

1 2 3 4 5 6 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

11 EDWARD B. SPENCER,
12 Plaintiff,
13 v.
14 KOKOR, et al.,
15 Defendant.

Case No. 1:17-cv-00597-DAD-JLT (PC)
**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**
(Doc. 1)
21-DAY DEADLINE

17 Plaintiff seeks to proceed on claims under the Eighth Amendment for deliberate
18 indifference to his serious medical needs against Dr. Kokor and Nurse Powell for failing to timely
19 renew/refill various of his medications. Plaintiff has not stated any cognizable claims, but may be
20 able to do so. Thus, the Court grants him leave to file a first amended complaint.

A. Screening Requirement

22 The Court is required to screen complaints brought by prisoners seeking relief against a
23 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
24 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
25 frivolous, malicious, fail to state a claim upon which relief may be granted, or that seek monetary
26 relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2); 28 U.S.C.
27 § 1915(e)(2)(B)(i)-(iii).

28 | //

1 **B. Pleading Requirements**

2 **1. Federal Rule of Civil Procedure 8(a)**

3 “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited
4 exceptions,” none of which applies to section 1983 actions. *Swierkiewicz v. Sorema N. A.*, 534
5 U.S. 506, 512 (2002); Fed. R. Civ. Pro. 8(a). A complaint must contain “a short and plain
6 statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. Pro. 8(a).
7 “Such a statement must simply give the defendant fair notice of what the plaintiff’s claim is and
8 the grounds upon which it rests.” *Swierkiewicz*, 534 U.S. at 512.

9 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a
10 cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556
11 U.S. 662, 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
12 Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim that is
13 plausible on its face.’” *Iqbal*, 556 U.S. at 678, quoting *Twombly*, 550 U.S. at 555. Factual
14 allegations are accepted as true, but legal conclusions are not. *Iqbal* at 678; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009); *Twombly*, 550 U.S. at 556-557.

16 While “plaintiffs [now] face a higher burden of pleadings facts . . . ,” *Al-Kidd v. Ashcroft*,
17 580 F.3d 949, 977 (9th Cir. 2009), the pleadings of *pro se* prisoners are still construed liberally
18 and are afforded the benefit of any doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).
19 However, “the liberal pleading standard . . . applies only to a plaintiff’s factual allegations,”
20 *Neitze v. Williams*, 490 U.S. 319, 330 n.9 (1989), “a liberal interpretation of a civil rights
21 complaint may not supply essential elements of the claim that were not initially pled,” *Brunsv v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) quoting *Ivey v. Bd. of Regents*,
22 673 F.2d 266, 268 (9th Cir. 1982), and courts are not required to indulge unwarranted inferences,
23 *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and
24 citation omitted). The “sheer possibility that a defendant has acted unlawfully” is not sufficient,
25 and “facts that are ‘merely consistent with’ a defendant’s liability” fall short of satisfying the
26 plausibility standard. *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949; *Moss*, 572 F.3d at 969.

28 If he chooses to file a first amended complaint, Plaintiff should make it as concise as

1 possible. He should simply state which of his constitutional rights he feels were violated by each
2 Defendant and its factual basis. Where the allegations against two or more Defendants are
3 factually intertwined, Plaintiff need not repeat the factual allegations separately against each
4 Defendant. Rather, Plaintiff should present his factual allegations and identify the Defendants he
5 feels are thereby implicated. Plaintiff need not cite legal authority for his claims in a second
6 amended complaint as his factual allegations are accepted as true. The amended complaint
7 should be clearly legible (*see* Local Rule 130(b)), and double-spaced pursuant to Local Rule
8 130(c).

9 **2. Linkage Requirement**

10 The Civil Rights Act (42 U.S.C. § 1983) requires that there be an actual connection or link
11 between the actions of the defendants and the deprivation alleged to have been suffered by
12 Plaintiff. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423
13 U.S. 362 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation
14 of a constitutional right, within the meaning of section 1983, if he does an affirmative act,
15 participates in another’s affirmative acts or omits to perform an act which he is legally required to
16 do that causes the deprivation of which complaint is made.” *Johnson v. Duffy*, 588 F.2d 740, 743
17 (9th Cir. 1978). In order to state a claim for relief under section 1983, Plaintiff must link each
18 named defendant with some affirmative act or omission that demonstrates a violation of
19 Plaintiff’s federal rights.

20 Plaintiff must clearly identify which Defendant(s) he feels are responsible for each
21 violation of his constitutional rights and their factual basis as his Complaint must put each
22 Defendant on notice of Plaintiff’s claims against him or her. *See Austin v. Terhune*, 367 F.3d
23 1167, 1171 (9th Cir. 2004).

24 **C. Plaintiff’s Claim**

25 **1. Eighth Amendment -- Serious Medical Needs**

26 Prison officials violate the Eighth Amendment if they are “deliberate[ly] indifferen[t] to [a
27 prisoner’s] serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). “A medical need
28 is serious if failure to treat it will result in ““significant injury or the unnecessary and wanton

1 infliction of pain.”” *Peralta v. Dillard*, 744 F.3d 1076, 1081-82 (2014) (quoting *Jett v. Penner*,
2 439 F.3d 1091, 1096 (9th Cir.2006) (quoting *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th
3 Cir.1992), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th
4 Cir.1997) (en banc))

5 To maintain an Eighth Amendment claim based on medical care in prison, a plaintiff must
6 first “show a serious medical need by demonstrating that failure to treat a prisoner’s condition
7 could result in further significant injury or the unnecessary and wanton infliction of pain. Second,
8 the plaintiff must show the defendants’ response to the need was deliberately indifferent.”
9 *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (quoting *Jett*, 439 F.3d at 1096
10 (quotation marks omitted)).

11 As to the first prong, indications of a serious medical need “include the existence of an
12 injury that a reasonable doctor or patient would find important and worthy of comment or
13 treatment; the presence of a medical condition that significantly affects an individual’s daily
14 activities; or the existence of chronic and substantial pain.” *Colwell v. Bannister*, 763 F.3d 1060,
15 1066 (9th Cir. 2014) (citation and internal quotation marks omitted); *accord Wilhelm*, 680 F.3d at
16 1122; *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000). For screening purposes, Plaintiff’s
17 cornea transplant, hypertension, and diabetes are accepted as serious medical needs.

18 As to the second prong, deliberate indifference is “a state of mind more blameworthy than
19 negligence” and “requires ‘more than ordinary lack of due care for the prisoner’s interests or
20 safety.’ ” *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (quoting *Whitley*, 475 U.S. at 319).
21 Deliberate indifference is shown where a prison official “knows that inmates face a substantial
22 risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”
23 *Id.*, at 847. In medical cases, this requires showing: (a) a purposeful act or failure to respond to a
24 prisoner’s pain or possible medical need and (b) harm caused by the indifference. *Wilhelm*, 680
25 F.3d at 1122 (quoting *Jett*, 439 F.3d at 1096). “A prisoner need not show his harm was
26 substantial; however, such would provide additional support for the inmate’s claim that the
27 defendant was deliberately indifferent to his needs.” *Jett*, 439 F.3d at 1096, citing *McGuckin*, 974
28 F.2d at 1060.

1 Deliberate indifference is a high legal standard. *Toguchi v. Chung*, 391 F.3d 1051, 1060
2 (9th Cir.2004). “Under this standard, the prison official must not only ‘be aware of the facts from
3 which the inference could be drawn that a substantial risk of serious harm exists,’ but that person
4 ‘must also draw the inference.’ ” *Id.* at 1057 (quoting *Farmer*, 511 U.S. at 837). “If a prison
5 official should have been aware of the risk, but was not, then the official has not violated the
6 Eighth Amendment, no matter how severe the risk.”” *Id.* (quoting *Gibson v. County of Washoe*,
7 *Nevada*, 290 F.3d 1175, 1188 (9th Cir. 2002)).

8 **2. Plaintiff’s Allegations**

9 Plaintiff alleges that Dr. Kokor has been his primary care physician for approximately
10 four years. On April 6, 2016, Plaintiff had a cornea transplant and cataract surgery performed by
11 ophthalmologist surgeon Dr. Rasheed. Afterwards, Dr. Rasheed prescribed ciprofloxacin and
12 prednisolone so that Plaintiff’s body would not reject the cornea transplant. Approximately a
13 month after the surgery, Dr. Kokor informed Plaintiff that he would require those medications for
14 the rest of his life. On July 1, 2016, Plaintiff submitted a slip requesting a ciprofloxacin refill,
15 which was denied by the CSATF pharmacy on July 8, 2016, because it did not have a refill order.
16 On July 12, 2016, Plaintiff was interviewed on the matter by RN Powell who escorted Plaintiff to
17 Dr. Kokor, but Dr. Kokor refused to refill Plaintiff’s ciprofloxacin and prednisolone. On July 27,
18 2016, non-defendant FNP Merritt consulted with Dr. Rasheed and ciprofloxacin and prednisolone
19 were reordered for Plaintiff.

20 On August 8, 2016, Plaintiff submitted a refill request for Lisinopril for his hypertension ,
21 and on August 29, 2016, Plaintiff submitted a refill request for Metformin for his diabetes, but
22 both were not filled until mid-October. Plaintiff requests refills of his medications on CDC-7362
23 forms. However, Nurse Powell repeatedly writes on Plaintiff’s 7362s that he should use a white
24 Corcoran Pharmacy slip instead. Though both forms are approved for requesting medication
25 refills, Plaintiff prefers to use 7362s as they provide proof that he submitted a refill request,
26 whereas the white slips do not.

27 Plaintiff’s allegations are not cognizable. It appears that Plaintiff feels Dr. Kokor and
28 Nurse Powell interfered with Dr. Rasheed’s post-surgical prescriptions -- which *could* be

1 cognizable. *See Snow v. McDaniel*, 681 F.3d 978, 986 (9th Cir. 2012) (concluding that reliance
2 on “non-specialized” medical conclusions may constitute deliberate indifference to a plaintiff’s
3 medical needs), overruled on other grounds by *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014)
4 (en banc); *Wakefield v. Thompson*, 177 F.3d 1160, 1165 (9th Cir. 1999) (“[A]llegations that a
5 prison official has ignored the instructions of a prisoner’s treating physician are sufficient to state
6 a claim for deliberate indifference.”). However, though Plaintiff alleges that Dr. Kokor told him
7 that he would need to be on ciprofloxacin and prednisolone for the rest of his life, Plaintiff does
8 not show that his eye surgeon, Dr. Rasheed (who apparently prescribed them for Plaintiff after
9 surgery) initially prescribed them for the rest of Plaintiff’s life. In fact, Plaintiff’s allegations
10 acknowledge that he consulted Dr. Rasheed who issued a report in which he reordered them for
11 Plaintiff when they were not refilled. Plaintiff’s allegations do not show that Dr. Kokor or Nurse
12 Powell interfered with medications that Dr. Rasheed prescribed.

13 Plaintiff’s allegations also do not show that Dr. Kokor was aware of any other difficulties
14 that Plaintiff had timely obtaining prescription refills to have been deliberately indifferent to
15 Plaintiff’s medical needs. Plaintiff also fails to show that Nurse Powell was aware that Plaintiff
16 had hypertension and diabetes bad enough to require medications, or that Plaintiff had standing
17 prescriptions for Lisinopril and Metformin and intentionally delayed their refills. Plaintiff’s
18 statement that he has a medical condition does factually support a finding that every medical
19 personnel he interacts with is aware of it, or is aware of medications Plaintiff needs to treat it.
20 Plaintiff also fails to state allegations to show any harm he sustained as a result of the delay in his
21 receipt of any of the medications noted in his allegations. Finally, Plaintiff’s allegations show
22 that, at most, she was part of a relay between his request for medication refills and a physician
23 who would prescribe the refill. Plaintiff fails to show that Nurse Powell had the discretion,
24 means, and authority to order a medication be refilled or to reorder medications that had been
25 prescribed by a physician. *Leer v. Murphy*, 844 F.2d 628, 633-34 (9th Cir. 1988) *citing with*
26 *approval* *Williams v. Bennett*, 689 F.2d 1370, 1384 (11th Cir. 1982) (“There can be no duty, the
27 breach of which is actionable, to do that which is beyond the power, authority, or means of the
28 charged party. One may be callously indifferent to the fate of prisoners and yet not be liable for

1 their injuries. Those whose callous indifference results in liability are those under a duty --
2 possessed of authority and means -- to prevent the injury.”) Moreover, the fact that plaintiff
3 prefers to use a particular form but prison officials prefer that he use a different one, does not
4 describe a constitutional deprivation. Thus, Plaintiff’s allegations do not state a cognizable claim
5 against Dr. Kokor or Nurse Powell.

6 **D. Conclusion**

7 For the reasons set forth above, Plaintiff’s Complaint is dismissed with leave to file a first
8 amended complaint within 21 days. If Plaintiff no longer desires to pursue this action, he may
9 file a notice of voluntary dismissal. If Plaintiff needs an extension of time to comply with this
10 order, Plaintiff shall file a motion seeking an extension of time no later than 21 days from the
11 date of service of this order.

12 Plaintiff must demonstrate in any first amended complaint how the conditions complained
13 of have resulted in a deprivation of Plaintiff’s constitutional rights. *See Ellis v. Cassidy*, 625 F.2d
14 227 (9th Cir. 1980). The first amended complaint must allege in specific terms how each named
15 defendant is involved. There can be no liability under section 1983 unless there is some
16 affirmative link or connection between a defendant’s actions and the claimed deprivation. *Rizzo*
17 *v. Goode*, 423 U.S. 362 (1976); *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980); *Johnson v.*
18 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

19 Plaintiff’s first amended complaint should be brief. Fed. R. Civ. P. 8(a). Such a short and
20 plain statement must “give the defendant fair notice of what the . . . claim is and the grounds upon
21 which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) quoting *Conley v.*
22 *Gibson*, 355 U.S. 41, 47 (1957). Although accepted as true, the “[f]actual allegations must be
23 [sufficient] to raise a right to relief above the speculative level” *Twombly*, 550 U.S. 127, 555
24 (2007) (citations omitted).

25 Plaintiff is further advised that an amended complaint supercedes the original, *Lacey v.*
26 *Maricopa County*, Nos. 09-15806, 09-15703, 2012 WL 3711591, at *1 n.1 (9th Cir. Aug. 29,
27 2012) (en banc), and must be “complete in itself without reference to the prior or superceded
28 pleading,” Local Rule 220.

1 The Court provides Plaintiff with opportunity to amend to cure the deficiencies identified
2 by the Court in this order. *Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff
3 may not change the nature of this suit by adding new, unrelated claims in his first amended
4 complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

5 Based on the foregoing, the Court **ORDERS**:

- 6 1. Plaintiff’s Complaint is dismissed, with leave to amend;
7 2. The Clerk’s Office shall send Plaintiff a civil rights complaint form; and
8 3. **Within 21 days** from the date of service of this order, Plaintiff must file a first
9 amended complaint curing the deficiencies identified by the Court in this order or
10 a notice of voluntary dismissal.

11 **If Plaintiff fails to comply with this order, this action will be dismissed for failure to obey a**
12 **court order and for failure to state a claim.**

13 IT IS SO ORDERED.

14 Dated: July 24, 2017

15 _____
16 **/s/ Jennifer L. Thurston**
17 UNITED STATES MAGISTRATE JUDGE

18
19
20
21
22
23
24
25
26
27
28