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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LEWIS PERRY,

Plaintiff,

v.

JOHN GARCIA, et al.,

Defendants.

Case No. 1:12-cv-00312-AWI-SKO PC

ORDER DIRECTING SECOND AMENDED COMPLAINT BE FILED, FINDING SERVICE OF SECOND AMENDED COMPLAINT APPROPRIATE ON EIGHTH AMENDMENT CLAIM AGAINST NGUYEN, AND DISMISSING OTHER CLAIMS AND DEFENDANTS, WITH PREJUDICE

(Doc. 20)

I. Procedural History

Plaintiff Lewis Perry, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on February 21, 2012. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On October 3, 2012, the Magistrate Judge dismissed Plaintiff's complaint, with leave to amend, for failure to state a claim. Plaintiff filed an amended complaint on October 31, 2012, and on January 23, 2013, the Magistrate Judge issued findings and recommendations recommending dismissal of this action, with prejudice, for failure to state a claim. On May 16, 2013, after obtaining two extensions of time, Plaintiff filed objections and submitted a proposed second amended complaint, which was lodged.

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1 At this juncture in the proceedings, Plaintiff has the right to amend once as a matter of
2 course and therefore, his second amended complaint shall be filed, rendering moot his objections
3 and the findings and recommendations to which those objections were directed. Fed. R. Civ. P.
4 15(a)(1).

5 **II. Screening Order**

6 **A. Statutory Screening Requirement**

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

15 **B. Eighth Amendment Claim**

16 **1. Allegations**

17 Plaintiff seeks to impose liability on Doctors Nguyen, Garcia, and Freeman; Chief Medical
18 Officer Lonigro; Warden Trimble; and Does 1-25 for violating his right to medical care under the
19 Eighth Amendment of the United States Constitution. At the time of the events in question,
20 Plaintiff was incarcerated at Pleasant Valley State Prison in Coalinga, California. Plaintiff is now
21 at California Medical Facility in Vacaville, California.

22 As recognized by the Magistrate Judge in both prior screening orders, Plaintiff’s allegation
23 that he suffers from chronic, painful boils which become infected and fail to heal is sufficient to
24 support the existence of a serious medical condition. *Wilhelm v. Rotman*, 680 F.3d 1113, 1122
25 (9th Cir. 2012). However, to state a viable Eighth Amendment claim, Plaintiff must also allege
26 facts showing that each of the named defendants knew of and disregarded Plaintiff’s medical
27 needs, causing him harm. *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970 (1994); *Estelle*

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1 v. *Gamble*, 429 U.S. 97, 104-06, 97 S.Ct. 285 (1976); *Wilhelm*, 680 F.3d at 1122; *Jett v. Penner*,
2 439 F.3d 1091, 1096 (9th Cir. 2006).

3 At the time Plaintiff was transferred to Pleasant Valley State Prison, he was suffering from
4 chronic, painful boils which would open and drain pus. After prison physicians were unsuccessful
5 in treating Plaintiff conservatively via topical ointments and dressing changes, they referred
6 Plaintiff to Defendant Garcia at San Joaquin Community Hospital. Defendant Garcia found that
7 Plaintiff was presenting with chronic perineal infection, and on March 30, 2010, Defendant Garcia
8 performed surgery on Plaintiff in an attempt to clear up the boils.

9 Several months later, Plaintiff was readmitted to the hospital after he failed to heal from
10 the surgery and the area around the surgical site became infected. Plaintiff was kept at the prison's
11 hospital for several more months, where he continued to develop painful, infected, open boils.

12 Plaintiff was then seen and treated by Defendant Freeman, a contract physician. However,
13 a week after Defendant Freeman attempted to re-suture Plaintiff's wounds, the wounds opened up
14 again and became infected, causing Plaintiff additional pain and suffering.

15 Plaintiff alleges that his treating physician, Defendant Nguyen, did nothing more than
16 order dressing changes on a regular basis. Bloody pus continued to drain from the open wounds
17 and boils. Plaintiff's medical problems were beyond "the defendants'" medical training and
18 experience, but they did nothing further for him for twelve months. (2nd Amend. Comp., ¶33.)

19 Plaintiff was finally seen in September 2011 at the University of California, San Francisco,
20 where he was informed his condition could be treated but it would require major surgery and
21 extensive recovery. Approximately nine months later, Plaintiff was informed that he would not be
22 getting the surgery because it was too costly.

23 Plaintiff alleges that he continued suffer from his medical condition. Finally, on January
24 31, 2013, Plaintiff was transferred to California Medical Facility for treatment, where the pattern
25 continues.

26 **2. Defendants Garcia and Freeman**

27 With respect to outside physicians Garcia and Freeman, Plaintiff's second amended
28 complaint is devoid of any facts supporting his claim that they acted with deliberate indifference

1 to his medical needs.¹ The fact that the surgeries or procedures they performed failed to achieve
2 the desired results does not support a claim against them and they are entitled to dismissal. *Snow*
3 *v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (citation and quotation marks omitted); *Wilhelm*,
4 680 F.3d at 1122.

5 **3. Defendants Lonigro and Trimble**

6 Likewise, there are no facts supporting a claim against Defendants Lonigro and Trimble.
7 Defendants may not be held liable based solely on their positions of authority at the prison: section
8 1983 requires personal involvement in the violation at issue and liability may not be imposed
9 under a theory of *respondeat superior*. *Starr v. Baca*, 652 F.3d 1202, 1205-08 (9th Cir. 2011),
10 *cert. denied*, 132 S.Ct. 2101 (2012); *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1020-21
11 (9th Cir. 2010); *Ewing v. City of Stockton*, 588 F.3d 1218, 1235 (9th Cir. 2009); *Jones v. Williams*,
12 297 F.3d 930, 934 (9th Cir. 2002).

13 The conclusory assertion that Defendants Lonigro and Trimble are “directly and legally
14 responsible” is not a substitute for factual allegations linking them to the violation at issue. *Doe I*
15 *v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009). (2nd Amend. Comp., ¶¶16, 18.) The
16 Court is mindful that prisoners proceeding pro se in civil rights actions are entitled to have their
17 pleadings liberally construed and to have any doubt resolved in their favor, *Hebbe v. Pliler*, 627
18 F.3d 338, 342 (9th Cir. 2010), but the standard is not so lenient as to “unlock the doors of
19 discovery for a plaintiff armed with nothing more than conclusions,” *Ashcroft v. Iqbal*, 556 U.S.
20 662, 678-79, 129 S.Ct. 662 (2009). The sheer possibility that a defendant has acted unlawfully
21 does not suffice and Defendants Lonigro and Trimble are entitled to dismissal. *Id.* at 678
22 (quotation marks omitted).

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25 ¹ The presumption is that “conduct by private actors is not state action,” *Floreer v. Congregation Pidyon Shevuyim*,
26 *N.A.*, 639 F.3d 916, 922 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1000 (2012), but “state action may be found if . . .
27 there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly
28 treated as that of the State itself,” *Floreer*, 639 F.3d at 924 (quoting *Brentwood Academy v. Tennessee Secondary*
School Athletic Assoc., 531 U.S. 288, 295, 121 S.Ct. 924 (2001)). For purposes of screening, the Court will assume
these outside physicians were acting under color of state law by virtue of their contract with the state. *West v. Atkins*,
487 U.S. 42, 54, 108 S.Ct. 2250 (1988) (citations omitted).

1 **4. Defendant Nguyen**

2 Finally, Defendant Nguyen was Plaintiff’s primary care physician at the prison. A
3 complete denial of medical care is not required to show deliberate indifference. *Lopez v. Smith*,
4 203 F.3d 1122, 1132 (9th Cir. 2000). “The Eighth Amendment requires that prison officials
5 provide a system of ready access to adequate medical care.” *Hoptowit v. Ray*, 682 F.2d 1237,
6 1253 (9th Cir. 1982), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472, 481-
7 84, 115 S.Ct. 2293 (1995). “[M]edical staff must be competent to examine prisoners and diagnose
8 illnesses,” and must either “be able to treat medical problems or to refer prisoners to others who
9 can.” *Hoptowit*, 682 F.2d at 1253.

10 In light of Plaintiff’s serious medical condition, a condition which presented challenges
11 prison medical staff acknowledged being unequipped to address, the allegation that Defendant
12 Nguyen, Plaintiff’s primary care physician, failed to take any action beyond regular dressing
13 changes for one year is sufficient to support a claim under the Eighth Amendment.

14 **C. Conspiracy Claim**

15 Plaintiff also alleges a conspiracy claim under section 1985, which provides a cause of
16 action for conspiracy to deny equal protection of the laws. *Bretz v. Kelman*, 773 F.2d 1026, 1027-
17 28 (9th Cir. 1985). Given the nature of Plaintiff’s claim, which has been consistent across three
18 pleadings, there is no support his reliance on section 1985 for redress. There are no facts pled, nor
19 have there ever been, which even hint at the possibility of racial or class-based discrimination
20 against Plaintiff. *Bretz*, 773 F.2d at 1028-1030. Accordingly, Plaintiff’s section 1985 conspiracy
21 claim fails as a matter of law.²

22 **D. IIED Claim**

23 Plaintiff next alleges a claim under California law for intentional infliction of emotional
24 distress (IIED). The Government Claims Act requires that a tort claim against a public entity or
25 its employees be presented to the California Victim Compensation and Government Claims Board
26 no more than six months after the cause of action accrues. Cal. Gov’t Code §§ 905.2, 910, 911.2,

27 _____
28 ² To the extent Plaintiff’s claim should be construed as brought under section 1983, there are still no facts pled, nor
have there ever been, supporting the existence of a conspiracy to violate Plaintiff’s rights. *Avalos v. Baca*, 596 F.3d
583, 592 (9th Cir. 2010); *Franklin v. Fox*, 312 F.3d 423, 441 (9th Cir. 2001).

