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

PAUL JORDAN,  
  
Plaintiff,  
  
v.  
  
DEBBIE ASUNCION, et al.,  
  
Defendants.

Case No. CV 17-1283 PSG (SS)  
  
**MEMORANDUM DECISION AND ORDER  
DISMISSING FIRST AMENDED  
COMPLAINT WITH LEAVE TO AMEND**

**I.**

**INTRODUCTION**

Pending before the Court is Plaintiff's First Amended Complaint, filed pursuant to 42 U.S.C. § 1983.<sup>1</sup> ("FAC," Dkt. No. 6). Congress mandates that district courts perform an initial screening of complaints in civil actions where a prisoner seeks redress from a governmental entity or employee. 28 U.S.C. § 1915A(a). This Court may dismiss such a complaint, or any portion thereof, before service of process if the complaint (1) is

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<sup>1</sup> This matter was assigned to the undersigned Magistrate Judge on April 25, 2018.

1 frivolous or malicious, (2) fails to state a claim upon which  
2 relief can be granted, or (3) seeks monetary relief from a defendant  
3 who is immune from such relief. 28 U.S.C. § 1915A(b)(1-2); see  
4 also Lopez v. Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000)  
5 (en banc). For the reasons stated below, the First Amended  
6 Complaint is DISMISSED with leave to amend.<sup>2</sup>

7  
8 **II.**

9 **ALLEGATIONS OF THE COMPLAINT**

10  
11 Plaintiff sues two employees of California State Prison-Los  
12 Angeles County ("CSP-LAC"): (1) physician Dr. J. Marcelo, and  
13 (2) Warden Debbie Asuncion. Both Defendants are sued in both their  
14 individual and official capacities. (FAC at 3).<sup>3</sup>

15  
16 The FAC alleges that on May 21, 2015, Plaintiff suffered a  
17 back injury that caused him to collapse. (Id. at 8). Plaintiff  
18 was taken to the prison medical clinic, where he informed

19 \_\_\_\_\_  
20 <sup>2</sup> A magistrate judge may dismiss a complaint with leave to amend  
21 without the approval of a district judge. See McKeever v. Block,  
22 932 F.2d 795, 798 (9th Cir. 1991) ("[T]he dismissal of a complaint  
23 with leave to amend is a non-dispositive matter."). Consistent  
24 with McKeever, the Court concludes that its Order Dismissing First  
25 Amended Complaint with Leave to Amend is a non-dispositive Order.  
26 However, pursuant to Federal Rule of Civil Procedure 72, if  
27 Plaintiff disagrees, he may file an objection with the District  
28 Judge. See Bastidas v. Chappell, 791 F.3d 1155, 1162 (9th Cir.  
2015); see also Hunt v. Pliler, 384 F.3d 1118, 1124 (9th Cir. 2004)  
("District court review of even these nondispositive matters . . .  
can be compelled upon objection of the party against whom the  
magistrate has ruled.") (quoting McKeever, 932 F.2d at 798).

<sup>3</sup> The Court will cite to the FAC and its attached exhibits as though  
they were consecutively paginated.

1 Dr. Marcelo that his "back gave out and he was in a lot of pain."  
2 (Id.). Dr. Marcelo did not believe Plaintiff and told him to "get  
3 ready for a rectum exam." (Id.). Plaintiff asked, "What does a  
4 rectum exam have to do with my back?" (Id.). Dr. Marcello told  
5 Plaintiff that the procedure he was "about to do would tell [him]  
6 all [he] need[ed] to know." (Id.). Dr. Marcello then placed his  
7 fingers in Plaintiff's rectum, which Plaintiff claims constituted  
8 sexual assault. (Id.).  
9

10 Plaintiff was not told of any alternatives to the rectal exam,  
11 and no such procedures were performed. (Id. at 16). For example,  
12 Plaintiff was not given an x-ray, and he "was not advised of a  
13 digital rectum exam as an alternate option to Marcelo['s] sexual  
14 assault with his fingers and the doctor did not offer the digital  
15 exam [sic]."<sup>4</sup> (Id.).  
16

17 As a lasting consequence of this "assault," Plaintiff claims  
18 that whenever he is around medical personnel, his heart starts to  
19 beat very fast and he sweats "profusely," which often trigger  
20 breathing difficulties and severe back pain. (Id. at 9-10). These  
21 physical injuries make Plaintiff become "extremely anxious," and  
22 he experiences "abnormal" feelings of anger towards health care  
23 providers and depression. (Id.).  
24

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25 <sup>4</sup> It is possible that Plaintiff is unclear as to the meaning of  
26 "digital rectal exam." "A digital rectal examination (DRE) is a  
27 simple procedure doctors use to examine the lower rectum and other  
28 internal organs. . . . To perform a DRE, your doctor will gently  
insert a gloved, lubricated finger into your anus. This allows  
them to feel for any abnormalities." (See  
<https://www.healthline.com/health/digital-rectal-exam#uses>).

1 Plaintiff filed a grievance in which he complained of the  
2 sexual assault. (Id. at 18). However, to avoid having to address  
3 the assault, prison officials denied the 602 and refused to return  
4 it to Plaintiff, thereby depriving him of the ability to prove that  
5 he had raised the issue in his first-level grievance.<sup>5</sup> Plaintiff's  
6 third level appeal was wrongfully denied on the false ground that  
7 Plaintiff raised the sexual assault issue for the first time at  
8 the Director's Level of Review and failed to provide evidence that  
9 he had attempted to address it at the lower level. (Id. at 18 &  
10 Exh. A at 21).

11  
12 Plaintiff states that Warden Asuncion took no action against  
13 prison employees who purposely attempted to obstruct his right to  
14 file a grievance. (Id. at 11). According to Plaintiff, "[t]he  
15 routine illegal Screening out of plaintiff's 602 to avoid  
16 addressing the complaint and allowing plaintiff to stipulate [to]  
17 [sic] clearly determined facts is the moving force behind the  
18 violation of the First Amendment." (Id. at 18). Plaintiff contends  
19 that Warden Asuncion "is responsible for the First Amendment  
20 violation . . . [because] employee's [sic] of CDCR under her  
21 supervision made false claims and withheld Plaintiff's original  
22

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23 <sup>5</sup> "When a prisoner files an administrative appeal concerning an  
24 action by the CDCR, typically the appeal is filed using a '602'  
25 form." Pride v. Correa, 719 F.3d 1130, 1136 n.9 (9th Cir. 2013);  
26 see also Cal. Code Regs. tit. 15, § 3084.2. "Administrative  
27 remedies are not deemed exhausted until the appeal proceeds to a  
28 third level review, and administrative remedies are not deemed  
exhausted as to any new issue, information or person not included  
in the originally submitted . . . 602 form." Parthemore v. Col,  
221 Cal. App. 4th 1372, 1380 (2013) (citing Cal. Code Regs., tit.  
15, § 3084.1(b)).

1 complaint of sexual abuse in order to not grant the 602 or address  
2 the claim as a properly filed First Amendment right.” (Id. at 17).

3  
4 Plaintiff raises claims for violations of his First, Eighth  
5 and Fourteenth Amendment rights and for the state law tort of  
6 negligence. (Id. at 5). He requests one million dollars in damages  
7 from each Defendant. (Id. at 19).

8  
9 **III.**

10 **DISCUSSION**

11  
12 Under 28 U.S.C. § 1915A(b), the Court must dismiss the FAC  
13 due to pleading defects. However, the Court must grant a pro se  
14 litigant leave to amend his defective complaint unless “it is  
15 absolutely clear that the deficiencies of the complaint could not  
16 be cured by amendment.” Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th  
17 Cir. 2012) (citation and internal quotation marks omitted). For  
18 the reasons discussed below, it is not “absolutely clear” that at  
19 least some of the defects of Plaintiff’s FAC could not be cured by  
20 amendment. The FAC is therefore DISMISSED with leave to amend.

21  
22 **A. The FAC Fails To State A Fourteenth Amendment Claim**

23  
24 Plaintiff broadly alleges that his Fourteenth Amendment rights  
25 were violated. However, he does not clearly state whether he is  
26 bringing a Fourteenth Amendment claim against Dr. Marcelo, Warden  
27 Asuncion, or both, or what the basis of his Fourteenth Amendment  
28 claim might be. However, any purported Fourteenth Amendment claim

1 involving either the rectal examination or the processing of  
2 Plaintiff's grievance fails to state a claim.

3  
4 **1. Rectal Examination**

5  
6 Except in unusual circumstances, a prisoner generally has a  
7 constitutional right to refuse unwanted medical care. See Cruzan  
8 by Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 278  
9 (1990) ("The principle that a competent person has a  
10 constitutionally protected liberty interest in refusing unwanted  
11 medical treatment may be inferred from our prior decisions.");  
12 Benson v. Terhune, 304 F.3d 874, 884 (9th Cir. 2002) ("The due  
13 process clause of the Fourteenth Amendment substantively protects  
14 a person's rights to be free from unjustified intrusions to the  
15 body, to refuse unwanted medical treatment and to receive  
16 sufficient information to exercise these rights intelligently.")  
17 (internal citations omitted); Runnels v. Rosendale, 499 F.2d 733,  
18 735 (9th Cir. 1974) ("Allegations that prison medical personnel  
19 performed major surgical procedures upon the body of an inmate,  
20 without his consent and over his known objections, that were not  
21 required to preserve his life or further a compelling interest of  
22 imprisonment or prison security, may [be sufficient to state a  
23 cognizable Fourteenth Amendment due process claim].").  
24 Nonetheless, exceptions to this rule may apply for life and death  
25 situations or for medical conditions that could impact the health  
26 and well-being of other prisoners or prison staff. See, e.g.,  
27 Washington v. Harper, 494 U.S. 210, 222, 226 (1990).

1 Here, Plaintiff fails to state a Fourteenth Amendment claim  
2 with respect to his rectal examination because he does not allege  
3 any facts showing that he ever communicated to Dr. Marcelo or any  
4 other health care provider that he did not want to submit to the  
5 procedure. The FAC alleges that Plaintiff asked Dr. Marcelo about  
6 the purpose of the examination and its connection to his complaint  
7 of back pain, but nothing more. Accordingly, the FAC must be  
8 dismissed, with leave to amend.

## 9

## 10 **2. Grievance Processing**

## 11

12 Plaintiff appears to allege that his constitutional rights  
13 were violated because his form 602 was denied and not returned to  
14 him, thus depriving him of the ability to challenge the denial of  
15 his claim at the Director's Level on the ground that he had not  
16 raised his assault claim in the 602.

17

18 Although a prisoner must "exhaust his administrative remedies  
19 before filing a lawsuit concerning prison conditions," Sapp v.  
20 Kimbrell, 623 F.3d 813, 821 (9th Cir. 2010) (citing 42 U.S.C.  
21 § 1997e(a)), prison grievance procedures do not create substantive  
22 rights enforceable under the Due Process Clause. See Antonelli v.  
23 Sheahan, 81 F.3d 1422, 1430 (7th Cir. 1996) ("[A] state's inmate  
24 grievance procedures do not give rise to a liberty interest  
25 protected by the Due Process Clause."). A prisoner does not have  
26 a constitutional right to any particular grievance procedure. See  
27 Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) ("[I]nmates  
28 lack a separate constitutional entitlement to a specific prison

1 grievance procedure.") (citing Mann v. Adams, 855 F.2d 639, 640  
2 (9th Cir. 1988)). Nor does a prisoner have a constitutional right  
3 to any particular grievance outcome. See Geiger v. Jowers, 404  
4 F.3d 371, 374 (5th Cir. 2005) (an inmate "does not have a federally  
5 protected liberty interest in having . . . grievances resolved to  
6 his satisfaction"); Grenning v. Klemme, 34 F. Supp. 3d 1144, 1157  
7 (E.D. Wash. 2014) ("[A plaintiff] cannot state a constitutional  
8 claim based on his dissatisfaction with the grievance process.  
9 Where the defendant's only involvement in the allegedly  
10 unconstitutional conduct is 'the denial of administrative  
11 grievances or the failure to act, the defendant cannot be liable  
12 under § 1983.'" (quoting Shehee v. Luttrell, 1999 F.3d 295, 300  
13 (6th Cir. 1999)). Moreover, a prison official's failure to process  
14 a grievance, without more, is insufficient to establish liability  
15 under section 1983. See Buckey v. Barlow, 997 F.2d 494, 495 (8th  
16 Cir. 1993).

