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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 08cv1324 L(WVG)

ESTER BURNETT,)
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Plaintiff,)
)
v.)
)
DR. DUGAN, *et al.*,)
)
Defendants.)
_____)

**ORDER ADOPTING IN PART REPORT;
GRANTING MOTION TO DISMISS
UNEXHAUSTED CLAIM [doc. #87]and
MOTION TO DISMISS SAC [doc. #88];
REFERRING MOTION FOR LEAVE TO
FILE A SUPPLEMENTAL COMPLAINT
TO MAGISTRATE JUDGE [doc. #89];
DENYING MOTION TO FILE LATE
RESPONSE TO MOTION TO DISMISS
[doc. #113]**

Plaintiff, appearing *pro se*, filed a second amended complaint on November 10, 2009, alleging violation of his Eighth Amendment rights based upon accommodations to plaintiff’s medical condition that were denied or delayed. The SAC names Doctors Dugan, Hawthorne, Barreras, Frazee, and Khatri; Jane Doe, R.N., Victor Almager, and G.J. Giurbino¹ as defendants. Defendants filed a motion to dismiss the SAC for failure to exhaust his administrative remedies and a motion to dismiss for failure to state a claim under the Eighth Amendment. Rather than respond to defendants’ motions to dismiss,² plaintiff filed a motion to file a supplemental

¹ Defendants G.J. Guirbino and Jane Doe, R.N. have not been served with the complaint or any amended complaints in this action. They are therefore dismissed from this action without prejudice.

² On August 23, 2010, plaintiff filed a motion to file a late “answer” to defendants’ motion to dismiss the SAC. Because plaintiff has filed lengthy objections to the Report’s recommendation concerning the SAC, the Court will deny this motion.

1 complaint. Defendants opposed plaintiff's motion and plaintiff has replied.

2 The case was referred to United States Magistrate Judge William V. Gallo for a report
3 and recommendation ("Report") in accordance with 28 U.S.C. § 636(b)(1)(B) and Civil Local
4 Rule 72.3. The magistrate judge recommended that both of defendants' motions to dismiss be
5 granted and plaintiff's motion to file a supplemental complaint be denied. Plaintiff filed
6 objections to the Report and defendants filed a response to plaintiff's objections.

7 The district court's role in reviewing a Magistrate Judge's report and recommendation is
8 set forth in 28 U.S.C. § 636(b)(1). Under this statute, the district court "shall make a *de novo*
9 determination of those portions of the report . . . to which objection is made," and "may accept,
10 reject, or modify, in whole or in part, the findings or recommendations made by the magistrate
11 judge." *Id.* Under this statute, "the district judge must review the magistrate judge's findings
12 and recommendations *de novo* if objection is made, but not otherwise." *United States v.*
13 *Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.) (*en banc*), *cert. denied*, 124 S. Ct. 238 (2003).

14 **1. Background**

15 Plaintiff's complaint alleges defendants were deliberately indifferent to his medical needs
16 in that he received inadequate medical care from various health care providers while
17 incarcerated at both the Richard J. Donovan Correctional Facility ("Donovan") and at the
18 Centinela State Prison ("CEN"). Plaintiff has lumbar disk disease that ultimately required
19 surgery. His back problems include mobility impairment to his lower extremities. Plaintiff
20 contends that while incarcerated at RJD, Dr. Dugan, a staff physician, and Dr. Hawthorne, Chief
21 Medical Officer and Dr. Dugan's supervisor, failed to assign plaintiff lower tier housing in
22 contravention of a prior doctor's recommendation.

23 Plaintiff was transferred to CEN where Doctors Frazee, Khatri and Barreras were assigned.
24 Dr. Calvin, an outside neurosurgeon, also was involved in plaintiff's medical care and performed
25 surgery on plaintiff's back on June 27, 2008. While in CEN, plaintiff contends the physician
26 defendants were deliberately indifferent by failing to provide him with a raised toilet seat
27 following the surgery; he was removed from the Disability Placement Program ("DPP"), and
28 there was a delay in transferring him from a general population lower bunk to the Correctional

1 Treatment Center, a prison health care facility, which was ADA accessible.

2 The SAC also alleges that Victor Almager, the Warden of CEN and G.J. Giurbino, the
3 prior warden of CEN, violated his rights when plaintiff was not provided with an extra mattress
4 based on prison policy.

5 **2. Motion to Dismiss for Failure to Exhaust Administrative Remedies**

6 It is well established that under the Prison Litigation Reform Act of 1995, prisoners are
7 required to exhaust the available administrative remedies prior to filing suit. *Jones v. Bock*, 549
8 U.S. 199, 211 (2007); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). 42 U.S.C.
9 § 1997e(a) does not impose a pleading requirement, but rather, is an affirmative defense under
10 which defendants have the burden of raising and proving the absence of exhaustion. *Jones*, 549
11 U.S. at 216; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). Defendants move to
12 dismiss a claim raised in the SAC that was not properly exhausted, *i.e.*, that defendants Barreras,
13 Frazee and Khatri were deliberately indifferent to his medical needs when they refused to provide
14 a raised toilet seat following plaintiff's back surgery.

15 The administrative grievance system for prisoner complaints provides for four levels of
16 appeal: the informal level, first formal level, second formal level, and third formal level, also
17 known as the "Director's Level." Appeals must be submitted within fifteen working days of the
18 event being appealed, and the process is initiated by submission of the appeal to the informal
19 level, or in some circumstances, the first formal level. In order to satisfy 42 U.S.C. § 1997e(a),
20 California state prisoners are required to use this process to exhaust their claims prior to filing
21 suit. *Woodford v. Ngo*, 548 U.S. 81, 85-86 (2006).

22 In deciding a motion to dismiss for failure to exhaust administrative remedies, the Court
23 may look beyond the pleadings and decide disputed issues of fact. *Wyatt v. Terhune*, 315 F.3d
24 1108, 1119-20 (9th Cir. 2003).

25 Using CDC Form 1824, plaintiff requested a raised toilet seat on July 5, 2008. On
26 August 4, 2008, Dr. Khatri, as the First Level Reviewer, denied plaintiff's request finding that
27 there was no medical indication for the request. (SAC, Doc. # 83-2 at 40.) There are no records
28 demonstrating that plaintiff ever appealed the issue to any further levels of review.

1 In objecting to the Report that found plaintiff had not exhausted this claim, plaintiff
2 argues that: ‘the issue of raised toilet seat was addressed at the 3rd level of appeals (see Page 2
3 of Exhibit C last paragraph last sentence) as a related health care appliance.’” Objection at 13, ¶
4 79. Plaintiff points to the Director’s Level Decision dated October 13, 2009 to show that an
5 appeal of the raised toilet seat was considered in the consolidated appeal. Plaintiff’s
6 characterization does not accurately reflect the record. The raised toilet seat request was issued
7 an Institution Log No. CEN-A-08-00857 but the Director’s Level Decision concerned five other
8 appeals: CEN-29-08-11666; CEN-29-08-11854; CEN-29-09-10331; CEN-29-09-10018; and
9 SAC-10-09-11528. It is beyond dispute that the raised toilet seat appeal was not addressed in
10 the Director’s Level Decision.

11 Defendants have met their burden to show plaintiff has not exhausted his administrative
12 remedies as to the claim of a raised toilet seat and plaintiff has not offered any evidence to rebut
13 this conclusion. There is no documentation that plaintiff took the specific issue of a raised toilet
14 seat to any appeal level after Dr. Khatri denied the request on August 4, 2008.

15 Accordingly, the Court overrules plaintiff’s objection to the magistrate judge’s Report
16 that plaintiff failed to exhaust administrative remedies and the claim will be dismissed.

17 **3. Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(6)**

18 As noted above, plaintiff contends defendants were deliberately indifferent to his serious
19 medical needs in violation of the Eighth Amendment. In the Report, the magistrate judge
20 recommended that the SAC be dismissed in its entirety because certain defendants acted only in
21 a supervisory capacity and plaintiff failed to adequately allege facts pointing to deliberate
22 indifference on the part of defendants. Plaintiff objects to the Report by generally relying on
23 Federal Rule of Civil Procedure 8 and his *pro se* status. But plaintiff does not object to the
24 dismissal without prejudice of the unserved defendants, Jane Doe, R.N. and G.J. Guirbino.
25 Objection at 15, ¶ 92.

26 **A. Legal Standard**

27 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro v.*
28 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). Federal Rule of Civil Procedure 8(a) requires a

1 complaint to contain “a short and plain statement of the claim showing that the pleader is entitled
2 to relief” FED. R. CIV. P. 8(a). “While a complaint attacked by a Rule 12(b)(6) motion to
3 dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds
4 of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation
5 of the elements of a cause of action will not do. Factual allegations must be enough to raise a
6 right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
7 (2007) (internal quotation marks, brackets and citations omitted).

8 In reviewing a motion to dismiss under Rule 12(b)(6), the court must assume the truth of
9 all factual allegations and must construe them in the light most favorable to the nonmoving
10 party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Legal conclusions
11 need not be taken as true merely because they are cast in the form of factual allegations. *Roberts*
12 *v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987); *W. Mining Council v. Watt*, 643 F.2d 618,
13 624 (9th Cir. 1981). Similarly, “conclusory allegations of law and unwarranted inferences are
14 not sufficient to defeat a motion to dismiss.” *Pareto v. Fed. Deposit Ins. Corp.*, 139 F.3d 696,
15 699 (9th Cir. 1998). A *pro se* plaintiff’s pleadings are read liberally. *Hebbe v. Pliler*, 2010 WL
16 2947323 *3 (9th Cir. July 29, 2010)

17 In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond
18 the complaint for additional facts, *e.g.*, facts presented in plaintiff’s memorandum in opposition
19 to a defendant’s motion to dismiss or other submissions. *United States v. Ritchie*, 342 F.3d 903,
20 908 (9th Cir. 2003); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998); *see also* 2
21 MOORE’S FEDERAL PRACTICE, § 12.34[2] (Matthew Bender 3d ed.) (“The court may not . . . take
22 into account additional facts asserted in a memorandum opposing the motion to dismiss, because
23 such memoranda do not constitute pleadings under Rule 7(a).”).

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1 **B. Eighth Amendment Claim and Supervisory Liability**

2 Deliberate indifference to serious medical needs violates the Eighth Amendment's
3 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104
4 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds,
5 *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of
6 “deliberate indifference” involves an examination of two elements: the seriousness of the
7 prisoner's medical need and the nature of the defendant's response to that need. *See McGuckin*,
8 974 F.2d at 1059. A “serious” medical need exists if the failure to treat a prisoner's condition
9 could result in further significant injury or the “wanton infliction of unnecessary pain.” *Id.* A
10 prison official is deliberately indifferent if he knows that a prisoner faces a substantial risk of
11 serious harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer v.*
12 *Brennan*, 511 U.S. 825, 837 (1994). Claims that the prison official was negligent or even
13 grossly negligent are insufficient to establish a constitutional violation. *Estelle*, 429 U.S. at 106.

14 In this case, plaintiff seeks to hold several defendants liable under Section 1983 on a
15 theory of supervisory liability. Supervisors can only be held liable under Section 1983 for the
16 actions of their subordinates for their own culpable action or inaction in the training, supervision,
17 or control of subordinates, for their acquiescence in the constitutional deprivation of which a
18 complaint is made, or for conduct that showed a reckless or callous indifference to the rights of
19 others. *See Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000). For liability to exist, the
20 supervisor must have been personally involved in the constitutional deprivation or a sufficient
21 causal connection must exist between the supervisor's unlawful conduct and the constitutional
22 violation. *Jackson v. City of Bremerton*, 268 F.3d 646, 653 (9th Cir.2001). There is no
23 “vicarious liability” under Section 1983. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009).

24 **C. Allegation Against the RJD Defendants**

25 **1. Defendant Dugan**

26 Plaintiff asserts that defendant Dugan, as his primary care physician, did not follow a
27 prior doctor’s recommendations by failing to provide him access to lower-tier housing which
28 caused plaintiff severe pain. Before his transfer to RJD, Dr. Griffin noted on a DPPV form that

1 plaintiff had a lower extremity mobility impairment requiring relatively level terrain. Once at
2 RJD, Dr. Dugan physically examined plaintiff, reviewed the Disability Placement Program
3 Verification (“DPPV”) form and his medical record and determined that there was not a “no
4 stairs” housing restriction indicated. But Dr. Dugan provided plaintiff with a lower bunk
5 assignment, pain medications and a referral for physical therapy consistent with Dr. Griffin’s
6 DPPV notes.

7 In his objections, plaintiff provides an additional exhibit, no. 50, but it does not strengthen
8 his claim as he suggests. The January 10, 2006 letter from Dr. Bruce Faecher does not state that
9 plaintiff required no stairs but merely states “Referral to a level institution to reduce aggravation
10 of symptoms.” Objections to Report, Exh. 50.

11 Viewing the allegations with extreme liberality, plaintiff has not alleged facts sufficient to
12 show deliberate indifference on the part of defendant Dugan. Here defendant Dugan response to
13 plaintiff’s medical condition does not even reach a negligence standard. Plaintiff’s objections
14 are overruled and Dr. Dugan will be dismissed with prejudice.

15 **2. Dr. Hawthorne**

16 While a RJD, Dr. Hawthorne was the second level reviewer of plaintiff’s appeal
17 concerning Dr. Dugan’s failure to provide no-stairs housing. When a named defendant holds a
18 supervisory position, the causal link between him and the claimed constitutional violation must
19 be specifically alleged. *See Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979); *Mosher v.*
20 *Saalfeld*, 589 F.2d 438, 441 (9th Cir.1978). Here, plaintiff has failed to allege facts
21 demonstrating a causal link between the actions of Dr. Hawthorne and any constitutional
22 violation. Plaintiff merely alleges that defendant Hawthorne was aware of plaintiff’s serious
23 medical needs and caused him pain by denying lower tier housing in his review of Dr. Dugan’s
24 response to plaintiff’s request. Such an allegation is an insufficient basis for liability under §
25 1983 particularly when the claim for no-stair housing does not rise to a constitutional violation.
26 Accordingly, the court concludes that plaintiff has failed to state a cognizable claim against
27 defendant Hawthorne, plaintiff’s objection is overruled and Dr. Hawthorne will be dismissed
28 with prejudice.

1 **D. Allegation Against the CEN Defendants**

2 **1. Dr. Barreras**

3 Dr. Barreras is a physician and the Chief Medical Officer at Centinela State Prison.
4 Plaintiff contends that Dr. Barreras reviewed plaintiff’s grievances and failed to overrule Dr.
5 Khatri’s recommendation to place plaintiff in a general housing assignment. In his SAC,
6 plaintiff clearly indicates that Dr. Barreras is being sued under a theory of respondeat superior,
7 *i.e.*, vicarious liability: “Dr. Barreras did not commit the cruel and unusual punishment . . . she
8 became responsible for them when she failed to correct them in the course of her supervisory
9 responsibilities.” SAC at 10. In his objections, plaintiff contends that as a supervisor, Dr.
10 “Barreras knew of the violations and failed to correct them.” Objection at 10.

11 “Government officials may not be held liable for the unconstitutional conduct of their
12 subordinates under a theory of respondeat superior.” *Iqbal*, 129 S. Ct. at 1948. Instead, each
13 government official, regardless of his or her title, is only liable for his or her own misconduct;
14 therefore, Plaintiff must allege with some facts that each defendant, through his or her own
15 individual actions, violated Plaintiff’s constitutional rights. *Id.* at 1948-49.

16 Because Dr. Barreras was not personally involved in the alleged constitutional
17 deprivation and plaintiff does not suggest a causal connection between her conduct and the
18 alleged constitutional violation, plaintiff fails to state a claim against Dr. Barreras. Further,
19 plaintiff’s allegations against Dr. Barreras are conclusory in that they lack any factual basis.
20 Even reviewing plaintiff’s allegations broadly, plaintiff has failed to allege an Eighth
21 Amendment deliberate indifference claim against Dr. Barreras.

22 The Court overrules plaintiff’s objection and will dismiss with prejudice Dr. Barreras
23 from this action.

24 **2. Dr. Frazee**

25 Dr. Frazee is a physician at CEN who examined plaintiff and provided him with
26 medication and arranged for housing in the prison infirmary. Plaintiff contends that Dr. Frazee
27 refused to provide him with a raised toilet seat: “Plaintiff is asserting a claim that Dr. Frazee,
28 directly contravened medical orders & recommendations of an appropriate specialist &

1 neurosurgeon Dr. Calvin” Objection at 12. As discussed above, plaintiff has not exhausted
2 his administrative remedies with respect to this as to the raised toilet seat claim.

3 With respect to other accommodations plaintiff sought post-surgery, Dr. Frazee examined
4 plaintiff and provided a 90-day no work assignment, prison authority tennis shoes and a
5 temporary lower-tier, bottom bunk assignment as an accommodation. Given the
6 accommodations and medical examinations provided by Dr. Frazee, the Court concludes that
7 plaintiff has not alleged a level of deliberate indifference constituting a violation of the Eighth
8 Amendment.

9 Plaintiff’s objection is overruled and Dr. Frazee will be dismissed from the action without
10 prejudice.

11 3. Dr. Khatri

12 Dr. Khatri was a primary care physician at CEN who examined plaintiff on at least three
13 occasions, consulted with Dr. Calvin, an outside specialist and neurosurgeon, and determined
14 that plaintiff could be housed in general population without accommodation for his medical
15 condition. In his August 26, 2008 examination of plaintiff, Dr. Khatri recommended a 90-day no
16 work restriction, prison tennis shoes, an extra mattress, and bottom bunk, lower tier housing
17 assignment. (SAC, doc. #83-2 at 58.) In his objection to the Report, plaintiff state “Dr. Khatri
18 and Dr. Frazee actions mirror one another” and therefore, Dr. Khatri should not be dismissed for
19 the same reasons plaintiff’s claims against Dr. Frazee should not be dismissed. Objection at 14.

20 As noted above, the raised toilet seat claim is unexhausted and therefore, this portion of
21 the claim is dismissed without prejudice. As for the other portions of the claim against Dr.
22 Khatri, plaintiff’s assertion of deliberate indifference fails to meet the Eighth Amendment
23 standard. To the extent Dr. Khatri’s medical decisions were at odds with Dr. Calvin’s
24 recommendations, the disagreement in medical opinions is insufficient to state a claim for
25 deliberate indifference. This is particularly so when Dr. Calvin observed that plaintiff was
26 progressing well (SAC, doc. 83-2, 43-44, 58.) and Dr. Khatri provided an accommodation
27 recommendation for a 90-day no work assignment, prison authority tennis shoes, and a
28 temporary lower-tier, bottom bunk assignment. Accordingly, plaintiff’s objection is overruled

1 and Dr. Khatri will dismissed without prejudice.

2 **4. Warden Almager**

3 Victor Almager, the Warden at CEN, is alleged to have been deliberately indifferent to
4 plaintiff's medical needs when he allegedly upheld a prior institutional policy against extra
5 mattresses. The attachments to the SAC clearly indicate that plaintiff was approved for an extra
6 mattress.

7 Although "[s]upervisory liability exists even without overt personal participation in the
8 offensive act if supervisory officials implement a policy so deficient that the policy 'itself is a
9 repudiation of constitutional rights' and is 'the moving force of the constitutional violation,'"
10 here it is clear that the policy plaintiff complains of was not being implemented by Warden
11 Almager. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir.1989) quoting *Thompkins v. Belt*, 828 F.2d
12 298, 304 (5th Cir.1987).

13 Plaintiff's bald statement that Almager knew of the mattress policy and plaintiff's
14 situation is insufficient to establish a sufficient causal connection between Almager and the
15 alleged constitutional violation. Accordingly, the Court overrules plaintiff's objection and will
16 dismiss Warden Almager from this action with prejudice because plaintiff cannot state a claim
17 relying on a policy that was not implemented by Almager.

18 **5. Jane Doe, R.N. and G.J. Guirbino**

19 In the SAC, plaintiff names a Jane Doe defendant, a registered nurse who was the
20 specialty appointment scheduler at CEN, and former CEN Warden G.J. Guirbino. But as
21 plaintiff acknowledges in his objection to the Report, he has not served these defendants and
22 they may properly be dismissed without prejudice.

23 **E. State Law Claims**

24 Having failed to successfully allege a federal claim, with only state law claims remaining,
25 this Court ceases to have subject matter jurisdiction over the suit. The Court declines to exercise
26 its supplemental jurisdiction over the remaining state law causes of action and they are dismissed
27 without prejudice.

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1 **4. Motion for Leave to File a Supplemental Complaint**

2 Plaintiff sought leave to file a supplemental complaint. In relying on then-current case
3 law, the magistrate judge recommended that the motion be denied because the new claims had
4 not been administratively exhausted. After the filing of the Report, the Ninth Circuit issued its
5 decision in *Rhodes v. Robinson*, 2010 WL 3489777 (9th Cir. 2010). With respect to the PLRA's
6 exhaustion requirement, the court of appeals held that it is satisfied so long as the plaintiff
7 exhausted his administrative remedies with respect to the new claims asserted in his
8 supplemental complaint prior to tendering that complaint to the court for filing.

9 Rather than consider the current recommendation, the Court refers plaintiff's motion for
10 leave to file a supplemental complaint to the magistrate judge to be considered in light of *Rhodes*
11 *v. Robinson*.

12 **5. Conclusion**

13 Based on the foregoing, **IT IS ORDERED:**

14 1. **ADOPTING** in part the Report and Recommendation with respect to defendants'
15 motion to dismiss the SAC for failure to exhaust and motion to dismiss for failure to state a
16 claim;

17 2. **OVERRULING** plaintiff's objections to the report and recommendation in their
18 entirety;

19 3. **GRANTING** defendants' motion to dismiss unexhausted claim without prejudice;

20 4. **GRANTING** defendants' motion to dismiss the SAC with prejudice as to Warden
21 Almager, Dr. Barreras, Dr. Dugan and Dr. Hawthorne, and without prejudice as to defendants
22 Dr. Frazee, Dr. Khatri, G.J. Guirbino and Jane Doe, R.N.;

23 5. **DENYING** plaintiff's motion for leave to file a late answer to defendants' motion
24 to dismiss the SAC; and

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1 6. **REFERRING** plaintiff's motion for leave to file a supplemental complaint to the
2 magistrate judge for further consideration.

3 **IT IS SO ORDERED.**

4 DATED: September 30, 2010

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6 
M. James Lorenz
United States District Court Judge

7 COPY TO:

8 HON. WILLIAM V. GALLO
9 UNITED STATES MAGISTRATE JUDGE

10 ALL PARTIES/COUNSEL

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