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

LUTHER JONES, JR.,

Plaintiff,

No. 2:12-cv-02381 KJN P

vs.

CALIFORNIA MEDICAL FACILITY  
CUSTODY STAFF,

Defendant.

ORDER and

FINDINGS AND RECOMMENDATIONS

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Plaintiff is a state prisoner, proceeding without counsel, who seeks relief pursuant to 42 U.S.C. § 1983, and requests leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302.

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). However, because this action must be dismissed without prejudice, for the reasons set forth below, the court also denies without prejudice plaintiff’s motion to proceed in forma pauperis.

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised

1 claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be  
2 granted, or that seek monetary relief from a defendant who is immune from such relief.  
3 28 U.S.C. § 1915A(b)(1),(2).

4 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
5 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28  
6 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
7 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
8 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
9 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
10 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
11 2000) (“a judge may dismiss [in forma pauperis] claims which are based on indisputably  
12 meritless legal theories or whose factual contentions are clearly baseless.”); Franklin, 745 F.2d at  
13 1227.

14 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and  
15 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
16 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic  
17 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47  
18 (1957)). In order to survive dismissal for failure to state a claim, a complaint must contain more  
19 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
20 allegations sufficient “to raise a right to relief above the speculative level.” Id. However,  
21 “[s]pecific facts are not necessary; the statement [of facts] need only ‘give the defendant fair  
22 notice of what the . . . claim is and the grounds upon which it rests.’” Erickson v. Pardus, 551  
23 U.S. 89, 93 (2007) (quoting Bell Atlantic Corp., 550 U.S. at 555) (citations and internal  
24 quotations marks omitted). In reviewing a complaint under this standard, the court must accept  
25 as true the allegations of the complaint in question, id., and construe the pleading in the light  
26 most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

1 Plaintiff, who is currently incarcerated at California State Prison-Solano (“CSP-  
2 SOL”), alleges that he was “adversely transferred” from CMF to CSP-SOL on January 18, 2012.  
3 (Dkt. No. 1 at 3.) Plaintiff states that he is diabetic and has “P.A.D.” (peripheral artery disease)  
4 and “R.L.S.” (restless leg syndrome). Plaintiff alleges that he does “not get anywhere near the  
5 medical treatment I was getting at CMF,” which has caused plaintiff to “have more injuries  
6 because of non-treatment.” (*Id.*) These problems include “waking up in a[n] emergency room at  
7 CSP Solano in a diabetic coma;” walking long distances in inclement weather (plaintiff states  
8 that, at CMF, his meals were brought to him); and the inability to obtain toothpaste for his  
9 sensitive teeth, previously prescribed by a CMF dentist. Plaintiff also alleges that his property  
10 was confiscated by CMF staff, and that plaintiff continues to be deprived of his “personal TV,  
11 hot pot, religious cross, headphone, and my big cooking bowl, two quart water container which I  
12 had for years. Plus all my connectors and three (3) different length cables.” (*Id.* at 5-6.) Plaintiff  
13 contends that these conditions are causing him significant mental distress. Plaintiff seeks the  
14 return of his property, and \$455,000 damages. Plaintiff states that his 602 appeal (challenging  
15 his past and pending transfers, and the confiscation of his property) is still pending but, because  
16 plaintiff has now been “reclassified for another transfer,” he filed this action because he was  
17 concerned that his current appeal would become “null and void.” (Dkt. No. 1 at 5.)

18 Plaintiff names as defendants the California Medical Facility, as well as “CMF  
19 Custody Staff, Third Floor, Counselor to Captain,” “CMF R&R Staff, Officers to Sgt. CMF  
20 Medical & Psych.,” and “CSP Solano Medical Staff, Social Worker, psychotherapist,  
21 psychologist, nurses and doctors.” (Dkt. No. 1 at 2-3.)

22 Several problems beset the complaint. Most significantly, plaintiff concedes that  
23 he did not exhaust his administrative remedies before initiating this action. The Prison Litigation  
24 Reform Act (“PLRA”) requires that a prisoner exhaust his available administrative remedies  
25 before bringing a federal civil rights action. *See* 42 U.S.C. § 1997e(a); *Brown v. Valoff*, 422  
26 F.3d 926, 934 (9th Cir. 2005); *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009). The

1 district court must dismiss an action where it is clear from the face of the complaint that plaintiff  
2 failed to exhaust his administrative remedies prior to filing suit. 42 U.S.C. § 1997e(a);  
3 McKinney v. Carey, 311 F.3d 1198, 1199-1200 (9th Cir. 2002) (per curiam); Wyatt v. Terhune,  
4 315 F.3d 1108, 1120 (“A prisoner’s concession to nonexhaustion is a valid grounds for dismissal.  
5 . . .”); see also Bennett v. King, 293 F.3d 1096, 1098 (9th Cir. 2002).

6 In the present case, it is clear from the face of the complaint that plaintiff did not  
7 exhaust his administrative remedies before initiating this action. While the PLRA does not  
8 require exhaustion when circumstances render administrative remedies “effectively unavailable,”  
9 Sapp v. Kimbrell, 623 F.3d 813 (9th Cir. 2010), plaintiff does not make this assertion. Rather,  
10 plaintiff states that he intentionally initiated this action before exhausting his administrative  
11 remedies because he was concerned that he would be transferred to another institution before  
12 CSP-SOL completed review of his appeal. Plaintiff’s failure to exhaust the underlying appeal is  
13 underscored by plaintiff’s supplemental filing (see Dkt. No. 9), which contains, inter alia, a  
14 Second Level Response to the appeal, dated August 16, 2012 (see id. at 9), more than a month  
15 after plaintiff filed his complaint. For these reasons, plaintiff’s complaint and this action must be  
16 dismissed without prejudice. Once plaintiff receives the Director’s Level Response to his appeal,  
17 he may file a new action in federal court.

