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

DWAYNE SWEARINGTON,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF  
CORRECTIONS AND REHABILITATION,

Defendant.

Case No. 1:12-cv-00958-MJS (PC)

**ORDER DISMISSING ACTION WITH  
PREJUDICE FOR FAILURE TO STATE  
A CLAIM**

**(ECF No. 19)**

**DISMISSAL COUNTS AS STRIKE  
PURSUANT TO 28 USC § 1915(g)**

**CLERK TO TERMINATE ALL PENDING  
MOTIONS AND CLOSE CASE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. The Complaint and First Amended Complaint were dismissed for failure to state a claim. Before the Court for screening is Plaintiff's Second Amended Complaint.<sup>1</sup>

**I. SCREENING REQUIREMENT**

The Court is required to screen complaints brought by prisoners seeking relief

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<sup>1</sup> The Second Amended Complaint includes a form pleading captioned "Notice of [Third] Amended Complaint" which is analyzed as part of the Second Amended Complaint.

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

## 9 **II. PLEADING STANDARD**

10 Section 1983 “provides a cause of action for the deprivation of any rights,  
11 privileges, or immunities secured by the Constitution and laws of the United States.”  
12 *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 (1990), quoting 42 U.S.C. § 1983.  
13 Section 1983 is not itself a source of substantive rights, but merely provides a method  
14 for vindicating federal rights conferred elsewhere. *Graham v. Connor*, 490 U.S. 386,  
15 393-94 (1989).

16 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)  
17 that a right secured by the Constitution or laws of the United States was violated and (2)  
18 that the alleged violation was committed by a person acting under the color of state law.  
19 See *West v. Atkins*, 487 U.S. 42, 48 (1988); *Ketchum v. Alameda Cnty.*, 811 F.2d 1243,  
20 1245 (9th Cir. 1987).

21 A complaint must contain “a short and plain statement of the claim showing that  
22 the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
23 are not required, but “[t]hreadbare recitals of the elements of a cause of action,  
24 supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S.  
25 662, 678 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
26 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim that is  
27 plausible on its face.” *Id.* Facial plausibility demands more than the mere possibility that  
28 a defendant committed misconduct and, while factual allegations are accepted as true,

1 legal conclusions are not. *Id.* at 667-68.

2 **III. PLAINTIFF'S ALLEGATIONS**

3 Plaintiff's claims arose during previous incarcerations at the California Men's  
4 Colony ("CMC") and North Kern State Prison ("NKSP").

5 Defendants:

6 The Defendants are (1) the California Department of Corrections and  
7 Rehabilitation ("CDCR"), (2) Gonzalez, CMC Correctional Officer, (3) Artega, CMC  
8 Correctional Officer, (4) Grooves, CMC Correctional Captain, (5) Wisneski, CMC  
9 Correctional Captain - Mailroom Supervisor, (6) Van Beck, CMC Correctional  
10 Lieutenant, (7) McDaniel, CMC Mailroom Supervisor, (8) Lloyed, CMC Correctional  
11 Counselor, (9) Lansford, CMC Correctional Counselor, (10) Risner, CMC Correctional  
12 Counselor, (11) Clements, CMC Correctional Officer – R&R Property, (12) Flores,  
13 NKSP Prison Medical Doctor, (13) Shehata, NKSP Prison Medical Doctor.

14 CMC Allegations:

15 Defendant Gonzalez signed out Plaintiff's legal mail (a letter addressed to the  
16 district court and one to a private attorney). The mail was intentionally held in the prison  
17 mail room for nine months and then returned to Plaintiff by Defendant Artega. The mail  
18 had not been entered in the mail log, and it had been opened.

19 Gonzalez did not know what happened to the mail and refused to investigate.  
20 Defendant Van Beek covered up for Artega. Plaintiff spoke to Defendant Grooves, who  
21 refused to accept responsibility or investigate.

22 Plaintiff sent Defendant Wisneski a pre-grievance (CDCR Form 22) request for  
23 information. Wisneski ignored CDCR procedures and retaliated by sending Van Beek to  
24 search Plaintiff's cell.

25 Defendant McDaniel, ignoring CDCR policy, refused to discuss the mail with  
26 Plaintiff.

27 The failure to deliver the letter addressed to the court resulted in dismissal of  
28 Plaintiff's district court action.

1 Defendants Lloyed, Lansford and Risner were aware Plaintiff's mail had not  
2 been delivered and of his threat to file a grievance. They retaliated by transferring him to  
3 NKSP. They knew his CMC single cell medical chono would not be honored at NKSP.

4 Defendant Clements deprived Plaintiff of personal and legal property upon  
5 transfer to NKSP.

6 NKSP Allegations:

7 Defendant Flores, Plaintiff's initial Primary Care Physician ("PCP") at NKSP,  
8 refused to honor prior medical and accommodation chronos. Flores also discussed  
9 Plaintiff's personal medical information in the presence of custody staff.

10 Defendant Shehata, Plaintiff's subsequent PCP at NKSP retaliated for Plaintiff's  
11 disrespectful remarks about Flores by refusing to honor prior chronos, falsifying  
12 medical records and giving Plaintiff improper medication.

13 Relief:

14 Plaintiff claims Defendants conspired in the above rights violations, and he seeks  
15 monetary damages, replacement of his lost and destroyed property, and an order that  
16 retaliation at CMC and NKSP end and he be moved to a medical facility that can  
17 accommodate his needs.

18 **IV. DISCUSSION**

19 **A. Eleventh Amendment Immunity**

20 The Eleventh Amendment "erects a general bar against federal lawsuits brought  
21 against a state." *Wolfson v. Brammer*, 616 F.3d 1045, 1065-66 (9th Cir. 2010), quoting  
22 *Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003).

23 The CDCR, a state agency, is entitled to Eleventh Amendment immunity in this  
24 action.

25 **B. Supervisor Liability**

26 A § 1983 plaintiff must demonstrate that each defendant personally participated  
27 in the deprivation of his rights. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002).

28 There must be an actual connection or link between the individual actions of the

1 defendants and the alleged violation. See *Monell v. Department of Social Services*, 436  
2 U.S. 658 (1978).

3 Plaintiff does not connect or “link” supervisory Defendants Wisneski and  
4 McDaniel to the alleged rights violations. He claims he sent requests for information to  
5 these Defendants, but alleges no facts to suggest either actually received or was even  
6 aware of such requests. Plaintiff does not attribute to these Defendants any personal  
7 action or failure to act that violated his rights.

### 8 **C. Interference with Mail**

9 Prisoners have “a First Amendment right to send and receive mail.” *Witherow v.*  
10 *Paff*, 52 F.3d 264, 265 (9th Cir. 1995). However, there must be a “delicate balance”  
11 between prisoners’ First Amendment rights and the discretion given to prison  
12 administrators to govern the order and security of the prison. *Thornburgh v. Abbott*, 490  
13 U.S. 401, 407-408 (1989).

14 Additionally, the Due Process Clause of the Fourteenth Amendment prohibits the  
15 United States from depriving any person of life, liberty, or property without “due process  
16 of law.” *Dusenbery v. U.S.*, 534 U.S. 161, citing *Mullane v. Central Hanover Bank &*  
17 *Trust Co.*, 339 U.S. 306, 313 (1950). “[W]ithhold[ing] delivery of [inmate mail] must be  
18 accompanied by minimum procedural safeguards.” *Procunier v. Martinez*, 416 U.S. 396,  
19 417-18 (1974). The “minimum procedural safeguards” are: (1) notifying the inmate that  
20 the mail was seized; (2) allowing the inmate a reasonable opportunity to protest the  
21 decision; and (3) referring any complaints to a prison official other than the one who  
22 seized the mail. *Procunier*, 416 U.S. at 418-19; *Krug v. Lutz*, 329 F.3d 692, 698 (9th Cir.  
23 2003).

24 Plaintiff’s allegations do not link any named Defendant to interference with or  
25 seizure of his outgoing mail. He does not include factual allegations attributing any  
26 specifically wrongful act relating to his mail to any specific individual. Other than noting it  
27 was not delivered, he does not allege what happened to his mail, who handled it, how  
28 and why it was delayed, whether any institutional policy or practice was implicated,

1 whether he filed a grievance and if so the results of the grievance process. The  
2 allegations suggest nothing more than negligence by parties unknown.

3 Plaintiff's mail interference claim fails.

#### 4 **D. Access to Courts**

5 Inmates have a fundamental right of access to the courts for habeas and civil  
6 rights actions, *Lewis v. Casey*, 518 U.S. 343, 346-54 (1996), and to litigate without  
7 interference claims that have a reasonable basis. *Silva v. Di Vittorio*, 658 F.3d 1090,  
8 1103 (9th Cir. 2011).

9 An inmate claiming denial of access to courts must show: 1) actual injury from  
10 the loss of a nonfrivolous or arguable underlying claim; 2) the official acts frustrating the  
11 litigation; and 3) a remedy that may be awarded as recompense but that is not  
12 otherwise available in a future suit. See *Christopher v. Harbury*, 536 U.S. 403, 412-15  
13 (2002). The complaint should state the underlying claim in accordance with Federal  
14 Rule of Civil Procedure 8(a). *Id.*, at 417-18.

15 Plaintiff alleges his federal action was dismissed for failure to prosecute because  
16 his pretrial statement was held in the CMC mailroom beyond the court's filing deadline.  
17 Plaintiff's prior pleading identified that action as *Dwayne Swearington v. Wedell et al.*,  
18 E.D. Cal. Case No. 2:06-cv-01407-GEB-EFB which, its docket reveals, was in fact  
19 dismissed because of Plaintiff's failure to timely file a pretrial statement. This suggests  
20 actual injury as a result of the mail delay. However, as noted, Plaintiff has not linked the  
21 delay to any wrongful act or failure to act on the part of any named Defendant. A merely  
22 negligent handling of mail is insufficient to show denial of access to court. *Nwaokocha v.*  
23 *Sadowski*, 369 F.Supp.2d 362, 374-76 (E.D.N.Y. 2005).

24 The alleged non-delivery of a letter seeking assistance from a private attorney  
25 does not demonstrate actual harm and a remedy lost.

26 The access to courts claim fails.

#### 27 **E. Retaliation**

28 This claim requires: (1) an assertion that a state actor took some adverse action

1 against an inmate (2) because of (3) that inmate's protected conduct, and that such  
2 action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action  
3 did not reasonably advance a legitimate correctional goal. *Rhodes v. Robinson*, 408  
4 F.3d 559, 567-68 (9th Cir. 2005).

5 Plaintiff's CMC allegations do not demonstrate the cell search, transfer to NKSP,  
6 and property deprivation resulted from his engaging in protected conduct. The alleged  
7 protected conduct was the pre-grievance request to Defendant Wisneski, but Plaintiff  
8 does not allege that any other Defendants were aware of it or that their alleged actions  
9 were substantially motivated by anything other than legitimate correctional goals and  
10 regulations. *Brodheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009), citing *Rhodes*, 408  
11 F.3d at 568); see also *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir.  
12 1989) (a plaintiff must show that his protected conduct was a "substantial' or  
13 'motivating' factor behind the defendant's conduct).

14 Plaintiff's NKSP allegations similarly fail. His unspecified remarks to Dr. Shehata  
15 are not protected conduct. Cf., *Pearson v. Welborn*, 471 F.3d 732, 740-41 (7th Cir.  
16 2006) (complaint about prison conditions related to matters of public concern and  
17 designed to effect a change in prison policy and petition the court protected by the First  
18 Amendment). Even if he had shown protected conduct, his allegation that Dr. Shehata  
19 was substantially motivated to and did retaliate is factually unsupported.

20 The retaliation claim fails.

#### 21 **F. Indifference and False Medical Records**

22 A claim of medical indifference requires (1) a serious medical need, and (2) a  
23 deliberately indifferent response by defendant. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th  
24 Cir. 2006). The deliberate indifference standard is met by showing (a) a purposeful act  
25 or failure to respond to a prisoner's pain or possible medical need and (b) harm caused  
26 by the indifference. *Id.*

27 Mere indifference, negligence, or medical malpractice is not sufficient to support  
28 the claim. *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir.1980), citing *Estelle v.*

1 *Gamble*, 429 U.S. 97, 105-06 (1976).

2 Plaintiff's allegations do not demonstrate that NKSP Drs. Flores and Shehata  
3 failed to respond to his serious medical needs or knowingly acted in a medically  
4 unacceptable manner. *Toguchi v. Chung*, 391 F.3d 1051, 1058–60 (9th Cir. 2004). He  
5 complains of chronic conditions, but provides no additional information about them upon  
6 which the court might determine if they actually reflect a serious medical need. *Jett*, 439  
7 F.3d at 1096; see also *Scarver v. Litscher*, 371 F.Supp.2d 986, 999 (W.D. Wis. 2005),  
8 citing *Gutierrez v. Peters*, 111 F.3d 1364, 1369 (7th Cir. 1997) (“serious medical needs”  
9 encompass conditions that are life-threatening or that carry risks of permanent serious  
10 impairment if left untreated, those that result in needless pain and suffering when  
11 treatment is withheld and those that have been diagnosed by a physician as mandating  
12 treatment).

13 Plaintiff disagrees with decisions regarding medical and accommodation  
14 chronos. He claims falsification of medical records. However, he offers no facts to  
15 suggest that such actions were the result of anything other than the exercise of  
16 professional judgment or that that judgment was medically unacceptable. He does not  
17 state why and how his medical records were false.

18 He does not have an independent (due process) right to an accurate prison  
19 record, *Hernandez v. Johnston*, 833 F.2d 1316, 1319 (9th Cir. 1987), and has not  
20 demonstrated false medical records caused atypical and significant hardship. *Sandin v.*  
21 *Conner*, 515 U.S. 472, 481-84 (1995).

22 Plaintiff's conclusion he was given improper medication is unaccompanied by  
23 any factual allegations that would suggest he was harmed as a result. His bare  
24 conclusion or belief that it did harm him is not sufficient to state a claim.

25 Even if Drs. Flores and Shehata failed to properly treat him in accordance with  
26 the medical standard of care, he alleges nothing more than medical negligence which is  
27 not a federal rights violation. See *Broughton*, 622 F.2d at 460, citing *Estelle*, 429 U.S. at  
28 105-06 (1976) (mere indifference, negligence, or medical malpractice will not support



1 this cause of action).

2 **G. Property Deprivation**

3 Prisoners have a protected interest in their personal property. *Hansen v. May*,  
4 502 F.2d 728, 730 (9th Cir. 1974). However, while an authorized, intentional deprivation  
5 of property is actionable under the Due Process Clause, *Hudson v. Palmer*, 468 U.S.  
6 517, 532, n.13 (1984), citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36  
7 (1982),<sup>2</sup> neither negligent nor unauthorized intentional deprivations of property by a  
8 governmental employee “constitute a violation of the procedural requirements of the  
9 Due Process Clause of the Fourteenth Amendment if a meaningful post deprivation  
10 remedy for the loss is available”. *Hudson*, 468 U.S. at 533.

11 Plaintiff alleges an unauthorized intentional property deprivation. He has an  
12 adequate post-deprivation remedy under California law and therefore, his attempt to  
13 pursue a claim under federal law for the loss of his property fails as a matter of law.  
14 *Barnett v. Centoni*, 31 F.3d 813, 816–17 (9th Cir. 1994) 31 F.3d at 816-17, citing Cal.  
15 Gov 't Code §§ 810-895.

16 **H. Medical Privacy**

17 The Due Process Clause of the Fourteenth Amendment protects individuals  
18 against the disclosure of personal matters, *Whalen v. Roe*, 429 U.S. 589, 598-99  
19 (1977), which “clearly encompasses medical information and its confidentiality . . . .”  
20 *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998).

21 The privacy protection afforded medical information is not absolute, and may be  
22 infringed upon a showing of proper governmental interest. *Planned Parenthood of*  
23 *Southern Arizona v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002). The governmental  
24 interest in disclosure must advance a legitimate state interest and the government’s  
25 action must be narrowly tailored to meet the legitimate interest. *Roe v. Sherry*, 91 F.3d

26 \_\_\_\_\_  
27 <sup>2</sup> An authorized deprivation is one carried out pursuant to established state procedures, regulations, or  
28 statutes. *Piatt v. McDougall*, 773 F.2d 1032, 1036 (9th Cir.1985); see also *Knudson v. City of Ellensburg*,  
832 F.2d 1142, 1149 (9th Cir. 1987). Plaintiff has not alleged, and the facts do not demonstrate, an  
authorized deprivation.

1 1270, 1274 (9th Cir. 1996). In making the determination whether the governmental  
2 interest outweighs the individual's privacy interest, courts must balance the following  
3 factors: (1) the type of information, (2) the potential harm in non-consensual disclosure,  
4 (3) the adequacy of safeguards to prevent unauthorized disclosure, (4) the degree of  
5 need for access, and (5) whether there is an express statutory mandate, articulated  
6 public policy, or other recognizable public interest militating toward access. *Tucson*  
7 *Woman's Clinic v. Eden*, 379 F.3d 531, 551 (9th Cir. 2004).

8 Plaintiff's allegation that Defendant Flores improperly discussed his unspecified  
9 "personal medical information" with corrections staff is conclusory. He does not state the  
10 type of information disclosed, why staff was present and should not have been, whether  
11 there was any reason or need for Dr. Flores to discuss the information with staff, and  
12 how he was harmed.

13 This claim for privacy fails.

#### 14 **I. Conspiracy**

15 This claim requires the existence of an agreement or a meeting of the minds to  
16 violate plaintiff's constitutional rights, and an actual deprivation of those constitutional  
17 rights. *Avalos v. Baca*, 596 F.3d 583, 592 (9th Cir. 2010); *Franklin v. Fox*, 312 F.3d 423,  
18 441 (9th Cir. 2001).

