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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PAUL DAVID JOHNSON,  
Plaintiff,  
v.  
J.A. BEARD, et al.,  
Defendants.

No. 2:15-cv-1313 TLN KJN P

FINDINGS AND RECOMMENDATIONS

Introduction

Plaintiff is a state prisoner, proceeding pro se and in forma pauperis, with a civil rights action under 42 U.S.C. § 1983. On February 4, 2019, plaintiff filed a motion to amend. As set forth below, the undersigned recommends that plaintiff's motion to amend be denied, and that this action be dismissed based on plaintiff's failure to comply with court orders. Fed. R. Civ. P. 41(b).

Background

On March 20, 2018, the undersigned issued an order and findings and recommendations, which the district court adopted in full over plaintiff's objections on October 31, 2018. (ECF Nos. 19, 25.) On November 5, 2018, plaintiff was granted, *sua sponte*, a thirty-day extension of time in which to file a second amended complaint that complied with the March 20, 2018 order, and warned that failure to do so would result in dismissal of this action. (ECF No. 26.)

1 Thereafter, plaintiff filed interlocutory appeals, which were dismissed for lack of jurisdiction.  
2 (ECF No. 31.) On January 18, 2019, again *sua sponte*, the court granted plaintiff one final  
3 extension of time of twenty-one days in which to file a second amended complaint that complied  
4 with the March 20, 2018 order. (ECF No. 34.) Plaintiff was cautioned that “[f]ailure to file his  
5 pleading in response to this order will result in the dismissal of this action. Fed. R. Civ. P.  
6 41(b).” (ECF No. 34 at 1.)

### 7 Plaintiff’s Motion

8 Despite this court’s orders, plaintiff has not filed a second amended complaint. Rather, on  
9 February 4, 2019, plaintiff filed a motion to amend in which he seeks leave to pursue a claim  
10 against D.L. Runnels, Warden of High Desert State Prison (“HDSP”), who allegedly set in  
11 motion a series of acts by others, including being legally responsible for the safe drinking water,  
12 the medical treatment, and health, safety, and welfare of the inmate population. (ECF No. 35 at  
13 3.) Plaintiff alleges Runnels, with the approval of the contracted medical doctors and the  
14 institutional plant operator, allowed the drinking water at HDSP to continue to be consumed by  
15 inmates knowing it was unsafe due to high levels of arsenic and nitrate, exposing plaintiff to  
16 arsenic from 2000 to 2004 or 2005. (Id.) Plaintiff contends that despite such awareness, Runnels  
17 acted with negligence, breaching his obligation to plaintiff. (ECF No. 35 at 5.) Plaintiff concedes  
18 that Runnels was not the medical provider, but argues that supervisors can be liable under § 1983  
19 based on their supervision and control of their subordinates by their own culpable action or  
20 inaction in the training, supervision or control of such subordinates; acquiescence in the  
21 constitutional deprivation; or conduct showing a reckless or callous indifference for the rights of  
22 others.

### 23 Standards Governing Terminating Sanctions

24 District courts retain broad discretion to control their dockets and “[i]n the exercise of that  
25 power they may impose sanctions, including where appropriate, default or dismissal.” Adams v.  
26 California Dep’t of Health Servs., 487 F.3d 684, 688 (9th Cir. 2007)<sup>1</sup> (brackets in original)

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27  
28 <sup>1</sup> Adams was overruled on other grounds by Taylor v. Sturgell, 553 U.S. 880, 904 (2008).

1 (quoting Thompson v. Hous. Auth. of City of Los Angeles, 782 F.2d 829, 831 (9th Cir. 1986)  
2 (per curiam)). “[C]ourts have inherent power to dismiss an action when a party has willfully  
3 deceived the court and engaged in conduct utterly inconsistent with the orderly administration of  
4 justice.” Fjelstad v. American Honda Motor Co., Inc., 762 F.2d 1334, 1338 (9th Cir. 1985)  
5 (internal quotations and citation omitted); see, e.g., Anheuser-Busch, Inc. v. Natural Beverage  
6 Distrib., 69 F.3d 337, 348 (9th Cir. 1995) (upholding dismissal where party engaged in deceptive  
7 practices that undermined the integrity of the proceedings). But such a harsh penalty “should be  
8 imposed as a sanction only in extreme circumstances.” Thompson, 782 F.2d at 831 (citing  
9 Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986)). Courts have dismissed an action  
10 with prejudice for various reasons. See, e.g., Malone v. United States Postal Service, 833 F.2d  
11 128, 130-31 (9th Cir. 1987) (dismissal for failure to comply with court order); Henderson, 779  
12 F.2d at 1424 (dismissal for failure to prosecute and for failure to comply with local rules);  
13 Sanchez v. Rodriguez, 298 F.R.D. 460, 464 (C.D. Cal. 2014) (applied terminating sanctions for  
14 pro se plaintiff’s failure to respond to discovery requests).

15 Accordingly, the Ninth Circuit permits imposition of such terminating sanctions only after  
16 the district court has weighed: “(1) the public’s interest in expeditious resolution of litigation; (2)  
17 the court’s need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public  
18 policy favoring disposition of cases on their merits and (5) the availability of less drastic  
19 sanctions.” Thompson, 782 F.2d at 831; Conn. Gen. Life Ins. Co. v. New Images of Beverly  
20 Hills, 482 F.3d 1091, 1096 (9th Cir. 2007) (“Only ‘willfulness, bad faith, and fault’ justify  
21 terminating sanctions.”) (quoting Jorgensen v. Cassidy, 320 F.3d 906, 912 (9th Cir. 2003)).

## 22 Discussion

23 Initially, plaintiff’s motion to amend fails because it was not accompanied by a proposed  
24 second amended complaint. As a prisoner, plaintiff’s pleadings are subject to evaluation by this  
25 court pursuant to the in forma pauperis statute. See 28 U.S.C. § 1915A. Because plaintiff did not  
26 submit a proposed second amended complaint, the court is unable to evaluate it.

27 More importantly, however, plaintiff failed to comply with the court’s orders, which this  
28 court finds willful in light of the specific rulings contained in the order and findings and

1 recommendations issued on March 20, 2018. “Disobedient conduct not shown to be outside the  
2 control of the litigant is sufficient to demonstrate willfulness, bad faith, or fault.” Jorgensen v.  
3 Cassiday, 320 F.3d 906, 912 (9th Cir. 2003) (citation omitted). Plaintiff’s failure to file a second  
4 amended complaint is solely within plaintiff’s control, as evidenced by his ability to file other  
5 documents with the court.

6 The court made clear that this action would proceed solely on plaintiff’s claims  
7 concerning medical care at CSP-SOL and DVI, and plaintiff was warned that he was not allowed  
8 to change the nature of this suit by alleging new, unrelated claims. (ECF No. 19 at 38.)  
9 Specifically, plaintiff was granted leave to amend the following claims:

10 a. Eighth Amendment medical claims based on medical care provided by Dr. Naku, Dr.  
11 Mahmoud, Dr. Chen, or Dr. Collinsworth, at CSP-SOL *after December 13, 2010*;

12 b. Eighth Amendment medical claims based on medical care provided by defendants Dr.  
13 Win, Dr. Zheng, or Dr. Kim at DVI; and

14 c. Negligence or medical malpractice state law claims based on medical care, provided he  
15 can demonstrate timely compliance with the CTCA’s presentation requirement.

16 (ECF No. 19 at 39 (emphasis added.)) Further, plaintiff was informed that his water claims must  
17 be raised in a separate civil rights action, and cautioned that his HDSP claims were likely barred  
18 by the statute of limitations. (ECF No. 19 at 8.) Moreover, plaintiff’s claims against doctors at  
19 HDSP based on medical care from 2000 to 2005 at HDSP were dismissed as barred by the statute  
20 of limitations. (ECF No. 19 at 25.) Plaintiff was reminded that Runnels is not liable based on a  
21 theory of respondeat superior in a federal civil rights action. (ECF No. 19 at 5 n.4.)

22 In light of the detailed screening order, as well as plaintiff’s continued failure to file a  
23 second amended complaint, the undersigned finds that plaintiff’s failure to comply with court  
24 orders is willful and intentional.

25 The court finds that the public’s interest in expeditiously resolving this litigation and the  
26 court’s interest in managing the docket weigh in favor of dismissal. This action has been pending  
27 since June of 2015, and plaintiff’s willful refusal to file a second amended complaint since  
28 December 5, 2018, further delays screening, service of process, and timely resolution of this

1 action. Moreover, plaintiff's filing of a futile motion to amend usurps scarce judicial resources by  
2 requiring the court to revisit issues already addressed in the March 20, 2018 screening order.

3 The third factor, risk of prejudice to defendants, also weighs in favor of dismissal. "To  
4 prove prejudice, a defendant must establish that plaintiff's actions impaired defendant's ability to  
5 proceed to trial or threatened to interfere with the rightful decision of the case." Pagtalunan v.  
6 Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (citing Malone, 833 F.2d at 131). The risk of prejudice  
7 is considered in relation to plaintiff's reason for defaulting. Id. (citing Yourish v. Cal. Amplifier,  
8 191 F.3d 983, 991 (9th Cir. 1999)). Here, defendants have not yet been served with process and  
9 therefore have not received notice of plaintiff's claims. Fed. R. Civ. P. 4(m). Plaintiff's claims  
10 grow more stale as time passes, and his continued efforts to pursue stale claims from 2000 to  
11 2005, which are likely barred by the statute of limitations, are prejudicial and interfere with the  
12 court's ability to address plaintiff's timely claims. Technically, plaintiff's amended pleading  
13 should have been filed April 20, 2018 (ECF No. 19 at 39), but this court *sua sponte* granted  
14 plaintiff extensions of time in which to comply. Plaintiff's additional delay in filing his pleading  
15 further prejudices defendants by depriving them of an opportunity to timely respond.

16 The fourth factor weighs against dismissal, because "public policy strongly favors  
17 disposition of actions on the merits." Yourish, 191 F.3d at 992 (citation and internal quotation  
18 marks omitted). However, in this case it is outweighed by the factors in favor of dismissal  
19 discussed herein.

20 Finally, the court finds that there are no other, lesser sanctions that would be satisfactory  
21 or effective. Plaintiff has twice been warned that failure to file a second amended complaint  
22 would result in the dismissal of this action. (ECF Nos. 26 at 1; 34 at 1.) See, e.g., Anderson v.  
23 City of Davis, 368 Fed. Appx. 851 (9th Cir. 2010); Puckett v. Dyer, 331 Fed. Appx. 476, 477 (9th  
24 Cir. 2009); Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (1992) (citing Malone, 833 at 132-33;  
25 Henderson, 779 F.2d at 1424). Monetary sanctions are ineffective in light of plaintiff's in forma  
26 pauperis status. Because no operative pleading is on file, the court is unable to consider any other  
27 evidentiary sanctions. Additional court orders are ineffective because plaintiff refuses to comply  
28 with them. Plaintiff's objections were overruled by the district court, and his appeals were

1 dismissed by the United States Court of Appeals for the Ninth Circuit.

2 In addition, plaintiff has been granted multiple opportunities to amend his pleading.  
3 Plaintiff filed his first pleading in the Northern District of California in 2014. (See ECF No. 19 at  
4 2.) Plaintiff's claims against defendants at HDSP, CSP-SOL and DVI were dismissed without  
5 prejudice to filing an action in the Eastern District. (Id.) On June 19, 2015, plaintiff filed his  
6 original complaint in this action. (ECF No. 1.) On June 21, 2016, plaintiff filed a 220-page  
7 amended complaint. (ECF No. 15.) Despite the court's two prior warnings, plaintiff did not  
8 otherwise file or submit a proposed second amended complaint with his motion to amend.


9 For all of the above reasons, and after weighing all of the factors required by the Ninth  
10 Circuit, the undersigned finds that plaintiff's willful failure to file a second amended complaint as  
11 required by the district court's October 31, 2018 order warrants the imposition of terminating  
12 sanctions based on plaintiff's failure to comply with the court's orders. Fed. R. Civ. P. 41(b).

13 Accordingly, IT IS HEREBY RECOMMENDED that:

- 14 1. Plaintiff's motion to amend (ECF No. 35) be denied; and
- 15 2. This action be dismissed with prejudice. Fed. R. Civ. P. 41(b).

16 These findings and recommendations are submitted to the United States District Judge  
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
18 after being served with these findings and recommendations, plaintiff may file written objections  
19 with the court and serve a copy on all parties. Such a document should be captioned  
20 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that  
21 failure to file objections within the specified time may waive the right to appeal the District  
22 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

23 Dated: February 7, 2019

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26 KENDALL J. NEWMAN  
27 UNITED STATES MAGISTRATE JUDGE

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