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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PEDRO REYES,

Plaintiff,

v.

EDMUND G. BROWN, JR., DR. ROGELIO
ORTEGA, RAY MADDEN, JOHN DOE
CORRECTIONAL OFFICERS 1 THROUGH 5,
JOHN DOE CORRECTIONAL SERGEANT, AND
NURSE BELTRAN,

Defendants.

Case No.: 16cv84-JLS (BLM)

**REPORT AND RECOMMENDATION FOR
ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S
SECOND AMENDED COMPLAINT FOR
FAILURE TO STATE A CLAIM FOR
WHICH RELIEF MAY BE GRANTED**

**ORDER (1) GRANTING PLAINTIFF'S
REQUEST FOR ADDITIONAL TIME TO
FILE A THIRD AMENDED COMPLAINT,
(2) GRANTING PLAINTIFF'S REQUEST
FOR A COPY OF THE LOCAL RULES,
AND (3) CLARIFYING THE STATUS OF
THE PLEADINGS**

[ECF Nos. 70, 72, and 75]

I. REPORT AND RECOMMENDATION

This Report and Recommendation is submitted to United States District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(c) and 72.3(f) of the United States District Court for the Southern District of California. For the following reasons, the Court **RECOMMENDS** that Defendants' motion to dismiss be **GRANTED**.

///

1 **PROCEDURAL BACKGROUND**

2 On January 5, 2016, Plaintiff Pedro Reyes, a state prisoner proceeding *pro se* and *in*
3 *forma pauperis*, filed a complaint under the Civil Rights Act, 42 U.S.C. § 1983, against
4 Defendants Brown, Ortega, and Madden. ECF No. 1 ("Comp."). Plaintiff alleged claims under
5 the Eighth and Fourteenth Amendments. *Id.* at 3-18. On April 25, 2016, Defendants filed a
6 Motion to Dismiss the Complaint for Failure to State a Claim for which Relief May be Granted.
7 ECF No. 19-1. After granting two requests from Plaintiff to continue his deadline for opposing
8 Defendants' motion [see ECF Nos. 22-26], Plaintiff timely filed his opposition [ECF No. 28].

9 On July 25, 2016, Plaintiff filed a "REQUEST FOR LEAVE TO FILE A FIRST AMENDED
10 COMPLAINT" and "PLAINTIFF'S SECOND MOTION FOR THE APPOINTMENT OF COUNSEL BASED
11 ON PRIOR ARGUMENT AND A RECENT THREAT TO AN INMATE ASSISTANT" which were
12 accepted by the Court on discrepancy on August 2, 2016. ECF Nos. 29-32. On August 15, 2016,
13 Defendants filed a response indicating that they did not oppose the motion to file a first amended
14 complaint [see ECF No. 35] and the Court took the matter under submission. On August 26,
15 2016, District Judge Sammartino granted Plaintiff's motion to file a first amended complaint and
16 denied as moot Defendants' motion to dismiss. ECF No. 36.

17 On July 25, 2016, Plaintiff filed a First Amended Complaint under the Civil Rights Act, 42
18 U.S.C. § 1983, alleging violations of the Eighth Amendment against Defendants Madden, Ortega,
19 Beltran, and John Does 1 through 6. ECF No. 37 ("FAC"). On October 5, 2016, Defendants
20 Madden and Ortega filed a Motion to Dismiss for Failure to State a Claim for Which Relief May
21 be Granted. ECF No. 39-1.

22 On October 25, 2016, Plaintiff filed a letter requesting the appointment of counsel, or in
23 the alternative, more time to file his opposition. ECF No. 44; see also ECF No. 45. On November
24 4, 2016, the Court issued an order denying Plaintiff's motion for the appointment of counsel and
25 granted Plaintiff's motion to extend the deadline to file an opposition to Defendants' motion to
26 dismiss. ECF No. 45. On November 15, 2016, Plaintiff filed a motion to appoint counsel and
27 requested the case be stayed until the Court rules on the motion to appoint counsel. ECF No.
28 48. On November 30, 2016, the Court denied Plaintiff's motion to appoint counsel and denied

1 as moot Plaintiff's motion to stay. ECF No. 49.

2 On December 12, 2016, Plaintiff filed a second motion for an extension of time to file an
3 opposition to Defendants' motion to dismiss. ECF No. 51. The Court granted Plaintiff's motion
4 and ordered Plaintiff to file his opposition on or before January 12, 2017, and Defendants to file
5 their reply on or before February 6, 2017. ECF No. 52. On January 3, 2017, Plaintiff timely filed
6 his opposition. ECF No. 55. Defendants did not file a reply. See Docket.

7 On December 21, 2016, Defendant Beltran filed a motion to dismiss Plaintiff's First
8 Amended Complaint for failure to state a claim for which relief may be granted. ECF No. 53-1.
9 On January 24, 2017, Plaintiff filed his opposition. ECF No 56. Defendants did not file a reply.
10 See Docket.

11 On April 4, 2017, the Court issued a "REPORT AND RECOMMENDATION FOR ORDER
12 GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT
13 FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED." ECF No. 57. Plaintiff
14 filed objections to the Report and Recommendation on May 31, 2017. ECF No. 61. Defendants
15 replied to the objections on June 13, 2017. ECF No. 62. On July 10, 2017, United States District
16 Janis L. Sammartino issued an "ORDER: (1) ADOPTING R&R; AND (2) DISMISSING PLAINTIFF'S
17 COMPLAINT." ECF No. 63. In the order, Judge Sammartino overruled Plaintiff's first objection,
18 that Judge Major improperly relied on the original complaint when analyzing Plaintiff's claim of
19 deliberate indifference by Defendant Ortega, and dismissed without prejudice Plaintiff's claims
20 against Defendant Ortega. Id. at 6. Judge Sammartino sustained Plaintiff's second objection
21 that Judge Major failed to assess his claim for declaratory relief against Defendant Beltran, but
22 noted that "it does not appear that Plaintiff stated a declaratory relief claim against Beltran." Id.
23 at 7. Judge Sammartino concluded that it appeared as though "Plaintiff [sought] to challenge
24 the policy Beltran followed itself rather than Beltran's specific decision under that alleged policy."
25 Id.

26 On July 18, 2017, Plaintiff constructively filed his fifth motion to appoint counsel. ECF No.
27 65. The Court denied the motion on July 28, 2017. ECF No. 66. On August 10, 2017, Plaintiff
28 filed his Second Amended Complaint ("SAC"). ECF No. 69. The document is entitled

1 "PLAINTIFF'S AMENDED COMPLAINT AND AMENDED ATTEMPT TO PLEAD A DECLARATORY
2 JUDGMENT CLAIM" and it names three individuals as Defendants, Dr. Ortega, Warden Madden,
3 and MTA Beltran. Id. at 1, 4. On August 30, 2017, Defendants filed a motion to dismiss Plaintiff's
4 SAC for failing to state a claim against Defendant Ortega for deliberate indifference to Plaintiff's
5 medical needs and for failing to state a claim for declaratory judgment for Defendant Beltran
6 following an unconstitutional policy. ECF No. 70-1 ("MTD"). On October 2, 2017, Plaintiff filed
7 a document entitled "OBJECTION TO DEFENDANTS MOTION TO DISMISS PLAINTIFF'S SECOND
8 AMENDED COMPLAINT." ECF No 72 ("Oppo."). The Court interpreted this document to be both
9 an opposition and a motion to file a third amended complaint ("TAC"). Defendants did not file
10 a reply. See Docket.

11 On November 6, 2017, Plaintiff filed a "REQUEST FOR CLARIFICATION AND
12 CORRECTION" which was accepted by the Court on discrepancy on November 21, 2017. ECF
13 Nos. 74 and 75.

14 **COMPLAINT ALLEGATIONS**

15 Because this case comes before the Court on a motion to dismiss, the Court must accept
16 as true all material allegations in the complaint, and must construe the complaint and all
17 reasonable inferences drawn therefrom in the light most favorable to Plaintiff. See Thompson
18 v. Davis, 295 F.3d 890, 895 (9th Cir. 2002).

19 According to the SAC, on March 11, 2015, Plaintiff was jogging on the track at his prison
20 yard facility when he tripped and fell and incurred serious injuries. SAC at 4. Plaintiff alleges
21 that he tripped because of the "uneven road provided by the prison warden and staff." Id. After
22 his fall, Plaintiff lost consciousness and was carried to the infirmary by his fellow inmates as the
23 correction officers failed to issue a "man down" alert. Id. at 4-5. Once he arrived at the
24 infirmary, Defendant Beltran, a Medical Technical Assistant ("MTA") employed by Centinela State
25 Prison where Plaintiff was housed, refused to examine or treat Plaintiff and forced Plaintiff to
26 return to his cell and complete the required paperwork. Id. at 5. Plaintiff alleges that he was
27 deprived of medical assistance for nine days despite the fact that he suffered immense pain. Id.
28 Plaintiff further alleges that Defendant Beltran was "untrained in his medical profession" and

1 failed to identify and treat “a serious medical need for [Plaintiff] who had just received serious
2 injuries from ‘An Unsafe Environment.’” Id. Plaintiff claims that he did not see a “bonafide
3 doctor” until June 20, 2015 when Dr. Qazi examined him and discovered a spinal injury. Id.
4 Two days later, on June 22, 2015, Plaintiff was admitted to the hospital where he underwent
5 cervical spine surgery. Id.

6 Plaintiff states that Defendant Madden, Warden of Centinela State Prison, failed to
7 properly manage and train Defendant Beltran on how to handle emergency medical needs and
8 failed to manage road repairs on the jogging track. Id. Plaintiff alleges that Defendant Madden’s
9 failure to maintain a safe jogging track caused his fall and resulting injuries. Id. at 4-5.

10 As a result of the fall, Plaintiff states that he has suffered extreme pain in his back and
11 legs and mental anguish, and is currently requesting to have a walker assigned to him to assist
12 in alleviating the pain in his back and legs. Id. at 6. Plaintiff seeks six million dollars, attorney’s
13 fees and costs and such additional relief as the Court deems proper. Id.

14 **LEGAL STANDARD**

15 Pursuant to Federal Rule of Civil Procedure 8(a), a complaint must contain “a short and
16 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).
17 “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it
18 demands more than an unadorned, the-defendant-unlawfully-harmed-me-accusation.” Ashcroft
19 v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555
20 (2007)).

21 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the plaintiff’s claims.
22 See Fed. R. Civ. P. 12(b)(6). The issue is not whether the plaintiff ultimately will prevail, but
23 whether he has properly stated a claim upon which relief could be granted. Jackson v. Carey,
24 353 F.3d 750, 755 (9th Cir. 2003). In order to survive a motion to dismiss, the plaintiff must
25 set forth “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible
26 on its face.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). If the facts alleged in
27 the complaint are “merely consistent with” the defendant’s liability, the plaintiff has not satisfied
28 the plausibility standard. Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). Rather,

1 “[a] claim has facial plausibility when the [plaintiff] plead[s] factual content that allows the court
2 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal,
3 556 U.S. at 678 (citing Twombly, 550 U.S. at 556).

4 When a plaintiff appears *pro se*, the court must be careful to construe the pleadings
5 liberally and to afford the plaintiff any benefit of the doubt. See Erickson v. Pardus, 551 U.S.
6 89, 94 (2007); Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002). This rule of liberal
7 construction is “particularly important” in civil rights cases. Hendon v. Ramsey, 528 F. Supp. 2d
8 1058, 1063 (S.D. Cal. 2007) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992));
9 see also Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (stating that because “Iqbal
10 incorporated the Twombly pleading standard and Twombly did not alter the courts’ treatment
11 of *pro se* filings; accordingly we continue to construe *pro se* filings liberally” This is
12 particularly important where the petitioner is a *pro se* prisoner litigant in a civil matter). When
13 giving liberal construction to a *pro se* civil rights complaint, however, the court is not permitted
14 to “supply essential elements of the claim[] that were not initially pled.” Easter v. CDC, 694 F.
15 Supp. 2d 1177, 1183 (S.D. Cal. 2010) (quoting Ivey v. Bd. of Regents of the Univ. of Alaska,
16 673 F.2d 266, 268 (9th Cir. 1982)). “Vague and conclusory allegations of official participation
17 in civil rights violations are not sufficient to withstand a motion to dismiss.” Id. (quoting Ivey,
18 673 F.2d at 268).

19 The court should allow a *pro se* plaintiff leave to amend his or her complaint, “unless the
20 pleading could not possibly be cured by the allegation of other facts.” Ramirez v. Galaza, 334
21 F.3d 850, 861 (9th Cir. 2003) (internal quotation marks and citations omitted). Moreover,
22 “before dismissing a *pro se* complaint the district court must provide the litigant with notice of
23 the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to
24 amend effectively.” Ferdik, 963 F.2d at 1261.

25 To state a claim under § 1983, a plaintiff must allege facts sufficient to show that (1) a
26 person acting under color of state law committed the conduct at issue, and (2) the conduct
27 deprived the plaintiff of some “rights, privileges, or immunities” protected by the Constitution of
28 the laws of the United States. 42 U.S.C. § 1983. To prevail on a § 1983 claim, “a plaintiff must

1 demonstrate that he suffered a specific injury as a result of specific conduct of a defendant and
2 show an affirmative link between the injury and the conduct of the defendant.” Harris v. Schriro,
3 652 F. Supp. 2d 1024, 1034 (D. Ariz. 2009) (citation omitted). A particular defendant is liable
4 under § 1983 only when the plaintiff proves he participated in the alleged violation. Id.

5 **A. Defendant Ortega**

6 Plaintiff alleges that he was denied adequate medical care after his fall. SAC. In the
7 “Parties” section of his complaint, Plaintiff states that “Defendant Ortega is a medical doctor,
8 who at all times relevant hereto was assigned to Centinela State Prison.” Id. at 4. In the
9 introduction, Plaintiff states “[i]t is, without any doubt to the common layman, the fault of
10 Defendant Ortega that Plaintiff continues to suffer from delayed treatment after the accident on
11 March 11, 2015.” Id. at 2. Plaintiff does not, however, provide any specific allegations regarding
12 what Defendant Ortega did to violate Plaintiff’s rights. Id. at 4-6.

13 Defendants move to dismiss Plaintiff’s claims against Defendant Ortega on the ground
14 that Plaintiff’s SAC fails to state a claim for relief under Plaintiff’s Eighth Amendment right to
15 adequate medical care. MTD.

16 A prison official’s “deliberate indifference to a prisoner’s serious illness or injury” violates
17 the Eighth Amendment’s proscription against cruel and unusual punishment. See Clement v.
18 Gomez, 298 F.3d 898, 904 (9th Cir. 2002). A prisoner must satisfy an objective and a subjective
19 requirement to assert an Eighth Amendment violation. Id. The objective requirement is satisfied
20 so long as the prisoner alleges facts to show that his medical need is sufficiently “serious” such
21 that the “failure to treat [the] condition could result in further significant injury or the
22 unnecessary and wanton infliction of pain.” Id. (internal quotation marks and citation omitted);
23 Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000) (en banc). The subjective component
24 requires the prisoner to allege facts showing a culpable mental state, specifically, “deliberate
25 indifference to a substantial risk of serious harm.” Farmer v. Brennan, 511 U.S. 825, 836 (1970).
26 The indifference must be substantial, and inadequate treatment due to malpractice, or even
27 gross negligence does not rise to the level of a constitutional violation. Estelle v. Gamble, 429
28 U.S. 97, 106 (1976). Indifference “may appear when prison officials deny, delay, or intentionally

1 interfere with medical treatment, or it may be shown by the way in which prison physicians
2 provide medical care.” Tracey v. Sacramento Cnty. Sheriff, 2008 WL 154607, at *2 (E.D. Cal.
3 Jan. 15, 2008) (quoting Hutchinson v. U.S., 838 F.2d 390, 392 (9th Cir. 1988)).

4 “Mere delay of medical treatment, without more, is insufficient to state a claim of
5 deliberate medical indifference.” Robinson v. Catlett, 725 F. Supp. 2d 1203, 1208 (S.D. Cal. July
6 19, 2012) (quoting Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir.
7 1985)). To state a claim for deliberate indifference arising from a delay in treatment, a prisoner
8 must allege that the delay was harmful, although an allegation of substantial harm is not
9 required. McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1991), overruled on other grounds
10 by, WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997). Factual allegations indicating that
11 the official “sat idly by as [the prisoner] was seriously injured despite the defendant’s ability to
12 prevent the injury” or that the official “repeatedly failed to treat an inmate properly . . . strongly
13 suggests that the defendant’s actions were motivated by ‘deliberate indifference’ to the
14 prisoner’s medical needs.” Id. at 1060-61. “In sum, the more serious the medical needs of the
15 prisoner, and the more unwarranted the defendant’s actions in light of those needs, the more
16 likely it is that a plaintiff has established ‘deliberate indifference’ on the part of the defendant.”
17 Id. at 1061. Isolated incidents relative to a plaintiff’s overall treatment suggests no deliberate
18 indifference. Id. at 1060.

19 1. Objective Prong

20 Plaintiff satisfies the objective prong of the test for an Eighth Amendment violation. A
21 “serious” medical need exists if the failure to treat a prisoner’s condition could result in further
22 significant injury or the “unnecessary and wanton infliction of pain.” Nawabi v. Wyatt, 2009 WL
23 3514849, at *7 (C.D. Cal., Oct. 26, 2009) (citing Estelle, 429 U.S. 97 at 104). In considering
24 the seriousness of an alleged medical need, courts should consider whether (1) a reasonable
25 doctor would think that the condition is worthy of comment or treatment; (2) the condition
26 significantly affects the prisoner’s daily activities; and (3) the condition is chronic and
27 accompanied by substantial pain. Id. (citing Doty v. County of Lassen, 37 F.3d 540 at 546 n.3)
28 (9th Cir. 1994).

1 Here, the Court must accept as true that Plaintiff fell down and seriously injured his neck
2 which resulted in the need for surgery. SAC at 4-6. In addition, Plaintiff had to endure
3 substantial pain for several months until his injury was properly diagnosed and the surgery was
4 performed. Id. at 5. A reasonable doctor is likely to think that an injury that requires cervical
5 spine surgery is worthy of comment or treatment. Plaintiff alleges that his injury affects his
6 daily activities, as he suffers extreme pain in his back and legs and believes that he needs the
7 use of a walker to get around. Id. at 6. Under these facts, Plaintiff states a plausible allegation
8 of a "serious illness or injury." McGuckin, 974 F.2d at 1061-62 (finding that a prisoner's
9 herniated nucleus pulposus, which required surgery, is sufficiently serious for Eighth Amendment
10 purposes).

11 2. Subjective Prong

12 Plaintiff has failed to allege facts supporting his claim that Defendant Ortega was
13 deliberately indifferent to a substantial risk of serious harm to Plaintiff resulting from his medical
14 care after his fall on the track. Plaintiff's SAC states that he had to wait for nine days after his
15 fall for his initial doctor's visit and that he saw a "bonafide" doctor, Dr. Qazi, almost three months
16 later on June 20, 2015. Id. at 5. Plaintiff makes no mention of Defendant Ortega's role in his
17 injury or delayed medical treatment at all except to say that "[i]t is, without any doubt to the
18 common layman, the fault of Defendant Ortega that Plaintiff continues to suffer from delayed
19 treatment after the accident on March 11, 2015." Id. at 2.

20 As such, Plaintiff has not alleged facts establishing the subjective prong of an Eighth
21 Amendment deliberate indifference to medical care claim. In the Court's April 2017 order, the
22 Court clearly stated the requirements for alleging an Eighth Amendment violation and described
23 how and why Plaintiff's allegations were insufficient. ECF No. 57 at 15-20. Judge Sammartino
24 adopted Judge Major's reasoning, but allowed Plaintiff another opportunity to amend his
25 complaint to provide additional facts supporting his claim against Defendant Ortega. ECF No.
26 63 at 6. Plaintiff has failed to provide any additional factual allegation and has failed to state
27 any facts supporting a constitutional violation against Dr. Ortega. See SAC. Because Plaintiff
28 has unsuccessfully attempted to state a claim against Dr. Ortega three times, the Court

1 **RECOMMENDS** that Defendants' motion to dismiss Plaintiff's Eighth Amendment claim of
2 deliberate indifference to his medical needs against Defendant Ortega be **GRANTED WITHOUT**
3 **LEAVE TO AMEND**. See Ramirez, 334 F.3d at 861 (court may dismiss without leave to amend
4 if the pleading cannot be cured by the addition of other facts).

5 **B. Defendant Beltran**

6 In her "ORDER: (1) ADOPTING R&R; AND (2) DISMISSING PLAINTIFF'S COMPLAINT,"
7 Judge Sammartino gave Plaintiff the opportunity to amend his complaint "to attempt to plead a
8 declaratory judgment claim, if any." ECF No. 63 at 7. Judge Sammartino explained that "it
9 appears here that Plaintiff seeks to challenge the policy Beltran followed itself rather than
10 Beltran's specific decision under that alleged policy. It may well be, as Defendants suggest, that
11 Plaintiff will be unable to state a claim even as against the policy itself. But the Court will at
12 least grant Plaintiff an opportunity to present that claim in an amended complaint." ECF No. 63
13 at 7. Plaintiff has failed to do so. Nowhere in the SAC does Plaintiff mention a policy that
14 Defendant Beltran did or did not follow or that was unconstitutional in some way. SAC.
15 Accordingly, the Court **RECOMMENDS** Defendants' motion to dismiss Plaintiff's claims against
16 Defendant Beltran be **GRANTED WITHOUT LEAVE TO AMEND**.

17 **CONCLUSION**

18 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue
19 an order: (1) approving and adopting this Report and Recommendation, (2) granting
20 Defendants' Motion to Dismiss, and (3) dismissing the claims against Defendant Ortega and the
21 declaratory relief claim against Defendant Beltran.

22 **IT IS HEREBY ORDERED** that any written objections to this Report must be filed with
23 the Court and served on all parties **no later than January 19, 2018**. The document should
24 be captioned "Objections to Report and Recommendation."

25 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with this Court
26 and served on all parties **no later than February 9, 2018**. The parties are advised that failure
27 to file objections within the specified time may waive the right to raise those objections on
28 appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

1 **II. MOTION TO FILE A THIRD AMENDED COMPLAINT**

2 On October 2, 2017, Plaintiff filed a document entitled "OBJECTION TO DEFENDANTS
3 MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT" which the Court
4 interpreted to be both an opposition and a motion to file a TAC. ECF No 72 ("Oppo."). On
5 November 6, 2017, Plaintiff filed a "MOTION FOR CLARIFICATION AND CORRECTION." ECF
6 No. 75. Considering these two documents together, it appears that Plaintiff's first filing was not
7 an opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint but was
8 a request to file a Third Amended Complaint. In light of the Court's misinterpretation of Plaintiff's
9 pleading, and given the Court's analysis set forth above, the Court will give Plaintiff another
10 opportunity to address the deficiencies identified by Defendants and the Court.

11 On or before **January 19, 2018**, Plaintiff may file a TAC. The TAC must incorporate the
12 findings set forth in the Court's Report and Recommendation dated April 4, 2017, Judge
13 Sammartino's order dated July 10, 2017, and this Report and Recommendation. Plaintiff is
14 reminded that the TAC must contain all relevant claims and Defendants. See Ruiz v. Esquibel,
15 2007 WL 935171, at *4 (S.D. Cal. Mar. 1, 2007) (noting that "Plaintiff's Amended Complaint
16 must be complete in itself without reference to the superseded pleading. Defendants not named
17 and all claims not re-alleged in the Amended Complaint will be deemed to have been waived.")
18 (internal citations omitted); see also Schwartzmiller v. Rodriguez, 2017 WL 4227267, at *4 (S.D.
19 Cal. Sept. 22, 2017) (same) (citing) Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012)
20 (noting that claims dismissed with leave to amend which are not re-alleged in an amended
21 pleading may be "considered waived if not repled."); and S.D. CA. CIV. L R. 15.1(a) ("[e]very
22 pleading to which an amendment is permitted as a matter of right or has been allowed by court
23 order, must be complete in itself without reference to the superseded pleading"). Defendants
24 may challenge Plaintiff's TAC on or before **February 9, 2018**.

25 **II. PLAINTIFF'S REQUEST FOR CLARIFICATION AND CORRECTION**

26 Plaintiff seeks clarification and an order regarding his motion for appointment of counsel and
27 extension of time. Id. Plaintiff states that he has not seen his most recent motion for
28 appointment of counsel or request for extension of time on the docket. Id. Additionally, Plaintiff

1 states that he requested a copy of the local rules and did not receive a response. Id.
2 Accordingly, Plaintiff seeks a ruling on these requests. Id.

3 A. Request for Counsel

4 Plaintiff states that he has not seen his most recent motion for appointment of counsel on
5 the docket. Plaintiff has filed five requests for counsel. See ECF Nos. 3, 32, 44, 48, and 65.
6 The last request for counsel received by the Court was on July 18, 2017. ECF No. 66. The Court
7 denied Plaintiff's request on July 28, 2017. Id. As such, there is no pending motion for
8 appointment of counsel. If Plaintiff files a sixth request, he must provide facts and argument
9 establishing the requisite "exceptional circumstances." Agyeman v. Corr. Corp. of Am., 390 F.3d
10 1101, 1103 (9th Cir. 2004) (noting that under 28 U.S.C. § 1915(e)(1), courts are granted
11 discretion to appoint counsel for indigent persons under "exceptional circumstances" and that a
12 finding of exceptional circumstances demands at least "an evaluation of the likelihood of the
13 plaintiff's success on the merits and an evaluation of the plaintiff's ability to articulate his claims
14 "in light of the complexity of the legal issues involved."").

15 B. Request for Local Rules

16 Plaintiff alleges that he submitted a request for a copy of the local rules that was not
17 addressed. The Court is not clear where Plaintiff presented this request. There is no pending
18 motion on the docket requesting a copy of the Local Rules and if it was included in another
19 pleading, the Court is unclear which pleading the request is contained in. However, the Court
20 will **GRANT** Plaintiff's current request for a copy of the Local Rules. Accordingly, the Clerk's
21 Office is **ORDERED** to mail a copy of the Civil Local Rules for the United States District Court
22 Southern District of California to Plaintiff along with a copy of this Order.

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1 C. Request for Extension of Time

2 Plaintiff asks for additional time to file a TAC. As set forth above, this request is **GRANTED**.

3 If Plaintiff decides to file a TAC, he must do so by **January 19, 2018**.

4 **IT IS SO ORDERED.**

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6 Dated: 12/13/2017


Hon. Barbara L. Major
United States Magistrate Judge

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