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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

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9 KEVIN E. FIELDS, CASE NO. 1:06-cv-00407-AWI-YNP PC10 Plaintiff, ORDER DISMISSING COMPLAINT, WITH  
11 v. LEAVE TO FILE FIFTH AMENDED  
12 P. ROBERTS, et al., COMPLAINT WITHIN 30 DAYS13 Defendants.  
14 /15 Plaintiff Kevin E. Fields (“Plaintiff”) is a state prisoner proceeding pro se and in forma  
16 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff is in the custody of the  
17 California Department of Corrections and Rehabilitation (“CDCR”) and is currently incarcerated at  
18 the California State Prison in Corcoran, California (“CSP-Corcoran”). Plaintiff is suing under  
19 section 1983 for the violation of his rights under the First and Eighth Amendments. Plaintiff also  
20 raises claims under state law. Plaintiff names P. Roberts (registered nurse), Jeff Neubarth (doctor),  
21 William McGuinness (chief medical officer), and Corcoran State Prison as defendants. For the  
22 reasons set forth below, the Court finds that Plaintiff’s complaint fails to state any claims upon which  
23 relief may be granted under section 1983. Plaintiff’s complaint will be dismissed with leave to file  
24 a fifth amended complaint within 30 days.25 **I. Screening Requirement**26 The Court is required to screen complaints brought by prisoners seeking relief against a  
27 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
28 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally

1 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek  
2 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).  
3 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall  
4 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a  
5 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

6 In determining whether a complaint fails to state a claim, the Court uses the same pleading  
7 standard used under Federal Rule of Civil Procedure 8(a). Under Rule 8(a), a complaint must  
8 contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.  
9 R. Civ. P. 8(a)(2). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual  
10 allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me  
11 accusation.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v.  
12 Twombly, 550 U.S. 544, 555 (2007)). “[A] complaint must contain sufficient factual matter,  
13 accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id. (quoting Twombly, 550  
14 U.S. at 570). “[A] complaint [that] pleads facts that are ‘merely consistent with’ a defendant’s  
15 liability . . . ‘stops short of the line between possibility and plausibility of entitlement to relief.’” Id.  
16 (quoting Twombly, 550 U.S. at 557). Further, although a court must accept as true all factual  
17 allegations contained in a complaint, a court need not accept a plaintiff’s legal conclusions as true.  
18 Id. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
19 statements, do not suffice.” Id. (quoting Twombly, 550 U.S. at 555).

20 **II. Background**

21 **A. Procedural Background**

22 Plaintiff filed the original complaint in this action on April 10, 2006. (Doc. #1.) On  
23 December 21, 2006, Plaintiff filed his first amended complaint. (Doc. #13.) On July 26, 2007,  
24 Plaintiff filed a motion to amend his complaint. (Doc. #19.) The Court granted Plaintiff’s motion  
25 and Plaintiff filed his second amended complaint on August 1, 2007. (Docs. #22, 23.) On June 25,  
26 2008, the Court dismissed Plaintiff’s second amended complaint for failing to state any claims.  
27 (Doc. #27.) Plaintiff was granted leave to file a third amended complaint. On August 18, 2008,  
28 Plaintiff filed his third amended complaint. (Doc. #35.) On June 16, 2009, Plaintiff filed a motion

1 to file a fourth amended complaint. (Doc. #38.) The Court granted Plaintiff's motion and Plaintiff  
2 filed his fourth amended complaint on June 18, 2009. (Doc. #40, 41.) This action proceeds on  
3 Plaintiff's fourth amended complaint.

4 **B. Factual Background**

5 Plaintiff claims that Defendants violated Plaintiff's rights under the Eighth Amendment  
6 through their deliberate indifference to Plaintiff's serious medical needs. Plaintiff claims that he  
7 experienced excruciating pain in his neck and complained to medical personnel while at CSP-  
8 Corcoran. (Compl. ¶ 12.) Plaintiff was diagnosed with "degenerative osteoarthritic changes,"  
9 "discherniation," and "compression on the anterior aspect of cervical spinal cord." (Compl. ¶ 12.)

10 On December 13, 2005, Plaintiff was sent to the Mercy Medical Center in Bakersfield,  
11 California for a consult with Dr. Mahmoud Rashidi. (Compl. ¶ 13.) Dr. Rashidi ordered CSP-  
12 Corcoran officials to refill Plaintiff's pain medication because it was going to expire in a few days.  
13 (Compl. ¶ 13.) Plaintiff claims that his pain medication prescription expired on December 17, 2005  
14 because prison officials failed to obey Dr. Rashidi's orders. (Compl. ¶ 14.) Plaintiff began  
15 submitting medical care requests. (Compl. ¶ 14.) On December 27, 2005, Plaintiff was summoned  
16 to the medical clinic for a consult with Defendant Neubarth. (Compl. ¶ 15.) Neubarth refused to  
17 renew Plaintiff's pain medication prescription because Neubarth only prescribed narcotics to cancer  
18 patients. (Compl. ¶ 16.) Plaintiff asked Neubarth to refer Plaintiff to another doctor, but Neubarth  
19 refused. (Compl. ¶¶ 17-18.)

20 On January 5, 2006, Plaintiff filed an inmate grievance about Neubarth's refusal to provide  
21 Plaintiff with pain medication. (Compl. ¶ 19.) On January 19, 2006, Defendant McGuinness  
22 assigned Plaintiff's grievance to J. Amaya for an informal level response. (Compl. ¶ 20.) Plaintiff's  
23 grievance was denied. (Compl. ¶ 20.) On January 24, 2006, Plaintiff appealed the decision.  
24 (Compl. ¶ 21.) On February 16, 2006, Defendant Roberts interviewed Plaintiff about his grievance.  
25 (Compl. ¶ 22.) Plaintiff complained that the grievance should not have been assigned to Roberts  
26 because she did not have the authority to change anything. (Compl. ¶ 23.) Roberts told Plaintiff that  
27 she did have authority and told Plaintiff that she reviewed Plaintiff's medical file and told Plaintiff  
28 that he was abusing the system with frivolous medical complaints. (Compl. ¶ 24.) Plaintiff

1 requested that Roberts forward his grievance to the chief medical officer, but Roberts responded by  
2 leaving. (Compl. ¶ 25.) Plaintiff continued to complain to Roberts about his excruciating pain.  
3 (Compl. ¶ 27.)

4 On March 15, 2006, Plaintiff's "celly" complained to the control booth officer about  
5 Plaintiff's pain. (Compl. ¶ 28.) The officers summoned Roberts to assess Plaintiff's condition.  
6 (Compl. ¶ 28.) Roberts arrived and told Plaintiff that she did not know what Plaintiff was  
7 complaining about because she placed Plaintiff on the doctor's list for March 23, 2006. (Compl. ¶  
8 29.) Plaintiff cursed at her and Roberts walked away. (Compl. ¶ 29.) Plaintiff complains that  
9 Roberts then placed two false medical records in Plaintiff's file "to cover-up her deliberate  
10 indifference towards my serious medical conditions." (Compl. ¶ 29.) Plaintiff does not describe  
11 what the false medical records contained, or explain how they covered up Roberts actions.

12 On March 15, 2006, Plaintiff's celly submitted an emergency health care services request on  
13 Plaintiff's behalf. (Compl. ¶ 30.) The request was given to the licensed vocational nurse, who then  
14 forwarded it to the emergency room nurse. (Compl. ¶¶ 30-31.) Plaintiff was scheduled to see the  
15 doctor on March 16, 2006. (Compl. ¶ 31.)

16 **III. Discussion**

17 **A. Eighth Amendment Claims**

18 Plaintiff claims that Defendants violated Plaintiff's rights under the Eighth Amendment by  
19 refusing Plaintiff's requests for pain medication. The Eighth Amendment prohibits the imposition  
20 of cruel and unusual punishments and "embodies 'broad and idealistic concepts of dignity, civilized  
21 standards, humanity and decency.'" Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson  
22 v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). A prison official violates the Eighth Amendment only  
23 when two requirements are met: (1) the objective requirement that the deprivation is "sufficiently  
24 serious", Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Wilson v. Seiter, 501 U.S. 294, 298  
25 (1991), and (2) the subjective requirement that the prison official has a "sufficiently culpable state  
26 of mind", Id. (quoting Wilson, 501 U.S. at 298). The objective requirement that the deprivation be  
27 "sufficiently serious" is met where the prison official's act or omission results in the denial of "the  
28 minimal civilized measure of life's necessities". Id. (quoting Rhodes v. Chapman, 452 U.S. 337, 347

1 (1981)). The subjective requirement that the prison official has a “sufficiently culpable state of  
2 mind” is met where the prison official acts with “deliberate indifference” to inmate health or safety.  
3 Id. (quoting Wilson, 501 U.S. at 302-303). A prison official acts with deliberate indifference when  
4 he/she “knows of and disregards an excessive risk to inmate health or safety”. Id. at 837. “[T]he  
5 official must both be aware of facts from which the inference could be drawn that a substantial risk  
6 of serious harm exists, and he must also draw the inference.” Id.

