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8 **UNITED STATES DISTRICT COURT**

9 EASTERN DISTRICT OF CALIFORNIA

10
11 DEWEY MITCHELL,

12 Plaintiff,

13 v.

14 LVN GALEY, et al.,

15 Defendants.
16 _____/

Case No. 1:14-cv-00317-LJO-SKO (PC)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING ACTION BE
DISMISSED, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM UNDER
SECTION 1983

(Doc. 9)

17 **I. Screening Requirement and Standard**

18 Plaintiff Dewey Mitchell, a state prisoner proceeding pro se and in forma pauperis, filed
19 this civil rights action pursuant to 42 U.S.C. § 1983 on March 6, 2014. On October 9, 2014, the
20 Court dismissed Plaintiff's complaint, with leave to amend, for failure to state a claim. Plaintiff
21 filed an amended complaint on November 7, 2014.

22 The Court is required to screen complaints brought by prisoners seeking relief against a
23 governmental entity or an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
24 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
25 legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that
26 seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),
27 (2). "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court
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1 shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to
2 state a 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
4 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
5 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
6 conclusory statements, do not suffice,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937
7 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and
8 courts “are not required to indulge unwarranted inferences,” *Doe I v. Wal-Mart Stores, Inc.*, 572
9 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). While factual
10 allegations are accepted as true, legal conclusions are not. *Iqbal*, 556 U.S. at 678.

11 Under section 1983, Plaintiff must demonstrate that each defendant personally participated
12 in the deprivation of his rights. *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). This
13 requires the presentation of factual allegations sufficient to state a plausible claim for relief. *Iqbal*,
14 556 U.S. at 678-79; *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). Prisoners
15 proceeding pro se in civil rights actions are entitled to have their pleadings liberally construed and
16 to have any doubt resolved in their favor, *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010)
17 (citations omitted), but nevertheless, the mere possibility of misconduct falls short of meeting the
18 plausibility standard, *Iqbal*, 556 U.S. at 678; *Moss*, 572 F.3d at 969.

19 **II. Discussion**

20 **A. Summary of Plaintiff’s Allegations**

21 Plaintiff, who is currently incarcerated at Mule Creek State Prison in Ione, California,
22 brings this action against Licensed Vocational Nurse Galey, Dr. Biol, Physician Assistant S.
23 Hitchman, and Chief Medical Officer Chapnick for violating his rights under the Eighth
24 Amendment of the United States Constitution with respect to his diabetes while he was at Avenal
25 State Prison in 2012.

26 As an initial matter, Plaintiff omitted certain relevant allegations from his amended
27 complaint, which is briefer than his original complaint and which lacks the exhibits attached to his
28 original complaint. “A party cannot amend pleadings to ‘directly contradict an earlier assertion

1 made in the same proceeding,”” *Air Aromatics, LLC v. Opinion Victoria’s Secret Stores Brand*
2 *Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th
3 Cir. 1990)), and given the omissions, the Court will consider both pleadings in determining
4 whether Plaintiff’s allegations support any viable Eighth Amendment claims,

5 In his original complaint, as summarized in the first screening order, Plaintiff alleged as
6 follows:

7 Plaintiff alleges that on or around November 1, 2012, Defendant Galey injected
8 him with an incorrect dosage of insulin, and he began to feel dizzy and see spots
9 within fifteen minutes of the injection. Plaintiff returned to the B Facility medical
10 clinic and Defendant Galey checked his blood sugar level, which was 63.
11 Defendant Galey gave Plaintiff Glucose 15 and called the trauma center. Plaintiff
12 began to sweat profusely and he passed out. Defendant Galey gave Plaintiff more
13 glucose, and during Plaintiff’s transportation to the trauma center, he went in and
14 out of consciousness.

15 Plaintiff was not transported to an outside hospital, and he fought for his life for
16 four hours. Plaintiff alleges that his blood sugar level was rising and falling in
17 rapid succession, 300 one minute and 30 the next minute. Further, Plaintiff was not
18 stabilized until 0200 hours.

19 Next, Plaintiff alleges that ASP medical staff failed to provide him with a special
20 diabetic diet, and the regular diet did not provide him with proper nutrients because
21 the nutritional value of the meals came from starch and carbohydrates. On October
22 5, 2012, a physician assistant at ASP told Plaintiff he was not getting a special diet,
23 and Defendant Chapnick told him he did not need a special diabetic diet because he
24 was on the “Heart Healthy Diet.” (Comp., p. 10.) Plaintiff alleges, however, that
25 the Heart Healthy Diet did not provide him with proper nutrition, and that the
26 failure to provide him with a special diabetic diet contributed to the further
27 deterioration of his health.

28 Doc. 8, Order, 2:25-3:13.)

29 In his amended complaint, Plaintiff alleges that on or around November 1, 2012,
30 “Defendant Galey injected Plaintiff with a [deadly] lethal combination of insulin which caused the
31 Plaintiff to go into diabetic shock.” (Doc. 9, Amend. Comp., p. 3.) Plaintiff alleges that
32 Defendant Galey had given Plaintiff his insulin injection on numerous occasions, he knew giving
33 the wrong dosage would cause diabetic shock, and he gave Plaintiff the wrong dosage anyway.

34 Subsequently, two MTAs revived Plaintiff by administering sugar shots and food, saving
35 his life, but Defendant Biol, who was in the TTA,¹ sent him back to his cell while he was still

36 ¹ Trauma Treatment Area. (Doc. 1, Comp., p. 3.)

1 unstable and in the absence of any testing to determine why Plaintiff was going in and out of
2 consciousness and his blood sugar was fluctuating. Plaintiff “fell out again” and returned to the
3 TTA, where he was eventually stabilized at 0200 hours. (*Id.*, p. 4.)

4 Next, Plaintiff alleges that while he was at the El Dorado County Jail, he was provided
5 with a diabetic diet and “proper” insulin dosages. (*Id.*) When he arrived at ASP, Defendant
6 Chapnick reviewed his medical file and determined he did not need a diabetic diet and he needed
7 an insulin dosage increase. Plaintiff alleges that a heart healthy diet does not keep diabetics’ blood
8 sugar levels in check, and Defendant Chapnick increased his insulin dosage to compensate for the
9 heart healthy diet.

10 Finally, Plaintiff alleges that Defendant Hitchman failed to provide Plaintiff with a diabetic
11 diet and diabetics face deterioration as a result of improper diet. Plaintiff alleges that he suffers
12 from retinopathy, which has caused his eyesight to worsen, and his kidneys are affected by high
13 A1C levels.²

14 Plaintiff alleges that “[i]n looking at the totality-of-the-circumstances the defendant’s
15 actions and inactions were and are the proximate cause of Plaintiff’s declining health,” and “[t]heir
16 actions combined show that they were ‘deliberately indifferent’ to Plaintiff’s serious medical
17 needs in treating his diabetes.” (*Id.*)

18 **B. Eighth Amendment Medical Care Claims**

19 **1. Legal Standard**

20 While the Eighth Amendment of the United States Constitution entitles Plaintiff to medical
21 care, the Eighth Amendment is violated only when a prison official acts with deliberate
22 indifference to an inmate’s serious medical needs. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir.
23 2012)), *overruled in part on other grounds*, *Peralta v. Dillard*, 744 F.3d 1076, 1082-83 (9th Cir.
24 2014); *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012); *Jett v. Penner*, 439 F.3d 1091,

26 ² The Court may take judicial notice of information on government websites not subject to reasonable dispute, Fed. R.
27 Evid. 201; *Daniels-Hall v. National Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010); *Siebert v. Gene Security*
28 *Network, Inc.*, __ F.Supp.3d __, __, 2015 WL 6765835, at *1 n.2 (N.D.Cal. 2014), and it takes judicial notice of the
fact that “[t]he A1C test is a blood test that provides information about a person’s average levels of blood glucose...
over the past three months,” <http://diabetes.niddk.nih.gov/dm/pubs/A1CTest/#1> (U.S. Dept. of Health & Human
Services, National Institutes of Health website).

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

10 **2. Findings**

11 Diabetes, which in Plaintiff’s case requires treatment via insulin injection, unquestionably
12 qualifies as a serious medical need, and the Court sympathizes with the challenges diabetes can
13 present. *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014); *Lemire v. California Dep’t of*
14 *Corr. and Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013). However, to state a viable claim for
15 violation of the Eighth Amendment, Plaintiff must also allege adequate facts to support a claim
16 that each named defendant knew of and disregarded an excessive risk of harm to Plaintiff’s health.
17 *Colwell*, 763 F.3d at 1066; *Lemire*, 726 F.3d at 1074.

18 **a. Defendant Galey**

19 Here, Plaintiff’s allegations do not support a claim that Defendant Galey acted with
20 subjective deliberate indifference by intentionally administering the wrong dosage of insulin to
21 Plaintiff. Although Plaintiff alleges that Defendant Galey administered the wrong dosage despite
22 having previously administered insulin to Plaintiff and knowing the harm that could befall
23 someone given the wrong dosage, his allegations across both pleadings simply do not suggest that
24 Defendant Galey knowingly and intentionally administered the wrong insulin dosage to Plaintiff.
25 While Plaintiff clearly alleges resulting harm, an error such as this does not “become a
26 constitutional violation merely because the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S. 97,
27 106, 97 S.Ct. 285 (1977); *Colwell*, 763 F.3d at 1068; *Lemire*, 726 F.3d at 1081-82; *Snow*, 681 F.3d
28 at 987-88; *Wilhelm*, 680 F.3d at 1122.

1 **b. Defendant Biol**

2 With respect to Defendant Biol, Plaintiff's allegations also fall short of supporting a claim
3 that Biol knowingly disregarded a serious risk of harm to Plaintiff's health. Between both
4 pleadings, Plaintiff's allegations show that he returned to the facility clinic about fifteen minutes
5 after receiving the incorrect insulin injection, when he became dizzy and started seeing spots.
6 Defendant Galey checked Plaintiff's sugar level, administered Glucose 15, and called the TTA.
7 While awaiting a response, Plaintiff started sweating and passed out; and Defendant Galey
8 administered more glucose. Plaintiff alleges that Defendant Biol subsequently sent him back to
9 his cell while he was still unstable and without conducting further tests. Plaintiff thereafter
10 returned back to the TTA, where he was ultimately stabilized after many hours.

11 Although Plaintiff alleges that Defendant Biol failed to conduct further testing, Plaintiff's
12 allegations establish that, at the very *minimum*, he received some measure of assessment by
13 Defendant Galey and some measure of treatment first by Galey and then by two MTAs. Section
14 1983 provides no redress for mere disagreements between prisoners and medical staff, and based
15 on the facts alleged in both pleadings, Plaintiff's allegations evidence his mere disagreement with
16 Defendant Biol's medical evaluation and decision to return him to his cell; there is no factual
17 support for a reasonable inference that Defendant Biol knew of and disregarded a substantial risk
18 of harm to Plaintiff's health when he determined Plaintiff could return to his cell.

19 **c. Defendants Chapnick and Hitchman**

20 Finally, with respect to a special diabetic diet, Plaintiff's disagreement with prison
21 officials' determination that a heart-healthy diet met his dietary needs does not support a claim
22 under section 1983. *Snow*, 681 F.3d at 987-88; *Wilhelm*, 680 F.3d at 1122-23. Plaintiff alleges
23 that Defendant Chapnick reviewed his medical file and determined that he did not need a diabetic
24 diet and his insulin needed increased. In addition, Exhibit B to Plaintiff's original complaint
25 evidences that he was interviewed regarding his request for a diabetic diet, during the course of
26 which his laboratory studies were reviewed. Plaintiff's disagreement with medical staff's
27 determination that the standard "Heart Healthy Diet" sufficed and he lacked any medical need for
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1 a more specialized diet does not give rise to a viable claim for relief under section 1983. (Doc. 1,
2 Comp., Ex. B.)

3 **III. Conclusion and Recommendation**

4 Plaintiff's amended complaint fails to state a claim upon which relief may be granted under
5 section 1983. Plaintiff was previously provided with an opportunity to amend and based on the
6 allegations in both pleadings, and the exhibits included with the original complaint, further leave
7 to amend is not warranted. *Akhtar v. Mesa*, 698 F.3d 1202, 1212-13 (9th Cir. 2012); *Lopez v.*
8 *Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000). Accordingly, the Court HEREBY RECOMMENDS
9 that this action be dismissed, with prejudice, for failure to state a claim under section 1983.

10 These Findings and Recommendations will be submitted to the United States District
11 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
12 **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may file
13 written objections with the Court. The document should be captioned "Objections to Magistrate
14 Judge's Findings and Recommendations." Plaintiff is advised that failure to file objections within
15 the specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d
16 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

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19 IT IS SO ORDERED.

20 Dated: May 27, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE