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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY GRISSOM,  
Plaintiff,  
v.  
JOHNSON & JOHNSON,  
Defendants.

No. 2:15-cv-1334 TLN DAD P

ORDER AND  
FINDINGS AND RECOMMENDATIONS

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

**SCREENING REQUIREMENT**

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. See 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. See 28 U.S.C. § 1915A(b)(1) & (2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th

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

6 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain  
7 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the  
8 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic  
9 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
10 However, in order to survive dismissal for failure to state a claim a complaint must contain more  
11 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
12 allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic, 550  
13 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the  
14 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.  
15 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all  
16 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

17 The Civil Rights Act under which this action was filed provides as follows:

18 Every person who, under color of [state law] . . . subjects, or causes  
19 to be subjected, any citizen of the United States . . . to the  
20 deprivation of any rights, privileges, or immunities secured by the  
21 Constitution . . . shall be liable to the party injured in an action at  
22 law, suit in equity, or other proper proceeding for redress.

23 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
24 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
25 Monell v. Department of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
26 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the  
27 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or  
28 omits to perform an act which he is legally required to do that causes the deprivation of which  
complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

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1 Where, as here, it is clear that granting plaintiff leave to amend his complaint would be  
2 futile, the court will recommend that this action be dismissed. See Chaset v. Fleer/Skybox Int'l,  
3 300 F.3d 1083, 1088 (9th Cir. 2002) (there is no need to prolong the litigation by permitting  
4 further amendment where the “basic flaw” in the underlying facts as alleged cannot be cured by  
5 amendment); Lipton v. Pathogenesis Corp., 284 F.3d 1027, 1039 (9th Cir. 2002) (“Because any  
6 amendment would be futile, there was no need to prolong the litigation by permitting further  
7 amendment.”).

8 **OTHER MATTERS**

9 Also pending before the court is plaintiff’s motion for appointment of counsel. The  
10 United States Supreme Court has ruled that district courts lack authority to require counsel to  
11 represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490 U.S. 296,  
12 298 (1989). In certain exceptional circumstances, the district court may request the voluntary  
13 assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017  
14 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

15 The test for exceptional circumstances requires the court to evaluate the plaintiff’s  
16 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in  
17 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,  
18 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances  
19 common to most prisoners, such as lack of legal education and limited law library access, do not  
20 establish exceptional circumstances that would warrant a request for voluntary assistance of  
21 counsel. In light of the findings and recommendations herein, the court does not find the required  
22 exceptional circumstances.

23 **CONCLUSION**

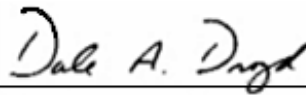
24 IT IS HEREBY ORDERED that plaintiff’s motion for appointment of counsel (Doc. No.  
25 6) is denied.

26 IT IS HEREBY RECOMMENDED that:

- 27 1. Plaintiff’s motion to proceed in forma pauperis (Doc. No. 2) be denied; and
- 28 2. This action be dismissed for failure to state a cognizable claim for relief.

1           These findings and recommendations are submitted to the United States District Judge  
2 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
3 after being served with these findings and recommendations, plaintiff may file written objections  
4 with the court and serve a copy on all parties. Such a document should be captioned  
5 “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that  
6 failure to file objections within the specified time may waive the right to appeal the District  
7 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

8 Dated: October 8, 2015

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11 DALE A. DROZD  
12 UNITED STATES MAGISTRATE JUDGE

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