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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

8
9 ANTHONY SCOTT BERRINGER,

10 Plaintiff,

11 v.

12 S. GATES,

13 Defendant.

Case No. 1:18-cv-00677-SAB (PC)

ORDER DIRECTING CLERK OF COURT
TO RANDOMLY ASSIGN A FRESNO
DISTRICT JUDGE

FINDINGS AND RECOMMENDATIONS
RECOMMENDING DISMISSAL OF
ACTION, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM, FAILURE
TO COMPLY WITH A COURT ORDER,
AND FAILURE TO PROSECUTE

[ECF Nos. 1, 7, 8]

FOURTEEN-DAY DEADLINE

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18 **I.**

19 **INTRODUCTION**

20 Plaintiff Anthony Scott Berringer, a state prisoner, is appearing pro se and in forma
21 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This matter was referred to a
22 United States Magistrate Judge pursuant to 28 U.S.C. § 636(1)(B) and Local Rule 302.

23 On June 11, 2018, the Court screened Plaintiff's complaint and found that he had not
24 stated any cognizable claim. (ECF No. 7.) Plaintiff was granted leave to amend his complaint
25 allegations within thirty days to attempt to cure the deficiencies identified in that order. (*Id.* at 6-
26 7.)

27 Plaintiff failed to comply with or otherwise respond to the Court's order, and on July 23,
28 2018, the Court required Plaintiff to show cause why this action should not be dismissed, within

1 twenty-one days. (ECF No. 8.) That deadline has passed, and Plaintiff has not responded to the
2 order to show cause. Accordingly, the Court recommends dismissal of this action for the reasons
3 discussed below.

4 II.

5 FAILURE TO STATE A CLAIM

6 The Court is required to screen complaints brought by prisoners seeking relief against a
7 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
8 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
9 legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or
10 that “seek[] monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §
11 1915(e)(2)(B).

12 A complaint must contain “a short and plain statement of the claim showing that the
13 pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
14 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
16 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate
17 that each defendant personally participated in the deprivation of Plaintiff’s rights. Jones v.
18 Williams, 297 F.3d 930, 934 (9th Cir. 2002).

19 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
20 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d
21 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff’s claims must be
22 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer
23 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss
24 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The “sheer possibility that a defendant
25 has acted unlawfully” is not sufficient, and “facts that are ‘merely consistent with’ a defendant’s
26 liability” falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572
27 F.3d at 969.

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1 In this case, Plaintiff names as a defendant S. Gates, the Chief of the Health Care Appeal
2 branch. Plaintiff claims that Defendant Gates wrongfully denied his health care grievance appeal
3 seeking that he be placed on Neurontin (gabapentin).

4 While the Eighth Amendment of the United States Constitution entitles Plaintiff to
5 medical care, the Eighth Amendment is violated only when a prison official acts with deliberate
6 indifference to an inmate's serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th
7 Cir. 2012), overruled in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th
8 Cir. 2014); Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d
9 1091, 1096 (9th Cir. 2006). Plaintiff "must show (1) a serious medical need by demonstrating
10 that failure to treat [his] condition could result in further significant injury or the unnecessary and
11 wanton infliction of pain," and (2) that "the defendant's response to the need was deliberately
12 indifferent." Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). Deliberate indifference
13 is shown by "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical
14 need, and (b) harm caused by the indifference." Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d
15 at 1096). The requisite state of mind is one of subjective recklessness, which entails more than
16 ordinary lack of due care. Snow, 681 F.3d at 985 (citation and quotation marks omitted);
17 Wilhelm, 680 F.3d at 1122.

18 "A difference of opinion between a physician and the prisoner—or between medical
19 professionals—concerning what medical care is appropriate does not amount to deliberate
20 indifference." Snow, 681 F.3d at 987 (citing Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);
21 Wilhelm, 680 F.3d at 1122-23 (citing Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986)).
22 Rather, Plaintiff "must show that the course of treatment the doctors chose was medically
23 unacceptable under the circumstances and that the defendants chose this course in conscious
24 disregard of an excessive risk to [his] health." Snow, 681 F.3d at 988 (citing Jackson, 90 F.3d at
25 332) (internal quotation marks omitted). Medical malpractice does not become a constitutional
26 violation merely because the victim is a prisoner." Estelle v. Gamble, 429 U.S. 97, 106; Snow,
27 681 F.3d at 987-88; Wilhelm, 680 F.3d at 1122.

