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# UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 15cv2814-WQH-PCL

VINCENT BRANDON,
Plaintiff,

Plaintiff, ORDER

Defendants

Defendants.

HAYES, Judge:

L. CARMICHAEL et al.,

The matters before the Court are the reviews of the Reports and Recommendations (ECF Nos. 25, 26) issued by United States Magistrate Judge Peter C. Lewis on the motion for a preliminary injunction filed by Plaintiff (ECF No. 18) and the motion to dismiss filed by Defendants (ECF No. 20).

## I. Procedural Background

On December 14, 2016, Plaintiff Vincent Brandon, a state prisoner proceeding pro se, initiated this action by filing a Complaint pursuant to 42 U.S.C. § 1983 against Defendants L. Carmichael, Erika Estock, David Hjerpe, Dr. Ball, Kevin Reilly, and J. Lewis. (ECF No. 1). Plaintiff alleges five causes of action: (1) deliberate indifference to a serious medical need in violation of the Eighth Amendment; (2) negligence under California state law; (3) violation of due process under the Fourteenth Amendment; (4) violation of equal protection under the Fourteenth Amendment; and, (5) a retaliation claim under the First Amendment. *Id.* at 9-10.

On April 21, 2016, Plaintiff filed a "Motion for Order to Show Cause for An

Preliminary Injunction," which the Court construed as a motion for a preliminary injunction. (ECF No. 18). The docket reflects that Defendants did not file any response in opposition to this motion for a preliminary injunction.

On May 18, 2016, Defendants filed a motion to dismiss for failure to state a claim for which relief may be granted. (ECF No. 20). On June 24, 2016, Plaintiff filed a response. (ECF No. 23).

On October 28, 2016, the Magistrate Judge issued the Report and Recommendation recommending that the Court grant in part and deny in part Defendants' motion to dismiss. (ECF No. 26).

On October 28, 2016, the Magistrate Judge issued the Report and Recommendation recommending that the Court deny the motion for a preliminary injunction. (ECF No. 25).

Both Reports and Recommendations stated that parties shall file any written objections no later than November 10, 2016 and any reply to objections no later than November 18, 2016. (ECF Nos. 25, 26).

The docket reflects that neither party has filed any objection to either of the two Reports and Recommendations.

#### II. Standard of Review

The duties of the district court in connection with a report and recommendation of a magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b). The district judge must "make a de novo determination of those portions of the report . . . to which objection is made," and "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b). The district court need not review de novo those portions of a Report and Recommendation to which neither party objects. *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) ("Neither the Constitution nor the [Federal Magistrates Act] requires a district judge to review, de novo, findings and recommendations that the

parties themselves accept as correct.").

#### **III. Motion to Dismiss**

The Report and Recommendation on the motion to dismiss recommends that the Court deny the motion to dismiss as to the Eighth Amendment and state law negligence claims and grant the motion to dismiss as to the due process, equal protection, and First Amendment claims. (ECF No. 26). The Court has reviewed the Report and Recommendation, the record, and the submissions of the parties. The Court concludes that the Magistrate Judge correctly recommended that Defendants' motion to dismiss be denied as to the Eighth Amendment and state law negligence claims and granted as to the due process, equal protection, and First Amendment claims. The Report and Recommendation on the motion to dismiss is adopted in its entirety.

### IV. Motion for a Preliminary Injunction

In his motion for a preliminary injunction, Plaintiff requests that the Court grant a preliminary injunction "to ensure that he receives the proper medical care" for medical issues with his liver. (ECF No. 18 at 14-15). In a declaration attached to his motion for a preliminary injunction, Plaintiff states that he "continues to suffer due to the lack of medical care and denial of prescribed treatment." (ECF No. 18 at 4).

In light of the ruling that Plaintiff stated claims under the Eighth Amendment and California state law, Defendants shall file a response to Plaintiff's motion for a preliminary injunction no later than December 16, 2016.

The Report and Recommendation on the motion for a preliminary injunction and the Plaintiff's motion for a preliminary injunction shall remain pending.

#### V. Conclusion

IT IS HEREBY ORDERED that the Report and Recommendation on Defendants' Motion to Dismiss (ECF No. 26) is ADOPTED in its entirety. The Motion to Dismiss filed by Defendants (ECF No. 20) is GRANTED as to the due process, equal protection, and First Amendment claims and DENIED as to the Eighth Amendment and California law claims.

IT IS FURTHER ORDERED that Defendants shall file a response to Plaintiff's motion for a preliminary injunction (ECF No. 18) no later than December 16, 2016. The Report and Recommendation on Motion for a Preliminary Injunction (ECF No. 25) and Plaintiffs' Motion for a Preliminary Injunction (ECF No. 18) shall remain pending.

DATED: December 2, 2016

WILLIAM Q. HAYES
United States District Judge