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

Mark Steven Parker,
Plaintiff,
vs.
Adu-Tutu, et al.,
Defendants.

No. CV 10-2747-PHX-GMS (ECV)

ORDER

On December 20, 2010, Plaintiff Mark Steven Parker, who is confined in the Arizona State Prison Complex (ASPC)-Tucson, filed a *pro se* pleading entitled “Order To Cause For A[n] Injunction For Writ Of Habeas Corpus By A Person In State Custody” (Doc. 1), which the Clerk of Court docketed as a Petition for Writ of Habeas Corpus (Petition). Plaintiff also filed a pleading entitled “Injunction For a Writ Of Habeas Corpus By A Person In State Custody” (Doc. 2) and an “Application To Proceed *In Forma Pauperis* By A Prisoner (Habeas)” (Doc. 3).

By Order filed January 4, 2011 (Doc. 5), the Court dismissed without prejudice, with leave to amend, Plaintiff’s Petition (Doc. 1), which the Court construed as a civil rights Complaint brought pursuant to 42 U.S.C. § 1983. Plaintiff was given 30 days from the filing date of the Order to file a first amended complaint that complied with the Order.

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1 The Court's Order also denied without prejudice Plaintiff's pleading entitled
2 "Injunction For a Writ Of Habeas Corpus By A Person In State Custody" (Doc. 2) and
3 "Application To Proceed *In Forma Pauperis* By A Prisoner (Habeas)" (Doc. 3). Plaintiff
4 was given 30 days from the filing date of the Order to either pay the \$350.00 filing fee or file
5 a completed "Application To Proceed *In Forma Pauperis* By A Prisoner Civil (Non-
6 Habeas)" and a certified six-month trust account statement from the Arizona Department of
7 Correction's Central Office.

8 On January 3, 2011, Plaintiff filed a "Motion For Leave To File An Amended
9 Complaint To Injunction For Writ Of Habeas Corpus" (Doc. 6) and a second "Application
10 To Proceed *In Forma Pauperis* By A Prisoner (Habeas)" (Doc. 7). Neither of these
11 pleadings came to the attention of the Court before the Court's January 4, 2011 Order
12 (Doc. 5) was filed. By Order filed January 11, 2011 (Doc. 9), the Court denied without
13 prejudice as moot both Plaintiff's "Motion For Leave To File An Amended Complaint To
14 Injunction For Writ Of Habeas Corpus" and second "Application To Proceed *In Forma*
15 *Pauperis* By A Prisoner (Habeas)." Plaintiff was advised that he must still comply with the
16 Court's January 4, 2011 Order (Doc. 5) in a timely manner.

17 On February 16, 2011, Plaintiff filed a "Motion For: Injunctive Relief" (Doc. 11).
18 Then, on February 22, 2011, Plaintiff filed a First Amended Complaint (Doc. 12), an
19 "Application To Proceed *In Forma Pauperis* (Doc. 13), a "Certified Statement Of Account"
20 (Doc. 14), and a pleading entitled "Motion For: Informing Court of Due Process Violations"
21 (Doc. 15).

22 On March 23, 2011, Plaintiff filed a Notice of Change of Address (Doc. 16) and a
23 "Motion For: Request For Status" (Doc. 17). On April 4, 2011, Plaintiff filed "Plaintiff's
24 Motion For Preliminary Injunction" (Doc. 18), "Memorandum Of Law In Support Of
25 Plaintiff's Motion For Preliminary Injunction" (Doc. 19), and a "Motion For Leave To File
26 An Amended Complaint" (Doc. 20). On April 5, 2010, the Court issued a "Notice To Filer
27 Of Deficiencies In Electronically Filed Documents" (Doc. 21). On April 18, 2011, Plaintiff
28 filed a "Motion For Extension Of Time" (Doc. 22) and a pleading entitled "Filer Not In

1 Possession Requesting Copy” (Doc. 23).

2 By Order filed April 21, 2011 (Doc.24), the Court granted Plaintiff’s Application to
3 Proceed *In Forma Pauperis* (Doc. 13); granted in part and denied in part Plaintiff’s “Motion
4 For: Request For Status” (Doc. 17), “Motion For Leave To File An Amended Complaint”
5 (Doc. 20), and pleading entitled “Filer Not In Possession Requesting Copy” (Doc. 23);
6 denied Plaintiff’s “Motion For Extension Of Time” (Doc. 22) as moot; denied without
7 prejudice Plaintiff’s “Motion For: Injunctive Relief” (Doc. 11), “Motion For: Informing
8 Court of Due Process Violations” (Doc. 15), and “Plaintiff’s Motion For Preliminary
9 Injunction” (Doc. 18); dismissed without prejudice Plaintiff’s First Amended Complaint
10 (Doc. 12); gave Plaintiff 30 days from the date the Order was filed to file a second amended
11 complaint; and directed the Clerk of Court to mail to Plaintiff a copy of his First Amended
12 Complaint (Doc. 12) and a court-approved form for filing a civil rights complaint by a
13 prisoner.