7 “[D]eliberate indifference to a prisoner’s serious illness or injury states a cause of action  
8 under § 1983.” Estelle, 429 U.S. at 105. In order to state an Eighth Amendment claim based on  
9 deficient medical treatment, a plaintiff must show: (1) a serious medical need; and (2) a deliberately  
10 indifferent response by the defendant. Conn v. City of Reno, 572 F.3d 1047, 1055 (9th Cir. 2009)  
11 (quoting Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)). A serious medical need is shown by  
12 alleging that the failure to treat the plaintiff’s condition could result in further significant injury, or  
13 the unnecessary and wanton infliction of pain. Id. A deliberately indifferent response by the  
14 defendant is shown by a purposeful act or failure to respond to a prisoner’s pain or possible medical  
15 need and harm caused by the indifference. Id. In order to constitute deliberate indifference, there  
16 must be an objective risk of harm and the defendant must have subjective awareness of that harm.  
17 Id. However, “a complaint that a physician has been negligent in diagnosing or treating a medical  
18 condition does not state a valid claim of medical mistreatment under the Eighth Amendment.  
19 Medical malpractice does not become a constitutional violation merely because the victim is a  
20 prisoner.” Estelle v. Gamble, 429 U.S. 97, 106 (1976). Isolated occurrences of neglect do not  
21 constitute deliberate indifference to serious medical needs. See Jett v. Penner, 439 F.3d 1091, 1096  
22 (9th Cir. 2006); McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1992); O’Loughlin v. Doe, 920  
23 F.2d 614, 617 (9th Cir. 1990).

24 Plaintiff claims that Defendant Neubarth violated Plaintiff’s Eighth Amendment rights by  
25 denying Plaintiff’s requests for pain medication. Plaintiff claims that a doctor from outside the  
26 prison ordered Plaintiff’s pain medication to be renewed. Plaintiff had a consult with Neubarth and  
27 Neubarth did not renew Plaintiff’s pain medication because Neubarth only prescribed pain  
28 medication to cancer patients. The facts alleged do not amount to an Eighth Amendment violation.

1 Plaintiff has alleged that Neubarth did not prescribe Plaintiff with pain medication because Neubarth  
2 disagreed with the outside doctor's medical opinion. A difference of opinion concerning the  
3 appropriate course of medical treatment does not amount to deliberate indifference. Toguchi v.  
4 Chung, 391 F.3d 1051, 1059-60 (9th Cir. 2004). Plaintiff fails to state a cognizable claim against  
5 Defendant Neubarth under section 1983. Plaintiff has not alleged any facts that suggest that  
6 Neubarth's decision was made in deliberate indifference to a known risk to Plaintiff. Plaintiff  
7 alleges that Neubarth's decision stemmed from his own policy of not prescribing narcotics to non-  
8 cancer patients, and there is no suggestion of any malicious intent towards Plaintiff.

9 Plaintiff claims that Defendant Roberts violated Plaintiff's Eighth Amendment rights by  
10 denying Plaintiff's inmate grievance. Plaintiff alleges that Roberts denied Plaintiff's grievance  
11 because she believed that it was frivolous. Roberts' belief that Plaintiff's medical requests were  
12 frivolous contradicts any suggestion that she deliberately disregarded a known risk to Plaintiff's  
13 health or safety. If Roberts thought Plaintiff's request was frivolous, then she did not believe there  
14 was any risk to Plaintiff. Even if Roberts' belief was erroneous, that would at most make her actions  
15 negligent, a state of mind that does not rise to the level of an Eighth Amendment violation. Plaintiff  
16 fails to state a cognizable claim against Defendant Roberts.

17 Plaintiff claims that Defendant McGuinness violated Plaintiff's Eighth Amendment rights  
18 by failing to adequately train Roberts. Plaintiff's allegations are not sufficient to hold McGuinness  
19 liable for failing to prevent any constitutional violations committed by Roberts because Roberts did  
20 not commit any constitutional violations. Further, Plaintiff's vague allegations are not sufficient to  
21 support a claim against McGuinness. Plaintiff does not allege how Roberts' training was deficient  
22 or how McGuinness was aware that Roberts' training was deficient and therefore posed a risk to  
23 Plaintiff. Plaintiff fails to state a cognizable claim against Defendant McGuinness.

24 **B. First Amendment Retaliation Claims**

25 Plaintiff claims that Defendant Roberts retaliated against Plaintiff for filing inmate  
26 grievances. In the prison context, allegations of retaliation against a prisoner's First Amendment  
27 rights to speech or to petition the government may support a section 1983 claim. Rizzo v. Dawson,  
28 778 F.2d 527, 532 (9th Cir. 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th Cir.

1 1989); Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995). “[A] viable claim of First Amendment  
2 retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action  
3 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled  
4 the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance  
5 a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005). An  
6 allegation of retaliation against a prisoner’s First Amendment right to file a prison grievance is  
7 sufficient to support a claim under section 1983. Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003).

8 Plaintiff claims that Defendant Roberts retaliated against Plaintiff by refusing to grant  
9 Plaintiff’s inmate grievance requesting pain medication. However, Plaintiff’s allegations state that  
10 Roberts denied Plaintiff’s request because she thought Plaintiff’s requests were frivolous. There are  
11 no facts alleged which suggest that Roberts denied Plaintiff’s requests because of Plaintiff’s exercise  
12 of his First Amendment right to file prison grievances. Thus, Robert’s actions were not retaliatory.  
13 Plaintiff fails to state a cognizable claim against Defendant Roberts.

14 Plaintiff claims that Defendant McGuinness is liable for failing to prevent Roberts from  
15 violating Plaintiff’s constitutional rights. Since Plaintiff’s allegations do not establish any  
16 constitutional violation committed by Roberts, Plaintiff does not state a claim against Defendant  
17 McGuinness.

18 **C. State Law Claims**

19 Plaintiff also raises a claim for intentional infliction of emotional distress under California  
20 law. In order to state a claim for the intentional infliction of emotional distress under California law,  
21 Plaintiff must allege (1) extreme and outrageous conduct by the defendant with the intention of  
22 causing, or reckless disregard to the probability of causing, emotional distress, (2) the plaintiff’s  
23 suffering severe or extreme emotional distress, and (3) actual and proximate causation of the  
24 emotional distress by the defendant’s outrageous conduct. Christensen v. Superior Court, 54 Cal.  
25 3d 868, 903 (1991).

26 Plaintiff’s complaint fails to allege facts that support the first element. First, Plaintiff’s  
27 allegations regarding Defendants’ conduct cannot be said to be “extreme and outrageous.” In the  
28 context of claims for the intentional infliction of emotional distress, the conduct alleged to be

1       outrageous “must be so extreme as to exceed all bounds of that usually tolerated in a civilized  
2       community.” Id. (quoting Davidson v. City of Westminster, 32 Cal. 3d 197 209 (1982)). Plaintiff  
3       alleges that Neubarth denied Plaintiff’s request for pain medication because Neubarth only  
4       prescribed narcotics to cancer patients. Defendant Roberts is alleged to have denied Plaintiff’s  
5       medical requests because she believed them to be frivolous. Plaintiff alleges that Defendant  
6       McGuinness failed to train or supervise his subordinates, but Plaintiff does not provide any details  
7       as to how McGuinness’ training or supervision was deficient. None of Plaintiff’s allegations come  
8       close to describing “extreme and outrageous conduct.”

9           Further, none of the conduct alleged was directed toward Plaintiff with the intention of  
10       causing emotional distress. “It is not enough that the conduct be intentional and outrageous. It must  
11       be conduct directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is  
12       aware.” Id. Defendants’ actions were not directed at Plaintiff with the intention of causing  
13       emotional distress, or with reckless disregard to a risk of emotional distress. Defendants’ actions  
14       were the result of a disagreement with Plaintiff over the appropriate course of treatment. Plaintiff’s  
15       claims for intentional infliction of emotional distress fail as a matter of law.

16           **D.       Claims Against Corcoran State Prison**

17           Plaintiff names Corcoran State Prison as a Defendant. Plaintiff’s claims against Corcoran  
18       State Prison are barred by the Eleventh Amendment. The Eleventh Amendment to the United States  
19       Constitution states that “[t]he Judicial power of the United States shall not be construed to extend  
20       to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens  
21       of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const. amend. XI. “The  
22       Amendment . . . enacts a sovereign immunity from suit, rather than a nonwaivable limit on the  
23       Federal Judiciary’s subject-matter jurisdiction.” Idaho v. Couer d’Alene Tribe, 521 U.S. 261, 267  
24       (1997). “The Eleventh Amendment prohibits federal courts from hearing suits brought against an  
25       unconsenting state. Though its language might suggest otherwise, the Eleventh Amendment has  
26       long been construed to extend to suits brought against a state both by its own citizens, as well as by  
27       citizens of other states.” Brooks v. Sulphur Springs Valley Elec. Coop., 951 F.2d 1050, 1053 (9th  
28       Cir. 1991) (citation omitted). The Eleventh Amendment bars suits against state agencies as well as

1 those where the state itself is named as a defendant. See Puerto Rico Aqueduct & Sewer Auth. v.  
2 Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993); Hyland v. Wonder, 117 F.3d 405, 413 (9th Cir.),  
3 amended by 127 F.3d 1135 (9th Cir. 1997); see also Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th  
4 Cir. 1995) (per curiam) (stating Board of Corrections is agency entitled to immunity); Taylor v. List,  
5 880 F.2d 1040, 1045 (9th Cir. 1989) (concluding that Nevada Department of Prisons was a state  
6 agency entitled to Eleventh Amendment immunity); cf. Leer v. Murphy, 844 F.2d 628, 631 (9th Cir.  
7 1988) (stating that Eleventh Amendment requires examination of the complaint and relief sought to  
8 determine whether the state is the “real party in interest”). Corcoran State Prison is an entity within  
9 the California Department of Corrections and Rehabilitations, which is a state agency immune from  
10 suit under the Eleventh Amendment. Therefore, Plaintiff’s claims against Corcoran State Prison are  
11 barred by the Eleventh Amendment.

12 **IV. Conclusion and Order**

13 The Court has screened Plaintiff’s fourth amended complaint and finds that it does not state  
14 any claims upon which relief may be granted under section 1983. The Court will provide Plaintiff  
15 with the opportunity to file an amended complaint curing the deficiencies identified by the court in  
16 this order. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff is cautioned that he  
17 may not add unrelated claims involving different defendants in his amended complaint. George v.  
18 Smith, 507 F.3d 605, 607 (7th Cir. 2007).

19 If Plaintiff opts to amend, his amended complaint should be brief. Fed. R. Civ. P. 8(a).  
20 Plaintiff must identify how each individual defendant caused the deprivation of Plaintiff’s  
21 constitutional or other federal rights: “The inquiry into causation must be individualized and focus  
22 on the duties and responsibilities of each individual defendant whose acts or omissions are alleged  
23 to have caused a constitutional deprivation.” Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988).  
24 With respect to exhibits, while they are permissible if incorporated by reference, Fed. R. Civ. P.  
25 10(c), they are not necessary in the federal system of notice pleading, Fed. R. Civ. P. 8(a). In other  
26 words, it is not necessary at this stage to submit evidence to prove the allegations in Plaintiff’s  
27 complaint because at this stage Plaintiff’s factual allegations will be accepted as true.

28 However, although Plaintiff’s factual allegations will be accepted as true and that “the

1 pleading standard Rule 8 announces does not require ‘detailed factual allegations’”, “a complaint  
2 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on  
3 its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). (quoting Bell Atlantic Corp. v. Twombly,  
4 550 U.S. 544, 555 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content  
5 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
6 alleged.” Id. (citing Twombly, 550 U.S. at 556).

7 Finally, Plaintiff is advised that an amended complaint supercedes the original complaint,  
8 Forsyth v. Humana, Inc., 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567  
9 (9th Cir. 1987), and must be “complete in itself without reference to the prior or superceded  
10 pleading,” Local Rule 15-220. Plaintiff is warned that “[a]ll causes of action alleged in an original  
11 complaint which are not alleged in an amended complaint are waived.” King, 814 F.2d at 567 (citing  
12 London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981)); accord Forsyth, 114 F.3d at  
13 1474. In other words, even the claims that were properly stated in the original complaint must be  
14 completely stated again in the amended complaint.

15 Accordingly, based on the foregoing, it is HEREBY ORDERED that:

- 16 1. Plaintiff’s complaint is dismissed, with leave to amend, for failure to state a claim;
- 17 2. The Clerk’s Office shall send Plaintiff a complaint form;
- 18 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file an  
19 amended complaint;
- 20 4. Plaintiff may not add any new, unrelated claims to this action via his amended  
21 complaint and any attempt to do so will result in an order striking the amended  
22 complaint; and
- 23 5. If Plaintiff fails to file an amended complaint, the Court will recommend that this  
24 action be dismissed, with prejudice, for failure to state a claim.

25  
26 IT IS SO ORDERED.

27 Dated: April 7, 2010

28 /s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE