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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LACEDRIC W. JOHNSON

Plaintiff,

No. 08-cv-1609 JAM KJN P

vs.

D.K. SISTO, et al.

Defendants.

FINDINGS AND RECOMMENDATIONS AND
ORDER

_____ /

Plaintiff is a state prisoner proceeding without counsel and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. By order filed March 26, 2009, plaintiff's complaint was dismissed with leave to file an amended complaint. (Dkt. No. 9.) Plaintiff filed an amended complaint and followed it with a motion for leave to file a second amended complaint. (Dkt. Nos. 13, 22.) The court will grant the motion and execute its duty to screen all pro se prisoners' complaints with respect to the second amended complaint.¹ 28 U.S.C. § 1915A.

¹ As the court informed plaintiff in its order of March 26, 2009, an amended complaint supercedes the original complaint. See Order at 5 (Dkt No. 9). The same is true of a second amended complaint with respect to the complaint that preceded it. Therefore, in granting the motion for leave to file the second amended complaint, the court renders the first amended complaint ineffective.

1 I. Screening Order

2 The court is required to screen complaints brought by prisoners seeking relief
3 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
5 claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be
6 granted, or that seek monetary relief from a defendant who is immune from such relief. 28
7 U.S.C. § 1915A(b)(1),(2).

8 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
9 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
10 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
11 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
12 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
13 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
14 Cir. 1989); Franklin, 745 F.2d at 1227.

15 When considering whether a complaint states a claim upon which relief can be
16 granted, the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200
17 (2007), and construe the complaint in the light most favorable to the plaintiff. See Scheuer v.
18 Rhodes, 416 U.S. 232, 236 (1974). Pro se pleadings are held to a less stringent standard than
19 those drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520 (1972). Still, to survive
20 dismissal for failure to state a claim, a pro se complaint must contain more than “naked
21 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
22 action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words,
23 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
24 statements do not suffice.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Furthermore, a
25 claim upon which the court can grant relief must have facial plausibility. Twombly, 550 U.S. at
26 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the

1 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
2 Iqbal, 129 S. Ct. at 1949. Attachments to a complaint are considered to be part of the complaint
3 for purposes of a motion to dismiss for failure to state a claim. Hal Roach Studios v. Richard
4 Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

5 The second amended complaint states some cognizable claims for relief pursuant
6 to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b). However, the complaint does not adequately
7 plead each claim alleged against every defendant. Rather, the court finds that if the allegations of
8 the amended complaint are proven, plaintiff has a reasonable opportunity to prevail on the merits
9 of this action only as to the following claims and defendants:

10 With respect to Claim I for use of excessive force, the complaint states a viable
11 cause of action against defendant J. Freeman III.

12 With respect to Claim II for unlawful conditions of confinement, the complaint
13 states a viable cause of action against defendants Sisto, Singh, Traquina, Cate, Greer, Gentry,
14 Nuehring, Jones, Shockley, Fleishman and Petersen.

15 With respect to Claim III for deliberate indifference to a serious medical need, the
16 complaint states a viable cause of action against defendants Deur, Eck, Noriega and DeChant.

17 With respect to Claim IV, the complaint does not state an independent cause of
18 action against any defendant. However, defendants to Claim II are apprised that to the extent
19 plaintiff has alleged mental or psychological suffering as a result of his placement on contraband
20 surveillance watch, that is an element of the cognizable claim for unconstitutional conditions of
21 confinement stated in Claim II. See Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993).

22 With respect to Claims V and VI, the complaint does not state a cause of action
23 against any defendant.

24 As the court stated in its initial screening order, the Eleventh Amendment
25 prohibits suits for damages against state officials in their official capacities. See Order at 9 (Dkt.
26 No. 9)(citing Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989)). Therefore, none of

1 plaintiff's claims is viable as a claim for damages against any defendant sued in his or her official
2 capacity.

3 Plaintiff has also filed a motion for additional time in which to serve defendants
4 and a motion for an order directing the U.S. Marshal to serve defendants. (Dkt. Nos. 19, 21.) An
5 order regarding service of a pro se prisoner's complaint follows the successful screening of the
6 complaint under 28 U.S.C. § 1915A and plaintiff's submission of the appropriate service
7 documents. Such an order is therefore the prerogative of the court, not the plaintiff. Both of
8 plaintiff's motions regarding service of his complaint will be denied. The court will order
9 service upon the sixteen above-named defendants after plaintiff complies with the instructions
10 for submitting service documents, set out in Paragraph 4 below.

11 II. Findings and Recommendations

12 The court finds that plaintiff has not alleged viable claims against the thirty-five
13 remaining defendants who are named in the second amended complaint but are not named in the
14 screening order above. Therefore the undersigned recommends that all claims against those
15 defendants, listed below, be dismissed without prejudice.

16 The court notes that plaintiff has now taken three opportunities to draft a pleading
17 that adequately states the factual basis of a cause of action against each defendant. Plaintiff
18 abided by the court's order that he restrict the actual complaint within twenty-five pages, but he
19 ignored the court's order that the page restriction also include exhibits. See Order at 4 (Dkt. No.
20 9). The court finds that this infraction should not result in dismissal, but plaintiff has now
21 exhausted the permissiveness for amending his complaint provided by Fed.R.Civ.P. 15(a).
22 Plaintiff has successfully pled some claims against some defendants, but he has failed to do so
23 against other defendants despite the court's allowances. Therefore, while plaintiff has the right
24 to object to these findings and recommendations concerning his second amended complaint,
25 plaintiff is admonished that the court will not grant leave to file a third amended complaint, and
26 thus delay the progress of this case even further, without a showing of good cause.

1 In accordance with the above, IT IS HEREBY ORDERED that:

2 1. The motion for leave to file a second amended complaint (Dkt. No. 22) is
3 granted.

4 2. Service is appropriate for the following defendants: J. Freeman III, Sisto,
5 Singh, Traquina, Cate, Greer, Gentry, Nuehring, Jones, Shockley, Fleishman, Petersen, Deur,
6 Eck, Noriega and DeChant.

7 3. The Clerk of the Court shall send plaintiff sixteen USM-285 forms, one
8 summons, an instruction sheet and a copy of the second amended complaint filed February 22,
9 2010.

10 4. Within thirty days from the date of this order, plaintiff shall complete the
11 attached Notice of Submission of Documents and submit the following documents to the court:

12 a. The completed Notice of Submission of Documents;

13 b. One completed summons;

14 c. One completed USM-285 form for each defendant listed in number 1
15 above; and

16 d. Seventeen copies of the endorsed amended complaint filed February 22,
17 2010.

18 5. Plaintiff need not attempt service on defendants and need not request waiver of
19 service. Upon receipt of the above-described documents, the court will direct the United States
20 Marshal to serve the above-named defendants pursuant to Federal Rule of Civil Procedure 4
21 without payment of costs.

22 6. The motion for an extension of time in which to serve a summons (Dkt. No.
23 19) is denied.

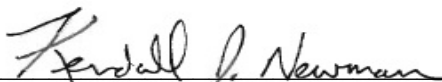
24 7. The motion for an order directing the U.S. Marshal to serve process (Dkt. No.
25 21) is denied.

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1 IT IS HEREBY RECOMMENDED that all claims against the following
2 defendants be dismissed without prejudice: V.D. Brumfield, Anderson, Becerra, R.L. Bond, B.
3 Burns, Camacho, Camaya, ComyRomero, R. Cordova, DeGorgis, Durffy, Elisara, T. Ellior, V.
4 Fera, J.P. Fields, Francis, Freese, M. Grimm, Heath, M. Hogan, B. Johnson, Kharsa, S. Lee,
5 Lemus, Liu, Madil, N. Marquez, Menjavar, M. Ross, Scotland, K. Sillivan, Tamayo, Weaver, G.
6 Wong, and J. Zucker.

7 These findings and recommendations are submitted to the United States District
8 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
9 one days after being served with these findings and recommendations, any party may file written
10 objections with the court and serve a copy on all parties. Such a document should be captioned
11 “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections
12 shall be served and filed within twenty-one days after service of the objections. The parties are
13 advised that failure to file objections within the specified time may waive the right to appeal the
14 District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

15 DATED: March 24, 2010

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19 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Plaintiff,
vs.

No. CIV

NOTICE OF SUBMISSION
OF DOCUMENTS

Defendants.

_____ /

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

- _____ completed summons form
- _____ completed USM-285 forms
- _____ copies of the _____
Amended Complaint

DATED:

Plaintiff