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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 JIMMIE STEPHEN,

12 Plaintiff,

13 v.

14 C. TILESTONE, et al.,

15 Defendants.  
16

No. 2:20-cv-1841 KJN P

ORDER AND FINDINGS AND  
RECOMMENDATIONS

17 Plaintiff is a state prisoner, proceeding without counsel. Plaintiff's second amended  
18 complaint is before the court.

19 By order filed September 22, 2020, plaintiff's motion to proceed in forma pauperis was  
20 deferred. (ECF No. 4.) Plaintiff submitted a declaration that makes the showing required by 28  
21 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis is granted.

22 Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C.  
23 §§ 1914(a), 1915(b)(1). By this order, plaintiff is assessed an initial partial filing fee in  
24 accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court directs the  
25 appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward  
26 it to the Clerk of the Court. Thereafter, plaintiff is obligated to make monthly payments of twenty  
27 percent of the preceding month's income credited to plaintiff's trust account. These payments  
28 will be forwarded by the appropriate agency to the Clerk of the Court each time the amount in

1 plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
2 § 1915(b)(2).

3 The court is required to screen complaints brought by prisoners seeking relief against a  
4 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
5 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally  
6 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek  
7 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

8 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
9 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
10 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
11 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
12 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
13 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
14 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
15 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
16 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at  
17 1227.

18 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain  
19 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the  
20 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic  
21 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
22 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a  
23 formulaic recitation of the elements of a cause of action;" it must contain factual allegations  
24 sufficient "to raise a right to relief above the speculative level." Bell Atlantic, 550 U.S. at 555.  
25 However, "[s]pecific facts are not necessary; the statement [of facts] need only 'give the  
26 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Erickson v.  
27 Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal  
28 quotations marks omitted). In reviewing a complaint under this standard, the court must accept as

1 true the allegations of the complaint in question, Erickson, 551 U.S. at 93, and construe the  
2 pleading in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236  
3 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984).

#### 4 Plaintiff's Second Amended Complaint

5 In his first claim, plaintiff alleges deliberate indifference to his serious medical needs in  
6 violation of the Eighth Amendment while housed at CSP-Solano. He alleges that defendant  
7 Spencer, under supervision of defendant Matteson, punished plaintiff on November 12, 2020, for  
8 plaintiff's refusal to sign the mandatory papers required to work in PIA Optical, which plaintiff  
9 alleges was high risk for COVID-19 exposure, and plaintiff was still not cleared to work after  
10 radiation for prostate cancer.<sup>1</sup> As a life prisoner, plaintiff received a serious write-up for his  
11 refusal to work.

12 In his second claim, plaintiff alleges he was diagnosed with prostate cancer in 2019, when  
13 plaintiff complained about the smells coming from the prison's ventilation system, which plaintiff  
14 claims was infected with asbestos and mold, and claims defendant Tileston requires all employees  
15 to sign waivers to work at CMF. Plaintiff claims defendant Tileston violated plaintiff's First  
16 Amendment rights by segregating plaintiff under false charges, then continuously transferring  
17 plaintiff from prison to prison in retaliation for plaintiff filing a lawsuit. But plaintiff also claims  
18 that Tileston placed plaintiff in ad seg for staff separation after plaintiff's relationship with  
19 defendant Nunez became public.

20 In his third claim, plaintiff alleges his First Amendment and due process rights were  
21 violated in May of 2020, when defendant Santos at CMF wrote a false write-up in defendant  
22 Nunez' name, claiming plaintiff had stalked Nunez. Plaintiff also alleges that at CSP-Solano  
23 defendant Espinoza used unsigned statements and altered a 115 notice under the names of Nunez  
24 and Santos. However, at the January 27, 2021 hearing, the charges were reduced to over-  
25 familiarity and dropped because overfamiliarity is not a crime.

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26 <sup>1</sup> Plaintiff later states "when knowledge by Matteson," but it is unclear to what plaintiff refers.  
27 (ECF No. 10 at 7.) It appears plaintiff refers to Matteson's knowledge of the over 38 staff  
28 members who tested positive for COVID-19, rather than Matteson's knowledge concerning  
plaintiff's refusal to work at CSP-Solano.

1 Plaintiff names as defendants: Associate Warden C. Tileston, CMF; Warden C. Matteson,  
2 CSP-Solano; Lt. C. Santos, CMF; L. Spencer, PIA, CSP-Solano; Correctional Officer A.  
3 Espinoza, CSP-Solano; and Correctional Officer M. Nunez, CMF.<sup>2</sup> Plaintiff seeks money  
4 damages and unspecified injunctive relief.

#### 5 Discussion

6 Plaintiff's second amended complaint does not satisfy the pleading requirements set forth  
7 by the Federal Rules of Civil Procedure or comply with this court's prior orders. While the  
8 pleading is not lengthy, his allegations are vague and conclusory. Plaintiff jumps from at least  
9 three separate incidents involving multiple defendants at two different prisons. Despite two  
10 separate warnings in prior screening orders, plaintiff has again named a defendant solely in his  
11 supervisory capacity, and again joined unrelated claims against several defendants in a single  
12 action.

13 It appears that plaintiff is either unwilling or unable to comply with the court's orders.  
14 Because plaintiff has consistently failed to follow the court's orders with regard to amending the  
15 complaint, the undersigned recommends that plaintiff's second amended complaint be dismissed  
16 without leave to amend. "District courts have inherent power to control their dockets,"  
17 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986), and "may dismiss an action for  
18 failure to comply with any order of court," Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.  
19 1992) (citing Fed. R. Civ. P. 41(b)).<sup>3</sup>

#### 20 Sua Sponte Dismissal

##### 21 A. Governing Standards

22 Federal Rule of Civil Procedure 41(b) grants district courts the authority to dismiss actions  
23 *sua sponte* for failure to prosecute or failure to comply with court orders. See Link v. Wabash

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25 <sup>2</sup> Plaintiff included no charging allegations against defendant Nunez.

26 <sup>3</sup> **"Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute or to comply with these rules  
27 or a court order, a defendant may move to dismiss the action or any claim against it. Unless the  
28 dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not  
under this rule--except one for lack of jurisdiction, improper venue, or failure to join a party  
under Rule 19--operates as an adjudication on the merits." Fed. R. Civ. P. 41(b).

1 R.R., 370 U.S. 626, 629-31 (1962) (“The power to invoke this sanction is necessary in order to  
2 prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars  
3 of the District Courts.”). Dismissal, however, is a harsh penalty and is to be imposed only in  
4 extreme circumstances. See Henderson v. Duncan, 779 F.2d 1421, 1423 (9th Cir. 1986).

5 In considering whether to dismiss an action for failure to prosecute, the Court must weigh five  
6 factors:

7 In determining whether to dismiss a case for failure to comply with  
8 a court order the district court must weigh five factors including:  
9 “(1) the public’s interest in expeditious resolution of litigation; (2)  
10 the court’s need to manage its docket; (3) the risk of prejudice to  
defendants; (4) the public policy favoring disposition of cases on  
their merits; and (5) the availability of less drastic alternatives.

11 Ferdik, 963 F.2d at 1260-61. The Ninth Circuit will “affirm a dismissal where at least four  
12 factors support dismissal, or where at least three factors strongly support dismissal.” Dreith v. Nu  
13 Image, Inc., 648 F.3d 779, 788 (9th Cir. 2011) (quoting Yourish v. Cal. Amplifier, 191 F.3d 983,  
14 990 (9th Cir. 1999)).

15 B. The Five Factors

16 1. Expeditious Resolution and The Court’s Need to Manage Its Docket

17 The first two factors strongly favor dismissal. The public’s interest in expeditious  
18 resolution of litigation always weighs towards dismissal. Yourish, 191 F.3d at 990. It is  
19 important that the court manage its docket without being subject to the routine noncompliance of  
20 litigants. Ferdik, 963 F.2d at 1261. Here, despite multiple admonishments that supervisory  
21 officials are generally not liable under § 1983, and that plaintiff may not pursue unrelated claims  
22 against unrelated defendants, plaintiff persists in doing so. His continued refusal to follow the  
23 court’s orders impedes the court’s ability to move this case forward. This action was filed on  
24 September 12, 2020; five months later, plaintiff’s proposed pleading still suffers from the same  
25 defects. Plaintiff’s continued failure to comply with the court’s instructions has led to this case  
26 consuming “large amounts of the court’s valuable time that it could have devoted to other major  
27 and serious . . . cases on its docket.” Ferdik, 963 F.2d at 1261. Therefore, the first two factors  
28 favor dismissal.

