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

David S. Martinez,  
Plaintiff,  
vs.  
Unit Manager Meier, et al.,  
Defendants.

No. CV 09-956-PHX-MHM (ECV)

**ORDER**

On May 4, 2009, Plaintiff David S. Martinez, who is confined in the Corrections Corporation of America’s La Palma Correctional Center in Eloy, Arizona, filed a *pro se* civil rights Complaint pursuant to 42 U.S.C. § 1983 and an Application to Proceed *In Forma Pauperis*. In a June 18, 2009 Order, the Court granted the Application to Proceed and dismissed with Complaint because Plaintiff had failed to state a claim upon which relief could be granted. The Court gave Plaintiff 30 days to file an amended complaint that cured the deficiencies identified in the Order.

On July 14, 2009, Plaintiff filed an Application for Enlargement of Time to Amend Complaint, seeking an extension of time to file his amended complaint. In an August 11, 2009 Order, the Court granted Plaintiff’s Application, giving him until August 18th to file his first amended complaint.

On August 13, 2009, Plaintiff filed his First Amended Complaint (Doc. #8). The Court will dismiss the First Amended Complaint with leave to amend.

1 **I. Statutory Screening of Prisoner Complaints**

2 The Court is required to screen complaints brought by prisoners seeking relief against  
3 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.  
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised  
5 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may  
6 be granted, or that seek monetary relief from a defendant who is immune from such relief.  
7 28 U.S.C. § 1915A(b)(1), (2).

8 A pleading must contain a “short and plain statement of the claim *showing* that the  
9 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2) (emphasis added). While Rule 8 does not  
10 demand detailed factual allegations, “it demands more than an unadorned, the-defendant-  
11 unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).  
12 “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
13 statements, do not suffice.” Id.

14 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a  
15 claim to relief that is plausible on its face.’” Id. (quoting Bell Atlantic Corp. v. Twombly,  
16 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual content  
17 that allows the court to draw the reasonable inference that the defendant is liable for the  
18 misconduct alleged.” Id. “Determining whether a complaint states a plausible claim for  
19 relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial  
20 experience and common sense.” Id. at 1950. Thus, although a plaintiff’s specific factual  
21 allegations may be consistent with a constitutional claim, a court must assess whether there  
22 are other “more likely explanations” for a defendant’s conduct. Id. at 1951.

23 If the Court determines that a pleading could be cured by the allegation of other facts,  
24 a *pro se* litigant is entitled to an opportunity to amend a complaint before dismissal of the  
25 action. See Lopez v. Smith, 203 F.3d 1122, 1127-29 (9th Cir. 2000) (*en banc*). The Court  
26 should not, however, advise the litigant how to cure the defects. This type of advice “would  
27 undermine district judges’ role as impartial decisionmakers.” Pliler v. Ford, 542 U.S. 225,  
28 231 (2004); see also Lopez, 203 F.3d at 1131 n.13 (declining to decide whether the court was

1 required to inform a litigant of deficiencies). Plaintiff’s First Amended Complaint will be  
2 dismissed for failure to state a claim, with leave to amend because the First Amended  
3 Complaint may possibly be saved by amendment.

4 **II. First Amended Complaint**

5 In his three-count Complaint, Plaintiff sues Defendants Unit Manager Meier,  
6 Lieutenant Johnson, “Unknown Officer(s),” and “Unknown Medical Staff.”<sup>1</sup>

7 Plaintiff claims that he arrived at the La Palma Correctional Center and submitted  
8 under duress to tuberculosis testing after Defendants Meier, Johnson, and an unknown officer  
9 verbally threatened to physically restrain inmates and place inmates in segregation if they  
10 refused to submit to testing.

11 In Count One, Plaintiff alleges a violation of his Fourth Amendment right to privacy  
12 because he was forced to participate in the tuberculosis testing. He claims Defendants Meier  
13 and Johnson “intruded . . . into a clinic area designed for private medical screening for  
14 inmates . . . with the intent to forcefully coerce [P]laintiff Martinez, and other inmates . . .  
15 to accept unwarranted and/or excessive medical treatment.” He asserts that Plaintiff Meier  
16 used excessive and unjustifiable verbal threats and that Defendant Johnson’s presence was  
17 “not standard procedure and was maintained contrary to [P]laintiff Martinez’[s] objection.”  
18 He also alleges that Defendant Unknown Medical Staff, who is a nurse practitioner,  
19 “improperly and negligently and with intent to deny [P]laintiff Martinez of his right to  
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22 <sup>1</sup>In his original Complaint, Plaintiff named Corrections Corporation of America as a  
23 defendant. However, Plaintiff does not list Corrections Corporation of America as a  
24 Defendant in the caption of his First Amended Complaint or in the list of Defendants on the  
25 second page of Plaintiff’s First Amended Complaint. Thus, Corrections Corporation of  
26 America is no longer a defendant in this action, and the Court will disregard any references  
27 to “Defendant CCA” in the body of Plaintiff’s First Amended Complaint. See Ferdik v.  
28 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992) (a first amended complaint supersedes the  
original complaint; after amendment, the Court will treat an original complaint as  
nonexistent). Moreover, there is only one Plaintiff in this action—Plaintiff David S.  
Martinez—and, therefore, the Court will disregard any references to “Plaintiff Torrez” in the  
First Amended Complaint.

1 privacy” injected Plaintiff with the tuberculosis test without Plaintiff’s express or implied  
2 consent.

3 In Count Two, Plaintiff alleges a violation of the Eighth Amendment, because  
4 Defendants Meier, Johnson, and Unknown Male Staff exposed Plaintiff to “substantial risk  
5 of harm with indifference to the risk by instigating a riot using unwarranted combative  
6 language” towards the inmates in the clinic waiting room. Plaintiff contends that when the  
7 inmates became agitated as a result of Defendants Meier, Johnson, and Unknown Male  
8 Staff’s statements, Defendants threatened to call the Special Operation Response Team to  
9 control the inmates with pepper spray and physical restraint.

10 In Count Three, Plaintiff alleges that he received inadequate medical care, in violation  
11 of his Eighth and Fourteenth Amendment rights, because Defendant Unknown Medical Staff  
12 (the nurse practitioner) “improperly and negligently and with intentional misconduct” denied  
13 Plaintiff the right to decline medical treatment. Plaintiff contends that Defendant Unknown  
14 Medical Staff ordered Plaintiff to extend his arm, after Plaintiff verbally objected to the test  
15 because he had tested positive for tuberculosis for 14 years, and then injected Plaintiff after  
16 Plaintiff’s “express objection.”

17 In his Request for Relief, Plaintiff seeks injunctive relief, monetary damages, and his  
18 costs of suit.

### 19 **III. Failure to State a Claim**

#### 20 **A. Count One—Right to Privacy**

21 “The applicability of the Fourth Amendment turns on ‘whether the person invoking  
22 its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’  
23 that has been invaded by government action.” Hudson v. Palmer, 468 U.S. 517, 525 (1984)  
24 (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)). “A right of privacy in traditional  
25 Fourth Amendment terms is fundamentally incompatible with the close and continual  
26 surveillance of inmates and their cells required to ensure institutional security and internal  
27 order.” Hudson, 468 U.S. at 527-28.

1 Any restriction on an inmate’s privacy interests is justified to the extent that it is  
2 “reasonably related to legitimate penological interests.” Turner v. Safley, 482 U.S. 78, 89  
3 (1987). Prisons can restrict privacy rights “to the extent necessary to further the correctional  
4 system’s legitimate goals and policies.” Grummett v. Rushen, 779 F.2d 491, 493 (9th Cir.  
5 1985). The plaintiff “bears the burden of pleading and proving the absence of legitimate  
6 correctional goals for the conduct of which he complains.” Bruce v. Ylst, 351 F.3d 1283,  
7 1289 (9th Cir. 2003) (citation omitted).

8 Plaintiff fails to describe any facts to support that he had an expectation of privacy in  
9 not being subjected to a tuberculosis test or that receiving the test was not reasonably related  
10 to legitimate penological interests. Tuberculosis is a highly contagious disease in prison  
11 populations and screening is necessary to prevent outbreaks. See DeGidio v. Pung, 920 F.2d  
12 525, 527 (8th Cir. 1990). Diagnosing and preventing disease and protecting the health of  
13 inmates are legitimate penological goals. See Thompson v. City of Los Angeles, 885 F.2d  
14 1439, 1447 (9th Cir.1989) (“County’s interest of diagnosing severe medical problems to  
15 prevent transmission of serious disease among the general jail population is sufficiently  
16 compelling to preclude a finding that [forced blood tests and x-rays] are unreasonable within  
17 the meaning of the Fourth Amendment.”). Moreover, Plaintiff has failed to allege facts to  
18 support that Defendants Meier and Johnson’s presence in the clinic or Defendant Johnson’s  
19 presence during the test was not reasonably related to legitimate penological interests.  
20 Finally, “[v]erbal harassment or abuse . . . is not sufficient to state a constitutional  
21 deprivation[.]” Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (quoting Collins  
22 v. Cundy, 603 F.2d 825, 827 (10th Cir. 1979)). Therefore, the Court will dismiss without  
23 prejudice Count One.

24 **B. Count Two—Threat to Safety**

25 The Eighth Amendment requires prison officials to take reasonable measures to  
26 guarantee the safety of inmates, and officials have a duty to protect prisoners from violence  
27 at the hands of other prisoners. Farmer v. Brennan, 511 U.S. 825, 832-33 (1994); Hearns v.  
28 Terhune, 413 F.3d 1036, 1040 (9th Cir. 2005). The inmate must show that the deprivation

1 is “objectively, sufficiently serious,” and that the prison officials had a “sufficiently culpable  
2 state of mind,” acting with deliberate indifference. Hearns, 413 F.3d at 1040 (quoting  
3 Farmer, 511 U.S. at 834). To demonstrate deliberate indifference, a prisoner must show that  
4 the official knew of and disregarded an excessive risk to inmate safety; the official must both  
5 be aware of facts from which the inference could be drawn that a substantial risk of serious  
6 harm exists, and the official must also draw the inference. Farmer, 511 U.S. at 837.

7 Plaintiff fails to allege facts to support that Defendants Meier, Johnson, or Unknown  
8 Male Staff knew of, but disregarded, a substantial threat to Plaintiff’s safety. To the  
9 contrary, Plaintiff alleges that, when Defendants saw that the inmates were becoming  
10 agitated, Defendants took steps to control the inmates by informing them that Defendants  
11 would call the Special Operation Response Team to control the inmates with pepper spray  
12 and physical restraints. No riot occurred. Plaintiff therefore has failed to state a claim for  
13 a threat to his safety. The Court will dismiss without prejudice Count Two.

14 **C. Count Three—Inadequate Medical Care**

15 Not every claim by a prisoner that he has received inadequate medical treatment states  
16 a violation of the Eighth or Fourteenth Amendment. To state a § 1983 medical claim, a  
17 plaintiff must show that the defendants acted with “deliberate indifference to serious medical  
18 needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429  
19 U.S. 97, 104 (1976)). A plaintiff must show (1) a “serious medical need” by demonstrating  
20 that failure to treat the condition could result in further significant injury or the unnecessary  
21 and wanton infliction of pain and (2) the defendant’s response was deliberately indifferent.  
22 Jett, 439 F.3d at 1096 (quotations omitted).

23 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,  
24 1060 (9th Cir. 2004). To act with deliberate indifference, a prison official must both know  
25 of and disregard an excessive risk to inmate health; the official must both be aware of facts  
26 from which the inference could be drawn that a substantial risk of serious harm exists and  
27 he must also draw the inference. Farmer, 511 U.S. at 837. Deliberate indifference in the  
28 medical context may be shown by a purposeful act or failure to respond to a prisoner’s pain

1 or possible medical need and harm caused by the indifference. Jett, 439 F.3d at 1096.  
2 Deliberate indifference may also be shown when a prison official intentionally denies,  
3 delays, or interferes with medical treatment or by the way prison doctors respond to the  
4 prisoner's medical needs. Estelle, 429 U.S. at 104-05; Jett, 439 F.3d at 1096.

5 Deliberate indifference is a higher standard than negligence or lack of ordinary due  
6 care for the prisoner's safety. Farmer, 511 U.S. at 835. "Neither negligence nor gross  
7 negligence will constitute deliberate indifference." Clement v. California Dep't of  
8 Corrections, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter  
9 Labs., 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or  
10 "medical malpractice" do not support a claim under § 1983). "A difference of opinion does  
11 not amount to deliberate indifference to [a plaintiff's] serious medical needs." Sanchez v.  
12 Vild, 891 F.2d 240, 242 (9th Cir. 1989). The indifference must be substantial. The action  
13 must rise to a level of "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 105-  
14 06.

15 Plaintiff contends that Defendant Unknown Medical Staff forced Plaintiff to submit  
16 to the tuberculosis test without Plaintiff's consent because Defendant Unknown Medical  
17 Staff ordered Plaintiff to extend his arm after Plaintiff objected to the test on the ground that  
18 he had tested positive for tuberculosis for 14 years. Plaintiff has failed to suggest that he was  
19 subjected to a wanton infliction of pain or that Defendant Unknown Medical Staff knew of  
20 and disregarded an excessive risk to Plaintiff's health. Plaintiff's allegations in Count Three  
21 do not rise to the level of deliberate indifference. Therefore, the Court will dismiss without  
22 prejudice Count Three.

#### 23 **IV. Leave to Amend**

24 For the foregoing reasons, Plaintiff's First Amended Complaint will be dismissed for  
25 failure to state a claim upon which relief may be granted. Within 30 days, Plaintiff may  
26 submit a second amended complaint to cure the deficiencies outlined above. The Clerk of  
27 Court will mail Plaintiff a court-approved form to use for filing a second amended complaint.  
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1 If Plaintiff fails to use the court-approved form, the Court may strike the second amended  
2 complaint and dismiss this action without further notice to Plaintiff.

3 A second amended complaint supersedes the original Complaint and First Amended  
4 Complaint. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992); Hal Roach Studios v.  
5 Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990). After amendment, the Court will  
6 treat the original Complaint and First Amended Complaint as nonexistent. Ferdik, 963 F.2d  
7 at 1262. Any cause of action that was raised in the original Complaint or First Amended  
8 Complaint is waived if it is not raised in a second amended complaint. King v. Atiyeh, 814  
9 F.2d 565, 567 (9th Cir. 1987).

10 **V. Warnings**

11 **A. Release**

12 Plaintiff must pay the unpaid balance of the filing fee within 120 days of his release.  
13 Also, within 30 days of his release, he must either (1) notify the Court that he intends to pay  
14 the balance or (2) show good cause, in writing, why he cannot. Failure to comply may result  
15 in dismissal of this action.

16 **B. Address Changes**

17 Plaintiff must file and serve a notice of a change of address in accordance with Rule  
18 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other  
19 relief with a notice of change of address. Failure to comply may result in dismissal of this  
20 action.

21 **C. Copies**

22 Plaintiff must submit an additional copy of every filing for use by the Court. See  
23 LRCiv 5.4. Failure to comply may result in the filing being stricken without further notice  
24 to Plaintiff.

25 **D. Possible “Strike”**

26 Because the First Amended Complaint has been dismissed for failure to state a claim,  
27 if Plaintiff fails to file a second amended complaint correcting the deficiencies identified in  
28 this Order, the dismissal will count as a “strike” under the “3-strikes” provision of 28 U.S.C.

1 § 1915(g). Under the 3-strikes provision, a prisoner may not bring a civil action or appeal  
2 a civil judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more  
3 prior occasions, while incarcerated or detained in any facility, brought an action or appeal  
4 in a court of the United States that was dismissed on the grounds that it is frivolous,  
5 malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is  
6 under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

7 **E. Possible Dismissal**

8 If Plaintiff fails to timely comply with every provision of this Order, including these  
9 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at  
10 1260-61 (a district court may dismiss an action for failure to comply with any order of the  
11 Court).

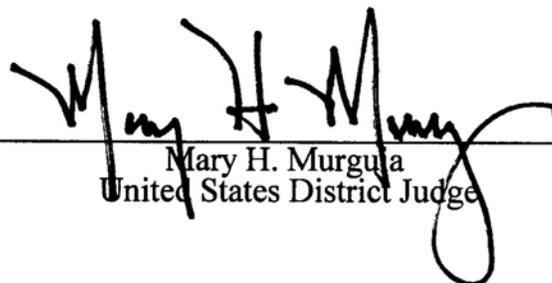
12 **IT IS ORDERED:**

13 (1) Plaintiff’s First Amended Complaint (Doc. #8) is **dismissed** for failure to state  
14 a claim. Plaintiff has **30 days** from the date this Order is filed to file a second amended  
15 complaint in compliance with this Order.

16 (2) If Plaintiff fails to file a second amended complaint within 30 days, the Clerk  
17 of Court must, without further notice, enter a judgment of dismissal of this action with  
18 prejudice that states that the dismissal counts as a “strike” under 28 U.S.C. § 1915(g).

19 (3) The Clerk of Court must mail Plaintiff a court-approved form for filing a civil  
20 rights complaint by a prisoner.

21 DATED this 21<sup>st</sup> day of September, 2009.

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24   
25 Mary H. Murgula  
26 United States District Judge  
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