UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 19 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KAVIN MAURICE RHODES,

Plaintiff-Appellant,

v.

PETER C. SWARTH, Attorney, in individual capacity; et al.,

Defendants-Appellees.

No. 18-56492

D.C. No. 2:17-cv-05211-JGB-KK
Central District of California,
Los Angeles

ORDER

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

A review of the record, the response to the court's November 26, 2018 order, and the opening brief received on February 15, 2019, indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating standard).

Accordingly, we summarily affirm the district court's judgment.

All other pending motions are denied as moot.

AFFIRMED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KAVIN MAURICE RHODES,

Plaintiff,

v.

PETER C. SWARTH, ET AL.,

Defendants.

Case No. CV 17-5211-JGB-KK

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Second Amended Complaint, the relevant records on file, and the Report and Recommendation of the United States Magistrate Judge. The Court has engaged in de novo review of those portions of the Report to which Plaintiff has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

Moreover, in light of this Order dismissing the action with prejudice and without leave to amend, there is no operative complaint or pending action. Hence, Plaintiff's request for a preliminary injunction, dkt. 42, is DENIED. Coalition for Econ. Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997) (denying preliminary injunction where plaintiffs failed to show a likelihood of success on their underlying civil rights complaint).

IT IS THEREFORE ORDERED that (1) Judgment be entered dismissing Plaintiff's Second Amended Complaint with prejudice and without leave to amend, and (2) Plaintiff's request for a preliminary injunction is DENIED.

Dated: September 25, 2018

HONORABLE JESUS G. BERNAL
United States District Judge

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KAVIN MAURICE RHODES, Plaintiff, v. PETER C. SWARTH, ET AL., Defendant(s).	Case No. CV 17-5211-JGB-KK JUDGMENT

Pursuant to the Order Accepting Findings and Recommendation of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that Plaintiff's Second Amended Complaint is dismissed with prejudice and without leave to amend.

Dated: September 25, 2018

HONORABLE JESUS G. BERNAL
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KAVIN MAURICE RHODES, Plaintiff, v. PETER C. SWARTH, et al., Defendants.	Case No. CV 17-5211-JGB (KK) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to United States District Judge Jesus G. Bernal pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

SUMMARY OF RECOMMENDATION

Kavin Maurice Rhodes ("Plaintiff"), a state inmate proceeding pro se and in forma pauperis, filed a Second Amended Complaint ("SAC") alleging civil violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") pursuant 18 U.S.C. §§ 1961-1968. ECF Docket No. ("Dkt.") 31, SAC. Plaintiff alleges numerous individuals, including the over sixty named defendants, have engaged in a massive RICO conspiracy from 2014 to present day. Id. After

screening the SAC and providing Plaintiff with multiple opportunities to correct pleading deficiencies the Court previously identified, the Court recommends dismissing the SAC with prejudice and without leave to amend.

II.

FACTUAL ALLEGATIONS

On June 26, 2017, Plaintiff constructively filed[1] a civil RICO Complaint against fifty-eight defendants in their individual capacity for "violations of Plaintiff's constitutional and statutory rights under the color of state law." See Dkt. 1, Compl. While the specific allegations and details of the Complaint were indecipherable, Plaintiff alleged a wide-ranging civil RICO conspiracy among a state court judge, various state and federal prosecutors and defense attorneys, as well as correctional officers, wardens, litigation coordinators, and law librarians at Kern Valley State Prison and Pelican Bay State Prison. Id.

On November 13, 2017, the Court dismissed the Complaint with leave to amend for failure to comply with Federal Rule of Civil Procedure 8 and other deficiencies warranting dismissal. Dkt. 13.

On December 3, 2017, Plaintiff constructively filed a First Amended Complaint ("FAC") again alleging a wide-ranging civil RICO conspiracy against fifty-eight defendants[2] and appeared to add allegations of constitutional due process and equal protection violations pursuant to 42 U.S.C. § 1983 ("Section 1983") and Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). Dkt. 19, FAC.

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[1] Under the "mailbox rule," when a pro se inmate gives prison authorities a pleading to mail to court, the court deems the pleading constructively "filed" on the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010).

[2] Plaintiff replaced ten of the named defendants from the original Complaint with the federal public defenders who had been appointed to assist him in his federal habeas action, county counsel, a deputy district attorney, the program administrator for the Los Angeles County Bar Association, custodians of records for the Los Angeles Police Department, and the president of the California State Bar. FAC.

On January 3, 2018, the Court dismissed the FAC with leave to amend for failure to comply with Federal Rule of Civil Procedure 8. Dkt. 21.

On March 6, 2018, Plaintiff constructively filed the instant SAC. Dkt. 31. The SAC is 72 pages long, and once again alleges a wide-ranging civil RICO conspiracy against sixty-six named defendants, including the majority of the defendants named in the FAC.[3] Dkt. 31, SAC. Plaintiff subsequently filed four supplemental pleadings seeking to add the following defendants: Kern County Superior Court Officials, Kern County Superior Court Lawyers, Xavier Becerra, N. Sandquest, and T. Cromwell. See dkts. 32, 33, 36, 38.

In the SAC, Plaintiff alleges a vast conspiracy aimed at "intimidat[ing] Plaintiff to abate in his plight to prove his innocence" involving various individuals, including state court judges, private attorneys, prosecutors, custodians of records, a mail room captain, California Department of Corrections and Rehabilitation ("CDCR") officials, correctional officers, and law librarians. SAC at 70. Plaintiff claims the violations were conducted "at the direction of Los Angeles Superior Court officials, and lawyers, and federal public Defenders." Id. at 2. Plaintiff also appears to allege constitutional retaliation, due process, and equal protection violations. Id. at 51, 54, 68.

Plaintiff seeks injunctive relief against defendants Judge Ohta, Kernan, Allison, Robertson, and Anderson "for the return of all his personal and legal

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[3] The following named defendants are hereinafter collectively referred to as "Defendants": Hon. Sam Ohta, Peter C. Swarth, Antonio J. Bestard, Tinsley, Santiago, Lt. C. Lesniak, [FNU] Bowen, Sgt. J. Anderson, Lt. Sandoval, Lt. M. Stewart, Sgt. P. Chanello, Sgt. Martinez, Sgt. Rodriguez, C/O Dyer, Lt. P. Denny, R. Lazano, Babcock, Leyva, C. Rios, Sgt. Nuckles. Lt. Fitzpatrick, Lt. Ostrander, Lt. Betzinger, V. Benivadias, B. Cope, [FNU] Hunter, B. Valdez, Sgt. Fehlman, C. Wincewicz, Jeffery Beard, Christain Pfieffer, Robert Barton, Scott Kernan, Kathleen Allison, P. Melton, Sgt. Anderson, E. Williams, B. Howe, S. Mendoza, A. Benafield, Valdez, Sgt. Davis, C. Gonzales, N. Bramucci, J.D. Smith, B. Buckhorn, J. Ryan, C.E. Ducart, C. Parry, Jim Robertson, Jackie Lacey, Tom Homles, Eugena Brown, John S. Crouchley, Idan Irvy, Lana Choi, Chung Cho, Miarissa Kessler, Cephas Sund, James Pattern Fox, Raymond J. Fuentes, Sgt. Silva, A. Loza, A. Lampley, Lt. McBride, and T. Onley. The Court adopts the spelling of Defendants' names from the Court's CM/ECF docketing system.

property"; against defendant Lacey "permitting a criminal investigation"; against the State Attorney General to remove defendant Irvy as Plaintiff's habeas counsel and to "disclose the nature of the relationship between himself and Hector Becerra"; against the State Bar of California "permitting a proper investigation into Plaintiff's allegations of attorney misconduct"; against the U.S. Department of Justice to investigate the "racketeering practices"; and against all judicial defendants and CDCR for unspecified relief. Id. at 70. Additionally, Plaintiff seeks trial by jury and $100,000 from each defendant "individually and collectively." Id. Plaintiff further seeks "the forfeiture of State Bar Cards, from all attorneys proven to have used the privilege of the practice of law to deprive Plaintiff of his rights." Id.

