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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10
11 JUAN CARLOS MARTINEZ,

12 Plaintiff,

13 v.

14 BEARD, et al.,

15 Defendants.

Case No. 1:14-cv-00405-AWI-JLT (PC)

**FINDINGS AND RECOMMENDATIONS TO
DISMISS DEFENDANTS BEARD,
KATAVICH, SAGUSTA, SANGER, YOUSSEF,
MARSHALL, THARRAT, and KELSO AND
ALL CLAIMS AGAINST THEM**

(Docs. 31, 32)

30-DAY DEADLINE

16
17 **I. Findings**

18 Plaintiff, Juan Carlos Martinez, is a prisoner in the custody of the California Department
19 of Corrections and Rehabilitation ("CDCR") and is proceeding in this civil rights action pursuant
20 to 42 U.S.C. § 1983. Plaintiff filed the Complaint in this action on March 19, 2014. (Doc. 1.)
21 Summons issued on May 19, 2014. (Docs. 7, 8.) Various of the Defendants requested a
22 screening order, which was granted. (Docs. 17, 19, 21.) Plaintiff was ordered to either file a first
23 amended complaint or notify of willingness to proceed only on claims found to be cognizable.
24 (Doc. 21.) Plaintiff filed the First Amended Complaint on which screening was again requested.
25 (Docs. 24, 25.) Upon screening, Plaintiff was ordered to either file a second amended complaint
26 or to notify of willingness to proceed only on claims found to be cognizable. (Doc. 29.) Plaintiff
27 filed the Second Amended Complaint which Defendants again requested be screened. (Docs. 31,
28 32.) Upon screening and, by concurrently issued order, all of the claims against all of the

1 Defendants named in the Second Amended Complaint have been found to be cognizable.

2 However, Plaintiff did not name all of the Defendants he originally named in this action as
3 Defendants in the Second Amended Complaint. Specifically, Plaintiff did not name the following
4 persons in any of this three delineated causes of action nor are they listed as Defendants in the
5 Second Amended Complaint: CDCR Secretary Jeffrey A. Beard; Warden John N. Katavich; R.
6 Sagusta; M. Sanger; Ashraf Youssef, MD; Brian Marshall; Robert Tharratt, MD; and J. Clark
7 Kelso. Thus it appears that Plaintiff no longer wishes to pursue these Defendants such that
8 dismissal from this action is appropriate.

9 Rule 41(a)(1)(A) allows a Plaintiff to “dismiss an action without a court order by filing:
10 (i) a notice of dismissal before the opposing party serves either an answer or a motion for
11 summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared.”
12 Subsection (B) of Rule 41 provides that, “[u]nless the notice or stipulation states otherwise, the
13 dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court
14 action based on or including the same claim, a notice of dismissal operates as an adjudication on
15 the merits.” Subsection (2) of Rule 41 provides in pertinent part that, “[e]xcept as provided in
16 Rule 41(a)(1), an action may be dismissed at the plaintiff’s request only by court order, on terms
17 that the court considers proper. . . .”

18 None of the Defendants in this action have filed either an answer or a motion for summary
19 judgment. Thus, dismissal with prejudice of CDCR Secretary Jeffrey A. Beard; Warden John N.
20 Katavich; R. Sagusta; M. Sanger; Ashraf Youssef, MD; Brian Marshall; Robert Tharratt, MD;
21 and J. Clark Kelso based on Plaintiff’s failure to name and/or pursue them as Defendants in the
22 Second Amended Complaint is appropriate.

23 **II. CONCLUSION**

24 Plaintiff’s Second Amended Complaint does not name CDCR Secretary Jeffrey A. Beard;
25 Warden John N. Katavich; R. Sagusta; M. Sanger; Ashraf Youssef, MD; Brian Marshall; Robert
26 Tharratt, MD; and J. Clark Kelso as Defendants in this action, nor does Plaintiff list any of them
27 in the three claims that he has delineated. Thus, they and all claims against them are properly
28 dismissed from this action with prejudice.

1 Accordingly, it is HEREBY RECOMMENDED that CDCR Secretary Jeffrey A. Beard;
2 Warden John N. Katavich; R. Sagusta; M. Sanger; Ashraf Youssef, MD; Brian Marshall; Robert
3 Tharratt, MD; and J. Clark Kelso and all claims against them be dismissed from this action with
4 prejudice.

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

13
14 IT IS SO ORDERED.

15 Dated: **March 11, 2015**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE