

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CAMERON SHEPHERD,

No. 2:15-cv-1894 KJN P

Plaintiff,

V.

## ORDER

CALIFORNIA FORENSIC MEDICAL  
GROUP, et al.,

## Defendants.

Plaintiff is a state prisoner, presently housed in the Yolo County Jail, proceeding without counsel. 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).

Plaintiff 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). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 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 to make monthly payments of twenty percent of the preceding month's income credited to plaintiff's trust account.

1 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time  
2 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
3 § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief against a  
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
6 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally  
7 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek  
8 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

9 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
11 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
12 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
13 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
14 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
15 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
16 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
17 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at  
18 1227.

19 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain  
20 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the  
21 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic  
22 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
23 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a  
24 formulaic recitation of the elements of a cause of action;" it must contain factual allegations  
25 sufficient "to raise a right to relief above the speculative level." Id. at 555. However, "[s]pecific  
26 facts are not necessary; the statement [of facts] need only 'give the defendant fair notice of what  
27 the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93  
28 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).

1 In reviewing a complaint under this standard, the court must accept as true the allegations of the  
2 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most  
3 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other  
4 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
6 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
7 the alleged violation was committed by a person acting under the color of state law. West v.  
8 Atkins, 487 U.S. 42, 48 (1988).

9 Liability may be imposed on an individual defendant under 42 U.S.C. § 1983 if the  
10 plaintiff can show that the defendant's actions both actually and proximately caused the  
11 deprivation of a federally protected right. Lemire v. Caifornia Dep't of Corrections &  
12 Rehabilitation, 726 F.3d 1062, 1074 (9th Cir. 2013); Leer v. Murphy, 844 F.2d 628, 634 (9th Cir.  
13 1988); Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981). A person deprives  
14 another of a constitutional right within the meaning of § 1983 if he does an affirmative act,  
15 participates in another's affirmative act or omits to perform an act which he is legally required to  
16 do, that causes the deprivation of which the plaintiff complains. Leer, 844 F.2d at 633.

17 Under no circumstances is there respondeat superior liability under § 1983. Lemire, 756  
18 F.3d at 1074. Put another way, there is no liability under section 1983 solely because one is  
19 responsible for the actions or omissions of another. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.  
20 1989); Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984).  
21 A supervisor may be liable under § 1983 upon a showing of (1) personal involvement in the  
22 constitutional deprivation or (2) a sufficient causal connection between the supervisor's wrongful  
23 conduct and the constitutional violation. Henry A. v. Willden, 678 F.3d 991, 1003-04 (9th Cir.  
24 2012) (citing Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011)).

25 Here, plaintiff alleges that the California Forensic Medical Group ("CFMG") provided  
26 him an unsanitary wheelchair, resulting in a staph infection which was misdiagnosed as a spider  
27 bite, and then developed MRSA. Plaintiff claims that despite his request for a medical chrono for  
28 additional boxers and towels to change out due to the blood and pus, defendant Chan forgot to put

1 the information in the computer, subjecting plaintiff to further unsanitary conditions and  
2 infections. Plaintiff alleges that CFMG medical staff failed to follow through with a medical  
3 chrono, and states that defendants Owens and Chan “refused proper medical treatment of [his]  
4 MRSA stating ‘the MRSA antibiotics are outside the CFMG level of care.’” (ECF No. 1 at 5.)  
5 Plaintiff developed another MRSA infection on April 28, 2015, and was denied antibiotics.  
6 Plaintiff suffered a fourth MRSA infection on May 26, 2015, and two more on June 4, 2015. On  
7 June 10, 2015, plaintiff was provided medical ointment to help with the MRSA infections.  
8 Plaintiff contends he was subjected to several months of unnecessary pain and suffering that  
9 could have been avoided with the proper antibiotics. Based on these allegations, plaintiff claims  
10 that he will now have MRSA for the rest of his life due to defendants’ “gross negligence.” (ECF  
11 No. 1 at 3.) In addition to the CFMG, Owens, and Chan, plaintiff names Dr. Tomkew and Nurse  
12 Assistant Nick as defendants.

13 First, plaintiff includes no charging allegations as to defendants Kew and Nick. Plaintiff  
14 must allege facts linking each named defendant with the alleged constitutional violation.

15 Second, plaintiff names CMFG as a defendant. CMFG appears to be a private entity. To  
16 state a claim under § 1983, the defendant must have acted under color of state law. Private actors  
17 have been found to act under color of state law where they contract with the state to provide a  
18 service that the state bears “an affirmative obligation to provide.” West, 487 U.S. at 55-56 (1988)  
19 (finding private doctor acted under color of state law in providing medical care to inmates under a  
20 contract with prison because Eighth Amendment requires prison to provide such care to inmates).  
21 If plaintiff wishes to assert a civil rights claim against CMFG, he must specify how CMFG acted  
22 under color of state law, e.g. if CMFG operates as a state contractor, and how CMFG violated  
23 plaintiff’s constitutional rights.

24 Third, although it appears that plaintiff is attempting to allege an Eighth Amendment  
25 violation, plaintiff refers to negligence and gross negligence. Plaintiff is cautioned that in order to  
26 state a claim for a violation of the Eighth Amendment, he must allege facts demonstrating  
27 deliberate indifference to his serious medical needs, which is a higher standard than negligence.  
28 ////

1           To state a claim for violation of the Eighth Amendment based on inadequate medical care,  
2 plaintiff must allege “acts or omissions sufficiently harmful to evidence deliberate indifference to  
3 serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976). To prevail, plaintiff must  
4 show both that his medical needs were objectively serious, and that defendant possessed a  
5 sufficiently culpable state of mind. Snow v. McDaniel, 681 F.3d 978, 982 (9th Cir. 2012),  
6 overruled in part on other grounds by Peralta v. Dillard, 744 F.3d 1076 (9th Cir. 2014) (en banc);  
7 Wilson v. Seiter, 501 U.S. 294, 297-99 (1991).

8           To meet the objective element, plaintiff must demonstrate the existence of a serious  
9 medical need. Estelle, 429 U.S. at 104. Such need exists if the failure to treat the injury or  
10 condition “could result in further significant injury” or cause “the unnecessary and wanton  
11 infliction of pain.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal quotes and  
12 citations omitted). Serious medical needs include “[t]he existence of an injury that a reasonable  
13 doctor or patient would find important and worthy of comment or treatment; the presence of a  
14 medical condition that significantly affects an individual’s daily activities; [and] the existence of  
15 chronic and substantial pain.” McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992),  
16 overruled in part on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997).

17           Under the subjective element, a prison official is deliberately indifferent only if the  
18 official “knows of and disregards an excessive risk to inmate health and safety.” Toguchi v.  
19 Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (internal quotes and citation omitted). To prevail on  
20 a claim for deliberate indifference, a prisoner must demonstrate that the prison official “kn[ew] of  
21 and disregard[ed] an excessive risk to inmate health or safety; the official must both be aware of  
22 the facts from which the inference could be drawn that a substantial risk of serious harm exists,  
23 and he must also draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate  
24 indifference “may appear when prison officials deny, delay or intentionally interfere with medical  
25 treatment, or it may be shown by the way in which prison physicians provide medical care.”  
26 Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988). The court “need not defer to the  
27 judgment of prison doctors or administrators” when deciding the deliberate indifference element.  
28 Hunt v. Dental Dept., 865 F.2d 198, 200 (9th Cir. 1989) (where prison officials were aware loss

1 of his dentures was causing him severe pain and permanent physical damage, three month delay  
2 in providing pain relief and soft food diet constituted Eighth Amendment violation).

3 Delays in providing medical care may manifest deliberate indifference. Estelle, 429 U.S.  
4 at 104-05. To establish a claim of deliberate indifference arising from delay in providing care, a  
5 plaintiff must show that the delay was harmful. See Hallett v. Morgan, 296 F.3d 732, 745-46 (9th  
6 Cir. 2002); Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin, 974 F.2d at 1059.  
7 In this regard, “[a] prisoner need not show his harm was substantial; however, such would  
8 provide additional support for the inmate’s claim that the defendant was deliberately indifferent to  
9 his needs.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see also McGuckin, 974 F.2d at  
10 1060.