18 The following is provided as guidance should plaintiff choose to file a new  
19 complaint in a new action, after exhaustion of his administrative remedies.

20 First, the alleged circumstances underlying the confiscation and retention of  
21 plaintiff’s property are too vague to ascertain whether plaintiff can state a potentially cognizable  
22 due process claim. The United States Supreme Court has held that “an unauthorized intentional  
23 deprivation of property by a state employee does not constitute a violation of the procedural  
24 requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful  
25 postdeprivation remedy for the loss is available.” Hudson v. Palmer, 468 U.S. 517, 533 (1984).  
26 Only an authorized, intentional deprivation of property -- one carried out pursuant to established

1 state procedures, regulations, or statutes -- may constitute an actionable violation of the Due  
2 Process Clause. Piatt v. McDougall, 773 F.2d 1032, 1036 (9th Cir. 1985); see also Knudson v.  
3 City of Ellensburg, 832 F.2d 1142, 1149 (9th Cir. 1987).

4           Second, plaintiff has failed to allege the necessary elements for stating a  
5 potentially cognizable challenge to his medical care. In Estelle v. Gamble, 429 U.S. 97, 106  
6 (1976), the Supreme Court held that inadequate medical care did not constitute cruel and unusual  
7 punishment cognizable under Section 1983 and the Eighth Amendment unless the alleged  
8 mistreatment rose to the level of “deliberate indifference to serious medical needs.” In applying  
9 this standard, the Ninth Circuit has held that “the indifference to [plaintiff’s] medical needs must  
10 be substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this  
11 cause of action.” Broughton v. Cutter Lab., 622 F.2d 458, 460 (9th Cir. 1980), citing Estelle, 429  
12 U.S. at 105-06. To establish deliberate indifference, a plaintiff must show that defendants knew  
13 of and disregarded an excessive risk to plaintiff’s health or safety. Farmer v. Brennan, 511 U.S.  
14 825, 837 (1994). A prison official must “both be aware of facts from which the inference could  
15 be drawn that a substantial risk of serious harm exists, and he must also draw the inferences.” Id.  
16 Plaintiff’s allegations fail to meet these requirements.

17           Third, all of plaintiff’s claims fail to allege an actual connection or link between  
18 the alleged conduct of specifically identified, individual defendants and plaintiff’s alleged  
19 constitutional deprivations. See Monell v. Department of Social Servs., 436 U.S. 658 (1978);  
20 Rizzo v. Goode, 423 U.S. 362 (1976). “A person ‘subjects’ another to the deprivation of a  
21 constitutional right, within the meaning of § 1983, if he does an affirmative act, participates in  
22 another’s affirmative acts or omits to perform an act which he is legally required to do that  
23 causes the deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th  
24 Cir. 1978); see also Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (“The inquiry into  
25 causation must be individualized and focus on the duties and responsibilities of each individual  
26 defendant whose acts or omissions are alleged to have caused a constitutional deprivation.”).

1 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or  
2 connection between a specific defendant’s actions and the claimed deprivation. Rizzo v. Goode,  
3 423 U.S. 362, 371 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v.  
4 Duffy, supra, 588 F.2d at 743. Moreover, “[u]nder Section 1983, supervisory officials are not  
5 liable for actions of subordinates on any theory of vicarious liability. A supervisor may be liable  
6 [only] if there exists either (1) his or her personal involvement in the constitutional deprivation,  
7 or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the  
8 constitutional violation.” Hansen v. Black, 885 F.2d 642, 645-646 (9th Cir. 1989) (citations  
9 omitted). Vague and conclusory allegations of official participation in civil rights violations are  
10 not sufficient. Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982). Should plaintiff file  
11 a new action after exhausting his administrative remedies, he must identify individual  
12 defendants, the challenged actions or inactions of each defendant, and demonstrate how these  
13 actions or inactions deprived plaintiff of his constitutional rights. Rizzo v. Goode, supra, 423  
14 U.S. at 371.

15 Finally, because plaintiff’s complaint must be dismissed at the outset for failure to  
16 exhaust administrative remedies, the court declines to impose the filing fee, which is otherwise  
17 required of prisoners granted leave to proceed in forma pauperis.<sup>1</sup> See 28 U.S.C. § 1915(a). In  
18 any newly-filed action, plaintiff may submit a new application to proceed in forma pauperis.  
19 Plaintiff is cautioned, however, that if he attempts to further pursue the instant action, rather than  
20 file a new civil rights action after exhaustion of his administrative remedies, the court will grant  
21 in forma pauperis status and impose the \$350.00 filing fee in this case before again  
22 recommending that this action be dismissed.

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26 <sup>1</sup> The court notes that plaintiff is not a frequent or vexatious litigant in this court, or subject to the “three strikes” rule of 28 U.S.C. § 1915(g).

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

2 1. Plaintiff’s motion to proceed in forma pauperis is denied without prejudice;

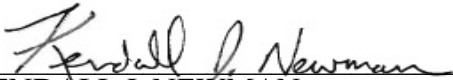
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4 2. The Clerk of Court is directed to randomly assign a district judge to this action.

5 For the reasons stated herein, IT IS HEREBY RECOMMENDED that this action  
6 be dismissed without prejudice.

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 14 days  
9 after being served with these findings and recommendations, plaintiff may file written objections  
10 with the court. The document should be captioned “Objections to Magistrate Judge’s Findings  
11 and Recommendations.” Plaintiff is advised that failure to file objections within the specified  
12 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153  
13 (9th Cir. 1991).

14 DATED: October 17, 2012

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17 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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