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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

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10 Jaime L. Zepeda,

11 Plaintiff,

12 vs.

13 Harold Tate, et al.,

14 Defendants.

) No. CV 1:07-0982-SMM

) **ORDER**

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Before the Court is Plaintiff’s Motion for Leave to Amend Complaint (Doc. 27). Federal Rule of Civil Procedure 15(a)(2) states that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2). Here, sole remaining Defendant C. O’Brien filed a Statement of Non-Opposition to Plaintiff’s Motion for Leave to File a Second Amended Complaint, which constitutes written consent. (Doc. 33.) Because Defendant O’Brien has provided Plaintiff written consent to amend, the Court grants Plaintiff’s Motion for Leave to Amend Complaint (Doc. 27). The Court will now conduct statutory screening pursuant to 28 U.S.C. § 1915A.<sup>1</sup>

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<sup>1</sup>All claims alleged in Plaintiff’s prior complaints are waived if they are not alleged in his Second Amended Complaint. See Hal Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1546 (9th Cir. 1990) (“an amended pleading supersedes the original”); King v. Atiyeh, 814 F.2d 565 (9th Cir. 1987). After amendment, the Court will treat the prior complaints as nonexistent. Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992).

1 **BACKGROUND**

2 On July 10, 2007, Plaintiff brought suit against Defendant O'Brien and others alleging  
3 violations of California law and his First and Eighth Amendment rights under the United  
4 States Constitution in ten claims for relief. (Doc. 1.) The Court's Screening Order dismissed  
5 Plaintiff's Complaint for failure to state a claim with leave to file an amended complaint.  
6 (Doc. 9.) On August 31, 2009, Plaintiff filed a First Amended Complaint alleging eight  
7 claims for relief. (Doc. 10.) The Court's Screening Order dismissed all but two of Plaintiff's  
8 claims, leaving claims alleging violations of: (1) the Eighth Amendment for deliberate  
9 indifference to Plaintiff's pain and (2) Cal. Gov't Code § 845.6 for failure to summon for  
10 Plaintiff immediate medical care. (Doc. 11.) On October 15, 2010, Plaintiff filed a Second  
11 Amended Complaint without first seeking leave of the Court or receiving Defendant's  
12 consent (Doc. 18). That Second Amended Complaint was stricken on November 10, 2010  
13 as improperly filed. (Doc. 21.) On December 10, 2010, Plaintiff filed his Motion for Leave  
14 to Amend Complaint (Doc. 27) and lodged his Second Amended Complaint,<sup>2</sup> alleging  
15 thirteen claims against fifteen Defendants (Doc. 29). On January 19, 2011, sole remaining  
16 Defendant O'Brien provided Plaintiff with written consent to amend the Complaint. (Doc.  
17 33.) In this Order the Court will conduct statutory screening pursuant to 28 U.S.C. § 1915A.

18 **LEGAL STANDARD**

19 Complaints brought by prisoners seeking redress from a governmental entity, officer,  
20 or employee of a governmental entity must be screened by the Court. 28 U.S.C. § 1915A(a).  
21 If the complaint is "frivolous, malicious, or fails to state a claim upon which relief may be  
22 granted" or "seeks monetary relief from a defendant who is immune from such relief," the  
23 complaint, or a portion thereof, must be dismissed. 28 U.S.C. § 1915A(b)(1), (2).

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26 Accordingly, the Court will consider only those claims specifically asserted in Plaintiff's  
27 Second Amended Complaint (Doc. 29).

28 <sup>2</sup> Although Plaintiff labeled his filing as the "Third Amended Complaint," (Doc. 29  
at 1), it constitutes Plaintiff's Second Amended Complaint because the Court ordered  
Plaintiff's earlier Second Amended Complaint stricken (Doc. 21).

1           “A pleading that states a claim for relief must contain . . . a short and plain statement  
2 of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). Even though  
3 a complaint subject to dismissal for failure to state a claim is not required to provide  
4 “detailed factual allegations,” a Plaintiff must present more than labels and conclusions, or  
5 a formulaic recitation of the elements of the asserted cause of action. Bell Atl. Corp. v.  
6 Twombly, 550 U.S. 544, 555 (2007).<sup>3</sup> A plaintiff must state enough facts so that the claim  
7 is plausible on its face. Id. at 570. The Supreme Court does not require a heightened pleading  
8 standard, just enough facts to push the claim across the threshold of conceivable to plausible.  
9 Id.

10           The court will treat all allegations of material fact in the complaint as true and  
11 construe the complaint in the light most favorable to the plaintiff. W. Mining Council v.  
12 Watt, 643 F.2d 618, 624 (9th Cir. 1981). But “conclusory allegations of law and unwarranted  
13 inferences are insufficient.” Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001) (citing  
14 Associated Gen. Contractors v. Metro. Water Dist. of S. Cal., 159 F.3d 1178, 1187 (9th Cir.  
15 1998)). When evaluating claims under Twombly and Iqbal, courts must “continue to construe  
16 pro se filings liberally.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010).

17           If the court finds that the plaintiff does not allege enough facts to support a cognizable  
18 legal theory, the court may dismiss the claim. SmileCare Dental Grp. v. Delta Dental Plan  
19 of Cal., Inc., 88 F.3d 780, 783 (9th Cir. 1996). “Dismissal without leave to amend is  
20 improper unless it is clear, upon *de novo* review, that the complaint could not be saved by  
21 any amendment.” Polich v. Burlington N., Inc., 942 F.2d 1467, 1472 (9th Cir. 1991) (citing

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23           <sup>3</sup> Prior to Twombly, the standard of review for failure to state a claim was established  
24 by Conley v. Gibson, 355 U.S. 41 (1957). The Court in Conley held that a complaint may  
25 only be dismissed for failure to state a claim if “it appears beyond doubt that the plaintiff can  
26 prove no set of facts in support of his claim which would entitle him to relief.” Id. at 45-46;  
27 Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). After Twombly,  
28 however, it was unclear if the new plausibility standard applied to all civil complaints or only  
to antitrust complaints. Recently, the Supreme Court clarified the scope of the Twombly  
holding by reiterating that it applied to all civil actions. Ashcroft v. Iqbal, 129 S.Ct. 1937,  
1953 (2009) (“Our decision in Twombly expounded the pleading standard for ‘all civil  
actions.’”).

1 Kelson v. City of Springfield, 767 F.2d 651 (9th Cir. 1985)). When exercising it discretion  
2 to deny leave to amend, “a court must be guided by the underlying purpose of Rule 15 to  
3 facilitate decision on the merits, rather than on the pleadings or technicalities.” United States  
4 v. Webb, 655 F.2d 977, 979 (9th Cir. 1981).

## 5 **DISCUSSION**

6 In his Second Amended Complaint, Plaintiff sues the following Defendants: (1)  
7 California Correctional Institution (“CCI”) Chief Medical Officer Harold Tate; (2) Secretary  
8 of the California Department of Corrections and Rehabilitation (“CDCR”) Mathew Cate; (3)  
9 CCI Warden W.J. Sullivan; (4) CCI Staff Physician C. O’Brien; (5) CCI Registered Nurse  
10 Jane Doe #1; (6) CCI Medical Appeals Analyst L. Bluford; (7) CCI Registered Nurse Jane  
11 Doe #2; (8) the CDCR; (9) CDCR Chief of Health Services Peter Farber; (10) CDCR  
12 administrator Mark Keller; (11) Medical Development International (“MDI”), a health care  
13 company; (12) CCI Chief Medical Officer T. Bzoskie; (13) CCI Chief of Inmate Appeals N.  
14 Grannis; (14) CCI Inmate Appeals Coordinator Kim Sampson; and (15) Director of CDCR  
15 Institutions John Doe. (Doc. 29 at 4-5.)

16 Plaintiff’s Second Amended Complaint alleges violations of the Eighth Amendment  
17 under the United States Constitution and of California law in thirteen claims for relief. (Doc.  
18 29.) Counts I, II, III, V, and VI allege that Defendant O’Brien violated the Eighth  
19 Amendment through deliberate indifference to Plaintiff’s need for treatment of his  
20 gastrointestinal tract problems. (Doc. 29 at 6-9, 12-16.) Counts IV alleges that Defendants  
21 O’Brien, Bluford, and Jane Doe #2 violated the Eighth Amendment through deliberate  
22 indifference to Plaintiff’s need for treatment of his gastrointestinal tract problems. (Doc. 29  
23 at 10-11.) Count VII alleges that Defendants Jane Doe #1, Bluford, and the CDCR violated  
24 California law by failing to summon immediate medical care for Plaintiff. (Doc. 29 at 17-18.)  
25 Count VIII alleges that Defendants Sullivan, O’Brien, Bluford, and Jane Doe #2 violated  
26 California law by failing to summon immediate medical care for Plaintiff. (Doc. 29 at 19.)  
27 Counts IX and XII allege that Defendant O’Brien violated California law by failing to  
28 summon for Plaintiff immediate medical care and by failing to meet the required medical

1 standard of care, respectively. (Doc. 29 at 20, 27.) Count X alleges that Defendants Tate,  
2 Sullivan, O'Brien, Jane Doe #1, Farber, Keller, and MDI violated the Eighth Amendment by  
3 failing to schedule Plaintiff a colonoscopy. (Doc. 29 at 21-22.) Count XI alleges that  
4 Defendants Bzoskie, Grannis, and Sampson violated the Eighth Amendment by not providing  
5 Plaintiff with alternative medication. (Doc. 29 at 23-26.) Count XIII alleges that Defendants  
6 Tate, Cate, Sullivan, Jane Doe #2, and John Doe violated the Eighth Amendment by failing  
7 to train or supervise others who allegedly failed to treat Plaintiff. (Doc. 29 at 28.) Plaintiff  
8 seeks declaratory, injunctive, and monetary relief. (Doc. 29 at 25.)

9 **I. Plaintiff's Eighth Amendment Claims**

10 Not every prisoner claim of inadequate medical treatment states a violation of the  
11 Eighth Amendment. To state a § 1983 medical claim, a plaintiff must show that the  
12 defendants acted with "deliberate indifference to serious medical needs." Jett v. Penner, 439  
13 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). A  
14 plaintiff must show (1) "'serious medical need' by demonstrating that 'failure to treat a  
15 prisoner's condition could result in further significant injury or the 'unnecessary and wanton  
16 infliction of pain'" and (2) the defendant's response "was deliberately indifferent." Jett, 439  
17 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1991)).

18 To act with deliberate indifference, a prison official must both know of and disregard  
19 an excessive risk to inmate health; the official must both be aware of facts from which the  
20 inference could be drawn that a substantial risk of serious harm exists and he must also draw  
21 the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate indifference in the  
22 medical context may be shown by a purposeful act or failure to respond to a prisoner's pain  
23 or possible medical need and harm caused by the indifference. Jett, 439 F.3d at 1096.  
24 Deliberate indifference may also be shown when a prison official intentionally denies,  
25 delays, or interferes with medical treatment or by the way prison doctors respond to the  
26 prisoner's medical needs. Estelle, 429 U.S. at 104-05; Jett, 439 F.3d at 1096.