11 In applying the deliberate indifference standard, the Ninth Circuit has held that before it  
12 can be said that a prisoner’s civil rights have been abridged, “the indifference to his medical  
13 needs must be substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not  
14 support this cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir.  
15 1980) (citing Estelle, 429 U.S. at 105-06.) A complaint that a physician has been negligent in  
16 diagnosing or treating a medical condition does not state a valid claim of medical mistreatment  
17 under the Eighth Amendment. Even gross negligence is insufficient to establish deliberate  
18 indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir.  
19 1990). A difference of opinion between medical professionals concerning the appropriate course  
20 of treatment generally does not amount to deliberate indifference to serious medical needs.  
21 Toguchi, 391 F.3d at 1058; Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Also, “a  
22 difference of opinion between a prisoner-patient and prison medical authorities regarding  
23 treatment does not give rise to a [§]1983 claim.” Franklin v. Oregon, 662 F.2d 1337, 1344 (9th  
24 Cir. 1981). To establish that such a difference of opinion amounted to deliberate indifference, the  
25 prisoner “must show that the course of treatment the doctors chose was medically unacceptable  
26 under the circumstances” and “that they chose this course in conscious disregard of an excessive  
27 risk to [the prisoner’s] health.” See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); see  
28 also Wilhelm, 680 F.3d at 1123 (awareness of need for treatment followed by unnecessary delay

1 in implementing the prescribed treatment sufficient to plead deliberate indifference); see also  
2 Snow, 681 F.3d at 988 (decision of non-treating, non-specialist physicians to repeatedly deny  
3 recommended surgical treatment may be medically unacceptable under all the circumstances.)

4 As an example, plaintiff's allegations that his initial infection was misdiagnosed as a  
5 spider bite, and defendant Chan initially forgot to enter the medical chrono in the computer, fail  
6 without more to state a cognizable Eighth Amendment claim.

7 Finally, plaintiff claims, without any factual support, that he was denied dental care. Such  
8 conclusory allegation, without more, fails to state a cognizable Eighth Amendment claim.

9 The court finds the allegations in plaintiff's complaint so vague and conclusory that it is  
10 unable to determine whether the current action is frivolous or fails to state a claim for relief. The  
11 court has determined that the complaint does not contain a short and plain statement as required  
12 by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading policy, a  
13 complaint must give fair notice and state the elements of the claim plainly and succinctly. Jones  
14 v. Cnty. Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff must allege with at least  
15 some degree of particularity overt acts which defendants engaged in that support plaintiff's claim.  
16 Id. Because plaintiff has failed to comply with the requirements of Fed. R. Civ. P. 8(a)(2), the  
17 complaint must be dismissed. The court will, however, grant leave to file an amended complaint.

18 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
19 about which he complains resulted in a deprivation of plaintiff's constitutional rights. Rizzo v.  
20 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each  
21 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is  
22 some affirmative link or connection between a defendant's actions and the claimed deprivation.  
23 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743  
24 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil  
25 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

26 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to  
27 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended  
28 complaint be complete in itself without reference to any prior pleading. This requirement exists

1 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.  
2 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original  
3 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an  
4 original complaint, each claim and the involvement of each defendant must be sufficiently  
5 alleged.

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

7 1. Plaintiff's request for leave to proceed in forma pauperis is granted.  
8 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
9 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
10 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
11 Director of the California Department of Corrections and Rehabilitation filed concurrently  
12 herewith.

13 3. Plaintiff's complaint is dismissed.

14 4. Within thirty days from the date of this order, plaintiff shall complete the attached  
15 Notice of Amendment and submit the following documents to the court:

16 a. The completed Notice of Amendment; and

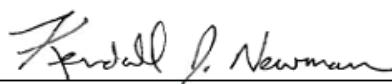
17 b. An original and one copy of the Amended Complaint.

18 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the  
19 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must  
20 also bear the docket number assigned to this case and must be labeled "Amended Complaint."

21 Failure to file an amended complaint in accordance with this order may result in the  
22 dismissal of this action.

23 Dated: December 18, 2015

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

## CAMERON SHEPHERD.

No. 2:15-cv-1894 KJN P

Plaintiff,

V.

## NOTICE OF AMENDMENT

CALIFORNIA FORENSIC MEDICAL  
GROUP, et al.,

## Defendants.

Plaintiff hereby submits the following document in compliance with the court's order filed \_\_\_\_\_.

## Amended Complaint

DATED:

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**Plaintiff**