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

9 THOMAS YEUNG,

10 Plaintiff,

No. CIV S-10-0735 GGH P

11 vs.

12 RICHARD IVES,

13 Defendant.

ORDER

14 _____/
15 Plaintiff is a federal prisoner proceeding pro se. He seeks relief pursuant to
16 Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct.
17 1999 (1971), which provides a remedy for violation of civil rights by federal actors. Plaintiff has
18 also requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. This
19 proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

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

22 Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28
23 U.S.C. §§ 1914(a), 1915(b)(1). An initial partial filing fee of \$19.29 will be assessed by this
24 order. 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to
25 collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the
26 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
26 court to draw the reasonable inference that the defendant is liable for the misconduct alleged."

1 Id.

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

7 Plaintiff has filed a motion to compel proper medical treatment that the court
8 construes as a prisoner civil rights complaint. Plaintiff alleges that he has a condition that
9 impairs his ability to breathe and a medical specialist recommended that plaintiff receive surgery
10 to correct the condition. Plaintiff states that four months have passed and the surgery has been
11 denied and steroid shots that managed the condition are no longer given. However, plaintiff
12 provides no details regarding his condition or the surgery and plaintiff identifies no specific
13 defendants. The warden is named as defendant but no specific actions of the warden or anybody
14 are described in the complaint. Plaintiff's complaint will be dismissed with leave to amend to
15 identify the specific defendants and their actions and provide more information regarding his
16 medical condition.

17 In order to state a claim for violation of the Eighth Amendment based on
18 inadequate medical care, plaintiff must allege "acts or omissions sufficiently harmful to evidence
19 deliberate indifference to serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976).
20 To prevail, plaintiff must show both that his medical needs were objectively serious, and that
21 defendants possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299,
22 (1991); McKinney v. Anderson, 959 F.2d 853 (9th Cir. 1992) (on remand). The requisite state of
23 mind for a medical claim is "deliberate indifference." Hudson v. McMillian, 503 U.S. 1, 4
24 (1992).

25 A serious medical need exists if the failure to treat a prisoner's condition could
26 result in further significant injury or the unnecessary and wanton infliction of pain. Indications

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

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

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

1 affirmative link or connection between a defendant's actions and the claimed deprivation. Rizzo
2 v. Goode, 423 U.S. 362, 96 S.Ct. 598 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.
3 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory
4 allegations of official participation in civil rights violations are not sufficient. See Ivey v. Board
5 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 In accordance with the above, 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 \$19.29. All fees shall be collected and paid in
17 accordance with this court's order to the Herlong Federal Correctional Institution filed
18 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 4. The Clerk of the Court is directed to send plaintiff the form used to file a civil
23 rights action in this district.

24 DATED: June 3, 2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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