14 On May 16, 2011, Plaintiff filed a Second Amended Complaint (Doc. 26), a new
15 “Application To Proceed *In Forma Pauperis*” (Doc. 27), a “Certified Statement Of Account”
16 (Doc. 28), “Plaintiff’s Motion For Preliminary Injunction” (Doc. 29), “Memorandum Of Law
17 In Support Of Plaintiff’s Motion For Preliminary Injunction” (Doc. 30), and “Motion For:
18 Extraordinary Circumstances Exist For Delay Filing” (Doc. 31). On June 22, 2011, Plaintiff
19 filed a “Motion For Due Process Violation Request For Injunctive Relief” (Doc. 34).

20 **I. New Application to Proceed *In Forma Pauperis***

21 Because Plaintiff’s previous Application to Proceed *In Forma Pauperis* (Doc. 13) was
22 granted by Order filed April 21, 2011 (Doc. 24), the Court will deny as moot Plaintiff’s new
23 Application to Proceed *In Forma Pauperis* (Doc. 27).

24 **II. Motion to Allow Late Filing**

25 In Plaintiff’s “Motion For: Extraordinary Circumstances Exist For Delay Filing”
26 (Doc. 31), Plaintiff requests this Court to “allow late filing due to no fault of Plaintiff.”
27 Because Plaintiff’s Second Amended Complaint (Doc. 26) was timely filed within 30 days
28 of the Court’s April 21, 2011 Order (Doc. 24), the Court will deny as moot Plaintiff’s

1 Motion.

2 **III. Statutory Screening of Prisoner Complaints**

3 The Court is required to screen complaints brought by prisoners seeking relief against
4 a governmental entity or an officer or an employee of a governmental entity. 28 U.S.C.
5 § 1915A(a). The Court must dismiss a complaint or portion thereof if a plaintiff has raised
6 claims that are legally frivolous or malicious, that fail to state a claim upon which relief may
7 be granted, or that seek monetary relief from a defendant who is immune from such relief.
8 28 U.S.C. § 1915A(b)(1), (2).

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

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

24 But as the United States Court of Appeals for the Ninth Circuit has instructed, courts
25 must “continue to construe *pro se* filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th
26 Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards
27 than formal pleadings drafted by lawyers.’” Id. (quoting Erickson v. Pardus, 551 U.S. 89,
28 94 (2007) (*per curiam*)).

1 **IV. Second Amended Complaint**

2 Plaintiff should take notice that all causes of action alleged in an original complaint
3 or first amended complaint which are not alleged in a second amended complaint are waived.
4 Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990) (“an
5 amended pleading supersedes the original”); King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987).
6 Accordingly, the Court will consider only those claims specifically asserted in Plaintiff’s
7 Second Amended Complaint (Doc. 26) with respect to only those Defendants specifically
8 named in the Second Amended Complaint.

9 Named as Defendants in the Second Amended Complaint are: (1) Charles L. Ryan,
10 Director, Arizona Department of Corrections (ADOC); (2) Adu-Tutu, Doctor, Facility Health
11 Administrator (FHA); (3) Phen, Doctor, FHA, ASPC-Florence; (4) Chitwood, Physician’s
12 Assistant, North and East Units, ASPC-Florence; (5) Thunderwood, Doctor, ASPC-Fort
13 Grant; (6) John Doe Food Service Canteen Manager; (7) John Doe Doctor, ASPC-Fort Grant;
14 (8) Rowe, Doctor, FHA; and (9) Kenter, Doctor, Stiner Unit, ASPC-Lewis.

15 Plaintiff alleges nine counts in the Second Amended Complaint and seeks a jury trial,
16 a proper medical diet for gout, “doctor prescribed shoes,” and monetary damages.

17 **V. Discussion**

18 **A. Introduction**

19 Under the heading of “A. Introduction” in the Second Amended Complaint (Doc. 26),
20 Plaintiff states that “[t]his is a 1983 action filed by Plaintiff, Mark Parker, a state prisoner,
21 alleging violation of his constitutional right to receive adequate and proper medical treatment
22 for chronic gout and seeking injunctive relief and money damages and damages pursuant to
23 the Americans with Disabilities Act and the Rehabilitation Act.” However, Plaintiff does not
24 make any claims under either the Americans with Disabilities Act or the Rehabilitation Act
25 in the counts of his Second Amended Complaint. Accordingly, the Court will dismiss any
26 claims that Plaintiff may be trying to make under either the Americans with Disabilities Act
27 or the Rehabilitation Act for failure to state a claim upon which relief may be granted.
28

1 **B. Count I**

2 In Count I, Plaintiff claims that his Eighth Amendment rights were violated by
3 Defendant Thunderwood when he diagnosed him with chronic gout and prescribed a low-
4 purine diet, by Defendant John Doe Doctor when he “overrode” the low-purine medical diet
5 that was prescribed by Defendant Thunderwood and “confiscated” Plaintiff’s diet card, and
6 by Defendant John Doe Food Service Canteen Manager when he “refused” to provide
7 Plaintiff with the low-purine medical diet that was prescribed by Defendant Thunderwood.

8 To establish a § 1983 claim for violation of the Eighth Amendment based on
9 inadequate medical care, a plaintiff must demonstrate “acts or omissions sufficiently harmful
10 to evidence deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S.
11 97, 106 (1976). This requires the plaintiff to satisfy both the objective and subjective
12 components of a two-part test. Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002). First,
13 the plaintiff must demonstrate that he or she suffered a serious medical need. Jett v. Penner,
14 439 F.3d 1091, 1096 (9th Cir. 2006).

15 Second, the plaintiff must show that the defendant’s response to that serious medical
16 need was deliberately indifferent. “[D]eliberate indifference to a prisoner’s serious medical
17 needs is the ‘unnecessary and wanton infliction of pain.’” Estelle, 429 U.S. at 104-05. An
18 official is deliberately indifferent if he both knows of and disregards an excessive risk to an
19 inmate’s health. Farmer v. Brennan, 511 U.S. 825, 837 (1970).

20 “Neither negligence nor gross negligence will constitute deliberate indifference.”
21 Clement v. California Dep’t of Corrections, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002)
22 (emphasis added); see also Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir. 1980)
23 (mere claims of “indifference,” “negligence,” or “medical malpractice” do not support a
24 claim under § 1983). “A difference of opinion does not amount to deliberate indifference
25 to [a plaintiff’s] serious medical needs.” Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).
26 A mere delay in medical care, without more, is insufficient to state a claim against prison
27 officials for deliberate indifference. See Shapley v. Nevada Bd. of State Prison Comm’rs,
28 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial. The action must

1 rise to a level of “unnecessary and wanton infliction of pain.” Estelle, 429 U.S. at 105.

2 Plaintiff’s allegations against Defendant Thunderwood are insufficient to state an
3 Eighth Amendment claim for inadequate medical care. Plaintiff does not show how
4 Defendant Thunderwood was deliberately indifferent to a serious medical need. Indeed, it
5 appears that Defendant Underwood not only made the diagnosis of chronic gout for Plaintiff
6 but also he gave him what Plaintiff considered to be an appropriate medical diet.
7 Accordingly, the Court will dismiss Plaintiff’s claims in Count I against Defendant
8 Thunderwood for failure to state a claim upon which relief may be granted.

9 Plaintiff has also failed to state a claim for inadequate medical care against Defendant
10 John Doe Food Service Canteen Manager. Although Plaintiff alleges that Defendant John
11 Doe Food Service Canteen Manager “refused” to provide Plaintiff with the low-purine
12 medical diet that was prescribed by Defendant Thunderwood, Plaintiff does not make any
13 showing that this Defendant, who is not a doctor, knew that there was an excessive risk to
14 Plaintiff’s health if he did not receive a low-purine diet. Accordingly, the Court will dismiss
15 Plaintiff’s claims in Count I against Defendant John Doe Food Service Canteen Manager for
16 failure to state a claim upon which relief may be granted.

17 Liberally construed, Plaintiff has stated an Eighth Amendment claim against
18 Defendant John Doe Doctor. However, the Court will not direct that service be made on
19 Defendant John Doe Doctor at this time.

