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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

FEDERICO RODRIGUES,	)	NO. EDCV 10-629-R(MAN)
	)	
Plaintiff,	)	MEMORANDUM AND ORDER DISMISSING
	)	
v.	)	COMPLAINT WITH LEAVE TO AMEND
	)	
J.L. NORWOOD, et al.,	)	
	)	
Defendants.	)	
	)	
_____	)	

Plaintiff, a federal prisoner proceeding *pro se* and *in forma pauperis*, filed a civil rights complaint, pursuant to Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999 (1971), on April 30, 2010 ("Complaint").

Congress has mandated that courts perform an initial screening of civil actions brought by prisoners with respect to prison conditions and/or that seek redress from a governmental entity or officer or employee of a governmental entity. This Court "shall" dismiss such a civil action brought by a prisoner before service of process if the Court concludes that the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks relief against

1 a defendant who is immune from suit. 28 U.S.C. § 1915A(b); 42 U.S.C.  
2 § 1997e(c)(1). In screening such a complaint, the Court must construe  
3 the allegations of the complaint liberally and must afford the plaintiff  
4 the benefit of any doubt. See Karim-Panahi v. Los Angeles Police Dep't,  
5 839 F.2d 621, 623 (9th Cir. 1988). A *pro se* litigant must be given  
6 leave to amend his or her complaint unless it is absolutely clear that  
7 the deficiencies of the complaint cannot be cured by amendment. *Id.*;  
8 Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

9  
10 **ALLEGATIONS OF THE COMPLAINT**

11  
12 Plaintiff is currently in the custody of the Federal Bureau of  
13 Prisons ("BOP") at the Federal Correctional Complex at Coleman,  
14 Florida. (Complaint, Parties, ¶ 1.) His claims arise out of his  
15 confinement at the Federal Correctional Complex at Victorville,  
16 California ("Victorville"). (*Id.*) He names the following defendants:  
17 Warden J.L. Norwood; Associate Warden R. Ali; Captain Bourne; SIS  
18 Lieutenant Nunez; Lieutenants C. Schindehette and T. Patterson; Dr.  
19 Jesus Fernandez; BOP Director Harley Lappin; BOP Western Regional  
20 Counsel Harlin Penn; BOP Supervisory Attorney Eliezer Ben-Shmuel; and  
21 two officials of United States Department of Justice, Office of  
22 Information Policy, Janice Galli McLeod and Anne D. Work. (*Id.* at ¶¶  
23 2-12.)

24  
25 Plaintiff alleges that he is a citizen of the Dominican Republic.  
26 (Complaint, Parties, ¶ 1.) On February 6, 2008, he arrived at  
27 Victorville at the same time as another Dominican inmate. (Complaint,  
28 Facts, ¶ 1.) Plaintiff did not know that the other Dominican inmate had

1 "serious problems" with a group of Victorville inmates who were  
2 expecting his arrival. (*Id.* at ¶ 2.) Defendant Nunez interviewed  
3 plaintiff to see if there were any reasons why plaintiff could not  
4 safely be released into the general population. (*Id.* at ¶ 3.) The  
5 other Dominican inmate had already told Nunez that he had enemies in the  
6 general population, and Nunez had placed him in protective custody in  
7 segregation. (*Id.* at ¶ 4.) While interviewing plaintiff, Nunez adopted  
8 a hostile tone, and plaintiff responded in kind. (*Id.* at ¶ 5.) At the  
9 conclusion of the interview, Nunez told plaintiff that he was going to  
10 send him to his death. (*Id.*) Nunez then released plaintiff into the  
11 general population. (*Id.* at ¶ 6.)

12  
13 Before releasing plaintiff, Nunez told a group of inmates that the  
14 Dominican with "problems" was being placed in segregation and the  
15 Dominican without problems would be placed in the general population.  
16 (Complaint, Statement of the Facts, ¶ 7.) However, Nunez did not convey  
17 this information to the group that had "problems" with the other  
18 Dominican, and they believed that plaintiff was the man they wanted.  
19 (*Id.* at ¶ 6.) On February 7, 2008, these inmates approached plaintiff  
20 and repeatedly stabbed him. (*Id.* at ¶ 7.) Plaintiff sustained 45 stab  
21 wounds. (Complaint at p. 2.) He was transported by helicopter to the  
22 hospital and remained there for a week. (*Id.* at ¶ 7.) When plaintiff  
23 returned to prison, he was housed in segregation in an unsanitary area  
24 and was not provided with adequate medical care. (*Id.*) On March 12,  
25 2008, plaintiff was forced to return to the general population. (*Id.*  
26 at ¶ 19.)

27  
28 Plaintiff contends that defendants attempted to cover up Nunez's

1 misconduct and/or failed to conduct an adequate investigation.  
2 (Complaint, Statement of the Facts, ¶¶ 9-18.) Defendants McLeod and  
3 Work prevented plaintiff from gathering evidence regarding the other  
4 defendants' misconduct when they denied his Freedom of Information Act  
5 ("FOIA") request for records pertaining to the incident. (Complaint,  
6 Parties, ¶ 12, Statement of the Facts, ¶ 13.)

7  
8 Plaintiff asserts the following claims: (1) an Eighth Amendment  
9 claim for deliberate indifference to his safety; (2) an Eighth Amendment  
10 claim for deliberate indifference to his serious medical needs; (3) a  
11 due process claim; (4) an equal protection claim; and (5) claims under  
12 42 U.S.C. §§ 1985 and 1986. (Complaint at pp. 10-11.) He seeks damages  
13 and an injunction enjoining defendants and their agents from retaliating  
14 against him or transferring him to a facility containing persons who  
15 would harm him for filing this complaint. (*Id.* at p. 12.)

## 16 17 DISCUSSION

### 18 19 I. PLAINTIFF FAILS TO STATE AN EIGHTH AMENDMENT CLAIM FOR DELIBERATE 20 INDIFFERENCE TO HIS SAFETY AGAINST ANY DEFENDANT EXCEPT NUNEZ.

21  
22 The Eighth Amendment imposes a duty on prison officials to protect  
23 prisoners from violence at the hands of other prisoners. Farmer v.  
24 Brennan, 511 U.S. 825, 833, 114 S. Ct. 1970, 1976 (1994). A prison  
25 official's deliberate indifference to a substantial risk of serious harm  
26 to an inmate violates the Eighth Amendment. *Id.* at 828, 114 S. Ct. at  
27 1974. However, not every injury suffered by one inmate at the hands of  
28 another translates into constitutional liability for prison officials

1 responsible for his safety. *Id.* at 834, 114 S. Ct. at 1977. To be  
2 liable, the defendant must not only have been aware of facts from which  
3 an inference could be drawn that a substantial risk of serious harm  
4 existed, but also must have actually drawn the inference. Farmer, 511  
5 U.S. at 837, 114 S. Ct. at 1979.

6  
7 Plaintiff has alleged that defendant Nunez knew that there was a  
8 contract on the life of another Dominican inmate who arrived at  
9 Victorville on the same day as plaintiff, and nevertheless, Nunez  
10 released plaintiff into the general population without informing the  
11 inmates planning the assault that plaintiff was not their intended  
12 victim. (Complaint, Statement of the Facts, ¶¶ 4-6.) Moreover,  
13 plaintiff alleges that Nunez told him that he was sending him to his  
14 death. (*Id.* at ¶ 5.) Plaintiff was stabbed 45 times and sustained  
15 serious injuries. (Complaint at p.2, Statement of the Facts, ¶ 7, 17.)  
16 The Court concludes that these allegations are sufficient to state an  
17 Eighth Amendment claim against Nunez for deliberate indifference to  
18 plaintiff's safety.<sup>1</sup>

19  
20 Plaintiff has not, however, alleged such an Eighth Amendment claim  
21 against any of the other defendants. Liability under Bivens must be  
22 based on personal involvement by the defendant. Ashcroft v. Iqbal, \_\_\_  
23 U.S. \_\_\_, 129 S. Ct. 1937, 1948 (2009) ("Because vicarious liability is  
24 inapplicable to Bivens and § 1983 suits, a plaintiff must plead that  
25 each Government-official defendant, through the official's own  
26

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27  
28 <sup>1</sup> Although this claim withstands screening, plaintiff must re-  
allege it in any amended complaint he files to continue pursuing it.

