

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

KEVIN MOORE,

Plaintiff,

v.

DAVID STEVIG, et al.,

Defendants.

CASE NO. 1:11-cv-01108-LJO-GBC (PC)

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING DISMISSING ACTION FOR  
FAILURE TO STATE A CLAIM

Doc. 24

FIFTEEN DAY DEADLINE

---

**I. Procedural History**

On July 6, 2011, Plaintiff Kevin Moore (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983, alleging failure to treat his hepatitis medical condition from 2002 through 2011. Doc. 1 at 8-9. Defendants were employed at California Men’s Colony, San Luis Obispo, Corcoran State Prison, and Pleasant Valley State Prison. Doc. 1 at 3. On May 29, 2012, the Court screened the complaint and dismissed the action with leave to amend for failure to state a claim upon which § 1983 relief could be granted. Doc. 23. On June 22, 2012, Plaintiff filed the first amended complaint which is currently before the Court. Doc. 24.

**II. Screening Requirement**

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

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

6 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon  
7 which relief may be granted if it appears beyond doubt that Plaintiff can prove no set of facts in  
8 support of the claim or claims that would entitle him to relief. *See Hishon v. King & Spalding*, 467  
9 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also Synagogue v.*  
10 *United States*, 482 F.3d 1058, 1060 (9th Cir. 2007); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898  
11 (9th Cir. 1986). In determining whether to dismiss an action, the Court must accept as true the  
12 allegations of the complaint in question, and construe the pleading in the light most favorable to the  
13 plaintiff, and resolve all doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22  
14 (1969); *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010).

### 15 **III. Plaintiff's Complaint**

16 Plaintiff is currently a state prisoner at the Deuel Vocational Institute (DVI) in Tracy,  
17 California. The events central to Plaintiff's complaint occurred while he was a prisoner at various  
18 California state prison. Doc. 24 at 4. In the complaint, Plaintiff names the following as a  
19 defendants: 1) Moon (M.D. at Corcoran State Prison); and 2) Chokatos (M.D. at Pleasant Valley  
20 State Prison). Doc. 24 at 4. Plaintiff also mentions the actions of Dr. Ho, however, it is unclear  
21 whether he is naming Dr. Ho as a defendant. Doc. 24 at 7-8, 12. Plaintiff requests monetary relief  
22 and injunctive relief in the form of requiring two new medications to be prescribed to Plaintiff. Doc.  
23 24 at 10, 14.

24 Plaintiff alleges that Defendants Moon and Chokatos failed to provide adequate medical care  
25 for Plaintiff's serious medical need which amounts to deliberate indifference. Doc. 24 at 4.  
26 According to Plaintiff, he did not receive any medications from Defendants Moon and Chokatos and  
27 did not receive the new medication to treat Hepatitis C. Doc. 24 at 4. Plaintiff argues that his  
28 attachment from the American Liver Association demonstrates that his life-span is shortened without

1 the new medication. Doc. 24 at 4. Plaintiff is not receiving medication currently as a result of  
2 Defendants Moon and Chokatos' diagnosis and treatment plans. Doc. 24 at 4. Plaintiff reiterates  
3 that he has not received the new medication needed to treat his Hepatitis C and not the "interferon  
4 injection." Doc. 24 at 5. Plaintiff alleges that the medication of "interferon" did nothing to change  
5 the course of his Hepatitis C infection and defendant Chokatos knew that these injections were not  
6 working. Doc. 24 at 6. Defendant Chokatos told Plaintiff that he would receive a new drug to treat  
7 Hepatitis C. Doc. 24 at 6. According to Plaintiff from 2002 to 2011 all of the Defendants have  
8 failed to provide adequate care. Doc. 24 at 6. Plaintiff alleges that he told the official about his  
9 condition in his 602 grievance and "they" knew his condition was getting worse, however, doctors  
10 at Pleasant Valley State Prison told Plaintiff that they did not have the medication to treat Hepatitis  
11 C. Doc. 24 at 7 (citing to grievance Log No. PVSP-27-11-12651). Plaintiff states that on August  
12 2, 2011, Dr. Ho interviewed Plaintiff and stated that they gave Plaintiff four weeks of treatment to  
13 justify grievance log No. 09-2010-13896. Doc. 24 at 7-8. In grievance log No. PVSP-27-11-12651  
14 medical staff stated that Plaintiff's medical issues are being adequately accommodated. Doc. 24 at  
15 8. According to Plaintiff, Dr. Ho and Chokatos stated that the medication "Boceprevir" and  
16 "Telaprevir" have not been approved to treat Plaintiff's Hepatitis C and that Plaintiff's laboratory  
17 results were within normal limits. Doc. 24 at 8, 12. When Plaintiff asked Dr. Ho why the new  
18 medications would not get approved, Plaintiff was told that the State of California does not have any  
19 money. Doc. 24 at 12.

20 According to Plaintiff the Federal Drug Administration (FDA) approved of Victrelis  
21 (Boceprevir) and Incinern (Telaprevir) to be used in combination with Pegylated Interferon and  
22 Ribavirin to treat Hepatitis C. Doc. 24 at 9. Plaintiff emphasizes the importance of treating the  
23 disease early and argues that if he is given the new medication at his current stage, he would have  
24 a chance for his liver to heal. Doc. 24 at 9-10. Plaintiff states that he can show that the Department  
25 of Corrections refuse to treat Plaintiff's medical condition by not giving Plaintiff "Victrelis"  
26 (Boceprevir) and Inciver (Telaprevir). Doc. 24 at 12. Plaintiff states that he is bringing a claim  
27 against Defendants Chokatos and Mood based on supervisory liability. Doc. 24 at 13.

28 ///

1 **IV. Applicable Law and Analysis**

2 **A. Rule 8**

3 A complaint must contain "a short and plain statement of the claim showing that the pleader  
4 is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but  
5 "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,  
6 do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (citing *Bell Atlantic Corp. v. Twombly*, 550  
7 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient factual matter, accepted as true, to 'state  
8 a claim that is plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).  
9 Facial plausibility demands more than the mere possibility that a defendant committed misconduct,  
10 *Iqbal* at 1950, and while factual allegations are accepted as true, legal conclusions are not, *id.* at  
11 1949.

12 **1. Analysis**

13 Plaintiff's legal conclusions fail to comply with Rule 8(a). Plaintiff bears the burden of  
14 separately setting forth his legal claims and for each claim, briefly and clearly providing the facts  
15 supporting the claim so that the Court and Defendants are readily able to understand the claims.  
16 *Bautista v. Los Angeles County*, 216 F.3d 837, 840-41 (9th Cir. 2000).

17 **B. Eighth Amendment Deliberate Indifference of medical treatment**

18 "[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate  
19 must show 'deliberate indifference to serious medical needs.'" *Jett v. Penner*, 439 F.3d 1091, 1096  
20 (9th Cir. 2006) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part  
21 test for deliberate indifference requires the plaintiff to show (1) "'a serious medical need' by  
22 demonstrating that 'failure to treat a prisoner's condition could result in further significant injury or  
23 the unnecessary and wanton infliction of pain,'" and (2) "the defendant's response to the need was  
24 deliberately indifferent." *Jett*, 439 F.3d at 1096 (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059  
25 (9th Cir. 1992), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th  
26 Cir. 1997) (en banc) (internal quotations omitted)). Deliberate indifference is shown by "a  
27 purposeful act or failure to respond to a prisoner's pain or possible medical need, and harm caused  
28 by the indifference." *Id.* (citing *McGuckin*, 974 F.2d at 1060).

1 “Mere negligence in diagnosing or treating a medical condition, without more, does not  
2 violate a prisoner's Eighth Amendment rights.” *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000)  
3 (quoting *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (internal quotation marks  
4 omitted). Additionally, to state a viable claim, Plaintiff must demonstrate that each named defendant  
5 personally participated in the deprivation of his rights. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948-49  
6 (2009); *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1020-21 (9th Cir. 2010); *Ewing v. City of*  
7 *Stockton*, 588 F.3d 1218, 1235 (9th Cir. 2009); *Jones v. Williams*, 297 F.3d 930, 934. Liability may  
8 not be imposed on supervisory personnel under the theory of *respondeat superior*, *Iqbal*, 129 S.Ct.  
9 at 1948-49; *Ewing*, 588 F.3d at 1235, and supervisors may only be held liable if they “participated  
10 in or directed the violations, or knew of the violations and failed to act to prevent them,” *Taylor v.*  
11 *List*, 880 F.2d 1040, 1045 (9th Cir. 1989); accord *Starr v. Baca*, 652 F.3d 1202, 1205-08 (9th Cir.  
12 2011); *Corales v. Bennett*, 567 F.3d 554, 570 (9th Cir. 2009); *Preschooler II v. Clark County School*  
13 *Board of Trustees*, 479 F.3d 1175, 1182 (9th Cir. 2007); *Harris v. Roderick*, 126 F.3d 1189, 1204  
14 (9th Cir. 1997).

15 “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060  
16 (9th Cir. 2004). “A difference of opinion between a prisoner-patient and prison medical authorities  
17 regarding treatment does not give rise to a § 1983 claim,” *Franklin v. Oregon*, 662 F.2d 1337, 1344  
18 (9th Cir. 1981) (internal citation omitted), and a difference of opinion between medical personnel  
19 regarding treatment does not amount to deliberate indifference, *Sanchez v. Vild*, 891 F.2d 240, 242  
20 (9th Cir. 1989). To prevail, Plaintiff “must show that the course of treatment the doctors chose was  
21 medically unacceptable under the circumstances . . . and . . . that they chose this course in conscious  
22 disregard of an excessive risk to plaintiff’s health.” *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.  
23 1986) (internal citations omitted).

## 24 1. Analysis

25 According to Plaintiff, the Federal Drug Administration (FDA) recently approved of Victrelis  
26 (Boceprevir) and Incinern (Telaprevir) to be used in combination with Pegylated Interferon and  
27 Ribavirin to treat Hepatitis C. Doc. 24 at 9. Plaintiff alleges that he has not received the newly  
28 approved of drugs to treat his Hepatitis C, rather, Plaintiff received “interferon injections” which

1 were not affective. Doc. 24 at 5-6. According to Plaintiff, Dr. Ho and Chokatos stated that the  
2 medication “Boceprevir” and “Telaprevir” have not been approved to treat Plaintiff’s Hepatitis C  
3 and that Plaintiff’s laboratory results were within normal limits. Doc. 24 at 8, 12. When Plaintiff  
4 asked Dr. Ho why the new medications would not get approved, Plaintiff was told that the State of  
5 California does not have any money. Doc. 24 at 12.

6 Plaintiff’s disagreement with the type of medication that is prescribed to treat Plaintiff’s  
7 Hepatitis C amounts to a difference in medical opinion and such is insufficient to state a deliberate  
8 indifference claim. *See Toguchi v. Chung*, 391 F.3d 1051, 1060; *Franklin v. Oregon*, 662 F.2d 1337,  
9 1344; *Sanchez v. Vild*, 891 F.2d 240, 242. Additionally, a policy of not using the latest FDA  
10 approved drugs to treat Hepatitis and instead using alternate medications is an exercise of medical  
11 judgement amounting to a difference in medical opinion and fails to state a deliberate indifference  
12 claim. *See Toguchi v. Chung*, 391 F.3d 1051, 1060; *Franklin v. Oregon*, 662 F.2d 1337, 1344;  
13 *Sanchez v. Vild*, 891 F.2d 240, 242.<sup>1</sup> Moreover, Plaintiff’s original complaint demonstrated that  
14 Defendants were not indifferent to Plaintiff’s complaints but evaluated Plaintiff and treated him  
15 according to medical necessity and in accordance with his thyroid condition. Doc. 1 at 32 (Pltf’s  
16 Exhibit); Doc. 24 at 57 (Pltf’s Exhibit). Plaintiff’s allegations may, at most, amount to negligence,  
17 which is insufficient to hold a defendant liable for deliberate indifference to a serious medical need,  
18 under the Eighth Amendment.

19 ///

---

21 <sup>1</sup> *See also Loeber v. Andem*, 2012 WL 3590745 at \*1-2 (11th Cir. 2012) (unpublished) (affirming decision  
22 that inmate failed to state a claim where although the inmate requested to be treated with interferon and ribavirin for  
23 his Hepatitis C, defendants chose alternate treatment); *Taylor v. Ortiz*, 410 Fed.Appx. 76 at \*2 (10th Cir. 2010)  
24 (unpublished) (finding that inmate’s request for the specific treatment of interferon/ribavirin failed to state a claim  
25 where defendants provided alternate treatment); *Amarir v. Hill*, 243 Fed.Appx. 353, 354 (9th Cir. 2007)  
26 (unpublished) (“A prison inmate . . . does not have a right to treatment for conditions that are not readily amenable to  
27 treatment”) (citing to Cal. Code Regs. tit. 15, § 3350.1); *Floyd v. Chief Medical Director of UTMB*, 210 Fed.Appx.  
28 387, 388-89 (5th Cir. 2006) (unpublished) (Inmate’s insistence that a newer drug (pegylated Interferon or Pegasys)  
would be more effective than the standard treatment fails to demonstrate that a doctor’s decision to continue the  
standard treatment resulted in a substantial risk of serious harm); *Hix v. Tennessee Dept. of Corrections*, 196  
Fed.Appx. 350, 358 n. 1 (6th Cir. 2006) (unpublished) (noting that “. . . numerous courts have acknowledged [that]  
hepatitis C does not require treatment in all cases.”); *Grindling v. Martone*, No. 12-cv-00361-LEK-BMK, 2012 WL  
3776491 at \*7-8 (D. Hawaii 2012) (finding that inmate failed to state a deliberate indifference claim regarding his  
Hepatitis C condition because Plaintiff failed to demonstrate that defendants’ treatment decisions could result in  
significant harm).

1           **C.     Linkage Requirement**

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

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

6   42 U.S.C. § 1983. The statute plainly requires that there be an actual connection or link between the  
7   actions of the defendants and the deprivation alleged to have been suffered by Plaintiff. *See Monell*  
8   *v. Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The  
9   Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a constitutional right,  
10   within the meaning of section 1983, if he does an affirmative act, participates in another’s  
11   affirmative acts or omits to perform an act which he is legally required to do that causes the  
12   deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). In  
13   order to state a claim for relief under section 1983, Plaintiff must link each named defendant with  
14   some affirmative act or omission that demonstrates a violation of Plaintiff’s federal rights.

15                     **1.     Analysis**

16           Although Plaintiff lists 1) Moon (M.D. at Corcoran State Prison); and 2) Chokatos (M.D. at  
17   Pleasant Valley State Prison) as a defendants in the action, Plaintiff fails to explain what specific act  
18   or omission each Defendant Moon did to cause the constitutional deprivation. Plaintiff also  
19   mentions the actions of Dr. Ho, however, it is unclear whether he is naming Dr. Ho as a defendant.  
20   Doc. 24 at 7-8, 12.

21           **D.     Supervisory Liability**

22           Under § 1983, liability may not be imposed on supervisory personnel under the theory of  
23   respondeat superior, *Iqbal*, 129 S. Ct. at 1948-49; *Ewing*, 588 F.3d at 1235, and administrators may  
24   only be held liable if they “participated in or directed the violations, or knew of the violations and  
25   failed to act to prevent them,” *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *accord Starr*, 652  
26   F.3d 1202, 1205-08 (9th Cir. 2011); *Corales*, 567 F.3d at 570; *Preschooler II v. Clark County School*  
27   *Board of Trustees*, 479 F.3d 1175, 1182 (9th Cir. 2007); *Harris v. Roderick*, 126 F.3d 1189, 1204  
28   (9th Cir. 1997). Some culpable action or inaction must be attributable to defendants and while the

1 creation or enforcement of, or acquiescence in, an unconstitutional policy may support a claim, the  
2 policy must have been the moving force behind the violation. *Starr*, 652 F.3d at 1205; *Jeffers v.*  
3 *Gomez*, 267 F.3d 895, 914-15 (9th Cir. 2001); *Redman v. County of San Diego*, 942 F.2d 1435,  
4 1446-47 (9th Cir. 1991); *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989).

5 **1. Analysis**

6 Simply naming Dr. Moon and Dr. Chokatos as defendants in their supervisory capacity is  
7 insufficient to hold them liable based on a position of authority as Plaintiff has not alleged any facts  
8 linking Defendant Moon to any conduct nor has Plaintiff alleged facts sufficient to demonstrate an  
9 Eighth Amendment deliberate indifference claim. *Iqbal*, 129 S. Ct. at 1948-49; *Ewing*, 588 F.3d at  
10 1235. Accordingly, the Court finds that Plaintiff fails to state a cognizable claim for relief under §  
11 1983 against Defendants Moon and Chokatos based upon supervisory liability.

12 **V. Conclusions and Recommendation**

13 The Court finds that Plaintiff's first amended complaint filed on June 22, 2012, fails to state  
14 any Section 1983 claims upon which relief may be granted against the named defendant. Under Rule  
15 15(a) of the Federal Rules of Civil Procedure, leave to amend "shall be freely given when justice so  
16 requires." In addition, "[l]eave to amend should be granted if it appears at all possible that the  
17 plaintiff can correct the defect." *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (internal  
18 citations omitted). However, in this action, Plaintiff filed two complaints and received substantial  
19 guidance from the Court in its initial screening order. Doc. 23. The Court finds that the deficiencies  
20 outlined above are not capable of being cured by amendment, and therefore orders that further leave  
21 to amend not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii).

22 Accordingly, the Court HEREBY RECOMMENDS that this action be DISMISSED in its  
23 entirety, WITH PREJUDICE, for failure to state a claim upon which relief may be granted.

24 ///

25 ///

26 ///

27 ///

28 ///



1           These Findings and Recommendations will be submitted to the United States District Judge  
2 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fifteen (15)  
3 days after being served with these Findings and Recommendations, Plaintiff may file written  
4 objections with the Court. The document should be captioned "Objections to Magistrate Judge's  
5 Findings and Recommendations." Plaintiff is advised that failure to file objections within the  
6 specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d  
7 1153 (9th Cir. 1991).

8  
9 IT IS SO ORDERED.

10 Dated: November 13, 2012

  
11 \_\_\_\_\_  
12 UNITED STATES MAGISTRATE JUDGE  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28