20 Generally, the use of anonymous type appellations to identify defendants is not
21 favored. Rule 10(a) of the Federal Rules of Civil Procedure requires the plaintiff to include
22 the names of the parties in the action. As a practical matter, it is impossible in most instances
23 for the United States Marshal or his designee to serve a summons and complaint upon an
24 anonymous defendant.

25 The Ninth Circuit has held that where identity is unknown prior to the filing of a
26 complaint, the plaintiff should be given an opportunity through discovery to identify the
27 unknown defendants, unless it is clear that discovery would not uncover the identities, or that
28 the complaint would be dismissed on other grounds. Wakefield v. Thompson, 177 F.3d

1 1160, 1163 (9th Cir. 1999) (citing Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980)).
2 Accordingly, Plaintiff may use the discovery processes to obtain the name of the person who
3 he believes violated his constitutional rights. If Plaintiff discovers the true identity of this
4 fictitious party through the discovery process, or otherwise, he may seek leave of the Court
5 to amend his Second Amended Complaint to name the individual in place of Defendant John
6 Doe Doctor.

7 **C. Count II**

8 In Count II, Plaintiff claims that his Eighth Amendment rights were violated by
9 Defendant Chitwood when she prescribed a “control protein diet” for Plaintiff, which
10 Plaintiff asserts is an “improper diet for gout,” when she had to prescribe special shoes for
11 Plaintiff because of the damage the “improper diet” caused, and when she had to increase the
12 dosage of Plaintiff’s gout medication “Allopurinol” to counter the effects of the “control
13 protein diet.” Plaintiff also claims that his Eighth Amendment rights were violated by
14 Defendant Rowe when he denied Defendant Chitwood’s request to prescribe a “no meat”
15 diet” for Plaintiff.

16 Plaintiff’s allegations against Defendant Chitwood do not rise to the level of Eighth
17 Amendment violations. At most, Plaintiff’s allegations against Defendant Chitwood
18 constitute a difference of opinion about the proper diagnosis and treatment for his gout that
19 does not amount to deliberate indifference. See Sanchez, 891 F.2d at 242. This is not a case
20 where Defendant Chitwood refused to treat Plaintiff’s gout. Instead, Defendant Chitwood
21 prescribed a medical diet for Plaintiff and made efforts to mitigate the effects of the diet by
22 increasing the dosage of his medication, prescribing special shoes, and trying to prescribe a
23 different diet for Plaintiff after Plaintiff’s joints were damaged and he suffered pain.
24 Accordingly, the Court will dismiss Plaintiff’s claims in Count II against Defendant
25 Chitwood for failure to state a claim upon which relief may be granted.

26 Liberally construed, Plaintiff has stated an Eighth Amendment claim against
27 Defendant Rowe in Count II. Accordingly, the Court will require Defendant Rowe to answer
28 Count II.

1 **D. Count III**

2 In Count III, Plaintiff claims that his Eighth Amendment rights were violated by
3 Defendant Phen when he requested a “‘no meat’ diet” for Plaintiff after he “saw a for seeable
4 harm” if Plaintiff stayed on the “control protein diet that Defendant Chitwood prescribed,”
5 when he requested a “‘no meat’ diet” for Plaintiff, and when he added a “resource (a protein
6 powder) to the improper control protein diet” after Defendant Rowe refused his request for
7 the “‘no meat’ diet.” Plaintiff also claims that his Eighth Amendment rights were violated
8 by Defendant Rowe when he denied Defendant Phen’s request to prescribe a “‘no meat’ diet”
9 for Plaintiff.

10 Plaintiff’s allegations against Defendant Phen do not rise to the level of Eighth
11 Amendment violations. Defendant Phen was not deliberately indifferent to the medical need
12 to treat Plaintiff’s gout; Defendant Phen tried to prescribe a “‘no meat’ diet” for Plaintiff and
13 added a “resource (a protein powder)” to Plaintiff’s “control protein diet” in an effort to stop
14 Plaintiff from losing weight. Accordingly, the Court will dismiss Plaintiff’s claims in Count
15 III against Defendant Phen for failure to state a claim upon which relief may be granted.

16 Liberally construed, Plaintiff has stated an Eighth Amendment claim against
17 Defendant Rowe in Count III. Accordingly, the Court will require Defendant Rowe to
18 answer Count III.

