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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

FRED JAY OTTO,	)	No. ED CV-16-1883-AB (AS)
	)	
Plaintiff,	)	<b>ORDER DISMISSING THIRD AMENDED</b>
v.	)	<b>COMPLAINT WITH LEAVE TO AMEND</b>
	)	
ROSS QUINN, et al.,	)	
	)	
Defendants.	)	
	)	

I. INTRODUCTION

On September 18, 2017, Plaintiff Fred Jay Otto ("Plaintiff"), an inmate at the Federal Correctional Institute in Victorville, California ("Victorville I"), proceeding pro se, filed a Third Amended Complaint pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 3888 (1971) and the Federal Tort Claims Act ("FTCA"), for compensatory damages. (Docket Entry No. 21 ("TAC")).<sup>1</sup> The Third Amended Complaint follows the Court's dismissal, with leave to amend, of Plaintiff's Complaint on December

<sup>1</sup> Pages in the SAC are cited as if they are consecutively paginated, the first page being "1."

1 28, 2016, his First Amended Complaint on June 14, 2017, and his  
2 Second Amended Complaint on August 18, 2017. (Docket Entry Nos. 11,  
3 16, 19).

4  
5 The Court has screened the Third Amended Complaint as prescribed  
6 by 28 U.S.C. § 1915A(b). For the reasons discussed below, the Third  
7 Amended Complaint is DISMISSED with leave to amend.<sup>2</sup>

8  
9 **II. THIRD AMENDED COMPLAINT**

10  
11 The three-count Third Amended Complaint names two Defendants,  
12 Ross Quinn ("Quinn") and L. Carrington ("Carrington"), both in their  
13 individual capacities. (TAC at 3, 5, 7, 9, 15-19). Plaintiff  
14 voluntarily dismissed the following four Defendants who were named in  
15 his previous pleadings: (1) Warden Randy Tews ("Tews"); (2) Linda  
16 Aragon ("Aragon"); (3) Franklin Rutledge ("Rutledge"); and (4) the  
17 United States government. (Docket Entry No. 20; TAC at 7).

18  
19 In Count One, Plaintiff alleges that Quinn violated his First,  
20 Fifth, and Eighth Amendment rights by acting with deliberate  
21 indifference to Plaintiff's medical needs. (TAC at 15-16).  
22 Plaintiff claims that Quinn knowingly and intentionally conspired  
23 with Dr. Hall, an orthopedic physician, to falsify medical documents  
24 in order to lower Plaintiff's medical care inmate level from level  
25 four (the highest level) to level two. (TAC at 15-16). One of these  
26 documents was a falsified health re-assessment, dated January 28,

27  
28 <sup>2</sup> A Magistrate Judge may dismiss a complaint with leave to  
amend without the approval of a District Judge. See McKeever v.  
Block, 932 F.2d 795, 798 (9th Cir. 1991).

1 2016, that Plaintiff claims he was not present for. (Id. at 16). As  
2 a result of the level change, Plaintiff was transferred from the  
3 Federal Medical Center in Butner, North Carolina, a level-four  
4 facility where he was being treated for acute liver disease, throat  
5 cancer, and debilitating chronic pain, to Victorville I, a level  
6 three facility. (Id. at 15). According to Plaintiff, Quinn  
7 orchestrated the transfer in retaliation for Plaintiff's  
8 administrative complaints. (Id. at 16). Plaintiff allegedly heard  
9 Quinn tell Plaintiff's Victorville I physician that he was aware of  
10 Plaintiff's level four status and that he "personally approved his  
11 transfer from Butner." (Id.). Plaintiff alleges that "Quinn did not  
12 allow Plaintiff to be medically treated for anything," and, "in  
13 concert with others," altered Plaintiff's pain medication, which he  
14 had been taking for the past twelve years. (Id. at 15). Because of  
15 Quinn's acts and omissions, Plaintiff allegedly suffered "unnecessary  
16 and wanton infliction of pain." (Id. at 16).

17  
18 In Count Two, Plaintiff asserts that Carrington violated his  
19 First, Fifth, and Eighth Amendment rights by conspiring and  
20 retaliating against him, as well as through medical negligence and  
21 deliberate indifference to Plaintiff's medical needs. (Id. at 17-  
22 18). Plaintiff asserts that Carrington retaliated against him for  
23 filing administrative grievances by writing him up for improperly  
24 taking his pain medication. (Id. at 18). As the administrator of  
25 medications, Carrington was allegedly aware of a doctor's order to  
26 "crush and float in water" Plaintiff's Oxycodone pills, and  
27 Carrington had previously administered Plaintiff's pills in this  
28 fashion. (Id. at 17). Plaintiff alleges that on February 25, 2016,  
Carrington crushed the Oxycodone pill into a cup and ordered

1 Plaintiff to consume it without water. (Id.). Plaintiff explained  
2 to Carrington that he could not swallow the crushed pill without  
3 water because of his dry mouth from the throat cancer and asked for  
4 water. (Id. at 17-18). Carrington refused to provide Plaintiff with  
5 water, giving him the option of taking the pill as it was or  
6 "sign[ing] a refusal form." (Id. at 18). Plaintiff attempted to  
7 swallow the crushed pill, but he unintentionally coughed up a "small  
8 particle" of the pill, which hit a window. (Id.) Carrington then  
9 ordered Plaintiff to open his mouth and observed small particles  
10 still in his mouth. (Id.). Carrington allegedly stated, "Now I can  
11 write you up, for abusing your meds, that's what you get for filing  
12 complaints, and always coming to my window complaining. Now you may  
13 have some water." (Id.).

14  
15 Count Three of the Third Amended Complaint is a conspiracy claim  
16 against both Defendants for retaliation and medical negligence in  
17 violation of Plaintiff's First, Fifth, and Eighth Amendment rights.  
18 (Id. at 19). The alleged conspirators include Tews, Aragon, and  
19 Rutledge, the individuals whom Plaintiff voluntarily dismissed from  
20 the case upon filing the Third Amended Complaint.<sup>3</sup> (Id.). Plaintiff  
21 asserts, among other things, that Quinn ordered the medical staff not  
22 to treat Plaintiff and to give him only "minimal pain medication[,]  
23 [c]ontrary to Plaintiff's medical condition." (Id.). Plaintiff also  
24 alleges that "Carrington stated to Plaintiff that they (Staff) are  
25 here to punish Plaintiff and deviated from policy and protocol for  
26 the intent of causing unnecessary pain and suffering to Plaintiff."  
27 (Id.).

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<sup>3</sup> Plaintiff refers to "Defendant Tews" in Count Three here,  
(TAC at 19), despite having dismissed Tews.

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3 **III. STANDARD OF REVIEW**

4 Congress mandates that District Courts initially screen civil  
5 complaints filed by prisoners seeking redress from governmental  
6 entities or employees. 28 U.S.C. § 1915A(b). A court may dismiss  
7 such a complaint, or any portion thereof, before service of process,  
8 if that court concludes that the complaint: (1) is frivolous or  
9 malicious; (2) fails to state a claim upon which relief can be  
10 granted; or (3) seeks monetary relief from a defendant who is immune  
11 from such relief. 28 U.S.C. § 1915A(b)(1)-(2); see also Lopez v.  
12 Smith, 203 F.3d 1122, 1126-27 n.7 (9th Cir. 2000) (en banc).

13 To state a claim for which relief may be granted, a complaint  
14 must contain "enough facts to state a claim to relief that is  
15 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
16 570 (2007). "A claim has facial plausibility when the plaintiff  
17 pleads factual content that allows the court to draw the reasonable  
18 inference that the defendant is liable for the misconduct alleged."  
19 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In addition, a court  
20 must interpret a pro se complaint liberally and construe all material  
21 allegations of fact in the light most favorable to the plaintiff.  
22 See Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) ("[A]  
23 complaint [filed by a pro se prisoner] 'must be held to less  
24 stringent standards than formal pleadings drafted by lawyers.'")  
25 (quoting Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam)).  
26 However, a court does not have to accept as true mere legal  
27 conclusions. See Iqbal, 556 U.S. at 678 ("Threadbare recitals of the  
28 elements of a cause of action, supported by mere conclusory  
statements, do not suffice."). Furthermore, in giving liberal

1 interpretation to a pro se complaint, a court may not supply  
2 essential elements of a claim that were not initially pled. Pena v.  
3 Gardner, 976 F.2d 469, 471-72 (9th Cir. 1992).  
4

#### 5 IV. DISCUSSION

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7 In dismissing Plaintiff's seven-count Second Amended Complaint  
8 with leave to amend, the Court pointed to various legal deficiencies  
9 in his claims and allegations. The Court also noted, however, that  
10 two particular claims passed muster: (1) a claim against Quinn for  
11 deliberate indifference to serious medical needs and (2) a  
12 retaliation claim against Carrington. (Docket Entry No. 19, at 9,  
13 12-13). For the Third Amended Complaint, Plaintiff retains these two  
14 claims and Defendants, while discarding the other Defendants and most  
15 of the other claims. (TAC at 3, 5, 7, 9, 15-19). But the pared-  
16 down, three-count pleading remains deficient in certain respects.  
17

18 First, while Count Two manages to state a retaliation claim  
19 against Carrington, this count is deficient to the extent that it  
20 also attempts to assert claims of conspiracy and deliberate  
21 indifference to serious medical needs. Plaintiff fails to state a  
22 claim of deliberate indifference against Carrington because, while  
23 Carrington's actions may have caused Plaintiff discomfort from dry  
24 mouth, these actions did not place his health or safety at an  
25 excessive risk of harm. Cf. Farmer v. Brennan, 511 U.S. 825, 837  
26 (1994); Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). The  
27 allegations also fail to establish that Carrington conspired with  
28 anyone else in the conduct at issue. Accordingly, Plaintiff's Count

1 Two claims against Carrington for conspiracy and deliberate  
2 indifference must be DISMISSED with leave to amend.

3  
4 Second, Count Three fails to state a claim. Count Three asserts  
5 that "all Defendants" conspired in retaliation and medical  
6 negligence. (TAC at 19). Plaintiff's allegations fail to show any  
7 conspiracy involving Carrington, and they also fail to show that  
8 Quinn retaliated or conspired to retaliate against Plaintiff.  
9 Plaintiff does not, for instance, allege facts showing a causal  
10 connection between Quinn's actions and Plaintiff's protected conduct.  
11 See Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (a  
12 prison retaliation claim requires allegations that, among other  
13 things, the defendant took adverse action against an inmate because  
14 of the inmate's protected conduct). Accordingly, Count Three must be  
15 DISMISSED with leave to amend.

16  
17 **V. ORDER**  
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19 For the reasons stated above, Plaintiff's Third Amended  
20 Complaint is DISMISSED with leave to amend. If Plaintiff wishes to  
21 further pursue this action, he must file a Fourth Amended Complaint  
22 no later than **30 days from the date of this Order. The Fourth**  
23 **Amended Complaint must cure the pleading defects discussed above and**  
24 **shall be complete in itself without reference to prior pleadings.**  
25 **See L.R. 15-2 ("Every amended pleading filed as a matter of right or**  
26 **allowed by order of the Court shall be complete including exhibits.**  
27 **The amended pleading shall not refer to the prior, superseding**  
28 **pleading." ). This means that Plaintiff must again allege and plead**  
**any viable claims that he wishes to retain in the case.**

1 In any amended complaint, Plaintiff should identify the nature  
2 of each separate legal claim, identify the defendant(s) against whom  
3 he brings the claim, and confine his allegations to those operative  
4 facts supporting each of his claims. Pursuant to Federal Rule of  
5 Civil Procedure 8(a), all that is required is a "short and plain  
6 statement of the claim showing that the pleader is entitled to  
7 relief." However, Plaintiff is advised that the allegations in the  
8 Fourth Amended Complaint should be consistent with the authorities  
9 discussed above. In addition, the Fourth Amended Complaint may not  
10 include new Defendants or claims not reasonably related to the  
11 allegations in the previously filed complaints. Furthermore,  
12 Plaintiff shall indicate in what capacity he sues any defendant(s).  
13 **Plaintiff is strongly encouraged to utilize the standard civil rights**  
14 **complaint form when filing any amended complaint, a copy of which is**  
15 **attached.**

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