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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

XAVIER NAILING,
Plaintiff,
v.
F. FELICIANO, et al.,
Defendants.

Case No. 1:18-cv-00230-DAD-BAM (PC)
FINDINGS AND RECOMMENDATIONS TO
DISMISS ACTION, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM, FAILURE
TO OBEY A COURT ORDER, AND
FAILURE TO PROSECUTE
(ECF No. 14)
FOURTEEN (14) DAY DEADLINE

I. Background

Plaintiff Xavier Nailing (“Plaintiff”) is a former state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action under 42 U.S.C. § 1983. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On August 14, 2018, the Court issued a screening order granting Plaintiff leave to file an amended complaint within thirty (30) days. (ECF No. 14.) The Court expressly warned Plaintiff that the failure to file an amended complaint in compliance with the Court’s order would result in a recommendation for dismissal of this action, with prejudice, for failure to obey a court order and for failure to state a claim. (*Id.* at 12.) Plaintiff’s amended complaint was due on or before September 17, 2018, and Plaintiff has failed to file an amended complaint or otherwise communicate with the Court.

1 **II. Failure to State a Claim**

2 **A. Screening Requirement**

3 The Court is required to screen complaints brought by prisoners seeking relief against a
4 governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C.
5 § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous
6 or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary
7 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2); 28 U.S.C.
8 § 1915(e)(2)(B)(ii).

9 A complaint must contain “a short and plain statement of the claim showing that the
10 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
11 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
12 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
13 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken as
14 true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc.,
15 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

16 To survive screening, Plaintiff’s claims must be facially plausible, which requires
17 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable
18 for the misconduct alleged. Iqbal, 556 U.S. at 678 (quotation marks omitted); Moss v. U.S.
19 Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted
20 unlawfully is not sufficient, and mere consistency with liability falls short of satisfying the
21 plausibility standard. Iqbal, 556 U.S. at 678 (quotation marks omitted); Moss, 572 F.3d at 969.

22 **B. Plaintiff’s Allegations**

23 Plaintiff is no longer in custody. The events in the complaint are alleged to have occurred
24 while Plaintiff was housed at Wasco State Prison. Plaintiff names the following defendants: (1)
25 F. Feliciano, Appeal Coordinator; (2) G. Baker, Correctional Officer; (3) C. Wade, Correctional
26 Sergeant; (4) J. Actis, Correctional Case Counselor; (5) B. Keyfauver, Correctional Case
27 Counselor Supervisor; and (6) Weston Philips, Associate Warden. All defendants are sued in
28 their official and individual capacities.

1 Claim 1

2 In Claim 1, Plaintiff asserts a violation of the Due Process Clause and Equal Protection
3 Clause of the Fourteenth Amendment related to his property. Plaintiff alleges that on July 28,
4 2017, he was placed in the Administrative Segregation (“Ad-Seg”) Unit because on a prior prison
5 term, he was endorsed to a SNY Facility without knowing and never going. While in the Ad-Seg
6 Unit, Defendant Baker took Plaintiff’s personal property, including purported evidence of Los
7 Angeles County Sheriff employees’ violation of Plaintiff’s civil rights. The evidence was
8 comprised of documents that included names, dates, and accounts of the employees’ actions and
9 violations and Plaintiff’s grievances. Plaintiff appealed the taking of his property and evidence,
10 but the appeal was not returned to him or processed by the Appeals Coordinator.

11 On August 2, 2017, Plaintiff was placed in the California Department of Corrections and
12 Rehabilitation (“CDCR”) Mental Health Services Delivery System at the clinical case
13 management level of care. On or about August 9, 2017, Plaintiff filed a CDCR 602 grievance by
14 placing it in the housing appeal box. Defendant Feliciano did not process Plaintiff’s CDCR 602
15 and Plaintiff has not received a response.

16 On August 15, 2017, Plaintiff filed a CDCR 602. On August 17, 2017, Plaintiff’s group
17 CDCR 602 was rejected. On August 24, 2017, Plaintiff rewrote and resubmitted the legal
18 supplies group appeal. Defendant Feliciano did not process the appeals after Plaintiff submitted
19 them in the inmate appeals box.

20 Plaintiff contends that Defendant Feliciano violated interdepartmental policy, Title 15 and
21 Plaintiff’s Fourteenth Amendment rights. Plaintiff further contends that Defendant Feliciano, as
22 Appeals Coordinator, should have known that she could not treat Plaintiff differently without a
23 reason. Plaintiff believes that Defendant Feliciano would not process his CDCR grievances based
24 on his “suspect classification.” (ECF No. 1 at p. 4.) Plaintiff asserts that Defendant Feliciano
25 was deliberately indifferent to his constitutional rights.

26 As of the filing of the complaint, Plaintiff alleges that he has not received a response from
27 Defendant Feliciano after Defendant Baker took and did not return his property and evidence.
28 Plaintiff also alleges that he has not received any notification from Defendant Feliciano of the

1 second inmate group appeal. Plaintiff resubmitted a CDCR 602 regarding his property that was
2 taken by Defendant Baker, but he has not received a response from Defendant Feliciano.

3 Claim 2

4 In Claim 2, Plaintiff contends that his Due Process and Equal Protection rights were
5 violated in relation to disciplinary proceedings. Plaintiff alleges that on September 2, 2017, he
6 filed an appeal because he received a Rules Violation Report (“RVR”) for disobeying an order on
7 September 1, 2017. Plaintiff further alleges that Defendant Wade violated interdepartmental
8 procedures and Title 15. Within the body of the RVR, it states, “I instructed inmate NAILING to
9 get out of the shower which complied.” (ECF No. 1 at p. 5.) Plaintiff asserts that in Wasco State
10 Prison’s Reception Center orientation manual it states that inmates may shower during dayroom if
11 you are scheduled for dayroom activities. Plaintiff asserts that Defendant Feliciano did not
12 process his appeal. He therefore alleges that both Defendant Wade and Defendant Feliciano were
13 deliberately indifferent to his constitutional rights.

14 On September 25, 2017, Plaintiff filed a CDCR 602 grievance against Defendant
15 Feliciano for not processing his last three appeals. Plaintiff contends that he has not received a
16 response from Defendant Feliciano or from his fourth CDCR 602 grievance. Prior to filing his
17 grievance on September 25, 2017, Plaintiff filed a CDCR 22 request for interview on September
18 9, 2017.

19 On September 21, 2017, Plaintiff sent Defendant Actis, his assigned correctional
20 counselor, a copy of the CDCR 22 form asking Defendant Actis to interview Plaintiff. On
21 September 27, 2017, Plaintiff filed yet another CDCR 22 request for interview and sent it to
22 Defendant Feliciano asking why Defendant Feliciano would not respond to his CDCR 602
23 grievances. Defendant Feliciano reportedly has not responded to the CDCR 22 forms or CDCR
24 602 grievances.

25 On September 28, 2017, Plaintiff filed another CDCR 22 request for interview and sent it
26 to Defendant Actis. Plaintiff asserted that he had been at the reception center for 60 days and had
27 not been interviewed. Plaintiff also asserted that he was a Coleman class and he should have
28 been interviewed in 60 days and transferred in 90 days. Defendant Actis would not respond to

1 Plaintiff's CDCR 22 form, so he filed a CDCR 22 request with Defendant Keyfauver, Defendant
2 Actis' supervisor, on October 8, 2017. Plaintiff reported that he had filed two CDCR 22 requests
3 with no response, that he was a Coleman call member and that his assigned counselor, Defendant
4 Actis, would not respond to his CDCR 22 forms. Plaintiff stated that he needed and requested to
5 be endorsed to SATF for treatment and that it would be 90 days on October 28.

6 On October 15, 2017, Plaintiff filed a CDCR 602 grievance against Defendant Actis,
7 placing it in the inmate appeals box. To date, Plaintiff has not received a response from
8 Defendant Feliciano regarding the CDCR 602 he filed against Defendant Actis.

