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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GRAHAM ROGER-LEE DE-LUIS CONTI,

Plaintiff,

v.

M. CATES, et al.,

Defendants.

Case No. 1:10-cv-01852-LJO-MJS (PC)

**FINDINGS AND RECOMMENDATIONS
DISMISSING FIFTH AMENDED
COMPLAINT FOR FAILURE TO STATE
A CLAIM (1) WITH LEAVE TO AMEND
CSATF CLAIMS AGAINST
DEFENDANTS SCHWARZENEGGER,
CATES, ALLISON AND DOES 1-10, and
(2) WITHOUT LEAVE TO AMEND AND
WITHOUT PREJUDICE AS TO ALL
OTHER CLAIMS AND DEFENDANT
EVANS**

(ECF No. 39)

**OBJECTIONS DUE WITHIN FOURTEEN
DAYS**

Plaintiff Graham Roger-Lee De-Luis-Conti is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

The action was commenced in the Northern District of California on November 19, 2008 and later transferred to this Court. Plaintiff filed several amended complaints prior to the Court screening his action. The Fourth Amended Complaint was dismissed for failure to state a claim, but Plaintiff was given leave to amend. Plaintiff filed a fifth

1 amended complaint which the Court now screens.

2 For the reasons set forth below, the undersigned recommends the fifth amended
3 complaint be dismissed for failure to state a claim, with leave to amend claims arising at
4 the California Substance Abuse and Treatment Facility (CSATF) against Defendants
5 Schwarzenegger, Cates, Allison and Does 1-10, and without leave to amend as to all
6 other claims and Defendant Evans.

7 **I. SCREENING REQUIREMENT**

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

17 **II. PLEADING STANDARD**

18 Section 1983 “provides a cause of action for the deprivation of any rights,
19 privileges, or immunities secured by the Constitution and laws of the United States.”
20 Wilder v. Virginia Hosp. Ass’n, 496 U.S. 498, 508 (1990), quoting 42 U.S.C. § 1983.
21 Section 1983 is not itself a source of substantive rights, but merely provides a method
22 for vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386,
23 393-94 (1989).

24 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)
25 that a right secured by the Constitution or laws of the United States was violated and (2)
26 that the alleged violation was committed by a person acting under the color of state law.
27 See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243,
28 1245 (9th Cir. 1987).

1 A complaint must contain “a short and plain statement of the claim showing that
2 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations
3 are not required, but “[t]hreadbare recitals of the elements of a cause of action,
4 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.
5 662, 678 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).
6 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim that is
7 plausible on its face.” Id. Facial plausibility demands more than the mere possibility that
8 a defendant committed misconduct and, while factual allegations are accepted as true,
9 legal conclusions are not. Id. at 667-68.

10 **III. PLAINTIFF’S ALLEGATIONS**

11 Plaintiff, a paraplegic in the custody of the California Department of Corrections
12 and Rehabilitation (CDCR), is currently housed at the CSATF. Since his incarceration in
13 2001, Defendants former Governor Schwarzenegger, former CDCR Secretary Cates,
14 former Salinas Valley State Prison (SVSP) Warden Evans, former CSATF Warden
15 Allison, and Does 1-10 subjected him to overcrowding and extensive lockdowns,
16 indifference to medical needs and conditions of confinement, discrimination based on
17 disability and gender, denial of disability accommodation, denial of vocational training,
18 retaliation, and interference with prison mail. These violations occurred at various
19 CDCR facilities and violated his federal and state rights.¹

20 Plaintiff specifically alleges that:

21 While at San Quentin State Prison, Duel Vocational Institution and SVSP, he was
22 housed in non-ADA, overcrowded conditions, subjected to extensive lockdowns, denied
23 appropriate yard access and proper clothing, denied transfer to an appropriate facility
24 because of his disability, discriminated against (in his ability to purchase certain items)
25 because of his gender, deliberately given improper medication, and denied a properly
26 functioning wheelchair.

27 _____
28 ¹ Plaintiff alleges he has been incarcerated at San Quentin State Prison, Duel Vocational State Prison,
SVSP, Corcoran State Prison, and CSATF.

1 He has not received any rehabilitation and vocational training.

2 Staff at SVSP interfered with his confidential and legal mail, falsified mail, and
3 retaliated against him (for filing accommodation requests) by housing him in an
4 overcrowded, non-ADA gym proximal to large fans, causing him serious health
5 problems. SVSP doctors Lee and Grillo gave Plaintiff the wrong treatment and
6 medication.²

7 Staff at CSATF retaliated against him for filing this litigation by housing him in an
8 overcrowded, unsanitary, non-ADA gym, depriving him of amenities available to others
9 and exposing him to extremes of hot and cold weather. CSATF staff disposed of his
10 broken wheelchair upon its replacement to prevent Plaintiff from presenting the broken
11 wheelchair to the Court. CSATF doctor Onyeje knowingly prescribed the wrong
12 medication and failed to explain side-effects, causing serious pain.³

13 Staff at SVSP and CSATF failed to timely deliver a medically prescribed seat for
14 Plaintiff's wheelchair.

15 Plaintiff seeks monetary damages; an order that the CDCR reduce the prison
16 population to single cell occupancy, provide appropriate medical care, stop retaliation,
17 stop disability and gender discrimination, repatriate desirous inmates who like Plaintiff
18 are foreign nationals, re-open closed vocational programs, close or re-fit all gyms
19 dormitories, provide for timely receipt of medical appliances and for confidentiality of
20 mail, and provide him with copies of his legal documents should he be transferred.

21 **IV. THE FIFTH AMENDED COMPLAINT FAILS TO STATE A CLAIM - LEAVE TO**
22 **AMEND APPROPRIATE ONLY FOR CSATF CLAIMS AGAINST DEFENDANTS**
23 **SCHWARZENEGGER, CATES, ALLISON AND DOES 1-10**

24 **A. Dismissal of Unrelated Claims Pursuant to Rule 18**

25 Plaintiff asserts claims arising at various CDCR facilities over an 11 year period.
26 Fed. R. Civ. P. 18(a) states: "[a] party asserting a claim to relief as an original claim,

27 _____
28 ² SVSP Drs. Lee and Grillo are not named defendants in this action.

³ CSATF Dr. Onyeje is not a named defendant in this action.

1 counterclaim, cross-claim, or third-party claim, may join, either as independent or as
2 alternate claims, as many claims, legal, equitable, or maritime, as the party has against
3 an opposing party.” However, unrelated claims against different defendants belong in
4 different suits, not only to prevent the sort of morass [a multiple claim, multiple
5 defendant] suit produce[s], but also to ensure that prisoners pay the required filing fees-
6 for the Prison Litigation Reform Act limits to 3 the number of frivolous suits or appeals
7 that any prisoner may file without prepayment of the required fees. 28 U.S.C. §
8 1915(g).” George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007).

9 The fact that claims are premised on the same type of constitutional violation(s)
10 against multiple defendants does not make them factually related. Claims are related
11 where they are based on the same precipitating event, or a series of related events
12 caused by the same precipitating event.

13 Plaintiff’s fifth amended complaint, like his fourth amended complaint, alleges
14 unrelated claims involving distinct incidents at distinct CDCR facilities and, as such,
15 violates Rule 18(a).⁴ Plaintiff was advised in the previous screening order that such
16 amassing of unrelated claims is not permissible and would result in dismissal of
17 unrelated claims. So it shall be.

18 All claims not arising at CSATF and all claims against Defendant former SVSP
19 warden Evans should be dismissed from this action, without prejudice, pursuant to Rule
20 18.

21 **B. Failure to Link Supervisory Defendants**

22 Plaintiff claims supervisory Defendants are responsible for the alleged violations
23 because they decide controlling rules, regulations and policies. However, a § 1983
24 plaintiff must demonstrate that each defendant personally participated in the deprivation
25 of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). There must be an

26 _____
27 ⁴ Claims against prison personnel at different facilities are generally unrelated, and Plaintiff alleges
28 nothing to suggest the claims might conceivably be related.

1 actual connection or link between the actions of the defendants and the deprivation
2 alleged to have been suffered by the plaintiff. See Monell v. Department of Social
3 Services, 436 U.S. 658 (1978). Government officials may not be held liable for the
4 actions of their subordinates under a theory of respondeat superior. Iqbal, 129 S.Ct. at
5 1948. Since a government official cannot be held liable under a theory of vicarious
6 liability in § 1983 actions, Plaintiff must plead sufficient facts showing that the official
7 has violated the Constitution through his own individual actions. Id. at 1948.