1           2. The Risk of Prejudice to Defendants

2           The risk of prejudice to defendants also weighs more heavily toward dismissal.  
3           “Unreasonable delay is the foundation upon which a court may presume prejudice.” Southwest  
4           Marine Inc. v. Danzig, 217 F.3d 1128, 1138 (9th Cir. 2000); see also Pagtalunan v. Galaza, 291  
5           F.3d 639, 643 (9th Cir. 2002) (unnecessary delay caused by petitioner’s inaction “inherently  
6           increases the risk that witnesses’ memories will fade and evidence will become stale”). Here,  
7           plaintiff’s continued failure to follow the court’s orders further delays the case and prejudices  
8           each defendant because the complaint remains unserved. Moreover, as time passes, the risk of  
9           loss of evidence and faded memories increase. Plaintiff’s repeated failure to comply with the  
10          court’s instructions, as well as the Federal Rules of Civil Procedure, creates unwarranted delay,  
11          which prejudices defendants.

12          3. Less Drastic Alternatives

13          The undersigned has explored the availability of less drastic alternatives, which also  
14          supports dismissal. This court told plaintiff what was wrong with each pleading, and gave him  
15          specific instructions on how to remedy the pleading deficiencies. The court has twice provided  
16          detailed standards governing his putative claims and informed plaintiff of the rules governing  
17          related claims. (ECF Nos. 4, 9.) Despite such efforts, plaintiff continued to improperly name  
18          defendants solely in their supervisory role, and plead unrelated claims against several defendants,  
19          as well as failed to set forth facts supporting each element of the proposed claims included in his  
20          second amended complaint. Plaintiff was twice cautioned that his failure to comply with the  
21          court’s orders may result in a recommendation that the action be dismissed. (ECF Nos. 4, 9.)  
22          Plaintiff has demonstrated that he is unable or unwilling to cure deficiencies identified by the  
23          court. Thus, providing him further opportunities to comply appears to be futile. As a result, the  
24          court is justified in concluding that there are no less drastic alternatives. See also Henderson, 779  
25          F.2d at 1424 (“The district court need not exhaust every sanction short of dismissal before finally  
26          dismissing a case, but must explore possible and meaningful alternatives.”).

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1           4. Public Policy

2           The fifth and final factor, public policy favoring the disposition of the cases on their  
3 merits, generally weighs against dismissal. See Dreith, 648 F.3d at 788. Here, plaintiff has  
4 repeatedly failed to follow the court's orders. Under such circumstances, the public policy  
5 favoring the resolution of disputes on the merits does not outweigh plaintiff's responsibility to  
6 comply with court orders.

7           C. Dismissal Is Appropriate

8           For all of the above reasons, the undersigned concludes that dismissal of this action is  
9 warranted under Rule 41(b), and recommends dismissal due to plaintiff's failure to follow court  
10 orders. As set forth above, plaintiff was twice warned about the possibility of dismissal if he  
11 failed to comply with the court's orders. (ECF Nos. 4, 9.)

12 Conclusion

13           In accordance with the above, IT IS HEREBY ORDERED that:

14           1. Plaintiff's request for leave to proceed in forma pauperis is granted.

15           2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
16 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
17 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
18 Director of the California Department of Corrections and Rehabilitation filed concurrently  
19 herewith.

20           3. The Clerk of the Court is directed to assign a district judge to this case.

21           Further, IT IS RECOMMENDED that this action be dismissed.

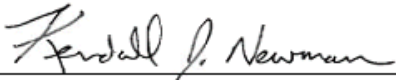
22           These findings and recommendations are submitted to the United States District Judge  
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
24 after being served with these findings and recommendations, plaintiff may file written objections  
25 with the court and serve a copy on all parties. Such a document should be captioned  
26 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that

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1 failure to file objections within the specified time may waive the right to appeal the District  
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: May 5, 2021

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5 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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