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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JOSEPH BECKER,

No. 2:12-CV-3040-KJM-CMK-P

Plaintiff,

vs.

FINDINGS AND RECOMMENDATIONS

K. FANG, et al.,

Defendants.

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Plaintiff, a prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff’s motion for temporary restraining order (Doc. 2). Prior to the formal completion of service, the court requested a response to plaintiff’s motion. Defendants filed the requested response, providing the court with additional information as to plaintiff’s mental health care, including relevant treatment notes (Doc. 16). Plaintiff has also filed a reply to the defendants’ response (Doc. 19), and has requested leave of court to file a supplemental response (Docs. 22, 23, 24).

Plaintiff moves for a temporary restraining order, requesting that he be allowed to continue in the Enhanced Outpatient Program (EOP) due to his suicidal ideation, severe depression, and post traumatic stress disorder. Plaintiff claims the defendants have removed him

1 from the EOP level of care, knowing that so doing will jeopardize plaintiff's mental health  
2 condition.

3           The legal principles applicable to requests for injunctive relief, such as a  
4 temporary restraining order or preliminary injunction, are well established. To prevail, the  
5 moving party must show that irreparable injury is likely in the absence of an injunction. See  
6 Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing Winter v. Natural Res.  
7 Def. Council, Inc., 129 S. Ct. 365 (2008)). To the extent prior Ninth Circuit cases suggest a  
8 lesser standard by focusing solely on the possibility of irreparable harm, such cases are “no  
9 longer controlling, or even viable.” Am. Trucking Ass'ns, Inc. v. City of Los Angeles, 559 F.3d  
10 1046, 1052 (9th Cir. 2009). Under Winter, the proper test requires a party to demonstrate: (1) he  
11 is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of an  
12 injunction; (3) the balance of hardships tips in his favor; and (4) an injunction is in the public  
13 interest. See Stormans, 586 F.3d at 1127 (citing Winter, 129 S. Ct. at 374).

14           Here, plaintiff argues he will suffer irreparable harm based on his risk of suicide;  
15 he has no adequate remedy at law as he has exhausted his administrative remedies; is likely to  
16 succeed on the merits of his claims because threats of suicide are serious mental health needs; the  
17 balance of hardships tips in his favor due to his suffering from removal of EOP and no hardship  
18 on the defendants in allowing him to continue; and the public interest will be served by requiring  
19 prison officials to obey the law. In support of his motion, plaintiff provides the court with his  
20 administrative grievance, which was denied at the Third Level Appeals; a Mental Health  
21 Treatment Plan, dated October 5, 2011; a Mental Health Treatment Plan, dated January 4, 2012;  
22 an Interdisciplinary Progress Notes, dated January 4, 2012, from the ASU Interdisciplinary  
23 Treatment Team Meeting; a copy of his scheduled treatment, dated December 7, 2012; an  
24 Informational Chrono, dated November 2, 2010; a copy of his habeas corpus decision from the  
25 Southern District of California; and a copy of a complaint filed against him.

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1 Plaintiff's 2010 administrative grievance, which was partially granted at the first  
2 and second levels, continued plaintiff's EOP placement until his next quarterly review. The third  
3 level determined plaintiff was receiving the treatment deemed medically necessary, and denied  
4 his appeal. In the October 4, 2011, treatment plan, Dr. Fang noted: "PI has ongoing mental  
5 illness of anxiety, depression, and mood instability needing EOP LOC. However, PI's  
6 documentation indicates no suicidal attempt that would need higher LOC, i.e. DMH referral. On  
7 the other hand, if PI's LOC is dropped to CCCMS, he is at risk of decompensating." (Pl.  
8 Motion, Exh. B, Doc. 2 at 20). In the January 4, 2012, treatment plan, D. Bressi, Psy.D., noted:  
9 "P/I has on-going mental disorder of anxiety, depression, and mood instability. P/I maintains  
10 without further decompensation or suicidality at EOP LOC but would likely decompensate with  
11 less structured and less routine mental health support. As P/I is currently in ASU, which is  
12 recognized as a typically stressful environment for the incarcerated, the recommendation is to  
13 continue at this LOC." (Pl. Motion, Exh. C, Doc. 2 at 23). Finally, the January 4, 2012, ASU  
14 Interdisciplinary Treatment Team Meeting notes indicate that plaintiff refused attendance at his  
15 treatment plan review, was responding well to treatment, continued to struggle with his mood  
16 and affect, which was exacerbated by his ASU placement, he refuses medication but benefits  
17 from his one-on-one and group sessions. It was also noted that plaintiff consistently and  
18 expressly denied suicidal ideation, suicidal attempts, and homicidal ideation. It was determined  
19 plaintiff was to continue in EOP as he would likely decompensate with less structured and less  
20 routine mental health support. (Pl. Motion, Exh. C, Doc. 2 at 25).

