amend.

IT IS ORDERED:

(1) Plaintiff's Motion for Taking of Depositions (Doc. 38) is **denied** as moot.

(2) Plaintiff's Third Amended Complaint (Doc. 27) and this action are **dismissed** for failure to state a claim, and the Clerk of Court must enter judgment accordingly.

(3) The Clerk of Court must make an entry on the docket stating that the dismissal for failure to state a claim may count as a "strike" under 28 U.S.C. § 1915(g).

(4) The docket shall reflect that the Court, pursuant to 28 U.S.C. § 1915(a)(3) and Federal Rules of Appellate Procedure 24(a)(3)(A), has considered whether an appeal of this decision would be taken in good faith and finds Plaintiff may appeal in forma pauperis.

Dated this 25th day of September, 2018.

G. Murray Snow
Chief United States District Judge