III.

STANDARD OF REVIEW

As Plaintiff is proceeding in forma pauperis, the Court must screen the SAC and is required to dismiss the case at any time if it concludes the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); see Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998).

In determining whether a complaint fails to state a claim for screening purposes, the Court applies the same pleading standard from Rule 8 of the Federal Rules of Civil Procedure ("Rule 8") as it would when evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012). A complaint may be dismissed for failure to state a claim "where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." Zamani v. Carnes, 491 F.3d 990, 996 (9th Cir. 2007). In considering whether a complaint states a claim, a court must accept as true all of the material factual allegations in it. Hamilton v. Brown, 630 F.3d 889, 892-93 (9th Cir. 2011). However, the court need not accept as true

"allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008). Although a complaint need not include detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Cook v. Brewer, 637 F.3d 1002, 1004 (9th Cir. 2011) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The complaint "must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

"A document filed pro se is 'to be liberally construed,' and a 'pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.'" Woods v. Carey, 525 F.3d 886, 889-90 (9th Cir. 2008). However, liberal construction should only be afforded to "a plaintiff's factual allegations," Neitzke v. Williams, 490 U.S. 319, 330 n.9, 109 S. Ct. 1827, 104 L. Ed. 2d 339 (1989), and the Court need not accept as true "unreasonable inferences or assume the truth of legal conclusions cast in the form of factual allegations," Ileto v. Glock Inc., 349 F.3d 1191, 1200 (9th Cir. 2003).

If the court finds the complaint should be dismissed for failure to state a claim, the court has discretion to dismiss with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1126-30 (9th Cir. 2000). Leave to amend should be granted if it appears possible the defects in the complaint could be corrected, especially if the plaintiff is pro se. Id. at 1130-31; see also Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995). However, if, after careful consideration, it is clear a complaint cannot be cured by amendment, the court may dismiss without leave to amend. Cato, 70 F.3d at 1107-11; see also Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009).

IV.

DISCUSSION

A. THE SAC FAILS TO COMPLY WITH THE PLEADING REQUIREMENTS OF RULE 8

1. Applicable Law

Under Rule 8, a complaint must contain a "short and plain statement of the claim showing the pleader is entitled to relief," and "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(a), (d). "[T]he 'short and plain statement' must provide the defendant with 'fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005). "Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." Bautista v. L.A. Cty., 216 F.3d 837, 841 (9th Cir. 2000).

As the Supreme Court has held, Rule 8(a) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). ~~Plaintiff's~~ A complaint must contain enough facts to "state a claim to relief that is plausible on its face," allowing "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678.

Rule 8 "has been held to be violated by a pleading that was needlessly long, or a complaint that was highly repetitious, or confused, or consisted of incomprehensible rambling." Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058-59 (9th Cir. 2011) (discussing cases in which the Ninth Circuit affirmed Rule 8 dismissals); see also Nevijel v. N. Coast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981) (affirming dismissal with prejudice of a first amended complaint that "was 23 pages long with 24 pages of addenda, named additional defendants

without leave of court, and was equally as verbose, confusing and conclusory as the initial complaint"); Corcoran v. Yorty, 347 F.2d 222, 223 (9th Cir. 1965) (affirming dismissal of second amended complaint that was "so verbose, confused and redundant that its true substance, if any, is well disguised"). Moreover, a complaint may be dismissed for violating Rule 8 even if "a few possible claims" can be identified and the complaint is not "wholly without merit." McHenry v. Renne, 84 F.3d 1172, 1177-79 (9th Cir. 1996) (stating that Rule 8's requirements apply "to good claims as well as bad" and affirming the dismissal of a complaint under Rule 8 for being "argumentative, prolix, replete with redundancy, and largely irrelevant"). Complaints that fail to comply with Rule 8 "impose unfair burdens on litigants and judges" who "cannot use [such] complaint[s]" and "must prepare outlines to determine who is being sued for what." Id. at 1179-80.

2. Analysis

While the length of the SAC and supplemental filings suggests Plaintiff has invested time into drafting the pleadings, the SAC still fails to comply with Rule 8. Notwithstanding the Court's exhortations to limit the length and complexity of his claims, Plaintiff's SAC remains as confusing as the previous versions of his complaints. McHenry, 84 F.3d at 1177; Nevijel, 651 F.2d at 674. Plaintiff has now had two opportunities to amend the pleadings to comply with Rule 8. Nevertheless, he has again filed a complaint that does not contain a short and plain statement of his claims showing he is entitled to relief, and does not provide the defendants fair notice of their allegedly wrongful acts.

First, the SAC and the supplemental briefs fail to "state a claim to relief that is plausible on its face," and do not permit "the court to draw the reasonable inference" that Defendants are liable for the alleged acts. Iqbal, 556 U.S. at 678. Plaintiff alleges an ever-growing conspiracy involving every person who has ever been associated with any civil and criminal litigation regarding Plaintiff. The sheer scope of the alleged conspiracy is so vague and wide-ranging – with the conclusory

"purpose" of "intimidat[ing] Plaintiff to abate in his plight to prove his innocence" – that it "rise[s] to the level of the irrational or the wholly incredible". See SAC at 70; Denton v. Hernandez, 504 U.S. 25, 33, 112 S. Ct. 1728, 1733, 118 L. Ed. 2d 340 (1992) (holding "a finding of factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible").

Second, despite the Court's multiple admonishments to Plaintiff to comply with Rule 8, the SAC suffers from the same deficiencies outlined in this Court's prior dismissal orders. See, e.g., dkt. 21 at 8 (directing Plaintiff to avoid "random, unsupported, and implausible allegations"). The SAC is argumentative, excessively long, confusing, and contains lengthy and irrelevant contentions. See McHenry, 84 F.3d at 1177. The digressions are remarkable and are interwoven throughout the SAC. Thus, this is not a case in which the Court could "simply strike the surplusage from the [complaint]." Hearns v. San Bernardino Police Dep't, 530 F.3d 1124, 1132 (9th Cir. 2008).

Moreover, even without such digressions, Plaintiff's claims would not be clear. Under each of his thirty-six claims, Plaintiff mixes multiple legal citations, conclusions, demands, and predicate acts. For example, under "Claim 4," Plaintiff writes the following:

> Defendants Bowen, Tinsley, and Santiago, conspired with Attorney General Noah P. Hill (not named as a defendant) to deny Plaintiff access to case law, to demonstrate that Hill's citation to People v. Carson, (2005) 35 Cal.4th 1, 12-13, fn. 3 & 4, was false, in his claim that Plaintiff's receipt of the newly discovered evidence of witness criminal histories provided by GiGi Gordon in 2011, was in the version of the murder book provided to Plaintiff pretrial in 1988, while in pro per. Needed to oppose Hill's Opposition Motion in case Rhodes v. Biter, Case No. 14-70204 (9th Cir. 2014) in federal court. And is the

obstruction of justice. 18 U.S.C. §§ 1512(c)(2), 1519, 1962(d). Predicate Act Five. And is First Amendment retaliation.

