

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTONIO CARREON,
Plaintiff,
v.
Dr. S. ABDUR-RAHMAN, et al.,
Defendants.

No. 2:17-cv-1292-TLN-KJN

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On August 15, 2018, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within fourteen days. Defendants filed objections to the findings and recommendations. Plaintiff filed no objections.

Defendants object to the magistrate judge’s decision not to consider documents not appended to the complaint under the incorporation by reference doctrine, relying on *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 986 (9th Cir. 1999), *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005), and other cases. (ECF No. 27 at 2–3.) However, none of the cases cited by Defendants were brought by prisoners proceeding pro se, and none of the courts’

1 decisions were rendered in the context of an Eighth Amendment challenge alleging deliberate
2 indifference to the prisoner's medical care.¹

3 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this
4 Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the
5 Court finds the findings and recommendations to be supported by the record and by proper
6 analysis.

7 Accordingly, IT IS HEREBY ORDERED that:

8 1. The findings and recommendations filed August 15, 2018 are ADOPTED in full.

9 2. Defendants' motion to dismiss (ECF No. 19) is GRANTED in part and DENIED in
10 part:

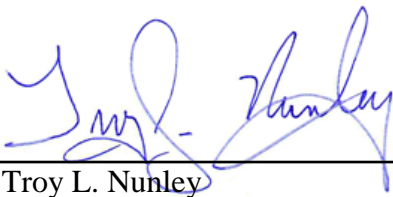
11 a. Defendants' motion to dismiss Plaintiff's retaliation claims against Defendant
12 Dr. Abdur-Rahman, based on medical treatment provided before July 26, 2015, is DISMISSED
13 with prejudice; and

14 b. Defendants' motion to dismiss Plaintiff's retaliation claims against Defendant
15 Dr. Abdur-Rahman based on medical treatment provided or not provided after July 26, 2015 is
16 DISMISSED with leave to amend; in the alternative, Plaintiff may choose to proceed on his
17 original complaint based solely on his Eighth Amendment deliberate indifference claims.

18 3. Defendants' motion to dismiss Plaintiff's Eight Amendment deliberate indifference
19 claims is DENIED without prejudice to renewal in a motion for summary judgment.

20 3. Plaintiff may file an amended complaint within thirty (30) days of this Order. If
21 Plaintiff does not file an amended complaint within that time, the action will proceed on the
22 original complaint for only the Eight Amendment deliberate indifference claims.

23
24 Dated: September 27, 2018

25
26 
Troy L. Nunley

United States District Judge

27 ¹ In addition, although Defendants filed a motion dismiss and not a motion for summary judgment, it is likely
28 Plaintiff would be entitled to contemporaneous and fair notice of how he would have to rebut information set forth in
those documents. *See Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) (*en banc*).