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1 According to the complaint, Defendant Gates reviewed Plaintiff's health care appeal at
2 the headquarters' level and provided a response dated May 1, 2018. The response is attached to
3 the complaint. (Doc. 1, at 7-8.) The response states that Plaintiff's health record and the
4 pertinent policies and procedures were reviewed, and they indicate that Plaintiff is being
5 evaluated and treated for chronic pain, and that he was seen by health providers on November
6 18, 2017 and January 12, 2018. The providers determined that there was no indication for pain
7 medication other than Tylenol (acetaminophen).

8 Plaintiff was then evaluated on February 8, 2018 as a new arrival, examined, and his
9 primary care provider proscribed neoprene support for better pain management. On February 27,
10 2018, Plaintiff was issued a neoprene knee brace. Plaintiff was continued in the chronic care
11 program with primary care follow-up pending, and he is continually prescribed acetaminophen.

12 Gabapentin, on the other hand, is restricted to adjunctive therapy for partial complex
13 seizures, post-herpetic neuralgia, and objective evidence of severe disease, and Plaintiff's health
14 care providers did not document a condition that meets the criteria for nonformulary use of
15 gabapentin. This last statement is consistent with Plaintiff's affirmative allegations that he does
16 not have seizures or suffer from post-herpetic neuralgia.

17 Based on Plaintiff's allegations and the attachments, he has not stated a cognizable
18 constitutional claim. He alleges pain and lack of treatment, but the attachments discuss to the
19 contrary that he is receiving medical monitoring, evaluations and pain medications. Further, the
20 attachments discuss that there is a medical basis for the denial of Neurontin (gabapentin).
21 Plaintiff's claim appears to be based on his desire for more frequent chronic pain care and a
22 specific medication, but a difference in medical opinion between a health care provider and a
23 patient is not sufficient to show deliberate indifference to a serious medical need.

24 **III.**

25 **FAILURE TO OBEY COURT ORDERS**

26 As noted above, on July 23, 2018, the Court issued an order to show cause in writing why
27 this action should not be dismissed for Plaintiff's failure to comply with or otherwise respond to
28 the June 11, 2018 order. (ECF No. 8.) Plaintiff was also informed that he could comply with the

1 order to show cause by filing an amended complaint. (*Id.* at 1-2.) Plaintiff was permitted
2 another twenty-one days to respond to the order to show cause, but did not file any amended
3 complaint or otherwise respond.

4 This action can proceed no further without Plaintiff's cooperation and compliance with
5 the orders at issue, and the action cannot simply remain idle on the Court's docket, unprosecuted.
6 *Id.* The Court has the inherent power to control its docket and may, in the exercise of that power,
7 impose sanctions where appropriate, including dismissal of the action. Bautista v. Los Angeles
8 Cnty., 216 F.3d 837, 841 (9th Cir. 2000). In determining whether to dismiss an action, the Court
9 must weigh "(1) the public's interest in expeditious resolution of litigation; (2) the court's need
10 to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring
11 disposition of cases on their merits; and (5) the availability of less drastic sanctions." In re
12 Phenylpropanolamine (PPA) Prod. Liab. Litig., 460 F.3d 1217, 1226 (9th Cir. 2006) (internal
13 quotations and citations omitted). These factors guide a court in deciding what to do, and are not
14 conditions that must be met in order for a court to take action. *Id.* (citation omitted).

15 Based on Plaintiff's failure to comply with or otherwise respond to the Court's order, the
16 Court is left with no alternative but to recommendation dismissal of the action for failure to
17 prosecute. Plaintiff has had no contact with the Court in almost two months, and repeated
18 attempts to engage him in the litigation have gone unanswered, affecting the use of the Court's
19 resources and management of its docket. There is no pleading on file in this action which sets
20 forth any claims upon which relief may be granted. Plaintiff has been repeatedly warned of
21 dismissal, to no avail, and as Plaintiff is proceeding in forma pauperis and has ceased litigating
22 this action, no lesser sanctions are available.

23 IV.

24 CONCLUSION

25 Accordingly, it is HEREBY ORDERED that the Clerk of the Court is directed to
26 randomly assign a Fresno District Judge to this action.

27 Further, for the reasons explained above, it is HEREBY RECOMMENDED that the
28 instant action be dismissed pursuant to 28 U.S.C. § 1915A and 28 U.S.C. § 1915(e), based on

1 Plaintiff's failure to comply with a court order, failure to prosecute, and for the failure state a
2 claim upon which relief may be granted.

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

10 IT IS SO ORDERED.

11 Dated: August 23, 2018

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14 UNITED STATES MAGISTRATE JUDGE

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