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

ROBERT BENYAMINI,

Plaintiff,

No. CIV S-10-0101 GGH P

vs.

V. OGBEIDE, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding pro se. He seeks relief pursuant to 42 U.S.C. § 1983 and has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$ 6.30 will be assessed by this order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff’s trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated for monthly payments of twenty percent of the

1 preceding month's income credited to plaintiff's prison trust account. These payments will be  
2 forwarded by the appropriate agency to the Clerk of the Court each time the amount in plaintiff's  
3 account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C. § 1915(b)(2).

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

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

17 A complaint must contain more than a "formulaic recitation of the elements of a  
18 cause of action;" it must contain factual allegations sufficient to "raise a right to relief above the  
19 speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).  
20 "The pleading must contain something more...than...a statement of facts that merely creates a  
21 suspicion [of] a legally cognizable right of action." Id., quoting 5 C. Wright & A. Miller, Federal  
22 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). "[A] complaint must contain sufficient  
23 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft  
24 v. Iqbal, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127 S.Ct.  
25 1955). "A claim has facial plausibility when the plaintiff pleads factual content that allows the

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1 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”

2 Id.

3 In reviewing a complaint under this standard, the court must accept as true the  
4 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
5 738, 740, 96 S.Ct. 1848 (1976), construe the pleading in the light most favorable to the plaintiff,  
6 and resolve all doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct.  
7 1843 (1969).

8 The complaint states a colorable claim for relief against defendants Correctional  
9 Officers B. Baker and S. Byrd, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b).

10 As to defendant Ogbeide, a registered nurse, plaintiff’s claim against this  
11 individual at California State Prison Sacramento (New Folsom) is that, after his cell door was  
12 closed on his head on April 16, 2006 (for which the above defendants are implicated), she  
13 refused to do anything but provide plaintiff with his already prescribed Tylenol (two doses) when  
14 he complained that his ears were ringing and head was hurting. Complaint, pp. 9-10. Instead,  
15 plaintiff was not seen for any treatment until April 19, 2006 (some three days later), at which  
16 time plaintiff had an x-ray ordered, as well as an EKG for chest pain. Id., at 9. Plaintiff alleges  
17 that he was not provided an M.R.I. until November 1, 2006, even though he believes he was  
18 probably suffering a concussion due to his ears ringing, and a “tingly sensation and massive  
19 migraine” he states that he endured for weeks. Id.

20 In order to state a § 1983 claim for violation of the Eighth Amendment based on  
21 inadequate medical care, plaintiff must allege “acts or omissions sufficiently harmful to evidence  
22 deliberate indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct.  
23 285, 292 (1976). To prevail, plaintiff must show both that his medical needs were objectively  
24 serious, and that defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter,  
25 501 U.S. 294, 299, 111 S. Ct. 2321, 2324 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir.  
26 1992) (on remand). The requisite state of mind for a medical claim is “deliberate indifference.”

1 Hudson v. McMillian, 503 U.S. 1, 4, 112 S. Ct. 995, 998 (1992).

2           A serious medical need exists if the failure to treat a prisoner’s condition could  
3 result in further significant injury or the unnecessary and wanton infliction of pain. Indications  
4 that a prisoner has a serious need for medical treatment are the following: the existence of an  
5 injury that a reasonable doctor or patient would find important and worthy of comment or  
6 treatment; the presence of a medical condition that significantly affects an individual’s daily  
7 activities; or the existence of chronic and substantial pain. See, e.g., Wood v. Housewright, 900  
8 F. 2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01  
9 (9th Cir. 1989). McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other  
10 grounds, WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

11           In Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994) the Supreme Court  
12 defined a very strict standard which a plaintiff must meet in order to establish “deliberate  
13 indifference.” Of course, negligence is insufficient. Farmer, 511 U.S. at 835, 114 S. Ct. at 1978.  
14 However, even civil recklessness (failure to act in the face of an unjustifiably high risk of harm  
15 which is so obvious that it should be known) is insufficient. Id. at 836-37, 114 S. Ct. at 1979.  
16 Neither is it sufficient that a reasonable person would have known of the risk or that a defendant  
17 should have known of the risk. Id. at 842, 114 S. Ct. at 1981.

18           It is nothing less than recklessness in the criminal sense – subjective standard –  
19 disregard of a risk of harm of which the actor is actually aware. Id. at 838-842, 114 S. Ct. at  
20 1979-1981. “[T]he official must both be aware of facts from which the inference could be drawn  
21 that a substantial risk of serious harm exists, and he must also draw the inference.” Id. at 837,  
22 114 S. Ct. at 1979. Thus, a defendant is liable if he knows that plaintiff faces “a substantial risk  
23 of serious harm and disregards that risk by failing to take reasonable measures to abate it.” Id. at  
24 847, 114 S. Ct. at 1984. “[I]t is enough that the official acted or failed to act despite his  
25 knowledge of a substantial risk of serious harm.” Id. at 842, 114 S. Ct. at 1981. If the risk was  
26 obvious, the trier of fact may infer that a defendant knew of the risk. Id. at 840-42, 114 S. Ct. at

1 1981. However, obviousness per se will not impart knowledge as a matter of law.

2           Also significant to the analysis is the well established principle that mere  
3 differences of opinion concerning the appropriate treatment cannot be the basis of an Eighth  
4 Amendment violation. Jackson v. McIntosh, 90 F.3d 330 (9th Cir. 1996); Franklin v. Oregon,  
5 662 F.2d 1337, 1344 (9th Cir. 1981).

6           Moreover, a physician need not fail to treat an inmate altogether in order to violate  
7 that inmate's Eighth Amendment rights. Ortiz v. City of Imperial, 884 F.2d 1312, 1314 (9th Cir.  
8 1989). A failure to competently treat a serious medical condition, even if some treatment is  
9 prescribed, may constitute deliberate indifference in a particular case. Id.

10           Additionally, mere delay in medical treatment without more is insufficient to state  
11 a claim of deliberate medical indifference. Shapley v. Nevada Bd. of State Prison Com'rs, 766  
12 F.2d 404, 408 (9th Cir. 1985). Although the delay in medical treatment must be harmful, there is  
13 no requirement that the delay cause "substantial" harm. McGuckin, 974 F.2d at 1060, citing  
14 Wood v. Housewright, 900 F.2d 1332, 1339-1340 (9th Cir. 1990) and Hudson, 112 S. Ct. at 998-  
15 1000. A finding that an inmate was seriously harmed by the defendant's action or inaction tends  
16 to provide additional support for a claim of deliberate indifference; however, it does not end the  
17 inquiry. McGuckin, 974 F.2d 1050, 1060 (9th Cir. 1992). In summary, "the more serious the  
18 medical needs of the prisoner, and the more unwarranted the defendant's actions in light of those  
19 needs, the more likely it is that a plaintiff has established deliberate indifference on the part of  
20 the defendant." McGuckin, 974 F.2d at 1061.

21           Superimposed on these Eighth Amendment standards is the fact that in cases  
22 involving complex medical issues where plaintiff contests the type of treatment he received,  
23 expert opinion will almost always be necessary to establish the necessary level of deliberate  
24 indifference. Hutchinson v. United States, 838 F.2d 390 (9th Cir. 1988).

25           In this case, plaintiff fails to state an Eighth Amendment claim against defendant  
26 Ogbeide simply based on his allegation that he did not receive medical attention he claims he

1 needed for his alleged injury for three days beyond when it occurred. Plaintiff does not clarify  
2 what treatment he should have received when the nurse gave him his Tylenol, nor that she was  
3 responsible for his not receiving his M.R.I. until November of 2001; nor does he set forth  
4 whether it has ever been determined that he sustained a treatable injury and, if so, when or what  
5 treatment he received. This claim will be dismissed, but plaintiff will be granted leave to amend.

6 Plaintiff also appears to be attempting to identify an individual named Vicks as a  
7 defendant, but he fails to do so sufficiently and does not adequately link him to any constitutional  
8 deprivation. The putative claim against this defendant will be dismissed, but plaintiff may  
9 amend.

10 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the  
11 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See  
12 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms  
13 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless  
14 there is some affirmative link or connection between a defendant's actions and the claimed  
15 deprivation. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v. Enomoto, 633 F.2d  
16 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore,  
17 vague and conclusory allegations of official participation in civil rights violations are not  
18 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

19 In addition, plaintiff is informed that the court cannot refer to a prior pleading in  
20 order to make plaintiff's amended complaint complete. Local Rule 220 requires that an amended  
21 complaint be complete in itself without reference to any prior pleading. This is because, as a  
22 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
23 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no  
24 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
25 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

26 Accordingly, IT IS HEREBY ORDERED that:

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1. Plaintiff's request to proceed in forma pauperis is granted;

2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff is assessed an initial partial filing fee of \$ 6.30. All fees shall be collected and paid in accordance with this court's order to the Director of the California Department of Corrections and Rehabilitation filed concurrently herewith.

3. Plaintiff's claims against defendants Ogbeide and Vicks are dismissed for the reasons discussed above, with leave to file an amended complaint within twenty-eight days from the date of service of this Order. Failure to file an amended complaint will result in a recommendation that these defendants be dismissed from this action.

4. Upon filing an amended complaint or expiration of the time allowed therefor, the court will make further orders for service of process upon some or all of the defendants.

DATED: April 30, 2010

/s/ Gregory G. Hollows

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GREGORY G. HOLLOWES  
UNITED STATES MAGISTRATE JUDGE

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