

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DERRICK SIMS,

No. C 08-01691 SBA (PR)

Plaintiff,

**ORDER OF SERVICE; ADDRESSING  
PENDING MOTION; AND DIRECTING  
FURTHER BRIEFING ON PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION**

v.

MICHAEL SAYRE, et al.,

Defendants.

**INTRODUCTION**

Plaintiff, a state prisoner, has filed a pro se civil rights action pursuant to 42 U.S.C. § 1983 alleging that Defendants were deliberately indifferent to his serious medical needs. His motion for leave to proceed in forma pauperis has been granted. Venue is proper because the events giving rise to the claim are alleged to have occurred at the Pelican Bay State Prison (PBSP), which is located in this judicial district. See 28 U.S.C. § 1391(b).

In his original complaint, Plaintiff names the following Defendants: PBSP Chief Medical Officer Dr. Michael Sayre; PBSP Staff Service Analyst C. Gorospe; PBSP Family Nurse Practitioner/Health Care Manager Maureen McLean; PBSP Correctional Counselors Joseph Kravitz and B. Samples; PBSP Physician Linda Rowe; and California Department of Corrections and Rehabilitation (CDCR) Chief of the Inmate Appeals Branch N. Grannis. Plaintiff seeks monetary damages as well as injunctive relief.

Plaintiff has since filed motions for leave to file an amended complaint as well as a second amended complaint.

In an Order dated May 12, 2009, the Court granted Plaintiff's motion for leave to file an amended complaint and directed the Clerk of the Court to docket his attached amended complaint. In his amended complaint, Plaintiff states, "[s]ince the filing of the original complaint plaintiff on numerous occasions has had his Eighth Amendment Rights violated by several new parties." (Am. Compl. at 1.) He names the following "new" Defendants: PBSP Correctional Officers Seneta and R. Denead and PBSP Registered Nurse Schutz.

United States District Court  
For the Northern District of California

1 Before the Court is Plaintiff's motion for leave to file a second amended complaint. In his  
2 second amended complaint, Plaintiff again adds a "new" Defendant, CDCR Director Matthew Cate.<sup>1</sup>  
3 (Second. Am. Compl. at 1.) He also alleges that certain prison officials, who the Court will construe  
4 as Doe Defendants, have allegedly violated his constitutional rights "since the filing of the original  
5 complaint." (Id.)

6 Also before the Court is Plaintiff's Motion for a Preliminary Injunction.

7 **DISCUSSION**

8 **I. Standard of Review**

9 A federal court must conduct a preliminary screening in any case in which a prisoner seeks  
10 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.  
11 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that  
12 are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary  
13 relief from a defendant who is immune from such relief. Id. § 1915A(b)(1), (2). Pro se pleadings  
14 must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

15 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:

- 16 (1) that a right secured by the Constitution or laws of the United States was violated, and  
17 (2) that the alleged violation was committed by a person acting under the color of state law. West v.  
18 Atkins, 487 U.S. 42, 48 (1988).

19 **II. Motion for Leave to File a Second Amended Complaint**

20 A plaintiff may amend his complaint once as a matter of course at any time before a  
21 responsive pleading is served. See Fed. R. Civ. P. 15(a). Where a plaintiff seeks to amend after a  
22 responsive pleading has already been served, however, the decision whether to grant leave to amend  
23 is committed to the sound discretion of the trial court. Waits v. Weller, 653 F.2d 1288, 1290 (9th  
24 Cir. 1981). Federal Rule of Civil Procedure 15(a) is to be applied liberally in favor of amendments  
25 and, in general, leave shall be freely given when justice so requires. Janicki Logging Co. v. Mateer,  
26 42 F.3d 561, 566 (9th Cir. 1994).

27 \_\_\_\_\_  
28 <sup>1</sup> Plaintiff mis-spelled the first name of the CDCR Director as "Mathew." (Second Am. Compl.  
at 1.) The Court has confirmed that the correct spelling is Matthew.

1 The Court notes that the defendants in this action have not been served at this time. Plaintiff  
2 may as a matter of course amend his complaint because a responsive pleading has not yet been  
3 served. See Fed. R. Civ. P. 15(a). While Plaintiff has previously filed an amended complaint  
4 (docket no. 11), the Court finds that it is in the interests of justice to allow Plaintiff to amend his  
5 complaint a second time. See Janicki Logging Co., 42 F.3d at 566.

6 Accordingly, Plaintiff's motion for leave to file a second amended complaint (docket no. 12)  
7 is GRANTED, and the Clerk of the Court shall file the second amended complaint as indicated  
8 below.

9 The Court now reviews the allegations in the complaint, the amended complaint, and the  
10 second amended complaint below.

11 **III. Legal Claims**

12 **A. Deliberate Indifference Claim**

13 Deliberate indifference to serious medical needs violates the Eighth Amendment's  
14 proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);  
15 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, WMX  
16 Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); Jones v. Johnson, 781  
17 F.2d 769, 771 (9th Cir. 1986). A determination of "deliberate indifference" involves an examination  
18 of two elements: the seriousness of the prisoner's medical need and the nature of the defendant's  
19 response to that need. See McGuckin, 974 F.2d at 1059. A "serious" medical need exists if the  
20 failure to treat a prisoner's condition could result in further significant injury or the "unnecessary  
21 and wanton infliction of pain." Id. (citing Estelle v. Gamble, 429 U.S. at 104). A prison official is  
22 deliberately indifferent if he or she knows that a prisoner faces a substantial risk of serious harm and  
23 disregards that risk by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825,  
24 837 (1994).

25 In his original complaint, Plaintiff's alleges that he has suffered from severe chronic asthma  
26 since he was a child, and this supports an inference that he has serious medical needs. He alleges  
27 that he is being housed at PBSP's Security Housing Unit (SHU), that "smoke, sent [sic] and fumes  
28 are irritants that linger on to the SHU yards also entering through the ventilation system, consisting

1 of dust, soot, and ash," and that "[t]he ventilation system in the SHU is inadequate . . . trigger[ing]  
2 what could be serious respiratory problems where Plaintiff struggles to breathe, resulting in chest  
3 pains, shortness of breath, and wheezing." (Compl. at 3-21 - 3-22.)<sup>2</sup> Plaintiff alleges that the  
4 Defendants named in his original complaint were "deliberately indifferen[t] to the serious medical  
5 needs of Plaintiff Derrick Sims . . . during his confinement at [PBSP]." (Id. at 3.) In his amended  
6 complaint, Plaintiff alleges that Defendants Denead and Seneta acted with deliberate indifference to  
7 his serious medical needs on June 13 and 14, 2008 as well as on August 3, 2008, respectively, "by  
8 violating the state and federal law band on smoking inside housing units" and causing Plaintiff to  
9 suffer asthma episodes. On August 21, 2008, Plaintiff alleges that Defendant Schutz failed to  
10 provide him with adequate treatment for his asthma. Liberally construed, Plaintiff's allegations that  
11 prison officials failed to provide adequate medical treatment for his asthma or caused him to suffer  
12 asthma episodes -- while he was housed at PBSP from September 29, 2006 (date his first submitted  
13 a "sick call slip to medical and was seen by RN for complaints of asthma) through October 16, 2009  
14 (the date of his second amended complaint) -- state a cognizable deliberate indifference claim  
15 against Defendants Sayre, Gorospe, McLean, Kravitz, Samples, Rowe, Grannis, Denead, Seneta and  
16 Schultz. Accordingly, this claim may proceed against these Defendants.

17 **B. Disability Discrimination**

18 As mentioned above, Plaintiff claims that he suffers from severe chronic asthma. He further  
19 claims that he has requested an "emergency medical transfer to another prison (SHU) that best suits  
20 his disability under (ADA)." (Compl. at 3-21.) He alleges that his "asthmatic state qualifies for  
21 medical transfer." (Id.) In his second amended complaint, Plaintiff claims that he has not yet been  
22 transferred from PBSP and that he still experiences problems related to his severe chronic asthma.  
23 He alleges that the Defendants named in his original complaint "have and continue to discriminate  
24 against Plaintiff because of his asthma by failing to make reasonable accommodations such as  
25 transferring [sic] Plaintiff to another prison due to environment . . . failure to accommodate a  
26 disability constitutes discrimination under ADA." (Id. at 3-28.)