27 Deliberate indifference is a higher standard than negligence or lack of ordinary due  
28 care for the prisoner's safety. Farmer, 511 U.S. at 835. "Neither negligence nor gross

1 negligence will constitute deliberate indifference.” Clement v. Cal. Dep’t Corrs., 220 F.  
2 Supp. 2d 1098, 1105 (N.D. Cal. 2002); see also Broughton v. Cutter Labs., 622 F.2d 458, 460  
3 (9th Cir. 1980) (mere claims of “indifference,” “negligence,” or “medical malpractice” do  
4 not support a claim under § 1983). “[A] mere ‘difference of medical opinion . . . [is]  
5 insufficient, as a matter of law, to establish deliberate indifference.’” Toguchi v. Chung, 391  
6 F.3d 1051, 1058 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). A mere  
7 delay in medical care, without more, is insufficient to state a claim against prison officials  
8 for deliberate indifference. See Shapley v. Nev. Bd. State Prison Comm’rs, 766 F.2d 404,  
9 407 (9th Cir. 1985). The indifference must be substantial. The action must rise to a level of  
10 “unnecessary and wanton infliction of pain.” Estelle, 429 U.S. at 105-06.

11 **A. Count I**

12 Plaintiff’s Count I alleges an Eighth Amendment violation because Defendant  
13 O’Brien allegedly failed to properly investigate Plaintiff’s complaints, instead endorsing an  
14 inexpensive and inefficient diagnostic test and refusing to send Plaintiff immediately to a  
15 specialist for a colonoscopy. (Doc. 29 at 6-7.) Plaintiff allegedly first saw Defendant O’Brien  
16 in February or March 2006 with complaints of rectal bleeding, abnormal bowel movements,  
17 abdominal pains, abdominal cramping, temporary spasms, and painful bowel movements.  
18 (Doc. 29 at 6.) During that visit, Plaintiff claims that Defendant O’Brien prescribed a stool  
19 softener and denied his colonoscopy request because he first needed to see stool test results.  
20 (Doc. 29 at 6.) On April 17, 2006, Defendant O’Brien allegedly told Plaintiff that the stool  
21 test results were “positive.” (Doc. 29 at 6.) Plaintiff also allegedly complained that the stool  
22 softener had not helped, causing Defendant O’Brien to order a blood test and prescribe a  
23 stronger stool softener. (Doc. 29 at 6.) On May 18, 2006, Defendant O’Brien allegedly told  
24 Plaintiff that Plaintiff had the *Helicobacter pylori* (*H. pylori*) intestinal bacteria. (Doc. 29 at  
25 7.) Defendant O’Brien then prescribed Plaintiff “various medications” and ordered a “routine  
26 colonoscopy.” (Doc. 29 at 7.)

27 The Court finds that Plaintiff’s Count I fails to state a claim. Rather, Plaintiff’s  
28 allegations suggest nothing more than a disagreement with Defendant O’Brien’s considered

1 judgment about the appropriate course of diagnosis and treatment of Plaintiff's medical  
2 conditions. They do not reveal deliberate indifference to Plaintiff's serious medical needs.  
3 See Toguchi, 391 F.3d at 1058 (“a mere ‘difference of medical opinion . . . [is] insufficient,  
4 as a matter of law, to establish deliberate indifference’”). Plaintiff's factual allegations reflect  
5 that he received consistent and regular treatment, testing, and monitoring of his  
6 gastrointestinal condition. Defendant O'Brien initially treated Plaintiff with a stool softener  
7 at Plaintiff's first visit, and treatment was adjusted when Plaintiff complained that his  
8 symptoms had not abated. (Doc. 29 at 6-7.) Diagnostic testing also started with Plaintiff's  
9 first visit and additional tests were ordered when the need for them became apparent. (Doc.  
10 29 at 6-7.)

11 Plaintiff may not have received a colonoscopy as soon as he would have liked, but  
12 Plaintiff does not allege that he suffered any serious medical consequences as a result. The  
13 colonoscopy ultimately revealed that Plaintiff had one internal hemorrhoid and small ruptures  
14 in his intestine that were caused by constipation—a condition for which Plaintiff had already  
15 been receiving consistent treatment. (Doc. 29 at 6-7, 12.) A delay in providing medical  
16 treatment does not constitute deliberate indifference unless the delay was harmful. Hunt v.  
17 Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989); see also Hallett v. Morgan, 296 F.3d 732,  
18 746 (9th Cir. 2002) (The Eighth Amendment is only violated if “delays occurred to patients  
19 with problems so severe that delays would cause significant harm and that Defendants should  
20 have known this to be the case[.]”); Wood v. Housewright, 900 F.2d 1332, 1333-35 (9th Cir.  
21 1990) (holding that a delay of several days in receiving pain medication for a broken  
22 shoulder did not amount to a constitutional violation). Because Plaintiff does not allege that  
23 the delay in providing him with a colonoscopy caused him any serious harm, he has failed  
24 to state a cognizable Eighth Amendment claim. Therefore, the Court will dismiss Count I.

25 **B. Count II**

26 Count II alleges that Defendant O'Brien violated Plaintiff's Eighth Amendment rights  
27 by failing to prescribe alternative medication to alleviate Plaintiff's chest and abdominal  
28 pains and order testing for his abdominal pains. (Doc. 29 at 8.) During his appointments with

1 Defendant O'Brien from February or March 2006 through October 16, 2006, Plaintiff  
2 allegedly requested medication for his abdominal pain. (Doc. 29 at 8.) On October 18, 2006,  
3 Plaintiff allegedly told Defendant O'Brien that he suspected that he was having side-effects  
4 from his Proton Pump Inhibitor ("PPI") medication, and that he was suffering from dry  
5 mouth and throat, swollen saliva glands, dizzy spells, sore throat, pain in his chest and upper  
6 abdomen, acid reflux, and vomiting. (Doc. 29 at 8, 14.) In response, Defendant O'Brien  
7 allegedly discontinued Plaintiff's PPIs and prescribed him liquid Maalox. (Doc. 29 at 8, 14.)  
8 On February 6, 2007, Plaintiff allegedly informed Defendant O'Brien that most of his  
9 symptoms had subsided, but that he was suffering from irregular bowel movements, chest  
10 pains, dry mouth and throat, and acid reflux. (Doc. 29 at 8, 14.) Plaintiff alleges that although  
11 Defendant O'Brien told Plaintiff he would receive alternative medications in an attempt to  
12 reduce or eliminate any side effects, he never received those medications. (Doc. 29 at 8.)

