

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

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL MUTAWALLY COOPERWOOD,	)	No. C 07-05417 JF (PR)
	)	
Plaintiff,	)	ORDER OF SERVICE; DIRECTING
	)	DEFENDANTS TO FILE
vs.	)	DISPOSITIVE MOTION OR
	)	NOTICE REGARDING SUCH
BOB MCKINNEY, et al.,	)	MOTION; INSTRUCTIONS TO
	)	CLERK
Defendants.	)	(Docket No. 32)
_____	)	

Plaintiff, a California prisoner incarcerated at the Pelican Bay State Prison (“PBSP”), filed in pro se the instant civil rights action pursuant to 42 U.S.C. § 1983 against PBSP prison officials. Plaintiff was granted leave to proceed in forma pauperis. The Court dismissed Plaintiff’s original and first amended complaint. Plaintiff’s second amended complaint (“SAC”) (Docket No. 30) is now before the Court for initial review. The Court will also address Plaintiff’s “motion for preservation of tangible items” in this order. (Docket No. 32.)

///  
///  
///

1 **DISCUSSION**

2 A. Standard of Review

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

11 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
12 elements: (1) that a right secured by the Constitution or laws of the United States was  
13 violated, and (2) that the alleged violation was committed by a person acting under the  
14 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

15 B. Plaintiff’s Claims

16 Plaintiff complains that the PBSP’s Security Housing Unit (“SHU”) and on the  
17 SHU’s exercise yard are “in serious need of proper maintenance and repair work” and  
18 have problems with the “heating system, ventilation system, plumbing, electrical outlets,  
19 [and] drainage system.” (SAC 9.) In particular, Plaintiff claims that the “acrylic plastic  
20 sheet (plexi-glass) and metal screen safety covering” of the Facility D exercise yard  
21 shows “numerous unknown foreign contaminants[,] mold, fungi and organism material.”  
22 (Id.) Plaintiff claims these foreign contaminants blow through the air and into the air  
23 vents, and are the cause of severe asthma attacks.

24 Plaintiff claims that Defendants violated his First, Eighth and Fourteenth  
25 Amendment rights by failing to properly investigate his grievances with respect to the  
26 offending plex-glass. Plaintiff claims that Defendants’ failure to address his concerns  
27 subjected him to cruel and unusual punishment because he was exposed to and was  
28 harmed by hazardous conditions. Plaintiff also claims that the medical personnel acted

1 with deliberate indifference in failing to properly treat his serious asthmatic condition due  
2 to the exposure to the foreign contaminants. Liberally construed, these claims are  
3 cognizable under § 1983.

4 Plaintiff's motion for preservation of tangible items (Docket No. 32) is  
5 GRANTED. The Court directs Respondent to take steps to preserve all evidence relevant  
6 to Plaintiff's claims in the care, custody, or control of PBSP until further order of this  
7 Court.

### 8 9 CONCLUSION

10 For the reasons stated above, the Court orders as follows:

11 1. The Clerk of the Court shall issue summons and the United States Marshal  
12 shall serve, without prepayment of fees, a copy of the **second amended complaint**  
13 (Docket No. 30), all attachments thereto, and a copy of this order upon Plant Operations  
14 Supervisor of Building Trades **Bob McKinney**, Chief Medical Officer **Michael C. Sayre**,  
15 Facility Nurse Practitioner **Sue Risenhoover**, Registered Nurse **J. Flowers**, Correctional  
16 Officer **D. Methfor**, Correctional Officer **M. Cuthbertson**, and Facility Captain **R.**  
17 **Pimental** at **Pelican Bay State Prison**, and Chief Inmate Appeals Branch Officer **N.**  
18 **Grannis** at the Department of Corrections and Rehabilitation in Sacramento. The Clerk  
19 shall also mail courtesy copies of the Complaint and this order to the California Attorney  
20 General's Office.

21 Defendants not named in an amended complaint are no longer defendants. See  
22 Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.1992). Accordingly, Defendants  
23 **Robert Tilton**, **Robert Sillen**, **Robert A. Horel**, and **C. Scavetta** are **DISMISSED** from  
24 the instant action.

25 2. No later than **sixty (60) days** from the date of this order, Defendants shall  
26 file a motion for summary judgment or other dispositive motion with respect to the claim  
27 in the complaint found to be cognizable above.

28 a. If Defendants elect to file a motion to dismiss on the grounds that

1 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.  
2 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to  
3 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.  
4 Terhune, 540 U.S. 810 (2003).

5 b. Any motion for summary judgment shall be supported by adequate  
6 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
7 Civil Procedure. **Defendants are advised that summary judgment cannot be granted,**  
8 **nor qualified immunity found, if material facts are in dispute. If any Defendant is of**  
9 **the opinion that this case cannot be resolved by summary judgment, he shall so**  
10 **inform the Court prior to the date the summary judgment motion is due.**

11 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
12 and served on Defendants no later than **thirty (30) days** from the date Defendants'  
13 motion is filed.

14 a. In the event Defendants file an unenumerated motion to dismiss  
15 under Rule 12(b), Plaintiff is hereby cautioned as follows:<sup>1</sup>

16 The Defendants have made a motion to dismiss pursuant to Rule  
17 12(b) of the Federal Rules of Civil Procedure, on the ground you have not  
18 exhausted your administrative remedies. The motion will, if granted, result  
19 in the dismissal of your case. When a party you are suing makes a motion  
20 to dismiss for failure to exhaust, and that motion is properly supported by  
21 declarations (or other sworn testimony) and/or documents, you may not  
22 simply rely on what your complaint says. Instead, you must set out specific  
23 facts in declarations, depositions, answers to interrogatories, or documents,  
24 that contradict the facts shown in the Defendant's declarations and  
25 documents and show that you have in fact exhausted your claims. If you do  
26 not submit your own evidence in opposition, the motion to dismiss, if  
27 appropriate, may be granted and the case dismissed.

28 b. In the event Defendants file a motion for summary judgment, the  
Ninth Circuit has held that the following notice should be given to Plaintiffs:

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

---

<sup>1</sup> The following notice is adapted from the summary judgment notice to be given to pro se  
prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See  
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 granted, end your case.

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

18 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to  
19 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477  
20 U.S. 317 (1986) (holding party opposing summary judgment must come forward with  
21 evidence showing triable issues of material fact on every essential element of his claim).  
22 Plaintiff is cautioned that failure to file an opposition to Defendants' motion for summary  
23 judgment may be deemed to be a consent by Plaintiff to the granting of the motion, and  
24 granting of judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52,  
25 53-54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

26 4. Defendants shall file a reply brief no later than **fifteen (15) days** after  
27 Plaintiff's opposition is filed.

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

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

7. Discovery may be taken in accordance with the Federal Rules of Civil  
Procedure. No further Court order is required before the parties may conduct discovery.

8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
Court informed of any change of address and must comply with the Court's orders in a

1 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
2 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

3  
4 IT IS SO ORDERED.

5 DATED: 11/12/08

6   
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
JEREMY FOGEL  
United States District Judge