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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

ANTOINE P. LeBLANC,

Plaintiff,

v.

JOHN SOTO, *et al.*,

Defendants.

Case No. CV 15-05174-JLS (AFM)

**ORDER DISMISSING SECOND
AMENDED COMPLAINT WITH
LEAVE TO AMEND**

I. SUMMARY OF PROCEEDINGS

On July 9, 2015, plaintiff, a state prisoner presently incarcerated at the California Health Care Facility in Stockton, California, filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983. He subsequently was granted leave to proceed without prepayment of the full filing fee. Plaintiff's claims arise from incidents that took place while he was incarcerated at the California State Prison – Los Angeles County in Lancaster, California (“CSP-LAC”). (ECF No. 1 at 2.)¹ The Complaint named as defendant Warden John Soto, in his individual and official capacities. (*Id.* at 3.) On October 23, 2015, plaintiff filed a motion for leave to amend the

¹ The Court references the electronic version of the pleadings.

1 Complaint, which the Court granted. (ECF Nos. 17-18.)² On October 27, 2015,
2 plaintiff filed a First Amended Complaint (“FAC”), which consists of more than
3 300 pages including exhibits. (ECF No. 19.) The FAC named Warden Soto and
4 various other prison officials at CSP-LAC as defendants. All defendants were
5 named in their official as well as individual capacities. (*Id.* at 3-7, 24-28, 32-37;
6 ECF No. 19-1 at 16.)

7 In accordance with the terms of the “Prison Litigation Reform Act of 1995”
8 (“PLRA”), the Court screened the FAC prior to ordering service for purposes of
9 determining whether the action is frivolous or malicious; or fails to state a claim on
10 which relief may be granted; or seeks monetary relief against a defendant who is
11 immune from such relief. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b); 42 U.S.C.
12 § 1997e(c)(1). After careful review and consideration of the FAC, the Court found
13 that plaintiff’s allegations appeared insufficient to state any claim on which relief
14 may be granted. Plaintiff was apprised that his allegations failed to comply with
15 Federal Rules of Civil Procedure 8(a) and 8(d); the Eleventh Amendment bars
16 plaintiff’s federal civil rights claims for monetary damages against an individual
17 defendant in his or her official capacity; to the extent plaintiff was purporting to
18 raise any claims for denial of access to the courts, he must show that he suffered an
19 “actual injury” as a result of the defendants’ actions; plaintiff may not raise a
20 federal civil rights claim arising from a failure by prison officials to adequately
21 process grievances because prisoners have no constitutional right to an effective
22 grievance or appeal procedure; and to the extent plaintiff was seeking injunctive
23 relief, his transfer from CSP-LAC rendered any such request moot. (*See* ECF No.
24 20.)

25 Accordingly, the FAC was dismissed with leave to amend. *See Rosati v.*
26 *Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not dismiss

27 ² By Order of the Chief Magistrate Judge, this case was transferred to the calendar
28 of the below Magistrate Judge on July 20, 2015.

1 a pro se complaint without leave to amend unless it is absolutely clear that the
2 deficiencies of the complaint could not be cured by amendment.”) (internal
3 quotation marks omitted). Plaintiff was ordered, if he still desired to pursue this
4 action, to file a Second Amended Complaint no later than April 27, 2016,
5 remedying the pleading deficiencies discussed in the Court’s Order Dismissing.
6 Further, plaintiff was admonished that, if he failed to timely file a Second Amended
7 Complaint, or failed to remedy the deficiencies of his pleading, the Court would
8 recommend that the action be dismissed with prejudice. (*See* ECF No. 20.)

9 Following an extension of time, plaintiff filed a Second Amended Complaint
10 (“SAC,” ECF No. 25) on May 3, 2016. The SAC names ten defendants from CSP-
11 LAC, including Warden Soto; Associate Wardens Ulstad and Jordan; Chief Deputy
12 Wardens Biaggini and Cano; Voong, the Chief of Inmate Appeals; and Appeals
13 Coordinator Fordham. Once again, all defendants are named in their official as
14 well as individual capacities. (ECF No. 25 at 4-8.) Plaintiff raises four claims
15 arising from the repeated refusal of prison officials to provide him with paper and
16 pen fillers and an alleged “misappropriation of funds” (*id.* at 24). The SAC seeks
17 compensatory and punitive damages (*id.* at 26-27, 30-31), declaratory relief, and
18 injunctive relief to “require defendants to supply the entire indigent population with
19 pen fillers and paper at their expense” (*id.* at 28-29), and an “audit of the financial
20 state and budget of CSP-LAC” regarding the “misappropriation of funds i.e. pen
21 fillers and paper” (*id.* at 32).

22 On July 19, 2016, plaintiff filed a Motion for a Temporary Restraining Order
23 and Preliminary Injunction. (ECF No. 27 “Motion”.) Plaintiff’s Motion included
24 an attached Exhibit A, a Rules Violation Report (“RVR”) concerning an incident
25 that occurred on June 28, 2016, at CSP-LAC. In his Motion, plaintiff sought
26 “protection” from the Court to “prevent any more retaliatory actions” and alleged
27 that he was in imminent danger of harm. (ECF No. 27 at 1, 7.) Plaintiff stated that
28 he and his cellmate had been attacked and beaten by two Correctional Officers at

1 CSP-LAC. Following the incident, plaintiff was taken to the hospital and then
2 transferred to a different facility. (*Id.* at 3.) The RVR that plaintiff attached to his
3 TRO motion indicates that felony prosecution of plaintiff is likely for attempted
4 murder following the incident on June 28, 2016. (*Id.* at 8-9.) Plaintiff's request for
5 a temporary restraining order was denied by the District Judge on July 20, 2016,
6 because plaintiff had failed to show any likelihood that the harm would be repeated
7 following his transfer. (ECF No. 28.)

8 On August 18, 2016, plaintiff notified the Court that he had been transferred
9 to the California Health Care Facility in Stockton, California. (ECF No. 29.) Also
10 on August 18, 2016, plaintiff filed a Motion seeking copies of complaints and
11 motions pending in his federal cases because, at the time that he was transferred
12 from CSP-LAC on June 28, 2016, his property did not accompany him. As of
13 August 11, 2016, his legal documents had not been returned to him. Plaintiff stated
14 in an attached declaration (signed on August 11, 2016) that "without my property
15 . . . it will hinder my progress in all cases pending before your court." (ECF No. 30
16 at 1-3.) In response, the Court ordered the Deputy Attorney General to make an
17 effort to locate plaintiff's legal property. (ECF No. 34.) On September 23, 2016,
18 the Deputy Attorney General notified the Court that plaintiff's property had been
19 located and would be "transported forthwith" to his present facility. (ECF No. 35.)

20 Also on August 18, 2016, plaintiff notified the Court of his intent to appeal
21 the Court's denial of his Motion for a Temporary Restraining Order, and, on
22 August 29, 2016, the Court was notified by the Ninth Circuit that plaintiff had filed
23 an appeal. (ECF Nos. 31, 33.)

24 On August 22, 2016, plaintiff filed another Request for Preliminary
25 Injunction herein, seeking an order requiring defendants to provide pen fillers and
26 paper to indigent inmates at CSP-LAC, the same relief that he seeks, in part, in his
27 SAC. (ECF No. 32.)

28

1 Having now been notified that plaintiff has regained, or soon will regain,
2 possession of his legal documents, the Court, in accordance with the mandate of the
3 PLRA, has screened the SAC prior to ordering service. The Court’s screening of
4 the pleading under the foregoing statutes is governed by the following standards. A
5 complaint may be dismissed as a matter of law for failure to state a claim for two
6 reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a
7 cognizable legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699
8 (9th Cir. 1990); *see also Rosati*, 791 F.3d at 1039 (when determining whether a
9 complaint should be dismissed for failure to state a claim under 28 U.S.C.
10 § 1915(e)(2), the court applies the same standard as applied in a motion to dismiss
11 pursuant to Rule 12(b)(6)). In determining whether the pleading states a claim on
12 which relief may be granted, its allegations of material fact must be taken as true
13 and construed in the light most favorable to plaintiff. *See Love v. United States*,
14 915 F.2d 1242, 1245 (9th Cir. 1989). However, the “tenet that a court must accept
15 as true all of the allegations contained in a complaint is inapplicable to legal
16 conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

17 In addition, since plaintiff is appearing *pro se*, the Court must construe the
18 allegations of the pleading liberally and must afford plaintiff the benefit of any
19 doubt. *See Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir.
20 1988). However, the Supreme Court has held that, “a plaintiff’s obligation to
21 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
22 conclusions, and a formulaic recitation of the elements of a cause of action will not
23 do. . . . Factual allegations must be enough to raise a right to relief above the
24 speculative level . . . on the assumption that all the allegations in the complaint are
25 true (even if doubtful in fact).” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
26 (2007) (internal citations omitted, alteration in original); *see also Iqbal*, 556 U.S. at
27 678 (To avoid dismissal for failure to state a claim, “a complaint must contain
28 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible

1 on its face.’ . . . A claim has facial plausibility when the plaintiff pleads factual
2 content that allows the court to draw the reasonable inference that the defendant is
3 liable for the misconduct alleged.” (internal citation omitted)); *Starr v. Baca*, 652
4 F.3d 1202, 1216 (9th Cir. 2011) (“the factual allegations that are taken as true must
5 plausibly suggest an entitlement to relief, such that it is not unfair to require the
6 opposing party to be subjected to the expense of discovery and continued
7 litigation”), *cert. denied*, 132 S. Ct. 2101 (2012).

8 After careful review and consideration of the SAC under the foregoing
9 standards, the Court finds that plaintiff’s allegations remain insufficient to state any
10 claim on which relief may be granted. Because plaintiff is appearing *pro se*, the
11 Court must afford plaintiff the benefit of any doubt. *See Karim-Panahi*, 839 F.2d at
12 623. Therefore, the Court will provide him with one final opportunity to amend his
13 pleading to correct the deficiencies set forth below. Accordingly, the FAC is
14 dismissed with leave to amend. *See Rosati*, 791 F.3d at 1039 (“A district court
15 should not dismiss a pro se complaint without leave to amend unless it is absolutely
16 clear that the deficiencies of the complaint could not be cured by amendment.”)
17 (internal quotation marks omitted).

18 **If plaintiff still desires to pursue this action, he is ORDERED to file a**
19 **Third Amended Complaint no later than November 18, 2016, remedying the**
20 **deficiencies discussed below.** Further, plaintiff is admonished that, if he fails to
21 timely file a Third Amended Complaint, or fails to remedy the deficiencies of this
22 pleading as discussed herein, the Court will recommend that this action be
23 dismissed without leave to amend and with prejudice.³

24 _____
25 ³ Plaintiff is advised that this Court’s determination herein that the allegations in
26 the Second Amended Complaint are insufficient to state a particular claim should
27 not be seen as dispositive of that claim. Accordingly, although this Court believes
28 that you have failed to plead sufficient factual matter in your pleading, accepted as
true, to state a claim to relief that is plausible on its face, you are not required to
omit any claim or defendant in order to pursue this action. However, if you decide

1 **II. PLAINTIFF’S FACTUAL ALLEGATIONS**

2 Prior to plaintiff’s “arrival” at CSP-LAC, plaintiff had a “civil suit” against a
3 “Duane Folke” pending in Los Angeles County Superior Court. (ECF No. 25 at 9.)
4 After arriving at CSP-LAC, plaintiff “soon realized that staff do not give pen fillers
5 or paper nor [sic] any other writing utensil.” (*Id.*) Plaintiff “corresponded with the
6 courts [sic] intermittently by borrowing pens from inmates against the rules of
7 CDC.” (*Id.*) Plaintiff corresponded with the Superior Court in September and
8 October 2012, and he received mail from the Superior Court from September 2012
9 through February 2013. (*Id.* at 9-10.) Plaintiff states the conclusory allegation that
10 his Superior Court case was “dismissed” because CSP-LAC denied “access to pen
11 fillers or pencils.” (*Id.* at 10.)

12 Plaintiff requested pen fillers and paper on November 11, 2014 “from the
13 Inmate Trust Office,” which sent him to the mailroom. The mailroom sent him to
14 the floor staff at his facility, and the floor staff refused his request. (*Id.* at 10-11.)

15 Plaintiff alleges that, “[b]etween December 17, 2014, current, numerous
16 appeals were either rejected or cancelled” by defendant Fordham. (*Id.* at 11.)
17 Plaintiff explained to defendant Fordham that plaintiff did not have any pens, and
18 that CSP-LAC does not distribute pens. (*Id.*) Plaintiff also alleges that Sergeant
19 Gonzales accommodated plaintiff “one time.” (*Id.* at 12.) In addition, plaintiff
20 alleges that his “access to the grievance procedure was denied” by Fordham on nine
21 dates from December 19, 2014, through September 2, 2015. (*Id.* at 11.) Further,
22 plaintiff alleges that some of his administrative grievances were rejected because he
23 wrote them in pencil. (*Id.* at 11, 15.)

24
25 to pursue a claim in a Third Amended Complaint that this Court has found to be
26 insufficient, then this Court, pursuant to the provisions of 28 U.S.C. § 636,
27 ultimately will submit to the assigned district judge a recommendation that such
28 claim be dismissed with prejudice for failure to state a claim, subject to your right
at that time to file Objections with the district judge as provided in the Local Rules
Governing Duties of Magistrate Judges.

1 Plaintiff also alleged that defendants’ “intentional denial of writing materials
2 was causing a deterioration in my mental health.” (*Id.* at 16-17.) “Between July
3 2014 and August 2015,” plaintiff had mental health issues “due to situational,
4 emotional and institutional stressors,” and he attempted suicide on December 30,
5 2014. (*Id.* at 22.) In addition, plaintiff alleges that he suffered from depression,
6 and he let unspecified officials know (at unspecified times) that “they were
7 hampering, denying my ability to contact my family, one who was terminally ill.”
8 (*Id.* at 21.)

10 **III. DISCUSSION**

11 **A. Federal Rule of Civil Procedure 8**

12 Plaintiff’s SAC still fails to comply with Federal Rules of Civil Procedure
13 8(a) and 8(d). Fed. R. Civ. P. 8(a) states:

14 A pleading that states a claim for relief must contain: (1) a short
15 and plain statement of the grounds for the court’s jurisdiction
16 . . . ; (2) **a short and plain statement of the claim showing that
17 the pleader is entitled to relief**; and (3) a demand for the relief
18 sought, which may include relief in the alternative or different
types of relief.

19 (Emphasis added). Further, Rule 8(d)(1) provides: “Each allegation must be
20 simple, concise, and direct. No technical form is required.” Although the Court
21 must construe a *pro se* plaintiff’s pleadings liberally, a plaintiff nonetheless must
22 allege a minimum factual and legal basis for each claim that is sufficient to give
23 each defendant fair notice of what plaintiff’s claims are and the grounds upon
24 which they rest. *See, e.g., Brazil v. United States Dep’t of the Navy*, 66 F.3d 193,
25 199 (9th Cir. 1995); *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991) (a
26 complaint must give defendants fair notice of the claims against them). If a
27 plaintiff fails to clearly and concisely set forth factual allegations sufficient to
28 provide defendants with notice of which defendant is being sued on which theory

1 and what relief is being sought against them, the pleading fails to comply with Rule
2 8. *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996); *Nevijel v.*
3 *Northcoast Life Ins. Co.*, 651 F.2d 671, 674 (9th Cir. 1981). Moreover, failure to
4 comply with Rule 8 constitutes an independent basis for dismissal of a complaint
5 that applies even if the claims in a complaint are not found to be wholly without
6 merit. *See McHenry*, 84 F.3d at 1179; *Nevijel*, 651 F.2d at 673.

7
8 **B. Declaratory and Injunctive Relief**

9 As the Court has previously apprised plaintiff, his transfer from CSP-LAC
10 renders his request for declaratory and injunctive relief moot because plaintiff is no
11 longer subject to the policies and practices of CSP-LAC regarding the provision of
12 writing materials to indigent prisoners. The Ninth Circuit has recognized that the
13 transfer of an inmate from a prison generally moots any claims for injunctive relief
14 based on the prison's policies. *See Dilley v. Gunn*, 64 F.3d 1365, 1368 (9th Cir.
15 1995). Like plaintiff does here, the inmate in *Dilley* argued that his injunctive relief
16 claim — based on inadequate access to legal materials — should nevertheless
17 survive because it was capable of repetition, yet evading review. The Ninth Circuit
18 rejected this argument for two reasons. First, the Ninth Circuit held that this type of
19 claim did not challenge action by the prison that was too short in duration to be
20 fully litigated before it ends. *Id.* at 1368-69. Similarly, nothing about the alleged
21 policy regarding pen fillers and paper at CSP-LAC indicates that it would escape
22 review because of its short duration. Second, the Ninth Circuit found in *Dilley* that
23 there was no reasonable expectation that the inmate would be transferred back to
24 the original prison and subjected again to the challenged policies. *Id.* The same
25 holds true regarding plaintiff in the present case; plaintiff does not allege that he is
26 likely to be transferred back to CSP-LAC. *See also Preiser v. Newkirk*, 422 U.S.
27 395, 402-04 (1975) (inmate's request for declaratory judgment rendered moot by
28 inmate's transfer to another prison).

1 **C. The Eleventh Amendment**

2 As the Court previously has apprised plaintiff, the Eleventh Amendment bars
3 his federal civil rights claims for monetary damages against the individual
4 defendants in their official capacities.

