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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IRA GREEN,

 Plaintiff,

 v.

JOHN CHAKOTOS,

 Defendant.

Case No. 1:11-cv-01611-LJO-DLB PC

**FINDINGS AND RECOMMENDATIONS
RECOMMENDING TO DISMISS
CERTAIN CLAIMS**

ECF No. 25

RESPONSE DUE WITHIN THIRTY DAYS

I. Background

Plaintiff Ira Green (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se in this civil action pursuant to 42 U.S.C. § 1983. Plaintiff filed this action in Fresno County Superior Court on June 27, 2011. Defendants removed the action to this Court on September 22, 2011. On October 29, 2012, Plaintiff filed his First Amended Complaint. (ECF No. 18.) On April 2, 2013, the Court screened Plaintiff’s first amended complaint and found that it stated some cognizable claims. (ECF No. 24.) Plaintiff was ordered to file an amended complaint curing the deficiencies in his non-cognizable claims or to proceed only on the claims found to be cognizable. On May 3, 2013, Plaintiff filed a second amended complaint, which is presently before the Court for screening. (ECF No. 25.)

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or 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

1 monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1),(2).

2 A complaint must contain “a short and plain statement of the claim showing that the pleader
3 is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
4 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
5 do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550
6 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a
7 claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). While factual
8 allegations are accepted as true, legal conclusions are not. *Id.*

9 **II. Summary of Second Amended Complaint**

10 Plaintiff was incarcerated at Pleasant Valley State Prison (“PVSP”) in Coalinga, California,
11 where the events giving rise to this action occurred. Plaintiff names D. John Chakotos as the
12 defendant in this action.

13 Plaintiff alleges the following. On August 10, 2010, Defendant Chakotos examined Plaintiff
14 and informed him that he would be renewing Plaintiff’s pain medication, morphine and nuerrodins,
15 and gave Plaintiff a pain questionnaire to bring back within thirty days, when he would talk about
16 raising the dosage. Plaintiff however was cut off from the morphine without first tapering Plaintiff
17 off the medication by Defendant Chakotos. Defendant Chakotos was aware that Plaintiff suffered
18 chronic pain and required a knee replacement, and was aware that he should have weaned Plaintiff
19 off the medication instead of cutting Plaintiff off “cold turkey.” On September 2, 2010, Plaintiff
20 awoke and could not move, as his body started shaking and trembling uncontrollably. Plaintiff went
21 to healthcare, and was told to fill out a sick call request.

22 On September 14, 2010, Plaintiff was seen by Defendant Chakotos, and complained that he
23 endured chronic pain and had a seizure experience. Defendant Chakotos examined Plaintiff and
24 informed him that he would not be renewing Plaintiff’s pain medication. Defendant Chakotos told
25 Plaintiff that he would be prescribing Tylenol 3 for Plaintiff, but he lied and never prescribed
26 anything. On October 9, 2010, Plaintiff was seen by another doctor who renewed Plaintiff’s
27 medication at a lesser dosage of 15 milligrams of morphine in the morning and the evening. Plaintiff
28 later put in a medical request slip, complaining that the pain medication was not “sustaining” the

1 pain. Plaintiff was seen by Defendant Chakotos a week later. Defendant Chakotos was upset and
2 asked who had renewed Plaintiff’s pain medication because he had cut Plaintiff off. He then
3 informed Plaintiff that he would taper Plaintiff off the morphine.

4 Plaintiff contends a violation of the Eighth Amendment, and negligence and intentional tort¹.
5 Plaintiff requests compensatory and punitive damages as relief.²

6 **III. Analysis**

7 **A. Eighth Amendment**

8 The Eighth Amendment prohibits cruel and unusual punishment. “The Constitution does not
9 mandate comfortable prisons.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quotation and citation
10 omitted). A prisoner’s claim of inadequate medical care does not rise to the level of an Eighth
11 Amendment violation unless (1) “the prison official deprived the prisoner of the ‘minimal civilized
12 measure of life’s necessities,’” and (2) “the prison official ‘acted with deliberate indifference in
13 doing so.’” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Hallett v. Morgan*, 296
14 F.3d 732, 744 (9th Cir. 2002) (citation omitted)). The deliberate indifference standard involves an
15 objective and a subjective prong. First, the alleged deprivation must be, in objective terms,
16 “sufficiently serious” *Farmer*, 511 U.S. at 834 (citing *Wilson v. Seiter*, 501 U.S. 294, 298
17 (1991)). Second, the prison official must “know[] of and disregard[] an excessive risk to inmate
18 health or safety” *Id.* at 837.

19 “Deliberate indifference is a high legal standard.” *Toguchi*, 391 F.3d at 1060. “Under this
20 standard, the prison official must not only ‘be aware of the facts from which the inference could be
21 drawn that a substantial risk of serious harm exists,’ but that person ‘must also draw the inference.’”
22 *Id.* at 1057 (quoting *Farmer*, 511 U.S. at 837). “‘If a prison official should have been aware of the
23 risk, but was not, then the official has not violated the Eighth Amendment, no matter how severe the
24 risk.’” *Id.* (quoting *Gibson v. Cnty. of Washoe, Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002)).

25 Here, the Court finds that Plaintiff states a cognizable claim for relief against Defendant

26 ¹ Plaintiff fails to specify what intentional tort.

27 ² Plaintiff also requests that his pain medication be re-prescribed, and that he see a pain specialist from an outside pain
28 management clinic. Where the prisoner is challenging conditions of confinement and is seeking injunctive relief, transfer
to another prison renders the request for injunctive relief moot absent some evidence of an expectation of being
transferred back. *Andrews v. Cervantes*, 493 F.3d 1047, 1053 n.5 (9th Cir. 2007). Because Plaintiff has been transferred
to another facility, Plaintiff’s requests for injunctive relief are moot.

1 Chakotos for deliberate indifference to a serious medical need, in violation of the Eighth
2 Amendment.

3 **B. State Law Claims**

4 Plaintiff alleges negligence and intentional tort by Defendant Chakotos, which are state law
5 claims. California’s Tort Claims Act requires that a tort claim against a public entity or its
6 employees be presented to the California Victim Compensation and Government Claims Board,
7 formerly known as the State Board of Control, no more than six months after the cause of action
8 accrues. Cal. Gov’t Code §§ 905.2, 910, 911.2, 945.4, 950-950.2. Presentation of a written claim,
9 and action on or rejection of the claim, are conditions precedent to suit. *State v. Superior Court of*
10 *Kings Cnty. (Bodde)*, 32 Cal. 4th 1234, 1245 (2004); *Mangold v. Cal. Pub. Utils. Comm’n*, 67 F.3d
11 1470, 1477 (9th Cir. 1995). To state a tort claim against a public employee, a plaintiff must allege
12 compliance with the Tort Claims Act. *State v. Superior Court*, 32 Cal.4th at 1245; *Mangold*, 67 F.3d
13 at 1477; *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 627 (9th Cir. 1988). Plaintiff’s
14 second amended complaint provides sufficient evidence to satisfy the threshold requirement of the
15 California Tort Claims Act. Accordingly, the issue is whether Plaintiff’s second amended complaint
16 sufficiently pleads causes of action for his various state law claims.

17 **1. Negligence**

18 “Under California law, ‘[t]he elements of negligence are: (1) defendant’s obligation to
19 conform to a certain standard of conduct for the protection of others against unreasonable risks
20 (duty); (2) failure to conform to that standard (breach of duty); (3) a reasonably close connection
21 between the defendant’s conduct and resulting injuries (proximate cause); and (4) actual loss
22 (damages).” *Corales v. Bennett*, 567 F.3d 554, 572 (9th Cir. 2009) (quoting *McGarry v. Sax*, 158
23 Cal.App.4th 983, 994, 70 Cal.Rptr.3d 519 (2008) (internal quotations omitted)).

24 Here, the Court finds that Plaintiff states a cognizable claim for relief against Defendant
25 Chakotos for state law negligence.

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1 **2. Intentional Infliction of Emotional Distress³**

2 Under California law, the elements of intentional infliction of emotional distress are: (1)
3 extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard
4 of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme
5 emotional distress; and (3) actual and proximate causation of the emotional distress by the
6 defendant's outrageous conduct. *Corales v. Bennett*, 567 F.3d 554, 571 (9th Cir. 2009) (quotation
7 marks omitted); *Tekkle v. United States*, 567 F.3d 554, 855 (9th Cir. 2007); *Simo v. Union of*
8 *Needletrades, Industrial & Textile Employees*, 322 F.3d 602, 621-22 (9th Cir. 2003). Conduct is
9 outrageous if it is so extreme as to exceed all bounds of that usually tolerated in a civilized
10 community. *Corales*, 567 F.3d at 571; *Tekkle*, 511 F.3d at 855; *Simo*, 322 F.3d at 622. In addition
11 to the requirement that the conduct be intentional and outrageous, the conduct must have been
12 directed at Plaintiff or occur in the presence of Plaintiff, of whom Defendant was aware. *Simo*, 322
13 F.3d at 622.

14 Plaintiff's complaint is devoid of any facts showing he has suffered severe or extreme
15 emotional distress. Accordingly, the Court finds that Plaintiff fails to sufficiently plead a claim for
16 intentional infliction of emotional distress.

17 **IV. Conclusion and Recommendation**

18 Plaintiff states cognizable claims against Defendant John Chakotos for 1) deliberate
19 indifference to a serious medical need in violation of the Eighth Amendment; and 2) for negligence.
20 Plaintiff does not state any other claims against Defendant Chakotos. Under Rule 15(a) of the
21 Federal Rules of Civil Procedure, leave to amend 'shall be freely given when justice so requires,'"
22 Fed. R. Civ. P. 15(a), and "[l]eave to amend should be granted if it appears at all possible that the
23 plaintiff can correct the defect," *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (internal
24 citations omitted). However, the Court finds that the deficiencies outlined above are not capable of
25 being cured by amendment, and therefore leave to amend should not be granted. 28 U.S.C. §
26 1915(e)(2)(B)(ii); *Noll v. Carlson*, 809 F. 2d 1446, 1448-49 (9th Cir. 1987).

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³ Although Plaintiff does not specifically indicate which intentional tort claim he brings, the Court construes Plaintiff's claim as one for the intentional infliction of emotional distress.

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Accordingly, it is HEREBY RECOMMENDED that:

1. This action proceed on Plaintiff's second amended complaint, filed May 3, 2013, against Defendant John Chakotos for 1) deliberate indifference in violation of the Eighth Amendment; and 2) state law negligence;

2. Plaintiff's remaining state law claims be dismissed, with prejudice, for failure to state a claim.

These findings and recommendations are submitted to the district judge assigned to this action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within thirty (30) days of service of this recommendation, Plaintiff may file written objections to these findings and recommendations with the Court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The district judge will review the magistrate judge's findings and recommendations pursuant to 28 U.S.C. § 636(b)(1)(C). Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the district judge's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: September 19, 2013

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE