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

11 ST. MICHAEL BALZARINI,

12 Plaintiff,

13 v.

14 RALPH DIAZ and DEAN  
15 BORDERS,

16 Defendants.  
17  
18

Case No. 5:18-cv-01962-RGK (MAAx)

**MEMORANDUM DECISION AND  
ORDER DISMISSING FIRST  
AMENDED COMPLAINT WITH  
LEAVE TO AMEND**

19  
20 **I. INTRODUCTION**

21 On September 13, 2018, Plaintiff St. Michael Balzarini (“Plaintiff”), currently  
22 incarcerated at the California Institution for Men in Chino, San Bernardino County,  
23 California (the “Prison”), proceeding *pro se* and *in forma pauperis*, filed a civil  
24 Complaint alleging violations of his civil rights pursuant to 42 U.S.C. § 1983  
25 (“Section 1983”). (ECF No. 1.) On October 5, 2018, Plaintiff filed a First Amended  
26 Complaint. (“FAC,” ECF No. 7.) The Court has screened the FAC as prescribed by  
27 28 U.S.C. § 1915A and 28 U.S.C. § 1915(e)(2)(B). For the reasons stated below,  
28 the FAC is **DISMISSED WITH LEAVE TO AMEND**.

1 **II. SUMMARY OF PLAINTIFF'S ALLEGATIONS AND CLAIM FOR**  
2 **RELIEF**

3 Plaintiff is a prisoner who suffers from end-stage Cirrhosis, which he  
4 contends makes him sensitive to heat and cold. (FAC 22<sup>1</sup>.) The Prison is a facility  
5 that primarily houses prisoners who are disabled, elderly or have medical conditions,  
6 including inmates with heat and cold sensitivities. (*Id.* at 9, 10.) Plaintiff alleges  
7 that the Prison's heating and ventilation system is inadequate. (*Id.* at 8.)  
8 Specifically, he claims that the lack of ventilation in the building caused him to  
9 suffer a second-degree burn on his back or other unspecified harm. (*Id.*) In what  
10 appears to be an unfiled grievance or appeal listing a number of grievances (all but  
11 one unrelated to his FAC), Plaintiff explains further:

12 3. Air quality and temperature:

13 There's no air-ventilation or heating in cell's [sic], you open  
14 window for air, and it's what ever the weather outside is.

15 If it's cold outside, then its [sic] cold in the cell's [sic]

16 ...

17 If it's 90°-100° F, then it's hotter in cell's [sic] because it's  
18 concrete buildings.

19 Causing to be deprived of basic human need.

20 ...

21 6. These are not decent conditions or as any similarly situated  
22 inmates in the State Prison system.

23 Chino Prison medical facility is run like third world prison.

24 ...

25 ///

26  
27  
28 <sup>1</sup> The Complaint contains a series of interrupted paginations. Accordingly, the Court cites the page numbers generated by ECF.

1           7. . . . This state run high-risk medical facility is causing  
2           inadequate or inhumane conditions, in which the totality of  
3           conditions added up, create an overall effect that is  
4           unconstitutional.

5           (*Id.* at 12-13.)

6           Plaintiff submitted a Health Care Grievance on July 14, 2018 complaining  
7           that there was no air in the cells and claiming that it felt like a sweat box in that it  
8           was hotter in the cells than outside. (*Id.* at 18.) The grievance was rejected on July  
9           20, 2018 with a reference to an attached letter with instructions. (*Id.*) A letter  
10          attached to the FAC, bearing the same date, directs Plaintiff to raise his concerns  
11          regarding inadequate living conditions with the Custody Staff rather than the Health  
12          Care Staff. (*Id.* at 16.)

13          In the meantime, on July 16, 2018, Plaintiff requested to be seen by the  
14          medical staff to care for a blister on his upper back allegedly caused by a “burn[]  
15          from heat in the building.” (*Id.* at 27.) He was treated on July 17, 2018. (*Id.* at 27,  
16          28, 30, 31.) Again on August 14, 2018, Plaintiff was seen by the medical staff for a  
17          burn to his upper back that occurred on August 7, 2018.<sup>2</sup> (*Id.* at 29.)

18          On August 8, 2018, during what he described as a “Level II” heat wave,  
19          Plaintiff submitted an Inmate/Parolee Appeal grievance requesting an emergency  
20          policy to lower temperatures at Facility C to a heat index of no more than 88  
21          degrees, a policy for taking action during heat waves, and the repair of the air  
22          ventilation system in the building. (*Id.* at 22, 24.) He explained that:

23                 According to the Centers for Disease Control, fans are  
24                 ineffective at temperatures over 95-degrees and actually  
25                 increase body heat. Both cool-down showers and cold water  
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27                 <sup>2</sup> It is unclear whether this is a new burn or the exacerbation or further treatment of  
28                 the original burn of July 16, 2018.

1 are effective only for brief periods and drinking large quantities  
2 of water can cause other medical complications.

3 (*Id.* at 24.)

4 On September 4, 2018, Plaintiff was interviewed regarding his August 8,  
5 2018 grievance and received a written Second Level Appeal Response partially  
6 granting his requests to have prison officials create a policy for taking action during  
7 a heat wave and to fix the air and ventilation in the buildings (“Appeal Response”).  
8 (*Id.* at 20-21.) In this Appeal Response, Warden Borders and Associate Warden  
9 Ellis indicated that the Prison was “undergoing a project to replace and upgrade the  
10 cooling and ventilation systems.” (*Id.* at 21.) The Appeal Response also explained  
11 the additional measures that the Prison had in place for Stage II heat alerts –  
12 “increased access to cool running water (showers), along with ice water . . . in the  
13 housing units . . . [and] from the hours 0600-2100 unit staff shall have the discretion  
14 to open the cell doors for all inmates housing in a Facility C housing unit.” (*Id.*)<sup>3</sup>

15 Dissatisfied with the Appeal Response, Plaintiff submitted his comments for a  
16 Third Level Review on September 20, 2018. (*Id.* at 23.) There, he stated:

17 You stated in interview, there’s no funds now, nor will their  
18 [sic] be in the future to fix air-ventilation and heating in the  
19 cell’s [sic]. So we continue to do without both. Making this  
20 not a medical facility, it should be close [sic] down then.

21  
22  
23 <sup>3</sup> The FAC includes a July 28, 2017 memorandum from Prison Captain Lemaster to  
24 the Facility C Custody Staff that details approved procedures to be used during an  
25 activation of the Heat Related Pathologies Plan, otherwise known as the “Hot  
26 Weather Plan,” specifically relating to the practice of opening inmate cell doors to  
27 increase ventilation during Stage I, II, and III heat alerts. (*Id.* at 26.) Given the  
28 placement of this document within the FAC, it is unclear whether Plaintiff received  
this in connection with the Appeal Response. Still, it appears that the Appeal  
Response was referencing the cell door procedures detailed in this July 28, 2017  
memorandum.

1 (*Id.*) The FAC does not contain a final response to Plaintiff's Third Level Review  
2 request.

3       Based on the foregoing allegations and supporting documents, Plaintiff brings  
4 claims pursuant to the Eighth Amendment of the United States Constitution and the  
5 California Elder Abuse and Dependent Adult Civil Protection Act, Cal. Welf. &  
6 Inst. Code §§ 15610, *et seq.* ("Elder Abuse Act"), alleging that Defendants Secretary  
7 of CDCR Ralph Diaz and Prison Warden Dean Borders violated Plaintiff's rights by  
8 failing to provide adequate heating and ventilation. (*Id.* at 3, 5, 6.)<sup>4</sup> Plaintiff sues  
9 these defendants in both their individual and official capacities. (*Id.* at 3.) He seeks  
10 (1) prospective relief in the form of (a) an emergency injunction to lower  
11 temperatures at the facility, (b) a policy for taking action during a heat or cold wave,  
12 and (c) a practice of maintaining temperatures between 60 and 88 degrees  
13 Fahrenheit for the benefit of heat- and cold-sensitive prisoners (*Id.* at 9, 10); and (2)  
14 costs of proceedings (*Id.* at 5.)

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19 <sup>4</sup> In addition, in a kitchen-sink approach and randomly scattered throughout the  
20 FAC, Plaintiff alludes to a host of other concerns regarding conditions that he and/or  
21 others are suffering or have suffered, including violation of the "Equal Protection  
22 Clause," failure to provide adequate food, lack of exercise equipment, insufficient  
23 visitation, too few phones, difficulties in reaching top bunks, no fish kits upon  
24 arrival, no hygiene (toothpaste), inadequate law library, no indoor visits, no family  
25 visits, no marriages or conjugal visits. (FAC 7, 8, 13, 14.) Because Plaintiff fails to  
26 provide facts to support these claims, as he must (*see Ashcroft v. Iqbal*, 556 U.S.  
27 662, 678 (2009)), the Court finds that these conclusory statements are insufficient to  
28 state a claim to relief that is plausible on its face, and reviews the FAC in relation to  
Plaintiff's Elder Abuse Act and Eighth Amendment claims premised on improper  
heating and ventilation. *See id.* (explaining that a pleading is insufficient if it  
contains only "labels and conclusions" or "'naked assertion[s]' devoid of 'further  
factual enhancement'") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557  
(2007)).

1     **III. STANDARD OF REVIEW**

2             Federal courts must conduct a preliminary screening of any case in which a  
3 prisoner seeks redress from a governmental entity or officer or employee of a  
4 governmental entity, or in which a plaintiff proceeds *in forma pauperis*. 28 U.S.C.  
5 §§ 1915(e)(2)(B), 1915A(b). The court must identify cognizable claims and dismiss  
6 any complaint, or any portion thereof, that is: (1) frivolous or malicious, (2) fails to  
7 state a claim upon which relief may be granted, or (3) seeks monetary relief from a  
8 defendant who is immune from such relief. *Id.*

9             When screening a complaint to determine whether it fails to state a claim  
10 upon which relief can be granted, courts apply the Federal Rule of Civil Procedure  
11 12(b)(6) (“Rule 12(b)(6)”) standard. *See Watison v. Carter*, 668 F.3d 1108, 1112  
12 (9th Cir. 2012) (applying the Rule 12(b)(6) standard to Section 1915(e)(2)(B)(ii));  
13 *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012) (applying the Rule 12(b)(6)  
14 standard to Section 1915A). “Dismissal under Rule 12(b)(6) is appropriate only  
15 where the complaint lacks a cognizable legal theory or sufficient facts to support a  
16 cognizable legal theory.” *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d  
17 1114, 1122 (9th Cir. 2013) (*quoting Mendiondo v. Centinela Hosp. Med. Ctr.*, 521  
18 F.3d 1097, 1104 (9th Cir. 2008)).

19             Rule 12(b)(6) is read in conjunction with Federal Rule of Civil Procedure 8(a)  
20 (“Rule 8”), which requires that a complaint contain “a short and plain statement of  
21 the claim showing that the pleader is entitled to relief.” *See Li v. Kerry*, 710 F.3d  
22 995, 998 (9th Cir. 2013). In reviewing a motion to dismiss, the court will accept  
23 factual allegations as true and view them in the light most favorable to the plaintiff.  
24 *See Park v. Thompson*, 851 F.3d 910, 918 (9th Cir. 2017) (*citing N.M. State Inv.*  
25 *Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011). Although  
26 “detailed factual allegations” are not required, “[t]hreadbare recitals of the elements  
27 of a cause of action, supported by mere conclusory statements, do not suffice.”  
28 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Conclusory allegations of law . . . are

1 insufficient . . . .” *Park*, 851 F.3d at 918 (first ellipsis in original) (*quoting Lee v.*  
2 *City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001)). Rather, a complaint must  
3 “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is  
4 plausible on its face.’” *Iqbal*, 556 U.S. at 678 (*quoting Bell Atl. Corp. v. Twombly*,  
5 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads  
6 factual content that allows the court to draw the reasonable inference that the  
7 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 662. “If there are  
8 two alternative explanations, one advanced by defendant and the other advanced by  
9 plaintiff, both of which are plausible, plaintiff’s complaint survives a motion to  
10 dismiss under Rule 12(b)(6).” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

11 Where a plaintiff is *pro se*, particularly in civil rights cases, courts should  
12 construe pleadings liberally and afford the plaintiff any benefit of the doubt. *See*  
13 *Wilhelm*, 680 F.3d at 1121 (9th Cir. 2012). “[B]efore dismissing a *pro se* complaint  
14 the district court must provide the litigant with notice of the deficiencies in his  
15 complaint in order to ensure that the litigant uses the opportunity to amend  
16 effectively.” *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (*quoting Ferdik*  
17 *v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)). A court should grant a *pro se*  
18 plaintiff leave to amend a defective complaint “unless it is absolutely clear that the  
19 deficiencies of the complaint could not be cured by amendment.” *Akhtar*, 698 F.3d  
20 at 1212.

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

##### 23 **A. The Allegations in the FAC Are Insufficient to State an Eighth** 24 **Amendment Claim Against Either Defendant.**

25 The treatment a prisoner receives in prison and the conditions under which the  
26 prisoner is confined are subject to scrutiny under the Eighth Amendment, which  
27 prohibits cruel and unusual punishment. *Farmer v. Brennan*, 511 U.S. 825, 832  
28 (1994). The Eighth Amendment “embodies ‘broad and idealistic concepts of

1 dignity, civilized standards, humanity, and decency . . . ,’ against which we must  
2 evaluate penal measures.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting  
3 *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). Although the Eighth  
4 Amendment does not mandate that prisons be comfortable (*Rhodes v. Chapman*, 452  
5 U.S. 337, 349 (1981)), or that they provide every amenity that a prisoner might find  
6 desirable (*Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982)), it also will not  
7 permit inhumane prison conditions. *See Farmer*, 511 U.S. at 832.

8 An inmate complaining of conditions of confinement must allege facts that, if  
9 true, would satisfy both prongs of a bifurcated test. First, the plaintiff must allege  
10 that, objectively, the deprivation alleged is “sufficiently serious” such that it results  
11 in the denial of “the minimal civilized measure of life’s necessities.” *Farmer*, 511  
12 U.S. at 834. “Prison officials have a duty to ensure that prisoners are provided  
13 adequate shelter, food, clothing, sanitation, medical care, and personal safety.”  
14 *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000), *cert. denied*, 532 U.S. 1065  
15 (2001). “The circumstances, nature, and duration of a deprivation of these  
16 necessities must be considered in determining whether a constitutional violation has  
17 occurred. ‘The more basic the need, the shorter the time it can be withheld.’” *Id.*  
18 (citing *Ray*, 682 F.2d at 1259).

19 Second, from a subjective point of view, the plaintiff must allege that the  
20 defendants acted with a sufficiently culpable state of mind (*i.e.*, with “deliberate  
21 indifference”). *Wilson v. Seiter*, 501 U.S. 294, 298-99 (1991). “A prison official  
22 cannot be found liable under the Eighth Amendment for denying an inmate humane  
23 conditions of confinement unless the official knows of and disregards an excessive  
24 risk to inmate health or safety; the official must both be aware of facts from which  
25 the inference could be drawn that a substantial risk of serious harm exists, and he  
26 must also draw the inference.” *Farmer*, 511 U.S. at 837.

27 The Court finds that Plaintiff has alleged facts sufficient to satisfy the  
28 objective prong of “inhumane prison conditions.” *See id.* at 838. Ventilation is a



1 fundamental attribute of “shelter” and “sanitation,” both of which are basic Eighth  
2 Amendment concerns. *See Toussaint v. McCarthy*, 597 F. Supp. 1388, 1409 & n.39  
3 (N.D. Cal. 1984). “Inadequate ‘ventilation and air flow’ violates the Eighth  
4 Amendment if it ‘undermines the health of inmates and the sanitation of the  
5 penitentiary.’” *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996), *amended*, 135  
6 F.3d 1318 (9th Cir. 1998) (quoting *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th  
7 Cir. 1985)). Here, Plaintiff alleges that his cirrhotic liver causes him to be heat- and  
8 cold-sensitive (FAC 22) and that he has suffered a second degree burn or was  
9 otherwise harmed as a result of the heat that is created from the lack of ventilation in  
10 his cell. (*Id.* at 8.) Plaintiff also alleges that “prisoner’s [sic] frequently experience  
11 weakness, dizziness and nausea due to extreme heat conditions, which also make it  
12 hard for prisoner’s [sic] to breathe.” (*Id.* at 10.) The Patient Care orders that  
13 Plaintiff attaches to the FAC confirm these allegations: “needs to have back  
14 checked, burned from heat in the building”; “upper back burned sensitive to heat and  
15 cold.” (*Id.* at 27-31.)

16         However, the Court also finds that Plaintiff has failed to allege facts sufficient  
17 to satisfy the subjective prong of “deliberate indifference.” To begin with, other  
18 than conclusory allegations that this Court need not accept (*see Iqbal*, 556 U.S. at  
19 678), the FAC contains no express allegation that either Defendant personally was  
20 involved in the inadequate ventilation that gives rise to Plaintiff’s Eighth  
21 Amendment claim. The only allegations that in any way tie these Defendants to  
22 Plaintiff’s concerns are as follows:

- 23         • Respondents refused to “grant relief made by Petitioner” (FAC 5);
- 24         • Defendants violated the claims of inadequate heating and ventilation,  
25             which is a basic Eighth Amendment concern (*Id.* at 6);
- 26         • Defendants have a caretaking or custodial relationship with Plaintiff  
27             (*Id.* at 8);
- 28         • The prison officials deprived this prisoner . . . of the minimal civilized

1 measures of life's necessities (*Id.* at 10);

- 2 • The prison officials acted with deliberate indifference in doing so (*Id.* at
- 3 11); and
- 4 • These prison officials are liable for denying humane conditions of
- 5 confinement within prison (*Id.*).

6 Even assuming that the terms "Respondents," "Defendants," and "the/these prison  
7 officials" refer to Defendants Garcia and Borders, these allegations fail to satisfy the  
8 *Iqbal* requirement of pleading sufficient factual content to allow this Court to draw a  
9 reasonable inference that either of these Defendants is liable for the alleged conduct.  
10 *See Iqbal*, 556 U.S. 678.

11 Moreover, Plaintiff's own documents belie his allegations of "deliberate  
12 indifference." The Appeal Response letter of September 4, 2018, signed by  
13 Defendant Warden Borders, evidences affirmative efforts by the Prison to respond to  
14 Plaintiff's concerns. (FAC 20-21.) Plaintiff's requests to have prison officials  
15 create a policy for taking action during a heat wave and to fix the air and ventilation  
16 in the buildings were granted partially. (*Id.* at 21.) Indeed, the Appeal Response  
17 letter specifies that the prison was then undergoing a project to replace and upgrade  
18 the cooling and ventilation systems and had cooling procedures to be set in place  
19 when the institution reached a Stage II heat alert. (*Id.*)

20 To the extent that Plaintiff's Section 1983 claim against Defendants Secretary  
21 Garcia and Warden Borders is based on their role in the denial of Plaintiff's  
22 administrative appeals, the FAC allegations are insufficient to state a Section 1983  
23 claim for three reasons. First, there are no allegations that Defendant Garcia was in  
24 any way involved in Plaintiff's appeal. Indeed, the Appeal Response letter of  
25 September 4, 2018 was signed only by Warden Borders. (*Id.* at 20-21.) Second,  
26 Warden Borders granted in part Plaintiff's second-level appeal, dispelling any  
27 concerns that Warden Borders "denied" Plaintiff's appeal, as he alleges. Third, and  
28 in any event, the Ninth Circuit has held that a prisoner has no constitutional right to

1 an effective grievance or appeal procedure. *See Ramirez v. Galaza*, 334 F.3d 850,  
2 860 (9th Cir. 2003), *cert. denied*, 541 U.S. 1063 (2004); *Mann v. Adams*, 855 F.2d  
3 639, 640 (9th Cir. 1988); *see also, e.g., George v. Smith*, 507 F.3d 605, 609-10 (7th  
4 Cir. 2007) (holding that only persons who cause or participate in civil rights  
5 violations can be held responsible and that “[r]uling against a prisoner on an  
6 administrative complaint does not cause or contribute to the violation”); *Shehee v.*  
7 *Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (holding that prison officials whose only  
8 roles involved the denial of the prisoner’s administrative grievances could not be  
9 held liable under Section 1983), *cert. denied*, 530 U.S. 1264 (2000); *Wright v.*  
10 *Shapirshteyn*, No. CV-1-06-0927-MHM, 2009 WL 361951, at \*3 (E.D. Cal. Feb. 12,  
11 2009) (“[W]here a defendant’s only involvement in the allegedly unconstitutional  
12 conduct is the denial of administrative grievances, the failure to intervene on a  
13 prisoner’s behalf to remedy alleged unconstitutional behavior does not amount to  
14 active unconstitutional behavior for purposes of § 1983.”); *Velasquez v. Barrios*, No.  
15 07cv1130-LAB (CAB), 2008 WL 4078766, at \*11 (S.D. Cal. Aug. 29, 2008) (“An  
16 official’s involvement in reviewing a prisoner’s grievances is an insufficient basis  
17 for relief through a civil rights action.”).

18 Finally, to the extent Plaintiff seeks to impose Section 1983 liability on  
19 Defendants Secretary Garcia and Warden Borders premised on the acts of their  
20 respective subordinates, such a claim is not cognizable because supervisory  
21 personnel generally are not liable under Section 1983 on any theory of *respondeat*  
22 *superior* or vicarious liability in the absence of a state law imposing such liability.  
23 *See, e.g., Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (en  
24 banc). Recently, in *Iqbal*, the Supreme Court reaffirmed that “government officials  
25 may not be held liable for the unconstitutional conduct of their subordinates under a  
26 theory of *respondeat superior* liability.” *Iqbal*, 556 U.S. at 676. A supervisor “is  
27 only liable for his or her own misconduct, and is not “accountable for the misdeeds

28 //

1 of [his or her] agents.” *Id.* at 677. Mere knowledge of a subordinate’s alleged  
2 misconduct is insufficient. *Id.*

3         Notwithstanding, the Ninth Circuit has concluded that, at least in cases where  
4 the applicable standard is “deliberate indifference” (such as for an Eighth  
5 Amendment claim), *Iqbal* does not foreclose a plaintiff from stating a claim for  
6 supervisory liability based upon the “supervisor’s knowledge of and acquiescence in  
7 unconstitutional conduct by his or her subordinates.” *See Starr*, 652 F.3d at 1207.  
8 “A defendant may be held liable as a supervisor under § 1983 ‘if there exists either  
9 (1) his or her personal involvement in the constitutional deprivation, or (2) a  
10 sufficient causal connection between the supervisor’s wrongful conduct and the  
11 constitutional violation.’” *Id.* (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.  
12 1989)). “The requisite causal connection can be established . . . by setting in motion  
13 a series of acts by others or by knowingly refus[ing] to terminate a series of acts by  
14 others, which [the supervisor] knew or reasonably should have known would cause  
15 others to inflict a constitutional injury.” *Rodriguez v. County of Los Angeles*, 891  
16 F.3d 776, 798 (9th Cir. 2018) (quoting *Starr*, 652 F.3d at 1207-08). “Even if a  
17 supervisory official is not directly involved in the allegedly unconstitutional  
18 conduct, ‘[a] supervisor can be liable in his individual capacity for his own culpable  
19 action or inaction in the training, supervision, or control of his subordinates; for his  
20 acquiescence in the constitutional deprivation; or for conduct that showed a reckless  
21 or callous indifference to the rights of others.’” *Keates v. Koile*, 883 F.3d 1228,  
22 1243 (9th Cir. 2018) (quoting *Starr*, 652 F.3d at 1208). Specifically, supervisory  
23 liability may be alleged based on acquiescence with respect to a deficient policy that  
24 is the “moving force” behind a constitutional violation. *See Starr*, 652 F.3d at 1208;  
25 *see also Hansen*, 885 F.2d at 646 (“Supervisory liability exists even without overt  
26 personal participation in the offensive act if supervisory officials implement a policy  
27 so deficient that the policy itself is a repudiation of constitutional rights and is the  
28 moving force of the constitutional violation.”) (internal quotations omitted).

1 Here, the FAC fails to set forth any factual allegations that Defendants  
2 Secretary Diaz and/or Warden Borders had any knowledge of, or any connection  
3 with, any allegedly unconstitutional treatment that Plaintiff received at the hands of  
4 their subordinates. Nor does Plaintiff set forth any factual allegations that Secretary  
5 Diaz and Warden Borders personally promulgated any policy that had a direct causal  
6 connection with any alleged constitutional injury.<sup>5</sup>

7 Accordingly, the Court finds that the allegations of the FAC are insufficient to  
8 state an Eighth Amendment claim against Defendants Diaz and Borders.

9  
10 **B. The Allegations in the FAC Are Insufficient to State a Claim Under**  
11 **the Elder Abuse Act Against Either Defendant.**

12 California's Elder Abuse Act provides certain enhanced remedies to a plaintiff  
13 who proves abuse of an elder, *i.e.*, a person residing in California who is 65 years of  
14 age or older. *Carter v. Prime Healthcare Paradise Valley LLC*, 198 Cal. App. 4th  
15 396, 404 (2011).

16 To state a claim under the Elder Abuse Act, a plaintiff must allege facts to  
17 satisfy two requirements. First, a plaintiff must allege a defendant subjected an  
18 elder to statutorily-defined physical abuse, neglect, or financial abuse. *Davenport v.*  
19 *Litton Loan Servicing, LP*, 725 F. Supp. 2d 862, 879 (N.D. Cal. 2010). The Elder  
20 Abuse Act defines abuse as “[p]hysical abuse, neglect, financial abuse,  
21 abandonment, isolation, abduction, or other treatment with resulting physical harm

22 \_\_\_\_\_  
23 <sup>5</sup> By way of contrast to the FAC here, the complaint in *Starr* specifically alleged  
24 numerous incidents in which inmates in Los Angeles County jails had been killed or  
25 injured because of the culpable actions of the subordinates of Sheriff Baca;  
26 specifically alleged that Sheriff Baca was given notice of all of these incidents,  
27 specifically alleged that Sheriff Baca also was given notice, in several reports, of  
28 systematic problems in the county jails under his supervision that had resulted in  
these deaths and injuries; and specifically alleged that Sheriff Baca did not take  
action to protect inmates under his care despite the dangers created by the actions of  
his subordinates, of which he had been made aware. *See Starr*, 652 F.3d at 1216.

1 or pain or mental suffering” or “[t]he deprivation by a care custodian of goods or  
2 services that are necessary to avoid physical harm or mental suffering.” *Worsham v.*  
3 *O’Connor Hosp.*, 226 Cal. App. 4th 331, 336 (2014) (emphasis omitted) (quoting  
4 Welf. & Inst. Code § 15610.07(a)-(b)). The Elder Abuse Act defines neglect as  
5 “[t]he negligent failure of any person having the care or custody of an elder or a  
6 dependent adult to exercise that degree of care that a reasonable person in a like  
7 position would exercise.” *Worsham*, 226 Cal. App. 4th at 336 (quoting Welf. &  
8 Inst. Code § 15610.07(a)). “Neglect includes, but is not limited to” “[f]ailure to  
9 assist in personal hygiene, or in the provision of food, clothing, or shelter[,]” and  
10 “[f]ailure to protect from health and safety hazards.” *Worsham*, 226 Cal. App. 4th at  
11 336 (quoting Welf. & Inst. Code § 15610.07(b)).

12 Second, a plaintiff must allege that a defendant acted with recklessness,  
13 malice, oppression, or fraud in the commission of the abuse.” *Davenport*, 725 F.  
14 Supp. 2d at 879. “The Elder Abuse Act does *not* apply to simple or gross negligence  
15 . . . .” *Worsham*, 226 Cal. App. 4th at 336 (emphasis in original). “Oppression,  
16 fraud and malice involve intentional, willful, or conscious wrongdoing of a  
17 despicable or injurious nature.” *Carter*, 198 Cal. App. 4th at 405 (quotations  
18 omitted) (quoting *Delaney v. Baker*, 20 Cal. 4th 23, 31 (1999)). “Recklessness  
19 involves deliberate disregard of the high degree of probability that an injury will  
20 occur and rises to the level of a conscious choice of a course of action . . . with  
21 knowledge of the serious danger to others involved in it.” *Carter*, 198 Cal. App. 4th  
22 at 405 (quotations omitted) (quoting *Delaney*, 20 Cal. 4th at 31-32). Thus, the Elder  
23 Abuse Act’s enhanced remedies are available only for “acts of egregious abuse”  
24 against elder and dependent adults.” *Carter*, 198 Cal. App. 4th at 405 (quoting  
25 *Delaney*, 20 Cal. 4th at 35).

26 The FAC fails to allege a claim under the Elder Abuse Act for the same  
27 reasons it does not adequately plead “deliberate indifference.” Moreover, even  
28 liberally construed, there are no allegations that would support an inference that

1 either Defendant acted with “recklessness, malice, oppression, or fraud,” as required  
2 for liability under the Elder Abuse Act.

3 Accordingly, the Court finds that the allegations of the FAC are insufficient to  
4 state an Elder Abuse Act claim against Defendants Diaz and Borders.

5  
6 **V. CONCLUSION**

7 For the reasons stated above, the Court **DISMISSES** the FAC **WITH**  
8 **LEAVE TO AMEND.**

9 If Plaintiff still wishes to pursue this action, he shall file a Second Amended  
10 Complaint within **thirty (30) days** after the date of this Order. In any amended  
11 complaint, the Plaintiff shall cure the defects described above. Plaintiff shall not  
12 include new defendants or new allegations that are not reasonably related to the  
13 claims asserted in the Complaint. The Second Amended Complaint, if any, shall be  
14 complete in itself and shall bear both the designation “Second Amended Complaint”  
15 and the case number assigned to this action. It shall not refer in any manner to any  
16 previously filed complaint in this matter.

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

1           **The Court explicitly cautions Plaintiff that failure to timely file a Second**  
2 **Amended Complaint, or failure to correct the deficiencies described above, will**  
3 **result in a recommendation that this action, or portions thereof, be dismissed**  
4 **with prejudice for failure to prosecute and/or failure to comply with court**  
5 **orders pursuant to Federal Rule of Civil Procedure 41(b).**

6           If Plaintiff no longer wishes to pursue this action in its entirety or with respect  
7 to particular Defendants or claims, he voluntarily may dismiss all or any part of this  
8 action by filing a Notice of Dismissal in accordance with Federal Rule of Civil  
9 Procedure 41(a)(1). **A form Notice of Dismissal is attached for Plaintiff's**  
10 **convenience.**

11           Plaintiff is advised that this Court's determination herein that certain  
12 allegations in the Complaint are insufficient to state a particular claim should not be  
13 seen as dispositive of such claims. Accordingly, although the undersigned  
14 Magistrate Judge believes that Plaintiff has failed to plead sufficient factual matter  
15 in the pleading, accepted as true, to state a claim for relief that is plausible on its  
16 face, Plaintiff is not required to omit any claim or defendant in order to pursue this  
17 action. However, if Plaintiff decides to pursue a claim in an amended complaint that  
18 the undersigned previously found to be insufficient, then pursuant to 28 U.S.C.  
19 § 636, the undersigned ultimately may submit to the assigned District Judge a  
20 recommendation that such claim may be dismissed with prejudice for failure to state  
21 a claim, subject to Plaintiff's right at that time to file objections. *See* Fed. R. Civ. P.  
22 72(b); C.D. Cal. L.R. 72-3.

23           IT IS SO ORDERED.

24  
25 DATED: December 14, 2018

26  
27 Attachments:  
28 Form Complaint;  
Form Dismissal

  
\_\_\_\_\_  
MARIA A. AUDERO  
UNITED STATES MAGISTRATE JUDGE