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Redwood Shores, CA

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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15 CHRISTOPHER LIPSEY,)
16)
17 Plaintiff,)
18 v.)
19) **SECOND AMENDED COMPLAINT**
20 RON BARNES, et al.,)
21)
22 Defendants.) **JURY TRIAL DEMANDED**

23 1. Plaintiff Christopher Lipsey filed his initial complaint in this matter on June 16, 2014.
24 Counsel was appointed through the Federal Pro Bono Project on July 19, 2017.

25 2. Since 2013, Lipsey has been subject to a cacophonous system of “Guard One welfare
26 checks” that require officers to strike a metal button with a metal rod every thirty minutes, 24 hours
27 a day, on each cell in the Security Housing Units and Administrative Segregation Units.

28 3. This system is intended to reduce inmate suicides, but instead subjects inmates to
torturous and unconstitutional sleep deprivation in the process of checking whether they remain
alive.

4. This sleep deprivation has caused Lipsey to suffer physical, psychological, and
emotional harm.

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JURISDICTION

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. Plaintiff seeks declaratory and injunctive relief under 28 U.S.C. §§ 1343, 2201, and 2202 and 42 U.S.C. § 1983.

VENUE

6. Venue is proper under 28 U.S.C. § 1391(b)(1) because Defendant Clark Ducart, at a minimum, resides in the Northern District of California and all defendants reside in California.

7. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiff’s claims occurred in the Northern District of California, where Pelican Bay State Prison is located.

PARTIES

8. Plaintiff Christopher Lipsey is an inmate imprisoned by the California Department of Corrections and Rehabilitations.

Wardens

9. Defendant Greg Lewis was the Warden of Pelican Bay in 2013, when the Guard One checks at issue in this lawsuit began. He is sued in his individual capacity.

10. Defendant Clark E. Ducart has been the Acting Warden and then Warden of Pelican Bay since 2014. He is sued in his individual capacity.

11. Defendant David Davey has been the Acting Warden and then Warden of California State Prison, Corcoran, since Lipsey was first incarcerated there in 2014. He is sued in his individual capacity.

12. Defendant Josie Gastelo has been the Warden of California Men’s Colony since Lipsey was first incarcerated there in 2016. She is sued in her individual capacity.

13. Defendant Ron Rackley has been the Warden of Folsom State Prison since Lipsey was first incarcerated there in 2016. He is sued in his individual capacity.

14. The Wardens listed in paragraphs 9 to 13 are collectively referred to herein as the “Defendant Wardens.”

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State-level CDCR Defendants

15. Defendant Michael Stainer was the Acting Director and then Director of the Division of Adult Institutions of the CDCR from 2013 to 2014 and is sued in his individual capacity.

16. Defendant Kelly Harrington was the Director of the Division of Adult Institutions of the CDCR from 2014 to March 2016 and is sued in his individual capacity.

17. Defendant Kathleen Allison has been the Director of the Division of Adult Institutions of the CDCR since April 2016 and is sued in her official and individual capacities.

18. Defendant Jeffrey Beard was the Secretary of the California Department of Corrections and Rehabilitation (CDCR) from December 2012 through December 2015 and is sued in his individual capacity.

19. Defendant Scott Kernan has been the Secretary of the California Department of Corrections and Rehabilitation (CDCR) since January 2016 and is sued in his official and individual capacities.

FACTUAL ALLEGATIONS

The CDCR Requires the Use of the Guard One System, Which Awakens Inmates Throughout the Night, in All Its Restricted Housing Units.

20. The CDCR requires officers to conduct Guard One checks in the Security Housing Units (SHU), Administrative Segregation Units (ASU), Psychiatric Services Units (PSU), and Condemned Housing Units in all its prisons. Every CDCR prison has an ASU.

21. Under the Guard One system, floor correctional officers walk through each unit every thirty minutes, 24 hours a day, to conduct “welfare checks.”

22. To conduct the round of checks, the floor officer hits a metal button on each cell with a metal Guard One pipe. This electronic pipe records when and where it has connected with the metal buttons, creating a log of which buttons the officer has pushed.

23. The Corcoran SHU contains three sections. Each section of the Corcocan SHU contains 22 cells. The floor correctional officer hits the metal Guard One button on all 22 cells in each of the three sections during each round of checks.

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1 24. The metal-on-metal contact between the Guard One pipe and the metal buttons
2 creates a loud noise.

3 25. It is not uncommon for officers to attempt to strike the button repeatedly, making
4 multiple loud noises by striking metal on metal repeatedly, because they miss the button or want to
5 ensure that their checks are logged. The officers often hit the button harder than necessary as they
6 grow tired of the repetitive nature of the checks.

7 26. During the day, the pipe also emits a loud, high-pitched beep to notify the officers
8 that their checks have been logged.

9 27. Even though the purported purpose of the Guard One system is to confirm that floor
10 officers are conducting suicide checks, many officers often do not even look inside Lipsey's cell
11 during the checks. The Guard One system does not even guarantee that a cell has been checked,
12 because an officer can hit the button without looking inside the cell.

13 28. The correctional officers carry large rings of keys which rattle loudly as the officers
14 walk through the pods.

15 **Lipsey Has Been Subject to Guard One Checks Since 2013.**

16 29. Lipsey was assigned to the Pelican Bay ASU around February 2013. On May 28,
17 2013, officers in the Pelican Bay ASU began conducting Guard One checks every thirty minutes.

18 30. From October to November 2013, Lipsey was housed in the general population at
19 Pelican Bay, where he was not subject to Guard One checks.

20 31. In December 2013, Lipsey was reassigned to the Pelican Bay ASU, where Guard One
21 checks continued to be conducted every thirty minutes.

22 32. Around September 2014, Lipsey was transferred to the Corcoran SHU, where Guard
23 One checks were conducted every thirty minutes.

24 33. Between March 2016 and August 2016, Lipsey was transferred between several
25 different prisons, including the PSU at Corcoran, the ASU at California Men's Colony (CMC), and
26 the Mental Health Crisis Units at California Health Care Facility (CHCF) and California Medical
27 Facility (CMF). At the Corcoran PSU and CMC ASU, Lipsey was subject to Guard One checks
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1 every thirty minutes. At the Mental Health Crisis Units, nurses conducted welfare checks, but they
2 did not use the Guard One system to register the checks.

3 34. In August 2016, Lipsey was transferred to the Folsom State Prison PSU, where Guard
4 One checks were conducted every thirty minutes.

5 35. In March 2017, Lipsey was transferred to the Corcoran SHU, where Guard One
6 checks are conducted every thirty minutes.

7 36. Lipsey remains in the Corcoran SHU, and he is subject to the Guard One checks.

8 37. If Lipsey were transferred to the general population, he could be reassigned to the
9 ASU or SHU for any number of reasons, including disciplinary allegations, administrative needs,
10 and protection from threats against him.

11 38. Inmates in the SHU are confined to their windowless cells for an average of 22.5
12 hours a day. In the remaining 1.5 hours, they are allowed to go to a yard to exercise alone. The
13 exercise yard is approximately twice the size of the cell.

14 **The Noise Caused by the Guard One System Subjects Lipsey to Severe Sleep Deprivation.**

15 39. The Guard One checks make enough noise to awaken Lipsey. The system generates
16 noise from the metal-on-metal contact when the Guard One pipe strikes the metal buttons and from
17 the associated beep during the day, as well as the noise of the officer's keys clanging as he walks
18 through the pod.

19 40. Several officers have admitted, through written Request for Interview forms on
20 CDCR Form 22, that the metal-on-metal contact is loud enough to be audible even over the beep.
21 See Ex. A, Form 22 signed by Lassley; Ex. B, Form 22 signed by Magana; Ex. C, Form 22 signed by
22 Nichols.

23 41. At the Corcoran SHU, Lipsey can hear the noise not only from the Guard One check
24 performed at his own cell, but also the checks on other 22 cells in his section and some of the cells in
25 the neighboring section.

26 42. The cell door is made of perforated metal and does not muffle the noise at all. The
27 Guard One button is mounted on a metal plate throughout the CDCR system.

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1 43. At all other SHUs and ASUs where Lipsey has been incarcerated and subject to
2 Guard One checks, he could hear the checks being conducted on nearby cells as well as at his own
3 cell.

4 44. This noise, from several dozen metal-on-metal strikes every thirty minutes, awakens
5 Lipsey repeatedly during the night. Once he wakes up, it is difficult for him to fall asleep again,
6 because he is roused by another round of Guard One checks within thirty minutes, just as he is
7 beginning to fall asleep again after having been previously awakened by the prior rounds of checks.

8 45. Lipsey typically alternates between nights with very limited sleep (approximately 2 to
9 3 hours, broken into smaller chunks interrupted by Guard One checks) and nights with more sleep (6
10 to 7 hours). After a night with very limited sleep, Lipsey is so tired that he is sometimes able to sleep
11 through the checks the next night. But the following night, after sleeping more, he again suffers a
12 night of only 2 to 3 hours of sleep. This cycle has continued for the four years that he has been
13 subject to the checks.

14 46. Before the Guard One checks were implemented, Lipsey slept 7 to 8 hours per night
15 in the Pelican Bay ASU, typically without waking up during the night.

16 47. Lipsey has suffered medical problems from sleep deprivation, including headaches,
17 dizziness and sudden fainting, an increased heart rate, blurred vision, excessive hunger, changes in
18 weight, body cramps, irritability, anxiety, mood swings, memory loss, and inability to concentrate.
19 Before his incarceration in the SHU, Lipsey had never experienced these symptoms.

20 48. Lipsey's irritability from sleep deprivation has led to conflict in his relationship with
21 his mother. She has cut off contact with Lipsey, causing him severe emotional distress.

22 49. Lipsey has been diagnosed with schizoaffective disorder, which involves symptoms
23 of both schizophrenia and depression. The sleep deprivation caused by Guard One exacerbates both
24 sets of symptoms. Lipsey has experienced more hallucinations, begun hearing voices, and suffered
25 greater depression and thoughts of self-harm and suicide since the Guard One checks began.

1 50. The Guard One system also prevents Lipsey from concentrating during the day. He
2 cannot effectively work on his legal appeals or think clearly. The constant noise exacerbates his
3 symptoms during the day as well.

4 **Defendants Have Ignored Lipsey's Repeated Complaints About His Sleep Deprivation.**

5 51. On July 28, 2013, Lipsey filed a CDCR Form 22 (a form for a "request for interview,
6 item, or service") asking officers to stop conducting Guard One checks because of the resulting sleep
7 deprivation. *See* Ex. D, July 28, 2013 Form 22.

8 52. On July 29, 2013, a staff member responded that the device was "part of the new
9 security check policy." Lipsey requested supervisor review, and on July 30, 2015, the supervisor
10 wrote that "this is now a standard in all CDCR ad-segs." *See* Ex. D.

11 53. On July 30, 2013, Lipsey initiated a formal grievance (on CDCR Form 602)
12 complaining about the excessive noise caused by the Guard One checks. *See* Ex. E, July 30, 2013
13 Form 602.

14 54. The appeal bypassed the first level of review and was denied at the second level of
15 review by Defendant Warden Ducart on September 4, 2013. *See* Ex. F, Sept. 4, 2013 Second Level
16 Review.

17 55. An appeal was accepted and the request denied at the third level of review on October
18 16, 2013. *See* Ex. G, Oct. 16, 2013 Third Level Review.

19 56. Unable to achieve any change through the administrative grievance process, Lipsey
20 filed his first complaint in this case on June 16, 2014.

21 **All of the Defendants Participate or Participated in the Use of the Guard One System.**

22 57. The wardens of each prison, including the Defendant Wardens, are responsible for
23 establishing, monitoring, and enforcing operations, policies, and practices, including the Guard One
24 system. They are responsible for ensuring the provision of constitutional conditions of confinement
25 for inmates. Throughout Lipsey's incarceration, the Defendant Wardens continued to instruct floor
26 officers to conduct the checks, made no changes to make the Guard One system quieter, and offered
27 no training to officers about how to conduct the checks more quietly.

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1 58. Defendant Director Stainer personally signed a May 9, 2014 memorandum
2 authorizing the statewide use of the Guard One system. *See* Ex. H. As Division Director for Adult
3 Institutions, Defendant Stainer was responsible for establishing, monitoring, and enforcing
4 operations, policies, and practices at all California adult prisons. He was responsible for ensuring the
5 provision of constitutional conditions of confinement for all adult inmates.

6 59. Defendant Director Kelly Harrington personally signed a July 15, 2015 memorandum
7 authorizing the statewide use of the Guard One system. As Division Director for Adult Institutions,
8 Defendant Harrington was responsible for establishing, monitoring, and enforcing operations,
9 policies, and practices at all California adult prisons. He was responsible for ensuring the provision
10 of constitutional conditions of confinement for all adult inmates.

11 60. Defendant Secretary Beard was the Secretary of the CDCR when the Guard One
12 policy was implemented. As the Secretary of the CDCR, Defendant Beard was responsible for
13 establishing, monitoring, and enforcing overall operations, policies, and practices of the California
14 state prison system. He was responsible for ensuring the provision of constitutional conditions of
15 confinement for all inmates. He would likely have been involved in approving the use of Guard One
16 statewide.

17 61. Defendant Secretary Kernan is currently the Secretary of the CDCR. He is
18 responsible for establishing, monitoring, and enforcing overall operations, policies, and practices of
19 the California state prison system. He is responsible for ensuring the provision of constitutional
20 conditions of confinement for all inmates. He continues to order the use of Guard One statewide.

21 *All of the Defendants Sued in Their Individual Capacities Are Aware That the*
22 *Use of the Guard One System Subjects Inmates to Sleep Deprivation.*

23 62. The Defendant Wardens are aware that the Guard One checks awaken inmates
24 because they have witnessed the checks being carried out in their roles supervising the
25 implementation of the policy.
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63. The other state-level CDCR defendants sued in their individual capacity (including Defendants Beard, Kernan, Stainer, and Harrington) are aware that the Guard One checks awakened inmates because:

- a. they had likely seen the Guard One wand personally before ordering its use statewide or thereafter, and they would have heard how much noise it made; and
- b. other inmates have filed grievances and lawsuits including at a minimum:
 - i. *Matthews v. Holland*, No. 1:14-cv-01959-DAD-SKO, which was filed in the Eastern District of California on December 10, 2014;
 - ii. *Murillo v. Holland*, No. 1:15-cv-00266-LJO-JLT, which was filed in the Eastern District of California on February 2, 2015; and
 - iii. *Suarez v. Beard*, No. 3:15-cv-05756-VC, which was filed in the Northern District of California on December 16, 2015.

64. Defendant Beard was additionally aware that the Guard One checks awakened inmates because other inmates, including at a minimum Maher Suarez, wrote to Secretary Beard informing him of the sleep deprivation caused by the Guard One checks.

FIRST CLAIM FOR RELIEF
VIOLATION OF 42 U.S.C § 1983

65. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this complaint.

66. Plaintiff seeks relief under 42 U.S.C. § 1983 for conditions of confinement in violation of the Eighth Amendment of the United States Constitution. By their policies and practices described herein, Defendants subject Plaintiff to serious harm and injury from sleep deprivation. These policies and practices have been and continue to be implemented by Defendants under color of state law, in their official capacities, and are the proximate causes of Plaintiff’s ongoing deprivation of rights secured by the United States Constitution under the Eighth Amendment.

67. Defendants have been and are aware of the deprivations complained of herein, and have condoned or been deliberately indifferent to such conduct.

1 68. The sleep deprivation caused by the use of the Guard One system and Defendants’
2 conduct alleged herein is a direct and proximate cause of Plaintiff’s injuries and continues to cause
3 irreparable harm to Plaintiff, and Plaintiff has no adequate remedy at law.

4 **SECOND CLAIM FOR RELIEF**

5 **VIOLATION OF ARTICLE I, SECTION 17 OF THE CALIFORNIA STATE**
6 **CONSTITUTION**

7 69. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this
8 complaint.

9 70. Plaintiff seeks relief for conditions of confinement in violation of the Section 17 of
10 Article 1 of the California Constitution. By their policies and practices described herein, Defendants
11 subject Plaintiff to serious harm and injury from sleep deprivation. These policies and practices have
12 been and continue to be implemented by Defendants under color of state law, in their official
13 capacities, and are the proximate causes of Plaintiff’s ongoing deprivation of rights secured by the
14 California Constitution.

15 71. Defendants have been and are aware of the deprivations complained of herein, and
16 have condoned or been deliberately indifferent to such conduct.

17 72. The sleep deprivation caused by the use of the Guard One system and Defendants’
18 conduct alleged herein is a direct and proximate cause of Plaintiff’s injuries and continues to cause
19 irreparable harm to Plaintiff, and Plaintiff has no adequate remedy at law.

20 **THIRD CLAIM FOR RELIEF**

21 **NEGLIGENCE**

22 73. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this
23 complaint.

24 74. Defendants’ actions described herein constitute negligence in violation of California
25 state common law.

26 75. Defendants had a duty to reasonably care for the inmates incarcerated under their
27 control.

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76. Defendants breached that duty by waking Plaintiff approximately every thirty minutes, preventing him from getting adequate sleep.

77. Defendants’ actions subjected Plaintiff to sleep deprivation, causing him physical and mental harm.

FOURTH CLAIM FOR RELIEF

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

78. Plaintiff re-alleges and incorporates by reference the preceding paragraphs of this complaint.

79. Defendants’ actions described herein constitute intentional infliction of emotional distress in violation of California state common law.

80. Waking Plaintiff approximately every thirty minutes, preventing him from getting adequate sleep, is extreme and outrageous conduct that a reasonable person would expect to cause severe emotional distress.

81. Defendants’ actions in fact subjected Plaintiff to sleep deprivation, causing him severe emotional distress.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court grant him the following relief:

- a. Adjudge and declare that the acts, omissions, policies, and practices of Defendants described herein are in violation of the rights of Plaintiff under the Cruel and Unusual Punishments Clause of the Eighth Amendment, which grants constitutional protection to Plaintiff;
- b. Preliminarily and permanently enjoin Defendants, their agents, employees, and all persons acting in concert with them under color of state law from subjecting Plaintiff to the illegal and unconstitutional acts, omissions, policies, and practices set forth above;
- c. Award Plaintiff compensatory and punitive damages from each defendant sued in his or her individual capacity;

- d. Award Plaintiff the costs of this suit, and reasonable attorneys’ fees and litigation expenses pursuant to 42 U.S.C. § 1988, and other applicable law; and
- e. Award such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff hereby demands a trial by jury of all issues so triable.

DATED: November 17, 2017

Respectfully submitted,

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