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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THURMAN LEROY SPENCER,  
Plaintiff,  
v.  
TIMOTHY VIRGA, et al.,  
Defendants.

No. 2:16-cv-886-JAM-EFB P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. His initial complaint (ECF No. 1) was dismissed pursuant to 28 U.S.C. § 1915A (ECF No. 14). After numerous extensions of time to do so (ECF Nos. 18, 21, 25 & 27), he has filed an amended complaint (ECF No. 30), which the court must now screen pursuant to section 1915A.<sup>1</sup> Plaintiff has also filed a motion for a preliminary injunction (ECF No. 22). As explained below, the amended complaint must be dismissed with leave to amend and the motion for a preliminary injunction must be denied.

**I. Screening Order**

Congress mandates that district courts engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental

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<sup>1</sup> Plaintiff also requested extensions of time (ECF Nos. 28, 29), which the court denies as moot in light of this screening order.

1 entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the  
2 complaint, or any portion of the complaint, if the complaint “is frivolous, malicious, or fails to  
3 state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who  
4 is immune from such relief.” *Id.* § 1915A(b).

5 Plaintiff alleges that on or around June 18, 2012, defendants Brizendine, Haghbin,  
6 Peterson, and Crisostomo wrongfully diagnosed him with schizoaffective disorder, delusional  
7 disorder, antisocial personality disorder, bipolar disorder, psychotic disorder, and polysubstance  
8 dependence. ECF No. 30 at 9, 20. As a result, he was placed in the Enhanced Outpatient  
9 Program (“EOP”) for mentally ill inmates. *Id.* Plaintiff’s disagreement with the diagnosis made  
10 by his mental health professionals is insufficient to establish deliberate indifference. *See Sanchez*  
11 *v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) (“A difference of opinion does not amount to a  
12 deliberate indifference to [the inmate’s] medical needs.”). Moreover, “an incorrect diagnosis is  
13 not deliberate indifference.” *Smith v. Asghar*, 114 F. App’x 222, 224 (7th Cir. 2004) (citing  
14 *Steele v. Choi*, 82 F.3d 175, 178 (7th Cir. 1996)).

15 Next, plaintiff claims that being housed in the EOP with mentally ill inmates put his life in  
16 danger, but fails to specify how his life was endangered or who was aware of the danger. ECF  
17 No. 30 at 9-10. He claims further that the above-named defendants, along with defendants Virga,  
18 Meier, Cannady, and Cantrell, kept him in an unsanitary cell “flooded” with human waste, and  
19 that his placement in the EOP prevented him from challenging his criminal conviction in court.  
20 *Id.* at 11, 22. “[S]ubjection of a prisoner to lack of sanitation that is severe or prolonged can  
21 constitute an infliction of pain within the meaning of the Eighth Amendment.” *Anderson v. Cnty.*  
22 *of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995). Plaintiff must, however, specify which defendant  
23 confined him to the unsanitary cell, how each defendant became aware of the unsanitary  
24 conditions and what they did in response, and how long he was so confined. As for any access to  
25 the courts claim, plaintiff must allege how a particular defendant interfered with his effort to  
26 pursue a non-frivolous claim regarding his conviction. *See Lewis v. Casey*, 518 U.S. 343, 354-55  
27 (1996).

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1 In addition, plaintiff claims that defendant Virga’s “officers” deprived him of a wheelchair  
2 even though he is mobility impaired and in chronic pain. ECF No. 30 at 20. Plaintiff does not  
3 raise any discernable allegation that Virga had any direct involvement in his medical care. And  
4 “[t]here is no respondeat superior liability under section 1983.” *Taylor v List*, 880 F.2d 1040,  
5 1045 (9th Cir. 1989).

6 Plaintiff also claims that his administrative appeals were denied or ignored. ECF No. 30  
7 at 10, 16. However, inmates have no standalone rights with respect to the administrative  
8 grievance process. *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Williams v. Cate*, No.  
9 1:09-cv-00468-0WW-YNP PC, 2009 U.S. Dist. LEXIS 107920, 2009 WL 3789597, at \*6 (E.D.  
10 Cal. Nov. 10, 2009) (“Plaintiff has no protected liberty interest in the vindication of his  
11 administrative claims.”).

12 Finally, the complaint names Does 1-20 as defendants. ECF No. 30. at 6. Unknown  
13 persons cannot be served with process until they are identified by their real names and the court  
14 will not investigate the names and identities of unnamed defendants. If plaintiff later learns the  
15 identity of a “doe” defendant, he may seek to amend his complaint to add that individual as a  
16 defendant. *See Brass v. County of Los Angeles*, 328 F.3d 1192, 1197-98 (9th Cir. 2003).

## 17 **II. Leave to Amend**

18 For these reasons, plaintiff’s amended complaint is dismissed with leave to amend. If  
19 plaintiff chooses to file a third amended complaint it should observe the following:

20 Any amended complaint must identify as a defendant only persons who personally  
21 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*  
22 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a  
23 constitutional right if he does an act, participates in another’s act or omits to perform an act he is  
24 legally required to do that causes the alleged deprivation). The complaint should also describe,  
25 in sufficient detail, how each defendant personally violated or participated in the violation of his  
26 rights. The court will not infer the existence of allegations that have not been explicitly set forth  
27 in the amended complaint.

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1 The amended complaint must contain a caption including the names of all defendants.  
2 Fed. R. Civ. P. 10(a).

3 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. See  
4 *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

5 Any amended complaint must be written or typed so that it so that it is complete in itself  
6 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended  
7 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
8 earlier filed complaint no longer serves any function in the case. See *Forsyth v. Humana*, 114  
9 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter  
10 being treated thereafter as non-existent.””) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.  
11 1967)).

12 Finally, the court notes that any amended complaint should be as concise as possible in  
13 fulfilling the above requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of  
14 procedural or factual background which has no bearing on his legal claims.

### 15 **III. Motion for a Preliminary Injunction**

16 Plaintiff seeks a preliminary injunction to enjoin defendants from destroying his legal  
17 property. ECF No. 22. However, he fails to meet the minimum threshold for merit to satisfy the  
18 standard for a preliminary injunction.<sup>2</sup> At an irreducible minimum, he must demonstrate that  
19 there is at least a fair chance of success on the merits. *Johnson v. California State Board of*  
20 *Accountancy*, 72 F.3d 1427, 1430, 1433 (9th Cir. 1995); *Sports Form, Inc. v. United Press*  
21 *International*, 686 F.2d 750, 753 (9th Cir. 1982). As discussed above, his complaint must be  
22 dismissed for failure to state a claim and at present he has shown no likelihood of success on the  
23 merits of any claim. Accordingly, plaintiff’s motion preliminary injunction must be denied.

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25 <sup>2</sup> A preliminary injunction represents the exercise of a far reaching power not to be  
26 indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141,  
27 143 (9th Cir.1964). The moving party must prove that he is likely to succeed on the merits, that  
28 he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of  
equities tips in his favor, and that an injunction is in the public interest. *Stormans, Inc. v. Selecky*,  
586 F.3d 1109, 1127 (9th Cir.2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, — U.S. —  
—, 129 S.Ct. 365, 375–76, 172 L.Ed.2d 249 (2008)).

1           **IV. Conclusion**

2           Accordingly, IT IS HEREBY ORDERED that plaintiff’s amended complaint (ECF No.  
3 30) is dismissed with leave to amend within 30 days of the date this order is served. Failure to  
4 comply with this order may result in dismissal of this action. IT IS FURTHER ORDERED that  
5 plaintiff’s requests for extensions of time (ECF Nos. 28 & 29) are denied as moot.

6           Further, it is RECOMMENDED that plaintiff’s motion for a preliminary injunction (ECF  
7 No. 22) 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 served and filed 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. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez*  
16 *v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

17 Dated: May 2, 2018.

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19 EDMUND F. BRENNAN  
20 UNITED STATES MAGISTRATE JUDGE  
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