19 Plaintiff alleges no facts suggesting an agreement or common objective among  
20 Defendants to violate his rights. See *Zemsky v. City of New York*, 821 F.2d 148, 151  
21 (2nd Cir. 1987) (a pro se complaint containing only conclusory, vague, or general  
22 allegations of conspiracy to deprive a person of constitutional rights will not withstand a  
23 motion to dismiss); *Franklin*, 312 F.3d at 441, quoting *United Steel Workers of Am. v.*  
24 *Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir.1989) ("To be liable, each participant  
25 in the conspiracy need not know the exact details of the plan, but each participant must  
26 at least share the common objective of the conspiracy.").

27 Even if Plaintiff had shown such an agreement, there is no rights violation for the  
28 reasons stated.

1 This claim fails.

2 **J. Title 15 and DOM**

3 An inmate does not have an independent claim under § 1983 for violation of  
4 prison regulations (“Title 15”) or CDCR operating procedures (Department Operational  
5 Manual or “DOM”). See *Chappell v. Perrez*, 2011 WL 2296816, \*2 (E.D. Cal. June 8,  
6 2011); *Lamon v. Cate*, 2011 WL 773046, \*9 (E.D. Cal. February 28, 2011); *Vasquez v.*  
7 *Tate*, 2012 WL 6738167, at \*9 (E.D. Cal. December 28, 2012).

8 Plaintiff’s allegations that Defendants did not comply with such requirements  
9 regarding his outgoing mail are not a basis for a § 1983 action.

10 This claim fails.

11 **K. Injunctive Relief**

12 Injunctive relief, whether temporary or permanent, is an “extraordinary remedy,  
13 never awarded as of right.” *Winter v. Natural Res. Defense Council*, 555 U.S. 7, 22  
14 (2008). To prevail, the party seeking injunctive relief must show either “(1) a likelihood of  
15 success on the merits and the possibility of irreparable injury, or (2) the existence of  
16 serious questions going to the merits and the balance of hardships tipping in [the  
17 moving party's] favor.” *Oakland Tribune, Inc. v. Chronicle Publishing Company, Inc.*,  
18 762 F.2d 1374, 1376 (9th Cir. 1985), quoting *Apple Computer, Inc. v. Formula*  
19 *International, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984); see *City of Los Angeles v. Lyons*,  
20 461 U.S. 95, 101-102 (1983) (plaintiff must show “real and immediate” threat of injury).

21 Plaintiff cannot seek injunctive relief where there is no underlying federal claim.  
22 *City of Los Angeles*, 461 U.S. at 101-02 (plaintiff must show a “case or controversy” and  
23 “real and immediate” threat of injury). Plaintiff’s pleading does not state any cognizable  
24 claim against named Defendants for the reasons stated.

25 Even if Plaintiff had stated a cognizable claim, an allegation of “past exposure to  
26 illegal conduct does not in itself show a present case or controversy regarding injunctive  
27 relief . . . if unaccompanied by any continuing, present, adverse effects.” See *Id.* Plaintiff  
28 is no longer housed at either CMC or NKSP. (ECF No. 22.) He does not allege facts

1 suggesting any ongoing threat of harm and relative hardship.

2 This claim fails.

3 **V. CONCLUSIONS AND ORDER**

4 Plaintiff's Second Amended Complaint does not state a claim upon which relief  
5 may be granted. Plaintiff was advised in the prior screening order of the deficiencies in  
6 his claims and what would be necessary to correct them, and he was given the  
7 opportunity to correct them, and yet he did not do so. No useful purpose would be  
8 served in again instructing on these same deficiencies and allowing yet another  
9 opportunity to correct them.

10 Accordingly, based on the foregoing, it is HEREBY ORDERED that:

- 11 1. Plaintiff's Second Amended Complaint (ECF No. 19) is DISMISSED for  
12 failure to state a claim, further amendment would be futile and is denied,
- 13 2. The action is DISMISSED WITH PREJUDICE for failure to state a claim,  
14 dismissal shall count as a strike pursuant to 28 U.S.C. § 1915(g); *Silva v.*  
15 *Di Vittoria*, 658 F.3d at 1009, 1098 (9th Cir. 2011), and
- 16 3. Any and all pending motions shall be terminated and the Clerk of the  
17 Court shall CLOSE this case.

18  
19 IT IS SO ORDERED.

20 Dated: April 26, 2014

21 /s/ Michael J. Seng  
22 UNITED STATES MAGISTRATE JUDGE  
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