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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

MELVIN WISHUM, et al.,  
Plaintiffs,  
v.  
EDMUND G. BROWN, et al.,  
Defendants.

Case No. [14-cv-01491-WHO](#)

**ORDER GRANTING MOTION TO  
DISMISS**

Re: Dkt. No. 59

Markise Wishum died of cancer. His parents, plaintiffs Melvin Wishum and Chrystal Tyler, assert that defendant Matthew Cate, the former Secretary of the California Department of Corrections and Rehabilitation (“CDCR”), was deliberately indifferent to their son’s serious medical needs while he was incarcerated. Their complaint has been dismissed three times. *See* Dkt. Nos. 23, 37, 54. For reasons unexplained, Cate is the only defendant plaintiffs served with the Second Amended Complaint (“SAC”). Despite the directions in my earlier Order that dismissed the First Amended Complaint (“FAC”) against Cate and detailed the information needed to state a plausible claim, the SAC once again fails to adequately plead a causal connection between Cate’s actions and a violation of 42 U.S.C. § 1983. Because plaintiffs’ counsel admitted at oral argument that he had no other allegations to add to the claim against Cate, I GRANT the motion to dismiss with prejudice.

**BACKGROUND**

I accept all statements of material fact presented in the SAC as true. *See Davis v. HSBC Bank Nevada, N.A.*, 691 F. 3d 1152, 1159 (9th Cir. 2012). In my most recent Order, I discussed the factual background of this case, which is substantially the same as in the FAC. *See* Order at 1-2 (Dkt. No. 54). The decedent was diagnosed with Metastatic Squamous Cell Carcinoma while he was incarcerated. SAC ¶ 3. He was treated for the cancer at the Natividad Medical Center and

1 went into remission between September 2009 and May 2010, at which point he was released into  
2 the Salinas Valley State Prison. *Id.* ¶¶ 3, 13.

3 The hospital administered a CT scan in May of 2010, which did not detect a new tumor  
4 that the decedent had developed near his eye. *Id.* ¶ 13. In the months following the CT scan, the  
5 decedent noticed swelling over his left eye, began complaining of headaches, and requested a  
6 change in medication. *Id.* He had been instructed to have another CT scan two to three months  
7 after the first CT scan, but did not see a physician until February 2, 2011, nearly eight months  
8 later. *Id.* Plaintiffs allege that defendants denied the decedent medical care during this eight-  
9 month period, directly resulting in his death in August 2011. *Id.* ¶ 14.

10 Plaintiffs filed the SAC after I dismissed the FAC against defendant Cate for failure to  
11 state a claim against him with leave to amend. Order at 5-6. I heard oral argument on June 17,  
12 2015.

13 **LEGAL STANDARD**

14 Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint  
15 if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to  
16 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its  
17 face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007). A claim is facially plausible  
18 when the plaintiff pleads facts that “allow[] the court to draw the reasonable inference that the  
19 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
20 (internal quotations omitted). There must be “more than a sheer possibility that a defendant has  
21 acted unlawfully.” *Id.* While courts do not require “heightened fact pleading of specifics,” a  
22 plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.”  
23 *Twombly*, 550 U.S. at 555, 570.

24 In deciding whether the plaintiff has stated a claim upon which relief can be granted, the  
25 Court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the  
26 plaintiff. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court  
27 is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of  
28 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.

1 2008) (internal quotations omitted).

2 If the court dismisses the complaint, it “should grant leave to amend even if no request to  
3 amend the pleading was made, unless it determines that the pleading could not possibly be cured  
4 by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). In making  
5 this determination, the court should consider factors such as “the presence or absence of undue  
6 delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments,  
7 undue prejudice to the opposing party and futility of the proposed amendment.” *Moore v. Kayport  
8 Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).

9 **DISCUSSION**

10 A prisoner alleging Eighth Amendment violations under section 1983 must show that (i)  
11 the alleged constitutional deprivation was sufficiently serious, such that it resulted in the denial of  
12 “the minimal civilized measure of life’s necessities,” and that (ii) the prison official acted with  
13 “deliberate indifference” to the inmate’s health and safety. *Farmer v. Brennan*, 511 U.S. 825, 834  
14 (1994) (internal citations and quotations omitted). Deliberate indifference may be shown where  
15 “prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown  
16 by the way in which prison officials provide medical care.” *Crowley v. Bannister*, 734 F.3d 967,  
17 978 (9th Cir. 2013) (internal citations and quotations omitted).

18 A supervisor may be found liable if the supervisor “acted, or failed to act, in a manner that  
19 was deliberately indifferent to an inmate’s Eighth Amendment rights.” *Starr v. Baca*, 652 F.3d  
20 1202, 1206-07 (9th Cir. 2011). This requires that either (i) the supervisor was personally involved  
21 in the deprivation of rights, or (ii) there is a sufficient causal connection between the constitutional  
22 violation and the supervisor’s wrongful conduct. *Id.* at 1207. A causal connection may be  
23 established if the supervisor “set[] in motion a series of acts by others,” or “knowingly refus[ed] to  
24 terminate a series of acts by others, which [the supervisor] knew or reasonably should have known  
25 would cause others to inflict a constitutional injury.” *Id.* at 1207-08 (internal citations and  
26 quotations omitted).