27 \_\_\_\_\_  
28 <sup>2</sup> Plaintiff's original complaint has eight pages attached to page three of the complaint form, and he has labeled them pages "3-21" through "3-28."

1                                   **1.        Cause of Action**

2           Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq., and  
3 § 504 of the Rehabilitation Act of 1973, as amended and codified in 29 U.S.C. § 794(a) , prohibit  
4 discrimination on the basis of disability in the programs, services or activities of a public entity. The  
5 elements of a cause of action under Title II of the ADA are: (1) that the plaintiff is a qualified  
6 individual with a disability; (2) that the plaintiff was either excluded from participation in or denied  
7 the benefits of a service, program, or activity of a public entity, or was otherwise discriminated  
8 against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination was by  
9 reason of disability. Duvall v. County of Kitsap, 260 F.3d 1124, 1135 (9th 2001); 42 U.S.C. §  
10 12132. A cause of action under § 504 of the Rehabilitation Act essentially parallels an ADA cause  
11 of action. See Olmstead v. Zimring, 119 S. Ct. 2176, 2182 (1999); Duvall, 260 F.3d at 1135.

12           A qualifying "disability" is "(A) a physical or mental impairment that substantially limits one  
13 or more of the major life activities of such individual; (B) a record of such an impairment; or  
14 (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

15           Federal regulations require a public entity to "make reasonable modifications in policies,  
16 practices, or procedures when the modifications are necessary to avoid discrimination on the basis of  
17 disability, unless the public entity can demonstrate that making the modifications would  
18 fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

19                                   **2.        Proper Defendants**

20           Plaintiff cannot bring an ADA or § 504 action against individual prison officials, because the  
21 proper defendant in such actions is the public entity responsible for the alleged discrimination. Nor  
22 can he bring a § 1983 action against Defendants based on allegedly discriminatory conduct. See  
23 Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002) ("[A] plaintiff cannot bring an action under  
24 42 U.S.C. § 1983 against a State official in her individual capacity to vindicate rights created by Title  
25 II of the ADA or section 504 of the Rehabilitation Act."). Therefore, Plaintiff's disability  
26 discrimination claims against Defendants who are individual prison officials are DISMISSED WITH  
27 PREJUDICE.

28           The proper defendants to Plaintiff's disability discrimination claims are the public entities

1 that allegedly denied him equal access to their programs: PBSP and the CDCR. State correctional  
2 facilities are "public entities" within the meaning of the ADA. See 42 U.S.C. § 12131(1)(A) & (B);  
3 Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 210 (1998); Armstrong v. Wilson, 124  
4 F.3d 1019, 1025 (9th Cir. 1997). State prisons that receive federal financial assistance are covered  
5 by the Rehabilitation Act. See Armstrong, 124 F.3d at 1022-23.

6 As state agencies, these entities are shielded from suit in federal court unless they waive  
7 their sovereign immunity or Congress has validly abrogated their sovereign immunity in the  
8 applicable statute. See Kentucky v. Graham, 473 U.S. 159, 167 n.14 (1985). In Board of Trustees  
9 of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001), the Supreme Court held that Congress did not  
10 have the power to abrogate the States' Eleventh Amendment immunity under Title I of the ADA, but  
11 declined to reach the question whether Congress validly abrogated the States' immunity as to  
12 Title II. See Garrett 121 S. Ct. at 960 n.1. The Court specifically noted that Title II has somewhat  
13 different remedial provisions from Title I. Id. For purposes of initial review, the Court will assume  
14 that the California prisons do not enjoy Eleventh Amendment immunity with respect to Plaintiff's  
15 ADA claims.

16 As to the Rehabilitation Act, the Ninth Circuit has held that, "[b]ecause California accepts  
17 federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh  
18 Amendment" as to that Act's anti-discrimination provisions. See Clark v. State of California, 123  
19 F.3d 1267, 1271 (9th Cir. 1997); see also Douglas v. California Dept. Youth Authority, 271 F.3d  
20 812, 819 (9th Cir.), amended, 271 F.3d 910 (9th Cir. 2001) (adhering to Clark after Supreme Court's  
21 decision in Garrett.) Thus, Plaintiff may pursue claims for both money damages and prospective  
22 injunctive relief under the Rehabilitation Act directly against the PBSP and the CDCR.

23 In sum, assuming Plaintiff has a valid disability discrimination claim, he may assert the  
24 claim in an amendment to the complaint against PBSP and the CDCR, but not against any individual  
25 defendants.

### 26 **3. Analysis of Claim**

27 Even assuming Plaintiff's allegation that he suffers from severe chronic asthma could  
28 establish that he is an individual with a disability under the federal statutes, he has not alleged

1 discriminatory conduct. Plaintiff makes conclusory allegations that Defendants discriminated  
2 against him because of his disability by "failing to make reasonable accommodations such as  
3 transferring [sic] Plaintiff to another prison due to environment . . . ." (Compl. at 3-27.) Plaintiff  
4 does not allege that he was treated differently than similarly-situated non-disabled inmates and he  
5 does not allege that he was excluded from participation in a prison program or service because of his  
6 disability. Therefore, he does not appear to have a cognizable disability discrimination claim.

7 If Plaintiff names PBSP and the CDCR as Defendants, his Plaintiff's ADA and Section 504  
8 claims against these public entities are DISMISSED WITH LEAVE TO AMEND. Plaintiff may  
9 reassert the claims in an amendment to the complaint if he can in good faith allege that he is an  
10 individual with a disability under the federal statutes, that the prison discriminated against him on  
11 the basis of his "disability," and if he names the proper Defendants.

12 **C. Supervisory Liability**

13 Plaintiff's allegations in his second amended complaint regarding Defendant CDCR Director  
14 Matthew Cate as a supervising official are insufficient to link him to Plaintiff's claims of  
15 constitutional violations.

16 "A supervisor may be liable if there exists either (1) his or her personal involvement in the  
17 constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful  
18 conduct and the constitutional violation." Redman v. County of San Diego, 942 F.2d 1435, 1446-47  
19 (9th Cir. 1991) (quoting Hansen v. Black, 885 F.2d 642, 646 (9th Cir.1989)). Supervisory liability  
20 exists even without overt personal participation in an offensive act if supervisory officials  
21 implement a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is  
22 "the moving force of the constitutional violation." Id. at 1447 (internal quotation marks and  
23 citations omitted). But under no circumstances is there respondeat superior liability under § 1983.  
24 That is, under no circumstances is there liability under § 1983 solely because one is responsible for  
25 the actions or omissions of another. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989); Ybarra  
26 v. Reno Thunderbird Mobile Home Vill., 723 F.2d 675, 680-81 (9th Cir. 1984).

27 Under general principles of § 1983 liability, "an individual may recover only when that  
28 individual's federal rights have been violated." Quintanilla v. City of Downey, 84 F.3d 353, 356

1 (9th Cir. 1996). A supervisor cannot be held liable under § 1983 where no injury or constitutional  
2 violation has occurred. Jackson v. City of Bremerton, 268 F.3d 646, 653-54 (9th Cir. 2001).

3 Plaintiff has not alleged facts sufficient to state a claim for supervisory liability against  
4 Defendant Cate. See Redman, 942 F.2d at 1446. Therefore, the supervisory liability claim against  
5 Defendant Cate is DISMISSED WITH LEAVE TO AMEND in order to cure this deficiency, if he  
6 can do so in good faith.