8 Plaintiff does not connect or “link” supervisory Defendants to the alleged rights
9 violations. Plaintiff does not allege his rights were violated as a result of a decision by
10 CDCR and its policymaking officials or a persistent and widespread CDCR practice.
11 Connick v. Thompson, 131 S.Ct. 1350, 1359 (2011). Nor does Plaintiff explain how
12 these individuals personally acted or failed to act so as to violate his rights.

13 If Plaintiff chooses to amend, he should provide factual detail demonstrating
14 which supervisory Defendants did or did not do what, when, and why and how his rights
15 were violated.

16 **C. No Federal Rights Violation⁵**

17 Plaintiff re-alleges claims asserted in the fourth amended complaint. These
18 claims remain deficient for the reasons stated in the previous screening order. The
19 deficiencies and the corrections needed are again discussed below.

20 1. Indifference – Conditions of Confinement and Failure to Protect

21 Plaintiff claims Defendants have been indifferent to and failed to protect him from
22 overcrowded conditions, extensive lockdowns, and denial of yard access and have not
23 provided him with proper clothing, rehabilitation and vocational training. The Eighth
24 Amendment protects prisoners from inhumane methods of punishment and from

25 ⁵ The Court need not address the viability of state law negligence and spoliation of evidence claims
26 because the Court will not exercise supplemental jurisdiction over state law claims absent a cognizable
27 federal claim. 28 U.S.C. § 1367(a); Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 805
28 (9th Cir. 2001); see also Gini v. Las Vegas Metropolitan Police Dep't, 40 F.3d 1041, 1046 (9th Cir. 1994).
“When . . . the court dismisses the federal claim leaving only state claims for resolution, the court should
decline jurisdiction over the state claims and dismiss them without prejudice.” Les Shockley Racing v.
National Hot Rod Ass'n, 884 F.2d 504, 509 (9th Cir. 1989).

1 inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th
2 Cir. 2006). Extreme deprivations are required, and only those deprivations denying the
3 minimal civilized measure of life's necessities are sufficiently grave to form the basis of
4 an Eighth Amendment violation. Hudson v. McMillian, 503 U.S. 1, 9 (1992). The plaintiff
5 must allege facts sufficient to support a claim that prison officials knew of and
6 disregarded a substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 847
7 (1994); Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998). If failure to protect is
8 alleged, the defendant must have had a reasonable opportunity to intervene. Orwat v.
9 Maloney, 360 F.Supp.2d 146, 155 (D. Mass. 2005), citing Gaudreault v. Municipality of
10 Salem, 923 F.2d 203, 207 n.3 (1st Cir. 1991).

11 Prison officials must provide prisoners with food, clothing, shelter, sanitation,
12 medical care, and personal safety. See Toussaint v. McCarthy, 801 F.2d 1080, 1107
13 (9th Cir. 1986), abrogated in part on other grounds by Sandin v. Conner, 515 U.S. 472
14 (1995); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982). Here Plaintiff does not
15 explain the nature, extent and duration of risk presented; demonstrate any of the
16 Defendants knew of and disregarded such risk or were able to and failed to protect him;
17 and how he was harmed.

18 Plaintiff does not state what additional accommodations were required by him,
19 why, whether he requested same and, if so, whether and how Defendants responded,
20 and what reason was given for their response. Plaintiff also fails to allege he suffered
21 any harm as a result of the absence of accomodation.

22 Mere allegations of overcrowding, Rhodes v. Chapman, 452 U.S. 337, 348
23 (1981); Balla v. Idaho State Bd. of Corr., 869 F.2d 461, 471 (9th Cir. 1989), lockdowns,
24 Pepperling v. Crist, 678 F.2d 787, 789 (9th Cir. 1982), and lack of outdoor exercise,
25 Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996), citing Spain v. Proconier, 600 F.2d
26 189, 199 (9th Cir. 1979), amended by 135 F.3d 1318 (9th Cir. 1998), do not alone
27 demonstrate a constitutional violation. "Idleness and the lack of [vocational and
28 rehabilitative] programs" do not violate the Eighth Amendment. See Toussaint, 801 F.2d

1 at 1106-08. The lack of such programs alone likewise does not state a federal claim.

