UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARCUS BOVARIE, et al.,

Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

CASE NO. 08cv1661-LAB (NLS)

ORDER ADOPTING IN PART AND REJECTING IN PART REPORT AND RECOMMENDATION

Bovarie is a California prisoner currently incarcerated at Centinela State Prison. Defendants are the Governor of California, the secretary and former secretary of the California Department of Corrections and Rehabilitation, the warden and former wardens of Centinela, and a number of doctors and medical staff at Centinela. There are eighteen defendants in all. The essence of Bovarie's claim, which he brings as a civil rights lawsuit under 42 U.S.C. § 1983, is that he received inadequate medical care at Centinela. The Court adopts the Report and Recommendation almost in its entirety.

I. Procedural History

Bovarie filed this lawsuit on September 10, 2008, and pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(c) and (d) it was referred to Magistrate Judge Nita Stormes for a Report and Recommendation ("R&R"). Because Bovarie is proceeding

pro se, the Court screened his complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) and dismissed it for failure to state a claim. (Doc. No. 3.) *See Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc). Bovarie then filed his First Amended Complaint ("FAC") (Doc. No. 6), which the Court again screened and dismissed, but only as against certain defendants. (Doc. No. 8.) The remaining defendants then moved to dismiss, some individually, some collectively, and it is their motions to dismiss that the R&R addresses and that are now before the Court.

Three notable modifications were made to Bovarie's complaint as a result of the Court's screenings pursuant to 28 U.S.C. § 1915(e)(2)(B). First, defendants Schwarzenegger, Cates, Tilton, Smelosky, Almager, and Giurbino have been dismissed without prejudice. Bovarie does not allege that any of these defendants were directly involved in or responsible for the inadequate medical care he allegedly received, and there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437–38 (9th Cir. 1993). Second, Wayne Wicken was dismissed as a co-plaintiff because he failed to file a Motion to Proceed *In Forma Pauperis*, and because Bovarie has no legal authority to represent him. Third, Bovarie's motion for class certification was denied without prejudice. There is an almost identical class action, *Plata v. Schwarzenegger*, already pending in the Northern District of California. *See* N.D. Cal. Civil Case No. C-01-1351.

Judge Stormes issued her R&R on January 21, 2010. Both Bovarie and the Defendants filed objections to it.

II. The R&R

Bovarie is clear in the FAC that he is suing Defendants in their individual and official capacities. The first conclusion of the R&R is that the Eleventh Amendment immunizes Defendants from liability in their official capacities. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

Next, the R&R concludes that Tetteh, Ko, and Hodge should be dismissed as defendants, with prejudice, because Bovarie doesn't allege he had any contact with

them. These are doctors who treated Wicken, and the Court has already dismissed Wicken as a plaintiff in this case.

Then the R&R turns to Cook, Hammond, and Robinson, who it concludes can't be accused of deliberate indifference to Bovarie's medical needs because they merely reviewed and processed Bovarie's medical appeals by relying, in good faith, on the opinions of the doctors who actually saw Bovarie. The R&R recommends dismissing Cook, Hammond, and Robinson with prejudice.

The R&R also concludes that Bovarie has pled sufficient facts to ground an Eighth Amendment claim against Aymar, although this claim cannot be based upon Aymar's allegedly inadequate medical licensing.

Finally, the R&R recommends allowing Bovarie's claims for injunctive relief to go forward on the ground that Defendants haven't adequately shown why those claims are subsumed by the *Plata* class action.

III. Legal Standards

The Court reviews the R&R pursuant to Rule 72 of the Federal Rules of Civil Procedure. "The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district court may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3). The district judge "must review the magistrate judge's findings and recommendations de novo if objection is made, but not otherwise." *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc). The R&R itself warns that "failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order." (R&R at 17.)

Because Bovarie is a prisoner and is proceeding pro se, the Court construes his pleadings liberally and affords him the benefit of any doubt. *See Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261

(9th Cir. 1992). That said, "[p]ro se litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 f.2d 565, 567 (9th Cir. 1987).

IV. Discussion

Although both parties filed objections to the R&R, not all of the R&R's conclusions have been objected to.

Bovarie does not object to the dismissal of his claims against the Defendants in their official capacity. The Court agrees with the R&R that those claims should be dismissed with prejudice. Nor does Bovarie object to the dismissal of Tetteh, Ko, and Hodge, the doctors who he alleges only treated Wicken. Again, the Court agrees with the R&R's analysis, and dismisses these defendants with prejudice. The R&R recommended dismissing Cook, Hammond, and Robinson, who oversaw Bovarie's medical appeals but didn't actually treat him, and Bovarie objects only to the dismissal of Cook. Hammond and Robinson are therefore dismissed with prejudice.

Bovarie makes two other objections that don't relate to the R&R. First, he objects to the Court's dismissal, at the initial screening phase, of Schwarzenegger, Tilton, Smelosky, Almager, Giurbino, and Cates –- all defendants the Court determined could only be liable on a theory of respondeat superior that isn't contemplated by 42 U.S.C. § 1983. Second, Bovarie seeks the appointment of counsel for himself and for Wicken, a request he's made throughout this litigation.

For Defendants' part, Aymar doesn't object to the R&R's conclusion that Bovarie has stated an Eighth Amendment claim against her. Aymar's motion to dismiss is therefore denied in part and granted in part (to the extent Bovarie's claim against her relies on her medical licensing). Defendants do object, however, to the R&R's suggestion that they haven't sufficiently shown why Bovarie's claims for injunctive relief are being addressed in *Plata*.[1]

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[1] To be clear, only Cook, Hammond, Barreras, Khatri, Calderon, Manaig, and Navamani join in this objection.

A. Dismissal of Cook

Cook is a Health Care Appeals Coordinator at Centinela, and Bovarie alleges she "is and was responsible for all medical inmate appeals submitted by inmates at CEN, providing medical care for all inmates at CEN, including but not limited to diagnostics and testing." (FAC ¶ 23.) She functions in a "'gate keeper' to medical care role in which she personally diagnoses inmates to grant or deny appeals." (*Id.*)

It is not clear from the record that Cook personally diagnoses inmates. Rather, the R&R describes her as a "fact-gathering employee with no medical training," whose job it is to assess the legitimacy of an inmate's medical appeals by reviewing the opinions of the doctors who treated them. (R&R at 12.) The problem for Bovarie is that to be liable for the deprivation of his constitutional rights under 42 U.S.C. § 1983, Cook must have performed an affirmative act, participated in another's affirmative acts, or omitted to perform an act she is legally required to perform that made her deliberately indifferent to his medical needs. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). In other words, "there must be a showing of personal participation in the alleged rights deprivation." *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). The Court agrees with the R&R's conclusion that the mere good-faith and reasonable review of other doctors' opinions cannot make Cook complicit in their alleged indifference to Bovarie's medical needs. (R&R at 11.)

Deliberate indifference lies somewhere between negligence and "conduct engaged in for the very purposes of causing harm or with the knowledge that harm will result," *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). To accuse Cook of deliberate indifference, moreover, Bovarie must allege knowledge on her part that a substantial risk of harm existed in her taking the medical reports she reviewed at their word. *Id.* at 837-838. The Court approves the R&R's conclusion, with respect to both of Bovarie's medical grievances, that Cook reasonably relied on the opinions of Bovarie's doctors, and could not have drawn the inference that a substantial risk of harm threatened Bovarie by her doing so. (R&R at 12–13.)

Bovarie's response to this is that Cook's very position is illegal, and that, in the first instance, a non-doctor shouldn't be reviewing the opinions of doctors to assess the merits of a medical appeal. He claims Cook was deliberately indifferent by

> (1) performing this duty at all when it is painfully obvious she cannot, on her own, determine if care is sufficient; (2) by not taking her cases to a doctor (or anyone) to review before denied relief, and medical care, on her own insufficient opinion — an opinion she knew or should have known was insufficient to make a medical decision for Plaintiff. (Obj. to R&R at 6.)

These allegations, even assuming they are true, are insufficient to support the charge that Cook was deliberately indifferent to Bovarie's health. Bovarie's grievance isn't with Cook, really, as much as the regime of medical treatment at Centinela that entrusts a non-physician with the responsibility of reviewing medical records and processing appeals. Bovarie's objection to Cook's dismissal is therefore overruled, and she is dismissed with prejudice from this case.