19 **E. Count IV**

20 In Count IV, Plaintiff claims that his Eighth Amendment rights were violated by
21 Defendant Kenter when he “refused to pr[e]scribe a medical diet for [Plaintiff’s] chronic
22 gout” from “approximately 2008 to 2009.”

23 Although *pro se* pleadings are liberally construed, Haines v. Kerner, 404 U.S. 519,
24 520-21 (1972), conclusory and vague allegations will not support a cause of action. Ivey v.
25 Board of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982). Further,
26 a liberal interpretation of a civil rights complaint may not supply essential elements of the
27 claim that were not initially pled. Id. “Threadbare recitals of the elements of a cause of
28 action, supported by mere conclusory statements, do not suffice.” Iqbal, 129 S. Ct. at 1949.

1 Plaintiff's allegations against Defendant Kenter are too conclusory and vague to state
2 a claim under the Eighth Amendment. Plaintiff does not allege any facts whatsoever about
3 the circumstances surrounding his conclusory allegations. Accordingly, the Court will
4 dismiss Count IV for failure to state a claim upon which relief may be granted.

5 **F. Count V**

6 In Count V, Plaintiff claims that his Eighth Amendment rights were violated by
7 Defendant Chitwood when she tried to "discredit" him by "creating a campaign of false
8 reporting on Plaintiff's medical record." Plaintiff alleges that when he is having a "severe
9 and painful gout attack," he is "directed to fill out an H and R and made to wait for as long
10 as five [] days to be seen." Plaintiff further alleges that Defendant Chitwood "knows or
11 should know that a gout flare-up only lasts one to three days," but "deliberately delays [his]
12 medical appointment until the signs of [the] flare-up [are] over so that she can show that the
13 increased dosage of med[icine]s are working when they are not." Plaintiff asserts that
14 Defendant Chitwood "claims at the medical appointment that she sees no sign of a gout
15 attack knowing that Plaintiff just got over a gout flare-up and knowing that [Plaintiff] is still
16 in extreme pain" and that she is responsible for "false reporting" when she reports in the
17 medical records that Plaintiff "did not have a gout attack."

18 Plaintiff's allegations that Defendant Chitwood tried to discredit him and is
19 responsible for false reporting on his medical records do not rise to the level of Eighth
20 Amendment violations. Plaintiff does not allege that Defendant Chitwood failed to treat him
21 for gout. Accordingly, the Court will dismiss Count V for failure to state a claim upon which
22 relief may be granted.

23 **G. Count VI**

24 In Count VI, Plaintiff claims that his Eighth Amendment rights were violated by
25 Defendant Chitwood when, after Defendant Rowe overruled her attempt to provide a "needed
26 medical diet (vegetarian)" to Plaintiff, she tried to "make the ongoing gout attacks her
27 patient[']s fault and not the improper diet by creating a facade that the patient is not taking
28 his med[icine] Allopurinol." Plaintiff alleges that the "only time" he "did not take

1 Allopurinol is when [the] black nurse at [the] pill win[dow] said there is no med[icine] today
2 for you” and that this “went on for months.” Plaintiff further alleges that Defendant
3 Chitwood “deliberately refused to provide Allopurinol for gout and did not correctly report
4 gout flare-ups and mis[]le[]d the reader of medical records to justify upper medical officials’
5 refusal to order via the canteen a ‘no meat’ diet.”

6 Plaintiff’s claims against Defendant Chitwood in Count VI are too vague, conclusory,
7 and confusing to state a valid claim under the Eighth Amendment. See Ivey, 673 F.2d at 268.
8 For example, Plaintiff seems to be arguing that Defendant Chitwood made it appear that
9 Plaintiff was not taking his Allopurinol, at that same time that he seems to be arguing that
10 Defendant Chitwood refused to provide Allopurinol to Plaintiff. Accordingly, the Court will
11 dismiss Count VI for failure to state a claim upon which relief may be granted.

12 **H. Count VII**

13 In Count VII, Plaintiff claims that his Eighth Amendment rights were violated by
14 Defendant Charles L. Ryan because, as Director of the ADOC, he “is responsible for
15 [ADOC] policy that a medical official [doctor] is not allowed to provide a chronic gout
16 patient a medical vegetarian diet because a vege[tarian] diet can only be prescribed by the
17 chaplain.” Plaintiff asserts that Defendant Ryan’s policy that a “vege[tarian] diet is a
18 religious diet only” is “deliberately indifferent to [his] serious medical needs.”