13 Plaintiff's allegations in Counts II do not give rise to a plausible claim that Defendant  
14 O'Brien violated his Eighth Amendment rights. Plaintiff claims that at various stages  
15 Defendant O'Brien pursued treatment that produced side effects. As noted earlier, to prevail  
16 on a claim involving choices between alternative courses of treatment, a prisoner must show  
17 that the course of treatment the doctor chose was medically unacceptable in light of the  
18 circumstances and that it was chosen in conscious disregard of an excessive risk to the  
19 prisoner's health. See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996). Plaintiff's  
20 allegations do not support a plausible inference that Defendant O'Brien was subjectively  
21 aware of and consciously disregarded an excessive risk to Plaintiff's health. See Toguchi,  
22 391 F.3d at 1060. Instead, the allegations suggest that Defendant O'Brien consistently  
23 exercised his judgment in an attempt to balance the need to treat Plaintiff's condition without  
24 causing excessive side effects. At most, Plaintiff's allegations give rise to an inference that  
25 Defendant O'Brien may have been negligent in prescribing certain medications. But a  
26 "showing of medical malpractice or negligence is insufficient to establish a constitutional  
27 deprivation under the Eighth Amendment." Id. Plaintiff has therefore failed to state a  
28 cognizable Eighth Amendment claim, and the Court will dismiss Count II.



1 **C. Count III**

2 Count III alleges that Defendant O'Brien violated Plaintiff's Eighth Amendment  
3 rights because he "chose a 'course of treatment' that is medically unacceptable." (Doc. 29  
4 at 9.) Plaintiff alleges that Defendant O'Brien incorrectly required Plaintiff to have a stool  
5 test before prescribing a colonoscopy, because a stool test is not a "medically recognized  
6 diagnostic test." (Doc. 29 at 9.) The Court finds, incorporating the same reasoning set forth  
7 in parts I.A-B of this Order, that Plaintiff's Count III fails to state a claim. Plaintiff's  
8 allegations related to Defendant O'Brien ordering a stool test before ordering a colonoscopy  
9 constitute nothing more than Plaintiff disagreeing with Defendant O'Brien's considered  
10 judgment about the appropriate course of diagnosis and treatment of Plaintiff's medical  
11 conditions—they do not reveal deliberate indifference to Plaintiff's serious medical needs. See  
12 Toguchi, 391 F.3d at 1058. Therefore, the Court will dismiss Count III.

13 **D. Count IV**

14 Count IV alleges that Defendants O'Brien, Bluford, and Jane Doe #2 violated  
15 Plaintiff's Eighth Amendment rights by delaying access to a specialist without a legitimate  
16 reason. (Doc. 29 at 10.) On June 11, 2006, Plaintiff allegedly filed a grievance complaining  
17 of persistent symptoms and requesting an outside specialist and an expedited colonoscopy.  
18 (Doc. 29 at 10.) On July 25, 2006, Plaintiff allegedly received a notification of diagnostic  
19 test. (Doc. 29 at 10.) After this notification, Plaintiff allegedly asked Defendant O'Brien to  
20 expedite Plaintiff's colonoscopy because his symptoms had not abated, but Defendant  
21 O'Brien allegedly refused. (Doc. 29 at 10.) On August 1, 2006, Defendant Bluford allegedly  
22 interviewed Plaintiff regarding his grievance, and advised Plaintiff that the colonoscopy  
23 would be completed within 120 days of the interview, that Plaintiff would be monitored  
24 every 30 days until then, and that Plaintiff's request for an outside doctor was denied. (Doc.  
25 29 at 10-11.) Defendant Tate allegedly endorsed the first level decision on Plaintiff's  
26 grievance on August 3, 2006, but reversed this endorsement on November 2, 2006, when he  
27 also ordered Plaintiff an upper endoscopy. (Doc. 29 at 11.) After reviewing Plaintiff's  
28 allegations, the Court finds, incorporating the reasoning set forth in parts I.A-B of this Order,

1 that Plaintiff's Count IV fails to state a cognizable Eighth Amendment claim. Plaintiff's  
2 allegations do not support a plausible inference that Defendants O'Brien, Bluford, and Jane  
3 Doe #2 were subjectively aware of and consciously disregarded an excessive risk to  
4 Plaintiff's health. See Toguchi, 391 F.3d at 1060. Further, Defendant O'Brien's alleged delay  
5 in providing medical treatment, and the alleged conduct of Defendants Bluford and Jane Doe  
6 #2 cannot constitute deliberate indifference because Defendant has not plausibly alleged that  
7 the purported delay caused serious harm. See Hunt, 865 F.2d at 200. Therefore, the Court  
8 will dismiss Count IV.

9 **E. Count V**

10 Count V alleges that Defendant O'Brien violated Plaintiff's Eighth Amendment rights  
11 by delaying Plaintiff's colonoscopy. (Doc. 29 at 12.) Plaintiff alleges that his February 13,  
12 2007 colonoscopy revealed one internal hemorrhoid and three small ruptures of his long  
13 intestine. (Doc. 29 at 12.) On May 18, 2007, Defendant O'Brien allegedly advised Plaintiff  
14 that the rupture was caused by constipation, and advised certain dietary restrictions for  
15 Plaintiff. (Doc. 29 at 12-13.) The Court finds, incorporating the reasoning set forth in parts  
16 IA-B of this Order, that Plaintiff has failed to state a cognizable Eighth Amendment claim  
17 in Count V because a delay in providing medical treatment does not constitute deliberate  
18 indifference unless the delay caused serious harm. See Hunt, 865 F.2d at 200. Further,  
19 Plaintiff's allegations do not support a plausible inference that Defendant O'Brien was  
20 subjectively aware of and consciously disregarded an excessive risk to Plaintiff's health. See  
21 Toguchi, 391 F.3d at 1060. Therefore, the Court will dismiss Count V.

