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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LAWRENCE CHRISTOPHER SMITH,

Plaintiff,

v.

D. GOSS, et al.,

Defendants.

Case No.: 1:10-cv-01814-LJO-JLT (PC)

**FINDINGS AND RECOMMENDATIONS
TO GRANT DEFENDANTS' MOTION TO
DISMISS**

(Doc. 109)

30-DAY OBJECTION DEADLINE

I. Procedural History

Plaintiff Lawrence Christopher Smith is proceeding on the following cognizable claims in the Third Amended Complaint ("3rdAC"): under the First Amendment for retaliation against Defendants Lt. Goss and Officer Langler; under the Eighth Amendment for deliberate indifference to his serious medical condition against Defendant PA Byers; and for his claim of a violation of his right to due process against Lt. Goss. (Docs. 31, 42, 47, 114, 126.)

On October 24, 2014, Defendants Byers and Langler filed a motion to dismiss on the grounds that Plaintiff fails to state a cognizable claim against them under the Eighth Amendment and asserting qualified immunity. (Doc. 109.) Plaintiff filed an opposition to which Defendants replied. (Docs. 117, 120.) The motion is deemed submitted. L.R. 230(1).

1 **II. Motion to Dismiss**¹

2 **A. Standard**

3 A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim and
4 dismissal is proper if there is a lack of a cognizable legal theory or the absence of sufficient facts
5 alleged under a cognizable legal theory. *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th
6 Cir. 2011). "[A] complaint may survive a motion to dismiss only if, taking all well-pleaded factual
7 allegations as true, it contains enough facts to 'state a claim to relief that is plausible on its face.'" *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129
8 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955
9 (2007)); *see also*, *Conservation Force*, 646 F.3d at 1242; *Moss v. U.S. Secret Service*, 572 F.3d 962,
10 969 (9th Cir. 2009).

11
12 The pleading of an inmate proceeding *pro se* "must be held to less stringent standards than
13 formal pleadings drafted by lawyers." *Hebbe*, 627 F.3d at 342, *ref. Twombly*; *Erickson v. Pardus*, 551
14 U.S. 89, 94, 127 S.Ct. 2197 (2007) (per curiam). The Court must accept the well-pleaded factual
15 allegations as true and draw all reasonable inferences in favor of the non-moving party. *Daniels-Hall*
16 *v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *Sanders v. Brown*, 504 F.3d 903, 910 (9th
17 Cir. 2007); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 996-97 (9th Cir. 2006); *Morales v. City of*
18 *Los Angeles*, 214 F.3d 1151, 1153 (9th Cir. 2000). However, while prisoners proceeding *pro se* in
19 civil rights actions are entitled to have their pleadings liberally construed and to have any doubt
20 resolved in their favor, *Hebbe*, 627 F.3d at 342, courts are not required to indulge unwarranted
21 inferences, *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009), and need not accept
22 legal conclusions "cast in the form of factual allegations," *Western Mining Council v. Watt*, 643 F.2d
23 618, 624 (9th Cir. 1981). A *pro se* litigant is entitled to notice of the deficiencies in the complaint and
24 an opportunity to amend, unless the complaint's deficiencies cannot be cured by amendment. *Noll v.*
25 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

26
27
28 ¹ In arriving at this findings and recommendations, this Court carefully reviewed and considered all arguments, supporting documents, responses thereto, objections, and other papers filed by the parties regarding Defendants' motion to dismiss. Omission of reference to an argument, document, paper, or objection is not be construed as though it was not considered.

1 **B. Materials Properly Considered by the Court on a 12(b)(6) Motion**

2 In resolving a 12(b)(6) motion, a court's review is generally limited to the operative pleading.
3 *Daniels-Hall*, 629 F.3d at 998; *Sanders*, 504 F.3d at 910; *Schneider v. California Dept. of Corr.*, 151
4 F.3d 1194, 1197 n.1 (9th Cir. 1998).

5 **1. Judicial Notice**

6 “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1)
7 generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready
8 determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
9 201(b). “A court shall take judicial notice if requested by a party and supplied with the necessary
10 information.” Fed. R. Evid. 201(c)(2).

