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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PHILLIP J. LONG,
Plaintiff,
v.
CORIZON HEALTH, INC., et al.,
Defendants.

CASE NO. 1:17-cv-00898-JLT (PC)

**ORDER TO ASSIGN DISTRICT JUDGE;
AND FINDINGS AND
RECOMMENDATIONS TO ALLOW THIS
CASE TO PROCEED ONLY AGAINST
JANE DOE ON AN EIGHTH
AMENDMENT CLAIM
(Doc. 9)**

FOURTEEN-DAY DEADLINE

The Court screened Plaintiff’s First Amended Complaint, which asserted claims against several defendants, and found it stated only an Eighth Amendment medical indifference claim against Jane Doe. Plaintiff has filed a Second Amended Complaint, which is now before the Court for screening.

I. Screening Requirement

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, malicious,” or 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. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall

1 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a
2 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

3 **II. Pleading Standard**

4 A complaint must contain “a short and plain statement of the claim showing that the pleader
5 is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
6 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
7 do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly,
8 550 U.S. 544, 555 (2007)). Plaintiffs must set forth “sufficient factual matter, accepted as true, to
9 state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 678. Facial plausibility
10 demands more than the mere possibility that a defendant committed misconduct and, while factual
11 allegations are accepted as true, legal conclusions are not. Iqbal, 556 U.S. at 677-78.

12 Section 1983 “provides a cause of action for the deprivation of any rights, privileges, or
13 immunities secured by the Constitution and laws of the United States.” Wilder v. Virginia Hosp.
14 Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). To state a claim under section 1983,
15 a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws
16 of the United States was violated and (2) that the alleged violation was committed by a person
17 acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v.
18 Alameda Cnty., 811 F.2d 1243, 1245 (9th Cir. 1987).

19 Under section 1983 the Plaintiff must demonstrate that each defendant personally
20 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).
21 This requires the presentation of factual allegations sufficient to state a plausible claim for relief.
22 Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). Prisoners
23 proceeding pro se in civil rights actions are entitled to have their pleadings liberally construed and
24 to have any doubt resolved in their favor, Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010)
25 (citations omitted), but nevertheless, the mere possibility of misconduct falls short of meeting the
26 plausibility standard, Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

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1 **III. Plaintiff's Allegations**

2 Plaintiff is currently held at Fresno County Jail ("FCJ") in Fresno, California and complains
3 of acts that occurred there. He names as defendants Corizon Health, Inc. ("Corizon"), the health
4 care provider at the FCJ, and Jane Doe, an FCJ/Corizon nurse.

5 Plaintiff's allegations can be fairly summarized as follows:

6 On July 08, 2016, plaintiff injured his ankle in the FCJ gym. He was in pain and lacked
7 mobility, and his ankle was swelling. He was taken with the assistance of other prisoners and
8 correctional staff to Jane Doe who failed to treat or diagnose the injury. She did not x-ray the ankle,
9 did not provide pain medication, did not wrap the ankle, and did not schedule any follow-up
10 appointments. Plaintiff suffered in pain until, weeks later, he was properly treated.

11 Defendant Corizon implemented a policy "of having nurses or lower level personel [sic]
12 only initially see, diagnose and treat all inmates regardless of the level of severity of injury or
13 illness..." Corizon also has a policy of "not channeling" a serious medical need "for immediate
14 emergency medical care" whether through "a physician or local hospital emergency care."

15 **IV. Analysis**

16 **A. Municipal Liability**

17 Plaintiff, who names Corizon as an entity defendant acting on behalf of FCJ, appears to be
18 bringing a Monell claim.

19 Counties may be liable under section 1983. "[S]ection 1983 imposes liability only on
20 'persons' who, under color of law, deprive others of their constitutional rights, [and] the Supreme
21 Court has construed the term 'persons' to include municipalities such as the County." Castro v.
22 Cty. of Los Angeles, 797 F.3d 654, 670 (9th Cir. 2015) (citing Monell v. Dep't of Social Services,
23 436 U.S. 658, 690-91 (1978)). Counties may not be held liable for the actions of their employees
24 under a theory of *respondeat superior*, but they may be held liable for a constitutional violation if
25 an action taken pursuant to a policy, be it a formal or informal policy, caused the underlying
26 violation. Castro, 797 F.3d at 670 (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 131 (1989)
27 and Monell, 436 U.S. at 691) (quotation marks omitted); see also Simmons v. Navajo Cty., Ariz.,

1 609 F.3d 1011, 1021 (9th Cir. 2010) (municipal liability claim cannot be maintained unless there
2 is an underlying constitutional violation).

3 Municipal liability may also be imposed where the local government unit's omission led to
4 the constitutional violation by its employee. Gibson v. Cty. Of Washoe, Nev., 290 F.3d 1175, 1186
5 (9th Cir. 2002). Under this route to municipal liability, the "plaintiff must show that the
6 municipality's deliberate indifference led to its omission and that the omission caused the employee
7 to commit the constitutional violation." Id. This kind of deliberate indifference is found when the
8 need to remedy the omission is so obvious, and the failure to act so likely to result in the violation
9 of rights, that the municipality reasonably can be said to have been deliberately indifferent when it
10 failed to act. Id. at 1195.

11 Corizon is a private entity that provides health care for FCJ. Plaintiff may assert Monell
12 claims against a private entity contracting with a municipality provided: (1) the private entity acted
13 under color of state law; (2) a constitutional violation occurred; and (3) the violation was caused
14 by an official policy or custom. Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1139 (9th Cir.2012).

15 As with the previous iterations of his pleading, plaintiff makes general allegations
16 concerning a Corizon policy of requiring lower level medical staff to treat inmates and a policy of
17 denying access to a physician or hospital even for medical emergencies. He does not, however, link
18 this policy to any facts which "might plausibly suggest" that Corizon itself violated plaintiff's
19 constitutional rights. See Hernandez v. County of Tulare, 666 F.3d 631, 637 (9th Cir. 2012)
20 (applying Iqbal's pleading standards to Monell claims). Absent these facts, the Court finds
21 plaintiff's allegations as to Corizon insufficient to state a cognizable claim. Because this was
22 plaintiff's third attempt to state a claim against this defendant, the undersigned will recommend
23 that Corizon be dismissed with prejudice.

24 **B. Eighth Amendment**

25 The government has an "obligation to provide medical care for those whom it is punishing
26 by incarceration," and failure to meet that obligation can constitute an Eighth Amendment violation
27 cognizable under § 1983. Estelle v. Gamble, 429 U.S. 97, 103-105 (1976). To establish an Eighth
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1 Amendment violation, a prisoner "must satisfy both the objective and subjective components of a
2 two-part test." Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted). A prisoner
3 must show (1) a serious medical need by demonstrating that failure to treat a prisoner's condition
4 could result in further significant injury or the unnecessary and wanton infliction of pain, and (2)
5 that the defendant's response to the need was deliberately indifferent. Jett v. Penner, 439 F.3d 1091,
6 1096 (9th Cir. 2006) (citing McGuckin v. Smith, 974 F.2d 1050, 1559-1560 (9th Cir. 1991),
7 *overruled in part on other grounds by* WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997)).

8 "Deliberate indifference is a high legal standard." Toguchi v. Chung, 391 F.3d 1051, 1060
9 (9th Cir. 2004). A mere "difference of medical opinion . . . [is] insufficient, as a matter of law, to
10 establish deliberate indifference." Id. at 1058. Mere indifference, negligence, or medical
11 malpractice is not sufficient to support the claim. Broughton v. Cutter Labs., 622 F.2d 458, 460
12 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06. A prisoner can establish deliberate indifference
13 by showing that officials intentionally interfered with his medical treatment for reasons unrelated
14 to the prisoner's medical needs. See Hamilton v. Endell, 981 F.2d 1062, 1066 (9th Cir. 1992).

15 **a) Private Individual Liability**

16 Plaintiff asserts an Eighth Amendment claim against Jane Doe, a private individual
17 employed by a private entity. The Court considers first whether plaintiff may assert a claim against
18 a private party.

19 To state a claim under section 1983, a plaintiff must allege that the deprivation of a right
20 secured by the federal constitution or statutory law was committed by a person acting under color
21 of state law. Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006). "While generally not
22 applicable to private parties, a § 1983 action can lie against a private party when he is a willful
23 participant in joint action with the State or its agents." Kirtley v. Rainey, 326 F.3d 1088, 1092 (9th
24 Cir. 2003).

25 The Ninth Circuit has identified four circumstances under which a private person may be
26 deemed to be acting under color of state law. Under the "public function" test, "when private
27 individuals or groups are endowed by the State with powers or functions governmental in nature,
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1 they become agencies or instrumentalities of the State and subject to its constitutional limitations.”
2 Kirtley, 326 F.3d at 1093 (quoting Lee v. Katz, 276 F.3d 550, 554-55 (9th Cir. 2002)). Under the
3 “joint action test,” a court will consider whether “the state has so far insinuated itself into a position
4 of interdependence with the private entity that it must be recognized as a joint participant in the
5 challenged activity” and “knowingly accepts the benefits derived from unconstitutional behavior.”
6 Kirtley, 326 F.3d at 1093 (quoting Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1486 (9th
7 Cir. 1995)). Under the “governmental coercion or compulsion” test, the court considers “whether
8 the coercive influence or ‘significant encouragement’ of the state effectively converts a private
9 action into a government action.” Kirtley, 326 F.3d at 1094 (quoting Sutton v. Providence St.
10 Joseph Medical Center, 192 F.3d 826, 836-37 (9th Cir. 1999)). Finally, under the “government
11 nexus” test, the court asks whether “there is such a close nexus between the State and the challenged
12 action that the seemingly private behavior may be fairly treated as that of the State itself.” Kirtley,
13 326 F.3d at 1095 (quoting Brentwood Academy v. Tennessee Secondary School Athletic Ass’n,
14 531 U.S. 288, 295 (2001)).

15 Plaintiff has sued Jane Doe, ostensibly a private actor employed by Corizon, for failing to
16 provide adequate medical care at FCJ. Corizon, in turn, is alleged to have contracted with FCJ to
17 provide medical services to inmates. This suggests that Corizon, a private entity, has contracted
18 with FCJ to provide medical services to inmates

19 A private physician or hospital that contracts with a public prison system to provide
20 treatment for inmates performs a public function and acts under color of law for purposes of § 1983.
21 See West v. Atkins, 487 U.S. 42, 56 n.15 (1988) (“[A]lthough the provision of medical services is
22 a function traditionally performed by private individuals, the context in which respondent performs
23 these services for the State (quite apart from the source of remuneration) distinguishes the
24 relationship between respondent and West from the ordinary physician-patient relationship.
25 Respondent carried out his duties at the state prison within the prison hospital. That correctional
26 setting, specifically designed to be removed from the community, inevitably affects the exercise of
27 professional judgment.”); see also Lopez v. Dep’t of Health Servs., 939 F.2d 881, 883 (9th Cir.
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1 1991) (“Here the district court's sua sponte dismissal was improper because Lopez's complaint
2 alleges that defendants Maryvale Samaritan Hospital (“Maryvale”) and Southwest Ambulance
3 Service (“Southwest”) are under contract with the state of Arizona to provide medical services to
4 indigent citizens. These allegations are sufficient to support a section 1983 action because under
5 either the joint action or the government nexus analysis they set forth a claim that defendants
6 Southwest and Maryvale act under color of state law.”).

7 Since Corizon’s provision of medical care to inmate at FCJ amounts to the performance of
8 a public function, the undersigned finds that plaintiff is not precluded from bringing a §1983 claim
9 against the private individual, Jane Doe, a Corizon nurse.

10 **b) Plaintiff’s Claim**

11 Having established that a § 1983 claim may be asserted against Jane Doe, the Court now
12 turns to whether Plaintiff’s allegations are sufficient to state a claim. He alleges that he was taken
13 to see this defendant with an extremely swollen ankle, in extreme pain, and assistance needed in
14 walking. Although these symptoms suggest a serious injury, Jane Doe did not provide any pain
15 medication, did not wrap the ankle, did not order an x-ray, and did not schedule a follow-up
16 appointment. This reflects a nearly total absence of care and is sufficient to find that Jane Doe was
17 deliberately indifferent to plaintiff’s serious medical need.

18 **V. Doe Defendant**

19 Plaintiff alleges a cognizable claim against Jane Doe only. Although the use of Doe
20 Defendants is generally disfavored, the Ninth Circuit requires that plaintiff be provided with “an
21 opportunity through discovery to identify the unknown defendants, unless it is clear that
22 discovery would not uncover their identities....” Wakefield v. Thompson, 177 F.3d 1160, 1163
23 (9th Cir. 1999) (quoting Gillespie v. Civiletti, 629 E.2d 637, 642 (9th Cir. 1980)). However, the
24 Court cannot order the Marshal to serve a defendant whose identity is unknown.

25 Therefore, plaintiff may proceed in this action alleging only a cognizable claim against
26 Jane Doe, but he is advised that he alone is responsible for identifying Doe and substituting a
27 named defendant in her place. If the district judge assigned to this case adopts these findings and
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1 recommendations, the Court will open discovery for the limited purpose of identifying Defendant
2 Jane Doe. Plaintiff will be limited to seeking discovery pursuant to Rule 45 of the Federal Rules
3 of Civil Procedure and will be entitled to the issuance of subpoenas duces tecum through which
4 plaintiff can subpoena documents to discover Jane Doe's name. Fed. R. Civ. P. 45.

5 **VI. Conclusion and Order**

6 Based on the foregoing, the Court **ORDERS** that a district judge be assigned to this case.

7 The Court **RECOMMENDS** that this action proceed only on plaintiff's Eighth Amendment
8 claim against defendant Jane Doe, and all other claims and defendants be dismissed.

9 These findings and recommendations are submitted to the United States District Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
11 after being served with these findings and recommendations, any party may file written
12 objections with the court and serve a copy on all parties. Such a document should be captioned
13 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
14 objections shall be filed and served within fourteen days after service of the objections. The
15 parties are advised that failure to file objections within the specified time may waive the right to
16 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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18 IT IS SO ORDERED.

19 Dated: November 14, 2018

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE