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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JORGE ANDRADE RICO, Plaintiff, v. JEFFREY BEARD, et al., Defendants.	Case No. 2:17-cv-1402 KJM DB P **PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** Date: May 18, 2018 Time: 10:00 am Courtroom: 501 I St., Sacramento, CA Courtroom 27, 8th Floor Judge: Hon. Deborah Barnes Trial date: Not set Action filed: Aug. 2, 2016

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INTRODUCTION

Jorge Rico has been subjected to cruel and unusual punishment by being awakened repeatedly for years spent in solitary confinement. Defendants' motion primarily concerns not the merit of that claim but whether Rico may raise it at all. Defendants argue that Rico's claims should not be heard because of an order issued in a class action where he was not a party and his interests were not represented. Rico's serious allegations deserve to be heard on their merits.

STATEMENT OF FACTS

The California Department of Corrections and Rehabilitation ("CDCR") uses "welfare checks" in all forms of solitary confinement, including the Security Housing Units (SHU) and Administrative Segregation Units (ASU). Second Amended Complaint, ECF #38 ("SAC"), ¶ 26. During these checks, correctional officers are supposed to check on each inmate and then hit a metal button on his cell with a metal "Guard One" pipe to create an electronic record of the check. SAC ¶ 29. The metal-on-metal contact of the Guard One system creates a loud noise. SAC ¶¶ 29, 38. During Rico's time in the SHU, these Guard One checks were conducted either every thirty minutes or every hour, all night long, so he had only a short window to fall asleep before a round of checks began anew. SAC ¶ 37. Rico was subject to Guard One checks at Pelican Bay from October 2014 to August 2016, and from July 2017 to April 2018. *See* SAC ¶ 7.

Rico's sleep deprivation has caused headaches, body pain, abnormal heartbeat, blurred vision, anxiety, moodiness, impaired memory, and inability to concentrate. SAC ¶ 40. The checks and ensuing sleep deprivation constitute cruel and unusual punishment under the Eighth Amendment. Rico has alleged plausible claims for both injunctive relief and damages.

ARGUMENT

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A district court must accept all factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). The court should not "impose a probability requirement at the pleading stage"– there need only be "enough fact[s] to raise a reasonable expectation that

discovery will reveal evidence" of the claim. *Twombly*, 550 U.S. at 556 (2007). If a motion to dismiss is granted, it should be without prejudice unless the defect cannot be cured. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (citations and quotations omitted).

Both preclusion and qualified immunity are affirmative defenses. *Taylor v. Sturgell*, 553 U.S. 880, 907 (2008); *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir.1993). Defendants have the burden of proof. *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 855 (9th Cir. 2016); *Gomez*, 446 U.S. at 640. The Supreme Court has "refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense." *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *see also Taylor*, 553 U.S. at 907 (maintaining the burden of proof for preclusion). Rather, 12(b)(6) motions based on affirmative defenses are granted only if, taking all the facts in the complaint as true, it is already clear that the plaintiffs do not state a case. *See Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001) ("Rule 12(b)(6) dismissal is not appropriate unless [the court] can determine, based on the complaint itself, that qualified immunity applies"); *Morley v. Walker*, 175 F.3d 756, 761 (9th Cir.1999) (holding that "dismissal [based on qualified immunity] for failure to state a claim under 12(b)(6) is inappropriate"); *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984) (affirming dismissal on preclusion grounds only when "the defense raises no disputed issues of fact"). If an affirmative defense relies on facts outside the complaint, it may be raised at summary judgment. *See Morley*, 175 F.3d at 761.

The *Coleman* Order does not warrant the dismissal of Rico's injunctive or damages claims. As to injunctive relief, Rico has the right to collaterally attack the *Coleman* Order and raise issues not addressed in that case. As to damages, qualified immunity is not warranted for Defendants' actions beyond the scope of the Order.

I. *COLEMAN* DOES NOT PRECLUDE RICO'S INJUNCTIVE CLAIMS.

Defendants argue that the *Coleman* Order bars this Court from issuing injunctive relief because of comity. *See* Order, *Coleman v. Brown*, No. 2:90-cv-0520 KJM DAD P, ECF #5271 (E.D. Cal. Feb. 3, 2015). Defendants first raised these arguments when this case was before Judge Breyer in the Northern District of California. They argued that the Northern District, under the doctrine of comity, should defer to this Court. Before ruling on that motion, Judge Breyer

transferred this case to this district, apparently on the understanding that Defendants' argument was that the Northern District was not the *right court* to adjudicate Rico's claims. Order of Transfer, July 6, 2017 (ECF #51). This case has now been related to *Coleman* so that it can be heard by this Court. Order, Feb. 2, 2018 (ECF #60). Yet Defendants continue to argue that comity bars Rico's claims because a "coordinating court[]" should not interfere with "another court's order." Defendants' Motion to Dismiss, Feb. 28, 2018 (ECF #68), at 10 ("Motion").

Practically, these arguments no longer make sense, because there is no question of one court treading on the jurisdiction of another or issuing conflicting orders. This Court cannot tread on its own jurisdiction, and it is free to reconsider its rulings in *Coleman* if it decides the Guard One system is causing unlawful sleep deprivation, avoiding any risk of conflicting rulings.

Doctrinally, Defendants now clearly argue that *no* court may hear Rico's claims. Their "comity" argument is now indistinguishable from a traditional issue preclusion argument: Rico allegedly has no right to challenge the Guard One system because other plaintiffs have already done so. Labeling Defendants' argument is not a matter of mere semantics. Because the comity argument would bar Rico's claims just like issue preclusion, it is subject to the same Due Process limitations that have been extensively discussed in that context. Issue preclusion may apply only to issues "actually litigated and resolved in a valid court determination essential to the prior judgment." *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001). "The party asserting issue preclusion must demonstrate: (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Howard v. City of Coos Bay*, 871 F.3d 1032, 1041 (9th Cir. 2017). If the allegedly precluded party was not a party to the prior lawsuit, preclusion "require[s] privity between the parties" in the two cases. *United States v. Bhatia*, 545 F.3d 757, 759 (9th Cir. 2008).

These requirements are not met for two reasons. First, the issue in this lawsuit – whether the noise caused by the checks violates the Eighth Amendment – was not actually litigated in *Coleman*, where both parties agreed to the checks. Second, Rico cannot be bound by *Coleman* because he is not a class member and was not adequately represented by class representatives.

A. An Eighth Amendment Challenge to the Guard One Checks Was Not Actually Litigated in *Coleman*.

Issue preclusion requires that an issue was "actually litigated" in an earlier case. *Howard*, 871 F.3d at 1041. An actually litigated issue must be "raised" or "contested by the parties." *Gospel Missions of Am. v. City of L.A.*, 328 F.3d 548, 553 (9th Cir. 2003); *Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979) (requiring that a party "contest the propriety" of the earlier ruling). It is not enough that a party "bowed to the inevitable." *Segal*, 606 F.2d at 845.

The parties in *Coleman* did not actually litigate the Guard One checks. No party objected to them. When the issue of their noisiness was raised, the parties agreed to change the timing to once an hour; no one objected to hourly checks. Nor was the constitutionality of Guard One checks *for non-mentally ill inmates* ever actually litigated. Whether Guard One checks for mentally ill inmates are constitutionally permissible is a different issue than whether they are permissible for healthy inmates. *See Grenning v. Miller-Stout*, 739 F.3d 1235, 1240 (9th Cir. 2014) (discussing how "legitimate penological interests" may affect a "challenge to conditions of confinement"). Even if the penological interest in preventing suicide outweighs the harms of sleep deprivation for mentally ill inmates, there is no analogous penological interest in expanding Guard One checks to awaken healthy inmates who are not at the same risk of suicide. That issue was never addressed by any party in *Coleman*, because no non-mentally ill inmate was a party.

B. Rico Is Neither a *Coleman* Class Member Nor in Privity with Class Members.

Even if the issues in his complaint were litigated in *Coleman*, Rico has the right to challenge the welfare checks because his claims cannot be precluded when he was not a party, or in privity with a party, in *Coleman*. The *Coleman* class includes "all inmates with serious mental disorders who are now or who will in the future be confined within the [CDCR]." Order Certifying the Class at 3, *Coleman* (Oct. 24, 1991), ECF No. 103. Rico is not mentally ill.

Nonparties may relitigate issues raised by prior plaintiffs. "[A] litigant is not bound by a judgment to which she was not a party" because she "has not had a 'full and fair opportunity to litigate' the issues in that suit. The application of issue preclusion to nonparties runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 553

U.S. at 892-93, 898 (quotation omitted). *Taylor* built on a line of Supreme Court cases allowing later plaintiffs to raise claims on which earlier plaintiffs had lost. *See S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999); *Richards v. Jefferson Cnty., Ala.*, 517 U.S. 793, 797-802 (1996); *Martin v. Wilks*, 490 U.S. 755, 761-65 (1989), overruled on other grounds in 42 U.S.C. § 2000e-2(n); *Hansberry v. Lee*, 311 U.S. 32, 40-46 (1940). "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin*, 490 U.S. at 762 (internal citation and quotation marks omitted); *see also Sandpiper Vill. Condo. Ass'n., Inc. v. La.-Pac. Corp.*, 428 F.3d 831, 849 (9th Cir. 2005) (holding that nonmembers of a class are not bound by a class action judgment). There are only very narrow exceptions to that rule: to bar a nonparty to an earlier case from relitigating an issue in that case, the opposing party has the burden to show a relationship with a party to the earlier case "sufficiently close to afford application of the principle of preclusion." *Hansberry*, 311 U.S. at 41. *Taylor* lists only six categories of qualifying relationships, and it explicitly bars preclusion based only on "identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections" of formal class certification. *Taylor*, 553 U.S. at 896, 901. Rico does not fall within any of the six permitted categories.

Martin, 490 U.S. 755, is directly applicable here. In *Martin*, as in this case, a court issued injunctive relief: it ordered a firefighting department to adopt a racial affirmative action plan. There, as here, that injunctive relief was intended to benefit the plaintiffs (minority firefighters) but also incidentally affected nonparties (white firefighters). In both cases, the nonparties did not intervene, but they filed collateral lawsuits alleging that the injunctive relief violated their substantive rights (in *Martin*, the firefighters' rights under the Fourteenth Amendment, and here, Rico's rights under the Eighth Amendment). The United States Supreme Court holding in *Martin* directly rebuts Defendants' argument here. A collateral challenge to the injunctive relief is permissible, and indeed, barring such lawsuits would violate the Due Process Clause.

Comity is not a backdoor approach to expanding preclusion beyond these Due Process bounds. Nearly every case Defendants cite in their brief is consistent with the understanding that comity is given to a *different* court when the *same* parties litigated the *same* issues at the *same*

time in two courts. The only exception is *Bergh v. State of Wash.*, 535 F.2d 505 (9th Cir. 1976). In that case, the plaintiff challenged a policy ordered in a lawsuit to which he was not a party, and the Ninth Circuit nonetheless dismissed his case. *Bergh*, however, is no longer good law in light of *Martin*. In fact, the dissent in *Martin* directly cites *Bergh* for this point in *disagreeing* with the *Martin* majority opinion. *See Martin*, 490 U.S. at 792 (Stevens, J., dissenting).

The other cases Defendants cite confirm Rico's understanding of comity. For example, the *West Gulf* plaintiff filed a second case seeking declaratory judgment on the same issues raised between the same parties in another district. *W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, S. Atl. & Gulf Coast Dist. of ILA, AFL-CIO*, 751 F.2d 721, 724 (5th Cir. 1985); *see also Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738, 749 (9th Cir. 1979), overruled on other grounds by *Animal Legal Def. Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987 (9th Cir. 2016) (applying comity when the same party filed the same FOIA request in different districts); *Treadaway v. Acad. of Motion Picture Arts & Scis.*, 783 F.2d 1418 (9th Cir. 1986) (applying comity when plaintiff sued in one court challenging the result of a bankruptcy proceeding in another court, in which her predecessor-in-interest was the trustee). *Feller* likewise supports Rico's understanding of comity. In *Feller*, nonparties affected by an order sought, from a *different* court, injunctive relief arguably undermining the order. As the Fourth Circuit noted, "[u]se of the 'comity' label is somewhat misleading in this case because the [*Feller* plaintiffs] were not parties to the [prior] proceedings and because the litigation there has ended, although the district court's supervisory power over its injunction continues." *Feller v. Brock*, 802 F.2d 722, 728 (4th Cir. 1986). Thus, *Feller* confirms that comity ordinarily applies only when the same parties contest a pending ruling in a second court. Moreover, despite the risk of conflicting judgments from the two courts, the court did not dismiss the lawsuit. Rather, it reversed the district court's issuance of a *preliminary injunction*, because the conflict between the two courts should have been considered in assessing the public interest and balance of the hardships. *Id.*[1]

1 The *Feller* court left open how "preclusion principles circumscribe further action" on remand. 802 F.2d at 728 & n.6. This dicta in *Feller* about whether non-party preclusion might apply on remand, *id.* at 728-29, no longer reflects current law in light of *Taylor*.

Thus, *Feller* indicates that, while comity may weigh against a different court issuing a conflicting *preliminary* injunction, it does not preclude a court from issuing a final order conflicting with a sister court's previous order.

Defendants' interpretation of a Supreme Court decision from 1900 is particularly troubling. *See Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900). There, the same plaintiff appealed patent cases against different defendants to two different appellate courts. *Id.* at 488. The plaintiff won in the first appeal, but in the second appeal, the Seventh Circuit disagreed with the Eighth Circuit and found for the defendant. The plaintiff then appealed, arguing that the Eight Circuit's first ruling bound the Seventh Circuit. *Id. Mast* holds that precedent from other circuits is only persuasive, not binding. To the extent we can extrapolate anything from *Mast* about what weight district courts should give to rulings of sister district courts, *Mast* urges judges to follow their own convictions. Although Defendants quote *Mast* for the proposition that comity is "more than mere courtesy," Motion at 10, the Court goes on to substantially limit the application of comity, emphasizing that it "is not imperative" because:

> [i]f it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades; but it does not command. . . . It is only in cases where, in [a judge's] own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals.

Mast, 177 U.S. at 488-89. The *Mast* Court noted that it would not reverse a correct decision merely because "it had not given sufficient weight to the doctrine of comity," and affirmed the Seventh Circuit's disagreement with the Eighth Circuit. *Id.* at 489, 495.

In short, comity is merely one consideration in the unusual situation where the *same* parties file two cases *simultaneously* in two *different* courts. This situation is different. First, the two cases here do not involve the same parties: Rico is not a class member or party in *Coleman*, raising serious Due Process concerns under the Supreme Court's long line of preclusion cases. Second, the two cases are not adjudicating the legality of Guard One at the same time, which limits the practical benefits of comity. When two cases are filed simultaneously but otherwise

meet the requirements for preclusion, if the later action is stayed, the issues will eventually be resolved by the first court and preclusion will apply. Comity simply grants the practical benefits of preclusion sooner, avoiding duplicative litigation over issues that will eventually be precluded. But timing is not the issue here: the parties are not awaiting a pending ruling in *Coleman*. Rather, the *Coleman* Order has already been issued, but the other requirements for issue preclusion are not and will not be met. Third, the two cases are in the same court, so there is no risk of treading on another court's jurisdiction or of conflicting orders. Defendants cite no case, and Rico is aware of no case, where comity barred a second lawsuit in front of the same judge.

Defendants also argue that Rico's arguments should be raised "through class representative and attorney, or by intervention in the class action." Motion at 11. Rico could not proceed through *Coleman* class counsel because he is not a class member. But even if he had the option of proceeding through class counsel or intervening in *Coleman*, he was not required to do so. The Supreme Court has rejected the view that third parties affected by an order must intervene to challenge it. *Martin*, 490 U.S. at 762-65 (rejecting the argument "that, because respondents failed to timely intervene in the initial proceedings, their current challenge to actions taken under the consent decree constitutes an impermissible 'collateral attack'").

C. The *Coleman* Order Can Also Be Collaterally Challenged Because None of the *Coleman* Class Representatives Are Affected by the Guard One Checks.

Even if Rico were a class member in *Coleman*, he could collaterally challenge the *Coleman* Order because his interests were not adequately represented. Absent class members may not usually relitigate issues decided in a class action. *Taylor*, 553 U.S. at 900-01; *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994), *as amended on denial of reh'g* (Jan. 6, 1995). But that reasoning turns on "limitations attending nonparty preclusion based on adequate representation" requiring that "[t]he interests of the nonparty and her representative are aligned." *Taylor*, 553 U.S. at 900. Class members can collaterally attack a class order when their interests were not represented. *Crawford*, 37 F.3d at 488. The Ninth Circuit permits such collateral review when the first court "made no finding that . . . representation of the class was adequate" given the problems raised in the second case. *Hesse v. Sprint Corp.*, 598 F.3d 588 (9th Cir. 2010); *see also*

Lee v. Sprint Nextel Corp., No. 08-4959 SC, 2010 WL 1854422, at *2 (N.D. Cal. May 6, 2010). That standard is met here: the *Coleman* Order was issued without any ruling as to the continuing adequacy of representation of the *Coleman* class authorized 24 years earlier, even when the plaintiffs sought new injunctive relief and even though a class of inmates is inherently transitory.

Class representatives must adequately represent the class "at all times" during litigation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). A court adjudicating "a collateral attack on the judgment" must consider not only whether "the trial court in the first suit correctly determine[d], initially," that there was adequate representation, but also a "class representative's conduct of the entire suit." *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); *see also Pelt v. Utah*, 539 F.3d 1271, 1284-85 (10th Cir. 2008) ("The determination made by the original class action court that the representative adequately represented the class members . . . may not be correct at later stages of the litigation."). These concerns are particularly salient for Rule 23(b)(2) class actions like *Coleman*, where class members cannot opt out. *Pelt*, 539 F.3d at 1285-86.

While the *Coleman* class representatives may have adequately represented the class when it was certified in 1991, they do not represent currently incarcerated inmates because they are not affected by Guard One. As discovery will reveal, of the five representatives, only one, Ralph Coleman, is still incarcerated. He is housed at California Men's Colony, which does not have a SHU; unless he is temporarily housed in the ASU there (which houses only 25 of the more than 4,000 inmates in that prison and is used for temporary secure housing), he is not subject to Guard One checks. *Coleman* is now a case driven by lawyers without clients. The *Coleman* plaintiffs' lawyers have acceded to—indeed, advocated for—Guard One checks to protect inmates in solitary confinement even as half a dozen of those inmates have filed lawsuits to the contrary. Lawyers must operate in concert with real people affected by the injunctions they seek. *See* Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, 7A Fed. Prac. & Proc. Civ. § 1766 (3d ed.) (adequate representation "ensure[s] that the parties are not simply lending their names to a suit controlled entirely by the class attorney"). The danger of advocacy unchecked by the people it affects is the underlying basis for standing. *See Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (noting that only those with standing have "the appropriate incentive to challenge (or not

challenge) governmental action and to do so with the necessary zeal and appropriate presentation"). It would perversely invert this principle to allow the *Coleman* Order, agreed to by plaintiffs' counsel unchecked by the opinions of any inmate who would actually be subject to Guard One, to preclude all litigation by the people who *are* affected. At minimum, factual questions about adequate representation warrant discovery; Defendants do not meet the high bar for 12(b)(6) dismissal based on an affirmative defense.

The relief in *Coleman* has also evolved without notifying class members or reviewing their representation. Representation can become inadequate when the issues in a lawsuit evolve. In *Crawford*, a class of African-American students challenged the use of IQ testing to place them in a "dead-end" special education program and won an injunction against testing class members for placement in the program. 37 F.3d at 487. Years later, under the continuing supervision of the court, the parties agreed to expand the injunction to bar *all* IQ testing of African-American students for any reason. *Id.* at 486. Class members who wanted IQ tests collaterally challenged the new injunction. Permitting that challenge, the Ninth Circuit noted that "expansion of the injunction beyond the scope and contemplation of the 1979 decision through settlement negotiations without notice to absent class members . . . was troubling" and that the "plaintiffs' interests were not represented during the" later proceedings. *Id.* at 488. As in *Crawford*, the scope of the issues in *Coleman* has changed over the last 27 years without notice or reassessment of representation. The initial *Coleman* plaintiffs sought mental healthcare on behalf of mentally ill patients. Suicide monitoring, let alone the propriety of the Guard One system in particular, was not at issue. As *Coleman* has evolved, the continued representation of and notice to class members (let alone non-members like Rico) has fallen short of Due Process requirements.

II. THE *COLEMAN* ORDER DOES NOT WARRANT QUALIFIED IMMUNITY FOR THE INDIVIDUAL-CAPACITY DEFENDANTS.

In addition to his claims for injunctive relief, Rico also sues some defendants in their individual capacities for damages. Defendants seek to dismiss the damages claims[2] under the

[2] "[Q]ualified immunity does not bar injunctive relief," only damages. *Thornton v. Brown*, 757 F.3d 834, 840 (9th Cir. 2013).

doctrine of qualified immunity. But qualified immunity does not apply when officials violate a "well established" right. *Gomez v. Toledo*, 446 U.S. 635, 639-40 (1980). On a motion to dismiss, courts consider (1) whether the plaintiffs alleged a constitutional violation; and (2) whether the right at issue was "clearly established" at the time of the misconduct. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Officials are presumed to "know the law governing [their] conduct." *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011).

Well-established Ninth Circuit law holds that sleep deprivation is illegal. "[P]ublic conceptions of decency inherent in the Eighth Amendment require that [inmates] be housed in an environment that, if not quiet, is at least reasonably free of excess noise." *Keenan v. Hall*, 83 F.3d 1083, 1090 (9th Cir. 1996), *opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998) (quotation omitted) (alteration in original). Officials who cause sleep deprivation are not entitled to qualified immunity. *See Jones v. Neven*, 399 F. App'x 203, 205 (9th Cir. 2010) (finding "excessive noise" in prisons clearly illegal and reversing summary judgment based on qualified immunity); *Chappell v. Mandeville*, 706 F.3d 1052, 1070 (9th Cir. 2013) (finding "clearly established law that conditions having the mutually reinforcing effect of depriving a prisoner of a single basic need, such as sleep, may violate the Eighth Amendment") (Berzon, J., dissenting in part[3]); *Williams v. Anderson*, No. 1:10-CV-01250-SAB, 2015 WL 1044629, at *10 (E.D. Cal. Mar. 10, 2015) (denying qualified immunity because "it would have been clear to a reasonable officer that subjecting Plaintiff to excessive noise causing sleep deprivation for several months would pose a substantial risk of serious harm"). Indeed, this district has already denied qualified immunity in another case challenging Guard One, holding that "[i]t has been clearly established in the Ninth Circuit, since the 1990s, that inmates are entitled to conditions of confinement which do not result in chronic, long term sleep deprivation." *Matthews v. Holland*, No. 1:14-CV-01959-SKOPC, 2017 WL 1093847, at *8 (E.D. Cal. Mar. 23, 2017).

Defendants claim qualified immunity applies despite well-established authority barring sleep deprivation of inmates because the Defendants were merely following the *Coleman* Order.

3 The majority did not reach the issue of precedents on the illegality of sleep deprivation.

But the *Coleman* Order does not shield the Defendants from liability for their actions beyond the scope of the Order. Defendants argue that "each of the acts that Rico complains of . . . is governed by the *Coleman* orders," including "the metal-on-metal contact," "opening and closing of doors," and "frequency" of the checks. Motion at 9. But those are not the only actions Rico complains of: he also alleges that the checks were even louder due to the Defendants' actions beyond the scope of the Order, such as hitting the buttons with extra force and multiple times. SAC ¶ 35. He also alleges that the supervisory Defendants took no steps, such as training the floor officers, to reduce this unnecessary noise. SAC ¶ 52. As discussed *supra*, p. 2, qualified immunity warrants dismissal only if the Court can ascertain that qualified immunity applies based solely on the facts in the complaint. That is not the case here. The complaint states a claim for damages based on Defendants' actions that made the Guard One checks unnecessarily loud; even if the *Coleman* Order led the Defendants to believe that the Guard One checks were, in theory, constitutional, it did not give them carte blanche to perform the checks as loudly as possible with impunity. Even a policy that is constitutional in the abstract can be carried out in an unconstitutional way. At a minimum, discovery is warranted to evaluate Rico's particular claims about the unconstitutional *implementation* of the checks.

III. THE COMPLAINT INCLUDES SUFFICIENT FACTS ABOUT EACH INDIVIDUAL DEFENDANT'S ACTIONS AND KNOWLEDGE.

Defendants also argue that the facts pled about several specific defendants do not sufficiently state a claim. These claims were adequately pled and should not be dismissed.

A. The Failure to Address Problems Raised in a Grievance Can Demonstrate a Defendant's Complicity in an Underlying Constitutional Violation.

Defendants Marulli, Abernathy, Cuske, and Parry seek dismissal because the claims against them are based on their responses to Rico's grievances. This argument relies solely on *Franklin v. Lewis*, No. 13-CV-03777-YGR (PR), 2017 WL 1133363 (N.D. Cal. Mar. 27, 2017), and it misconstrues that case. *Franklin* holds that an inadequate response to a grievance is not itself a constitutional violation: the regulations governing grievances create a "purely procedural right" without any "substantive standards." *Id.* at *7. Nonetheless, grievances can be evidence of

defendants' knowledge of and failure to correct violations of other substantive rights. Indeed, the *Franklin* court went on to assess whether the conduct at issue in the grievances (withholding of mail) violated the plaintiff's First Amendment rights. *Franklin*, 2017 WL 1133363 at *7.

In *Murillo*, another of the related Guard One cases in this district, the court rejected the same argument Defendants raise here:

> While it is true that 'inmates lack a separate constitutional entitlement to a specific prison grievance procedure' under the Due Process Clause or elsewhere, their knowledge and acquiescence in unconstitutional conduct by others may be shown via the inmate appeals process where, as Plaintiff alleges here, the defendants were involved in reviewing Plaintiff's related inmate appeal (as well as appeals filed by other inmates) and failed to take corrective action which allowed the violation to continue.

Murillo v. Holland, No. 1:15-CV-00266-JLT-PC, 2017 WL 1513150, at *5 (E.D. Cal. Apr. 27, 2017), report and recommendation adopted, No. 1:15-CV-00266-LJOJLT-PC, 2017 WL 2379958 (E.D. Cal. June 1, 2017) (internal citation omitted). Many other courts have similarly allowed the use of grievances to show a "supervisor's knowledge of and acquiescence in unconstitutional conduct by others." *Matthews*, 2017 WL 1093847 at *4 (citing *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011)); *Grant v. Lewis*, No. 1:16-CV-00424-LJOSKO-PC, 2017 WL 3730496, at *5 (E.D. Cal. Aug. 30, 2017) (grievances may show supervisor's knowledge "where the supervisor reviewed Plaintiff's applicable inmate appeal and failed to take corrective action, thereby allowing the violation to continue to occur"); *Jones v. Corizon Health*, No. 1:16-CV-01055-SKO-PC, 2017 WL 2225075, at *5 (E.D. Cal. May 22, 2017).

Rico alleges that, because they read and responded to his grievances, Defendants Marulli, Abernathy, Cuske, and Parry knew that the Guard One checks, and the floor officers' haphazard and noisy conduct during the checks, awakened Rico. These Defendants, as higher-ranking officers, supervised the floor officers conducting the checks. *See* SAC ¶¶ 14-15, 50. But Defendants did nothing to solve the problem: they made no changes to the procedure and did not train the floor officers. *See id.* ¶ 52. That knowing failure to address a constitutional problem under their control makes them liable. The grievances merely prove that these Defendants were *aware* that the checks caused a constitutional problem by depriving Rico of sleep.

B. Rico States a Claim Against the Floor Officer Defendants.

Finally, Defendants Nelson, Garcia, Shaver, and Escamilla argue that the claims against them are "too vague" and must be dismissed. Motion at 14. Defendants acknowledge that Rico pled specific actions taken by these four floor officers: running loudly on the stairs, hitting the Guard One buttons too hard, and hitting each Guard One button multiple times. *Id.*; SAC ¶ 35. Defendants' argument is apparently that Rico failed to allege that they *knew* these actions would likely harm him, rather than merely being negligent as to the possibility of harm.

If Defendants knew they were awakening Rico, they presumably knew they were harming him. *See Clairmont*, 632 F.3d at 1109 (9th Cir. 2011) (presuming officials to "know the law governing [their] conduct"); *supra*, p.11 (summarizing law holding that sleep deprivation is unlawful). The only question is thus whether the Complaint adequately alleges that these Defendants knew the checks awakened Rico. Knowledge can be proven by "circumstantial evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge." *Matthews*, 2017 WL 1093847 at *3 (E.D. Cal. Mar. 23, 2017) (contrasting allegations against supervisors with the knowledge that could be inferred if a defendant "was personally walking through the [unit] conducting the Guard One Policy checks"). "Whether a prison official had the requisite knowledge of a substantial risk [of harm to a plaintiff] is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Cotta v. Cty. of Kings*, No. 1:13-CV-00359-LJO, 2013 WL 3213075, at *9 (E.D. Cal. June 24, 2013) (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).

Here, Defendants' knowledge that the checks awakened Rico is a reasonable inference from the facts in the Complaint. Rico alleges that the Guard One checks were "cacophonous" and "loud." SAC ¶¶ 2, 29, 35-36. These allegations must be taken as true.[4] The floor officer Defendants were necessarily close enough to hear such noise; they were the ones carrying out the

[4] Rico's claims cannot be dismissed based on the *Coleman* expert's opinion that the checks are quiet, *see* Motion at 5-6, 11, given the contrary allegations in the SAC, *see* ¶¶ 23, 29, 33, 35-36.

checks. *Id.* ¶ 35. It is a reasonable inference that a person who heard a loud noise mere feet from someone's bed would realize that that person could not sleep through it.

If this Court finds Defendants' knowledge inadequately pleaded, Rico should be granted leave to amend. *See United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981) (holding that, "to facilitate decision on the merits, rather than on the pleadings or technicalities," amendment should be allowed with "extreme liberality"). If necessary, Rico could add additional allegations about the logical conclusions Defendants should have drawn when they heard the noise caused by the Guard One checks and about Rico's conversations with floor officers regarding the noise.

CONCLUSION

Defendants claim that they are "sympathetic to the circumstances Rico was subject to" but "not at liberty to stop using the Guard One protocol." Motion at 2. Perhaps. But this Court, having ordered the Guard One checks in an ongoing case, certainly *is* at liberty to modify or end them. Defendants' sympathy is not enough: as an inmate deeply affected by the Guard One checks but unrepresented in the proceedings in which they were initially ordered, Rico has the right to raise his constitutional objections to the checks through this lawsuit. Rico therefore respectfully requests that the Motion be denied. Alternatively, he requests that any dismissal be without prejudice to amendment to resolve any shortcomings in the complaint.

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Respectfully submitted,

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