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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

TIMOTHY HOBAN,

CASE NO. 1:10-cv-00164-SKO PC

Plaintiff,

SCREENING ORDER DISMISSING ACTION,  
WITH PREJUDICE, FOR FAILURE TO  
STATE A CLAIM UNDER SECTION 1983

v.

C. K. CHEN,

(Doc. 11)

Defendant.

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

**Screening Order**

**I. Screening Requirement and Standard**

Plaintiff Timothy Hoban, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on February 2, 2010. On May 9, 2011, the Court dismissed Plaintiff’s complaint, with leave to amend, for failure to state a claim. Plaintiff filed an amended complaint on May 23, 2011.

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

“Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall

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1 dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a  
2 claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

3 A complaint must contain “a short and plain statement of the claim showing that the pleader  
4 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but  
5 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,  
6 do not suffice,” Ashcroft v. Iqbal, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1937, 1949 (2009) (citing Bell  
7 Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and courts “are not required  
8 to indulge unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir.  
9 2009) (internal quotation marks and citation omitted). While factual allegations are accepted as true,  
10 legal conclusions are not. Iqbal, 129 S.Ct. at 1949.

11 To state a claim, Plaintiff must demonstrate that each defendant personally participated in  
12 the deprivation of his rights. Id. at 1949. This requires the presentation of factual allegations  
13 sufficient to state a plausible claim for relief. Iqbal, 129 S.Ct. at 1949-50; Moss v. U.S. Secret  
14 Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of  
15 meeting this plausibility standard. Iqbal, 129 S.Ct. at 1949-50; Moss, 572 F.3d at 969.

## 16 **II. Summary of Amended Complaint**

### 17 **A. Allegations**

18 Plaintiff, an inmate housed at Kern Valley State Prison (KSVP), brings this action against  
19 C. K. Chen, M.D., a physician at the prison. Plaintiff, a dialysis patient with end-stage renal failure,  
20 alleges that Defendant Chen dismisses his concerns regarding his high blood pressure and that his  
21 diet needs to be switched to a low sodium diet. Plaintiff alleges that following his transfer to KVSP,  
22 his health has declined and his blood pressure has risen a lot, but Defendant Chen will not change  
23 his diet and he relies on multiple blood pressure medications to manage Plaintiff’s “created  
24 problem.” (Doc. 11, Amend. Comp., § IV.)

### 25 **B. Eighth Amendment Medical Care Claim**

26 To constitute cruel and unusual punishment in violation of the Eighth Amendment, prison  
27 conditions must involve “the wanton and unnecessary infliction of pain.” Rhodes v. Chapman, 452  
28 U.S. 337, 347, 101 S.Ct. 2392 (1981). A prisoner’s claim of inadequate medical care does not rise

1 to the level of an Eighth Amendment violation unless (1) “the prison official deprived the prisoner  
2 of the ‘minimal civilized measure of life’s necessities,’” and (2) “the prison official ‘acted with  
3 deliberate indifference in doing so.” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004)  
4 (quoting Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). A prison official  
5 does not act in a deliberately indifferent manner unless the official “knows of and disregards an  
6 excessive risk to inmate health or safety.” Farmer v. Brennan, 511 U.S. 825, 834, 114 S.Ct. 1970  
7 (1994).

8 Plaintiff’s disagreement with Defendant Chen’s medical decisions regarding diet and  
9 medication is not sufficient to support a claim for violation of the Eighth Amendment. Jackson v.  
10 McIntosh, 90 F.3d 330, 332 (9th Cir. 1986); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir.  
11 1981). “Deliberate indifference is a high legal standard,” Toguchi, 391 F.3d at 1060, and the facts  
12 set forth in Plaintiff’s amended complaint do not support a plausible claim against Defendant Chen  
13 for knowingly disregarded a substantial risk of harm to Plaintiff’s health, Iqbal, 129 S.Ct. at 1949-50;  
14 Moss, 572 F.3d at 969; Farmer, 511 U.S. at 837.

15 **III. Conclusion and Order**

16 Plaintiff’s amended complaint fails to state a claim upon which relief may be granted under  
17 section 1983. Plaintiff was previously provided with notice of the deficiencies and an opportunity  
18 to amend, but he was unable to cure the deficiencies in his claim and further leave to amend is not  
19 warranted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446,  
20 1448-49 (9th Cir. 1987).

21 Accordingly, this action is HEREBY DISMISSED, with prejudice, for failure to state a claim  
22 under section 1983 and the dismissal shall count as a strike under 28 U.S.C. § 1915(g).

23  
24 IT IS SO ORDERED.

25 **Dated: May 31, 2011**

/s/ Sheila K. Oberto  
UNITED STATES MAGISTRATE JUDGE