

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

MARTIN PARTIDA GAONA,

CASE NO. 1:06-cv-00865-SMS PC

Plaintiff,

ORDER DISMISSING ACTION, WITH  
PREJUDICE, FOR FAILURE TO STATE A  
CLAIM, AND DIRECTING CLERK’S OFFICE  
TO ENTER JUDGMENT

v.

KUSHNER, et al.,

(Doc. 34)

Defendants.

ORDER COUNTING DISMISSAL AS A  
STRIKE UNDER 28 U.S.C. § 1915(G)

**Screening Order**

**I. Procedural History**

Plaintiff Martin Partida Gaona, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on July 10, 2006. On May 13, 2008, the Court screened Plaintiff’s complaint and dismissed it, with leave to amend. Plaintiff filed a first amended complaint on July 10, 2008, and a second amended complaint on March 6, 2009. On July 8, 2010, the Court issued its second screening order, finding that Plaintiff’s second amended complaint failed to state a claim upon which relief may be granted. Because of the “significant change” in the standard to which pleadings are held, Moss v. U.S. Secret Service, 572 F.3d 962, 972 (9th Cir. 2009), and because it appeared that Plaintiff might be able to cure the deficiencies, the Court granted Plaintiff one final opportunity to amend, Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). Plaintiff filed his third amended complaint on October 13, 2010, and for the reasons set forth below,

1 this action shall be dismissed, with prejudice, for failure to state a claim.

2 **II. Screening Requirement**

3 The Court is required to screen complaints brought by prisoners seeking relief against a  
4 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
5 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally  
6 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek  
7 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).  
8 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall  
9 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a  
10 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

11 A complaint must contain “a short and plain statement of the claim showing that the pleader  
12 is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but  
13 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,  
14 do not suffice.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) (citing Bell Atlantic Corp. v.  
15 Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)). Plaintiff must set forth “sufficient  
16 factual matter, accepted as true, to ‘state a claim that is plausible on its face.’” Iqbal, 129 S.Ct. at  
17 1949 (quoting Twombly, 550 U.S. at 555). Facial plausibility demands more than the mere  
18 possibility that a defendant committed misconduct, Iqbal at 1950, and while factual allegations are  
19 accepted as true, legal conclusion are not, id. at 1949.

20 **III. Plaintiff’s Eight Amendment Medical Care Claims**

21 Plaintiff, who is currently incarcerated at Salinas Valley State Prison in Soledad, brings this  
22 action against Defendants Kushner, Benyamah, Salazar, Matter, Harper, Brewer, Hayden, Duel,  
23 Davis, Mantaras, Maegan, and Diana, all of whom were employed at Pleasant Valley State Prison  
24 in Coalinga, where the events at issue occurred. Plaintiff alleges that Defendant Kushner told  
25 custody staff Plaintiff was faking his medical conditions, but after several complaints, Plaintiff was  
26 diagnosed with pneumonia and Valley Fever. Plaintiff alleges that all of the named defendants  
27 denied him medical care, in violation of his rights under the Eighth Amendment of the United States  
28 Constitution.

1 ///

2  
3 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate  
4 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091, 1096  
5 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 295 (1976)). The two part  
6 test for deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by  
7 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury or  
8 the unnecessary and wanton infliction of pain,’” and (2) “‘the defendant’s response to the need was  
9 deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059  
10 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th  
11 Cir. 1997) (en banc) (internal quotations omitted)). Deliberate indifference is shown by “a  
12 purposeful act or failure to respond to a prisoner’s pain or possible medical need, and harm caused  
13 by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060).

14 “A difference of opinion between a prisoner-patient and prison medical authorities regarding  
15 treatment does not give rise to a s 1983 claim,” Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir.  
16 1981) (internal citation omitted), and a difference of opinion between medical personnel regarding  
17 treatment does not amount to deliberate indifference, Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.  
18 1989). Plaintiff must allege sufficient facts to support a claim that “the course of treatment the  
19 doctors chose was medically unacceptable under the circumstances . . . and . . . that they chose this  
20 course in conscious disregard of an excessive risk to plaintiff’s health.” Jackson v. McIntosh, 90  
21 F.3d 330, 332 (9th Cir. 1986) (internal citations omitted).

22 Plaintiff’s allegations falls short of stating any plausible claims for violation of the Eighth  
23 Amendment arising from deficient medical care. Iqbal at 1949-50; Moss at 969. Plaintiff alleges  
24 only that Defendant Kushner accused him of malingering when he was in fact suffering from  
25 pneumonia and Valley Fever, and that everyone denied him medical care. These conclusory  
26 allegations are insufficient to support the claim that Defendants knowingly disregarded an excessive  
27 risk to Plaintiff’s health, Farmer, 511 U.S. at 837, and that Plaintiff suffered further harm as a result,  
28 McGuckin at 1060 (citing Shapely v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th

1 Cir. 1985)).

2 ///

3 **IV. Conclusion and Order**

4 Plaintiff's third amended complaint fails to state a claim upon which relief may be granted.  
5 Plaintiff was previously given notice of the deficiencies and an opportunity to amend, but he was  
6 unable to cure the deficiencies. Lopez, 203 F.3d at 1130; Noll v. Carlson, 809 F.2d 1446, 1448-49  
7 (9th Cir. 1987). Therefore, further leave to amend is not warranted, and it is HEREBY ORDERED  
8 that:

- 9 1. This action is dismissed, with prejudice, for failure to state a claim;
- 10 2. The Clerk's Office shall enter judgment; and
- 11 3. This dismissal shall count as a strike under 28 U.S.C. § 1915(g).

12  
13  
14  
15 IT IS SO ORDERED.

16 **Dated: October 18, 2010**

17 /s/ Sandra M. Snyder  
18 UNITED STATES MAGISTRATE JUDGE  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28