5 The Eleventh Amendment bars federal jurisdiction over suits by individuals
6 against a State and its instrumentalities, unless either the State consents to waive its
7 sovereign immunity or Congress abrogates it. *Pennhurst State School & Hosp. v.*
8 *Halderman*, 465 U.S. 89, 99-100 (1984). In addition, “the eleventh amendment
9 bars actions against state officers sued in their official capacities for past alleged
10 misconduct involving a complainant’s federally protected rights, where the nature
11 of the relief sought is retroactive, *i.e.*, money damages.” *Bair v. Krug*, 853 F.2d
12 672, 675 (9th Cir. 1988). To overcome this Eleventh Amendment bar, the State’s
13 consent or Congress’ intent must be “unequivocally expressed.” *Pennhurst*, 465
14 U.S. at 99. While California has consented to be sued in its own courts pursuant to
15 the California Tort Claims Act, such consent does not constitute consent to suit in
16 federal court. *See BV Engineering v. University of California*, 858 F.2d 1394, 1396
17 (9th Cir. 1988); *see also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241
18 (1985) (holding that Art. III, § 5 of the California Constitution does not constitute a
19 waiver of California’s Eleventh Amendment immunity). Finally, Congress has not
20 repealed state sovereign immunity against suits brought under 42 U.S.C. § 1983.
21 Because the California Department of Corrections and Rehabilitation (“CDCR”) is
22 a state agency, it is immune from civil rights claims raised pursuant to § 1983. *See*
23 *Pennhurst*, 465 U.S. at 100 (“This jurisdictional bar applies regardless of the nature
24 of the relief sought.”); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam)
25 (the Eleventh Amendment bars claim for injunctive relief against Alabama and its
26 Board of Corrections). Because the individual defendants are alleged to be
27 employees of the CDCR (*see* ECF No. 25 at 4-7), plaintiff may not seek monetary
28 damages against state employees in their official capacities. Moreover, because

1 plaintiff's requests for declaratory and injunctive relief are moot, plaintiff may not
2 proceed with any claims against the named defendants in their official capacities.

3
4 **D. Access to the Courts**

5 In his Claim I, plaintiff alleges a “[d]enial of [his] First Amendment due
6 process rights of access to the courts.” (ECF No. 25 at 9.)

7 First, to the extent that plaintiff is alleging that defendants’ denial of his
8 requests for pen fillers and paper violated his federal constitutional right of access
9 to the courts, in order for plaintiff to state such a claim, he must show that he
10 suffered an “**actual injury**” that was caused by defendants’ actions. *See Lewis v.*
11 *Casey*, 518 U.S. 343, 354-55 (1996). In order to establish an “actual injury,”
12 plaintiff “must show that official acts or omissions ‘hindered his efforts to pursue a
13 [non-frivolous] legal claim.’” *Phillips v. Hust*, 588 F.3d 652, 655 (9th Cir. 2009)
14 (quoting *Lewis*, 518 U.S. at 351 (alteration in original)). The right of a prisoner’s
15 access to the courts is limited to “the capability of bringing contemplated
16 challenges to sentences or conditions of confinement before the courts.” *Lewis*, 518
17 U.S. at 356. As the Ninth Circuit has stated, the Supreme Court has “made clear”
18 that prisoners are guaranteed “no particular methodology [in accessing the courts],
19 but rather the conferral of a capability – the capability of bringing contemplated
20 challenges.” *Phillips*, 588 F.3d at 655. Moreover, the Ninth Circuit has held that
21 the Supreme Court’s opinion in *Bounds v. Smith*, 430 U.S. 817, 824-25 (1977),
22 requires only that prison officials provide resources adequate to “meet minimum
23 constitutional standards sufficient to provide meaningful, though perhaps not
24 ‘ideal,’ access to the courts.” *Phillips*, 588 F.3d at 656.

25 It is true that the Supreme Court in *Bounds*, 430 U.S. at 824-25, held that, “It
26 is indisputable that indigent inmates must be provided at state expense with paper
27 and pen to draft legal documents.” However, the Supreme Court subsequently
28 made it clear that the lack of paper or pens alone is not enough to state a claim for

1 denial of access to the courts. Rather, a prisoner must also set forth factual
2 allegations showing that defendants' "acts or omissions 'hindered his efforts to
3 pursue a [non-frivolous] legal claim.'" *Phillips*, 588 F.3d at 655 (quoting *Lewis*,
4 518 U.S. at 351 (alteration in original)). Moreover, the constitutional right of
5 access to the courts for prisoners is limited to "the capability of bringing
6 contemplated challenges to sentences or conditions of confinement before the
7 courts." *Lewis*, 518 U.S. at 356; *see also Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1
8 (9th Cir. 2008) ("Failure to show that a 'nonfrivolous legal claim has been
9 frustrated' is fatal to his *Bounds* claim."); *Simmons v. Sacramento County Superior*
10 *Court*, 318 F.3d 1156, 1159-60 (9th Cir. 2003) (explaining that "a prisoner has no
11 constitutional right of access to the courts to litigate an unrelated civil claim"). As
12 the Supreme Court stated in *Lewis* (*id.* at 355, explaining their earlier decision in
13 *Bounds*): "Impairment of any other litigating capacity is simply one of the
14 incidental (and perfectly constitutional) consequences of conviction and
15 incarceration."

16 In his SAC, plaintiff alleges that one Los Angeles County Superior Court
17 case was dismissed. However, plaintiff alleges that his last contact with the
18 Superior Court in that case was in February 2013, but plaintiff did not request pen
19 fillers and paper from any defendant prior to November 2014, long after the
20 Superior Court case had concluded. (ECF No. 9-10.) Accordingly, plaintiff's
21 factual allegations are entirely insufficient to raise a reasonable inference that the
22 denial of pen fillers or paper by any defendant **caused** plaintiff's Superior Court
23 case to be dismissed. Nor does plaintiff allege that the Superior Court case, which
24 was a civil suit against an individual (*id.* at 9), concerned plaintiff's conditions of
25 confinement.

26 Accordingly, plaintiff's factual allegations, even construed liberally, fail to
27 allege either that plaintiff suffered an "actual injury" to any case challenging
28 plaintiff's sentence or conditions of his confinement, or that the actions of any

1 defendant hindered his efforts to raise any such claim. *See, e.g., Rose v. Montana*,
2 422 Fed. App'x 631, 631-32 (9th Cir. 2011) (finding the district court properly
3 dismissed plaintiff's "access-to-courts claims because either they pertained to state
4 law tort causes of action, or Rose failed to allege facts showing how defendants'
5 acts hindered his efforts to pursue challenges to his criminal conviction or prison
6 conditions" citing *Lewis*) (now citable for its persuasive value per Ninth Circuit
7 Rule 36-3); *Terry v. Cal. Dep't of Corr. & Rehab.*, 2013 WL 1561432, at *4, 2013
8 U.S. Dist. LEXIS 53288, at *15 (C.D. Cal. Mar. 7, 2013) ("the right of state
9 prisoners to access the courts is not absolute; rather, it is limited to allowing
10 prisoners the capability of bringing contemplated challenges to sentences or
11 conditions of confinement before the courts" and "[a] prisoner has no right to court
12 access for any other type of action," citing *Lewis*, 518 U.S. at 355) (internal
13 quotation marks omitted)).

14 Second, to the extent that plaintiff may be purporting to raise a federal civil
15 rights claim arising from his allegations that defendants denied him "access to the
16 grievance procedure" (*id.* at 11) or from his allegations that defendants failed to
17 adequately answer or investigate the numerous administrative grievances that he
18 filed, a prisoner has no constitutional right to an effective grievance or appeal
19 procedure. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (holding that
20 a prisoner has no constitutional right to an effective grievance or appeal procedure);
21 *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988). In addition, the guarantee of
22 procedural due process under the Fourteenth Amendment applies only when a
23 constitutionally protected liberty or property interest is at stake. *See Ingraham v.*
24 *Wright*, 430 U.S. 651, 672 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 569
25 (1972). An administrative appeal system does not implicate a liberty interest
26 protected by the Due Process Clause. *See, e.g., Antonelli v. Sheahan*, 81 F.3d 1422,
27 1430 (7th Cir. 1996). In his SAC, plaintiff once again fails to set forth factual
28 allegations that raise a reasonable inference that any defendant responsible for

1 handling plaintiff's grievances "actually knew" that his or her failure to adequately
2 resolve the grievances placed plaintiff at a serious risk. *See, e.g., Peralta v. Dillard*,
3 744 F.3d 1076, 1087 (9th Cir. 2014) (*en banc*) (defendant's "failure to follow
4 required procedure for inmate appeals "isn't, of itself, enough to establish a
5 violation of [prisoner's] constitutional rights," the prisoner must show both that the
6 failure "put inmates at risk" and that the defendant "*actually knew* that his actions
7 put inmates at risk" (emphasis in original)), *cert. denied*, 135 S. Ct. 946 (2015).
8 Although plaintiff sets forth conclusory allegations that he let the appeals
9 coordinators know that they were hampering plaintiff's ability to contact his family
10 and that they were aware that he was "mentally ill" and "suffering from
11 depression," (*id.* at 21), plaintiff also alleges that he attempted suicide slightly more
12 than one month after his first request for pen fillers and paper on November 11,
13 2014 (*id.* at 10, 22 (*see also* attachment at 36 stating that plaintiff requested
14 supplies from November 11, 2014, to May 6, 2015)). Accordingly, plaintiff's
15 factual allegations fail to raise a reasonable inference that the alleged actions of any
16 defendant **caused** plaintiff's mental illness to worsen or that any prison official was
17 aware that the denial of plaintiff's request for pen fillers and paper would place
18 plaintiff at a serious risk of harm. *See Iqbal*, 556 U.S. at 678 ("A claim has facial
19 plausibility when the plaintiff pleads factual content that allows the court to draw
20 the reasonable inference that the defendant is liable for the misconduct alleged.").

