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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KEVIN ROBERSON,

Plaintiff,

v.

S. ZAMORA, et al.,

Defendants.

CASE NO. 1:08-cv-00214-AWI-MJS (PC)

THIRD AMENDED COMPLAINT DISMISSED
WITH LEAVE TO AMEND

(ECF No. 21)

FOURTH AMENDED COMPLAINT DUE
WITHIN THIRTY DAYS

_____ /

SCREENING ORDER

I. PROCEDURAL HISTORY

Plaintiff Kevin Roberson ("Plaintiff") is a former state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action on February 11, 2008. (ECF No. 1.) Plaintiff has since filed three amended complaints: First Amended Complaint on February 15, 2008, Second Amended Complaint on March 24, 2008, and Third Amended Complaint on April 15, 2009. (ECF Nos. 4, 6, & 21.) No other parties have appeared in this action.

1 Plaintiff's Third Amended Complaint is now before the Court for screening. For the
2 reasons set forth below, the Court finds that Plaintiff has failed to state a claim upon which
3 relief may be granted.

4
5 **II. SCREENING REQUIREMENTS**

6 The Court is required to screen complaints brought by prisoners seeking relief
7 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
8 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has
9 raised claims that are legally "frivolous or malicious," that fail to state a claim upon which
10 relief may be granted, or that seek monetary relief from a defendant who is immune from
11 such relief. 28 U.S.C. § 1915A(b)(1), (2). "Notwithstanding any filing fee, or any portion
12 thereof, that may have been paid, the court shall dismiss the case at any time if the court
13 determines that . . . the action or appeal . . . fails to state a claim upon which relief may be
14 granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

15
16 A complaint must contain "a short and plain statement of the claim showing that the
17 pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
18 not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by
19 mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949
20 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set
21 forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on its
22 face.'" Iqbal, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 555). While factual
23 allegations are accepted as true, legal conclusions are not. Iqbal, 129 S.Ct. at 1949.
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1 **III. SUMMARY OF COMPLAINT**

2 Plaintiff alleges that his First Amendment rights were violated by Defendants’
3 retaliatory conduct and that his Eighth Amendment right to adequate medical care was
4 violated. Plaintiff names the following individuals as Defendants: S. Zamora, healthcare
5 manager at Kern Valley State Prison (“KVSP”); Mohammed Ali, registered nurse (2) at
6 KVSP; Sherry Lopez, primary healthcare provider at KVSP; and John Doe, warden or
7 healthcare manager at California Correctional Institution (“CCI”).
8

9 Plaintiff alleges the following: In 2003, Plaintiff filed a civil rights action against prison
10 officials at High Desert State Prison. The case concluded with a jury verdict in favor of the
11 defendants in 2005.
12

13 In May 2006, Plaintiff was transferred to KVSP. Before his transfer, a doctor at High
14 Desert had determined that Plaintiff was a candidate for Hepatitis C treatment and was in
15 the process of referring him for a liver biopsy at an outside facility. Upon learning that
16 Plaintiff was to be transferred, the doctor held off on the biopsy referral, but assured
17 Plaintiff that he would be taken care of at KVSP.
18

19 Plaintiff arrived at KVSP on May 31, 2006. At receiving and release, Plaintiff
20 overheard prison officials referring to him as the “Litigator from High Desert.” (ECF No. 21,
21 p. 5; Pl.’s Compl. p. 5.) Subsequently, Plaintiff learned that several prison officials formerly
22 from High Desert worked at KVSP and were familiar with Plaintiff’s previous case.

23 Upon arrival at KVSP, Plaintiff informed the nurse in receiving that he had Hepatitis
24 C and was in need of a liver biopsy and treatment. On June 21, 2006, Plaintiff had blood
25 taken. One week later, he was notified that the test results were within normal limits and
26 that no physician follow-up was necessary. Plaintiff filed a medical grievance in response.
27

1 The institution's response at the first and second levels was delayed and Plaintiff was given
2 inaccurate and misleading information.

3 On November 27, 2007, Plaintiff was seen at the Hepatitis clinic. The doctor
4 informed Plaintiff that because his earliest possible release date was December 19, 2008
5 and that the hepatitis treatment took sixteen months, Plaintiff was not eligible to receive the
6 treatment.
7

8 In early 2008, Plaintiff's earliest possible release date was changed to April 2010.
9 He met with Defendant Lopez and asked to receive treatment since he would be confined
10 longer. Defendant Lopez told Plaintiff that she would look into it.

11 On May 16, 2008, Plaintiff was transferred to CCI. On November 18, 2008, a doctor
12 at CCI placed a medical hold on Plaintiff pending a liver biopsy. Despite the medical hold,
13 Plaintiff was transferred to Salinas Valley State Prison. His earliest possible release date
14 was then changed again to December 2009, which made him ineligible to receive
15 treatment.
16

17 Plaintiff seeks compensatory and punitive damages, and asks that counsel be
18 appointed to represent him.
19

20 **IV. ANALYSIS**

21 The Civil Rights Act under which this action was filed provides:

22 Every person who, under color of [state law] . . . subjects, or
23 causes to be subjected, any citizen of the United States . . . to
24 the deprivation of any rights, privileges, or immunities secured
25 by the Constitution . . . shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for
redress.

26 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal
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1 Constitution and laws.” Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir.
2 1997) (internal quotations omitted).

3 **A. Retaliation Claim**

4 Plaintiff states that he was being retaliated against by Defendants for exercising his
5 constitutional rights.

6
7 “Within the prison context, a viable claim of First Amendment retaliation entails five
8 basic elements: (1) An assertion that a state actor took some adverse action against an
9 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled
10 the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably
11 advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th
12 Cir. 2005).

13
14 Filing a grievance is a protected action under the First Amendment. Valandingham
15 v. Bojorquez, 866 F.2d 1135, 1138 (9th Cir. 1989). Pursuing a civil rights legal action is
16 also protected under the First Amendment. Bradley v. Hall, 64 F.3d 1276,1279 (9th Cir.
17 1995); Rizzo v. Dawson, 778 F.2d 527,532 (9th Cir. 1985). The Court is unsure as to
18 which of the two actions Plaintiff refers in claiming he is being retaliated against. Either
19 way, Plaintiff has satisfied the third prong of the retaliation standard. However, he fails to
20 satisfy the remaining four prongs; he fails to allege facts sufficient to sustain a claim of
21 retaliation.

22
23 Other than stating that some unnamed prison personnel knew of his earlier litigation
24 and, impliedly, had a motive to retaliate for it and other than beginning and ending his
25 statement of the case with the bare allegation that Defendants acted in retaliation, he
26 makes no statement as to how any of the complained-of conduct was in fact retaliatory.
27

1 Plaintiff does not allege that any of the **named Defendants** were aware of his past legal
2 actions. Plaintiff states he spoke twice with Defendant Ali about his medical care grievance
3 and Defendant Ali assured him that the problem would be corrected, but his Complaint
4 does not attribute any wrongful behavior to Defendant Ali. Similarly, with respect to
5 Defendant Lopez, Plaintiff states that she said she would look into Plaintiff's request for
6 treatment, but he makes no specific allegations of improper action or inaction on her part.
7 Plaintiff does not allege that either was in a position to do anything about the grievance and
8 failed to act not because of any legitimate correctional objective, but to retaliate against
9 Plaintiff for exercising his rights. Plaintiff also alleges that Defendant Zamora was on notice
10 (but does not specify of what) because she was assigned to review and respond to
11 Plaintiff's grievances and he claims that Zamora failed to take corrective action and
12 provided misleading and inaccurate information. Plaintiff fails to specify how these actions
13 violated his rights or how they were retaliatory. Plaintiff fails to mention the John Doe
14 Defendant in his statement of the case.

17 The Court is unsure as to what actions Plaintiff believes were retaliatory—the
18 transfers, the lack of medical care, the delay in processing his grievance, or some
19 combination of these. Upon amendment, Plaintiff must specify what acts he thinks are
20 retaliatory.

22 The second element of a prisoner retaliation claim focuses on causation and motive.
23 See Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009). A plaintiff must show that his
24 protected conduct was a “substantial’ or ‘motivating’ factor behind the defendant’s
25 conduct.” Id. (quoting Morgan, 874 F.2d at 1314). Although it can be difficult to establish
26 the motive or intent of the defendant, a plaintiff may rely on circumstantial evidence. Bruce
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1 v. Ylst, 351 F.3d 1283, 1289 (9th Cir. 2003) (finding that a prisoner established a triable
2 issue of fact regarding prison officials' retaliatory motives by raising issues of suspect
3 timing, evidence, and statements); Hines v. Gomez, 108 F.3d 265, 267-68 (9th Cir. 1997);
4 Pratt v. Rowland, 65 F.3d 802, 808 (9th Cir. 1995) ("timing can properly be considered as
5 circumstantial evidence of retaliatory intent"). Plaintiff has not alleged sufficient facts
6 showing suspect timing related to the alleged retaliation and the filing of the grievance or
7 lawsuit. Nor has he alleged that the named Defendants knew about his litigation history,
8 including the medical grievance he filed. Thus, Plaintiff has not stated adequate facts to
9 satisfy the second prong of his retaliation claim.
10

11 With respect to the fourth prong, "[it] would be unjust to allow a defendant to escape
12 liability for a First Amendment violation merely because an unusually determined plaintiff
13 persists in his protected activity" Mendocino Envtl. Ctr. v. Mendocino County, 192
14 F.3d 1283, 1300 (9th Cir. 1999). The correct inquiry is to determine whether an official's
15 acts would chill or silence a person of ordinary firmness from future First Amendment
16 activities. Rhodes, 408 F.3d at 568-69 (citing Mendocino Envtl. Ctr., 192 F.3d at 1300).
17 Again, Plaintiff has failed to link any facts to the alleged retaliation. The Court is not even
18 sure what acts are alleged to have been retaliatory: the transfers, the ineligibility to receive
19 treatment, etc. Thus, it cannot determine whether such acts would discourage a person
20 of ordinary firmness from exercising his First Amendment rights.
21

22 With respect to the fifth prong, a prisoner must affirmatively allege that "the prison
23 authorities' retaliatory action did not advance legitimate goals of the correctional institution
24 or was not tailored narrowly enough to achieve such goals." Rizzo, 778 F.2d at 532. This
25 is not a high burden to reach. See id. (prisoner's allegations that search was arbitrary and
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1 capricious sufficient to satisfy this inquiry). Plaintiff makes no statements regarding
2 penological goals and whether the allegedly retaliatory acts were related to such goals.
3 Plaintiff has therefore failed to satisfy the fifth prong of his retaliation claim.

4
5 Because Plaintiff has failed to allege sufficient facts to satisfy all five prongs of his
6 retaliation claim, the Court finds that he has failed to state a claim upon which relief could
7 be granted. The Court will grant Plaintiff leave to amend this claim and attempt to set forth
8 sufficient facts to state such a claim. In his amendment, Plaintiff should describe in greater
9 detail how he was retaliated against and who was doing the retaliation.

10 **B. Medical Care**

11 Plaintiff alleges inadequate medical care and deliberate indifference in violation of
12 his Eighth Amendment.

13
14 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
15 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439
16 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). The
17 two part test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical
18 need’ by demonstrating that ‘failure to treat a prisoner’s condition could result in further
19 significant injury or the unnecessary and wanton infliction of pain,’” and (2) “‘the defendant’s
20 response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting
21 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds,
22 WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc) (internal quotations
23 omitted)). Deliberate indifference is shown by “a purposeful act or failure to respond to a
24 prisoner’s pain or possible medical need, and harm caused by the indifference.” Jett, 439
25 F.3d at 1096 (citing McGuckin, 974 F.2d at 1060). In order to state a claim for violation of
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1 the Eighth Amendment, a plaintiff must allege sufficient facts to support a claim that the
2 named defendants “[knew] of and disregard[ed] an excessive risk to [Plaintiff’s] health . .
3 . .” Farmer v. Brennan, 511 U.S. 825, 837 (1994).

4
5 In applying this standard, the Ninth Circuit has held that before it can be said that
6 a prisoner’s civil rights have been abridged, “the indifference to his medical needs must be
7 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
8 cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)
9 (citing Estelle, 429 U.S. at 105-06). “[A] complaint that a physician has been negligent in
10 diagnosing or treating a medical condition does not state a valid claim of medical
11 mistreatment under the Eighth Amendment. Medical malpractice does not become a
12 constitutional violation merely because the victim is a prisoner.” Estelle, 429 U.S. at 106;
13 see also Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995); McGuckin, 974
14 F.2d at 1050, overruled on other grounds, WMX, 104 F.3d at 1136. Even gross negligence
15 is insufficient to establish deliberate indifference to serious medical needs. See Wood v.
16 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

17
18 Also, “a difference of opinion between a prisoner-patient and prison medical
19 authorities regarding treatment does not give rise to a § 1983 claim.” Franklin v. Oregon,
20 662 F.2d 1337, 1344 (9th Cir. 1981) (internal citation omitted). To prevail, Plaintiff “must
21 show that the course of treatment the doctors chose was medically unacceptable under
22 the circumstances . . . and . . . that they chose this course in conscious disregard of an
23 excessive risk to plaintiff’s health.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986)
24 (internal citations omitted). A prisoner’s mere disagreement with diagnosis or treatment
25 does not support a claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242
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1 (9th Cir. 1989).

2 Plaintiff makes one statement that he “suffered pain physical and psychological” as
3 a result of being denied treatment. (ECF No. 21, p. 9; Pl.’s Compl. p. 9.) Otherwise, he
4 makes no allegations that he was suffering symptoms from his hepatitis diagnosis and the
5 alleged delay and/or denial of treatment. Further, he does not state that any one
6 Defendant failed to adhere to the prison’s Hepatitis C guidelines. While a delay in
7 treatment or in receiving a liver biopsy can establish a constitutional violation, Plaintiff fails
8 to attribute the delay to a named Defendant. See Tatum v. Winslow, 122 Fed. Appx. 309,
9 311 (9th Cir. 2005); Hunt v. Dental Dep’t, 865 F.2d 198, 201 (9th Cir. 1989); Broughton v.
10 Cutter Labs., 622 F.2d 458, 459-60 (9th Cir. 1980); Madrid v. Gomez, 889 F. Supp. 1146,
11 1200-27 (N.D. Cal. 1995).

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14 Further, Plaintiff fails to allege that any named Defendant was deliberately
15 indifferent. His pleadings state that he was seen several times, but that he was ineligible
16 for treatment because he was eligible to be released before the treatment would be
17 completed. This seems to reflect practical realities of trying to treat an ever-changing
18 prison population; it does not show indifference.

19
20 Thus, Plaintiff has failed to state a cognizable claim. The Court will give him leave
21 to amend this claim.

22 **C. Doe Defendants**

23 Plaintiff names as a Defendant John Doe, warden or healthcare manager at CCI.
24 “As a general rule, the use of ‘John Doe’ to identify a defendant is not favored.” Gillespie
25 v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). “It is permissible to use Doe defendant
26 designations in a complaint to refer to defendants whose names are unknown to plaintiff.
27

1 Although the use of Doe defendants is acceptable to withstand dismissal of a complaint
2 at the initial review stage, using Doe defendants creates its own problem: those persons
3 cannot be served with process until they are identified by their real names.” Robinett v.
4 Correctional Training Facility, 2010 WL 2867696, *4 (N.D. Cal. July 20, 2010).

5
6 Plaintiff is advised that John Doe Defendant can not be served by the United States
7 Marshal until he has identified him as an actual individual and amended his complaint to
8 substitute the Defendant’s actual name. The burden remains on Plaintiff to promptly
9 discover the full name of Doe Defendant; the Court will not undertake to investigate the
10 names and identities of unnamed defendants. Id. The Court will grant Plaintiff leave to
11 amend this claim and attempt to set forth sufficient identification.
12

13 **D. Personal Participation and Supervisory Liability**

14 Plaintiff appears to be arguing that Defendant Doe is liable for the conduct of
15 subordinates as, according to Plaintiff’s statement of facts, he was not present and did not
16 participate in any of the complained of conduct. In fact, Defendant Doe is not mentioned
17 at all in the factual allegations that make up Plaintiff’s Complaint.
18

19 Under Section 1983, Plaintiff must demonstrate that each named Defendant
20 personally participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930,
21 934 (9th Cir. 2002). The Supreme Court has emphasized that the term “supervisory
22 liability,” loosely and commonly used by both courts and litigants alike, is a misnomer.
23 Iqbal, 129 S.Ct. at 1949. “Government officials may not be held liable for the
24 unconstitutional conduct of their subordinates under a theory of respondeat superior.” Id.
25 at 1948. Rather, each government official, regardless of his or her title, is only liable for
26 his or her own misconduct, and therefore, Plaintiff must demonstrate that each defendant,
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1 through his or her own individual actions, violated Plaintiff's constitutional rights. Id. at
2 1948-49.

3 When examining the issue of supervisor liability, it is clear that the supervisors are
4 not subject to vicarious liability, but are liable only for their own conduct. Jeffers v. Gomez,
5 267 F.3d 895, 915 (9th Cir. 2001); Wesley v. Davis, 333 F.Supp.2d 888, 892 (C.D.Cal.
6 2004). In order to establish liability against a supervisor, a plaintiff must allege facts
7 demonstrating (1) personal involvement in the constitutional deprivation, or (2) a sufficient
8 causal connection between the supervisor's wrongful conduct and the constitutional
9 violation. Jeffers, 267 F.3d at 915; Wesley, 333 F.Supp.2d at 892. The sufficient causal
10 connection may be shown by evidence that the supervisor implemented a policy so
11 deficient that the policy itself is a repudiation of constitutional rights. Wesley, 333
12 F.Supp.2d at 892 (internal quotations omitted). However, an individual's general
13 responsibility for supervising the operations of a prison is insufficient to establish personal
14 involvement. Id. (internal quotations omitted).

15 Supervisor liability under Section 1983 is a form of direct liability. Munoz v.
16 Kolender, 208 F.Supp.2d 1125, 1149 (S.D.Cal. 2002). Under direct liability, Plaintiff must
17 show that Defendant breached a duty to him which was the proximate cause of his injury.
18 Id. "The requisite causal connection can be established . . . by setting in motion a series
19 of acts by others which the actor knows or reasonably should know would cause others to
20 inflict the constitutional injury." Id. (quoting Johnson v. Duffy, 588 F.2d 740, 743-744 (9th
21 Cir. 1978)).

22 Plaintiff has not alleged facts demonstrating that Defendant Doe personally acted
23 to violate his rights. Nor has he alleged that Defendants Ali, Zamora, or Lopez violated his
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1 rights. In his Amended Complaint, Plaintiff needs to specifically link each Defendant to a
2 violation of his rights. Plaintiff shall be given the opportunity to file an amended complaint
3 curing the deficiencies in this respect.

4 **E. Appointment of Counsel**

5 Plaintiff requests appointment of counsel. This request is denied for want of
6 exceptional circumstances. See Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997);
7 see also Lassiter v. Dep't of Social Services, 452 U.S. 18, 25 (1981) (there is no
8 constitutional right to counsel in a civil case). The issues in this case are not particularly
9 complex, and Plaintiff has thus far been able to pursue his claims. This denial is without
10 prejudice to the Court's *sua sponte* appointment of counsel at a future date should the
11 circumstances of this case warrant such appointment.
12

13 **V. CONCLUSION AND ORDER**

14 The Court finds that Plaintiff's Complaint fails to state any Section 1983 claims upon
15 which relief may be granted. The Court will provide Plaintiff time to file one more amended
16 complaint to address the potentially correctable deficiencies noted above. See Noll v.
17 Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). In his Amended Complaint, Plaintiff must
18 demonstrate that the alleged incident or incidents resulted in a deprivation of his
19 constitutional rights. Iqbal, 129 S.Ct. at 1948-49. Plaintiff must set forth "sufficient factual
20 matter . . . to 'state a claim that is plausible on its face.'" Iqbal, 129 S.Ct. at 1949 (quoting
21 Twombly, 550 U.S. at 555). Plaintiff must also demonstrate that each defendant personally
22 participated in the deprivation of his rights. Jones, 297 F.3d at 934.
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24 Plaintiff should note that although he has been given the opportunity to amend, it
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1 is not for the purposes of adding new claims or defendants. Plaintiff should focus the
2 amended complaint on claims and defendants discussed herein.

3 Finally, Plaintiff is advised that Local Rule 220 requires that an amended complaint
4 be complete in itself without reference to any prior pleading. As a general rule, an
5 amended complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55,
6 57 (9th Cir. 1967). Once an amended complaint is filed, the original complaint no longer
7 serves any function in the case. Therefore, in an amended complaint, as in an original
8 complaint, each claim and the involvement of each defendant must be sufficiently alleged.
9 The amended complaint should be clearly and boldly titled "Fourth Amended Complaint,"
10 refer to the appropriate case number, and be an original signed under penalty of perjury.
11

12 Based on the foregoing, it is HEREBY ORDERED that:

- 13 1. Plaintiff request for appointment of counsel is DENIED;
- 14 2. Plaintiff's complaint is dismissed for failure to state a claim, with leave to file
15 an amended complaint within thirty (30) days from the date of service of this
16 order;
- 17 3. Plaintiff shall caption the amended complaint "Fourth Amended Complaint"
18 and refer to the case number 1:08-cv-214-AWI-MJS (PC); and
- 19 4. If Plaintiff fails to comply with this order, this action will be dismissed for
20 failure to state a claim upon which relief may be granted.
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22

23 IT IS SO ORDERED.

24 Dated: January 12, 2011
25 ci4d6

/s/ Michael J. Seng
26 UNITED STATES MAGISTRATE JUDGE