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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BENJAMIN K. TOSCANO,
Plaintiff,
v.
SCOTT KERNAN et al.,
Defendants.

CASE NO. 1:17-cv-00292-MJS (PC)
**ORDER DIRECTING CLERK'S
OFFICE TO ASSIGN MATTER TO A
DISTRICT JUDGE**
**FINDINGS AND RECOMMENDATION
TO DISMISS COMPLAINT WITHOUT
LEAVE TO AMEND**
(ECF NO. 1)
FOURTEEN (14) DAY DEADLINE

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. (ECF No. 1.) Plaintiff has consented to magistrate judge jurisdiction. (ECF No. 6.) No other parties have appeared in this action.

On March 07, 2017, the undersigned screened Plaintiff's complaint and dismissed it for failure to state a claim. (ECF No. 8.) Plaintiff appealed. (ECF No. 10.) On January 25, 2018, the Ninth Circuit Court of Appeals vacated the dismissal and remanded on the

1 ground that the undersigned lacked jurisdiction to issue such an order. (ECF Nos. 16,
2 17.)

3 The case has been reopened and Plaintiff's complaint is again before the Court for
4 screening. (ECF No. 1.)

5 **I. Williams v. King**

6 On November 9, 2017, the Ninth Circuit Court of Appeals ruled that 28 U.S.C.
7 § 636(c)(1) requires the consent of all named plaintiffs and defendants, even those not
8 served with process, before jurisdiction may vest in a Magistrate Judge to dispose of a
9 civil claim. Williams v. King, 875 F.3d 500 (9th Cir. 2017). Accordingly, the Court held that
10 a magistrate judge does not have jurisdiction to dismiss a claim with prejudice during
11 screening even if the plaintiff has consented to magistrate judge jurisdiction if all parties
12 have not consented. Williams, 875 F.3d, at 501. Since the Defendants were not yet
13 served and had not appeared or consented to magistrate judge jurisdiction, the Ninth
14 Circuit vacated this Court's dismissal on the ground that it had no jurisdiction to dismiss.
15 (Id.) The Ninth Circuit did not reach the merits of the undersigned's screening order.

16 Because the undersigned nevertheless stands by the analysis of Plaintiff's claims
17 set forth in the previous screening order, the undersigned will below recommend to the
18 District Judge that the complaint be dismissed without leave to amend for failure to state
19 a claim.

20 **II. Findings and Recommendations on First Amended Complaint**

21 **A. Screening Requirement**

22 The Court is required to screen complaints brought by prisoners seeking relief
23 against a governmental entity or an officer or employee of a governmental entity. 28
24 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner
25 has raised claims that are legally "frivolous or malicious," that fail to state a claim upon
26 which relief may be granted, or that seek monetary relief from a defendant who is
27 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). "Notwithstanding any filing fee, or
28 any portion thereof, that may have been paid, the court shall dismiss the case at any time

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

3 **B. Pleading Standard**

4 Section 1983 provides a cause of action against any person who deprives an
5 individual of federally guaranteed rights “under color” of state law. 42 U.S.C. § 1983. A
6 complaint must contain “a short and plain statement of the claim showing that the pleader
7 is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
8 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
9 mere conclusory statements, do not suffice,” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
10 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)), and courts “are not
11 required to indulge unwarranted inferences,” Doe I v. Wal-Mart Stores, Inc., 572 F.3d
12 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). While factual
13 allegations are accepted as true, legal conclusions are not. Iqbal, 556 U.S. at 678.

14 Under section 1983, Plaintiff must demonstrate that each defendant personally
15 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.
16 2002). This requires the presentation of factual allegations sufficient to state a plausible
17 claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962,
18 969 (9th Cir. 2009). Prisoners proceeding pro se in civil rights actions are entitled to have
19 their pleadings liberally construed and to have any doubt resolved in their favor, Hebbe v.
20 Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted), but nevertheless, the mere
21 possibility of misconduct falls short of meeting the plausibility standard, Iqbal, 556 U.S. at
22 678; Moss, 572 F.3d at 969.

23 **C. Plaintiff’s Allegations in the Complaint**

24 Plaintiff is incarcerated at Pelican Bay State Prison, but complains of acts that
25 occurred at Corcoran State Prison. He names the following defendants: (1) CDCR
26 Director Scott Kernan, (2) CDCR DRR Director J. Macomber, (3) DRB Member and
27 “Chief of CSU” B. Moak, (4) DRB Member and Correctional Counselor I E. Park,

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1 (5) Correctional Lieutenant M. Lujan, (6) Deputy Attorney General Byron Miller, and
2 (7) Magistrate Judge Erica P. Grosjean.

3 His allegations may be summarized essentially as follows:

4 On September 23, 2016, Plaintiff filed suit against Defendant Kernan in relation to
5 his placement in the step down program. See Toscano v. Kernan, No. 1:16-cv-01554-
6 EPG (E.D. Cal.) ("Toscano I"). The matter was assigned to the Honorable Erica
7 Grosjean, U.S. Magistrate Judge. Judge Grosjean ordered the Office of the Attorney
8 General to respond to Plaintiff's motion for injunctive relief. Judge Grosjean granted
9 Defendants' request to seal documents. She also dismissed Plaintiff's complaint with
10 leave to amend and denied his motion for injunctive relief. Plaintiff filed a motion for
11 reconsideration, which was denied by Judge Grosjean. Plaintiff contends that the denial
12 violated Federal Rule of Civil Procedure 60 and that Judge Grosjean's rulings were
13 inaccurate.

14 Plaintiff filed the instant action on March 2, 2017. The Court takes judicial notice of
15 the docket in Toscano I and notes that, on April 17, 2017, Judge Grosjean dismissed
16 Plaintiff's second amended complaint with prejudice and without leave to amend on the
17 ground that it failed to state a claim. (Case No. 1:16-cv-01554-EPG, ECF No. 34.)

18 Plaintiff seeks injunctive relief in relation to the claims raised in Case No. 1:16-cv-
19 01554-EPG, a criminal investigation, a federal investigation, transfer to a different
20 institution, and money damages.

21 **D. Analysis**

22 **1. Judicial Immunity**

23 Plaintiff alleges that Judge Grosjean erroneously ruled against him in Toscano I.
24 Judge Grosjean is entitled to absolute judicial immunity from such claims. See 42 U.S.C.
25 § 1983; In re Castillo, 297 F.3d 940, 947 (9th Cir. 2002), as amended (Sept. 6, 2002).
26 Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004) (quoting Bradley v.
27 Fisher, 13 Wall. 335, 347 (1871)); Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1133 (9th Cir.
28 2001), as amended on denial of reh'g (Oct. 11, 2001) (quoting Meek v. Cnty. of

1 Riverside, 183 F.3d 962, 967 (9th Cir. 1999)). This claim is not cognizable and should be
2 dismissed.

3 **2. Deputy Attorney General Byron Miller**

4 Defendant Miller represented the defendants in Toscano I by opposing Plaintiff's
5 motion for injunctive relief and by submitting certain documents under seal. Plaintiff does
6 not state any violation of his rights arising out of this representation. In any event, these
7 actions do not subject Defendant Miller to liability under section 1983. Defendant Miller is
8 absolutely immune under Section 1983 for actions taken in defending the State in suits
9 brought against it. Bly–Magee v. California, 236 F.3d 1014, 1016 (9th Cir. 2001); Fry v.
10 Melaragno, 939 F.2d 832, 835–36 (9th Cir. 1991); Imbler v. Pachtman, 424 U.S. 409, 431
11 (1976); Murphy v. Morris 849 F.2d 1101, 1105 (8th Cir.1988). This claim is not cognizable
12 and should be dismissed.

13 **3. Challenges to Case No. 1:16-cv-01554-EPG**

14 Plaintiff cannot seek relief in this action from orders issued in other cases. To
15 obtain review of the decisions issued Toscano I, Plaintiff must file a motion in that case or
16 seek appellate review of that judgment.

17 **4. Leave to Amend**

18 In general, a pro se Plaintiff is entitled to leave to amend unless “it appears
19 beyond doubt that the plaintiff can prove no set of facts in support of his claim which
20 would entitle him to relief.” Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984)
21 (citation omitted). “Valid reasons for denying leave to amend include undue delay, bad
22 faith, prejudice and futility.” Cal. Architectural Bldg. Prod. v. Franciscan Ceramics, 818
23 F.2d 1276, 1293 (9th Cir. 1983); Lockman Found. v. Evangelical Alliance Mission, 930
24 F.2d 764, 772 (9th Cir. 1991).

25 In this instance, the Court finds that amendment of the complaint would be futile.
26 Plaintiff cannot herein challenge the rulings in another action, nor can he proceed against
27 Defendants who are immune from suit. Leave to amend should be denied.

28

1 **III. Conclusion and Recommendation**

2 Plaintiff has consented to Magistrate Judge jurisdiction. (ECF No. 6.) However, no
3 defendants have appeared or consented. Accordingly, the Clerk’s Office is HEREBY
4 DIRECTED to randomly assign this matter to a district judge pursuant to Local Rule
5 120(e).

6 Additionally, Plaintiff’s complaint fails to state a cognizable claim. Accordingly, IT
7 IS HEREBY RECOMMENDED that this action be DISMISSED without leave to amend.

8 These findings and recommendation will be submitted to the United States District
9 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).
10 Within fourteen (14) days after being served with the findings and recommendation, the
11 parties may file written objections with the Court. The document should be captioned
12 “Objections to Magistrate Judge’s Findings and Recommendation.” A party may respond
13 to another party’s objections by filing a response within fourteen (14) days after being
14 served with a copy of that party’s objections. The parties are advised that failure to file
15 objections within the specified time may result in the waiver of rights on appeal.
16 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923
17 F.2d 1391, 1394 (9th Cir. 1991)).

18
19 IT IS SO ORDERED.

20 Dated: February 22, 2018

/s/ Michael J. Seng
21 UNITED STATES MAGISTRATE JUDGE
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