21
22 **E. First Amendment Right to Freedom of Speech**

23 Plaintiff's SAC purports to raise his Claim II for "denial of my First
24 Amendment right to freedom of speech." (ECF No. 25 at 18.) He incorporates the
25 "supporting facts" and defendants mentioned in Claim 1. (*Id.*) In this claim,
26 plaintiff alleges that each defendant "violated my right to freedom of speech by not
27 supplying a writing instrument or paper" to an indigent inmate. (*Id.*)

1 Although inmates have a First Amendment right to send and receive mail,
2 prison officials “may adopt regulations which impinge on an inmate’s constitutional
3 rights if those regulations are ‘reasonably related to legitimate penological
4 interests.’” *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (quoting *Turner v.*
5 *Safley*, 482 U.S. 78, 89 (1987)). Here, plaintiff does not allege that defendants
6 censored his outgoing mail, but rather, that the alleged failure to provide indigent
7 prisoners with pen fillers and paper interfered with plaintiff’s First Amendment
8 right to send non-legal mail. Prisoners, however, do not have a constitutional right
9 to unlimited free access to the mail. Prison administrators may balance the cost of
10 providing supplies against plaintiff’s First Amendment right to send non-legal mail.
11 *See, e.g., Walker v. Davis*, 533 Fed. App’x 471 (5th Cir.), *cert. denied*, 134 S. Ct.
12 643 (2013); *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) (“However,
13 although prisoners have a right of access to the courts, they do not have a right to
14 unlimited free postage.”) (citing *Bach v. Coughlin*, 508 F.2d 303, 307-08 (7th Cir.
15 1974)). Further, the Court does not accept as true plaintiff’s conclusory allegation
16 that defendants were “hampering, denying my ability to contact my family,” or that
17 defendants’ actions denied plaintiff the ability to write letters. *See Iqbal*, 556 U.S.
18 at 678; *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (a court
19 is not required “to accept as true allegations that are merely conclusory,
20 unwarranted deductions of fact, or unreasonable inferences.”). Plaintiff does not set
21 forth any factual allegations allowing the Court to draw a reasonable inference that
22 the actions of defendants in not providing pen fillers and paper denied plaintiff the
23 ability to contact his family at any point in time. To the contrary, plaintiff’s factual
24 allegations indicate that he was able to write grievances in pencil or a “borrowed
25 pencil” (ECF No. 25 at 11, 15), that he begged and borrowed paper, pen fillers, and
26 pencils, which was stressful, but did not prevent him from communicating (*id.* at
27 23), and that his request for pen fillers and paper was “accommodated” at least one
28 time (*id.* at 12). Moreover, the record of plaintiff’s own litigation history in this

1 Court shows that plaintiff had sufficient access to paper and writing utensils to
2 submit more than 190 handwritten pages in six of his separate lawsuits between
3 July 2015 and the beginning of June 2016.

4 Accordingly, plaintiff's SAC fails to set forth sufficient factual allegations to
5 "nudge" a First Amendment claim "across the line from conceivable to plausible."
6 *Twombly*, 550 U.S. at 555.

7 8 **F. Eighth Amendment**

9 In his Claim III, plaintiff alleges a "denial of my Eighth Amendment right to
10 be free from cruel and unusual punishment." (ECF No. 25 at 20.) Once again he
11 incorporates the defendants and supporting facts of Claim I. (*Id.*) Plaintiff alleges
12 that defendants' decision not to act "constitutes deliberate indifference as it allowed
13 the violations to continue in a manner inconsistent with established law." (*Id.*)
14 Plaintiff alleges that defendants were aware of a "risk of harm," but the only
15 "harm" he alleges is that he was suffering from depression and that he let them
16 know that "they were hampering, denying my ability to contact my family, one who
17 was terminally ill." (*Id.* at 21.)

18 "A prison official's 'deliberate indifference' to a substantial risk of serious
19 harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S.
20 825, 828 (1994). A prison official is "deliberately indifferent" if that official is
21 "subjectively aware of the risk and does nothing to prevent the resulting harm."
22 *Jeffers v. Gomez*, 267 F.3d 895, 913 (9th Cir. 2001) (citing *Farmer*, 511 U.S. at
23 828-29). To be subjectively aware of a risk, the prison "official must both be aware
24 of facts from which the inference could be drawn that a substantial risk of serious
25 harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.
26 Further, a plaintiff must allege that, objectively, "he is incarcerated under
27 conditions posing a substantial risk of serious harm." *Id.* at 834. Further, a plaintiff
28 must allege that the "defendants' failure to act was a proximate cause of the harm

1 that he suffered.” *Castro v. County of Los Angeles*, 797 F.3d 654, 665-66 (9th Cir.
2 2015).

3 Here, as discussed above, plaintiff does not set forth factual allegations
4 supporting a reasonable inference that a failure to act on the part of any defendant
5 *caused* plaintiff to be exposed to a substantial risk of serious harm. Further,
6 plaintiff does not set forth any factual allegation that, objectively, defendants’
7 failure to provide him with pen fillers and papers created a substantial risk of
8 serious harm. Finally, plaintiff’s allegations are insufficient to raise a reasonable
9 inference that any defendant was actually aware of any risk of serious harm.

10 Accordingly, plaintiff’s SAC fails to set forth sufficient factual allegations to
11 “nudge” an Eighth Amendment claim “across the line from conceivable to
12 plausible.”

13 14 **G. Fifth Amendment**

15 In his Claim IV, plaintiff alleges an “impermissible taking” under the Fifth
16 and Fourteenth Amendments arising from the allegation that Warden Soto
17 “misappropriated funds set for the funding of pen fillers.” (ECF No. 25 at 24.)

18 Once again, the Court does not accept as true plaintiff’s entirely conclusory
19 allegations. Plaintiff’s SAC does not set forth any factual allegations showing that
20 any funds set aside for providing pen fillers or paper to indigent inmates were
21 “misappropriated” or that the Warden took any specific action, participated in the
22 actions of another, or failed to take any action that he was legally required to do that
23 caused any alleged constitutional violation. “A person deprives another ‘of a
24 constitutional right, within the meaning of § 1983, if he does an affirmative act,
25 participates in another’s affirmative acts, or omits to perform an act which he is
26 legally required to do that causes the deprivation of which [the plaintiffs
27 complain].” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (quoting *Johnson*
28 *v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)) (emphasis in original). Further, the

1 Supreme Court has made it clear that a plaintiff “must plead facts sufficient to show
2 that [his] claim has substantive plausibility.” *Johnson v. City of Shelby*, 135 S. Ct.
3 346, 347, 190 L. Ed. 2d 309 (2014) (per curiam). Plaintiff sets forth no factual
4 allegations showing that this claim has substantive plausibility.

5 *****

6 The Court therefore finds that the SAC fails to comply with Rule 8 and fails
7 to state a claim upon which relief may be granted. **If plaintiff still desires to**
8 **pursue this action, he is ORDERED to file a Third Amended Complaint no**
9 **later than November 18, 2016, remedying the deficiencies discussed above.**
10 The Third Amended Complaint should bear the docket number assigned in this
11 case; be labeled “Third Amended Complaint”; and be complete in and of itself
12 without reference to the original complaint, the First Amended Complaint, the
13 Second Amended Complaint or any other pleading, attachment, or document.

14 The clerk is directed to send plaintiff a blank Central District civil rights
15 complaint form, which plaintiff is encouraged to utilize. Plaintiff is admonished
16 that he must sign and date the civil rights complaint form, and he must use the
17 space provided in the form to set forth all of the claims that he wishes to assert in a
18 Third Amended Complaint.

19 **Plaintiff is further admonished that, if he fails to timely file a Third**
20 **Amended Complaint, or fails to remedy the deficiencies of this pleading as**
21 **discussed herein, the Court will recommend that the action be dismissed with**
22 **prejudice on the grounds set forth above and for failure to diligently**
23 **prosecute.**

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1 In addition, if plaintiff no longer wishes to pursue this action, he may request
2 a voluntary dismissal of the action pursuant to Federal Rule of Civil Procedure
3 41(a). The clerk also is directed to attach a Notice of Dismissal form for plaintiff's
4 convenience.

5 **IT IS SO ORDERED.**

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7 DATED: October 11, 2016

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ALEXANDER F. MacKINNON
UNITED STATES MAGISTRATE JUDGE

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