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

KERRY R. ROBERTS,)	NO. CV 16-4956-FMO (E)
)	
Plaintiff,)	
)	
v.)	ORDER DISMISSING COMPLAINT
)	
J. HAAR, M.D., et al.,)	WITH LEAVE TO AMEND
)	
Defendants.)	
)	

BACKGROUND

Plaintiff, a state prisoner, filed this civil rights action on July 7, 2016, asserting claims arising out of Plaintiff's incarceration at the California Men's Colony ("CMC"). Defendants are: (1) CMC Chief Medical Officer J. Haar; (2) CMC Chief Support Executive M. Wallace; (3) CMC Medical Health Care Appeals Coordinator K. Lino; and (4) CMC Medical Health Care Doctor Voegle. Plaintiff sues all Defendants in their individual and official capacities.

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1 On December 1, 2016, Defendants filed a "Motion to Dismiss
2 Complaint" ("Motion to Dismiss"). On December 23, 2016, Plaintiff
3 filed an "Objection to Notice of Motion to Dismiss Complaint,"
4 constituting Plaintiff's opposition to the Motion to Dismiss
5 ("Opposition").

6
7 **SUMMARY OF PLAINTIFF'S ALLEGATIONS**
8

9 Plaintiff alleges:

10
11 On or about December 8, 2010, medical health care
12 providers at the Centinela State Prison ordered Plaintiff a
13 "Continuous Positive Airway Pressure" ("CPAP") machine to
14 treat Plaintiff's severe obstructive sleep apnea condition
15 (Complaint, attachment, ¶ 1). Plaintiff was issued
16 distilled water for use in the machine's built-in humidifier
17 (id., ¶ 2).

18
19 Upon Plaintiff's arrival at CMC on or about October 7,
20 2013, CMC medical staff was made aware that Plaintiff had a
21 CPAP machine (id., ¶ 3). On or about November 18, 2013,
22 Plaintiff requested distilled water for the machine, but CMC
23 medical staff told Plaintiff that distilled water was not
24 issued at CMC and that Plaintiff should use the water from
25 the sink in his cell (id., ¶ 5). The lack of distilled
26 water caused Plaintiff to suffer severe headaches,
27 nosebleeds, disorientation, fatigue and sleeplessness (id.,
28 ¶ 6).

1 Plaintiff asked to see a doctor and nursing staff, who
2 told Plaintiff to use the water from his sink (id., ¶ 7).
3 Plaintiff received Naproxen for his headaches "which did
4 nothing" (id., ¶ 8).

5
6 After Plaintiff submitted a grievance, Defendant Lino
7 interviewed Plaintiff and told Plaintiff that CMC did not
8 provide distilled water and that Plaintiff should use the
9 water from his sink (id., ¶¶ 9-10). Defendants Haar and
10 Wallace denied Plaintiff's grievance at the second level on
11 January 16, 2016 (id., ¶ 11). On April 22, 2016, a prison
12 official not named as a Defendant partially granted
13 Plaintiff's appeal, stating that CMC should order and issue
14 distilled water for Plaintiff (id., ¶ 14).

15
16 On April 27, 2016, Plaintiff was called to the clinic,
17 where an unidentified CMC nurse asked Plaintiff what was
18 wrong with Plaintiff's CPAP machine (id., ¶ 15). Plaintiff
19 said he was under the impression that he was there to obtain
20 the distilled water (id.). The nurse told Plaintiff that
21 "CMC does not issue distilled water to anyone" (id.).

22
23 On June 2, 2016, Plaintiff saw Defendant Voegle, who
24 again told Plaintiff to use the water from the sink in
25 Plaintiff's cell (id., ¶ 16). As of June 8, 2016, Plaintiff
26 had yet to receive any distilled water (id.). Plaintiff
27 continues to suffer daily severe headaches, dizziness,
28 nosebleeds, disorientation, sleeplessness, fatigue, and

1 physical and psychological pain and suffering (id.).
2

3 Plaintiff seeks compensatory damages in the sum on
4 \$250,000, punitive damages in the sum of \$100,000 and an
5 injunction "so that Plaintiff does not have any more
6 problems" (Complaint, p. 6).
7

8 DEFENDANTS' CONTENTIONS

9

10 Defendants contend:
11

12 1. The alleged denial of distilled water does not rise to the
13 level of an Eighth Amendment violation;
14

15 2. Plaintiff's allegations of Defendants' participation in the
16 administrative grievance procedure do not state a plausible Due
17 Process claim;
18

19 3. The Eleventh Amendment bars Plaintiff's official capacity
20 claims for damages; and
21

22 4. Defendants are entitled to qualified immunity.
23

24 STANDARDS GOVERNING THE MOTION TO DISMISS

25

26 To survive a motion to dismiss under Rule 12(b)(6), "a complaint
27 must contain sufficient factual matter, accepted as true, to state a
28 claim to relief that is plausible on its face." Ashcroft v. Iqbal,

1 556 U.S. 662, 678 (2009) (citation and internal quotations omitted).
2 "A claim has facial plausibility when the plaintiff pleads factual
3 content that allows the court to draw the reasonable inference that
4 the defendant is liable for the misconduct alleged." Id.

5
6 The Court "must accept as true all of the factual allegations
7 contained in the complaint." Erickson v. Pardus, 551 U.S. 89, 94
8 (2007) (citations omitted); Zucco Partners, LLC v. Digimatic Corp.,
9 552 F.3d 981, 989 (9th Cir. 2009) (on motion to dismiss, court takes
10 as true all non-conclusory factual allegations in the complaint and
11 construes the complaint in the light most favorable to the plaintiff).
12 "Generally a court may not consider material beyond the complaint in
13 ruling on a Fed. R. Civ. P. 12(b)(6) motion." Intri-Plex
14 Technologies, Inc. v. Crest Group, Inc., 499 F.3d 1048, 1052 (9th Cir.
15 2007) (citation and footnote omitted). However, the Court may
16 consider allegations in Plaintiff's Opposition in deciding whether to
17 grant leave to amend. See Broam v. Bogan, 320 F.3d 1023, 1026 n.2
18 (9th Cir. 2003).

19
20 The Court may not dismiss a complaint without leave to amend
21 unless "it is absolutely clear that the deficiencies of the complaint
22 could not be cured by amendment." Karim-Panahi v. Los Angeles Police
23 Dep't, 839 F.2d 621, 623 (9th Cir. 1988) (citations and quotations
24 omitted); see also Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)
25 (en banc) (district court should grant leave to amend "unless it
26 determines that the pleading could not possibly be cured by the
27 allegation of other facts") (citation and internal quotations
28 omitted).

1 DISCUSSION

2
3 I. The Complaint Fails to State a Plausible Eighth Amendment Claim.

4
5 Prison officials can violate the Constitution if they are
6 "deliberately indifferent" to an inmate's serious medical needs. See
7 Farmer v. Brennan, 511 U.S. 825, 834 (1994); Estelle v. Gamble, 429
8 U.S. 97, 104 (1976). To be liable for "deliberate indifference," a
9 jail official must "both be aware of facts from which the inference
10 could be drawn that a substantial risk of serious harm exists, and he
11 must also draw the inference." Farmer v. Brennan, 511 U.S. at 837.
12 "[A]n official's failure to alleviate a significant risk that he
13 should have perceived but did not, while no cause for commendation,
14 cannot . . . be condemned as the infliction of punishment." Id. at
15 838. Allegations of negligence do not suffice. Estelle v. Gamble,
16 429 U.S. at 105-06; Lopez v. Smith, 203 F.3d at 1131. Thus,
17 inadequate treatment due to accident, mistake, inadvertence, or even
18 gross negligence does not amount to a constitutional violation.
19 Estelle v. Gamble, 429 U.S. at 105-06; Toguchi v. Chung, 391 F.3d
20 1051, 1057 (9th Cir. 2004). "[A]n official's failure to alleviate a
21 significant risk that he should have perceived but did not, while no
22 cause for commendation, cannot . . . be condemned as the infliction of
23 punishment." Farmer v. Brennan, 511 U.S. at 838.

24
25 Plaintiff's claim concerning the denial of distilled water is
26 unclear in material particulars. Plaintiff does not allege expressly
27 that the use of tap water in the CPAP machine caused Plaintiff's
28 alleged medical problems. See Jett v. Penner, 439 F.3d 1091, 1096

1 (9th Cir. 2006) (prisoner must show harm caused by the alleged
2 deliberate indifference). In the Opposition, Plaintiff states that he
3 "suffered severe symptoms as soon as sleep apnea therapy was
4 discontinued" (Opposition, p. 2), which suggests perhaps that
5 Plaintiff stopped using the machine and did not use the machine with
6 tap water. If so, Plaintiff does not allege the reason(s) why he
7 stopped using the machine. In the Opposition, Plaintiff asserts that
8 Defendants purportedly acknowledged the alleged harm to Plaintiff and
9 stated it "would get worse, due to the fact that Plaintiff was
10 breathing in rust and other foreign metals" (Opposition, p. 4). It is
11 not entirely clear how these allegations relate to Plaintiff's claim
12 of harm from the denial of distilled water for his CPAP machine,
13 particularly if Plaintiff had stopped using the machine.

14
15 Plaintiff alleges in the Opposition that Plaintiff informed
16 unidentified "medical staff" of the "manufacturer's warnings against
17 C-PAP usage without distilled water" (Opposition, p. 2). In the
18 Opposition, Plaintiff asserts that the manufacturer's warning
19 allegedly stated that the use of tap water in the machine could cause
20 corrosion and rusting of the components "which could result in harm or
21 even death" (*id.*, p. 4). Plaintiff argues that these warnings placed
22 Defendants on notice that the machine should not be used with tap
23 water. Plaintiff does not allege that any Defendant actually saw the
24 alleged warnings, however. In any event, the Complaint contains no
25 allegations concerning any manufacturer's warning. In light of this
26 lack of clarity, the Complaint fails to allege a plausible Eighth
27 Amendment claim. See Ashcroft v. Iqbal, 556 U.S. at 678; see also
28 Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir. 2000)

1 ("Experience teaches that, unless cases are pled clearly and
2 precisely, issues are not joined, discovery is not controlled, the
3 trial court's docket becomes unmanageable, the litigants suffer, and
4 society loses confidence in the court's ability to administer
5 justice.") (citations and quotations omitted).
6

7 In the Opposition, Plaintiff also vaguely alleges that Defendants
8 disregarded "the proper treatment ordered by a specialist"
9 (Opposition, p. 2). It is unclear whether the "specialist" was the
10 prison official who allegedly partially granted Plaintiff's grievance
11 at the third level. The Complaint itself does not allege that any
12 Defendant refused to comply with any order by a "specialist." A
13 prison official may be held liable for deliberate indifference for
14 intentionally disregarding a physician's orders concerning an inmate's
15 medical treatment. See Snow v. McDaniel, 681 F.3d 978, 986-87 (9th
16 Cir. 2012), overruled on other grounds, Peralta v. Dillard, 744 F.3d
17 1076 (9th Cir. 2014), cert. denied, 135 S. Ct. 946 (2015) (en banc)
18 (summary judgment denied based on evidence that "review panel"
19 composed of prison physicians repeatedly refused to authorize hip
20 surgery for inmate despite reports of orthopedic specialists that
21 inmate's need for surgery was "urgent" and that his condition was an
22 "emergency")¹; Jett v. Penner, 439 F.3d at 1096-97 (evidence of
23 repeated disregard of doctors' recommendations that the plaintiff see
24 an orthopedist for hand fracture sufficient to withstand summary
25

26 ¹ In Peralta v. Dillard, the Ninth Circuit overruled the
27 holding in Snow v. McDaniel that lack of resources for a medical
28 official who lacked authority over budgeting decisions. See
Peralta v. Dillard, 744 F.3d at 1083.

1 judgment). However, to the extent the physician Defendants allegedly
2 made a medical decision not to provide Plaintiff with distilled water,
3 allegations that one prison doctor did not follow a treatment
4 suggestion or recommendation made by another doctor do not state a
5 claim for deliberate indifference. See Snow v. McDaniel, 681 F.3d at
6 987 (difference of medical opinion between medical professionals
7 concerning what medical care is appropriate does not amount to
8 deliberate indifference unless chosen care is "medically
9 unacceptable"; the course of treatment chosen must be "medically
10 unacceptable under the circumstances," chosen "in conscious disregard
11 of an excessive risk to plaintiff's health"); Franklin v. State of
12 Oregon, State Welfare Div., 662 F.2d 1337, 1344 (9th Cir. 1981) ("A
13 difference of opinion between a prisoner-patient and prison medical
14 authorities does not give rise to a § 1983 claim.").