9 On October 19, 2017, Plaintiff filed a CDCR 22 request for interview with T. Schultz, the
10 other Wasco State Prison Appeals Coordinator. Plaintiff requested that T. Schulz investigate the
11 missing CDCR 602 grievances that Plaintiff filed with Defendant Feliciano, the evidence
12 Defendant Baker took, and the 602 Plaintiff filed regarding Defendant Wade.

13 On October 28, 2017, Plaintiff filed another 602 and sent it to Defendant Feliciano
14 regarding the failure of appeals staff to process three 602s. Defendant Feliciano did not respond.

15 On November 7, 2017, Plaintiff filed a CDCR 22 placing Defendant Philips on notice,
16 stating that Defendant Philips was responsible for his treatment and that the appeals coordinator
17 had not processed three of his appeals. The appeal that Plaintiff filed regarding the failure to
18 process three appeals was rejected by A. Gayda. On the same date, Plaintiff filed a CDCR 22
19 request form to A. Gayda regarding the printout of four appeals that had been adjudicated.
20 Plaintiff stated that the 602s he filed were regarding Ad-Seg staff taking evidence. He also was a
21 primary appellant on a group appeal regarding legal supplies, which he rewrote. Additionally, he
22 appealed the RVR. Plaintiff reported that all three appeals were filed on time and were
23 meritorious. He also indicated that he had the right to participate in a group appeal when he is not
24 the primary of the CDCR 602.

25 On November 19, 2017, Plaintiff submitted another CDCR 22 form to Defendant Actis
26 stating that he was not yet endorsed to a mainline institution. Plaintiff asked what, if anything,
27 was holding him the reception center. Plaintiff claimed that he had never been in a reception
28 center for 115 days. As a result, Plaintiff contends that he was not in a treatment setting and

1 should have been transferred weeks before. Plaintiff asked Defendant Actis to respond to the
2 request, but received no response.

3 On November 21, 2017, Plaintiff filed a CDCR 22 request with T. Schultz. Plaintiff asked
4 why T. Schultz was allowing A. Gayda to reject all appeals based on inmates not filing CDCR 22
5 forms.

6 On November 28, 2017, Plaintiff submitted yet another CDCR 22 form information an
7 unidentified defendant that this was the second CDCR 22 he had submitted, but the appeals
8 coordinators would not process the appeal against Defendant Actis. On the same date, plaintiff
9 filed a CDCR 22 form placing Defendant Feliciano on notice of a civil action.

10 On November 30, 2017, Plaintiff filed a CDCR 22 form to A. Gayda, asking why his
11 appeals were being screened out/rejected because inmates must first file a CDCR 22, when
12 Defendants Actis, Feliciano, Keyfauver and the Chaplain and T. Schulz will not respond to the
13 forms. Plaintiff questioned whether A. Gayda had been told not to process his last two grievances
14 because he has legal skills and helps other prisoners with legal matters.

15 On December 1, 2017, Plaintiff filed a CDCR 602 grievance and staff complaint against
16 Defendant Feliciano, T. Schultz and A. Gayda regarding his treatment. In the CDCR 602,
17 Plaintiff requested an investigation into what happened to his CDCR grievances. Plaintiff alleges
18 that as a result of Defendants actions, he sustained injury and was treated for pain on December 1,
19 2017. Plaintiff also sustained additional injury after being in the reception center for 90 days
20 without mental health treatment. Plaintiff alleges that Defendants were deliberately indifferent
21 when they failed to respond to Plaintiffs' request to be transferred to a mainline treatment setting.
22 Plaintiff asserts that CDCR's program guide states that reception center CCMS to mainline
23 CCMS take place within 90 days of referral. Plaintiff also alleges that defendants conspired to
24 violate their policies by failing to respond to CDCR 602 and 22 forms.

25 Relief

26 Plaintiff seeks compensatory damages, along with declaratory and injunctive relief.

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1 **C. Discussion**

2 Plaintiff's complaint fails to comply with Federal Rules of Civil Procedure 18 and 20 and
3 fails to state a cognizable claim upon which relief may be granted.

