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UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

FILED JAN 3 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KEVIN DONAVON ATKINSON,
Plaintiff-Appellant,

v.

UNITED STATES GOVERNMENT
Defendant-Appellate.

No. 16-55146

D.C. No. 3:14-cv-
00016-JLS-JMA

ORDER

Before: THOMAS, Chief Judge, and LEAVY and
SILVERMAN, Circuit Judges

The Full Court has ben advised of the petion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R App. P. 35.

Atkinson's petion for rehearing en banc (Docket Enty No. 17) is denied. No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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No. 16-55146

D.C. No. 3:14-cv-
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MEMORANDUM*

Appeal from the United States District Court for the
Southern District of California
Janis L. Sammartino, District Judge, Presiding

Submitted May 24, 2017**

Before: THOMAS, Chief Judge, and LEAVY and
SILVERMAN, Circuit Judges

*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).

Kevin Donavon Atkinson appeals pro se from the district court's judgment dismissing his Federal Tort Claims Act action alleging negligent infliction of emotional distress and intentional infliction of emotional distress arising out of treatment provided at a Veteran's Affairs health center. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under Fed. R. Civ. P. 12(b)(6). *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010). We affirm.

The district court properly dismissed Atkinson's claim for negligent infliction of emotional distress because Atkinson failed to establish that defendant owed him a duty of care. *See Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 770 P.2d 278, 281 (Cal. 1989) (setting forth elements of a negligent infliction of emotional distress claim under California law); *Burgess v. Superior Court*, 831 P.2d 1197, 1200-03 (Cal. 1992) (discussing duty of care).

The district court properly dismissed Atkinson's claim for intentional infliction of emotional distress because Atkinson failed to establish that defendant's conduct was extreme and outrageous conduct. *See Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 819 (Cal. 1993) (discussing elements of an intentional infliction of emotional distress claim under California law).

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN DONAVON ATKINSON, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

Case No.: 14-CV-16 JLS (JMA)

ORDER: (1) GRANTING DEFENDANT S
MOTION TO DISMISS PLAINTIFF S THIRD
AMENDED COMPLAINT, AND DISMISSING
WITH PREJUDICE PLAINTIFF'S THIRD
AMENDED COMPLAINT

(ECF Nos. 39, 40)

Presently before the Court is Defendant
United States Motion to Dismiss Plaintiff's
Third Amended Complaint (TAC). (MTD, ECF
No. 40.) Also before the Court is Plaintiff
Kevin Atkinson's Opposition. (ECF No. 42.)
The Court vacated the hearing and took the
matter under submission without oral
argument pursuant to Civil Local Rule
7.1(d)(1). (ECF No. 43.) Having considered the
parties' arguments and the law, the Court
GRANTS Defendant s MTD and DISMISSES
WITH PREJUDICE Plaintiff s TAC.

BACKGROUND

1. Factual Background

On May 7, 2010, Plaintiff had an appointment with Dr. Woods, his primary care doctor at the Veteran's Affairs San Diego Health Care System (VASDHS). (TAC Ex. C at 1,¹ ECF No. 39 at 66.²) Prior to that appointment, Plaintiff called Dr. Woods to ask her whether prostate exams were customary. (Id.) Dr. Woods explained that prostate exams were not routinely performed, but that she would perform one at Plaintiff's May 7, 2010 appointment. (Id.) The results of the May 7, 2010 exam were fine. (Id.)

Plaintiff's annual physical was scheduled for October 14, 2010. (Id.) Before that appointment, Plaintiff was experiencing frequent urination, blood in his semen, and chronic pain in his right testicle. (Id.) Given these urological issues, Plaintiff asked Dr. Woods whether bi-annual prostate exams would be appropriate. (Id.) Dr. Woods said she had never heard of that. (TAC Ex. C 2, ECF No. 39 at 67.)

¹ Plaintiff appends a number of voluminous exhibits to his TAC. In considering a motion to dismiss under Rule 12(b)(6), the Court may consider the complaint, documents attached to the complaint, documents incorporated by reference in the complaint, and matters of judicial notice without converting the motion into one for summary judgment. See *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

² For ease of reference, page numbers to docketed materials refer to the CM/ECF page number.

Plaintiff then asked whether it would be appropriate to perform a prostate exam that day to align [his] prostate exam with [his] annual physical. (Id.) Dr. Woods agreed and added that, it's part of the job. (Id.)

At that point, Plaintiff realized that Dr. Woods did not want to perform the exam and was only doing it because [he] had inquired about it. (Id.) Plaintiff regretted the inquiry and was uncomfortable about continuing with the exam, but could not think of a way not to continue without making the situation worse. (Id.)

When Dr. Woods performed the exam, it was "painful," and Dr. Woods indicated that Plaintiff's prostate was slightly enlarged. (TAC Ex. C 5, ECF No. 39 at 70.) Plaintiff was "shocked," "felt ashamed, embarrassed, and betrayed," and "couldn't believe what had just happened to [him]." (TAC Ex. C 2, ECF No. 39 at 67.) A psychologist later noted that Plaintiff was reporting "anxiety, intense distress, and depression following a standard medical procedure in 2010 at the VA during which [he] felt traumatized and physically hurt." (TAC Ex. J, ECF No. 39 at 83.)

When Plaintiff returned home, he drafted a letter to Dr. Woods to explain his inquiry about prostate exams and to suggest a change of providers. (TAC Ex. C 3, ECF No. 39 at 68) 68.) Plaintiff delivered the letter on October 18, 2010, and on October 20, 2010, Dr. Woods filed a "behavior referral" describing

Plaintiff's "inappropriate behavior." (Id.) Plaintiff was unaware of this entry in his medical record at that time. (TAC 13, ECF No. 39.)

On October 24, 2010, Plaintiff received a call from Dr. Lavin, a psychologist, who informed Plaintiff that she had received word from Dr. Woods that Plaintiff had requested a change in providers. (TAC Ex. C 3, ECF No. 39 at 68.) Plaintiff and Dr. Lavin agreed that a change of provider was appropriate. (Id.) Dr. Lavin also diagnosed Plaintiff with "depression and adjustment disorder." (TAC 13, ECF No. 39.) Dr. Lavin's diagnosis was confirmed by the VASDHS Chief of Psychiatry. (Id.)

About two months later, Plaintiff was assigned to a new primary care provider, Dr. Jagasia, at the Chula Vista clinic. (TAC Ex. C 3, ECF No. 39 at 68.) On January 17, 2011, Plaintiff received notice that his January 19, 2011 appointment with Dr. Jagasia had been cancelled. (Id.) When Plaintiff contacted the call center to reschedule, he was informed that the Chula Vista clinic had instructed the call center "to not schedule [Plaintiff] for any appointments with Dr. Jagasia and that in the future [Plaintiff] should only be allowed to see male providers." (Id.) This caused Plaintiff no "small amount of anxiety." (TAC Ex. C 4, ECF No. 39 at 69.) Staff eventually informed Plaintiff that he was not able to see female providers "because of [his] insistence on having Dr. Woods perform a 'rectal exam.'" (Id.)

While Plaintiff was between providers, he “was in chronic debilitating pain, suffering from anxiety, depression and PTSD.” (TAC 15, ECF No. 39.) Plaintiff called Dr. Lavin, who suggested that Plaintiff change his care to the Mission Valley clinic. (TAC Ex. C 4, ECF No. 39 at 69.) During this period, Plaintiff was having difficulty obtaining his pain medication, which Dr. Woods eventually prescribed on February 17, 2011. (Id.)

Once Plaintiff was assigned to Mission Valley, he was subjected to “a brutal interrogation by [Dr. Keenan,] an ex-navy doctor meant to break a patient she thought was a behavioral problem.” (TAC 15, ECF No. 39.) At this time, “Plaintiff was suffering anxiety, depression and PTSD.” (Id.) Dr. Keenan “listed anxiety, depression and adjustment disorder in . . . Plaintiff s Medical Record.” (Id.) These medical “traumas” involving Drs. Woods, Jagasia, and Keenan occurred “as a result of an erroneous entry in[Plaintiff’s] electronic medical record.” (Id. at 18.)

Approximately five months after his last visit with Dr. Woods, Plaintiff called the Patient Advocate, who informed Plaintiff of the “behavior referral” Dr. Woods placed in his medical file. (TAC Ex. C 5, ECF No. 39 at 70.) On April 13, 2011, Plaintiff submitted a Medical Record Amendment Request (“MRAR”) through then-Congressman Bob Filner to have “all entr[i]es or referrals in [his] health record regarding the behavior consult referral by Dr. Woods and subsequent

entries by psychologist Dr. Ellen Lavin be removed from [his] health record.”³ (TAC at 16 17, ECF No. 39; TAC Ex. C 6, ECF No. 39 at 71.)

On June 7, 2011, VASDHS Acting Director Robert Smith responded to then-Congressman Filner that “[Plaintiff]’s request is being processed as a medical record amendment under HIPAA (45 CFR parts 160 164), 38 U.S.C. and VHA Handbook 1605.1, and that Health Information Management Services would “complete the processing timeline as per VHA Handbook 1605.1 (typically two weeks).” (TAC Ex. D, ECF No. 39 at 74.)

Bruce Moore, the VASDHS employee tasked with carrying out MRARs, “failed to meet the three-month deadline for processing . . . Plaintiff’s MRAR.” (TAC 21 22, ECF No. 39.) He also “failed to send out . . . Plaintiff’s MRAR to the authors of the erroneous medical record entries” and “failed to append . . . Plaintiff’s MRAR to the portions of his medical record where his MRAR was denied.” (Id.; see also TAC Ex. K 51, ECF No. 39 at 134.) Consequently, Plaintiff suffered anxiety attacks. (Id.) On July 18, 2011, Mr. Moore emailed Plaintiff’s doctors that Plaintiff was “very anxious to get [the MRAR] done because

³ Plaintiff also submitted an addendum to his original MRAR on June 17, 2011. (See TAC Ex. C 7 8, ECF No. 39 at 72 73; TAC Ex. K 20 22, ECF No. 39 at 103 05.)

he states comments made in his record are hampering his medical treatment.” (TAC Ex. L, ECF No. 39 at 148; see also TAC Ex. M, ECF No. 39 at 149.)

On August 2, 2011, VASDHS sent Plaintiff a letter advising him that his MRAR required additional time. (TAC Ex. K 27, ECF No. 39 at 110.) VASDHS again informed Plaintiff that additional time was required on August 16, 2011. (Id.) On that same date, Dr. Rutledge, a staff psychologist, noted that [w]hile working on having these corrections made [to his MRAR], [Plaintiff] has found his levels of anxiety have increased. (TAC Ex. I, ECF No. 39 at 82.)

Plaintiff received a response letter granting and denying his MRAR on September 22, 2011. (TAC Ex. K 28, ECF No. 39 at 111.) Mr. Moore also called Plaintiff and told him, “You will be pleasantly surprised by the outcome of your MRAR”, even though Mr. Moore knew that “over half of the Plaintiff’s MRAR had been denied.” (TAC 23, ECF No. 39.) This caused Plaintiff to have an anxiety attack. (Id.)

On November 1, 2011, Plaintiff submitted a complaint to the U.S. Department of Health and Human Services, Office for Civil Rights (OCR), alleging that VASDHS “did not respond to his requests to amend his medical records according to Privacy Rule standards.” (TAC Ex. E 1, ECF No. 39 at 75.) Todd Smith was the author of VASDHS’s response to the OCR investigation. (TAC 24, ECF No. 39.)

OCR closed the case on January 18, 2013, following “resol[ution] through the voluntary compliance actions of[VASDHS],” including revisions to VASDHS’s policies and procedures, employee training, and sanctioning and retraining of Mr. Moore. (TAC Ex. E 2, ECF No. 39 at 76.)

Plaintiff filed a number of additional MRARs between November 15, 2011 and January 24, 2012. (TAC Ex. K 27 28, ECF No. 39 at 110 11.) Plaintiff received responses to these MRARs on December 22, 2011 and February 10, 2012. (TAC Ex. K 28, ECF No.39 at 111.) On February 10, 2012, Mr. Moore attached Plaintiff s MRAR to his electronic medical files. (TAC Ex. H, ECF No. 39 at 81.)

At an unspecified date, Plaintiff filed a complaint with the U.S. Department of Veterans Affairs, Office of Inspector General (“OIG”). (TAC 24, ECF No. 39; see also TAC Ex. K 44, ECF No. 39 at 127.) Mr. Todd Smith and his supervisor, Silvania Hill, authored VASDHS’s response to the OIG investigation. (TAC 24 25, ECF No. 39.)

Plaintiff attempted to obtain VASDHS’s responses to the OCR and OIG investigations through Freedom of Information Act (FOIA) requests, but Mr. Todd Smith informed Plaintiff that the OIG response was not yet complete and that Plaintiff would need to resubmit his FOIA request. (Id.) On February 6, 2014, Plaintiff wrote to Director Gering, requesting to have somebody other

than Mr. Todd Smith handle Plaintiff's FOIA request because Mr. Todd Smith "repeatedly harassed the Plaintiff about his mental status," causing Plaintiff to suffer anxiety attacks. (TAC 52, 57, ECF No. 39; TAC Ex. P, ECF No. 39 at 152.) Once Plaintiff received Mr. Todd Smith and Ms. Hill's response to the OIG investigation, "he found that they had engaged in lies, slander and defamation of character that were directed at the Plaintiff" by "placing the blame for [VASDHS's] failure to correctly carry out the Plaintiff's MRAR on the Plaintiff." (TAC 26, 51, ECF No. 39.) Consequently, Plaintiff suffered an anxiety attack. (Id. 55.)

Plaintiff also suffered "multiple anxiety attacks as a result of Defendant's employees['] repeated failure to carry out his MRAR as they stated they would." (TAC 29, 47, ECF No. 39.) Because Plaintiff could not "face VA providers and the treatment they deliver based on the erroneous 'behavior consult' in [his] medical file," Plaintiff also suffered symptoms of prostate cancer with no access to care in the United States, instead seeking care in Mexico. (Id. at 18-19, 47; TAC Ex. C 5, ECF No. 39 at 70.)

II. Procedural Background

20 On January 3, 2014, Plaintiff, proceeding pro se, initiated the instant action, alleging negligent infliction of emotional distress ("NIED") under the Federal Tort Claims Act

("FTCA"), 28 U.S.C. §§ 1346, 2671 80. (ECF No. 1.) On March 7, 2014, Defendant moved to dismiss Plaintiff's Complaint (ECF No. 4), and on June 23, 2014, this Court granted Defendant's motion and dismissed Plaintiff's Complaint (ECF No. 11).

On June 27, 2014, Plaintiff filed a First Amended Complaint ("FAC" not restating and correcting his NIED claim, but alleging intentional infliction of emotional distress ("IIED") under the FTCA. (ECF No. 13.) On July 23, 2014, Defendant moved to dismiss Plaintiff's FAC. (ECF No. 17.) On December 11, 2014, this Court granted Defendant's motion and dismissed Plaintiff's FAC. (ECF No. 28.)

On January 5, 2015, Plaintiff filed a Second Amended Complaint ("SAC"), alleging breach of contract, NIED, and IIED. (ECF No. 29.) Defendant moved to dismiss Plaintiff's SAC on February 18, 2015 (ECF No. 32), and the Court granted Defendant's motion dismissed Plaintiff's SAC on June 30, 2015 (ECF No. 38). The Court caution[ed] Plaintiff that this may be his final opportunity to file an amended complaint. (Id. at 12.)

On July 30, 2015, Plaintiff filed his TAC, alleging claims for NIED and IIED under the FTCA and appending over ninety pages of exhibits. (ECF No. 38.) Defendant filed the instant MTD on August 14, 2015. (ECF No. 40.)

LEGAL STANDARD

I. Dismissal Under Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that the complaint “fail[s] to state a claim upon which relief can be granted,” generally referred to as a motion to dismiss. The Court evaluates whether a complaints states a recognizable legal theory and sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual allegations,’ . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.” *Twombly*, 550 U.S. at 555 (alteration in original). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (alteration in original)(quoting *Twombly*, 550 U.S. at 557).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting

Twombly, 550 U.S. at 570); see also Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pled “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must be probable, but there must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556). “[F]acts that are ‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions” contained in the complaint. *Id.* at 678 79 (citing *Twombly*, 550 U.S. at 555). This review requires “context-specific” analysis involving the Court’s “judicial experience and common sense.” *Id.* at 679. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged but it has not show[n] that the pleader is entitled to relief.” *Id.* (quoting Fed. R. Civ.P. 8(a)(2)). The Court will grant leave to amend unless it determines that no modified contention “consistent with the challenged pleading . . . [will] cure the deficiency.” *DeSotov. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (quoting *Schriber Distrib.Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986)).

II. Dismissal Under Rule 8

The court may dismiss a complaint sua sponte for failure to comply with Federal Rule of Civil Procedure 8 (“Rule 8”). Rule 8 mandates that a complaint include “a short and plain statement of the claim,” Fed. R. Civ. P. 8(a)(2), and that “[e]ach allegation must be simple, concise, and direct,” Fed. R. Civ. P. 8(d)(1). A complaint that is so confusing that its “true substance, if any, is well disguised” may be dismissed sua sponte for failure to satisfy Rule 8. *Hearns v. San Bernardino Police Dep t*, 530 F.3d 1124, 1131 (9th Cir.2008) (internal quotation marks omitted) (quoting *Gillibeau v. City of Richmond*, 417 F.2d 426, 431 (9th Cir. 1969)); see also *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir.1996) (“Something labeled a complaint but written . . . prolix in evidentiary detail, yet without simplicity, conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform the essential functions of a complaint.”).

Additionally, where the allegations in a complaint are “argumentative, prolix, replete with redundancy, and largely irrelevant,” the complaint fails to comply with Rule 8(a). *McHenry*, 84 F.3d at 1178 79 (“Prolix, confusing complaints . . . impose unfair burdens on litigants and judges.”) Failure to comply with Rule 8 “is a basis for dismissal independent of Rule 12(b)(6).” *Id.* at 1179 (citing *Nevijel v. N. Coast Life Ins. Co.*, 651 F.2d 671, 673 (9th Cir. 1981); *Von Poppenheim v. Portland Boxing & Wrestling Comm n*, 442 F.2d 1047, 1053 n.4 (9th Cir.1971)).

“Although pro se pleadings are liberally construed . . . , [pro se litigants] are nonetheless obligated to comply with the Federal Rules of Civil Procedure, including Rule 8.” *Holley v. Cnty. of Yolo*, No. CIVS062586GEBEFBPS, 2007 WL 3274174, at *5 (E.D.Cal. Nov. 5, 2007) (citing *Haines v. Kerner*, 404 U.S. 519, 520 21 (1972)), adopted, 2007WL 4239555 (E.D. Cal. Dec. 3, 2007).

ANALYSIS

In his TAC, Plaintiff asserts two causes of action: NIED and IIED. (See generally TAC, ECF No. 39.) The Court addresses each in turn.

I. Negligent Infliction of Emotional Distress

To state a claim for NIED, Plaintiff must fulfill the requirements of an ordinary negligence claim. *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 48 Cal. 3d 583, 588 (1989). An ordinary negligence claim requires the plaintiff to plead “that [the] defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury.” *Hayes v. Cnty. of San Diego*, 57 Cal.4th 622, 688 (2013) (alteration in original and internal quotation marks omitted) (quoting *Nally v. Grace Cmty. Church*, 47 Cal. 3d 278, 292 (1988); citing *Conroy v. Regents of Univ. of Cal.*, 45 Cal. 4th 1244, 1250 (2009)). “Whether a defendant owes a duty of care is a question of law. Its existence depends upon

the foreseeability of the risk and upon weighing of policy considerations for and against imposition of liability.” Marlene F., 48 Cal. 3d at 588 (internal quotation marks omitted) (quoting *Slaughter v. Legal Process & Courier Serv.*, 162 Cal. App. 3d 1236, 1249 (1984)). Further, “[d]amages for severe emotional distress . . . are recoverable in a negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two.” *Id.* at 590.

As in his previous complaints, Plaintiff alleges a duty of care arising under California Civil Code § 1714(a) (see TAC 30 44, ECF No. 39), which provides that “[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person.” In assessing whether, pursuant to this provision, Defendant owed Plaintiff a duty of care, the Court considers the following factors:

The foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to

exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland v. Christian, 69 Cal. 2d 108, 112 13 (1968) (citing cases), superseded by statute on other grounds. “Foreseeability and the extent of the burden to the defendant are ordinarily the crucial considerations.” Castaneda v. Olsher, 41 Cal. 4th 1205, 1213 (2007)(citing Delgado v. Trax Bar & Grill, 36 Cal. 4th 224, 235 (2005); Sharon P. v. Arman, Ltd., 21 Cal. 4th 1181, 1189 90 n.2 (1999)).

Defendant argues “it is simply unforeseeable that a delay in MRAR processing would lead to medical treatment and personal injury.” (MTD 3, ECF No. 40-1.) Plaintiff counters by pointing to documents he claims show foreseeability (Opp n 7 8, ECF No. 42), including his original MRAR, which let “Defendant’s employees know [Plaintiff s] care was on hold” and that “[Plaintiff] ha[d] been diagnosed with ‘Adjustment Disorder’” (Opp n 7, ECF No. 42 (citing TAC Ex. C 5 6, ECF No. 39 at 70 71)); Plaintiff’s August 4, 2011 letter to Sue Hollis, in which he “apologize[s] for [his] anxiety[,s]ome of which is attributable to the Pain and Adjustment disorders I’ve been diagnosed with[,s]ome attributable to the several health care issues that have been on hold since April[,a]nd finally some to my perception that this request has not been handled effectively” (TAC Ex. K 30, ECF No.

30 at 113); Plaintiff's February 25, 2014 letter to Ms. Hill, in which he notes that he "was suffering an anxiety attack as a result of learning the contents of the VASDHS file regarding the [OCR] investigation. . . . [Ms. Hill] can imagine how it was for [Plaintiff] to suffer these over and over for over six months as [his MRAR] was being carried out incompetently" (TAC Ex. K 61, ECF No. 39 at 144); and Mr. Moore's July 18, 2011 emails to Drs. Gabbai and Mitchell noting that Plaintiff "is very anxious to get this done because he states comments made in his record are hampering his medical treatment" (TAC Exs. L, M, ECF No. 39 at 148-49).

Once again, upon weighing the Rowland factors, the Court is not convinced that VASDHS owed Plaintiff a duty of care to properly process his MRAR. The Court again reiterates that the failure to timely process Plaintiff's MRAR carries little moral blame, and imposing liability for such failures may force facilities like VASDHS to take on fewer patients so as to meet deadlines such as that at issue, which would ultimately be a disservice to the community. Most importantly, however, Plaintiff's correspondence with VASDHS informing various VASDHS employees that he was experiencing anxiety as a result of Dr. Wood's examination and comments in Plaintiff's medical record do not render anxiety attacks following untimely processing of his MRAR foreseeable, especially given VASDHS's efforts to keep Plaintiff informed that processing

would in fact take longer than anticipated. (See TAC Ex. K 27, ECF No. 39 at 110.) As the Court has previously noted (ECF No. 11 at 5 6; ECF No. 38 at 9), while an employee would certainly expect a patient to experience some frustration from the failure to timely process a request to amend his medical record, one would not reasonably anticipate that such an act or omission would cause a person to suffer severe emotional distress. See, e.g., *Friedman v. Merck & Co.*, 107 Cal. App. 4th 454, 474 75 (2003) (concluding that defendant distributor of medical test did not assume a duty to exercise care for plaintiff s emotional condition when 28 defendant voluntarily responded to an inquiry on behalf of plaintiff as to whether defendant s product was vegan, since [i]t was reasonably foreseeable . . . that plaintiff would be upset . . . [; h]owever, it was not reasonably foreseeable plaintiff would suffer serious emotional harm) (emphasis in original).

In light of the foregoing, the Court again finds that Defendant did not owe Plaintiff duty of care and, therefore, there is no need for the Court to address the other elements of a negligence claim. Accordingly, the Court DISMISSES Plaintiff s NIED claim

II. Intentional Infliction of Emotional Distress

To state a claim for IIED, Plaintiff must plead “(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of

causing, emotional distress; (2) . . . suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct." *Davidson v. City of Westminster*, 32 Cal. 3d 197, 209 (1982) (internal quotation marks omitted) (quoting *Cervantez v. J.C. Penney Co.*, 24 Cal. 3d 579, 593 (1979), overturned on other grounds by legislative action, Cal. Penal Code § 243). Defendant argues that Plaintiff, once again, fails to allege sufficient facts to support a claim for IIED. (MTD 4-6, ECF No. 40-1.) Plaintiff, in response, again restates that because he had information of a violation of 18 U.S.C. § 1001(a), Messrs. Moore, Todd Smith, and Gering intentionally inflicted emotional distress upon him. (Opp'n 9, ECF No. 42.) Plaintiff also argues that Mr. Todd Smith and Ms. Hill intentionally inflicted emotional distress upon him by "submitting lies, slander and defamation of character in response to an investigation by [the OIG]." (Id. at 10.)

For conduct to be considered outrageous, it must "exceed all bounds of that usually tolerated in a civilized community." *Cervantez*, 24 Cal. 3d at 593 (citing *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal. 3d 493, 499 n.5 (1970); *Fuentes v. Perez*, 66 Cal. App. 3d 163, 170 (1977)). The tort of "IIED does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Hughes v. Pair*, 46 Cal. 4th 1035, 1051 (2009) (internal quotation marks omitted) (quoting *Molko v. Holy Spirit Ass'n*, 46 Cal. 3d

1092,1122 (1988), overruled on other grounds, *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826 (2001)). “The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.” *Cochran v. Cochran*, 65 Cal. App. 4th 488, 496 (1998) (internal quotation marks omitted) (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). Further, the conduct must have been “intended to inflict injury or engaged in with the realization that injury will result.” *Hughes*, 46 Cal. 4th at 1051 (internal quotation marks omitted) (quoting *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1001 (1993)).

Here, Plaintiff alleges that Mr. Moore intentionally inflicted emotional distress upon Plaintiff by calling Plaintiff and informing him that “You will be pleasantly surprised by the outcome of your MRAR”, despite knowing that over half of Plaintiff’s MRAR had been denied. (TAC 23, 50, ECF No. 39.) Plaintiff alleges that Mr. Todd Smith intentionally inflicted emotional distress upon Plaintiff by lying in response to inquiries from then-Congressman Filner and Senator Barbara Boxer; by requiring Plaintiff to resubmit his FOIA request for the VASDHS response to the OIG investigation; and by “engaging in lies, slander and defamation of character that were directed at the Plaintiff” in composing the VASDHS

response to the OIG investigation. (Id. at 24 26, 51 55.) Plaintiff alleges that Mr. Gering intentionally inflicted emotion distress upon Plaintiff failing to intervene when Plaintiff requested that Mr. Todd Smith have no further contact with Plaintiff. (Id. at 26 27, 57.)

Although more verbose, the allegations in Plaintiff's TAC do not differ substantively from those found in Plaintiff First ("FAC") and Second Amended Complaints ("SAC"). (Compare TAC, ECF No. 39, with FAC, ECF No. 13, and SAC, ECF No. 29.) As this Court has previously concluded (see ECF No. 28 at 6 7; ECF No. 38 at 10 11), none of the alleged conduct rises to the level of extreme and outrageous conduct "exceed[ing] all bounds of that usually tolerated in a civilized community," *Cervantez*, 24 Cal. 3d at 593. At most, Plaintiff has alleged conduct that could be considered rude or indifferent, but that cannot give way to an intentional tort. See *Cochran*, 65 Cal. App. 4th at 496; see also *Kruse v. Bank of Am.*, 202 Cal. App. 3d 38, 68 (1988) ("While [defendant's employee]'s heartless and insensitive remarks merit opprobrium, they do not qualify as the kind of 'outrageous' conduct necessary to support an action for intentional infliction of emotional distress."). Plaintiff's failure to sufficiently allege extreme and outrageous conduct is itself sufficient grounds to dismiss his IIED claim. See, e.g., *Dowell v. Contra Costa Cnty.*, 928 F. Supp. 2d 1137, 1157 (N.D. Cal. 2013); *McKenna v. Permanente Med. Grp., Inc.*, 894

F. Supp. 2d 1258, 1274 (E.D. Cal. 2012); *Schwartz v. Lassen Cnty. ex rel. Lassen Cnty. Jail (Det. Facility)*, 838 F. Supp. 2d 1045, 1061 (E.D. Cal. 2012).

Moreover, Plaintiff has failed to plausibly allege that Defendant's employees' conduct was intended to cause Plaintiff severe emotional distress. Allegations that Mr. Gering failed to act, without alleging intent to cause injury through the inaction, are insufficient. See, e.g., *Lucas v. City of Visalia*, No. 1:09-CV-1015AWIDLB, 2010 WL 1444667, at *7 (E.D. Cal. Apr. 12, 2010) ("[I]naction by a defendant does not constitute 'extreme and outrageous behavior' for purposes of IIED unless the defendant intends to cause injury to the plaintiff through the inaction.") (citing *Davidson v. City of Westminster*, 32 Cal. 3d 197, 210 (1982); Cal. Civ. Jury Instr. 12.74 cmt.); *Dove v. PNS Stores, Inc.*, 982 F. Supp. 1420, 1425 (C.D. Cal. 1997) (It is not enough to simply allege inaction on the part of the defendant.) (citing *Spackman v. Good*, 245 Cal. App. 2d 518, 530 (1966)). Plaintiff has also failed to allege that Mr. Todd Smith and Ms. Hill's OIG response was directed primarily at Plaintiff, rather than the OIG. See, e.g., *Christensen v. Super. Ct.*, 54 Cal. 3d 868, 906 (1991) (" [To sustain an IIED action, conduct] must be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware. . . . Plaintiffs here have not alleged that the conduct of any of the defendants was directed primarily at them.").

Because Plaintiff has failed to allege that Defendant's employees engaged in extreme and outrageous conduct intended to cause him extreme emotional distress, Plaintiff fails to state a claim for IIED and the Court need not address the other elements of an IIED claim. Consequently, the Court DISMISSES Plaintiff's IIED claim.

III. Dismissal Under Rule 8

As an independent basis for dismissal, the Court notes that Plaintiff's TAC fails to conform to the requirements set forth in Rule 8. With each amendment, Plaintiff's complaint has expanded, from thirteen pages (Compl., ECF No. 1) to over 150 pages (TAC, ECF No. 39). But more is not always better: "Plaintiff's voluminous exhibits transmute[] his complaint into one which illustrates the 'unfair burdens' imposed by complaints, 'prolix in evidentiary detail, yet without simplicity, conciseness and clarity' which 'fail to perform the essential functions of a complaint.'" *Anderson v. Felker*, No. CIV S-07-1061 GEBGGHP, 2007 WL 2767674, at *3 (E.D. Cal. Sept. 19, 2007) (quoting *McHenry*, 84 F.3d at 1179-80), reconsideration denied, 2008 WL 800443 (E.D. Cal. Mar. 26, 2008); 2008 WL 4380524 (E.D. Cal. Sept. 25, 2008). Accordingly, the Court sua sponte DISMISSES Plaintiff's TAC for violating Rule 8. See, e.g., *Hearns*, 530 F.3d at 1131; *McHenry*, 84 F.3d at 1180.

IV. Dismissal With Prejudice

The court must give a pro se litigant leave to amend his complaint “unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks omitted) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). But when a party repeatedly fails to cure deficiencies, the court may order dismissal without leave to amend. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992) (affirming dismissal with prejudice where district court had instructed pro se plaintiff regarding deficiencies in two prior orders dismissing his claim with leave to amend).

The Court has given Plaintiff three opportunities to amend his complaint. In light of Plaintiff’s repeated failure to state a claim for either NIED or IIED in the nearly two years this litigation has been pending, the Court **DISMISSES WITH PREJUDICE** Plaintiff’s TAC.⁴ See, e.g., *Khan v. Recon Trust Co.*, No. C 12-01107 LB, 2015 WL 1849264, at *6 (N.D. Cal. Apr. 22, 2015) (“Because the court has given [plaintiff] two opportunities to allege [a fraud claim against one defendant], and in light of the late stage of the litigation, the court dismisses [the claim] with prejudice.”); *Baranyi v. Univ. of Haw.*, No. CIV. 13-00667 SOM, 2014 WL 4180929, at *5 (D. Haw. Aug. 20, 2014) (dismissing with prejudice pro se plaintiff’s third amended

complaint); Perry v. Cash Call, Inc., No. C 13-02369 LB, 2014 WL 3778959, at *3 (N.D. Cal. July 31, 2014) (same).

CONCLUSION

In light of the foregoing, the Court GRANTS Defendant's MTD (ECF No. 40) and DISMISSES WITH PREJUDICE Plaintiff's Third Amended Complaint (ECF No. 39). The Clerk of the Court shall close the file.

IT IS SO ORDERED.

Dated: January 4, 2016


Hon. Janis L. Sammartino
United States District Judge

⁴The Court notes that it does not dismiss Plaintiff's TAC with prejudice for his failure to comply with Rule 8, as the Court has not previously called this defect to Plaintiff's attention.