17  
18       Improper screening of a grievance or other irregularities in  
19 the grievance's processing, whether "innocent or otherwise," may  
20 provide a ground for excusing a prisoner from the Prison Litigation  
21 Reform Act's exhaustion requirement. Nunez v. Duncan, 591 F.3d  
22 1217, 1226 (9th Cir. 2010). However, as a general matter, these  
23 improprieties will not provide the basis for a due process claim.  
24 Accordingly, the FAC must be dismissed, with leave to amend.



1 **B. The FAC Fails To Allege A First Amendment Claim**

2  
3 As a rule, "prisoners have a First Amendment right to file  
4 prison grievances." Brodheim v. Cry, 584 F.3d 1262, 1269 (9th  
5 Cir. 2009); Rhodes v. Robinson, 408 F.3d 559, 567 (9th Cir. 2005).  
6 "Retaliation against prisoners for their exercise of this right  
7 is itself a constitutional violation, and prohibited as a matter  
8 of 'clearly established law.'" Brodheim, 584 F.3d at 1269  
9 (citing Rhodes, 408 F.3d at 567).

10  
11 There are five basic elements for a viable claim of First  
12 Amendment retaliation in the prison context:

13  
14 (1) An assertion that a state actor took some adverse  
15 action against an inmate (2) because of (3) that  
16 prisoner's protected conduct, and that such action  
17 (4) chilled the inmate's exercise of his First  
18 Amendment rights, and (5) the action did not reasonably  
19 advance a legitimate correctional goal.

20  
21 Brodheim, 584 F.3d at 1269 (quoting Rhodes, 408 F.3d at 567-68).  
22 The prisoner must establish a specific link between the alleged  
23 retaliation and the exercise of a constitutional right. See Pratt  
24 v. Rowland, 65 F.3d 802, 807-08 (9th Cir. 1995). Even just "'a  
25 threat of retaliation is sufficient injury if made in  
26 retaliation for an inmate's use of prison grievance  
27 procedures.'" Brodheim, 584 F.3d at 1270 (quoting Burgess  
28 v. Moore, 39 F.3d 216, 218 (8th Cir. 1994)).

1 Plaintiff fails to state a First Amendment claim because  
2 the FAC does not allege that prison officials took or even  
3 threatened to take any adverse action against him for having  
4 filed grievances and appeals. The fact that Plaintiff's grievance  
5 was denied does not establish a First Amendment retaliation claim.  
6 Compare Entler v. Gregoire, 872 F.3d 1031, 1036, 1038 (9th Cir.  
7 2017) (allegation that inmate was disciplined for threatening to  
8 file lawsuits, resulting in "fifteen days of lost 'big yard' and  
9 gym time" and "five more days of cell confinement," adequately  
10 stated First Amendment retaliation claim); Klein v. Williams, 714  
11 F. App'x 631, 635 (9th Cir. 2017) (allegation that prison official  
12 threatened to fire inmate from his job for filing a grievance  
13 adequately stated a First Amendment claim). Accordingly, the FAC  
14 must be dismissed, with leave to amend.

15  
16 **C. The FAC Fails To State A Negligence Claim**

17  
18 Plaintiff alleges that Dr. Marcelo was negligent because he  
19 had a duty to use due care in dealing with his patients, which he  
20 breached by inserting his fingers into Plaintiff's rectum after  
21 Plaintiff had complained of back pain. (See FAC at 9). Plaintiff  
22 alleges that Warden Asuncion was negligent because she had a duty  
23 to ensure that her employees would not conspire to violate  
24 Plaintiff's First Amendment rights, which she breached by failing  
25 to punish the employees who violated Plaintiff's rights. (Id. at  
26 11). Negligence is a state law cause of action in tort. Apart  
27 from any substantive defects in Plaintiff's negligence claims, the  
28

1 FAC does not satisfy the procedural requirements for alleging state  
2 law tort claims against governmental actors.

3  
4 Under the California Government Claims Act ("CGCA"), a  
5 plaintiff may not bring an action for damages against a public  
6 employee or entity unless he first presents a written claim to the  
7 government within six months of the incident. See Mabe v. San  
8 Bernadino Cnty., Dept. of Public Social Servs., 237 F.3d 1101, 1111  
9 (9th Cir. 2001) (CGCA requires the "timely presentation of a  
10 written claim and the rejection of the claim in whole or in part"  
11 before a plaintiff can file suit); see also Cal. Gov't Code § 945.4  
12 (no suit for money damages may be brought against a public entity  
13 until a written claim is presented to the public entity, and is  
14 acted upon or rejected by the board). "The failure to exhaust an  
15 administrative remedy [under the CGCA] is a jurisdictional, not a  
16 procedural, defect." Miller v. United Airlines, Inc., 174 Cal.  
17 App. 3d 878, 890 (1985); see also Cornejo v. Lightbourne, 220 Cal.  
18 App. 4th 932, 938 (2013) ("Ordinarily, filing a claim with a public  
19 entity pursuant to the Claims Act is a jurisdictional element of  
20 any cause of action for damages against the public entity . . .").

21  
22 The CGCA's claim presentation requirement is separate from,  
23 and is not satisfied by, internal prison grievance processes. See  
24 Hendon v. Ramsey, 528 F. Supp. 2d 1058, 1069-70 (S.D. Cal. 2007)  
25 ("Although Plaintiff has demonstrated successfully that he utilized  
26 the prison grievance process to exhaust his federal claims by  
27 filing an inmate appeal, and has attached documentation in the form  
28 of his CDC 602 form and administrative responses, these documents

1 do not satisfy the [California Government Claims Act] with respect  
2 to his state law negligence claims."). Instead, "[a] claim under  
3 the Government Claims Act must be presented to the California  
4 Victim Compensation and Government Claims Board for all claims for  
5 money or damages made against the state." In re Jones, 2014 WL  
6 813063, at \*5 (Cal. Ct. App. Mar. 3, 2014) (citing Cal. Gov't.  
7 Code, § 905.2(a), (b)); Smith v. Cobb, 2018 WL 1141507, at \*4 (S.D.  
8 Cal. Mar. 2, 2018) (state prisoner tort claims under the CGCA "must  
9 be made to the Victim Compensation and Government Claims Board");  
10 Apollo v. Gyaami, 167 Cal. App. 4th 1468, 1473 (2008) (referring  
11 to state prisoner's proper presentation of tort claim to California  
12 Victim Compensation and Government Claims Board).

13  
14 Furthermore, a plaintiff must affirmatively allege in the  
15 complaint compliance with the CGCA's claims presentation  
16 requirement, or explain why compliance should be excused. Mangold  
17 v. Cal. Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995).  
18 Plaintiff does not allege compliance with the claims presentation  
19 requirement of the CGCA, or facts warranting excusal from that  
20 requirement, and therefore fails to state a negligence claim  
21 against either Defendant. Accordingly, the FAC must be dismissed,  
22 with leave to amend.

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1 **D. The FAC Fails To Allege A Claim For Supervisory Liability**  
2 **Against Warden Asuncion**

3  
4 To demonstrate a civil rights violation, a plaintiff must show  
5 either direct, personal participation, or some sufficient causal  
6 connection between the official's conduct and the alleged  
7 constitutional violation. See Starr v. Baca, 652 F.3d 1202, 1205-  
8 06 (9th Cir. 2011). Government officials are not liable under  
9 section 1983 simply because their subordinates engaged in  
10 unconstitutional conduct. See Ashcroft v. Iqbal, 556 U.S. 662,  
11 676 (2009). Where a plaintiff sues a supervisor but does not  
12 allege that the supervisor directly participated in the  
13 constitutional violation, a "sufficient causal connection" to the  
14 violation may be shown where the supervisor "set 'in motion a  
15 series of acts by others, or knowingly refused to terminate [such  
16 acts], which he knew or reasonably should have known, would cause  
17 others to inflict the constitutional injury.'" Levine v. City of  
18 Alameda, 525 F.3d 903, 907 (9th Cir. 2008) (quoting Larez v. City  
19 of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991)); see also  
20 Preschooler II v. Clark County Bd. of Trustees, 479 F.3d 1175, 1183  
21 (9th Cir. 2007) (a supervisor may be held accountable only "for  
22 his own culpable action or inaction in the training, supervision,  
23 or control of his subordinates, for his acquiescence in the  
24 constitutional deprivations of which the complaint is made, or for  
25 conduct that showed a reckless or callous indifference to the  
26 rights of others").

27 \\

28 \\

1 Here, Plaintiff simply alleges that Warden Asuncion is liable  
2 for the alleged mishandling of Plaintiff's grievances because she  
3 is "[r]esponsible for [the] operation of prison employees and  
4 w[e]lfare of inmates of the prison." (FAC at 3). This is an  
5 insufficient basis to show supervisory liability under § 1983.  
6 Accordingly, the FAC must be dismissed, with leave to amend.

7  
8 **E. The FAC Fails To State A Claim Against Defendants In Their**  
9 **Official Capacity**

10  
11 Plaintiff sues Defendants for damages in both their official  
12 and individual capacities. (Id.). State employees sued in their  
13 individual capacity may be liable for money damages. Hafer v.  
14 Melo, 502 U.S. 21, 27 (1991). However, Plaintiff's official-  
15 capacity claims are barred by the Eleventh Amendment and cannot  
16 proceed to the extent Plaintiff seeks only money damages.

17  
18 Pursuant to the Eleventh Amendment, a state and its official  
19 arms are immune from suit under section 1983. Howlett v. Rose,  
20 496 U.S. 356, 365 (1990); Brown v. Cal. Dept. of Corrections, 554  
21 F.3d 747, 752 (9th Cir. 2009) ("California has not waived its  
22 Eleventh Amendment immunity with respect to claims brought under  
23 § 1983 in federal court"). "[A] suit against a state official in  
24 his or her official capacity . . . is no different from a suit  
25 against the State itself." Flint v. Dennison, 488 F.3d 816, 824-  
26 25 (9th Cir. 2007) (citation omitted). Therefore, state officials  
27 sued in their official capacity under § 1983 are generally entitled  
28 to immunity. Id. at 825. However, state officials sued in their

1 official capacity are considered "person[s]" when they are sued  
2 for prospective injunctive relief under section 1983, and the  
3 Eleventh Amendment does not bar such claims. Id. (citing Kentucky  
4 v. Graham, 473 U.S. 159, 167 n.14 (1985)).

5  
6 To the extent that Defendants, both of whom are state  
7 employees, are sued for damages in their official capacity, this  
8 action is functionally a suit against the State of California.  
9 Plaintiff does not seek prospective injunctive relief that might  
10 warrant an exception to the Eleventh Amendment bar. Accordingly,  
11 Plaintiff's claims for money damages against Defendants in their  
12 official capacity are barred by the Eleventh Amendment and must be  
13 dismissed.

14  
15 **F. The FAC Violates Federal Rule of Civil Procedure 8**

16  
17 Federal Rule of Civil Procedure 8(a)(2) requires that a  
18 complaint contain "'a short and plain statement of the claim  
19 showing that the pleader is entitled to relief,' in order to 'give  
20 the defendant fair notice of what the . . . claim is and the  
21 grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly,  
22 550 U.S. 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)). Rule 8  
23 may be violated when a pleading "says too little," and "when a  
24 pleading says too much." Knapp v. Hogan, 738 F.3d 1106, 1108 (9th  
25 Cir. 2013) (emphasis in original).

26  
27 Here, the FAC violates Rule 8 because Plaintiff does not  
28 clearly identify the nature of each of the legal claims he is

1 bringing, the specific facts giving rise to each claim, or the  
2 specific Defendant or Defendants against whom each claim is  
3 brought. Without more specific information, Defendants cannot  
4 respond to the FAC. See Cafasso, U.S. ex rel. v. Gen. Dynamics C4  
5 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir. 2011) (a complaint  
6 violates Rule 8 if a defendant would have difficulty understanding  
7 and responding to the complaint). Moreover, because Plaintiff is  
8 not required to provide evidence supporting his claims at this  
9 stage of the litigation, the exhibits attached to the FAC appear  
10 unnecessary. Finally, it appears that the FAC consists of a largely  
11 verbatim copy of the original Complaint's claims and allegations  
12 against Dr. Marcelo and Warden Asuncion, which the Court found  
13 defective, followed by a new section entitled "additional facts."  
14 (FAC at 14-16). However, merely pleading "additional facts" on  
15 top of defective allegations did not and could not correct the  
16 underlying deficiencies in the claims as originally pled.  
17 Plaintiff is cautioned that any future amended complaint must not  
18 repeat the allegations of either the original or First Amended  
19 Complaint that the Court explained were defective. Accordingly,  
20 the FAC is dismissed, with leave to amend.

#### 21 22 **IV.**

#### 23 **CONCLUSION**

24  
25 For the reasons stated above, the FAC is dismissed with leave  
26 to amend. If Plaintiff still wishes to pursue this action, he is  
27 granted **thirty (30) days** from the date of this Memorandum and Order  
28 within which to file a Second Amended Complaint. In any amended



1 complaint, the Plaintiff shall cure the defects described above.  
2 **Plaintiff shall not include new defendants or new allegations that**  
3 **are not reasonably related to the claims asserted in the original**  
4 **complaint.** The Second Amended Complaint, if any, shall be complete  
5 in itself and shall bear both the designation "Second Amended  
6 Complaint" and the case number assigned to this action. It shall  
7 not refer in any manner to any previously filed complaint in this  
8 matter.

9  
10 In any amended complaint, Plaintiff should confine his  
11 allegations to those operative facts supporting each of his claims.  
12 Plaintiff is advised that pursuant to Federal Rule of Civil  
13 Procedure 8(a), all that is required is a "short and plain statement  
14 of the claim showing that the pleader is entitled to relief."  
15 **Plaintiff is strongly encouraged to utilize the standard civil**  
16 **rights complaint form when filing any amended complaint, a copy of**  
17 **which is attached.** In any amended complaint, Plaintiff should  
18 identify the nature of each separate legal claim and make clear  
19 what specific factual allegations support each of his separate  
20 claims, and the specific individual or individuals against whom  
21 each claim is brought. Plaintiff is strongly encouraged to keep  
22 his statements concise and to omit irrelevant details. **It is not**  
23 **necessary for Plaintiff to cite case law, include legal argument,**  
24 **or attach exhibits at this stage of the litigation.** Plaintiff is  
25 also advised to omit any claims for which he lacks a sufficient  
26 **factual basis.**

27 \\

28 \\

1 Plaintiff is explicitly cautioned that the failure to timely  
2 file a Second Amended Complaint, or the failure to correct the  
3 deficiencies described above, will result in a recommendation that  
4 this action be dismissed with prejudice for failure to prosecute  
5 and obey court orders pursuant to Federal Rule of Civil Procedure  
6 41(b). Plaintiff is further advised that if he no longer wishes  
7 to pursue this action, he may voluntarily dismiss it by filing a  
8 Notice of Dismissal in accordance with Federal Rule of Civil  
9 Procedure 41(a)(1). A form Notice of Dismissal is attached for  
10 Plaintiff's convenience.

11  
12 DATED: May 7, 2018

13 /s/  
14 \_\_\_\_\_  
15 SUZANNE H. SEGAL  
16 UNITED STATES MAGISTRATE JUDGE

17 **NOTICE**

18  
19 Reports and Recommendations are not appealable to the Court  
20 of Appeals, but may be subject to the right of any party to file  
21 objections as provided in the Local Rules Governing the Duties of  
22 Magistrate Judges and review by the District Judge whose initials  
23 appear in the docket number. No notice of appeal pursuant to the  
24 Federal Rules of Appellate Procedure should be filed until entry  
25 of the judgment of the District Court.  
26  
27  
28