27 As in the prior versions of the complaint, plaintiffs have not adequately pleaded specific  
28 facts establishing defendant Cate’s liability. *See Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir.

1 2012) (holding that complaint alleging violation of section 1983 did not include sufficient facts to  
2 establish defendant’s liability because it was “based on conclusory allegations and generalities,  
3 without any allegation of the specific wrong-doing by each Defendant”). Although I described the  
4 type of allegations needed to support a plausible claim, plaintiffs did not allege them. *See* Order at  
5 4.

6 The only updated allegations involving defendant Cate in the SAC state that (i) the  
7 decedent told Cate of the risk of serious harm to him, thus giving Cate “actual knowledge”; (ii)  
8 “CATE and/or his office was contacted repeatedly by Plaintiffs having been advised by various  
9 prison staff that CATE had the authority and power to intervene and order to [sic] immediate  
10 health care for [decedent];” and (iii) “Plaintiffs’ [sic] were so desperate to obtain medical care that  
11 their persistence resulted in the actual contact and communication with [the current secretary of  
12 the CDCR] Beard at a time prior to the critical time of medical care.” *See* SAC ¶ 6. In addition,  
13 the SAC states that Markise Wishum spoke to the prison warden about his health issues and was  
14 “assured Defendant would look into the matter.” *Id.* ¶ 7.

15 When I assume the truth of these allegations, I understand that Cate knew that Markise  
16 Wishum was ill. (It is worth noting that plaintiff’s counsel undercut those allegations at oral  
17 argument by admitting that plaintiffs did not know whether or not they actually spoke to Cate. *See*  
18 Oral Argument at 2:03:44-2:03:52 (June 17, 2015)). Even so, plaintiffs do not identify a specific  
19 wrongful act by Cate. An allegation that Cate knew of the decedent’s condition is not the same as  
20 an allegation that Cate set in motion a series of acts by others or refused to terminate the actions of  
21 others. *See* Order at 4-5. No new facts have been added regarding Cate’s alleged involvement in  
22 the alleged denial of medical care to the decedent or the specific denial of medical care that  
23 occurred. The SAC fails for the same reasons as the FAC, as set forth in my prior order.

24 I inquired at the hearing if plaintiffs could allege any additional facts regarding Cate. Their  
25 counsel said that they could not. He argued that the defendants possessed all of the pertinent  
26 information about plaintiffs’ claims, *see* Oral Argument at 2:02:43-2:03:00 (June 17, 2015), but  
27 that is not true. The plaintiffs, and not defendant Cate, are in the best position to know whether  
28 they contacted Cate and what actions the plaintiffs and the decedent took in attempting to obtain

1 medical care. In addition, plaintiffs have their son's medical records. Counsel added that he did  
2 not have the needed information because his clients are "unsophisticated." That is no excuse –  
3 obtaining the necessary information to assert a plausible claim is the prosecuting attorney's  
4 responsibility in drafting a complaint. Without it, the complaint cannot survive a motion to  
5 dismiss.

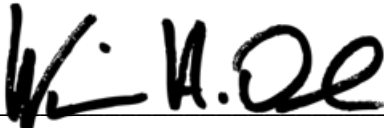
6 Cate was the Secretary of CDCR, charged with overseeing more than 100,000 inmates in  
7 more than thirty adult facilities. *See California Prisoners and Parolees, 2010*, California  
8 Department of Corrections and Rehabilitation (2011)  
9 [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/CalPri](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPri)  
10 [s/CALPRISd2010.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPri). It is baffling to me why plaintiffs pursued him as a defendant rather than  
11 others more directly involved in Markise Wishum's care. But that was the choice they made.  
12 Because plaintiffs are unable to allege particularized facts to establish that Cate was personally  
13 involved in the alleged Eighth Amendment violations, or that there was a causal connection  
14 between Cate's conduct and the constitutional violation to support their claims, dismissing the  
15 complaint with leave to amend yet another time would be futile. *See Lopez*, 203 F.3d at 1129  
16 ("district courts are only required to grant leave to amend if a complaint can possibly be saved").  
17 Accordingly, the SAC fails to state a claim upon which relief can be granted, cannot be saved, and  
18 must be DISMISSED.

19 **CONCLUSION**

20 For the foregoing reasons, defendant Cate's motion to dismiss is GRANTED. Plaintiffs  
21 previously abandoned their claims against Governor Brown and never served Warden Hedgepath.  
22 *See* Dkt. No. 37. This action is DISMISSED with prejudice, and judgment shall be entered  
23 accordingly.

24 **IT IS SO ORDERED.**

25 Dated: June 25, 2015

26 

27 WILLIAM H. ORRICK  
28 United States District Judge