2 If Plaintiff chooses to amend, he should state facts identifying a serious risk of
3 harm and the accommodation at CSATF he deems necessary and specifically identify
4 the Defendants, whether named or unknown, whose personal acts or omissions
5 resulted in the alleged violation of Plaintiff's federal rights, causing harm.

6 2. Retaliation

7 Plaintiff claims Defendants retaliated for his filing this litigation by housing him in
8 an overcrowded, unsanitary, non-ADA gym, depriving him of amenities available to
9 others and exposing him to extremes of hot and cold weather.

10 “Within the prison context, a viable claim of First Amendment retaliation entails
11 five basic elements: (1) an assertion that a state actor took some adverse action against
12 an inmate (2) because of (3) that inmate's protected conduct, and that such action (4)
13 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not
14 reasonably advance a legitimate correctional goal.” Rhodes v. Robinson, 408 F.3d 559,
15 567–68 (9th Cir. 2005).

16 Plaintiff has not alleged facts suggesting, even circumstantially, his protected
17 conduct was a “substantial or motivating factor behind the defendant's conduct.”
18 Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir.2009), quoting Sorrano's Gasco, Inc. v.
19 Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989), and the absence of a penological
20 purpose.

21 If Plaintiff chooses to amend, he should state facts demonstrating that named
22 Defendants at CSATF retaliated against him for having engaged in protected conduct,
23 that there was no penological justification for their action and that he suffered harm as a
24 result.

25 3. Discrimination and Failure to Accommodate

26 Plaintiff claims Defendants discriminated against him because of his disability
27 and gender, denying him accommodation, transfer to an appropriate facility, and
28 purchase of certain personal items.

1 a. Equal Protection

2 A Fourteenth Amendment discrimination claim requires Plaintiff show he was
3 intentionally discriminated against because he is male, Comm. Concerning Cmty.
4 Improvement v. City of Modesto, 583 F.3d 690, 702–03 (9th Cir. 2009); Serrano v.
5 Francis, 345 F.3d 1071, 1082 (9th Cir. 2003), or that he was treated differently
6 (disparately) from those similar to him for no valid purpose. Engquist v. Oregon
7 Department of Agriculture, 553 U.S. 591, 601–02 (2008); Village of Willowbrook v.
8 Olech; 528 U.S. 562, 564 (2000); Lazy Y Ranch Ltd. v. Behrens, 546 F.3d 580, 592 (9th
9 Cir. 2008); North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008).

10 Plaintiff does not demonstrate Defendants intentionally discriminated against him
11 at CSATF based on his gender, or treated him differently from similarly situated inmates
12 without valid penological purpose. That female inmates may be allowed to purchase
13 items different from and additional to those available for purchase by male inmates does
14 not alone suggest Defendants' intent to discriminate against males or preclude some
15 other explanation. Conjecture is not a basis for a federal claim.

16 Nor does Plaintiff demonstrate he was treated differently from others like him
17 without valid penological purpose.⁶ It is unclear how he identifies inmates thought to be
18 similarly situated, and why he believes such inmates were treated differently from him
19 without any valid penological justification.

20 If Plaintiff chooses to amend, he should state facts demonstrating named
21 Defendants' intentional discrimination or that named Defendants treated him unjustly
22 and differently from similarly situated inmates at CSATF, causing harm.

23 b. ADA

24 A failure to accommodate claim under the Americans with Disabilities Act (ADA),
25 42 U.S.C. § 12132, requires a showing Plaintiff has been "improperly excluded from

26 _____
27 ⁶ "Because the disabled do not constitute a suspect class for equal protection purposes, a governmental
28 policy that purposefully treats the disabled differently from the non-disabled need only be rationally
related to legitimate legislative goals to pass constitutional muster." Pierce v. County of Orange, 526 F.3d
1190, 1225 (9th Cir. 2008), citing Lee v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir. 2001).

1 participation in, and denied the benefits of, a prison service, program, or activity on the
2 basis of his physical handicap.” Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir.
3 1997). Lack of treatment for Plaintiff’s medical condition is not a basis for an ADA claim.
4 Burger v. Bloomberg, 418 F.3d 882, 883 (8th Cir. 2005) (medical treatment decisions
5 not basis for ADA claims).

6 “To recover monetary damages under Title II of the ADA, a plaintiff must prove
7 intentional discrimination on the part of the defendant,” and the standard for intentional
8 discrimination is deliberate indifference. Duvall v. County of Kitsap, 260 F.3d 1124,
9 1138 (9th Cir. 2001).