19 In order to state a medical claim under the Eighth Amendment against Defendant
20 Ryan, Plaintiff must show that Defendant Ryan was deliberately indifferent to Plaintiff’s
21 serious medical by both knowing of and disregarding an excessive risk to an Plaintiff’s
22 health. Farmer, 511 U.S. at 837. However, Plaintiff does not make any showing that
23 Defendant Ryan knew that there was an excessive risk to Plaintiff’s health if Plaintiff did not
24 receive a vegetarian diet. Accordingly, the Court will dismiss Count VII for failure to state
25 a claim upon which relief may be granted.

26 **I. Count VIII**

27 In Count VIII, Plaintiff claims that his Eighth Amendment rights were violated by
28 Defendant Rowe when he repeatedly denied requests by Defendants Phen, Thunderwood,

1 and Chitwood for a “vegetarian diet for a chronic gout patient claiming [that] [ADOC] policy
2 won[']t allow a doctor to prescribe a vegetarian diet because [ADOC] policy claims that a
3 vege[tarian] diet can only be prescribed by the chaplain.”

4 Liberally construed, Plaintiff has stated an Eighth Amendment claim against
5 Defendant Rowe in Count VIII. Accordingly, the Court will require Defendant Rowe to
6 answer Count VIII.

7 **J. Count IX**

8 In Count IX,¹ Plaintiff claims that his Eighth Amendment rights were violated by
9 Defendant Adu-Tutu because he “is top (FHA) of all the [ADOC] and over see[s] Dr. Rowe,
10 Dr. Phen, Dr. Kenter, Dr. Thunderwood, Dr. John Doe, P.A. Chitwood and so on”; “is
11 responsible for the medical service the doctor[s] provide”; and he “was part of the medical
12 officials who refused to allow said [doctors] and [Physician Assistants] to prescribe a proper
13 medical diet for a chronic gout patient - Parker.”

14 In order to state a viable constitutional claim under 42 U.S.C. § 1983, Plaintiff must
15 show an affirmative link between the alleged injury and the conduct of an individual
16 Defendant. Rizzo v. Goode, 423 U.S. 362, 371-72, 377 (1976). Also, to state a claim against
17 a state official, the civil rights complainant must allege that the official personally
18 participated in the constitutional deprivation, or that a state supervisory official was aware
19 of the widespread abuses and with deliberate indifference to the inmate's constitutional rights
20 failed to take action to prevent further misconduct. King, 814 F.2d at 568; see also Monell
21 v. New York City Department of Social Services, 436 U.S. 658, 691 (1978); Williams v.
22 Cash, 836 F.2d 1318, 1320 (11th Cir. 1988).

23 There is no liability under 42 U.S.C. § 1983 based on a theory of *respondeat superior*,
24 and, therefore, a defendant’s position as the supervisor of persons who allegedly violated a
25 plaintiff’s constitutional rights does not impose liability. Monell, 436 U.S. at 691; West v.
26 Atkins, 487 U.S. 42, 54 n.12 (1988); Ybarra v. Reno Thunderbird Mobile Home Village, 723

27 _____
28 ¹Count IX is denoted as “Count VIV” in the Complaint.

1 F.2d 675, 680-81 (9th Cir. 1984).

2 Plaintiff has not sufficiently linked the injuries that he complains about in Count IX
3 with the actions of Defendant Adu-Tutu. Defendant Adu-Tutu is not liable for violations of
4 Plaintiff's rights by the employees he over sees because there is no liability under 42 U.S.C.
5 § 1983 based on a theory of *respondeat superior*. See Monell, 436 U.S. at 691; West, 487
6 U.S. at 54 n.12; Ybarra, 723 F.2d at 680-81. Plaintiff does not allege that Defendant Adu-
7 Tutu personally denied Plaintiff medical care or directed other Defendants to deny medical
8 care to Plaintiff. Accordingly, the Court will dismiss Count IX for failure to state a claim
9 upon which relief may be granted.

10 **VI. Dismissal of Defendants**

11 Because no claims remain against them, the Court will dismiss Defendants Charles
12 L. Ryan, Adu-Tutu, Phen, Chitwood, Thunderwood, John Doe Food Service Canteen
13 Manager, and Kenter from this action for failure to state a claim upon which relief may be
14 granted.

15 **VII. Motion for Preliminary Injunction**

16 On May 16, 2011, Plaintiff filed "Plaintiff's Motion For Preliminary Injunction"
17 (Doc. 29), in which he seeks a preliminary injunction requiring the Defendants to provide
18 him with a "'no meat of any kind diet' (low in purine) that is adequate in calories and
19 nutritional value."

20 To obtain a preliminary injunction, the moving party must show "that he is likely to
21 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
22 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
23 the public interest." Winter v. Natural Resources Defense Council, Inc., 129 S. Ct. 365, 374
24 (2008). The moving party has the burden of proof on each element of the test.
25 Environmental Council of Sacramento v. Slater, 184 F. Supp. 2d 1016, 1027 (E.D. Cal.
26 2000).

27 The Court will require Defendant Rowe to file a response to "Plaintiff's Motion For
28 Preliminary Injunction."

1 **VIII. Motion for Due Process Violation Request for Injunctive Relief**

2 On June 22, 2011, Plaintiff filed a “Motion For Due Process Violation Request For
3 Injunctive Relief” (Doc. 34), in which advises the Court that he has “been placed in
4 Manzanita Detention” and that he has been “denied all [his] legal books, legal material, legal
5 supplies, legal documents to [his] complaint, [and] access to [a] legal reference library.”
6 Plaintiff requests that the Court “[e]nforce [his] Fourt[]eenth Amendment (due process) right
7 to the U.S. Constitution” and “grant access to the above legal material and access to a
8 reference library.”

9 An injunction or temporary restraining order is appropriate to grant intermediate relief
10 of the same character as which may be granted finally, and relief is not proper when
11 requested on matters lying wholly outside the issues in suit. See DeBeers Consol. Mines v.
12 United States., 325 U.S. 212, 220 (1945); Kaimowitz v. Orlando, Fla., 122 F.3d 41, 43 (11th
13 Cir.), amended, 131 F.3d 950 (11th Cir. 1997). To obtain injunctive relief, the party “must
14 necessarily establish a relationship between the injury claimed in the party’s motion and the
15 conduct asserted in the complaint.” Devose v. Herrington, 42 F.3d 470, 471 (8th Cir. 1994).

16 Plaintiff’s request for access to legal materials and to a reference library involves
17 matters lying wholly outside the medical issues in this suit. Accordingly, the Court will deny
18 Plaintiff’s “Motion For Due Process Violation Request For Injunctive Relief.”

19 **IX. Warnings**

20 **A. Release**

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

25 **B. Address Changes**

26 Plaintiff must file and serve a notice of a change of address in accordance with Rule
27 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion for other
28 relief with a notice of change of address. Failure to comply may result in dismissal of this

1 action.

2 **C. Copies**

3 Plaintiff must serve Defendant, or counsel if an appearance has been entered, a copy
4 of every document that he files. Fed. R. Civ. P. 5(a). Each filing must include a certificate
5 stating that a copy of the filing was served. Fed. R. Civ. P. 5(d). Also, Plaintiff must submit
6 an additional copy of every filing for use by the Court. See LRCiv 5.4. Failure to comply
7 may result in the filing being stricken without further notice to Plaintiff.

8 **D. Possible Dismissal**

9 If Plaintiff fails to timely comply with every provision of this Order, including these
10 warnings, the Court may dismiss this action without further notice. See Ferdik v. Bonzelet,
11 963 F.2d 1258, 1260-61 (9th Cir. 1992) (a district court may dismiss an action for failure to
12 comply with any order of the Court).

13 **IT IS ORDERED:**

14 (1) Plaintiff's Application to Proceed *In Forma Pauperis* (Doc. 27) and "Motion
15 For: Extraordinary Circumstances Exist For Delay Filing" (Doc. 31) are **denied as moot**.

16 (2) Plaintiff's "Motion For Due Process Violation Request For Injunctive Relief"
17 (Doc. 34) is **denied**.

18 (3) Defendants Charles L. Ryan, Adu-Tutu, Phen, Chitwood, Thunderwood, John
19 Doe Food Service Canteen Manager, and Kenter are **dismissed from this action** for failure
20 to state a claim upon which relief may be granted.

21 (4) Plaintiff's claims under the Americans with Disabilities Act and the
22 Rehabilitation Act, and Counts IV, V, VI, VII, and IX of the Second Amended Complaint
23 (Doc. 26) are **dismissed** for failure to state a claim upon which relief may be granted.

24 (5) Defendant Rowe **must answer** Counts II, III, and VIII of the Second Amended
25 Complaint (Doc. 26).