21 Defendants oppose the motion on several basis. First, defendants argue that  
22 plaintiff has not demonstrated that an injunction is necessary to prevent irreparable harm.  
23 Second, defendants contend that he has failed to show he is likely to succeed on the merits of his  
24 claims. In support of their contentions, defendants have provided the court with  
25 Interdisciplinary Progress Notes, dated December 11, 2012, from the ASU Interdisciplinary  
26 Treatment Team Meeting; Mental Health Treatment Plan, dated December 11, 2012; an

1 Interdisciplinary Treatment Team Level of Care Decision, dated December 11, 2012; a Mental  
2 Health Placement Chrono, dated December 11, 2012; a Suicide Risk Evaluation, dated December  
3 11, 2012; a Mental Health Referral Chrono, dated December 11, 2012; Interdisciplinary Progress  
4 Notes, dated December 11, 2012, by J. Scott, Psy.D.; Interdisciplinary Progress Notes, dated  
5 December 11, 2012, by Dr. Fang; a second Suicide Risk Evaluation, dated December 11, 2012;  
6 Mental Health Placement Chrono, dated December 11, 2012 (duplicate); Notice of Pending  
7 CDC-115, dated December 31, 2012; Subsequent Administrative Placement Review, dated  
8 December 6, 2012; and a declaration by defendant Fang.

9           The exhibits the defendants submit show that on December 12, 2012, plaintiff's  
10 EOP placement was reevaluated by the Interdisciplinary Treatment Team (IDTT). The progress  
11 notes states "IP reported no current suicidal or homicidal ideation. Recommendation was to  
12 change his LOC from EOP to CCCMS. IP was informed during the IDTT about [t]he change of  
13 LOC due to he was no longer benefit from EOP. IP has not taken medication for over a year  
14 now, for the last six months since arrived to MCSP ASU for Out to Court, IP had not major  
15 mental health issue and or major needs for mental health intervention. There were a few  
16 incidents that IP had verbalized that he was feeling suicidal. Those incidents that IP had voiced  
17 suicidal ideation were when IP was disciplined for behavior problems . . . . IP's suicidal ideation  
18 and suicidal threat in the last six months appear to be conditional." (Def. Response, Doc. 16, at  
19 10 (errors in original). The team's decision was to transfer plaintiff's level of care from EOP to  
20 Correctional Clinical Case Management Services (CCCMS). Following that decision, plaintiff  
21 apparently reported thoughts of suicidal ideation again. He was then seen and evaluated by J.  
22 Scott, Psy.D. The progress notes from that evaluation states that plaintiff "was approached cell-  
23 side and began complaining about the fact that he had been removed from EOP earlier in the day  
24 by his PC and how he felt it was retaliatory . . . . He avoided all questioning related to his claims  
25 of suicide making it impossible to evaluate him." (Def. Response, Doc. 16, at 19). Plaintiff was  
26 thereafter seen and evaluated by his primary clinician, defendant Fang. Progress notes from Dr.

1 Fang's evaluation state "IP stated that he was angry and upset that his LOC was changed to  
2 CCCMS and he did not agree that he should be CCCMS. IP denied current suicidal ideation,  
3 suicidal plan, or homicidal ideation. IP said he wanted to hear from this writer the reasons he  
4 was made CCCMS. This writer explained to IP that based on EOP and CCCMS criteria, he did  
5 not meet criteria to be EOP, yet he would benefit to be CCCMS. IP did not agree with the  
6 decision and the explanation, however, he said he was not suicidal and he rather go back to his  
7 cell to start on writing to the federal judge." (Def. Response, Doc. 16, at 20). Dr. Fang cleared  
8 plaintiff to return to his cell as he reported no suicidal ideation or plan, nor did he show any sign  
9 of psychotic symptoms and reported no psychosis. Finally, Dr. Fang submitted a declaration in  
10 support of the defense opposition, documenting the incident following the December 11, 2012,  
11 IDTT Meeting. Dr. Fang states "The teams decision was based on several facts: (1) Becker had  
12 not taken medication for over a year; (2) Becker's lack of major mental health issues for six  
13 months; and (3) Becker's absence of mental health intervention for six months. In addition, any  
14 suicidal ideations presented by Becker were associated with disciplinary actions taken against  
15 him." (Def. Response, Doc. 16, at 28).

16 Plaintiff further contends<sup>1</sup> that he has now been removed from CCCMS, and is not  
17 receiving any mental health treatment. In addition, he argues that his current provider, Dr.  
18 Fisher, has abandoned his treatment.

19 As stated above, in order for the court to grant plaintiff's request for a temporary  
20 restraining order, plaintiff must show that he is likely to succeed on the merits of his claims, is  
21 likely to suffer irreparable harm, the balance of hardships tips in his favor, and an injunction is in  
22 the public interest. All four conditions must be met prior to an injunction being issued. Here,

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24 <sup>1</sup> In addition to his reply to the defendants' response, plaintiff has also filed a  
25 motion to be allowed to file a supplemental response. In the supplemental response, plaintiff  
26 argues he has now been removed from all mental health treatment, and submits a Mental Health  
Removal Chrono he claims was signed by Dr. Dahl and given to him on March 13, 2013. The  
Chrono is not dated, but even assuming it is the current Chrono, removing plaintiff from mental  
health treatment does not alter the analysis herein.

1 defendants contend plaintiff has not met his burden of showing either the likelihood of  
2 irreparable injury or the likelihood of success on the merits.

3 As to the merits of the case, plaintiff claims that the defendants violated his  
4 Eighth Amendment rights by removing him from the EOP level of care without regards to his  
5 medical needs, and that decision was made deliberately with the knowledge that he will  
6 decompensate and be exposed to the risk of suicide. He has provided some support for his  
7 position, including that he has a history of suicidal ideation, attempts and threats, and that his  
8 providers have recommended he be assigned to EOP level of care.

9 The treatment a prisoner receives in prison and the conditions under which the  
10 prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits cruel  
11 and unusual punishment. See Helling v. McKinney, 509 U.S. 25, 31 (1993); Farmer v. Brennan,  
12 511 U.S. 825, 832 (1994). The Eighth Amendment “embodies broad and idealistic concepts of  
13 dignity, civilized standards, humanity, and decency.” Estelle v. Gamble, 429 U.S. 97, 102  
14 (1976). Conditions of confinement may, however, be harsh and restrictive. See Rhodes v.  
15 Chapman, 452 U.S. 337, 347 (1981). Nonetheless, prison officials must provide prisoners with  
16 “food, clothing, shelter, sanitation, medical care, and personal safety.” Toussaint v. McCarthy,  
17 801 F.2d 1080, 1107 (9th Cir. 1986). A prison official violates the Eighth Amendment only  
18 when two requirements are met: (1) objectively, the official’s act or omission must be so serious  
19 such that it results in the denial of the minimal civilized measure of life’s necessities; and (2)  
20 subjectively, the prison official must have acted unnecessarily and wantonly for the purpose of  
21 inflicting harm. See Farmer, 511 U.S. at 834. Thus, to violate the Eighth Amendment, a prison  
22 official must have a “sufficiently culpable mind.” See id.

23 Deliberate indifference to a prisoner’s serious illness or injury, or risks of serious  
24 injury or illness, gives rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at  
25 105; see also Farmer, 511 U.S. at 837. This applies to physical as well as dental and mental  
26 health needs. See Hoptowit v. Ray, 682 F.2d 1237, 1253 (9th Cir. 1982). An injury or illness is

1 sufficiently serious if the failure to treat a prisoner's condition could result in further significant  
2 injury or the "unnecessary and wanton infliction of pain." McGuckin v. Smith, 974 F.2d 1050,  
3 1059 (9th Cir. 1992); see also Doty v. County of Lassen, 37 F.3d 540, 546 (9th Cir. 1994).  
4 Factors indicating seriousness are: (1) whether a reasonable doctor would think that the condition  
5 is worthy of comment; (2) whether the condition significantly impacts the prisoner's daily  
6 activities; and (3) whether the condition is chronic and accompanied by substantial pain. See  
7 Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc).

8           The requirement of deliberate indifference is less stringent in medical needs cases  
9 than in other Eighth Amendment contexts because the responsibility to provide inmates with  
10 medical care does not generally conflict with competing penological concerns. See McGuckin,  
11 974 F.2d at 1060. Thus, deference need not be given to the judgment of prison officials as to  
12 decisions concerning medical needs. See Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir.  
13 1989). The complete denial of medical attention may constitute deliberate indifference. See  
14 Toussaint v. McCarthy, 801 F.2d 1080, 1111 (9th Cir. 1986). Delay in providing medical  
15 treatment, or interference with medical treatment, may also constitute deliberate indifference.  
16 See Lopez, 203 F.3d at 1131. Where delay is alleged, however, the prisoner must also  
17 demonstrate that the delay led to further injury. See McGuckin, 974 F.2d at 1060.

18           Negligence in diagnosing or treating a medical condition does not, however, give  
19 rise to a claim under the Eighth Amendment. See Estelle, 429 U.S. at 106. Moreover, a  
20 difference of opinion between the prisoner and medical providers concerning the appropriate  
21 course of treatment does not give rise to an Eighth Amendment claim. See Jackson v. McIntosh,  
22 90 F.3d 330, 332 (9th Cir. 1996).

23           In this instance, plaintiff has provided the court with evidence to support that he  
24 has been receiving the EOP level of care, and has a history of suicidal thoughts. Thus, there is  
25 some support for his claim that he needs to remain in EOP, and his removal from that  
26 programming could be detrimental. However, the defendants counter that evidence with

1 documentation as to why plaintiff was removed from EOP, including the declaration from Dr.  
2 Fang that such decision was based on plaintiff's lack of major mental health issues, need for  
3 medication and/or intervention. Thus, based on the information currently before the court, it  
4 does not appear the decision to remove plaintiff from EOP was done with the necessary purpose  
5 of inflicting harm. Rather, it appears there is at best a difference of opinion, which is insufficient  
6 to rise to the level of an Eighth Amendment violation. Whether a jury would agree, and whether  
7 there will be additional information available later in this case to sway the jury otherwise,  
8 remains to be determined. However, at this early stage of these proceedings, and based on the  
9 evidence submitted with the motion, it does not appear that plaintiff will be able to show  
10 deliberate indifference. Thus, plaintiff has not met his burden that it is likely he will succeed on  
11 the merits of his claim.

12           The undersigned could stop the analysis there, as the moving party must meet all  
13 four requirements before a temporary restraining order can issue. However, as the parties also  
14 address the irreparable injury, the undersigned will as well. There is no question that if plaintiff  
15 was to succeed in committing suicide, that would be irreparable. However, there are procedures  
16 in place at the prison to eliminate that possible outcome. As the parties have shown the court,  
17 when plaintiff has threatened suicide, he is evaluated by his clinician. He may then be put on  
18 suicide watch if there is deemed a real threat. However, pursuant to the information before the  
19 court, plaintiff has threatened suicide numerous times. The last time he did so was following the  
20 committee's decision to remove him from EOP. However, when he was evaluated, he  
21 acknowledged that he was not in fact suicidal, and wanted to be returned to his cell and not put  
22 on suicide watch. Plaintiff's past behavior of crying wolf does not support his contention that  
23 suicide is imminent. In addition, as plaintiff is in administrative segregation, he is reevaluated  
24 regularly. If plaintiff starts to decompose, his EOP status will similarly be evaluated, and there  
25 would be no reason plaintiff could not be put back on EOP status if the situation so required.  
26 Therefore, the undersigned finds plaintiff has not shown a likelihood of irreparable harm.



1 Based on the foregoing, the undersigned recommends that:

- 2 1. Plaintiff's motion to supplement his reply (Doc. 22) be granted; and  
3 2. Plaintiff's motion for a temporary restraining order (Doc. 2) be denied;

4 These findings and recommendations are submitted to the United States District  
5 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
6 after being served with these findings and recommendations, any party may file written  
7 objections with the court. Responses to objections shall be filed within 14 days after service of  
8 objections. Failure to file objections within the specified time may waive the right to appeal.  
9 See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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11 DATED: August 5, 2013

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13 **CRAIG M. KELLISON**  
14 UNITED STATES MAGISTRATE JUDGE  
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