1 945.4, 950-950.2. Presentation of a written claim, and action on or rejection of the claim are
2 conditions precedent to suit; and to state a tort claim against a public employee, Plaintiff is
3 required to allege in his complaint facts demonstrating compliance with the Government Claims
4 Act. *Shirk v. Vista Unified Sch. Dist.*, 42 Cal.4th 201, 208-09 (Cal. 2007); *State v. Superior Court*
5 *of Kings Cnty. (Bodde)*, 32 Cal.4th 1234, 1239 (Cal. 2004); *Mangold v. California Pub. Utils.*
6 *Comm'n*, 67 F.3d 1470, 1477 (9th Cir. 1995); *Karim-Panahi v. Los Angeles Police Dep't*, 839
7 F.2d 621, 627 (9th Cir. 1988). Plaintiff's bald assertion that he complied with the Government
8 Claims Act does not suffice to demonstrate he timely presented a claim or that compliance with
9 the claims statute was excused.³ *Shirk.*, 42 Cal.4th at 209.

10 In addition to that deficiency, Plaintiff's second amended complaint contains no facts
11 which support a claim for IIED, the elements of which are: (1) extreme and outrageous conduct by
12 the defendant with the intention of causing, or reckless disregard of the probability of causing,
13 emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual
14 and proximate causation of the emotional distress by the defendant's outrageous conduct. *Corales*
15 *v. Bennett*, 567 F.3d 554, 571 (9th Cir. 2009) (quotation marks omitted); *Tekkle v. United States*,
16 567 F.3d 554, 855 (9th Cir. 2007); *Simo v. Union of Needletrades, Industrial & Textile Employees*,
17 322 F.3d 602, 621-22 (9th Cir. 2003). The crux of Plaintiff's claims is and has been the denial of
18 adequate treatment for his challenging medical condition, and the facts set forth in Plaintiff's
19 second amended complaint do not support the existence of an IIED claim.

20 **E. Relief Sought**

21 Finally, in addition to damages, Plaintiff seeks a declaration that his rights were violated
22 and an injunction requiring he be provided with proper medical care. Because Plaintiff's claim for
23 damages necessarily entails a determination whether his rights were violated, his separate request
24 for declaratory relief is subsumed by that claim. *Rhodes v. Robinson*, 408 F.3d 559, 565-66 n.8
25 (9th Cir. 2005) (quotation marks omitted). Further, because Plaintiff is no longer incarcerated at
26 Pleasant Valley State Prison, he lacks standing to pursue a claim for injunctive relief against

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28 ³ The Court notes that Plaintiff's prior two pleadings alleged only compliance with the prison grievance system and
his original complaint was supported with prison grievance system documents.

1 Defendant Nguyen. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992);
2 *Alvarez v. Hill*, 667 F.3d 1061, 1063-64 (9th Cir. 2012); *Nelson v. Heiss*, 271 F.3d 891, 897 (9th
3 Cir. 2001); *see also* 18 U.S.C. § 3626(a)(1)(A) (“Prospective relief in any civil action with respect
4 to prison conditions shall extend no further than necessary to correct the violation of the Federal
5 right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective
6 relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to
7 correct the violation of the Federal right, and is the least intrusive means necessary to correct the
8 violation of the Federal right.”)

9 Accordingly, Plaintiff is limited to seeking damages for the past violation of his rights at
10 Pleasant Valley State Prison.

11 **III. Order**

12 This action for damages shall proceed on Plaintiff’s second amended complaint against
13 Defendant Nguyen for violation of the Eighth Amendment. All other claims and defendants are
14 dismissed, with prejudice, for failure to state a claim. Plaintiff was twice provided with detailed
15 screening orders and the events giving rise to his legal claims - the denial of adequate medical care
16 for his challenging condition - have been consistent across three pleadings. As a result, further
17 leave to amend to cure the deficiencies identified in this order is not warranted. *Lopez*, 203 F.3d at
18 1130.

19 Based on the foregoing, the Court HEREBY ORDERS as follows:

- 20 1. Plaintiff’s second amended complaint, lodged on May 16, 2013, shall be filed;
- 21 2. Plaintiff’s Eighth Amendment claims against Defendants Garcia, Freeman,
22 Longoria, and Trimble are dismissed, with prejudice, for failure to state a claim;
- 23 3. Plaintiff’s conspiracy and intentional infliction of emotional distress claims are
24 dismissed, with prejudice, for failure to state a claim;
- 25 4. This action, which is limited to damages, shall proceed on Plaintiff’s Eighth
26 Amendment medical care claim against Defendant Nguyen; and

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5. This matter is referred back to the Magistrate Judge to initiate service of process.

IT IS SO ORDERED.

Dated: November 5, 2013



SENIOR DISTRICT JUDGE