

1 The claims raised in plaintiff's first amended complaint, filed June 11, 2012, center on
2 alleged deliberate indifference to plaintiff's serious medical need for monitoring and treatment of
3 hyperlipidemia. In relevant part, plaintiff alleges that he has a history of high cholesterol and
4 elevated triglycerides.¹ He was placed in the Cardiovascular Chronic Care Program at High
5 Desert State Prison (High Desert). Plaintiff's elevated cholesterol and triglycerides were
6 managed well with Lovastatin. In 2007, his medication was changed to another medication,
7 Simvastatin. Without medication, plaintiff's total cholesterol level and his LDLs rose above
8 normal. Plaintiff was without medication from April 2007 until October 2008. In October 2008,
9 plaintiff was prescribed 500 mg of Niacin twice a day and 81 mg of aspirin twice a day. The
10 Niacin caused significant side effects. In February 2009, plaintiff's total cholesterol,
11 triglycerides, and LDLs were all above normal levels. Plaintiff's lipid levels returned to normal
12 in September 2010, while he was taking the prescribed Niacin and aspirin. Plaintiff transferred to
13 California State Prison-Corcoran (Corcoran) in February 2011, and to California State Prison-Los
14 Angeles County (CSP-LAC) in January 2012. Plaintiff had no fasting blood screening while he
15 was at Corcoran, and, at the time the first amended complaint was filed in June 2012, had not had
16 a fasting blood screening at CSP-LAC. Plaintiff's aspirin dosage was cut in half by a physician
17 at CSP-LAC. Plaintiff claims that his rights under the Eighth Amendment have been and
18 continue to be violated by deliberate indifference to the need for proper screening and treatment
19 of his high cholesterol and hyperlipidemia.² He seeks injunctive relief and money damages.

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21 ¹ In his objections, plaintiff contends that he has been diagnosed with coronary heart disease
(CHD).

22 ² Throughout the first amended complaint, plaintiff cites repeatedly to a consent decree in Plata v.
23 Brown, No. C01-1351 TEH. The magistrate judge finds that plaintiff has "failed to state a claim
24 for injunctive relief under Plata." Findings & Recommendations (ECF No. 28) at 5. In his
25 objections, plaintiff asserts that he is not attempting to state a claim directly under Plata, but that
26 evidence of non-compliance with relevant remedial orders in Plata is evidence of deliberate
27 indifference. The question of the evidentiary weight to be given remedial orders or guidelines
28 established in Plata in determining the adequacy of care provided to plaintiff is not before the
court at this time. The court is constrained to observe that the magistrate judge's truncated
description of the history that led to the decision of the United States Supreme Court in Brown v.
Plata, ___ U.S. ___, 131 S.Ct. 1910 (2011) erroneously suggests that the Plata class action and
the Coleman class action have been consolidated. The two actions remain separate and ongoing
class actions concerning, respectively, the constitutional adequacy of the delivery of medical and

1 The court agrees with the magistrate judge's findings that the allegations of the first
2 amended complaint of events through 2011 do not state a claim for violation of plaintiff's Eighth
3 Amendment rights based on deliberate indifference to his serious medical needs, that those
4 allegations reflect at most disagreement with the course of his treatment, and that there is no
5 showing of cognizable harm through the time of plaintiff's transfer to Corcoran. The court
6 cannot, however, adopt the recommendation to dismiss this action without leave to amend and
7 with prejudice at this time.

8 "Dismissal with prejudice and without leave to amend is not appropriate unless it is clear
9 on de novo review that the complaint could not be saved by amendment." Eminence Capital,
10 LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). As noted above, plaintiff alleges in his
11 first amended complaint that he had not received a fasting cholesterol screening since at least
12 February 2011. In his objections, plaintiff states that, while he has been continuously receiving
13 cholesterol medication since his arrival at CSP-LAC, he asserts that he still has not received any
14 blood lipid tests to date.³ Liberally construed, the court cannot find with certainty that plaintiff
15 could not state a viable Eighth Amendment claim based on the alleged failure to provide ongoing
16 monitoring of plaintiff's cholesterol and lipid levels since February 2011.⁴

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. The findings and recommendations filed September 14, 2012, are adopted in part; and
- 19 2. The First Amended Complaint (Dkt. No. 27) fails to state a claim against any
20 defendant named therein based on events that predated plaintiff's transfer to California State
21 Prison-Corcoran in February 2011 and is therefore dismissed with leave to amend;
- 22 3. Plaintiff is granted thirty days from the date of this order in which to file a Second
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24 mental health care to inmates in California's prisons.


25 ³ Plaintiff has named a Doe defendant at CSP-LAC as a party defendant. In order to proceed
26 further with this action he will have to name one or more individual defendants at CSP-LAC who
27 have caused or contributed to an alleged violation of plaintiff's Eighth Amendment rights.

28 ⁴ Plaintiff is reminded that the Eighth Amendment is only violated by deliberate indifference to
serious medical needs. See Estelle v. Gamble, 429 U.S. 97, 106 (1976). "Mere 'indifference,'
'negligence,' or 'medical malpractice' will not support this cause of action." Broughton v. Cutter
Lab., 622 F.2d 458, 460 (9th Cir. 1980), citing Estelle, 429 U.S. at 105-06.

1 Amended Complaint raising only Eighth Amendment claims based on allegations of events that
2 occurred on or after his transfer to California State Prison-Corcoran in February 2011 and naming
3 individual(s) in place of the Doe defendant at California State Prison-Los Angeles County;
4 plaintiff's Second Amended Complaint shall comply with the requirements of the Civil Rights
5 Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice; the Second Amended
6 Complaint must bear the docket number assigned this case and must be labeled "Second
7 Amended Complaint"; failure to file a Second Amended Complaint in accordance with this order
8 may result in the dismissal of this action; and

9 4. This matter is referred back to the assigned magistrate judge for further proceedings.

10 DATED: December 4, 2013.

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14 LAWRENCE K. KARLTON
15 SENIOR JUDGE
16 UNITED STATES DISTRICT COURT
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