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

GREGORY LANE BURR,

Plaintiff,

No. CIV S-10-0120 GEB GGH P

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

ORDER

_____ /

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 \$14.06 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 Plaintiff names the following as defendants: Gov. Arnold Schwarzenegger; James
9 Tilton, [former] Secretary of California Department of Corrections and Rehabilitation (CDCR);
10 Scot Kernan (identified as “Director of CDCR); James Yates, Warden of Pleasant Valley State
11 Prison (PVSP); Felix Igbinsosa, PVSP Chief Medical Officer (CMO). Complaint, p. 3.

12 Plaintiff’s claim is that he was placed in PVSP on or around December 24, 2005
13 to serve his sentence, after which he became aware that custody staff and inmates were
14 “contracting a[n] incurable disease, with lifelong symptoms ... leading to respiratory failure and
15 death.” Id. Plaintiff identifies this disease as “San Joaquin Valley Fever” [which has the medical
16 name “coccidioidomycosis”]. Id. Plaintiff alleges that the defendants knew or should have
17 known that they were placing plaintiff in an area where valley fever is endemic. Id. Plaintiff
18 seeks “life long [medical] treatment” “in case of any further medical complications and
19 respiratory problems” and punitive damages. Id.

20 Plaintiff does not explicitly set forth within his allegations that he has actually
21 contracted valley fever as a result of having been housed at PVSP. Nor does plaintiff allege that
22 he had any medical condition, of which defendants were aware, that made him particularly
23 vulnerable to the disease. Among the unauthenticated exhibits he attaches to his complaint is
24 what appears to be a copy of a 2/10/09 serology report indicating that plaintiff may have been
25 diagnosed with “a primary coccidioidal infection as yet well focalized.” Complaint, p. 6. He also
26 includes an exhibit which appears to be an information sheet indicating, inter alia, that most of

1 the cases of valley fever do not even need to be treated and that a large percentage of those who
2 live in areas where the disease is endemic, such as the southern part of the San Joaquin Valley,
3 often do not even know they have or have had it until they have skin tests. *Id.*, at 9. Although
4 the information does indicate that “[a] small fraction of those with disseminated disease ... will
5 be left with residual problems...” which could impair their ability to work at all and that up to 30
6 or 40 die in California of “disseminated” valley fever (*id.* at 16), plaintiff provides too little
7 information within his allegations to set forth a claim of a violation of his rights under the Eighth
8 Amendment. He must do more than state that he has been at risk for contracting valley fever by
9 being housed at PVSP or even that he has contracted valley fever. Plaintiff’s complaint will be
10 dismissed but plaintiff will be granted leave to amend.

11 “[O]nly those deprivations denying the minimal civilized measure of life’s
12 necessities are sufficiently grave to form the basis of an Eighth Amendment violation.” Somers
13 v. Thurman, 109 F.3d 614, 623 (1997), quoting Hudson v. McMillian, 503 U.S. 1, 9, 112 S.Ct.
14 995, 1000 (1992) (omitting internal quotations and citations). In order to state a § 1983 claim
15 for violation of the Eighth Amendment based on inadequate medical care, plaintiff must allege
16 “acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical
17 needs.” Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976). To prevail, plaintiff
18 must show both that his medical needs were objectively serious, and that defendants possessed a
19 sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299, 111 S. Ct. 2321, 2324
20 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The requisite state of
21 mind for a medical claim is “deliberate indifference.” Hudson v. McMillian, 503 U.S. 1, 4, 112
22 S. Ct. 995, 998 (1992).

23 A serious medical need exists if the failure to treat a prisoner’s condition could
24 result in further significant injury or the unnecessary and wanton infliction of pain. Indications
25 that a prisoner has a serious need for medical treatment are the following: the existence of an
26 injury that a reasonable doctor or patient would find important and worthy of comment or

1 treatment; the presence of a medical condition that significantly affects an individual's daily
2 activities; or the existence of chronic and substantial pain. See, e.g., Wood v. Housewright, 900
3 F. 2d 1332, 1337-41 (9th Cir. 1990) (citing cases); Hunt v. Dental Dept., 865 F.2d 198, 200-01
4 (9th Cir. 1989). McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other
5 grounds, WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

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

13 It is nothing less than recklessness in the criminal sense – subjective standard –
14 disregard of a risk of harm of which the actor is actually aware. Id. at 838-842, 114 S. Ct. at
15 1979-1981. “[T]he official must both be aware of facts from which the inference could be drawn
16 that a substantial risk of serious harm exists, and he must also draw the inference.” Id. at 837,
17 114 S. Ct. at 1979. Thus, a defendant is liable if he knows that plaintiff faces “a substantial risk
18 of serious harm and disregards that risk by failing to take reasonable measures to abate it.” Id. at
19 847, 114 S. Ct. at 1984. “[I]t is enough that the official acted or failed to act despite his
20 knowledge of a substantial risk of serious harm.” Id. at 842, 114 S. Ct. at 1981. If the risk was
21 obvious, the trier of fact may infer that a defendant knew of the risk. Id. at 840-42, 114 S. Ct. at
22 1981. However, obviousness per se will not impart knowledge as a matter of law.

23 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the
24 conditions complained of have resulted in a deprivation of plaintiff's constitutional rights. See
25 Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, the complaint must allege in specific terms
26 how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983 unless

1 there is some affirmative link or connection between a defendant's actions and the claimed
2 deprivation. Rizzo v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v. Enomoto, 633 F.2d
3 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore,
4 vague and conclusory allegations of official participation in civil rights violations are not
5 sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

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

13 Accordingly, IT IS HEREBY ORDERED that:

14 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

15 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action.

16 Plaintiff is assessed an initial partial filing fee of \$ 14.06. All fees shall be collected and paid in
17 accordance with this court's order to the Director of the California Department of Corrections
18 and Rehabilitation filed concurrently herewith.

19 3. The complaint is dismissed for the reasons discussed above, with leave to file
20 an amended complaint within twenty-eight days from the date of service of this order. Failure to
21 file an amended complaint will result in a recommendation that the action be dismissed.

22 DATED: April 20, 2010

23 /s/ Gregory G. Hollows

24

GREGORY G. HOLLOWES
UNITED STATES MAGISTRATE JUDGE

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