7 **D. Claim Against Doe Defendants**

8 Plaintiff identifies Doe Defendants, i.e., certain PBSP prison officials who have allegedly  
9 violated his constitutional rights "since the filing of the original complaint" whose name he intends  
10 to learn through discovery. (Second. Am. Compl. at 1.) The use of Doe defendants is not favored in  
11 the Ninth Circuit. See Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). However, where the  
12 identity of alleged defendants cannot be known prior to the filing of a complaint the plaintiff should  
13 be given an opportunity through discovery to identify them. Id. Failure to afford the plaintiff such  
14 an opportunity is error. See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).

15 Accordingly, the claims against these Doe Defendant are DISMISSED from this action without  
16 prejudice. Should Plaintiff learn the Doe Defendants' identities through discovery, he may move to  
17 file an amendment to the complaint to add them as named defendants. See Brass v. County of Los  
18 Angeles, 328 F.3d 1192, 1195-98 (9th Cir. 2003).

19 **IV. Motion for Preliminary Injunction**

20 Plaintiff seeks immediate injunctive relief. He claims that he is "suffering irreparable [sic]  
21 harm on a constant basis in the form of not being able to breathe at [the] onset of [his] asthma  
22 attacks, even a mild exacerbation can be fatal, and increases the risk of pain and possible death."

23 (Mot. for Prelim. Inj. at 4.) He further claims that he is "entitled to a preliminary injunction  
24 ordering the defendants to arrange for a transfer to a facility that best suits his medical needs,  
25 requiring Defendants to comply with the 8th Amendment." (Id.) Prior to granting a preliminary  
26 injunction, however, notice to the adverse party is required. See Fed. R. Civ. P. 65(a)(1).

27 Therefore, a motion for preliminary injunction cannot be decided until the parties to the action are  
28 served. See Zepeda v. INS, 753 F.2d 719, 727 (9th Cir. 1983).



1 serious medical needs against Defendants Sayre, Gorospe, McLean, Kravitz, Samples, Rowe,  
2 Grannis, Denead, Seneta and Schultz.

3 2. Plaintiff's disability discrimination claims against Defendants who are individual  
4 prison officials are DISMISSED WITH PREJUDICE. If Plaintiff names PBSP and the CDCR as  
5 Defendants, then his ADA and Section 504 claims against these public entitles are DISMISSED  
6 WITH LEAVE TO AMEND, as directed above.

7 3. Plaintiff has not alleged facts sufficient to state a claim for supervisory liability  
8 against Defendant Cate; therefore, the supervisory liability claim against him is DISMISSED WITH  
9 LEAVE TO AMEND.

10 4. Within **thirty (30) days** of the date of this Order Plaintiff may file amended ADA  
11 and Section 504 claims against PBSP and the CDCR as well as an amended supervisory liability  
12 claim against Defendant Cate as set forth above in Sections III(B)(3) and III(C) of this Order.  
13 (Plaintiff shall resubmit only his amended ADA, Section 504 and supervisory liability claims and  
14 not the entire complaint.) The failure to do so will result in the dismissal without prejudice of his  
15 ADA and Section 504 claims against PBSP and the CDCR as well as his supervisory liability claim  
16 against Defendant Cate.

17 5. Plaintiff's claims against the Doe Defendants are DISMISSED from this action  
18 without prejudice.

19 6. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of  
20 Service of Summons, two copies of the Waiver of Service of Summons, a copy of this Order, and a  
21 copy of either the complaint, amended complaint or second amended complaint and all attachments  
22 thereto, as specified, to the Defendants listed below: (1) a copy of the original complaint and all  
23 attachments thereto (docket no. 1) to **PBSP Chief Medical Officer Dr. Michael Sayre; PBSP**  
24 **Staff Service Analyst C. Gorospe; PBSP Family Nurse Practitioner/Health Care Manager**  
25 **Maureen McLean; PBSP Correctional Counselors Joseph Kravitz and B. Samples; PBSP**  
26 **Physician Linda Rowe; and CDCR Chief of the Inmate Appeals Branch N. Grannis;** and (2) a  
27 copy of the amended complaint and all attachments thereto (docket no. 11) to **PBSP Correctional**  
28

1 **Officers Seneta and R. Denead<sup>3</sup> as well as PBSP Registered Nurse Schutz.** The Clerk shall also  
2 mail a copy of the complaint, amended complaint and second amended complaint and all  
3 attachments thereto, as well as a copy of this Order to the State Attorney General's Office in San  
4 Francisco. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

5 7. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires  
6 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant  
7 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of  
8 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of  
9 such service unless good cause be shown for their failure to sign and return the waiver form. If  
10 service is waived, this action will proceed as if Defendants had been served on the date that the  
11 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve  
12 and file an answer before **sixty (60) days** from the date on which the request for waiver was sent.  
13 (This allows a longer time to respond than would be required if formal service of summons is  
14 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that  
15 more completely describes the duties of the parties with regard to waiver of service of the summons.  
16 If service is waived after the date provided in the Notice but before Defendants have been  
17 personally served, the Answer shall be due **sixty (60) days** from the date on which the request for  
18 waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.

19 8. Defendants shall answer the complaint in accordance with the Federal Rules of Civil  
20 Procedure. The following briefing schedule shall govern dispositive motions in this action:

21 a. No later than **ninety (90) days** from the date their answer is due, Defendants  
22 shall file a motion for summary judgment or other dispositive motion. The motion shall be  
23 supported by adequate factual documentation and shall conform in all respects to Federal Rule of  
24 Civil Procedure 56. If Defendants are of the opinion that this case cannot be resolved by summary  
25 judgment, they shall so inform the Court prior to the date the summary judgment motion is due. All  
26 papers filed with the Court shall be promptly served on Plaintiff.

27 \_\_\_\_\_  
28 <sup>3</sup> Plaintiff lists Defendant Denead as "Defendant Correctional Officer Denead, R," which the  
Court construes to be "R. Denead." (Am. Compl. at 2.)

1           b. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
2 and served on Defendants no later than **sixty (60) days** after the date on which Defendants' motion  
3 is filed. The Ninth Circuit has held that the following notice should be given to pro se plaintiffs  
4 facing a summary judgment motion:

5           The defendant has made a motion for summary judgment by which they seek  
6 to have your case dismissed. A motion for summary judgment under Rule 56 of the  
Federal Rules of Civil Procedure will, if granted, end your case.

7           Rule 56 tells you what you must do in order to oppose a motion for summary  
8 judgment. Generally, summary judgment must be granted when there is no genuine  
9 issue of material fact -- that is, if there is no real dispute about any fact that would  
10 affect the result of your case, the party who asked for summary judgment is entitled  
11 to judgment as a matter of law, which will end your case. When a party you are  
12 suing makes a motion for summary judgment that is properly supported by  
13 declarations (or other sworn testimony), you cannot simply rely on what your  
14 complaint says. Instead, you must set out specific facts in declarations, depositions,  
answers to interrogatories, or authenticated documents, as provided in Rule 56(e),  
that contradict the facts shown in the defendant's declarations and documents and  
show that there is a genuine issue of material fact for trial. If you do not submit your  
own evidence in opposition, summary judgment, if appropriate, may be entered  
against you. If summary judgment is granted [in favor of the defendants], your case  
will be dismissed and there will be no trial.

15           See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc).

16           Plaintiff is advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex  
17 Corp. v. Catrett, 477 U.S. 317 (1986) (party opposing summary judgment must come forward with  
18 evidence showing triable issues of material fact on every essential element of his claim). Plaintiff is  
19 cautioned that because he bears the burden of proving his allegations in this case, he must be  
20 prepared to produce evidence in support of those allegations when he files his opposition to  
21 Defendants' dispositive motion. Such evidence may include sworn declarations from himself and  
22 other witnesses to the incident, and copies of documents authenticated by sworn declaration.  
23 Plaintiff will not be able to avoid summary judgment simply by repeating the allegations of his  
24 complaint.

25           c. If Defendants wish to file a reply brief, they shall do so no later than **thirty**  
26 **(30) days** after the date Plaintiff's opposition is filed.

27           d. The motion shall be deemed submitted as of the date the reply brief is due.  
28 No hearing will be held on the motion unless the Court so orders at a later date.

1           9.       Discovery may be taken in this action in accordance with the Federal Rules of Civil  
2 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to depose  
3 Plaintiff and any other necessary witnesses confined in prison.

4           10.       All communications by Plaintiff with the Court must be served on Defendants, or  
5 Defendants' counsel once counsel has been designated, by mailing a true copy of the document to  
6 Defendants or Defendants' counsel.

7           11.       It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court  
8 informed of any change of address and must comply with the Court's orders in a timely fashion.  
9 Failure to do so may result in the dismissal of this action for failure to prosecute, pursuant to Federal  
10 Rule of Civil Procedure 41(b).

11           12.       Extensions of time are not favored, though reasonable extensions will be granted.  
12 Any motion for an extension of time must be filed no later than **fifteen (15) days** prior to the  
13 deadline sought to be extended.

14           13.       The Court concludes that Plaintiff's motion for a preliminary injunction (docket no.  
15 14) should not be granted without affording Defendants notice and an opportunity to be heard.  
16 Accordingly, Defendants are hereby ORDERED to respond to Plaintiff's motion for a preliminary  
17 injunction when they file their Answer to the complaint. In order to expedite the resolution of this  
18 case, the Court orders as follows:

19               a.       On the same date their Answer is due, Defendants shall respond to Plaintiff's  
20 motion for preliminary injunction. The response to the motion for preliminary injunction shall be  
21 supported by adequate factual documentation and shall conform in all respects to the Federal Rules  
22 of Civil Procedure, and all papers filed with the Court shall be promptly served on Plaintiff.  
23 Defendants are specifically directed to inform the Court of any plans to transfer Plaintiff to another  
24 prison or to house him in any location other than the SHU or the infirmary at Pelican Bay State  
25 Prison.

26               b.       Plaintiff may file a reply within **thirty (30) days** of the date Defendants'  
27 response is filed. Plaintiff's reply should be supported by factual documentation and should  
28 demonstrate why Plaintiff satisfies the standard for assessing a motion for preliminary injunction,

1 which is set forth in Winter, and has been outlined above.

2 c. The Prison Litigation Reform Act requires further that preliminary  
3 injunctions relating to prison conditions "be narrowly drawn, extend no further than necessary to  
4 correct the harm the court finds requires preliminary relief, and be the least intrusive means  
5 necessary to correct that harm." 18 U.S.C. § 3626(a)(2). The Court must give "substantial weight  
6 to any adverse impact on public safety or the operation of a criminal justice system caused by the  
7 preliminary relief." Id.

8 14. Plaintiff's motion for leave to file a second amended complaint (docket no. 12) is  
9 GRANTED. The Clerk of the Court is directed to file Plaintiff's motion, which is labeled "Motion  
10 for Leave to File an Amended Complaint and Demand for Jury Trial," and docket the  
11 aforementioned document as Plaintiff's "Second Amended Complaint." The Clerk is further  
12 directed to mark the Second Amended Complaint as filed on October 16, 2009, the date it was  
13 received by the Court.

14 15. This Order terminates Docket no. 12.

15 IT IS SO ORDERED.

16 DATED: 3/10/10

  
SAUNDRA BROWN ARMSTRONG  
United States District Judge

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1 UNITED STATES DISTRICT COURT  
2 FOR THE  
3 NORTHERN DISTRICT OF CALIFORNIA

4 DERRICK SIMS,  
5 Plaintiff,

Case Number: CV08-01691 SBA

6 v.

**CERTIFICATE OF SERVICE**

7 MICHAEL SAYRE et al,  
8 Defendant.

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
10 Court, Northern District of California.

11 That on March 15, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said  
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said  
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
14 located in the Clerk's office.

15 Derrick D. Sims J-20913  
16 Pelican Bay State Prison  
17 P.O. Box 7500  
18 Crescent City, CA 95531

19 Dated: March 15, 2010

Richard W. Wieking, Clerk  
By: LISA R CLARK, Deputy Clerk

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