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

PATRICK A. MARTINEZ,

Plaintiff,

No. 2:11-cv-0942 KJN P

vs.

VIRGA, et al.,

Defendants.

ORDER

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Plaintiff is a state prisoner proceeding without counsel and in forma pauperis, with an action filed pursuant to 42 U.S.C. § 1983. Plaintiff consented to proceed before the undersigned for all purposes. See 28 U.S.C. § 636(c). By order filed May 26, 2011, plaintiff's amended complaint was dismissed with leave to file a second amended complaint. On May 23, 2011, plaintiff's second amended complaint was docketed. (Dkt. No. 30.) However, on June 21, 2011, plaintiff filed a third amended complaint. (Dkt. No. 33.) The court now screens plaintiff's third amended complaint. 28 U.S.C. § 1915A(a).

The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
5 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
6 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
7 Cir. 1989); Franklin, 745 F.2d at 1227.

8 A complaint, or portion thereof, should only be dismissed for failure to state a  
9 claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set  
10 of facts in support of the claim or claims that would entitle him to relief. Hishon v. King &  
11 Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Palmer  
12 v. Roosevelt Lake Log Owners Ass'n, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a  
13 complaint under this standard, the court must accept as true the allegations of the complaint in  
14 question, Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the  
15 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor,  
16 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

17 In his third amended complaint, plaintiff again alleges that his prescription for  
18 Gabapentin was wrongfully discontinued. However, plaintiff now names over 16 different  
19 defendants, many of whom have no connection with the prescription of plaintiff's seizure  
20 medications, and most of whom plaintiff has failed to include charging allegations or, if charging  
21 allegations are included, fail to state a cognizable civil rights claim. Plaintiff was previously  
22 informed that supervisory personnel are generally not liable under § 1983 for the actions of their  
23 employees under a theory of respondeat superior. (Dkt. No. 15 at 4.)

24 Plaintiff was informed of the following standards on May 26, 2011. (Dkt. No. 6.)

25 Generally, deliberate indifference to a serious medical need presents a cognizable  
26 claim for a violation of the Eighth Amendment's prohibition against cruel and unusual

1 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). According to Farmer v. Brennan, 511  
2 U.S. 825, 847 (1994), “deliberate indifference” to a serious medical need exists “if [the prison  
3 official] knows that [the] inmate [ ] face[s] a substantial risk of serious harm and disregards that  
4 risk by failing to take reasonable measures to abate it.” The deliberate indifference standard “is  
5 less stringent in cases involving a prisoner’s medical needs than in other cases involving harm to  
6 incarcerated individuals because ‘the State’s responsibility to provide inmates with medical care  
7 ordinarily does not conflict with competing administrative concerns.’” McGuckin v. Smith, 974  
8 F.2d 1050, 1060 (9th Cir. 1992) (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992)), overruled  
9 on other grounds by WMX Technologies, Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997).  
10 Specifically, a determination of “deliberate indifference” involves two elements: (1) the  
11 seriousness of the prisoner’s medical needs; and (2) the nature of the defendant’s responses to  
12 those needs. McGuckin, 974 F.2d at 1059.

13 First, a “serious” medical need exists if the failure to treat a prisoner’s condition  
14 could result in further significant injury or the “unnecessary and wanton infliction of pain.” Id.  
15 (citing Estelle, 429 U.S. at 104). Examples of instances where a prisoner has a “serious” need for  
16 medical attention include the existence of an injury that a reasonable doctor or patient would find  
17 important and worthy of comment or treatment; the presence of a medical condition that  
18 significantly affects an individual’s daily activities; or the existence of chronic and substantial  
19 pain. McGuckin, 974 F.2d at 1059-60 (citing Wood v. Housewright, 900 F.2d 1332, 1337-41  
20 (9th Cir. 1990)). Second, the nature of a defendant’s responses must be such that the defendant  
21 purposefully ignores or fails to respond to a prisoner’s pain or possible medical need in order for  
22 “deliberate indifference” to be established. McGuckin, 974 F.2d at 1060. Deliberate  
23 indifference may occur when prison officials deny, delay, or intentionally interfere with medical  
24 treatment, or may be shown by the way in which prison physicians provide medical care.”  
25 Hutchinson v. United States, 838 F.2d 390, 392 (9th Cir. 1988). In order for deliberate  
26 indifference to be established, there must first be a purposeful act or failure to act on the part of

1 the defendant and resulting harm. See McGuckin, 974 F.2d at 1060. “A defendant must  
2 purposefully ignore or fail to respond to a prisoner’s pain or possible medical need in order for  
3 deliberate indifference to be established.” Id. Second, there must be a resulting harm from the  
4 defendant’s activities. Id.

5           However, mere differences of opinion concerning the appropriate treatment  
6 cannot be the basis of an Eighth Amendment violation. Jackson v. McIntosh, 90 F.3d 330, 332  
7 (9th Cir. 1996); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).

8           Plaintiff has failed to address the elements of deliberate indifference in his third  
9 amended complaint. Rather, plaintiff includes a litany of events that took place, including the  
10 provision of verbal information to plaintiff, as well as responses to administrative appeals.  
11 Prisoners have no due process rights related to the administrative grievance process. See Mann  
12 v. Adams, 855 F.2d 639, 640 (9th Cir. 1988) (unpublished administrative policy statements of  
13 the Arizona Department of Corrections in establishing a grievance procedure created no  
14 protected liberty interest); see also Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (there is  
15 no liberty interest entitling inmates to a specific grievance process). Because there is no right to  
16 any particular grievance process, it is impossible for due process to have been violated by  
17 ignoring or failing to properly process grievances.

18           Finally, plaintiff must limit the defendants to those responsible for the  
19 discontinuation of the prescription for Gabapentin. Nurses, officers, staff employees and other  
20 technicians are not authorized to prescribe medication. From plaintiff’s prior filings in this  
21 action, it appears one defendant who allegedly discontinued the Gabapentin is Eliva  
22 Mogahaddam. However, if plaintiff opts to file a fourth amended complaint against defendant  
23 Mogahaddam, plaintiff must demonstrate how this defendant’s discontinuation of the  
24 prescription for Gabapentin demonstrates deliberate indifference, particularly in light of  
25 defendant Mogahaddam’s declaration that in his medical opinion, an alternative medication is  
26 more appropriate for plaintiff’s medical condition. (Dkt. No. 14-1.)

1 For all of the above reasons, the court finds the allegations in plaintiff's amended  
2 complaint so vague and conclusory that it is unable to determine whether the current action is  
3 frivolous or fails to state a claim for relief. In an abundance of caution, plaintiff will be granted  
4 **one final opportunity** to file an amended complaint that complies with Rule 8(a)(2) of the  
5 Federal Rules of Civil Procedure. Plaintiff must allege with at least some degree of particularity  
6 overt acts which defendants engaged in that support plaintiff's claim. Id.

7 If plaintiff chooses to file a fourth amended complaint, plaintiff must demonstrate  
8 how the discontinuation of the prescription to Gabapentin demonstrates deliberate indifference to  
9 plaintiff's serious medical needs. Also, the fourth amended complaint must allege in specific  
10 terms how each named defendant is involved. There can be no liability under 42 U.S.C. § 1983  
11 unless there is some affirmative link or connection between a defendant's actions and the claimed  
12 deprivation. Rizzo v. Goode, 423 U.S. 362 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir.  
13 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, vague and conclusory  
14 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
15 Regents, 673 F.2d 266, 268 (9th Cir. 1982). Plaintiff shall not name a defendant unless plaintiff  
16 includes charging allegations demonstrating deliberate indifference by that defendant to  
17 plaintiff's serious medical needs.

18 Plaintiff is cautioned that failure to comply with this order and the court's prior  
19 orders will result in the dismissal of this action.

20 Finally, on June 21, 2011, plaintiff filed a motion for temporary restraining order.  
21 Plaintiff seeks an order preventing defendant Mogahaddam from allegedly harming plaintiff by  
22 prescribing Tylenol, which plaintiff claims is known to attack the liver, even though plaintiff  
23 suffers from Hepatitis C.

24 A temporary restraining order is an extraordinary and temporary "fix" that the  
25 court may issue without notice to the adverse party if, in an affidavit or verified complaint, the  
26 movant "clearly show[s] that immediate and irreparable injury, loss, or damage will result to the

1 movant before the adverse party can be heard in opposition.” See Fed. R. Civ. P. 65(b)(1)(A).  
2 The purpose of a temporary restraining order is to preserve the status quo pending a fuller  
3 hearing. See generally, Fed. R. Civ. P. 65; see also, E.D. Cal. L. R. (“Local Rule”) 231(a). It is  
4 the practice of this district to construe a motion for temporary restraining order as a motion for  
5 preliminary injunction.<sup>1</sup>

6 A preliminary injunction should not issue unless necessary to prevent threatened  
7 injury that would impair the court’s ability to grant effective relief in a pending action. Sierra  
8 On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984); Gon v. First State  
9 Ins. Co., 871 F.2d 863 (9th Cir. 1989). A preliminary injunction represents the exercise of a far  
10 reaching power not to be indulged except in a case clearly warranting it. Dymo Indus. v.  
11 Tapeprinter, Inc., 326 F.2d 141, 143 (9th Cir. 1964). “The proper legal standard for preliminary  
12 injunctive relief requires a party to demonstrate ‘that he is likely to succeed on the merits, that he  
13 is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of  
14 equities tips in his favor, and that an injunction is in the public interest.’” Stormans, Inc. v.  
15 Selecky, 586 F.3d 1109, 1127 (9th Cir. 2009), quoting Winter v. Natural Res. Def. Council, Inc.,  
16 129 S.Ct. 365, 375-76 (2008). In cases brought by prisoners involving conditions of  
17 confinement, any preliminary injunction “must be narrowly drawn, extend no further than  
18 necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive  
19 means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

20 The claim underlying the instant motion for temporary restraining order is that  
21 defendant Mogahaddam is prescribing Tylenol for plaintiff even though plaintiff suffers from  
22 Hepatitis C, allegedly putting plaintiff at risk for liver damage. However, this claim is not part  
23 of the underlying complaint in this action and, therefore, will not be given a hearing on the merits  
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25 <sup>1</sup> See, e.g., Aiello v. OneWest Bank, 2010 WL 406092, \*1 (E.D. Cal. 2010) (providing  
26 that “[t]emporary restraining orders are governed by the same standard applicable to preliminary  
injunctions”) (citations omitted).

1 at trial. Thus, plaintiff's motion is denied.<sup>2</sup>

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

3 1. Plaintiff's third amended complaint is dismissed; and

4 2. Plaintiff is granted thirty days from the date of service of this order to file a  
5 fourth amended complaint that complies with the requirements of the Civil Rights Act, the  
6 Federal Rules of Civil Procedure, and the Local Rules of Practice; the fourth amended complaint  
7 must bear the docket number assigned this case and must be labeled "Fourth Amended  
8 Complaint"; plaintiff must file an original and two copies of the fourth amended complaint;  
9 failure to file a fourth amended complaint in accordance with this order will result in a  
10 recommendation that this action be dismissed.

11 3. Plaintiff's June 21, 2011 motion for temporary restraining order (dkt. no. 34) is  
12 denied.

13 DATED: July 7, 2011

14   
15 KENDALL J. NEWMAN  
16 UNITED STATES MAGISTRATE JUDGE

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18 <sup>2</sup> The United States Department of Veterans Affairs' website for Hepatitis C, provides  
19 the following public information:

20 "Is it safe to take aspirin or Tylenol if I have hepatitis C? ¶) Over-the-counter  
21 pain relief medications are usually not harmful. Check with your doctor first and  
22 take them in moderation. Overuse of acetaminophen (in Tylenol) can cause liver  
23 damage. Patients with hepatitis C should limit their acetaminophen (Tylenol) to  
two grams (four 500mg tablets) per day. Other drugs for pain include aspirin,  
Ibuprofen, Motrin, Advil, Naproxen, and Aleve. They are safe in HCV patients  
who do not have cirrhosis. If you are not sure, always check with your doctor."

24 <http://www.hepatitis.va.gov/patient/faqs/aspirin-tylenol-safety.asp> (visited July 6, 2011).  
25 Although plaintiff attempted to mark out the reference to Acetaminophen on the Medication  
26 Reconciliation chart, it appears plaintiff was prescribed 1-2 tablets of 325 mg Acetaminophen  
tablets every 8 hours as needed for pain. (Dkt. No. 34 at 6.) If plaintiff wishes to refrain from  
taking Acetaminophen or Tylenol, he should ask his health professional to provide plaintiff with  
an alternative pain relief medication.