22 **F. Count VI**

23 Count VI alleges that Defendant O'Brien violated Plaintiff's Eighth Amendment  
24 rights by improperly documenting and treating Plaintiff's drug allergies. (Doc. 29 at 14.) As  
25 stated earlier in this Order, Plaintiff on October 18, 2006 allegedly told Defendant O'Brien  
26 that he suspected that he was having side-effects from his PPI. (Doc. 29 at 14.) In response,  
27 Defendant O'Brien allegedly discontinued Plaintiff's PPIs and prescribed him liquid Maalox.  
28 (Doc. 29 at 14.) On February 6, 2007, Plaintiff allegedly informed Defendant O'Brien that

1 most of his symptoms had subsided, but that he was suffering from irregular bowel  
2 movements, chest pains, dry mouth and throat, and acid reflux. (Doc. 29 at 14.) On an  
3 unspecified later date, Plaintiff allegedly told Defendant O'Brien that he still had these  
4 symptoms and that his bowel movements were becoming hard again. (Doc. 29 at 14-15.)  
5 Defendant O'Brien then allegedly prescribed Plaintiff new medications, which Plaintiff  
6 alleges caused swelling of his body, "extreme" swelling of his left arm, and difficulty  
7 breathing. (Doc. 29 at 15.) Plaintiff was then allegedly taken to a clinic and given  
8 antihistamines by an unnamed nurse. (Doc. 29 at 15.) Plaintiff also alleges that Defendant  
9 O'Brien did not properly document Plaintiff's drug allergies in Plaintiff's medical file. (Doc.  
10 29 at 15.) The Court finds, incorporating the same reasoning set forth in parts I.A-B of this  
11 Order, that Plaintiff's Count VI fails to state a claim. Plaintiff cannot plausibly allege that  
12 Defendant O'Brien failed to treat and document Plaintiff's drug allergies without alleging  
13 that Defendant O'Brien was aware of Plaintiff's drug allergies and had the opportunity to  
14 treat the allergies or document the allergies in the record. Plaintiff fails to allege that  
15 Defendant's alleged failure to treat and document his allergies constituted not mere  
16 negligence, but rather a conscious disregard of an excessive risk to Plaintiff's health. See  
17 Jackson, 90 F.3d at 332; Toguchi, 391 F.3d at 1060. Therefore, the Court will dismiss Count  
18 VI.

19 **G. Count X<sup>4</sup>**

20 Count X alleges that Defendants Tate, Sullivan, O'Brien, Jane Doe #1, Farber, Keller,  
21 and MDI violated his Eighth Amendment rights by not providing the proper procedural,  
22 organizational, and funding structures that would enable Plaintiff to receive treatment from  
23 a specialist. (Doc. 29 at 21.) Plaintiff alleges that Defendants Farber and Keller approved a  
24 pilot program with MDI to schedule outside specialist services for prisoners, then allegedly  
25 participated in a pattern of misconduct that resulted in Plaintiff not receiving a timely  
26 colonoscopy for reasons of cost. (Doc. 29 at 21-22.) incorporating the same reasoning set

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28 <sup>4</sup>Counts VII, VIII, IX, and XII allege state law claims. These claims will be addressed later in this Order.

1 forth in parts I.A-B of this Order, that Plaintiff’s allegations in Count X fail to state a  
2 cognizable Eighth Amendment claim. Defendants Tate, Sullivan, O’Brien, Jane Doe #1,  
3 Farber, Keller, and MDI’s alleged roles in delaying Plaintiff’s treatment do not show that  
4 they were subjectively aware of and consciously disregarded an excessive risk to Plaintiff’s  
5 health. See Toguchi, 391 F.3d at 1060. Further, Plaintiff fails to plausibly claim that the  
6 alleged delay in his receiving a colonoscopy caused serious harm. See Hunt, 865 F.2d at 200.  
7 Therefore, the Court will dismiss Count X.

8 **H. Count XI**

9 Count XI alleges that Defendants Bzoskie, Grannis, and Sampson violated Plaintiff’s  
10 Eighth Amendment rights by denying his appeal for alternative medication. (Doc. 29 at 23.)  
11 Plaintiff claims that on February 6, 2008, Defendant Bzoskie cancelled Plaintiff’s second  
12 level response—challenging Defendant O’Brien’s alleged refusal to provide Plaintiff  
13 alternative medication—on grounds that Plaintiff purportedly refused to cooperate by  
14 appearing for a scheduled interview related to the grievance. (Doc. 29 at 24.) On April 9,  
15 2008, Defendant Grannis allegedly returned Plaintiff’s administrative appeal, citing  
16 Plaintiff’s missed interview. (Doc. 29 at 24.) On April 15, 2008, Plaintiff allegedly filed a  
17 challenge to the cancelled administrative appeal with Defendant Sampson, who took no  
18 action. (Doc. 29 at 24-25.) Also in Count XI, Plaintiff claims that an “outside specialist”  
19 subsequently recommended doubling Plaintiff’s PPI medication, but that Plaintiff never  
20 received that medication. (Doc. 29 at 25.) The Court finds, incorporating the same reasoning  
21 set forth in parts I.A-B of this Order, that Plaintiff’s claims in Count XI fail to plausibly  
22 allege that Defendants Bzoskie, Sampson, and Grannis both knew of and disregarded an  
23 excessive risk to inmate health. See Toguchi, 391 F.3d at 1060. Plaintiff’s allegation in Count  
24 XI apparently derives from a dispute as to whether Plaintiff complied with the procedural  
25 requirement of submitting to an interview, rather than any demonstration of deliberate  
26 indifference by Defendants Bzoskie, Sampson, and Grannis. (Doc. 29 at 24.) Therefore, the  
27 Court will dismiss Count XI because Plaintiff’s allegations cannot support an Eighth  
28 Amendment claim.

1 **I. Count XIII**

2 Count XIII alleges that Defendants Tate, Cate, Sullivan, Jane Doe #2, and John Doe  
3 violated his Eighth Amendment rights by failing to train and supervise subordinates, leading  
4 to delayed medical care for Plaintiff. (Doc. 29 at 28.) Plaintiff alleges that in early 2006, an  
5 inmate transfer gave rise to an increased need for medical staff, which Defendants failed to  
6 provide, causing a delay in Plaintiff’s treatment. (Doc. 29 at 28.) After reviewing Plaintiff’s  
7 allegations in Count XIII, the Court finds, incorporating the reasoning set forth in parts I.A-B  
8 of this Order, that Plaintiff’s allegations in Count XIII fail to state a cognizable Eighth  
9 Amendment claim. Plaintiff’s allegations fail to show that Defendants Tate, Cate, Sullivan,  
10 Jane Doe #2, and John Doe were subjectively aware of and consciously disregarded an  
11 excessive risk to Plaintiff’s health. See Toguchi, 391 F.3d at 1060. Therefore, the Court will  
12 dismiss Count XIII.

13 **II. Plaintiff’s State Law Claims**

14 Plaintiff’s Counts VII, VIII, IX, and XII all allege violations of California law. (Doc.  
15 29.) Under 28 U.S.C. § 1367(a), subject to exceptions which are not relevant here, the district  
16 courts have supplemental jurisdiction over state law claims in any civil action in which the  
17 district courts also have original federal jurisdiction over all other claims in the case. But  
18 “once judicial power exists under § 1367(a), retention of supplemental jurisdiction over state  
19 law claims under § 1367(c) is discretionary.” Acri v. Varian Assoc. , Inc., 114 F.3d 999,  
20 1000 (9th Cir. 1997) (en banc). “The district court may decline to exercise supplemental  
21 jurisdiction over a claim under subsection (a) if . . . the district court has dismissed all claims  
22 over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). Moreover, the Supreme  
23 Court has cautioned that “if the federal claims are dismissed before trial, . . . the state claims  
24 should be dismissed as well.” United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726  
25 (1966).

26 Because Plaintiff will be given another opportunity to state claims for relief under §  
27 1983, the Court will reserve its discretion to exercise supplemental jurisdiction over  
28 Plaintiff’s state law claims until after Plaintiff files his Third Amended Complaint. If Plaintiff

1 fails to allege a viable federal claim in his Third Amended Complaint, the Court will not  
2 exercise supplemental jurisdiction over his state law claims.

3 **III. Leave to Amend**

4 For the foregoing reasons, Plaintiff's Complaint will be dismissed for failure to state  
5 a claim upon which relief may be granted. Within 30 days, Plaintiff may submit an amended  
6 complaint on the form provided with this Order. If Plaintiff fails to use the form provided  
7 with this Order, the Court may strike the amended complaint and dismiss this action without  
8 further notice to Plaintiff.

9 Plaintiff must clearly designate on the fact of the document that it is the "Third  
10 Amended Complaint." The amended pleading must be retyped or rewritten in its entirety on  
11 the form provided with this Order and may not incorporate any part of the prior complaints  
12 by reference.

13 Plaintiff must comply with the instructions provided with the form. Plaintiff should  
14 pay close attention to the instructions provided with the form. If Plaintiff fails to comply with  
15 the instructions provided with the form, the court may strike the amended complaint and  
16 dismiss this action without further notice to Plaintiff.

17 Among other requirements, Plaintiff must provide information regarding the Court's  
18 jurisdiction, provide information about the defendants, and divide his lawsuit into separate  
19 counts. In each count, Plaintiff must identify what federal constitutional civil right was  
20 violated, identify the issue most closely involved in that count, state which defendants  
21 violated that right and what those defendants did to violate that right, explain how Plaintiff  
22 was injured by the alleged violation of the constitutional right, and identify whether Plaintiff  
23 has exhausted any available administrative remedies. Plaintiff must repeat this process for  
24 each civil right that was violated. Plaintiff may allege only one claim per count.

25 An amended complaint supersedes prior complaints. Ferdik, 963 F.2d at 1262; Hal  
26 Roach Studios, 896 F.2d at 1546. After amendment, the Court will treat the prior complaints  
27 as nonexistent. Ferdik, 963 F.2d at 1262. Any cause of action that was raised in a prior  
28 complaint is waived if it is not raised in an amended pleading. King, 814 F.2d at 567.

1 **IV. Warnings**

2 **A. Address Changes**

3 Plaintiff must file and serve a notice of a change of address in accordance with Rule  
4 83-182(f) and 83-183(b) of the Local Rules of Civil Procedure. Plaintiff must not include a  
5 motion for other relief with a notice of change of address. Failure to comply may result in  
6 dismissal of this action.

7 **B. Copies**

8 Plaintiff must submit an additional copy of every filing for use by the Court. See  
9 LRCiv 5-133(d)(2). Failure to comply may result in the filing being stricken without further  
10 notice to Plaintiff.

11 **C. Possible “Strike”**

12 Because the Complaint has been dismissed for failure to state a claim, if Plaintiff fails  
13 to file an amended complaint correcting the deficiencies identified in this Order, the  
14 dismissal will count as a “strike” under the “3-strikes” provision of 28 U.S.C. § 1915(g).  
15 Under the 3-strike provision, a prisoner may not bring a civil action or appeal a civil  
16 judgment *in forma pauperis* under 28 U.S.C. § 1915 “if the prisoner has, on 3 or more prior  
17 occasions, while incarcerated or detained in any facility, brought an action or appeal in a  
18 court of the United States that was dismissed on the grounds that it is frivolous, malicious,  
19 or fails to state a claim upon which relief may be granted, unless the prisoner is under  
20 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

21 **D. Possible Dismissal**

22 If Plaintiff fails to timely comply with every provision of this Order, including these  
23 warnings, the Court may dismiss this action without further notice. See Ferdik, 963 F.2d at  
24 1260-61 (a district court may dismiss an action for failure to comply with any order of the  
25 Court).

26 **CONCLUSION**

27 **IT IS HEREBY ORDERED GRANTING** Plaintiff’s Motion for Leave to Amend  
28 Complaint (Doc. 27).

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**IT IS FURTHER ORDERED DISMISSING** Plaintiff's Second Amended Complaint for failure to state a claim. Plaintiff has **30 days** from the date this Order is filed to file an amended complaint in compliance with this Order.

**IT IS FURTHER ORDERED** that if Plaintiff fails to file an amended complaint within 30 days, the Clerk of Court must, without further notice, enter a judgment of dismissal of this action with prejudice that states that the dismissal counts as a "strike" under 28 U.S.C. § 1915(g).

**IT IS FURTHER ORDERED** that the Clerk of Court must send Plaintiff a copy of the form for filing a civil rights complaint by a prisoner provided with this Order.

DATED this 3<sup>rd</sup> day of March, 2011.

  
\_\_\_\_\_  
Stephen M. McNamee  
United States District Judge



## INSTRUCTIONS FOR FILING A COMPLAINT BY A PRISONER UNDER CIVIL RIGHTS STATUTE 42 U.S.C. § 1983

### I. Scope of Section 1983

An action under Section 1983 is available to challenge violations of the federal constitution or federal statutes which affect the conditions of your confinement or your treatment by government employees while in custody. Although you may ask for and obtain money damages or an injunction under Section 1983, the court cannot issue an order which could affect the length of your sentence in any way. Those types of claims may be raised only through a petition for writ of habeas corpus. If you want to file a petition for a writ of habeas corpus, you must do so on the correct forms, which are provided by the Clerk of the Court on request.

#### A. Exhaustion of Administrative Remedies

If there is an inmate appeal or administrative remedy process available at your institution, you may not file an action under Section 1983, or any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.S. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002). Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit. Booth, 532 U.S. at 734.

### II. Packet

A copy of a complaint form is attached to this instruction sheet. In addition, included in the packet is an information sheet for prisoners seeking leave to proceed in forma pauperis (without prepayment of filing fees) and a copy of an application to proceed in forma pauperis. To file an action, you must send all the following items to the court:

1. An original and one copy of the complaint. You must keep an additional copy of the complaint for your own records. All copies of the complaint must be identical to the original. If you wish to have a conformed copy of your complaint returned to you, you must send, in addition to the original, two extra copies and provide the court with a self-addressed postage paid envelope
2. Either a completed in forma pauperis application or the \$350.00 filing fee.

NOTICE: Leave to proceed in forma pauperis allows a case to proceed without *pre-payment* of the filing fee. However, a prisoner who brings a civil action in forma pauperis shall nevertheless be required to pay the full amount of the filing fee. The court shall collect the filing fee through deductions from the prisoner's trust account. Dismissal of the case does not excuse payment of the full filing fee. See 28 U.S.C. § 1915.

### III. Complaint Form

Your complaint must be legibly handwritten or typewritten. You must sign the complaint and declare under penalty of perjury that the facts stated in the complaint are correct. If you need additional space to answer a question, you should attach an additional blank page. You are required to state facts in support of each claim. The complaint should refer to the provision of the federal constitution or federal law on which you are relying, but should not contain legal arguments or citations.

### IV. Venue

Your complaint should be filed in the Fresno Division of this court only if one or more of the named defendants is located in the Fresno Division of the Eastern District of California, or if your claim arose in the Fresno Division of this district. The Fresno Division of the Eastern District of California is comprised of the following counties: Fresno, Calaveras, Inyo, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne.

Your complaint should be filed in the Sacramento Division of this court only if one or more of the named defendants is located in the Sacramento Division of the Eastern District of California, or if your claim arose in the Sacramento Division of this district. The Sacramento Division of the Eastern District of California is comprised of the following counties: Alpine, Amador, Butte, Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Sutter, Tehama, Trinity, Yolo, and Yuba..

### V. Mailing the Forms

When all of the forms described in part II are completed, if you are filing your case in the Fresno Division, mail the original and copies to:

Clerk of the U.S. District Court  
for the Eastern District of California  
2500 Tulare Street, Suite 1501  
Fresno, California 93721-2201

If you are filing your case in the Sacramento Division, mail the original and copies to:

Clerk of the U.S. District Court  
for the Eastern District of California  
501 "I" Street, Suite 4-200  
Sacramento, California 95814

## VI. After the Complaint is Filed

Once the complaint is filed, the court will review it and decide whether to order service of the complaint on the defendants. You will be sent a copy of any order the court issues. Because of the large volume of cases filed by inmates pending in this court, the court WILL NOT ANSWER INQUIRIES concerning the status of your complaint.

You must keep the Clerk of the Court informed of any change of address. If you fail to do so, the Clerk cannot be responsible for your failure to receive Court orders. This could result in the dismissal of your suit.

The Clerk of the Court cannot provide copies of documents to litigants, except at a charge of fifty cents (\$0.50) per page. This charge also applies to litigants proceeding in forma pauperis. Therefore you must keep copies of all documents submitted to the court for your own records.

