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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

GILBERT DEMETRIUS AGUILAR, )  
#56067 )  
Plaintiff, )  
vs. )  
CONGRESSMAN JAMES )  
GIBBONS, *et al.*, )  
Defendants. )  
/

2:10-cv-01349-KJD-RJJ

**ORDER**

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff’s application to proceed *in forma pauperis* is granted (docket #1). The court now reviews the complaint.

**I. Screening Standard**

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner’s claims, “if the allegation of poverty is untrue,” or if the action “is frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a

1 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*  
2 *v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
5 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under  
6 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,  
7 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the  
8 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief  
9 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965  
10 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a  
11 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,  
12 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*  
13 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to  
14 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

15 Allegations in a *pro se* complaint are held to less stringent standards than formal  
16 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.  
17 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th  
18 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the  
19 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal  
20 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of  
21 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
22 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever*  
23 *v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

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1           To sustain an action under section 1983, a plaintiff must show (1) that the conduct  
2 complained of was committed by a person acting under color of state law; and (2) that the conduct  
3 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689  
4 (9<sup>th</sup> Cir. 2006).

## 5 **II. Instant Complaint**

6           Plaintiff, who is currently incarcerated at Ely State Prison (“ESP”), has sued Nevada  
7 Governor James Gibbons, Nevada Department of Corrections (“NDOC”) Director Howard Skolnik,  
8 NDOC Medical Director Robert Bruce Bannister, ESP Director of Nursing Joe Brackbill, ESP Warden  
9 Eldon K. McDaniel, NDOC doctors John Perry, Karen Gedney, Marsha Johns, and NDOC ear nose and  
10 throat specialist Schlager. Plaintiff asserts that due to an ear infection that went untreated at ESP he  
11 developed two fistulas. Plaintiff claims that the lack of treatment caused irreparable damage to his right  
12 ear, damaged his salivary glands, necessitated the extraction of seven teeth and caused other damage.  
13 Plaintiff states that he filed numerous grievances and that defendants Bannister, Gedney, Johns, Perry,  
14 Skolnik and the Utilization Review Panel, denied him treatment due to cost. Plaintiff alleges that these  
15 defendants acted with deliberate indifference to his serious medical needs, in violation of his Eighth  
16 Amendment rights.

17           First, while plaintiff includes vague allegations against Governor Gibbons, government  
18 officials enjoy qualified immunity from civil damages unless their conduct violates “clearly established  
19 statutory or constitutional rights of which a reasonable person would have known.” *Harlow v.*  
20 *Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, the Supreme Court provided guidance on the  
21 application of qualified immunity, explaining that officials are entitled to qualified immunity unless (1)  
22 plaintiff alleges facts that show a constitutional violation and (2) it was clearly established at the time  
23 of the alleged violation that the conduct was unconstitutional. 533 U.S. 194, 201 (2001). The Supreme  
24 Court stressed that the first part of the analysis is the threshold question that courts should address before  
25 proceeding to the second part. *Id.* at 207. Plaintiff sets forth no allegations that Gibbons acted in  
26 violation of clearly established statutory or constitutional rights. Gibbons is dismissed from this action.

1           Next, “[l]iability under [§] 1983 arises only upon a showing of personal participation by  
2 the defendant. A supervisor is only liable for the constitutional violations of . . . subordinates if the  
3 supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent  
4 them. There is no respondeat superior liability under [§] 1983.” *Taylor v. List*, 880 F.2d 1040, 1045  
5 (9<sup>th</sup> Cir. 1989) (citations omitted); *see also Hydrick v. Hunter*, 500 F.3d 978, 988 (9<sup>th</sup> Cir. 2007); *Ortez*  
6 *v. Washington County, State of Or.*, 88 F.3d 804, 809 (9<sup>th</sup> Cir. 1996) (concluding proper to dismiss where  
7 no allegations of knowledge of or participation in alleged violation). Plaintiff does not describe any  
8 specific actions by Warden McDaniel, nor does he allege that Warden McDaniel had knowledge of or  
9 participated in any alleged civil rights violation. Defendant McDaniel is dismissed from this action.

10           Plaintiff also names nurse Brackbill and specialist Schlager as defendants. While he  
11 makes a vague allegation that these two and other defendants practice a “treat and return” policy, he  
12 states no specific claims against these defendants. Brackbill and Schlager are dismissed from this action.

13           With respect to the remaining defendants, plaintiff contends that they have been  
14 deliberately indifferent to his serious medical needs in violation of the Eighth Amendment. The Eighth  
15 Amendment prohibits the imposition of cruel and unusual punishments and “embodies broad and  
16 idealistic concepts of dignity, civilized standards, humanity and decency.” *Estelle v. Gamble*, 429 U.S.  
17 97, 102 (1976). A detainee or prisoner’s claim of inadequate medical care does not constitute cruel and  
18 unusual punishment unless the mistreatment rises to the level of “deliberate indifference to serious  
19 medical needs.” *Id.* at 106. The “deliberate indifference” standard involves an objective and a  
20 subjective prong. First, the alleged deprivation must be, in objective terms, “sufficiently serious.”  
21 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).  
22 Second, the prison official must act with a “sufficiently culpable state of mind,” which entails more than  
23 mere negligence, but less than conduct undertaken for the very purpose of causing harm. *Farmer*, 511  
24 U.S. at 837. A prison official does not act in a deliberately indifferent manner unless the official “knows  
25 of and disregards an excessive risk to inmate health or safety.” *Id.*

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1           In applying this standard, the Ninth Circuit has held that before it can be said that a  
2 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be substantial.  
3 Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.”  
4 *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at 105-06.  
5 “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does  
6 not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does  
7 not become a constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*, 429  
8 U.S. at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir. 1995); *McGuckin v.*  
9 *Smith*, 974 F.2d 1050, 1050 (9th Cir. 1992) (*overruled on other grounds*), *WMX Techs., Inc. v. Miller*,  
10 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc). Even gross negligence is insufficient to establish  
11 deliberate indifference to serious medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th  
12 Cir. 1990). A prisoner’s mere disagreement with diagnosis or treatment does not support a claim of  
13 deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

14           Delay of, or interference with, medical treatment can also amount to deliberate  
15 indifference. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9<sup>th</sup> Cir. 2006); *Clement v. Gomez*, 298 F.3d 898,  
16 905 (9<sup>th</sup> Cir. 2002); *Hallett v. Morgan*, 296 F.3d 732, 744 (9<sup>th</sup> Cir. 2002); *Lopez v. Smith*, 203 F.3d 1122,  
17 1131 (9<sup>th</sup> Cir. 1996); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9<sup>th</sup> Cir. 1996); *McGuckin v. Smith*, 974 F.2d  
18 1050, 1059 (9<sup>th</sup> Cir. 1992) *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133,  
19 (9<sup>th</sup> Cir. 1997) (en banc); *Hutchinson v. United States*, 838 F.2d 390, 394 (9<sup>th</sup> Cir. 1988). Where the  
20 prisoner is alleging that delay of medical treatment evinces deliberate indifference, however, the prisoner  
21 must show that the delay led to further injury. *See Hallett*, 296 F.3d at 745-46; *McGuckin*, 974 F.2d at  
22 1060; *Shapley v. Nev. Bd. Of State Prison Comm’rs*, 766 F.2d 404, 407 (9<sup>th</sup> Cir. 1985) (per curiam).

23 Plaintiff states Eighth Amendment medical claims against the remaining defendants.

24           Finally, in count II plaintiff makes a bare assertion, without elaboration, that defendants  
25 entered into a civil conspiracy to violate his Fourteenth Amendment rights. As plaintiff sets forth no  
26 facts implicating his Fourteenth Amendment rights, this claim is dismissed.

1 **III. Conclusion**

2 **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma*  
3 *pauperis* (docket #1) without having to prepay the full filing fee is **GRANTED**; plaintiff shall not be  
4 required to pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant to  
5 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform Act of 1996. The movant herein is  
6 permitted to maintain this action to conclusion without the necessity of prepayment of fees or costs or  
7 the giving of security therefor. This order granting *in forma pauperis* status shall not extend to the  
8 issuance of subpoenas at government expense.

9 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the  
10 Prisoner Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the Clerk  
11 of the United States District Court, District of Nevada, 20% of the preceding month's deposits to the  
12 account of Gilbert Demetrius Aguilar, **Inmate No. 56067** (in months that the account exceeds \$10.00)  
13 until the full \$350 filing fee has been paid for this action. The Clerk shall send a copy of this order to  
14 the attention of Albert G. Peralta, Chief of Inmate Services for the Nevada Department of Prisons, P.O.  
15 Box 7011, Carson City, NV 89702.

16 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise  
17 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the  
18 Prisoner Litigation Reform Act of 1996.

19 **IT IS FURTHER ORDERED** that the Clerk shall **FILE** the complaint (docket #1-1).

20 **IT IS FURTHER ORDERED** that defendants Gibbons, McDaniel, Brackbill and  
21 Schlager are **DISMISSED** from this action.

22 **IT IS FURTHER ORDERED** that plaintiff's Fourteenth Amendment claim is  
23 **DISMISSED**.

24 **IT IS FURTHER ORDERED** that plaintiff's Eighth Amendment claims against  
25 defendants Howard Skolnik, Robert Bannister, Karen Gedney, Marsha Johns, and John Perry **MAY**  
26 **PROCEED**.

1 **IT IS FURTHER ORDERED** as follows:

2 1. The Clerk **shall electronically serve a copy of this order, along with a copy of plaintiff's**  
3 **complaint, on the Office of the Attorney General of the State of Nevada, to the attention of Pamela**  
4 **Sharp.**

5 2. The Attorney General's Office shall advise the Court within **twenty-one (21) days** of the date  
6 of entry of this order whether it can accept service of process for the named defendants. As to any of  
7 the named defendants for which the Attorney General's Office cannot accept service, the Office shall  
8 file, *under seal*, the last known address(es) of those defendant(s).

9 3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a motion  
10 identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full name and  
11 address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal Rules of  
12 Civil Procedure, service must be accomplished within one hundred twenty (120) days of the date the  
13 complaint was filed.

14 **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,  
15 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or  
16 other document submitted for consideration by the court. Plaintiff shall include with the original paper  
17 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed  
18 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff  
19 shall direct service to the individual attorney named in the notice of appearance, at the address stated  
20 therein. The court may disregard any paper received by a district judge or a magistrate judge that has  
21 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

22 DATED: December 13, 2010

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25 UNITED STATES DISTRICT JUDGE  
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