SAC at 31. Under "Claim 6," Plaintiff writes:

> Plaintiff makes the allegation, that Kern Valley State Prison defendants, along with a corrupt Los Angeles Superior Court Judge Sam Ohta, are very likely responsible for the deaths of GiGi Gordon, Alberto Luper, Anthony Smith, and Hyron Tucker, to include the death of an Hispanic Prisoner on Facility-A at Kern Valley State Prison, as a ruse to justify having Plaintiff shot and killed, during the pendact [sic] of the RICO suit Rhodes v. Gordon, Case No. 2:12-cv-02863-JGB (DTB), in which they were defendants, to render that suit moot. 18 U.S.C. §§ 1961(A)(G), 1961(5), and 1962(d). Plaintiff entitled to a chance at discovery to develop the factual basis of this claim, before dismissal. That which at the pleading state must be deemed true.

SAC at 33. In another example, under "Claim 27," Plaintiff writes:

> Defendant Crouchley's conspiring with Los Angeles District Attorney Jackey Lacey, to deny Plaintiff his liberty interest in the newly enacted Cal. Penal Code § 141, and thus police protection, in violation of equal protection rights of the 5th and the 14th Amendment. As well as, having become complicit in the Court's denial of discovery rights, without objection to deprive Plaintiff of appellate review. In his continued conspiracy to Obstruct Justice. 18 U.S.C. §§ 1512(c)(2), 1519. And the conspiracy to violate RICO. 18 U.S.C. § 1962(d). Through the commission of Mail Fraud. 18 U.S.C. § 1341. Predicate Acts Thirty-Five and Thirty Six. From which Crouchley is not immune. And is Malpractice on Crouchley's behalf. Cal. Code of Civil P. § 340.6(a). To which Plaintiff ask the Court to exercise

supplemental jurisdiction over Plaintiff's state law claims. 28 U.S.C. § 1367(a).

SAC at 58. It is, therefore, impossible to determine from the SAC what each defendant allegedly did and what information Defendants might be compelled to provide in discovery. See Bautista, 216 F.3d at 841.

Unclear pleadings such as the SAC, "leav[e] it to the Court to figure out what the full array of [Plaintiff's] claims is and upon what federal law, and upon what facts, each claim is based." Little v. Bava, No. CV 13-0373-PA (RZ), 2013 WL 436018, at *3 (C.D. Cal. Feb. 1, 2013). "Neither the court nor the defendants should be compelled to cull through pages of rambling narrative, argument and needless digression to discover the factual bases for [Plaintiff's] claims." Jacobson v. Shwarzenegger, 226 F.R.D. 395, 397 (C.D. Cal. 2005). Ultimately, the SAC's failure to comply with Rule 8 prevents this Court, and Defendants, from deciphering the factual and legal basis for each defendants' alleged liability. See Clayburn v. Schirmer, 2008 WL 564958, at *4 (E.D. Cal. Feb. 28, 2008) ("The court (and any defendant) should be able to read and understand Plaintiff's pleading within minutes." (citing McHenry, 84 F.3d at 1177)). Accordingly, the SAC violates Rule 8 and must be dismissed.

B. THIS ACTION SHOULD BE DISMISSED WITH PREJUDICE FOR FAILURE TO OBEY COURT ORDERS

1. Legal Standard

Under Federal Rule of Civil Procedure 41(b), a district court has authority to dismiss a complaint with prejudice "for failure to comply with a court's order to amend the complaint to comply with Rule 8." McHenry, 84 F.3d at 1177 (citation omitted); see also Slack v. McDaniel, 529 U.S. 473, 489, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Before dismissing a case, a court must consider the following factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4)

the public policy favoring the disposition of cases on their merits; and (5) the availability of less drastic sanctions." Omstead v. Dell, Inc., 594 F.3d 1081, 1084 (9th Cir. 2010) (citation and internal quotation marks omitted).