## VII. Submission of Original Paper Exhibits

The Eastern District of California converted to an electronic filing, service, and storage system, effective January 3, 2005. Pro se litigants are exempt from the electronic filing requirement and must submit all documents to the court in paper. Local Rule 5-133(b)(2). Paper documents submitted by pro se litigants for filing will be scanned into the electronic court file by the Clerk's Office. After being scanned into the electronic court file, the paper documents will be retained in the Clerk's Office for a limited period of time and then discarded. Local Rule 39-138(d). For this reason, pro se litigants are cautioned not to send original exhibits to the court. If pro se litigants choose to submit exhibits to the court, the litigants shall retain their original exhibits and send photocopies to the court.

(Revised 8/30/06)

Plaintiff's Name \_\_\_\_\_  
Inmate No. \_\_\_\_\_  
Address \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

---

(Name of Plaintiff)	(Case Number)
vs.	COMPLAINT
	Civil Rights Act, 42 U.S.C. § 1983
_____	
_____	
_____	
_____	
_____	
_____	
(Names of all Defendants)	

**I. Previous Lawsuits (list all other previous or pending lawsuits on back of this form):**

A. Have you brought any other lawsuits while a prisoner? Yes \_\_\_ No \_\_\_

B. If your answer to A is yes, how many? \_\_\_\_\_  
Describe previous or pending lawsuits in the space below.  
(If more than one, use back of paper to continue outlining all lawsuits.)

1. Parties to this previous lawsuit:

Plaintiff \_\_\_\_\_

Defendants \_\_\_\_\_

---

2. Court (if Federal Court, give name of District; if State Court, give name of County)

3. Docket Number \_\_\_\_\_ 4. Assigned Judge \_\_\_\_\_

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)

6. Filing date (approx.) \_\_\_\_\_ 7. Disposition date (approx.) \_\_\_\_\_

**II. Exhaustion of Administrative Remedies**

A. Is there an inmate appeal or administrative remedy process available at your institution?

Yes\_\_\_ No\_\_\_

B. Have you filed an appeal or grievance concerning **ALL** of the facts contained in this complaint?

Yes\_\_\_ No\_\_\_

If your answer is no, explain why not \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

C. Is the process completed?

Yes\_\_\_ If your answer is yes, briefly explain what happened at each level.

\_\_\_\_\_  
\_\_\_\_\_

No\_\_\_ If your answer is no, explain why not.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**NOTICE:** Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). If there is an inmate appeal or administrative remedy process available at your institution, you may not file an action under Section 1983, or any other federal law, until you have first completed (exhausted) the process available at your institution. You are required to complete (exhaust) the inmate appeal or administrative remedy process before filing suit, regardless of the relief offered by the process. Booth v. Churner, 532 U.S. 731, 741 (2001); McKinney v. Carey, 311 F.3d 1198, 1999 (9th Cir. 2002). **Even if you are seeking only money damages and the inmate appeal or administrative remedy process does not provide money, you must exhaust the process before filing suit.** Booth, 532 U.S. at 734.

**III. Defendants**

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant \_\_\_\_\_ is employed as \_\_\_\_\_  
\_\_\_\_\_ at \_\_\_\_\_

B. Additional defendants \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
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\_\_\_\_\_

**IV. Statement of Claim**

(State here as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

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**V. Relief.**

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
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\_\_\_\_\_  
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I declare under penalty of perjury that the foregoing is true and correct.

Date \_\_\_\_\_

Signature of Plaintiff \_\_\_\_\_

(revised 6/01/04)

Name: \_\_\_\_\_

CDC No: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION**

**CASE NUMBER:**

Plaintiff,

vs.

**APPLICATION TO PROCEED  
IN FORMA PAUPERIS  
BY A PRISONER**

Defendants.

\_\_\_\_\_ /

I, \_\_\_\_\_, declare that I am the plaintiff in the above-entitled proceeding; that, in support of my request to proceed without prepayment of fees under 28 U.S.C. section 1915, I declare that I am unable to pay the fees for these proceedings or give security therefor and that I am entitled to the relief sought in the complaint.

In support of this application, I answer the following questions under penalty of perjury:

1. Are you currently incarcerated?     Yes     No    **(If “no” DO NOT USE THIS FORM)**

State the place of your incarceration. \_\_\_\_\_

2. Are you currently employed (includes prison employment)?     Yes     No

a. If the answer is “yes” state the amount of your pay. \_\_\_\_\_

b. If the answer is “no” state the date of your last employment, the amount of your take-home salary or wages and pay period, and the name and address of your last employer.

3. Have you received any money from the following sources over the last twelve months?

a. Business, profession, or other self-employment:     Yes     No

b. Rent payments, interest or dividends:     Yes     No

- c. Pensions, annuities or life insurance payments:     Yes     No
- d. Disability or workers compensation payments:     Yes     No
- e.. Gifts or inheritances:     Yes     No
- f. Any other sources:     Yes     No

If the answer to any of the above is “yes,” describe by that item each source of money. Also state the amount received **and** what you expect you will continue to receive (attach an additional sheet if necessary).

4. Do you have cash (includes balance of checking or savings accounts)?     Yes     No

If “yes” state the total amount: \_\_\_\_\_

5. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles or other valuable property?     Yes     No

If “yes” describe the property and state its value: \_\_\_\_\_

6. Do you have any other assets?     Yes     No

If “yes,” list the asset(s) and state the value of each asset listed:

7. List all persons dependent on you for support, stating your relationship to each person listed and how much you contribute to their support.

**IMPORTANT:    This form must be dated and signed below in order for the court to consider your application.**

I hereby authorize the agency having custody of me to collect from my trust account and forward to the Clerk of the United States District Court payments in accordance with 28 U.S.C. section 1915(b)(2).

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE OF APPLICANT

**NOTE:**    Within sixty days from the date of this application you must forward to the court a certified copy of your prison trust account statement showing transactions for the past six months.

(Revised 01/2008)