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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL HICKS,  
Plaintiff,  
v.  
BEHROZ HAMKAR et al.,  
Defendants.

No. 2:13-cv-1687 KJM CKD P (TEMP)

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with this civil rights action filed pursuant to 42 U.S.C. § 1983. Several matters are pending before the court, including plaintiff’s motion for preliminary injunctive relief, plaintiff’s motion to amend, and defendants’ motion for a protective order. The court will address these matters in turn.

**BACKGROUND**

Plaintiff is proceeding on a first amended complaint against defendants Hamkar, Venes, Johnson, Sayre, and Nangalama. Therein, plaintiff claims that defendants’ refusal to provide him adequate medical care for his arthritic condition (moderate multilevel cervical spondylosis) violates his rights under the Eighth Amendment.

On December 8, 2014, defendants filed a motion to revoke plaintiff’s in forma pauperis (“IFP”) status. On March, 25, 2015, then-Magistrate Judge Dale A. Drozd issued findings and recommendations, recommending defendants’ motion to revoke plaintiff’s IFP status be denied

1 and defendants be ordered to file a response to plaintiff's first amended complaint within forty-  
2 five days. Although defendants had demonstrated that plaintiff had accrued three or more strikes  
3 under 28 U.S.C. § 1915(g), Judge Drozd found that the allegations in plaintiff's original  
4 complaint satisfied the imminent danger exception to the three strikes rule. Judge Drozd also, by  
5 order, denied plaintiff's motion for preliminary injunctive relief as having been rendered moot  
6 because plaintiff had filed a notice of change of address in this action indicating he was no longer  
7 subject to the alleged conditions he complained of in his motion.

8 Plaintiff filed objections to Judge Drozd's findings and recommendations. On September  
9 22, 2015, United States District Judge Kimberly J. Mueller adopted the findings and  
10 recommendations in full and denied defendant's motion to revoke plaintiff's IFP status. Judge  
11 Mueller also construed plaintiff's objections as a motion for reconsideration of Judge Drozd's  
12 order denying plaintiff's motion for preliminary injunctive relief as moot. Judge Mueller vacated  
13 that order because plaintiff had raised arguments in his objections that called into question  
14 whether his motion had in fact been rendered moot by his transfer. Judge Mueller referred the  
15 matter back to the magistrate judge for further proceedings and issuance of findings and  
16 recommendations on plaintiff's motion.

#### 17 **PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF**

18 In plaintiff's motion for preliminary injunctive relief, plaintiff's allegations center on his  
19 conditions of confinement at CSP-Sacramento and at High Desert State Prison where he believed  
20 he was not receiving adequate physical therapy as a physical therapist at CSP-Sacramento had  
21 previously recommended for his medical condition. In various subsequent filings with this court,  
22 plaintiff maintained that he still was not receiving adequate physical therapy at Mule Creek State  
23 Prison and most recently at R.J. Donovan Correctional Facility. In this regard, plaintiff claims  
24 that prison officials have been deliberately indifferent to his serious medical needs. See Estelle v.  
25 Gamble, 429 U.S. 97 (1976).

26 Having reviewed plaintiff's motion for preliminary injunctive relief and his subsequent  
27 filings with the court, the undersigned finds that plaintiff is not entitled to preliminary injunctive  
28 relief. "The proper legal standard for preliminary injunctive relief requires a party to demonstrate

1 ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the  
2 absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction  
3 is in the public interest.’” Stormans v. Selecky, 571 F.3d 960, 978 (9th Cir. 2009) (quoting  
4 Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008)). See also 18 U.S.C. § 3626(a)(2)  
5 (preliminary injunction “must be narrowly drawn, extend no further than necessary to correct the  
6 harm the court finds requires preliminary relief, and be the least intrusive means necessary to  
7 correct the harm.”). Here, plaintiff has not shown that he is likely to succeed on the merits of his  
8 claims.

9 In the Ninth Circuit, a deliberate indifference claim has two components:

10 First, the plaintiff must show a “serious medical need” by  
11 demonstrating that “failure to treat a prisoner’s condition could  
12 result in further significant injury or the ‘unnecessary and wanton  
13 infliction of pain.’” Second, the plaintiff must show the  
14 defendant’s response to the need was deliberately indifferent. This  
15 second prong – defendant’s response to the need was deliberately  
16 indifferent – is satisfied by showing (a) a purposeful act or failure  
17 to respond to a prisoner’s pain or possible medical need and (b)  
18 harm caused by the indifference. Indifference “may appear when  
19 prison officials deny, delay or intentionally interfere with medical  
20 treatment, or it may be shown by the way in which prison  
21 physicians provide medical care.” (internal citations omitted)

22 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).

23 Although it appears plaintiff’s moderate multilevel cervical spondylosis is a serious  
24 medical need, plaintiff has not provided evidence to show that any defendants or prison officials  
25 have acted with deliberate indifference to this serious medical need. Based on plaintiff’s  
26 submissions to the court, this court simply cannot discern at this time whether defendants or  
27 prison officials are denying plaintiff necessary and reasonably available care or whether  
28 plaintiff’s claims represent mere differences of opinion between a prisoner and prison medical  
staff as to the proper course of treatment for his medical condition. See Snow v. McDaniel, 681  
F.3d 978, 987-88 (9th Cir. 2012), overruled in part on other grounds by Peralta v. Dillard, 744  
F.3d 1076, 1083 (9th Cir. 2014) (en banc); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);  
Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Plaintiff has not provided this court  
with evidence demonstrating that the care he is receiving is medically unacceptable under the

1 circumstances or that defendants are acting in conscious disregard of an excessive risk to  
2 plaintiff's health. See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996). See also Toguchi  
3 v. Soon Hwang Chung, 391 F.3d 1051, 1058 (9th Cir. 2004).

4 In fact, the evidence before the court indicates that defendants and prison officials have  
5 attempted to address plaintiff's medical needs. For example, plaintiff acknowledges that Dr.  
6 Bobbala started to facilitate a medical transfer for him to California Medical Facility prior to  
7 plaintiff's transfer to High Desert State Prison. Plaintiff also acknowledges that prison officials  
8 have provided him with some physical therapy and have submitted additional requests and  
9 referrals for physical therapy and neurosurgeon appointments on his behalf. While this evidence  
10 is not conclusive of defendants' or prison officials' subjective state of mind as to plaintiff's  
11 treatment, it is probative thereof and gives rise to a reasonable inference that they have not acted  
12 with deliberate indifference to plaintiff's serious medical needs. See Farmer v. Brennan, 511 U.S.  
13 825, 834 (1994) (deliberate indifference to a medical need is shown only when a prison official  
14 knows that an inmate has a serious medical need and disregards that need by failing to respond  
15 reasonably). See also Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980)  
16 ("Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of  
17 action.") (citing Estelle, 429 U.S. at 105-06).

18 Finally, plaintiff has not provided evidence to show that he is likely to suffer irreparable  
19 harm in the absence of preliminary injunctive relief and has not addressed how the balance of  
20 equities tips in his favor or why an injunction is in the public interest. Accordingly, for all of the  
21 foregoing reasons, the court will recommend that plaintiff's motion for preliminary injunctive  
22 relief be denied.

### 23 **PLAINTIFF'S MOTION TO AMEND**

24 Plaintiff has filed a motion to amend his first amended complaint to clarify some of his  
25 factual allegations against the defendants. Plaintiff does not name any new defendants or state  
26 any new causes of action in his proposed second amended complaint. The defendants have filed a  
27 statement of non-opposition to plaintiff's motion. In addition, defendants have requested an  
28 extension of time to file a response to plaintiff's complaint until after this court has ruled on

1 plaintiff's motion to amend.

2 Federal Rule of Civil Procedure 15 provides in relevant part:

3 (1) **Amending as a Matter of Course.** A party may amend its  
4 pleading once as a matter of course within:

5 (A) 21 days after serving it, or

6 (B) if the pleading is one to which a responsive pleading is  
7 required, 21 days after service of a responsive pleading or 21 days  
8 after service of a motion under Rule 12(b), (e), or (f), whichever is  
9 earlier.

10 (2) **Other Amendments.** In all other cases, a party may amend its  
11 pleading only with the opposing party's written consent or the  
12 court's leave. The court should freely give leave when justice so  
13 requires.

14 Fed. R. Civ. P. 15.

15 Under the circumstances of this case, and having screened plaintiff's proposed second  
16 amended complaint, the court will grant plaintiff's motion to amend and order the parties to  
17 proceed on plaintiff's second amended complaint. In addition, the court will grant defendants'  
18 motion for an extension of time to respond to plaintiff's complaint and order defendants to file  
19 their response to plaintiff's second amended complaint within seven days. Finally, the court  
20 notes that prior to plaintiff filing his motion to amend and second amended complaint, defendants  
21 Zamora and Venes filed a motion to dismiss plaintiff's first amended complaint pursuant to  
22 Federal Rule of Civil Procedure 12(b)(6). In light of the case developments discussed herein, the  
23 court will deny defendants' motion to dismiss as having been rendered moot.

#### 24 **DEFENDANTS' MOTION FOR A PROTECTIVE ORDER**

25 Defendants have filed a motion for a protective order staying discovery pending  
26 adjudication of defendants' forthcoming motion to dismiss. Defendants argue that allowing  
27 discovery before ruling on a qualified immunity defense in a pre-answer motion to dismiss would  
28 deprive defendants of one of the benefits of qualified immunity, namely, avoiding the burdens of  
unnecessary discovery. According to the defendants, plaintiff has already served defendants  
Hamkar and Sayre with discovery requests. Plaintiff has not opposed or otherwise responded to  
defendants' motion.

1 Under Federal Rule of Civil Procedure 26(c)(1), the court may, for good cause, issue a  
2 protective order that forbids or limits discovery. See Fed. R. Civ. P. 26(c)(1). A district court's  
3 stay of discovery pending a ruling on questions of immunity "furthers the goal of efficiency for  
4 the court and litigants." Little v. City of Seattle, 863 F.2d 681, 685 (9th Cir. 1988).

5 Good cause appearing, the court will grant defendants' motion for a protective order and  
6 will stay discovery until thirty days after the court rules on defendants' forthcoming motion to  
7 dismiss.

### 8 **OTHER MATTERS**

9 On June 17, 2015, plaintiff moved the court for an order to show cause as to why  
10 defendants should not have to pay monetary sanctions for failing to respond to plaintiff's first  
11 amended complaint. As defendants argue in opposition to plaintiff's motion, however, at the time  
12 plaintiff filed his motion for an order to show cause, defendants were under no obligation to file a  
13 response to plaintiff's complaint. As noted above, on March, 25, 2015, then-Magistrate Judge  
14 Drozd issued findings and recommendations, recommending defendants' motion to revoke  
15 plaintiff's IFP status be denied and defendants be ordered to file a response to plaintiff's first  
16 amended complaint within forty-five days. Judge Mueller did not adopt Judge Drozd's  
17 recommendations until September 22, 2015. Accordingly, the court will deny plaintiff's motion  
18 for an order to show cause.

### 19 **CONCLUSION**

20 Accordingly, IT IS HEREBY ORDERED that:

21 1. Plaintiff's motion to amend (Doc. No. 51) is granted. The parties shall now proceed on  
22 plaintiff's second amended complaint in this action.

23 2. Defendants' motion for an extension of time to file a response to plaintiff's complaint  
24 (Doc. No. 59) is granted. Defendants shall file a response to plaintiff's second amended  
25 complaint within seven days of the date of this order;

26 3. Defendant Zamora and Venes' motion to dismiss (Doc. No. 40) is denied as having  
27 been rendered moot;

28 /////

1 4. Defendants' motion for a protective order (Doc. No. 55) is granted. Discovery is  
2 stayed until thirty days after the court rules on defendants' forthcoming motion to dismiss based  
3 on qualified immunity; and

4 5. Plaintiff's motion for an order to show cause as to why defendants should not have to  
5 pay monetary sanctions (Doc. No. 38) is denied.

6 IT IS HEREBY RECOMMENDED that plaintiff's motion for preliminary injunctive  
7 relief (Doc. No. 27) be denied.

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

16 Dated: December 3, 2015

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19 CAROLYN K. DELANEY  
20 UNITED STATES MAGISTRATE JUDGE

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