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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

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MIZRA FIFIC,

Plaintiff,

v.

HARTLEY, et al.,

Defendants.

Case No. 1:13-cv-00885 DLB PC

ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND

THIRTY-DAY DEADLINE

Plaintiff Mizra Fific (“Plaintiff”), a state prisoner proceeding pro se, filed this civil rights action on June 12, 2013. Plaintiff paid the filing fee and is not proceeding pro se. Plaintiff names the California Department of Corrections and Rehabilitation, Avenal State Prison (“ASP”), ASP warden James D. Hartley, Jasmine Biol, M.D., and Nancy L. Siegrist, P.A. as Defendants.¹

A. LEGAL STANDARD

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 monetary relief from a defendant who is immune from such relief. 28 U.S.C.

¹ On June 26, 2013, Plaintiff consented to the jurisdiction of the United States Magistrate Judge for all purposes.

1 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been paid,
2 the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . .
3 fails to state a claim upon which relief may be granted.” 28 U.S.C.
4 § 1915(e)(2)(B)(ii).

5 A complaint must contain “a short and plain statement of the claim showing that the pleader
6 is entitled to relief . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but
7 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,
8 do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly,
9 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual matter, accepted as true, to
10 ‘state a claim that is plausible on its face.’” Id. (quoting Twombly, 550 U.S. at 555). While factual
11 allegations are accepted as true, legal conclusions are not. Id.

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

17 **B. SUMMARY OF PLAINTIFF’S ALLEGATIONS**

18 Plaintiff is currently incarcerated in Valley State Prison in Chowchilla, California.

19 Plaintiff alleges that prior to being transferred to Avenal State Prison (“ASP”), he should
20 have been examined by medical staff because he was a high risk inmate for Valley Fever infection.
21 He contends that he also should have been examined upon arrival at the new prison.

22 Plaintiff alleges that he was not examined at ASP, as ordered by the federal courts. Plaintiff
23 contends that because he was not examined, he has now contracted Valley Fever. He states that he
24 caught Valley Fever in December 2011 and was very ill. Plaintiff was seen six times at ASP and
25 given cough drops. He was finally diagnosed with Valley Fever in March 2012.

26 Plaintiff further contends that he is not currently receiving proper treatment.

1 **C. ANALYSIS**

2 1. Linkage and Rule 8

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

8 Similarly, a complaint must contain “a short and plain statement of the claim showing that
9 the pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
10 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell
12 Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth “sufficient factual matter,
13 accepted as true, to ‘state a claim that is plausible on its face.’” Id. (quoting Twombly, 550 U.S. at
14 555). While factual allegations are accepted as true, legal conclusions are not. Id.

15 Here, Plaintiff names numerous Defendants in the caption, but he fails to include any facts
16 showing how each Defendant is linked to an alleged deprivation of his rights. For example, although
17 Plaintiff alleges inadequate medical care, he fails to explain how each of the Defendants was
18 involved in his care. He also fails to allege sufficient facts to determine whether any constitutional
19 violation occurred. While Plaintiff may ultimately be able to state a claim, he has not provided
20 sufficient information to state a claim at this juncture.

21 The Court will allow Plaintiff to amend his complaint. In amending, he should keep the
22 following standards in mind.

23 2. Eighth Amendment

24 While the Eighth Amendment of the United States Constitution entitles Plaintiff to medical
25 care, the Eighth Amendment is violated only when a prison official acts with deliberate indifference
26 to an inmate’s serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012);
27 Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d 1091, 1096 (9th
28 Cir. 2006). Plaintiff “must show (1) a serious medical need by demonstrating that failure to treat

1 [his] condition could result in further significant injury or the unnecessary and wanton infliction of
2 pain,” and (2) that “the defendant’s response to the need was deliberately indifferent.” Wilhelm, 680
3 F.3d at 1122 (citing Jett, 439 F.3d 1091, 1096 (9th Cir. 2006)). Deliberate indifference is shown by
4 “(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need, and (b) harm
5 caused by the indifference.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The
6 requisite state of mind is one of subjective recklessness, which entails more than ordinary lack of
7 due care. Snow, 681 F.3d at 985 (citation and quotation marks omitted); Wilhelm, 680 F.3d at 1122.

8 Plaintiff mentions “medical negligence” in his allegations, but he is cautioned that negligence
9 does not rise to the level of an Eighth Amendment violation. An Eighth Amendment claim may not
10 be premised on even gross negligence by a physician. Wood v. Housewright, 900 F.2d 1332, 1334
11 (9th Cir. 1990).

12 3. CDCR and Avenal State Prison

13 Finally, Plaintiff includes CDCR and Avenal State Prison in the caption of his complaint.
14 However, the Eleventh Amendment erects a general bar against federal lawsuits brought against the
15 state. Wolfson v. Brammer, 616 F.3d 1045, 1065-66 (9th Cir. 2010) (citation and quotation marks
16 omitted). While “[t]he Eleventh Amendment does not bar suits against a state official for
17 prospective relief,” Wolfson, 616 F.3d at 1065-66, suits against the state or its agencies are barred
18 absolutely, regardless of the form of relief sought, e.g., Pennhurst State School & Hosp. v.
19 Halderman, 465 U.S. 89, 100, 104 S.Ct. 900 (1984); Buckwalter v. Nevada Bd. of Medical
20 Examiners, 678 F.3d 737, 740 n.1 (9th Cir. 2012).

21 Thus, Plaintiff may not maintain a claim against CDCR or Avenal State Prison, which is part
22 of CDCR.

23 **D. CONCLUSION AND ORDER**

24 Plaintiff’s complaint fails to state a claim under section 1983. The Court will provide
25 Plaintiff with an opportunity to file an amended complaint in an attempt to cure the deficiencies
26 identified above. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d
27 1446, 1448-49 (9th Cir. 1987). Plaintiff may not change the nature of this suit by adding new,
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1 unrelated claims in his amended complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no
2 “buckshot” complaints).

3 Plaintiff’s amended complaint should be brief, Fed. R. Civ. P. 8(a), but it must state what
4 each named defendant did that led to the deprivation of Plaintiff’s constitutional rights. Although
5 accepted as true, the “[f]actual allegations must be [sufficient] to raise a right to relief above the
6 speculative level. . . .” Twombly, 550 U.S. at 555 (citations omitted).

7 Finally, an amended complaint supercedes the prior complaint, Forsyth v. Humana, Inc., 114
8 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and it must be
9 “complete in itself without reference to the prior or superceded pleading,” Local Rule 220.

10 Based on the foregoing, it is HEREBY ORDERED that:

11 1. The Clerk’s Office shall send Plaintiff a complaint form;

12 2. Plaintiff’s complaint is dismissed for failure to state a claim upon which relief may be
13 granted under section 1983;

14 3. Within thirty (30) days from the date of service of this order, Plaintiff shall file an
15 amended complaint; and

16 4. If Plaintiff fails to file an amended complaint in compliance with this order, this
17 action will be dismissed, with prejudice, for failure to state a claim under section 1983.

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19 IT IS SO ORDERED.

20 Dated: February 7, 2014

21 /s/ Dennis L. Beck
22 UNITED STATES MAGISTRATE JUDGE

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