"These factors are not a series of conditions precedent before the judge can do anything, but a way for a district judge to think about what to do." In re PPA Products Liability Litigation, 460 F.3d 1217, 1226 (9th Cir. 2006) (citation and internal quotation marks omitted). "[W]here a court order is violated, factors 1 and 2 support sanctions and 4 cuts against case-dispositive sanctions, so 3 and 5, prejudice and availability of less drastic sanctions, are decisive." Valley Eng'rs, Inc. v. Electric Eng'g Co., 158 F.3d 1051, 1057 (9th Cir. 1998) (citation omitted). "[F]actor 5 involves consideration of three subparts: whether the court explicitly discussed alternative sanctions, whether it tried them, and whether it warned the recalcitrant party about the possibility of dismissal." Id. (citation omitted).

2. Application

The first two factors – the public's interest in expeditious resolution of litigation and the Court's need to manage its docket – weigh strongly in favor of dismissal with prejudice. See id. In each of its two prior orders of dismissal with leave to amend, the Court gave Plaintiff specific instructions to comply with Rule 8. See Dkts. 13, 21. Notwithstanding those instructions, each complaint has fallen well short of the requirements of Rule 8. Thus, there is no reason to believe Plaintiff would comply with Rule 8 if he were allowed to file a third amended complaint. In addition, Plaintiff's "vexatious noncompliance" with Rule 8 has hindered the Court's ability to move this case toward disposition. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992) (finding the first two factors strongly supported dismissal where the case had "consumed large amounts of the court's valuable time").

The third factor – risk of prejudice to defendants – also weighs in favor of dismissal with prejudice. By repeatedly refusing to comply with the Court's

orders, Plaintiff has unreasonably delayed the prosecution of this action, which creates a presumption the defendants have been prejudiced. In re Eisen, 31 F.3d 1447, 1452-53 (9th Cir. 1994). Moreover, nothing suggests this presumption is unwarranted in this case.

The fourth factor – public policy favoring disposition of cases on their merits – weighs against dismissal with prejudice. Valley Eng'rs, 158 F.3d at 1057. This factor alone, however, is not sufficient to outweigh the other factors. See Ferdik, 963 F.2d at 1263 ("Even if [two factors] both weighed against dismissal, they would not outweigh the other three factors that strongly support dismissal here.") (citation omitted).

The fifth factor – availability of less drastic sanctions – weighs strongly in favor of dismissal. The Court has given Plaintiff two opportunities to amend his complaint, with instructions to state his claims clearly and concisely. Dkts. 13, 21. This less drastic sanction of dismissal with leave to amend has failed, as each amended complaint continues to violate Rule 8. See Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1072 (9th Cir. 2008) ("[T]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint.") (citation and internal quotation marks omitted). The Court has tried less drastic sanctions and warned Plaintiff about the possibility of dismissal on two prior occasions. Moreover, in the most recent Order Dismissing the First Amended Complaint with leave to amend, the Court explicitly warned Plaintiff it would recommend dismissal with prejudice if the SAC failed to remedy the deficiencies in the FAC. Dkt. 21 at 11. Thus, the fifth factor weighs strongly in favor of dismissal with prejudice.

As discussed, the Court finds only the fourth factor – public policy favoring disposition of cases on their merits – weighs against dismissal in this case. All other factors weigh strongly in favor of dismissal with prejudice for failure to follow the

Court's orders. Hence, under these circumstances, further leave to amend is not warranted, and this action should now be dismissed with prejudice.

VI.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED the District Court issue an Order: (1) accepting this Report and Recommendation; (2) dismissing the SAC without leave to amend; and (3) directing Judgment be entered dismissing this action with prejudice.

Dated: August 6, 2018

HONORABLE KENLY KIYA KATO
United States Magistrate Judge

B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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MOLLY C. DWYER, CLERK
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KAVIN MAURICE RHODES,

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PETER C. SWARTH, Attorney, in individual capacity; et al.,

Defendants-Appellees.

No. 18-56492

D.C. No. 2:17-cv-05211-JGB-KK
Central District of California,
Los Angeles

ORDER

Before: McKEOWN, BYBEE, and OWENS, Circuit Judges.

We treat Rhodes's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 18) as a motion for reconsideration and motion for reconsideration en banc.

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.