B. Dismissal of Schwarzenegger, Tilton, Smelosky, Almager, Giurbino, and Cates

Schwarzenegger (Governor of California), Tilton and Cates (secretaries of the California Department of Corrections and Rehabilitation), and Smelosky, Almager, and Giurbino (wardens of Centinela) were dismissed from this lawsuit at an early stage. Pursuant to 28 U.S.C. § 1915(e)(2)(B), the Court screens all IFP complaints for failure to state a claim, and it twice determined that Bovarie alleged no direct involvement by any of these Defendants in the medical care he received and was attempting to hold them liable in their supervisory capacity. (*See* Doc. Nos. 3, 8.) Under 42 U.S.C. § 1983, however, there is no respondeat superior liability. *Palmer*, 9 F.3d at 1437–38. Bovarie challenges the dismissal of Schwarzenegger, Tilton, Cates, Smelosky, Almager, and Giurbino in his objection to the R&R.[2]

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[2] The R&R does not address the place of Schwarzenegger, Tilton, Cates, Smelosky, Almager, and Giurbino in this lawsuit. The Court — not Magistrate Judge Stormes — dismissed these defendants pursuant to an initial screening of the FAC under 28 U.S.C. § 1915(e)(2)(B). Bovarie could have sought leave to amend the FAC to allege facts sufficient to include these defendants, but he did not. Therefore, the

These Defendants cannot be held liable under section 1983 just because their job description includes the oversight of the prison where Bovarie is incarcerated. That is what it means, in this context, to say there is no respondeat superior liability. However, a supervisory official may be liable under section 1983 if he personally participated in the constitutional deprivation alleged, or if there was a sufficient causal connection between the supervisor's conduct and the deprivation. *Redman v. County of San Diego*, 942 F.2d 1435, 1446–47 (9th Cir. 1991). Ultimately what matters is that defendants can be said to have caused the deprivation. *Galen v. County of Los Angeles*, 477 F.3d 652, 659 (9th Cir. 2007); *see also Duffy*, 588 F.2d at 743–44 ("Personal participation is not the only predicate for section 1983 liability. Anyone who 'causes' any citizen to be subjected to a constitutional deprivation is also liable.").

That causal connection can be established in a number of ways. If a supervisor implements or oversees a policy that gives constitutional rights undue consideration and sets the wheels in motion for their trampling, he can be liable. *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000). If a supervisor fails to train or oversee subordinates who go on to violate another's constitutional rights, he can be liable. *Id*. If a supervisor acquiesces in the deprivation of a constitutional right of which a complaint is made, he can be liable. *Id*. "The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).

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Court interprets Bovarie's objection to their dismissal not as an objection to the R&R but as a request for leave to amend his FAC. Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend "be freely given when justice so requires." Fed. R. Civ. P. 15. "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). *See also Foman v. Davis*, 371 U.S. 178, 182 (1962) (implying leave to amend should be granted in the absence of undue delay, bad faith or dilatory motive, or undue prejudice to the opposing party or futility of amendment). The Court needn't grant leave to amend, however, if amendment would be futile. *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009).

An Eighth Amendment violation occurs when prison officials are deliberately indifferent to a prisoner's medical needs. *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004); *see also Leer*, 844 F.2d at 633 ("A prisoner can state a section 1983 claim against prison personnel under the eighth amendment by establishing that the prison personnel acted with 'deliberate indifference' in creating the condition that violates the eighth amendment."). To act with deliberate indifference, a prison official must *know of and disregard* an excessive risk to inmate health and safety. *Toguchi*, 391 F.3d at 1057 (internal citation omitted). "If a [prison official] should have been aware of the risk, but was not, then the [official] has not violated the Eighth Amendment, no matter how severe the risk." *Id*. (quoting *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1187 (9th Cir. 2002)).

Bovarie alleges that Schwarzenegger "failed to provide adequate funding and legislation for adequate health care in California's prisons" and "allowed overcrowding in California's prisons to reach such a severe degree that the provision of adequate health care to California's prisoners is an impossibility." (Obj. to R&R at 2.) Likewise, Bovarie alleges that Cates and Tilton, secretaries of the California Department of Corrections and Rehabilitation, allowed overcrowding to infringe on the provision of adequate health care, "failed to contract with adequate health care providers," "failed to establish adequate statewide protocol for the supervision and training of medical personnel," and "failed to provide adequate medical facilities and medical staff for CDCR's prisons." (Obj. to R&R at 2–3.) Finally, Smelosky, Almager, and Giurbino, Wardens of Centinela, "failed to establish adequate screening of private health care providers," "failed to establish adequate protocol for the provision of health care to inmates of Centinela," "failed to establish adequate protocol for the supervision and training of Centinela . . . medical personnel," and failed to train and supervise those responsible for health care. (Obj. to R&R at 3–4.) Bovarie makes essentially the same allegations in the FAC. He accuses each of these Defendants of being deliberately indifferent to inmates' medical needs and grossly negligent in supervising

their medical care, as well as overseeing certain policies and practices that they knew would create an excessive risk to inmate health and safety. (FAC at ¶¶ 127–134.)

Bovarie is obviously attempting to bring the dismissed Defendants into this lawsuit by pleading around the problem that there is no respondeat superior liability under section 1983. He comes up short.

First, Bovarie pleads no factual content that allows the Court to draw the inference that the Defendants violated his Eighth Amendment rights. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). He is clearly familiar with the law on suing prison officials under section 1983, but when he accuses the Defendants, for example, of enforcing policies and procedures "that they knew or should have known would deny medical care to CDCR inmates creating an excessive risk to inmate health and safety," (*see, e.g.*, FAC at ¶ 131) he is merely reciting, in a conclusory manner, the elements of a cause of action. This is inadequate. *Iqbal*, 129 S.Ct. at 1949.

Second, Bovarie outlines in broad strokes the alleged administrative failures of the Defendants to care for the medical needs of prisoners, but he doesn't even hazard an explanation as to how these alleged failures *caused* the deprivations of which he complains. He has to hazard one, however, if he cannot allege that they actually participated in the deprivations that are the subject of his lawsuit. *Duffy*, 588 F.2d at 743–44. Moreover, *Leer* establishes that the causal link between a defendant's action or inaction and a constitutional deprivation be specific to that particular defendant, but Bovarie's claims against Schwarzenegger, Tilton, Cates, Smelosky, Almager, and Giurbino are identically, and formulaically, pled. (*See* FAC at ¶¶ 127–34.) There is nothing in the FAC that connects his general claim that the Defendants oversee poor medical care in California prisons with his specific claim that his Eighth Amendment rights were violated because the doctors who treated him were deliberately indifferent to his well being.

At best, Bovarie's allegations against Schwarzenegger, Cates, Tilton, Smelosky, Almager, and Giurbino state a claim for supervisory liability, and there is no such

liability under section 1983. Rather, he must allege and *plead facts to show* that the Defendants, as prison administrators, were deliberately indifferent to Bovarie's treating physicians' own alleged deliberate indifference to Bovarie's health.[3] That is a high pleading standard that Bovarie has proven himself unable to meet. The Court stands by its dismissal of these Defendants at the screening phase of this lawsuit. Bovarie objected to their dismissal in his objection to the R&R, which the Court explained it would regard, charitably, as a request for leave to amend the FAC. That request is denied. The Court concludes amendment to include these Defendants would be futile, and they are again dismissed, this time with prejudice.[4]

C. Bovarie's Request for Counsel

Bovarie requested counsel in the FAC, but he never made this request in a formal motion for the Court to consider. (*See* FAC at V.) In his objection to the R&R, Bovarie again asks for counsel, for himself and for Wicken. Wicken has been dismissed from this lawsuit for the reasons given above, so the request as to him is denied.

Prisoners have no right to counsel in civil actions, unless their physical liberty is at stake. *Lassiter v. Dep't of Soc. Serv.'s of Durham County, N.C.*, 452 U.S. 18, 25 (1981). It is, however, within the Court's discretion to appoint counsel when the interests of justice so require. *Wilborn v. Escalderon*, 789 F.2d 1328, 1330–31 (9th Cir. 1986). Thus far, Bovarie appears to be on top of this case and to be plenty capable of litigating it himself. His pleadings are clear and intelligible, too, indicating

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[3] This is the point of the holding in *Leer* that "[a] prisoner can state a section 1983 claim against prison personnel under the eighth amendment by establishing that the prison personnel acted with 'deliberate indifference' in creating the condition that violates the eighth amendment." *Leer*, 844 F.2d at 633.

[4] Although the Court's analysis has focused on Bovarie's section 1983 claim against the Defendants, it also concludes that Bovarie's claim against them pursuant to California Government Code section 845.6 should be dismissed. Section 845.6 holds public employees liable if they know or have reason to know that a prisoner needs immediate medical care and fail to take action. Cal. Gov. Code. § 845.6. There is no allegation in Bovarie's complaint that the Defendants knew or should have known of Bovarie's medical needs in particular.

he has a sufficient grasp of the issues this case involves and the hurdles he must clear to see it move forward. The request for counsel is denied.

D. Relevance of *Plata*

Defendants Ko, Cook, Hammond, Barreras, Khatri, Calderon, Manaig, and Navamani moved to dismiss Bovarie's claims for injunctive relief on the ground that a pending class action, *Plata v. Schwarzenegger*, already covers those claims. *See* N.D. Cal. Civil Case No. C-01-1351. The R&R concludes that the Court can't take judicial notice of *Plata*, however, because the Defendants have only provided the case number, not a copy of the docket sheet and operative complaint. (R&R at 16.) Without these, the R&R explains, "the court cannot compare the relief sought in that case to the relief Bovarie requests here." (*Id.*) Defendants filed an objection to the R&R on this issue alone.

In fact, the Court took judicial notice of *Plata*, in its second screening order under 28 U.S.C. § 1915(e)(2)(B), when it denied Bovarie's request for class certification. (Doc. No. 8 at 2.) The Court noted, "It appears that the class action Plaintiff is seeking is identical to the class action that already exists in the *Plata* case." (*Id.*) The R&R, understandably, overlooks this. Bovarie did not reply to the Defendants' objection to the R&R, but the Court anticipates him arguing that the Court's judicial notice of *Plata* was limited to his request for "certification of a class action lawsuit based on denial of medical care affecting all California Department of Corrections and Rehabilitation's prisoners." (FAC at 3.) In other words, *Plata*, while it may preempt class certification of Bovarie's case, doesn't preempt Bovarie's specific claims for injunctive relief.

Defendants are right to contest that argument. "Individual lawsuits for injunctive and declaratory relief may not be brought if there is a class action pending involving the same subject matter." *Jacobson v. Schwarzenegger*, 357 F.Supp.2d 1198, 1209 (C.D. Cal. 2004) (citing *Crawford v. Bell*, 599 F.2d 890, 892–93 (9th Cir. 1979). It would be one thing if Bovarie sought injunctive relief that is specific to his medical

needs or the circumstances of his incarceration. But the injunctive relief he seeks is system-wide, structural reform. (*See* FAC at 71–73.) That is precisely the objective of the plaintiffs in *Plata.*

Defendants overstate the point slightly by arguing that the Court's prior notice of *Plata* is "the law of the case" and that the Court "has already made a factual finding that the injunctive relief claims in the two cases are identical." The Court's actual holding was that Bovarie's proposed class action *appeared* to be identical to *Plata*, and it denied Bovarie's request for class certification *without* prejudice. Moreover, while the initial screening of pro se complaints pursuant to 28 U.S.C. § 1915(e)(2)(B) is undertaken with care, it is undertaken sua sponte and without any input from parties, and is therefore not infallible. *See Harris v. Lappin*, Case No. 06-CV-664, 2009 WL 789756 at *3 (C.D. Cal. Mar. 19, 2009). Nonetheless, the sensible conclusion here is that the injunctive relief Bovarie seeks maps closely onto the injunctive relief the plaintiffs in *Plata* seek, and Bovarie can rest assured that the *Plata* litigation is taking the concerns he voices quite seriously. His claims for injunctive relief are therefore dismissed with prejudice.

V. Conclusion

The Court reaches the following conclusions, almost all of which affirm those of the R&R.

First, Bovarie's claims against all of the Defendants in their official capacities are dismissed, with prejudice.

Second, Tetteh, Ko, and Hodge are dismissed from this case, with prejudice. They treated Wicken, not Bovarie, and Wicken is not a party to this lawsuit.

Third, Cook, Hammond, and Robinson are also dismissed, with prejudice. They also did not treat Bovarie but rather were responsible for adjudicating his medical appeals based on the opinions of other physicians who did treat him.

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Fourth, Aymar's motion to dismiss is denied. Bovarie has alleged sufficient facts to plead an Eighth Amendment claim against her. However, this claim cannot be based on Aymar's ability to practice or her medical licensing.

Fifth, Bovarie's claims for injunctive relief are dismissed, given the pendency of *Plata*.

Sixth, because Barreras, Calderon, Khatri, Manaig, and Navamani only moved to dismiss Bovarie's claims against them in their official capacities, along with his claims for injunctive relief, they must answer Bovarie's remaining Eighth Amendment claim and pendant state law claims under California Government Code section 845.6 within 20 days of the date this Order is entered. The same goes for Aymar.

Seventh, Bovarie's request for counsel is denied.

Eighth, Schwarzenegger, Cates, Tilton, Smelosky, Almager, and Giurbino are dismissed from this case with prejudice. Bovarie fails to state a claim against them and the Court believes allowing him to amend his complaint would be futile.

IT IS SO ORDERED.

DATED: March 18, 2010

HONORABLE LARRY ALAN BURNS
United States District Judge