26 (6) The Clerk of Court **must send** to Plaintiff a service packet including the
27 Second Amended Complaint (Doc. 26), "Plaintiff's Motion For Preliminary Injunction"
28 (Doc. 29), Plaintiff's "Memorandum Of Law In Support Of Plaintiff's Motion For

1 Preliminary Injunction” (Doc. 30), this Order, and both summons and request for waiver
2 forms for Defendant Rowe.

3 (7) Plaintiff **must complete² and return** the service packet to the Clerk of Court
4 within **21 days** of the date of filing of this Order. The United States Marshal will not provide
5 service of process if Plaintiff fails to comply with this Order.

6 (8) **If** Plaintiff does not either obtain a waiver of service of the summons or
7 complete service of the Summons and Second Amended Complaint on Defendant Rowe
8 within 120 days of the filing of the Complaint or within 60 days of the filing of this Order,
9 whichever is later, the action may be dismissed as to Defendant Rowe. Fed. R. Civ. P. 4(m);
10 LRCiv 16.2(b)(2)(B)(I).

11 (9) The United States Marshal **must retain** the Summons, and copies of the
12 Second Amended Complaint, “Plaintiff’s Motion For Preliminary Injunction,” Plaintiff’s
13 “Memorandum Of Law In Support Of Plaintiff’s Motion For Preliminary Injunction”
14 (Doc. 30), and this Order for future use.

15 (10) The United States Marshal **must notify** Defendant Rowe of the commencement
16 of this action and request waiver of service of the summons pursuant to Rule 4(d) of the
17 Federal Rules of Civil Procedure. The notice to Defendant Rowe must include a copy of this
18 Order. **The Marshal must immediately file signed waivers of service of the summons.**
19 **If a waiver of service of summons is returned as undeliverable or is not returned by**
20 **Defendant Rowe within 30 days from the date the request for waiver was sent by the**
21 **Marshal, the Marshal must:**

22 (a) personally serve copies of the Summons, Second Amended Complaint,
23 “Plaintiff’s Motion For Preliminary Injunction,” Plaintiff’s “Memorandum Of Law
24 In Support Of Plaintiff’s Motion For Preliminary Injunction,” and this Order upon
25

26 ²If a Defendant is an officer or employee of the ADOC, Plaintiff must list the address of
27 the specific institution where the officer or employee works. Service cannot be effected on
28 an officer or employee at the Central Office of the ADOC unless the officer or employee
works there.

1 Defendant Rowe pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure; and
2 (b) within 10 days after personal service is effected, file the return of service
3 for Defendant, along with evidence of the attempt to secure a waiver of service of the
4 summons and of the costs subsequently incurred in effecting service upon Defendant.
5 The costs of service must be enumerated on the return of service form (USM-285) and
6 must include the costs incurred by the Marshal for photocopying additional copies of
7 the Summons, Second Amended Complaint, “Plaintiff’s Motion For Preliminary
8 Injunction,” Plaintiff’s “Memorandum Of Law In Support Of Plaintiff’s Motion For
9 Preliminary Injunction,” or this Order and for preparing new process receipt and
10 return forms (USM-285), if required. Costs of service will be taxed against the
11 personally served Defendant pursuant to Rule 4(d)(2) of the Federal Rules of Civil
12 Procedure, unless otherwise ordered by the Court.

13 (11) **If Defendant Rowe agrees to waive service of the Summons and Second**
14 **Amended Complaint, he must return the signed waiver forms to the United States**
15 **Marshal, not the Plaintiff.**

16 (12) Defendant Rowe **must answer** the Second Amended Complaint or otherwise
17 respond by appropriate motion within the time provided by the applicable provisions of Rule
18 12(a) of the Federal Rules of Civil Procedure.

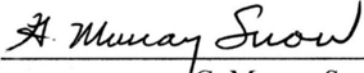
19 (13) Defendant Rowe **must file a response** to “Plaintiff’s Motion For Preliminary
20 Injunction” (Doc. 29) within **20 days** of the date of service of the Second Amended
21 Complaint. Plaintiff **may file a reply** within **10 days** of Defendant’s response.

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1 (14) This matter is **referred** to Magistrate Judge Edward C. Voss pursuant to Rules
2 72.1 and 72.2 of the Local Rules of Civil Procedure for all pretrial proceedings as authorized
3 under 28 U.S.C. § 636(b)(1).

4 DATED this 17th day of August, 2011.

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G. Murray Snow
United States District Judge