1 individual actions, has violated the Constitution."); see also Taylor  
2 v. List, 880 F.2d 1040, 1045 (9th Cir. 1989)("Liability under Section  
3 1983 arises only upon a showing of personal participation by the  
4 defendant. A supervisor is only liable for constitutional violations  
5 of his subordinates if the supervisor participated in or directed the  
6 violations, or knew of the violations and failed to act to prevent  
7 them."; internal citation omitted).<sup>2</sup> "A plaintiff must allege facts,  
8 not simply conclusions, that show that an individual was personally  
9 involved in the deprivation of his civil rights." Barren v. Harrington,  
10 152 F.3d 1193, 1194 (9th Cir. 1998). Moreover, there must be a  
11 sufficient causal connection between the supervisor's wrongful conduct  
12 and the constitutional violation. Redman v. County of San Diego, 942  
13 F.2d 1435, 1446-47 (9th Cir. 1991). Especially when a plaintiff seeks  
14 to hold a supervisor liable for damages, the inquiry into causation must  
15 be individualized and must focus on the duties and responsibilities of  
16 each individual defendant. Leer v. Murphy, 844 F.2d 628, 633 (9th Cir.  
17 1988).

18  
19 Here, plaintiff has not alleged facts showing any connection  
20 between defendants Norwood, Ali, Bourne, Schindehette, Patterson,  
21 Fernandez, Lappin, Penn, Ben-Shmuel, McLeod, and Work and the failure  
22 to protect him from assault. Plaintiff does not allege that these  
23 defendants knew anything about the planned assault on the other  
24 Dominican inmate; he only alleges that, afterwards, they helped cover  
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26  
27 <sup>2</sup> Although Taylor arose under 42 U.S.C. Section 1983, actions  
28 under Bivens are identical to those brought under Section 1983 "save for  
the replacement of a state actor under § 1983 by a federal actor under  
Bivens." Van Strum v. Lawn, 940 F.2d 406, 409 (9th Cir. 1991).

1 up defendant Nunez's actions and/or hindered plaintiff's attempts to  
2 obtain information about the incident. (Complaint at pp. 7-8.) Thus,  
3 plaintiff has not alleged any conduct by these defendants which could  
4 be construed as deliberate indifference on their part and which could  
5 be deemed to have caused the attack on him.

6  
7 To the extent that plaintiff attempts to base an Eighth Amendment  
8 claim on allegations that defendants Norwood, Ali, Bourne, Schindehette,  
9 and Patterson subsequently returned him to the general population, his  
10 claim is deficient. (Complaint, Statement of the Facts, ¶ 19.)  
11 Although plaintiff alleges that did not want to return to the general  
12 population and feared for his life, he never alleges that he suffered  
13 another attack. (*Id.*) While a prisoner need not wait to be injured  
14 before seeking injunctive relief, see Farmer, 511 U.S. at 845, 114 S.  
15 Ct. at 1983, a prisoner seeking damages must allege that the risk  
16 materialized and caused him physical injury. See 42 U.S.C. § 1997e(e)  
17 (prisoner may not bring federal action for mental or emotional injury  
18 without a showing of physical injury); Babcock v. White, 102 F.3d 267,  
19 272 (7th Cir. 1996)(explaining that "it is the reasonably preventable  
20 assault itself, rather than any fear of assault, that gives rise to a  
21 compensable claim under the Eighth Amendment").

22  
23 Accordingly, plaintiff's Eighth Amendment claims against defendants  
24 Norwood, Ali, Bourne, Schindehette, Patterson, Fernandez, Lappin, Penn,  
25 Ben-Shmuel, McLeod, and Work for deliberate indifference to his safety  
26 must be dismissed.

1 **II. PLAINTIFF FAILS TO STATE A CLAIM AGAINST ANY DEFENDANT FOR**  
2 **DELIBERATE INDIFFERENCE TO HIS MEDICAL NEEDS.**

3  
4 A prisoner asserting a Section 1983 claim for denial of medical  
5 care must show "acts or omissions sufficiently harmful to evidence  
6 deliberate indifference to serious medical needs." Estelle v. Gamble,  
7 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976). A serious medical need  
8 exists if failure to treat the condition could result in further  
9 significant injury or the unnecessary and wanton infliction of pain.  
10 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on*  
11 *other grounds by* WMX Technologies, Inc. v. Miller, 104 F.3d 1133 (9th  
12 Cir. 1997)(*en banc*). Deliberate indifference requires that defendants  
13 purposefully ignore or fail to respond to the prisoner's pain or medical  
14 need. McGuckin, 974 F.2d at 1060. Deliberate indifference "may appear  
15 when prison officials deny, delay or intentionally interfere with  
16 medical treatment, or it may be shown in the way in which prison  
17 physicians provide medical care." *Id.* at 1059.

18  
19 "Deliberate indifference is a high legal standard." Toguchi v.  
20 Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). A showing of medical  
21 malpractice or negligence is insufficient to establish deliberate  
22 indifference. *Id.* "[A] complaint that a physician has been negligent  
23 in diagnosing or treating a medical condition does not state a valid  
24 claim of medical mistreatment under the Eighth Amendment. Medical  
25 malpractice does not become a constitutional violation merely because  
26 the victim is a prisoner." Estelle, 429 U.S. at 105-06, 97 S. Ct. at  
27 292.



1 If medical treatment is delayed rather than denied, the delay  
2 generally amounts to deliberate indifference only if it caused further  
3 harm. Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Shapley  
4 v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir.  
5 1985)(*per curiam*). Moreover, a mere difference of opinion between an  
6 inmate and medical staff, or among medical staff, regarding appropriate  
7 medical treatment is generally insufficient to constitute deliberate  
8 indifference. See Toquchi, 391 F.3d at 1058; Jackson v. McIntosh, 90  
9 F.3d 330, 332 (9th Cir. 1996); Sanchez v. Vild, 891 F.2d 240, 242 (9th  
10 Cir. 1989). A prisoner asserting an Eighth Amendment claim against his  
11 physician must show that the course of treatment the physician chose was  
12 medically unacceptable under the circumstances, and that the physician  
13 chose it in conscious disregard of an excessive risk to the plaintiff's  
14 health. Toquchi, 391 F.3d at 1058; Jackson, 90 F.3d at 332.

15  
16 Plaintiff alleges that, when he returned to prison after receiving  
17 medical care for his stab wounds in the hospital, he was kept in an  
18 unsanitary and "non-medical" area, and he was not provided with adequate  
19 medical care and treatment. (Complaint, Statement of the Facts, ¶¶ 7,  
20 8.) However, plaintiff does not allege in what respects his medical  
21 care was deficient, nor does he allege what, if any, injuries he  
22 sustained as a result of the deficient medical care and unsanitary  
23 conditions. Moreover, plaintiff fails to allege a connection between  
24 the purported defects in his medical care and the defendants against  
25 whom he is asserting this claim. There are no factual allegations from  
26 which it could be inferred that any of defendants were deliberately  
27  
28

1 indifferent to plaintiff's medical needs.<sup>3</sup>

2  
3 Accordingly, plaintiff's Eighth Amendment claims for deliberate  
4 indifference to his medical needs must be dismissed.

5  
6 **III. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE DUE PROCESS CLAUSE.**

7  
8 Plaintiff contends that defendants attempted to cover up Nunez's  
9 misconduct and deprived him of an adequate resolution of his claim  
10 though administrative means. (Complaint at 16.)

11  
12 Allegations that officials engaged in a cover-up state a  
13 constitutional claim only if the cover-up deprived plaintiff of his  
14 right of access to courts by causing him to fail to obtain redress for  
15 the constitutional violation that was the subject of the cover-up. See  
16 Karim-Panahi, 839 F.2d at 625; Rose v. City of Los Angeles, 814 F. Supp.  
17 878, 881 (C.D. Cal. 1993). A cover-up claim is premature when, as here,  
18 plaintiff's action seeking redress for the underlying constitutional  
19 violations remains pending. See Karim-Panahi, 839 F.2d at 625 (claim  
20 alleging police cover-up of misconduct was premature when action  
21 challenging misconduct was pending); Rose, 814 F. Supp. at 881 (same).

