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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ERIC WHEELER,	)	1:12cv00861 LJO DLB PC
	)	
Plaintiff,	)	FINDINGS AND RECOMMENDATIONS
	)	FINDING CERTAIN CLAIMS
vs.	)	COGNIZALBE AND DISMISSING
	)	REMAINING CLAIMS
	)	
KATHLEEN ALISON, et al.,	)	THIRTY-DAY DEADLINE
	)	
Defendants.	)	

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Plaintiff Eric Wheeler (“Plaintiff”) is a prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 28 U.S.C. § 1983. Plaintiff filed this action on May 25, 2012. Plaintiff names California Substance Abuse Treatment Facility (“SATF”) Warden Kathleen Alison, Correctional Officers D. Duck, A. Murrieta, R. Lowder and S. Loftis, M. Ross, P.A., B. Mui, M.D., Agnes Wu, Jeffrey Neubarth, M.D., and M. Ancheta, D.D.S., as Defendants.

**I. LEGAL STANDARD**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.

1 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been  
2 paid, the court shall dismiss the case at any time if the court determines that . . . the action or  
3 appeal . . . fails to state a claim upon which relief may be granted.” 28 U.S.C.

4 § 1915(e)(2)(B)(ii).

5 A complaint must contain “a short and plain statement of the claim showing that the  
6 pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not  
7 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
8 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing  
9 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient  
10 factual matter, accepted as true, to ‘state a claim that is plausible on its face.’” Id. (quoting  
11 Twombly, 550 U.S. at 555). While factual allegations are accepted as true, legal conclusions are  
12 not. Id.

13  
14 Section 1983 provides a cause of action for the violation of Plaintiff’s constitutional or  
15 other federal rights by persons acting under color of state law. Nurre v. Whitehead, 580 F.3d  
16 1087, 1092 (9th Cir 2009); Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006);  
17 Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff’s allegations must link the  
18 actions or omissions of each named defendant to a violation of his rights; there is no respondeat  
19 superior liability under section 1983. Iqbal, 556 U.S. at 676-77; Simmons v. Navajo County,  
20 Ariz., 609 F.3d 1011, 1020-21 (9th Cir. 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235  
21 (9th Cir. 2009); Jones, 297 F.3d at 934. Plaintiff must present factual allegations sufficient to  
22 state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572  
23 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this  
24 plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

1 **II. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

2 Plaintiff is incarcerated at SATF, where the events at issue occurred.

3 Plaintiff alleges that on January 19, 2011, while he was returning to his housing unit after  
4 breakfast, he was attacked by Inmate Yepiz. He alleges that when he was attacked, there were  
5 no officers present. Yepiz struck Plaintiff in the right and left jaw area and ran away. Plaintiff  
6 pursued him, past the G-1 office where Defendant Duck and Murrieta were engaged in  
7 conversation. An inmate told Plaintiff that he heard Defendant Murrieta tell Defendant Duck to  
8 wait to call an alarm until Plaintiff and Yepiz were fighting. He also states that an inmate  
9 informed him that Yepiz was a “snitch” for Defendants Murrieta, Loftis and Lowder.  
10

11 Yepiz ran into the dayroom and Plaintiff unsuccessfully tried to grab the back of his  
12 collar from behind. Yepiz then got down onto his stomach. Plaintiff, who has post-traumatic  
13 stress disorder, stood frozen with panic. Without provocation, Defendant Duck approached  
14 Plaintiff from the left side and struck Plaintiff’s left knee with her baton. Defendant Duck struck  
15 Plaintiff a second time.

16 Defendant Murrieta then sprayed pepper-spray into Plaintiff’s eyes and face numerous  
17 times. Defendant Murrieta also hit other guards, including Defendant Loftis, with the pepper-  
18 spray. Defendant Loftis exited immediately and did not return. Defendant Duck struck Plaintiff  
19 a third time, hitting Plaintiff’s upper left thigh. Defendant Lowder, who was standing to the left  
20 of Duck and Plaintiff, sprayed pepper spray on the left side of Plaintiff’s head. Plaintiff turned  
21 towards Murrieta to avoid Duck’s baton, and Murrieta continued to spray pepper spray in  
22 Plaintiff’s face. Plaintiff dropped his head down and was then hit with a fourth blow from  
23 Defendant Duck’s baton. The baton struck the left side of Plaintiff’s neck and the top of his  
24 head. Defendant Duck was then hit with Defendant Murrieta’s pepper spray, and she stopped  
25 hitting Plaintiff and left the area.  
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1 Defendant Murrieta then handcuffed Yepiz and escorted him away. Plaintiff, with no  
2 officers present and in extreme pain, lay down on the dayroom floor. He was assisted to his feet  
3 by Officer Hughes and limped, uncuffed, to the shower. Plaintiff contends that he did not act  
4 aggressively towards Defendants Duck, Lowder, Murrieta or Loftis at any time.

5 Plaintiff alleges that Defendants Lowder, Duck, Murrieta and Loftis entered into a  
6 conspiracy to cover up the use of excessive force by authoring separate incident reports on  
7 Plaintiff. The false reports claimed that Plaintiff assaulted inmate Yepiz and the other officers.  
8 As a result of the false reports, Plaintiff spent time in Administrative Segregation (“Ad-Seg”)  
9 and served a six month term in the Secured Housing Unit.

10 On January 19, 2011, Defendant Ross examined Plaintiff. Plaintiff explained what  
11 happened and complained of severe pain in his jaw, left knee, left thigh and neck. Ross  
12 consulted a dentist, who ordered x-rays. The x-rays revealed jaw fractures and required transport  
13 to the hospital. Plaintiff alleges that Defendant Ross told him that he would not receive  
14 treatment for his neck, left knee or left thigh because Plaintiff was assaulted by staff. Defendant  
15 Ross did not refer Plaintiff for treatment of these injuries.

16 On January 19, 2011, Plaintiff was transported to Mercy Hospital in Bakersfield,  
17 California.<sup>1</sup> He was under the care of Defendant Mui, a doctor at Mercy Hospital, for his left  
18 jaw injury. In the emergency room, Plaintiff told staff that he sustained injuries to his left knee,  
19 left thigh and neck, and that he was in severe pain. A doctor in the emergency room noted these  
20 complaints in his reports. Examination revealed mild swelling of the left knee. A CT scan of  
21 Plaintiff’s face showed a mandibular fracture. An x-ray of Plaintiff’s left knee showed a  
22 prominent effusion and a non-displaced fracture of the distal femur.

23 Dr. Mui admitted Plaintiff for his mandibular fracture. Plaintiff was placed on the fifth  
24 floor prison ward, where his left leg was handcuffed to the foot of the bed. Plaintiff told prison  
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28 <sup>1</sup> Plaintiff alleges that Mercy Hospital contracts with CDCR to provide medical treatment to inmates.

1 guards and nurses that his left leg was in severe pain, but it remained cuffed to the bed for 44  
2 hours.

3 On January 20, 2011, Dr. Suesberry told Plaintiff that he would need to undergo a closed  
4 reduction of the jaw, with fixation. Dr. Mui told Plaintiff that a CT of his head showed a left  
5 condylar neck fracture. Dr. Mui did not mention knee x-rays and Plaintiff told him again that his  
6 left knee and thigh were in severe pain. Dr. Mui said he was not treating the left knee and told  
7 Plaintiff that he was admitted only for the mandibular fracture. Plaintiff told him that an  
8 emergency room doctor had documented his knee pain and that x-rays were taken, but Dr. Mui  
9 would not listen. Plaintiff alleges that A. Wu, Medical Director of Mercy Hospital, was  
10 responsible for medical staff and treatment of patients.  
11

12 On January 21, 2011, Plaintiff was discharged from Mercy Hospital and admitted to the  
13 prison infirmary. He had undergone surgery and his jaw would be wired shut for 5 to 6 weeks.  
14 Plaintiff was placed under the care of Defendant Neubarth. Plaintiff informed him that he could  
15 not put weight on his left leg and Neubarth was aware of the x-ray done at Mercy Hospital.  
16 Despite this, Defendant Neubarth kept ordering Plaintiff to walk and exercise his left leg. He did  
17 not refer Plaintiff for an MRI, or order any treatment.  
18

19 On February 22, 2011, Plaintiff was transported to see Dr. Suesberry. He cut the bands  
20 holding Plaintiff's jaw closed and told Plaintiff that he would remove the wires, bars and arches  
21 on March 8, 2011. Dr. Neubarth was responsible for requesting the follow-up on March 8, 2011,  
22 and knew of Dr. Suesberry's February 22, 2011, orders. Dr. Neubarth failed to request further  
23 treatment and Plaintiff went 55 days past March 8, 2011, with the wires, bars and arches intact.  
24 Plaintiff did not return to Dr. Suesberry.

25 On February 24, 2011, Plaintiff was discharged from the prison infirmary and placed in  
26 Ad-Seg.  
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1 On March 9, 2011, Plaintiff saw Defendant Ancheta, a dentist. Plaintiff told him that he  
2 was supposed to see Dr. Suesberry on March 8, 2011, for removal of the hardware. Dr. Ancheta  
3 told Plaintiff that she would take care of everything. Dr. Ancheta failed to request further  
4 treatment, however.

5 On March 11, 2011, Plaintiff was examined by P.A. Byers after submitting a health care  
6 request. Byers said that something was wrong with Plaintiff's left knee and ordered an MRI,  
7 which was performed on May 3, 2011. On May 5, 2011, Plaintiff was referred to specialist Dr.  
8 Smith. During his examination on July 6, 2011, Dr. Smith noted that Plaintiff was still in severe  
9 pain and had reduced range of motion and weakness in the left knee.  
10

11 On April 3, 2012, Plaintiff was medically declared permanently mobility impaired. As of  
12 March 22, 2012, he was awaiting surgery for a left hernia due to his left knee and thigh injuries.

13 Based on these allegations, Plaintiff asserts the following causes of action:

14 1. Violation of the Eighth and Fourteenth Amendments based on Defendant Alison's  
15 failure to staff enough officers to protect Plaintiff's safety, despite knowing of the shortage of  
16 prison staff in Facility G;

17 2. Violation of the Eighth and Fourteenth Amendments based on the use of  
18 excessive force by Defendant Duck, Murrieta, and Lowder;

19 3. Violation of the Eighth and Fourteenth Amendments based on failure to protect  
20 by Defendants Murrieta, Duck, Lowder and Loftis;

21 4. Violation of the Eighth and Fourteenth Amendments based on deliberate  
22 indifference to a serious medical need by Defendants Ross, Mui, Wu, Neubarth and Ancheta;  
23 and  
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25 5. Violation of the Eighth and Fourteenth Amendments based on an alleged  
26 conspiracy between Defendants Loftis, Lowder and Murrieta to cover up the use of excessive  
27 force.  
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1 **III. ANALYSIS**

2 A. Eighth Amendment- Excessive Force

3 The Cruel and Unusual Punishments Clause of the Eighth Amendment protects prisoners  
4 from the use of excessive physical force. Wilkins v. Gaddy, 559 U.S. 34, \_\_\_, 130 S.Ct. 1175,  
5 1178 (2010) (per curiam); Hudson v. McMillian, 503 U.S. 1, 8-9, 112 S.Ct. 995 (1992). What is  
6 necessary to show sufficient harm under the Eighth Amendment depends upon the claim at issue,  
7 with the objective component being contextual and responsive to contemporary standards of  
8 decency. Hudson, 503 U.S. at 8 (quotation marks and citations omitted). For excessive force  
9 claims, the core judicial inquiry is whether the force was applied in a good-faith effort to  
10 maintain or restore discipline, or maliciously and sadistically to cause harm. Wilkins, 559 U.S.  
11 at \_\_\_, 130 S.Ct. at 1178 (quoting Hudson, 503 U.S. at 7) (quotation marks omitted).

12 Plaintiff has stated a claim for excessive force in violation of the Eighth Amendment  
13 against Defendants Duck, Murrieta and Lowder. Plaintiff will be instructed on service in a  
14 separate order.

15 B. Eighth Amendment- Failure to Protect

16 The failure to intervene can support an excessive force claim where the bystander-  
17 officers had a realistic opportunity to intervene but failed to do so. Lolli v. County of Orange,  
18 351 F.3d 410, 418 (9th Cir. 2003); Cunningham v. Gates, 229 F.3d 1271, 1289 (9th Cir. 2000);  
19 Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir. 1995); see also Motley v. Parks, 383 F.3d  
20 1058, 1071 (9th Cir. 2004) (neither officers who participated in the harassing search nor officers  
21 who failed to intervene and stop the harassing search were entitled to qualified immunity).

22 Plaintiff has stated a claim for failure to protect in violation of the Eighth Amendment  
23 against Defendants Duck, Murrietta, Lowder and Loftis. Plaintiff will be instructed on service in  
24 a separate order.

1 C. Eighth Amendment- Medical Treatment

2 For Eighth Amendment claims arising out of medical care in prison, Plaintiff “must show  
3 (1) a serious medical need by demonstrating that failure to treat [his] condition could result in  
4 further significant injury or the unnecessary and wanton infliction of pain,” and (2) that “the  
5 defendant’s response to the need was deliberately indifferent.” Wilhelm v. Rotman, 680 F.3d  
6 1113, 1122 (9th Cir. 2012) (citing Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)).

7  
8 Deliberate indifference is shown by “(a) a purposeful act or failure to respond to a  
9 prisoner’s pain or possible medical need, and (b) harm caused by the indifference.” Wilhelm,  
10 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective  
11 recklessness, which entails more than ordinary lack of due care. Snow v. McDaniel, 681 F.3d  
12 978, 985 (9th Cir. 2012) (citation and quotation marks omitted); Wilhelm, 680 F.3d at 1122.  
13 Deliberate indifference may be shown “when prison officials deny, delay or intentionally  
14 interfere with medical treatment, or it may be shown by the way in which prison physicians  
15 provide medical care.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096) (internal  
16 quotation marks omitted).

17 Plaintiff has stated an Eighth Amendment claim for deliberate indifference to a serious  
18 medical need against Defendants Ross, Mui, Neubarth and Ancheta. Plaintiff will be instructed  
19 on service in a separate order.

20 D. Specific Defendants

21 1. *Defendant Wu*

22 Defendant Wu is the Medical Director at Mercy Hospital. Although Plaintiff alleges that  
23 Defendant Wu is responsible for medical staff and treatment of patients at Mercy Hospital, these  
24 allegations are insufficient to state a claim against Defendant Wu.

25 Under section 1983, Plaintiff must demonstrate that each named defendant personally  
26 participated in the deprivation of his rights. Ashcroft v. Iqbal, 556 U.S. 662, 676-77, 129 S.Ct.  
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1 1937, 1948-49 (2009); Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1020-21 (9th Cir.  
2 2010); Ewing v. City of Stockton, 588 F.3d 1218, 1235 (9th Cir. 2009); Jones v. Williams, 297  
3 F.3d 930, 934 (9th Cir. 2002). Liability may not be imposed on supervisory personnel under the  
4 theory of respondeat superior, as each defendant is only liable for his or her own misconduct.  
5 Iqbal, 556 U.S. at 676-77, 129 S.Ct. at 1948-49; Ewing, 588 F.3d at 1235. Supervisors may only  
6 be held liable if they “participated in or directed the violations, or knew of the violations and  
7 failed to act to prevent them.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr  
8 v. Baca, 652 F.3d 1202, 1205-08 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2101 (2012); Corales v.  
9 Bennett, 567 F.3d 554, 570 (9th Cir. 2009); Preschooler II v. Clark County School Board of  
10 Trustees, 479 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir.  
11 1997).

12  
13 While Defendant Wu may have been the Medical Director at Mercy Hospital, there is no  
14 indication that she was personally involved in the deprivation of Plaintiff’s rights. Plaintiff does  
15 not allege that Defendant Wu treated Plaintiff in any way, was aware of Plaintiff’s medical  
16 condition, or knew of Plaintiff’s complaints during his hospitalization. He has therefore failed to  
17 state a claim against Defendant Wu and the Court recommends that she be dismissed.

18  
19 *2. Defendant Alison*

20 Defendant Alison is also a supervisory defendant, and as such, can only be held liable if  
21 she “participated in or directed the violations, or knew of the violations and failed to act to  
22 prevent them,” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); accord Starr v. Baca, 652  
23 F.3d 1202, 1205-08 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 2101 (2012); Corales v. Bennett, 567  
24 F.3d 554, 570 (9th Cir. 2009); Preschooler II v. Clark County School Board of Trustees, 479  
25 F.3d 1175, 1182 (9th Cir. 2007); Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997).  
26 Moreover, while the creation or enforcement of, or acquiescence in, an unconstitutional policy  
27 may support a claim, the policy must have been the moving force behind the violation. Starr,  
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1 652 F.3d at 1205; Jeffers v. Gomez, 267 F.3d 895, 914-15 (9th Cir. 2001); Redman v. County of  
2 San Diego, 942 F.2d 1435, 1446-47 (9th Cir. 1991); Hansen v. Black, 885 F.2d 642, 646 (9th  
3 Cir. 1989).

4 Plaintiff alleges that Defendant Alison was responsible for hiring correctional officers  
5 and providing enough staff to ensure the safety of inmates. He contends that she failed to put  
6 enough staff in place to protect Plaintiff from assault by another inmate. Plaintiff alleges that  
7 Defendant Alison was fully aware of the shortage of prison staff in SATF Facility G.

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9 Despite Plaintiff's allegations, there are no facts demonstrating that Defendant Alison  
10 acted with deliberate indifference to a known or obvious danger that the alleged staffing  
11 decisions may subject Plaintiff to harm. L.W. v. Grubbs, 92 F.3d 894, 900 (9th Cir.1996).  
12 Moreover, defendants generally cannot be held personally liable under section 1983 for  
13 "incorrect or ill-advised [ ] decisions" that failed to "guarantee [state] employees a workplace  
14 that is free of unreasonable risks of harm." Collins v. City of Harker Heights, 503 U.S. 115, 129  
15 (1992) (internal quotation marks omitted).

16 Accordingly, Plaintiff has failed to state a claim against Defendant Alison and the Court  
17 recommends that she be dismissed.

18 E. Fourteenth Amendment

19 Plaintiff cites both the Eighth Amendment and the Fourteenth Amendment in his causes  
20 of action. However, he provides no arguments relating to specific, separate due process  
21 violations.

22 "[W]here a particular amendment provides an explicit textual source of constitutional  
23 protection against a particular sort of government behavior, that Amendment, not the more  
24 generalized notion of substantive due process, must be the guide for analyzing a plaintiff's  
25 claims." Patel v. Penman, 103 F.3d 868, 874 (9th Cir. 1996) (citations, internal quotations,  
26 and brackets omitted), overruling on other grounds recognized by Nitco Holding Corp. v.  
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1 Boujikian, 491 F.3d 1086, 1089-90 (9th Cir. 1997).

2 Here, the Eighth Amendment provides the source for Plaintiff's constitutional claims.  
3 The Fourteenth Amendment does not provide any additional relief with respect to Plaintiff's  
4 excessive force claim, failure to protect claim and deliberate indifference claim.

5 Plaintiff therefore fails to state any claims under the Fourteenth Amendment.

6 F. False Reports Claim Against Defendants Loftis, Lowder and Murrieta

7 Plaintiff alleges that Defendants Loftis, Lowder and Murrieta conspired to cover up the  
8 use of excessive force by authoring false reports, in violation of the Eighth and Fourteenth  
9 Amendments.  
10

11 A conspiracy claim brought under section 1983 requires proof of “an agreement or  
12 meeting of the minds to violate constitutional rights,” Franklin v. Fox, 312 F.3d 423, 441 (9th  
13 Cir. 2001) (quoting United Steel Workers of Am. v. Phelps Dodge Corp., 865 F.2d 1539, 1540-  
14 41 (9th Cir. 1989) (citation omitted)), and an actual deprivation of constitutional rights, Hart v.  
15 Parks, 450 F.3d 1059, 1071 (9th Cir. 2006) (quoting Woodrum v. Woodward County, Oklahoma,  
16 866 F.2d 1121, 1126 (9th Cir. 1989)). “To be liable, each participant in the conspiracy need not  
17 know the exact details of the plan, but each participant must at least share the common objective  
18 of the conspiracy.” Franklin, 312 F.3d at 441 (quoting United Steel Workers, 865 F.2d at 1541).  
19

20 Here, Plaintiff has failed to allege any facts to demonstrate a specific agreement between  
21 Defendants Loftis, Lowder and Murrieta. Instead, his claim is based on speculation and  
22 conclusory allegations. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir.1982) (“Vague  
23 and conclusory allegations of official participation in civil rights violations are not sufficient  
24 ....”). It is not enough to state the existence of a conspiracy, without alleging facts. “Threadbare  
25 recitals of the elements of a cause of action, supported by mere conclusory statements, do not  
26 suffice.” Iqbal, 556 U.S. at 678.

27 Therefore, Plaintiff fails to state a claim for conspiracy and this claim must be dismissed.  
28

1 **IV. CONCLUSION AND RECOMMENDATION**

2 The Court finds that Plaintiff’s complaint states the following claims: (1) a claim for  
3 excessive force in violation of the Eighth Amendment against Defendants Duck, Murrieta and  
4 Lowder; (2) a claim for failure to protect in violation of the Eighth Amendment against  
5 Defendants Duck, Murrieta, Lowder and Loftis; and (3) a claim for deliberate indifference to a  
6 serious medical in violation of the Eighth Amendment against Defendants Ross, Mui, Neubarth  
7 and Ancheta. It does not, however, state any claims against Defendants Alison or Wu, any claim  
8 under the Eighth or Fourteenth Amendment against Defendants Loftis, Lowder or Murrieta  
9 based on an alleged conspiracy, or any other Fourteenth Amendment claim. It does not appear  
10 that these deficiencies can be cured. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Noll  
11 v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). As explained above, Plaintiff will be  
12 instructed on service in a separate order.  
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14 Accordingly, it is **HEREBY RECOMMENDED** that this action proceed on the claims  
15 identified above and that Defendants Alison and Wu, as well as the Eighth and Fourteenth  
16 Amendment claim against Defendants Loftis, Lowder or Murrieta based on an alleged  
17 conspiracy, be **DISMISSED WITHOUT LEAVE TO AMEND** for failure to state a claim under  
18 section 1983.

19 These Findings and Recommendations will be submitted to the United States District  
20 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
21 **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may file  
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1 written objections with the Court. The document should be captioned “Objections to Magistrate  
2 Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections  
3 within the specified time may waive the right to appeal the District Court’s order. Martinez v.  
4 Ylst, 951 F.2d 1153 (9th Cir. 1991).

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7 IT IS SO ORDERED.

8 Dated: March 11, 2013

9 /s/ Dennis L. Beck  
10 UNITED STATES MAGISTRATE JUDGE  
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