15
16 **II. A Claim That Any Defendant Violated the Constitution By Denying**
17 **Plaintiff's Grievance Is Insufficient.**

18
19 To the extent Plaintiff claims that Defendants Haar and Wallace
20 violated Due Process merely by denying Plaintiff's grievance, any such
21 claim is insufficient. "[I]nmates lack a separate constitutional
22 entitlement to a specified prison grievance procedure." Ramirez v.
23 Galaza, 334 F.3d 850, 860 (9th Cir. 2003), cert. denied, 541 U.S. 1063
24 (2004) (rejecting claim that prison officials "added things" to
25 plaintiff's grievance to mask procedural errors allegedly committed at
26 challenged disciplinary hearing); see also Mann v. Adams, 855 F.2d
27 639, 640 (9th Cir.), cert. denied, 488 U.S. 898 (1988). A prison
28 official's denial of a grievance does not itself violate the

1 constitution. Evans v. Skolnik, 637 Fed. App'x 285, 288 (9th Cir.
2 2015), cert. dismiss'd, 136 S. Ct. 2390 (2016).

3
4 **III. The Eleventh Amendment Bars Plaintiff's Claims for Damages**
5 **Against Defendants in Their Official Capacities.**

6
7 Plaintiff may not sue Defendants, state prison officials, for
8 monetary damages in Defendants' official capacities. The Eleventh
9 Amendment bars suits in federal court for monetary damages against
10 state officials sued in their official capacities. See Will v.
11 Michigan Department of State Police, 491 U.S. 58, 71 (1989); Krainski
12 v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Educ., 616
13 F.3d 963, 968 (9th Cir. 2010), cert. denied, 562 U.S. 1286 (2011).

14
15 The Eleventh Amendment does not bar suit against state officials
16 in their official capacities for appropriate prospective declaratory
17 or injunctive relief regarding allegedly unconstitutional state
18 action. See Will v. Michigan Dept. of State Police, 491 U.S. at 71
19 n.10; Ex Parte Young, 209 U.S. 123, 159-60 (1908); Assoc. des Eleveurs
20 de Canards et d'Oies due Quebec v. Harris, 729 F.3d 937, 943 (9th Cir.
21 2013), cert. denied, 135 S. Ct. 398 (2014). In the Opposition,
22 Plaintiff asserts that he sues Defendants in their official capacities
23 for injunctive relief only (Opposition, p. 5). Any First Amended
24 Complaint should clarify the capacities in which Plaintiff sues
25 Defendants.

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27 ///

28 ///

1 **CONCLUSION AND ORDER**

2
3 For all of the foregoing reasons, the Complaint is dismissed with
4 leave to amend. See Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir.
5 2000).² If Plaintiff still wishes to pursue this action, he is
6 granted thirty (30) days from the date of this Order within which to
7 file a First Amended Complaint. The First Amended Complaint must be
8 complete in itself and shall not refer in any manner to any prior
9 complaint. Plaintiff should not attempt to add additional defendants
10 without leave of Court. See Fed. R. Civ. P. 21. Failure to file
11 timely a First Amended Complaint in conformity with this Order may
12 result in the dismissal of this action. See Pagtalunan v. Galaza, 291
13 F.3d 639, 642-43 (9th Cir. 2002), cert. denied, 538 U.S. 909 (2003)
14 (court may dismiss action for failure to follow court order); Simon v.
15 Value Behavioral Health, Inc., 208 F.3d 1073, 1084 (9th Cir.),
16 amended, 234 F.3d 428 (9th Cir. 2000), cert. denied, 531 U.S. 1104
17 (2001), overruled on other grounds, Odom v. Microsoft Corp., 486 F.3d
18 541 (9th Cir.), cert. denied, 552 U.S. 985 (2007) (affirming dismissal
19 without leave to amend where plaintiff failed to correct deficiencies
20 in complaint, where court had afforded plaintiff opportunities to do
21 so, and where court had given plaintiff notice of the substantive

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26 ² In light of the Court's decision to grant leave to
27 amend, the Court declines to rule on the issue of qualified
28 immunity, an issue often better resolved on summary judgment.
See Kwai Fun Wong v. United States, 373 F.3d 952, 957 (9th Cir.
2004).