10 Plaintiff does not provide facts suggesting that named Defendants participated in,
11 or were otherwise responsible for, excluding him from numerous activities, programs,
12 and benefits otherwise available to him at CSATF, by reason of his disability. Plaintiff
13 does not provide his classification and chrono status or basis for entitlement to facility
14 transfer. No facts suggest why and how named Defendants denied him appropriate
15 accommodation and transfer because of his disability.

16 If Plaintiff chooses to amend, he should set forth sufficient facts suggesting
17 named Defendants excluded him from participation in or otherwise discriminated
18 against him with regard to CDCR services, programs, or activities at CSATF by reason
19 of his disability, causing harm.

20 4. Interference with Mail

21 Plaintiff claims Defendants interfered with and falsified his confidential and legal
22 mail. While prisoners have a First Amendment right to send and receive mail, Witherow
23 v. Paff, 52 F.3d 264, 265 (9th Cir. 1995); Jones v. Brown, 461 F.3d 353, 358 (3d Cir.
24 2006), the right to receive mail is subject to substantial limitation and a regulation or
25 policy infringing on the right will be upheld if it is reasonably related to legitimate
26 penological interests. Prison Legal News v. Lehman, 397 F.3d 692, 699 (9th Cir. 2005),
27 citing Turner v. Safley, 482 U.S. 78, 89 (1987).

28 Plaintiff claims possible interference and falsification, by unnamed individuals as

1 to unspecified mail alleged to be confidential and legal. No harm or injury attributed to
2 named Defendants is alleged. Plaintiff does not explain the nature and extent of
3 interference with his mail at CSATF, what reason prison officials gave for the
4 interference, whether the alleged interference conforms with facility practice and prison
5 regulations, and harm caused.

6 Plaintiff should note that mere opening and visually inspection of legal and non-
7 legal correspondence does not alone state a federal claim. Wolff v. McDonnell, 418 U.S.
8 539, 576–77 (1974); Mitchell v. Dupnick, 75 F.3d 517, 523 (9th Cir. 1996); Samonte v.
9 Maglinti, 2007 WL 1963697, at *5 (D.Hawai'i July 3, 2007) (whether legal mail may be
10 opened outside the inmate's presence is an open question in the Ninth Circuit).

11 It is also unclear whether Plaintiff alleges his outgoing mail is being censored.
12 Censorship of outgoing prisoner mail is justified if the following criteria are met: (1) the
13 regulation furthers an important or substantial government interest unrelated to the
14 suppression of expression, and (2) the limitation on First Amendment freedoms must be
15 no greater than is necessary or essential to the protection of the particular governmental
16 interest involved. Procunier v. Martinez, 416 U.S. 396, 413 (1974), overturned in part by
17 Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989). Here the facts alleged are
18 insufficient to determine whether Plaintiff can state such a claim.

19 Finally, it is unclear whether Plaintiff's "legal" mail is in issue. A prison need not
20 treat all mail sent to government agencies and officials as legal mail. See O'Keefe v.
21 Van Boening, 82 F.3d 322, 326 (9th Cir. 1996). Plaintiff must allege facts sufficient for
22 the Court to determine a basis for finding the mail at issue to be legal mail.

23 If Plaintiff chooses to amend, he should explain in reasonable detail how named
24 Defendants violated his First Amendment rights at CSATF.

25 5. Indifference – Medical Needs

26 Plaintiff claims Defendants deliberately provided improper medication and
27 treatment. Specifically, he suggests Defendants gave him a defective wheelchair, failed
28 to disclose side effects of medications, and delayed delivery of a prescribed seat for his

1 wheelchair.

2 “[T]o maintain an Eighth Amendment claim based on prison medical treatment,
3 an inmate must show deliberate indifference to serious medical needs.” Jett v. Penner,
4 439 F.3d 1091, 1096 (9th Cir. 2006), quoting Estelle v. Gamble, 429 U.S. 97, 106
5 (1976). This requires Plaintiff to show (1) “a serious medical need by demonstrating that
6 failure to treat a prisoner’s condition could result in further significant injury or the
7 unnecessary and wanton infliction of pain,” and (2) “the defendant’s response to the
8 need was deliberately indifferent.” Jett, 439 F.3d at 1096, quoting McGuckin v. Smith,
9 974 F.2d 1050, 1059 (9th Cir. 1992).

10 Where a delay in treatment is alleged, the plaintiff must show delay led to further
11 significant injury or the unnecessary and wanton infliction of pain. Jett, 439 F.3d at
12 1096. The delay only rises to a constitutional violation if it caused the prisoner
13 “substantial harm.” Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990).

14 Misdiagnosis and/or negligent treatment, if such occurred, would not be sufficient
15 to show indifference. See Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir.
16 1980), citing Estelle, 429 U.S. at 105–06 (mere ‘indifference,’ ‘negligence,’ or ‘medical
17 malpractice’ will not support medical indifference claim).

18 Plaintiff states his belief, unsupported by any facts, that named Defendants
19 provided “wrong” and “improper” and negligent treatment. This is not sufficient to state a
20 federal claim.

21 If Plaintiff chooses to amend, he should demonstrate with facts that named
22 Defendants knowingly denied, delayed, or interfered with a response to his serious
23 medical need or provided unacceptable medical treatment.

24 6. Injunctive Relief

25 Plaintiff seeks an order for broad institutional relief, to benefit him and other
26 inmates, relating to the above claims.

27 Injunctive relief, whether temporary or permanent, is an “extraordinary remedy,
28 never awarded as of right.” Winter v. Natural Res. Defense Council, 555 U.S. 7, 22

1 (2008). To prevail, the party seeking injunctive relief must show either “(1) a likelihood of
2 success on the merits and the possibility of irreparable injury, or (2) the existence of
3 serious questions going to the merits and the balance of hardships tipping in [the
4 moving party's] favor.” Oakland Tribune, Inc. v. Chronicle Publishing Company, Inc.,
5 762 F.2d 1374, 1376 (9th Cir. 1985), quoting Apple Computer, Inc. v. Formula
6 International, Inc., 725 F.2d 521, 523 (9th Cir. 1984); see also City of Los Angeles v.
7 Lyons, 461 U.S. 95, 101–102 (1983) (plaintiff must show “real and immediate” threat of
8 injury). Requested relief must be narrowly drawn and the least intrusive means
9 necessary to correct the violation. 18 U.S.C. § 3626(a)(1)(A).

10 Plaintiff has not stated any cognizable federal claim, or threat or hardship
11 therefrom against named Defendants for the reasons stated above. He may not seek
12 relief on behalf of other inmates. Halet v. Wend Inv. Co., 672 F.2d 1305, 1308 (9th Cir.
13 1982), citing Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 80
14 (1978) (party must assert [his] own rights not those of third parties); accord, Warth v.
15 Seldin, 422 U.S. 490, 499 (1974). Plaintiff has not shown he needs and is entitled to
16 injunctive relief.

17 If Plaintiff chooses to amend, he should allege facts showing a likelihood of or
18 serious questions as to the merits, as against named Defendants, and the need for
19 specific, immediate injunctive relief to avoid hardship and injury.

20 **V. LEGAL CONCLUSIONS AND RECOMMENDATIONS**

21 The fifth amended complaint fails to state any federal claim. Claims not arising at
22 CSATF and Defendant Evans should be dismissed from this action without prejudice
23 pursuant to Rule 18. Plaintiff should be allowed to amend claims arising at CSATF
24 against Defendants Schwarzenegger, Cates, Allison, and Does 1-10.

25 Accordingly, for the reasons set forth above, it is HEREBY RECOMMENDED
26 that the fifth amended complaint be dismissed for failure to state a claim, with leave to
27 amend only claims arising at CSATF against Defendants Schwarzenegger, Cates,
28 Allison and Does 1-10, and without leave to amend and without prejudice as to all other

1 claims and Defendant Evans.

2 These findings and recommendations will be submitted to the United States
3 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
4 636(b)(1). Within fourteen (14) days after being served with these findings and
5 recommendations, the parties may file written objections with the Court. The document
6 should be captioned "Objections to Magistrate Judge's Findings and
7 Recommendations." A party may respond to another party's objections by filing a
8 response within fourteen (14) days after being served with a copy of that party's
9 objections. The parties are advised that failure to file objections within the specified time
10 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
11 (9th Cir. 1991).

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IT IS SO ORDERED.

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Dated: November 1, 2013

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/s/ Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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