11 In support of their motion, Defendants' request that judicial notice be taken of various
12 documents that were attached as exhibits to Plaintiff's original Complaint and attach copies of those
13 exhibits to their request. (Doc. 109-2.)

14 While Plaintiff acknowledges that exhibits to a complaint may be judicially noticed, he objects
15 that “defense counsel is trying to improperly discredit the Plaintiff's complaint with the inference of an
16 [sic] perjured complaint.” (Doc. 117, Opp., 3:1-8.) There is nothing about Defendants' request for
17 judicial notice which is improper or untoward. While there are discrepancies between exhibits to
18 Plaintiff's original Complaint and the 3rdAC, the Court does not intend to determine whether they
19 were intentionally or innocently made.

20 Plaintiff also argues that upon drafting the 3rdAC, he was "continuously deprived of his legal
21 documents needed to sufficiently recount the facts as needed to be an accurate portrayal of past events.
22 To have one expected to remember to the exact minute detail actions that occurred over three years
23 past [presumably meaning from the date he filed this action on October 1, 2010 to the date the 3rdAC
24 was filed on August 27, 2013] is absolutely ridiculous." (*Id.*, at 3:9-13.) Though Plaintiff thinks is it
25 "ridiculous" that he be expected to recall details of actions that occurred three years prior to his filing
26 of the 3rdAC, recollection of events three, five, or even ten years in the past is not uncommon, and
27 indeed is required, in protracted litigation such as this.

28 Finally, Plaintiff argues that Defendants' request for judicial notice forms a "sort of legal diary"

1 that he never submitted to the Court or defense counsel. (*Id.*, at 3:14-20.) To the contrary, Plaintiff
2 submitted all of the documents that Defendants request to have judicially noticed with his original
3 Complaint in this matter. That the Court declined to cull through all one-hundred seventy-one pages
4 of Plaintiff's original Complaint, they are all part of the record in this action and may be judicially
5 noticed since submitted with and as supporting documents to Plaintiff's original Complaint.

6 The Court may properly consider matters subject to judicial notice and documents
7 incorporated by reference in the pleading without converting a motion to dismiss to one for summary
8 judgment. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003), *see also, Durning v. First Boston Corp.*,
9 815 F.2d 1265, 1267 (9th Cir. 1987) (court may consider facts established by exhibits attached to the
10 complaint), *Mullis v. United States Bankruptcy Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987) (facts which
11 may be judicially noticed), *Mack v. South Bay Beer Distributors*, 798 F.2d 1279, 1282 (9th Cir. 1986)
12 (matters of public record, including pleadings, orders, and other papers filed with the court). Under
13 the doctrine of incorporation by reference, a court may consider a document provided by a defendant
14 that was not attached to the pleading if the plaintiff refers to the document extensively or if it forms
15 the basis of the plaintiff's claim. *Ritchie*, 342 F.3d at 908; *Daniels-Hall*, 629 F.3d at 998.

16 Thus, Defendants' request for judicial notice of the exhibits to Plaintiff's original Complaint
17 that they attached to their motion (Doc. 109-2) is **GRANTED**.

18 **C. Defendants' Motion**

19 Defendants argue that Plaintiff fails to state a cognizable claim under the Eighth Amendment
20 against them and assert that they are entitled to qualified immunity on Plaintiff's claims under the
21 Eighth Amendment.

22 **1. Eighth Amendment Claims**

23 The Screening F&R (Doc. 42) stated that the Eighth Amendment “embodies ‘broad and
24 idealistic concepts of dignity, civilized standards, humanity, and decency.’” *Estelle v. Gamble*, 429
25 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1976)). The prohibition
26 of cruel and unusual punishment requires that prison officials provide medical care to prisoners. *Id.*, at
27 104-05. To state a claim arising in the context of inadequate medical care, a plaintiff must point to
28 “acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”

1 *Id.*, at 106. Thus, a cognizable claim has two elements: “the seriousness of the prisoner’s medical
2 need and the nature of defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059
3 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th
4 Cir. 1997).

5 In screening the complaint, the Court found Plaintiff had set forth adequate facts that he
6 suffered from a serious medical condition in that he claimed that: he suffers from a congenital defect
7 of his feet in which he has no arch in either foot (Doc. 31, at 8); walking without medically prescribed
8 orthotics is very painful (*id.*); that non-prescription orthotics, such as “Dr. Scholl’s” insoles provide
9 him no relief (*id.*, at 9); and that after his arch supports and orthopedic shoes were confiscated, he
10 developed foot ulcers, callouses, and bunions (*id.*, at 8). With regard to Plaintiff’s interactions with
11 Defendant Byers, Plaintiff alleged that: in 2010, Defendant Byers refused to examine his feet and
12 refused to prescribe orthopedic shoes or supports (*id.*, at 8-9); Plaintiff “attempted to reasonably talk to
13 PA Byers concerning the need for orthotics to no avail and [Defendant Byers] again refused to
14 examine the Plaintiff’s feet” and indicated that the state budget did not allow for orthopedic shoes (*id.*,
15 at 9); and that it was not until Plaintiff was transferred to a different facility that he was examined by a
16 podiatrist who prescribed a pair of orthopedic shoes (*id.*). The Court found that Defendant Byers’
17 cursory response and apparent twice refusal to examine Plaintiff’s feet stated a cognizable Eighth
18 Amendment claim of failure to provide adequate medical care. (Doc. 42.)

19 **a. Defendant Byers**

20 Defendants argue that Plaintiff’s claim under the Eighth Amendment for deliberate indifference
21 to his serious medical needs should be dismissed. Defendants argue that (1) Plaintiff did not allege
22 that Defendant Byers acted with deliberate indifference or caused him any further harm (Doc. 109,
23 MTD, 7:10-9:2); and (2) Plaintiff’s allegations that Defendant Byers faced budgetary restrictions does
24 not demonstrate deliberate indifference (*id.*, at 9:3-10:2).

25 **(1) Deliberate Indifference**

26 Contrary to Plaintiff’s allegations, Defendants argue that Plaintiff attached exhibits to his
27 original complaint which show: Defendant Byers was assigned to evaluate Plaintiff’s inmate appeal at
28 the first formal level of review to determine whether Plaintiff should be referred to a specialist for new

1 orthotics (Doc. 109, MTD, 8:1-4, citing Doc. 109-2, Req. J.N. (Ex. A at 137) p. 13); Defendant Byers
2 evaluated whether Plaintiff should be referred to a specialist for new orthotics through the prison
3 grievance system and determined that Plaintiff's orthotics had been placed in evidence for an
4 altercation and had not been discarded by custody staff, as Plaintiff claimed in his initial description of
5 the problem (*id.*, citing Doc. 109-2, Req. Jud. Not. (Ex. A at 130, 134, 137) pp. 6, 10, 13); Defendant
6 Byers found that off-the-shelf orthotics were not a workable interim solution for Plaintiff's foot
7 condition, because they had to be custom-made (*id.* at 137); and shoe insoles were dispensed to
8 Plaintiff on June 1, 2010 (*id.*). These exhibits also show that Plaintiff's orthopedic inserts/arch
9 supports were returned to him on August 4, 2010. (Doc. 109-2, p. 18.)

10 In his opposition, Plaintiff acknowledges that Defendant Byers' only interaction with him
11 pertained to his inmate appeal for his orthotics and that Defendant Byers is a Physician's Assistant, not
12 a medical doctor, a podiatrist, or even a registered nurse. (Doc. 117, Opp., pp. 6-9.) Despite this,
13 Plaintiff argues that Defendant Byers should have examined his feet during the interview. (*Id.*)
14 Plaintiff also states that five days before the interview, Defendant Byers's immediate supervisor had
15 ordered for Plaintiff to be seen by a medical doctor and that Defendant Byers acknowledged as much
16 in his report. (*Id.*, at 6:23-7:5.)

17 Both sides point to Defendant Byers' findings from his interview of Plaintiff and agree that
18 Defendant Byers noted that Plaintiff had not been evaluated for orthotics since September of 2008;
19 that he had been referred to a medical doctor for evaluation and possible orthotics; that insoles were
20 given to him as there was no interim accommodation for his orthotics since they were custom made
21 and were merely placed in evidence -- not discarded. (Doc. 117, Opp., p. 25; Doc. 109-2, Req. JN, p.
22 13; Doc. 1, Orig. Comp., p. 137.) Both sides agree that insoles were approved by S. Oder, RN. (*Id.*)
23 It is also apparent from this document that Defendant Byers merely conducted the interview, as
24 required by Section 3084.7(e) of Title 15 of the California Administrative Code, and documented his
25 findings, but that S. Oder, RN actually made the decision and was responsible for the disposition of
26 Plaintiff's inmate appeal at that level. (*Id.*) Both sides also agree that the only interaction Plaintiff had
27 with Defendant Byers was during the interview for the first level of his inmate appeal in which
28 Plaintiff sought to obtain orthotics. (Doc. 109, MTD, 8:2-11; Doc. 117, Opp., pp. 6-9.)

1 Plaintiff's claim against Defendant Byers was found cognizable based on Plaintiff's allegations
2 that Defendant Byers refused, seemingly twice, to examine Plaintiff on allegations which did not
3 appear limited to an interview of an inmate appeal. (Doc. 42, Screen F&R, 14:7-15.) This Court, with
4 its burgeoning caseload, did not have the luxury of ferreting through the voluminous exhibits that
5 Plaintiff submitted with his prior pleadings for clarification when the 3rdAC was screened.

6 It has now been brought to light that the contact with Defendant Byers of which Plaintiff
7 complains, occurred solely during an interview at the first level on Plaintiff's inmate appeal attempting
8 to obtain orthotics for his podiatric condition. Given this clarification, Plaintiff's claim against
9 Defendant Byers for violation of his rights, for actions during an interview on an inmate
10 appeal/grievance under the Eighth Amendment is not cognizable. This Court has found that other
11 appellate circuits have effectively held that non-physician defendants cannot "be considered
12 deliberately indifferent simply because they failed to respond directly to the medical complaints of a
13 prisoner who was already being treated by the prison doctor" and if "a prisoner is under the care of
14 medical experts . . . a non-medical prison official will generally be justified in believing that the
15 prisoner is in capable hands." *Spruill v. Gillis*, 372 F.3d 218, 236 (3rd Cir. 2004); *see also Greeno v.*
16 *Daley*, 414 F.3d 645, 656 (7th Cir. 2005) (holding that "[o]nce a [non-medical] prison grievance
17 examiner becomes aware of potential mistreatment, the Eight Amendment does not require him or her
18 to do more than 'review [the prisoner's] complaints and verif[y] with the medical officials that [the
19 prisoner] was receiving treatment.'" This Court concurs with the analysis in *Greeno* and *Spruill*.

20 Defendant Byers's duties and abilities to address Plaintiff's need for his orthotics were limited
21 in as much as: (1) Defendant Byers is merely a physician's assistant and is not a medical doctor, or
22 even a registered nurse; (2) Defendant Byers only had contact with Plaintiff during an interview about
23 his inmate appeal regarding his orthotics; (3) as part of his findings from that interview, Defendant
24 Byers verified that an appointment for Plaintiff with a medical doctor had already been ordered by
25 qualified medical personnel, an RN; (4) Defendant Byers also discovered that Plaintiff's custom
26 orthotics had not been discarded, but were being held in evidence; (5) Defendant Byers verified that
27 Plaintiff was to receive shoe insoles until his orthotics were released; and (6) Defendant Byers was
28 merely performing the duty of interviewing Plaintiff regarding his inmate appeal while the actual

1 decision/disposition was made by a registered nurse. (See Doc. 117, Opp., p. 25; Doc. 109-2, Req. JN,
2 p. 13; Doc. 1, Orig. Comp., p. 137.) While Defendant Byers saw Plaintiff in the context of Plaintiff's
3 inmate appeal for medical appliances, Defendant Byers was not a decision-maker as to the appeal -- all
4 decisions were made by persons with medical degrees. Thus, the analysis in *Greeno* and *Spruill*
5 reasonably extends to this situation to exonerate Defendant Byers from Plaintiff's claim of deliberate
6 indifference stemming merely from his interview of Plaintiff regarding his inmate appeal.

7 Further, a claim under the Eighth Amendment against individual defendants must be addressed
8 via "a very individualized approach which accounts for the duties, discretion, and means of each
9 defendant." *Leer v. Murphy*, 844 F.2d 628, 633-34 (9th Cir. 1988) *citing with approval Williams v.*
10 *Bennett*, 689 F.2d 1370, 1384 (11th Cir. 1982) ("There can be no duty, the breach of which is
11 actionable, to do that which is beyond the power, authority, or means of the charged party. One may
12 be callously indifferent to the fate of prisoners and yet not be liable for their injuries. Those whose
13 callous indifference results in liability are those under a duty -- possessed of authority and means -- to
14 prevent the injury.") Since Defendant Byers was only a physician's assistant conducting the interview
15 of Plaintiff on his inmate appeal, the authority and/or means to ameliorate Plaintiff's podiatric
16 condition were beyond the scope of his duties and there is no deliberate indifference given that
17 Defendant Byers investigated Plaintiff's complaints and referred them to the medical provider(s) who
18 could be expected to address Plaintiff's concerns.

19 If the level of Defendant Byers' involvement in merely conducting the interview with Plaintiff
20 on his inmate appeal had been apparent at the time the 3rdAC was screened, Plaintiff's deliberate
21 indifference claim against Defendant Byers would not have been found cognizable. Thus, Plaintiff's
22 claim against Defendant Byers for deliberate indifference to Plaintiff's serious medical needs in
23 violation of the Eighth Amendment should be dismissed.

24 (1) **Budgetary Restraints**

25 Defendants argue that Plaintiff's allegations regarding budgetary restrictions demonstrate that
26 no violation occurred. (See Doc. 109, MTD, 9:3-10:2.) Plaintiff argues that those allegations show
27 that Defendant Byers used budgetary restrictions as a pretext to excuse illegal behavior. (See Doc.
28 117, Opp., 10:7-11:6.) While Plaintiff's allegations regarding the state budget was cursorily alluded to

1 in the Screening F&R (Doc. 42, Screen F&R, 14:11-12), it was neither required, nor considered as
2 Plaintiff's claim against Defendant Byers was found cognizable based on the inference that Defendant
3 Byers twice refused to examine Plaintiff in a medical setting.

4 In any event, an individual defendant is not liable beyond their "duties, discretion and
5 [available] means," *Leer v. Murphy*, 844 F.2d 628, 633-34 (9th Cir. 1988) and availability of
6 resources define the spectrum of choices an official has at his or her disposal, *Peralta v. Dillard*, 744
7 F.3d 1076, 1083 (9th Cir. 2013) (overruling *Jones v. Johnson*, 781 F.2d 769 (9th Cir. 1986) and *Snow*
8 *v. McDaniel*, 681 F.3d 978 (9th Cir. 2012) to the extent they held differently). A defendant cannot be
9 held to be deliberately indifferent for failing to prescribe that which is unavailable due to budgetary
10 restraints. It is true that Plaintiff has alleged that Defendant Byers mentioned budgetary constraints on
11 the orthotics Plaintiff desired, (*see*, Doc. 31, 3rdAC, p. 9 alleging that Defendant Byers "stated that the
12 state's budget was not allowing for many prisoners to receive orthopedic shoes anymore" and Doc.
13 109-2, Req. J.N.. at p. 21, Doc. 24, 2ndAC, at p. 9 alleging that Defendant Byers explained that the
14 state's budget no longer allowed medical staff to "indiscriminately" issue orthopedic shoes to
15 inmates). However, this Court never considered it even remotely possible that Defendant Byers, a PA,
16 would have any input as to budgetary decisions as to what medical devices would or would not be
17 provided to inmates and this was not a basis upon which Plaintiff's allegations against Defendant
18 Byers under the Eighth Amendment were found cognizable. Any such allegations do not resuscitate
19 Plaintiff's claim against Defendant Byers in light of the lack of deliberate indifference discussed
20 above.

21 **b. Defendant Langler**

22 Defendants seek clarification whether Plaintiff was found to have stated a cognizable claim
23 against Defendant Langler in the 3rdAC. (Doc. 109, 3:16-18, 6:22-7:8.) If the response is in the
24 affirmative, they seek dismissal since Plaintiff did not state any factual allegations regarding his
25 medical condition against Defendant Langler in the 3rdAC.

26 This inquiry was understandably generated by a clerical error contained in the Findings and
27 Recommendation that screened ("Screening F&R") the 3rdAC and provided the basis upon which this
28 action is proceeding, which was adopted by the District Judge. (*See* Docs. 42, 47.) The introductory

1 "Background" section of the Screening F&R, errantly stated that Plaintiff had stated a cognizable
2 claim under the Eighth Amendment against "Defendants PA Byers and Officer Langler." (Doc. 42,
3 2:1-6.) This is the only such errant reference in the Screening F&R. The Screening F&R did not
4 discuss any allegations under the Eighth Amendment against Defendant Langler as the 3rdAC
5 contained none; the final "Findings and Recommendations" section of the Screening F&R itemized the
6 cognizable claims found in the 3rd AC and did not state that any had been found under the Eighth
7 Amendment against Defendant Langler (Doc. 42, 17:3-11); and the Order Adopting the Screening
8 F&R accurately reflected the claims found to be cognizable (Doc. 47, 1:28-2:6) -- which did not
9 include a claim under the Eighth Amendment against Defendant Langler. Further, Plaintiff admits that
10 he did not allege a violation of his rights under the Eighth Amendment against Defendant Langler.
11 (Doc. 117, Opp., 5:5-14.)

12 Thus, there is no claim in this action against Defendant Langler for violation of Plaintiff's
13 rights under the Eighth Amendment to be dismissed.

14 **c. Qualified Immunity**

15 While Defendants argued that both Defendants Byers and Langler are entitled to qualified
16 immunity, since it has been clarified that there is no claim under the Eight Amendment against
17 Defendant Langler and the claim against Defendant Byers is being dismissed, their argument for
18 qualified immunity need not be considered.

19 **D. Leave to Amend**

20 Although leave to amend should be freely granted, a district court may dismiss for failure to
21 state a claim without leave to amend where amendment would fail to cure the pleading deficiencies
22 and amendment would be futile. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir.
23 2011).

24 In this action, leave to amend would be futile because Plaintiff cannot change the level of
25 Defendant Byers' involvement regarding his podiatric condition by amendment, nor can he change the
26 exhibits to his original Complaint which clarify Defendant Byers' limited involvement regarding
27 Plaintiff's orthotic inserts. Thus, Plaintiff's claim against Defendant Byers for deliberate indifference
28 to Plaintiff's serious medical needs in violation of the Eighth Amendment should be dismissed without

1 leave to amend.

2 **III. Recommendations**

3 Based on the foregoing, the Court HEREBY RECOMMENDS that the motion to dismiss filed
4 by Defendants Byers and Langler, filed on October 24, 2014 (Doc. 109), be GRANTED as follows:

- 5 1. Defendants' motion to dismiss Plaintiff's deliberate indifference claim against
6 Defendant Byers be GRANTED without leave to amend and Defendant Byers
7 be dismissed from this action; and
- 8 2. the Screening F&R (Doc. 42) is clarified to the extent that no claim for
9 deliberate indifference was found cognizable against Defendant Langler such
10 that Defendants' motion to dismiss any deliberate indifference claim against
11 Defendant Langler should be DISREGARDED as moot.

12 These Findings and Recommendations will be submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within 30 days** after
14 being served with these Findings and Recommendations, the parties may file written objections with
15 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and
16 Recommendations." The parties are advised that failure to file objections within the specified time
17 may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, __ F.3d __, __, No. 11-17911,
18 2014 WL 6435497, at *3 (9th Cir. Nov. 18, 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th
19 Cir. 1991)).

20
21 IT IS SO ORDERED.

22 Dated: March 18, 2015

/s/ Jennifer L. Thurston
23 UNITED STATES MAGISTRATE JUDGE