22  
23 Plaintiff also cannot allege a due process claim based on his  
24 allegations that defendants hindered his pursuit of administrative

25  
26 \_\_\_\_\_  
27 <sup>3</sup> As to defendants Lappin, Penn, Ben-Shmuel, McLeod, and Work,  
28 who are not Victorville officials, it is difficult to imagine what  
allegations *could* cure this deficiency. Nevertheless, the Court will  
grant plaintiff leave to amend.

1 remedies. A prisoner cannot state a due process claim based on the  
2 handling of his grievances. See Ramirez v. Galaza, 334 F.3d 850, 860  
3 (9th Cir. 2003) (“inmates lack a separate constitutional entitlement to  
4 a specific prison grievance procedure”); Mann v. Adams, 855 F.2d 639,  
5 640 (9th Cir. 1988) (“[t]here is no legitimate claim of entitlement to  
6 a grievance procedure”); see also Larkin v. Watts, 300 Fed. Appx. 501,  
7 2008 WL 4946284, \*1 (9th Cir. Nov. 12, 2008) (“Larkin’s claim that the  
8 defendants improperly processed his administrative complaints or  
9 grievances does not give rise to a cognizable constitutional or Bivens  
10 claim”)(citable under Fed. R. App. P. 32.1(a) and Ninth Circuit Rule  
11 36-3).

12  
13 Finally, plaintiff’s allegations against defendants McLeod and Work  
14 rest on their denial of his appeal from the BOP’s denial of his FOIA  
15 request for records pertaining to the February 7, 2008 assault.  
16 (Complaint, Parties, ¶ 12, Ex. C.) Even if, *arguendo*, that denial was  
17 improper, allegations that these defendants denied plaintiff’s FOIA  
18 request cannot provide a basis for a Bivens claim against them. See  
19 Johnson v. Executive Office for U.S. Attorneys, 310 F.3d 771, 777 (D.C.  
20 Cir. 2002)(allegations that defendant violated plaintiff’s due process  
21 rights by mishandling his FOIA request failed to state a claim for which  
22 a Bivens remedy was warranted; FOIA statutory scheme precluded damage  
23 remedy under Bivens); Kroposki v. F.A.A., 2009 WL 2710223, \*2 (D. Conn.,  
24 Aug. 26, 2009) (“Courts considering the question of whether a plaintiff  
25 can maintain a Bivens remedy against a federal official in his or her  
26 individual capacity in cases involving FOIA have declined to create such  
27 a remedy because the comprehensive scheme that FOIA provides to  
28 administer public rights precludes the creation of a Bivens remedy.”;

1 internal quotations marks omitted).

2  
3 Accordingly, plaintiff's due process claims must be dismissed.

4  
5 **IV. PLAINTIFF FAILS TO STATE A CLAIM UNDER THE EQUAL PROTECTION CLAUSE.**

6  
7 Plaintiff contends that defendants "acted out of invidious and  
8 racial discrimination." (Complaint, Statement of the Facts, ¶ 14.)

9  
10 The Equal Protection Clause of the Fourteenth Amendment "is  
11 essentially a direction that all persons similarly situated should be  
12 treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S.  
13 432, 439, 105 S. Ct. 3249, 3254 (1985). The threshold allegation is  
14 that plaintiff was similarly situated to other inmates who received  
15 different treatment. See Fraley v. Bureau of Prisons, 1 F.3d 924, 926  
16 (9th Cir. 1993). Plaintiff must also "plead intentional unlawful  
17 discrimination or allege facts that are at least susceptible of an  
18 inference of discriminatory intent." Monteiro v. Tempe Union High Sch.  
19 Dist., 158 F.3d 1022, 1026 (9th Cir. 1998); see Iqbal, 129 S. Ct. at  
20 1948 ("plaintiff must plead and prove that the defendant acted with  
21 discriminatory purpose").

22  
23 Applying these principles, the Court finds plaintiff's allegations  
24 wholly insufficient to state an equal protection claim. Plaintiff has  
25 not set forth in what manner the defendants discriminated against him  
26 based on race or how his treatment differed from that of similarly  
27 situated inmates. To the extent that Nunez took measures to protect the  
28 safety of the other Dominican inmate but not of plaintiff, the

1 difference in their treatment could not have been racially or ethnically  
2 motivated, because plaintiff alleges that both men are Dominican and  
3 look alike. The Complaint contains no factual allegations whatsoever  
4 from which it could be inferred that defendants acted with  
5 discriminatory purpose. See Iqbal, 129 S. Ct. at 1448. Even a liberal  
6 construction of a complaint cannot supply essential elements of a claim  
7 that were not pled. Ivey v. Board of Regents of University of Alaska,  
8 673 F.2d 266, 268 (9th Cir. 1982).

9  
10 Accordingly, plaintiff's equal protection claim must be dismissed.

11  
12 **V. PLAINTIFF FAILS TO STATE A CLAIM UNDER 42 U.S.C. SECTION 1985 OR**  
13 **SECTION 1986.**

14  
15 Plaintiff purports to assert claims under 42 U.S.C. §§ 1985 and  
16 1986. (Complaint at p. 11.)

17  
18 Plaintiff does not specify the subsection under which his Section  
19 1985 claim arises. Section 1985(1) prohibits conspiracies to prevent  
20 a United States officer from performing his or her duties. Bretz v.  
21 Kelman, 773 F.2d 1026, 1027 n.3 (9th Cir. 1985). Section 1985(2)  
22 prohibits conspiracies to intimidate parties, witnesses, or jurors in  
23 federal courts (first clause) and interfere with the administration of  
24 justice in state courts (second clause). Kush v. Rutledge, 460 U.S.  
25 719, 724-25, 103 S. Ct. 1483, 1486-87 (1983); Bretz, 773 F.2d at 1027  
26 n.3. Section 1985(3) prohibits conspiracies to deprive a person of the  
27 equal protection of the laws (first clause), or to hinder state  
28 authorities from securing equal protection of the laws (second clause),

1 or to interfere with federal elections (third clause). Kush, 460 U.S.  
2 at 720-25, 103 S. Ct. at 1485-87; Bretz, 773 F.2d at 1027 n.3. Plainly,  
3 plaintiff's claim can arise only under the first clause of Section  
4 1985(3).

5  
6 To state a claim under the first clause of Section 1985(3),  
7 plaintiff must allege a racial or other class-based discriminatory  
8 animus. Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798  
9 (1971). Plaintiff also must include factual allegations showing the  
10 requisite conspiracy. Karim-Panahi, 839 F.2d at 626. Here, plaintiff  
11 has alleged neither facts showing discriminatory animus nor facts  
12 showing a conspiracy. Plaintiff, therefore, has not alleged a claim  
13 under Section 1985(3).

14  
15 Section 1986 imposes liability on a person who knows of any  
16 impending violation of Section 1985 but neglects or refuses to prevent  
17 it. Karim-Panahi, 839 F.2d at 626. "A claim can be stated under  
18 section 1986 only if the complaint contains a valid claim under section  
19 1985." *Id.*; see also McCalden v. California Library Ass'n, 955 F.2d  
20 1214, 1223 (9th Cir. 1990)(same). Plaintiff's failure to state a claim  
21 under Section 1985 is fatal to his claim under Section 1986.

22  
23 Accordingly, plaintiff's claims under Sections 1985 and 1986 must  
24 be dismissed.

25  
26 **CONCLUSION**

27  
28 For the foregoing reasons, the Complaint is dismissed with leave

1 to amend. If plaintiff wishes to pursue this action, he is granted  
2 thirty (30) days from the date of this Memorandum and Order within which  
3 to file a First Amended Complaint that attempts to cure the defects in  
4 the Complaint described herein. The First Amended Complaint, if any,  
5 shall be complete in itself. It shall not refer in any manner to the  
6 original Complaint.

7  
8 **Plaintiff is explicitly cautioned that failure to timely file a**  
9 **First Amended Complaint, or failure to correct the deficiencies**  
10 **described herein, may result in a recommendation that this action be**  
11 **dismissed.**

12  
13 DATED: July 9, 2010

*Margaret A. Nagle*

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MARGARET A. NAGLE  
UNITED STATES MAGISTRATE JUDGE