4 **1. Federal Rules of Civil Procedure 18 and 20**

5 Plaintiff is attempting to assert claims against different defendants based on different
6 events. However, Plaintiff may not bring unrelated claims against unrelated parties in a single
7 action. Fed. R. Civ. P. 18(a), 20(a)(2); Owens v. Hinsley, 635 F.3d 950, 952 (7th Cir. 2011);
8 George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). Plaintiff may bring a claim against multiple
9 defendants so long as (1) the claim arises out of the same transaction or occurrence, or series of
10 transactions and occurrences, and (2) there are common questions of law or fact. Fed. R. Civ. P.
11 20(a)(2); Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997); Desert Empire Bank v. Ins.
12 Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980). Only if the defendants are properly joined
13 under Rule 20(a) will the Court review the other claims to determine if they may be joined under
14 Rule 18(a), which permits the joinder of multiple claims against the same party.

15 Plaintiff may not pursue unrelated claims against multiple defendants for unrelated events.
16 For instance, Plaintiff may not pursue claims relating to the alleged deprivation of his property by
17 Defendant Baker, while simultaneously pursuing claims against other defendants regarding the
18 asserted failure of appeals staff to process his grievances.

19 **2. Official Capacity**

20 Plaintiff is attempting to bring suit for monetary damages against defendants in their
21 individual and official capacities. "The Eleventh Amendment bars suits for money damages in
22 federal court against a state, its agencies, and state officials in their official capacities." Aholelei
23 v. Dep't. of Pub. Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) (citations omitted). However, the
24 Eleventh Amendment does not bar suits seeking damages against state officials in their personal
25 capacities, Hafer v. Melo, 502 U.S. 21, 30 (1991); Porter v. Jones, 319 F.3d 483, 491 (9th Cir.
26 2003), or suits for injunctive relief brought against state officials in their official capacities,
27 Austin v. State Indus. Ins. Sys., 939 F.2d 676, 680 n.2 (9th Cir. 1991).

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1 Thus, Plaintiff may only proceed against the defendants in their individual capacities for
2 monetary damages and in their official capacities for injunctive relief. However, as discussed
3 more fully below, any request for injunctive relief is now moot.

4 **3. Fourteenth Amendment – Equal Protection**

5 Plaintiff asserts that his Fourteenth Amendment rights under the Equal Protection Clause
6 were violated. The nature of this claim is unclear.

7 The Equal Protection Clause requires that persons who are similarly situated be treated
8 alike. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); Hartmann v.
9 California Dep’t of Corr. & Rehab., 707 F.3d 1114, 1123 (9th Cir. 2013); Furnace v. Sullivan,
10 705 F.3d 1021, 1030 (9th Cir. 2013); Shakur v. Schriro, 514 F.3d 878, 891 (9th Cir. 2008). To
11 state a claim, Plaintiff must show that Defendants intentionally discriminated against him based
12 on his membership in a protected class. Hartmann, 707 F.3d at 1123; Furnace, 705 F.3d at 1030;
13 Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003).

14 Plaintiff generally alleges that he is a member of a suspect class and that he has been
15 discriminated against. However, Plaintiff’s conclusory assertions that his Equal Protection rights
16 were violated is not sufficient to state a cognizable claim. Plaintiff must adequately demonstrate
17 that he is a member of a protected class and that defendants intentionally discriminated against
18 him based on his membership in that class.

19 **4. Fourteenth Amendment – Deprivation of Property**

20 Prisoners have a protected interest in their personal property. Hansen v. May, 502 F.2d
21 728, 730 (9th Cir. 1974). An authorized, intentional deprivation of property is actionable under
22 the Due Process Clause; see Hudson v. Palmer, 468 U.S. 517, 532, n. 13 (1984) (citing Logan v.
23 Zimmerman Brush Co., 455 U.S. 422, 435–36 (1982)); Quick v. Jones, 754 F.2d 1521, 1524 (9th
24 Cir. 1985), however, “[a]n unauthorized intentional deprivation of property by a state employee
25 does not constitute a violation of the procedural requirements of the Due Process Clause of the
26 Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available,”
27 Hudson, 468 U.S. at 533.

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1 Plaintiff alleges that Defendant Baker wrongly took his property and evidence and then
2 failed to return it in violation of his rights. Due Process is therefore satisfied if there is a
3 meaningful post-deprivation remedy available to him. Hudson, 468 U.S. at 533. Plaintiff has an
4 adequate post-deprivation remedy available under California law. Barnett v. Centoni, 31 F.3d
5 813, 816–17 (9th Cir. 1994) (citing Cal. Gov’t Code §§ 810–895). Accordingly, Plaintiff has
6 failed to state a cognizable claim for the alleged deprivation of his personal property against
7 Defendant Baker.

8 **5. Fourteenth Amendment – Processing of Grievances**

9 The bulk of Plaintiff’s complaint is directed at the failure of various defendants to process
10 and respond to his appeals and related inquiries. Plaintiff cannot pursue any claims against prison
11 staff based solely on the processing and review of inmate appeals in this action. The existence of
12 an inmate appeals process does not create a protected liberty interest upon which Plaintiff may
13 base a claim that he was denied a particular result or that the appeals process was deficient.
14 Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (Prisoners do not have a “separate
15 constitutional entitlement to a specific prison grievance procedure.”) (citation omitted), cert.
16 denied, 541 U.S. 1063 (2004); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988). Therefore,
17 Plaintiff has not stated a cognizable claim against Defendants Feliciano, Actis, Keyfauber, and
18 Philips arising out the processing or rejection of his 602 appeals.

19 **6. Eighth Amendment – Denial of Mental Health Treatment**

20 Although not entirely clear, it appears that Plaintiff is complaining about the denial of
21 mental health treatment while housed at Wasco State Prison Reception Center. A prisoner’s
22 claim of inadequate medical care does not constitute cruel and unusual punishment in violation of
23 the Eighth Amendment unless the mistreatment rises to the level of “deliberate indifference to
24 serious medical needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v.
25 Gamble, 429 U.S. 97, 104 (1976)). Deliberate indifference may be shown by the denial, delay or
26 intentional interference with medical treatment or by the way in which medical care is provided.
27 Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988). The two-part test for deliberate
28 indifference requires Plaintiff to show (1) “a ‘serious medical need’ by demonstrating that failure

1 to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and
2 wanton infliction of pain,’” and (2) “the defendant’s response to the need was deliberately
3 indifferent.” Jett, 439 F.3d at 1096.

4 A defendant does not act in a deliberately indifferent manner unless the defendant “knows
5 of and disregards an excessive risk to inmate health or safety.” Farmer v. Brennan, 511 U.S. 825,
6 837 (1994). “Deliberate indifference is a high legal standard,” Simmons v. Navajo Cty., Ariz.,
7 609 F.3d 1011, 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004), and
8 is shown where there was “a purposeful act or failure to respond to a prisoner’s pain or possible
9 medical need” and the indifference caused harm. Jett, 439 F.3d at 1096. In applying this
10 standard, the Ninth Circuit has held that before it can be said that a prisoner’s civil rights have
11 been abridged, “the indifference to his medical needs must be substantial. Mere ‘indifference,’
12 ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.” Broughton v. Cutter
13 Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105–106).

14 Plaintiff’s complaint fails to state a cognizable claim based on the denial of mental health
15 treatment. Plaintiff fails to adequately allege that any defendant knew that Plaintiff required
16 mental health treatment and failed to respond to that need. Plaintiff also fails to adequately
17 allege that he suffered any harm from the temporary delay in the receipt of treatment.

18 **7. Disciplinary Proceedings**

19 Plaintiff alleges that he received a RVR for showering, which was not a violation of the
20 reception center’s policy. Although not entirely clear, Plaintiff’s complaint suggests that he was
21 falsely accused of a violation. However, Inmates do not have any due process right to be free
22 from false disciplinary charges. See Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986)
23 (inmates have “no constitutionally guaranteed immunity from being falsely or wrongly accused of
24 conduct which may result in the deprivation of a protected liberty interest,” provided that they are
25 “not...deprived of a protected liberty interest without due process of law.”); Sprouse v. Babcock,
26 870 F.2d 450, 452 (8th Cir. 1989) (“Sprouse’s claims based on the falsity of the charges and the
27 impropriety of Babcock’s involvement in the grievance procedure, standing alone, do not state
28 constitutional claims.”). Accordingly, Plaintiff’s claim that any defendant wrote a false

1 disciplinary charge fails to state a cognizable claim.

2 **8. Declaratory Relief**

3 Plaintiff seeks a declaration that his rights were violated. “A declaratory judgment, like
4 other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised
5 in the public interest.” Eccles v. Peoples Bank of Lakewood Village, 333 U.S. 426, 431 (1948).
6 “Declaratory relief should be denied when it will neither serve a useful purpose in clarifying and
7 settling the legal relations in issue nor terminate the proceedings and afford relief from the
8 uncertainty and controversy faced by the parties.” United States v. Washington, 759 F.2d 1353,
9 1357 (9th Cir. 1985).

10 If this action reaches trial and the jury returns a verdict in favor of Plaintiff, then that
11 verdict will be a finding that Plaintiff’s constitutional rights were violated. Accordingly, a
12 declaration that any defendant violated Plaintiff’s rights is unnecessary.

13 **9. Injunctive Relief**

14 To the extent Plaintiff seeks injunctive relief against defendants, any such request is now
15 moot. Plaintiff is no longer housed at the Wasco State Prison Reception Center, where he alleges
16 the incident at issue occurred, and where the prison officials are employed. Therefore, any
17 injunctive relief against these defendants is moot. See Andrews v. Cervantes, 493 F.3d 1047,
18 1053 n.5 (9th Cir. 2007) (prisoner’s claims for injunctive relief generally become moot upon
19 transfer) (citing Johnson v. Moore, 948 F.2d 517, 519 (9th Cir. 1991) (per curiam) (holding
20 claims for injunctive relief “relating to [a prison’s] policies are moot” when the prisoner has been
21 moved and “he has demonstrated no reasonable expectation of returning to [the prison]”)).

22 **10. State Law Claims**

23 Based on language in his request for relief, Plaintiff appears to be asserting a state law
24 claim for intentional infliction of emotional distress. Under 28 U.S.C. § 1367(a), in any civil
25 action in which the district court has original jurisdiction, the “district courts shall have
26 supplemental jurisdiction over all other claims that are so related to claims in the action within
27 such original jurisdiction that they form part of the same case or controversy under Article III of
28 the United States Constitution,” except as provided in subsections (b) and (c). The Supreme

1 Court has stated that “if the federal claims are dismissed before trial, . . . the state claims should
2 be dismissed as well.” United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

3 Although the Court may exercise supplemental jurisdiction over state law claims, Plaintiff must
4 first have a cognizable claim for relief under federal law. 28 U.S.C. § 1367. As Plaintiff has not
5 stated a cognizable claim for relief under federal law, the Court will not screen Plaintiff’s state
6 law claims.

7 In addition, Plaintiff has failed to allege compliance with the Government Torts Claims
8 Act (“Act”). The Act requires that a party seeking to recover money damages from a public
9 entity or its employees submit a claim to the entity before filing suit in court, generally no later
10 than six months after the cause of action accrues. Cal. Gov’t Code §§ 905, 911.2, 945, 950.2
11 (emphasis added). When a plaintiff asserts a claim subject to the Act, he must affirmatively
12 allege compliance with the claim presentation procedure, or circumstances excusing such
13 compliance, in his complaint. Shirk v. Vista Unified Sch. Dist., 42 Cal. 4th 201, 209 (2007).
14 Plaintiff has not done so here.

15 **III. Failure to Prosecute and Failure to Obey a Court Order**

16 **A. Legal Standard**

17 Local Rule 110 provides that “[f]ailure . . . of a party to comply with these Rules or with
18 any order of the Court may be grounds for imposition by the Court of any and all sanctions . . .
19 within the inherent power of the Court.” District courts have the inherent power to control their
20 dockets and “[i]n the exercise of that power they may impose sanctions including, where
21 appropriate, . . . dismissal.” Thompson v. Hous. Auth., 782 F.2d 829, 831 (9th Cir. 1986). A
22 court may dismiss an action, with prejudice, based on a party’s failure to prosecute an action,
23 failure to obey a court order, or failure to comply with local rules. See, e.g., Ghazali v. Moran, 46
24 F.3d 52, 53–54 (9th Cir. 1995) (dismissal for noncompliance with local rule); Ferdik v. Bonzelet,
25 963 F.2d 1258, 1260–61 (9th Cir. 1992) (dismissal for failure to comply with an order requiring
26 amendment of complaint); Malone v. U.S. Postal Serv., 833 F.2d 128, 130–33 (9th Cir. 1987)
27 (dismissal for failure to comply with court order).

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1 In determining whether to dismiss an action, the Court must consider several factors:
2 (1) the public’s interest in expeditious resolution of litigation; (2) the Court’s need to manage its
3 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
4 cases on their merits; and (5) the availability of less drastic sanctions. Henderson v. Duncan, 779
5 F.2d 1421, 1423 (9th Cir. 1986); Carey v. King, 856 F.2d 1439, 1440 (9th Cir. 1988).

6 **B. Discussion**

7 Here, Plaintiff’s first amended complaint is overdue, and he has failed to comply with the
8 Court’s order. The Court cannot effectively manage its docket if Plaintiff ceases litigating his
9 case. Thus, the Court finds that both the first and second factors weigh in favor of dismissal.

10 The third factor, risk of prejudice to defendant, also weighs in favor of dismissal, since a
11 presumption of injury arises from the occurrence of unreasonable delay in prosecuting an action.
12 Anderson v. Air W., 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor usually weighs against
13 dismissal because public policy favors disposition on the merits. Pagtalunan v. Galaza, 291 F.3d
14 639, 643 (9th Cir. 2002). However, “this factor lends little support to a party whose
15 responsibility it is to move a case toward disposition on the merits but whose conduct impedes
16 progress in that direction,” which is the case here. In re Phenylpropanolamine (PPA) Products
17 Liability Litigation, 460 F.3d 1217, 1228 (9th Cir. 2006) (citation omitted).

18 Finally, the Court’s warning to a party that failure to obey the court’s order will result in
19 dismissal satisfies the “considerations of the alternatives” requirement. Ferdik, 963 F.2d at 1262;
20 Malone, 833 at 132–33; Henderson, 779 F.2d at 1424. The Court’s August 14, 2018 screening
21 order expressly warned Plaintiff that his failure to file an amended complaint would result in a
22 recommendation of dismissal of this action, with prejudice, for failure to obey a court order and
23 for failure to state a claim. (ECF No. 14, p. 12.) Thus, Plaintiff had adequate warning that
24 dismissal could result from his noncompliance.

25 Additionally, at this stage in the proceedings there is little available to the Court that
26 would constitute a satisfactory lesser sanction while protecting the Court from further
27 unnecessary expenditure of its scarce resources. Plaintiff is proceeding *in forma pauperis* in this
28 action, making monetary sanctions of little use, and the preclusion of evidence or witnesses is

1 likely to have no effect given that Plaintiff has ceased litigating his case.

2 **IV. Conclusion and Recommendation**

3 Accordingly, the Court finds that dismissal is the appropriate sanction and HEREBY
4 RECOMMENDS that this action be dismissed, with prejudice, for failure to state a claim
5 pursuant to 28 U.S.C. § 1915A, for failure to obey a Court order, and for Plaintiff's failure to
6 prosecute this action.

7 These Findings and Recommendation will be submitted to the United States District Judge
8 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**
9 **(14) days** after being served with these Findings and Recommendation, Plaintiff may file written
10 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
11 Findings and Recommendation." Plaintiff is advised that failure to file objections within the
12 specified time may result in the waiver of the "right to challenge the magistrate's factual
13 findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
14 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

15
16 IT IS SO ORDERED.

17 Dated: October 4, 2018

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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