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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RAUL ALVAREZ,  
Plaintiff,  
v.  
DEPARTMENT OF CORRECTIONS  
AND REHABILITATION, et. al.,  
Defendants.

No. 2:15-cv-02290 AC P

ORDER

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. In addition to filing a complaint (ECF No. 1), plaintiff has filed an application to proceed in forma pauperis under 28 U.S.C. § 1915. ECF No. 7.

**I. Application to Proceed In Forma Pauperis**

The court has reviewed plaintiff’s application and finds that it makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

**II. Screening Requirements**

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

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

4 A claim “is [legally] frivolous where 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 (9th  
6 Cir. 1984). “[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
7 meritless legal theories or whose factual contentions are clearly baseless.” Jackson v. Arizona,  
8 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), superseded by statute  
9 on other grounds as stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000); Neitzke, 490  
10 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully pleaded,  
11 has an arguable legal and factual basis. Id.

12 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the  
13 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of  
14 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550  
15 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
16 However, in order to survive dismissal for failure to state a claim, a complaint must contain more  
17 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
18 allegations sufficient “to raise a right to relief above the speculative level.” Id. (citations  
19 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that  
20 merely creates a suspicion [of] a legally cognizable right of action.” Id. (alteration in original)  
21 (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d  
22 ed. 2004)).

23 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
24 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell  
25 Atl. Corp., 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
26 content that allows the court to draw the reasonable inference that the defendant is liable for the  
27 misconduct alleged.” Id. (citing Bell Atl. Corp., 550 U.S. at 556). In reviewing a complaint  
28 under this standard, the court must accept as true the allegations of the complaint in question,

1 Hospital Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 740 (1976), as well as construe the pleading  
2 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor, Jenkins v.  
3 McKeithen, 395 U.S. 411, 421 (1969).

### 4 **III. Screening Order**

5 Plaintiff alleges that the California Department of Corrections and Rehabilitation (CDCR)  
6 failed to act in time to prevent him from contracting a fungal infection known as "Valley Fever."  
7 ECF No. 1 at 3. He has also sued California Governor Jerry Brown. Id. at 2. Plaintiff has failed,  
8 however, to allege how either of these defendants actually violated his rights. He does not allege  
9 how either was specifically responsible for his infection. Additionally, the CDCR is not a viable  
10 defendant because it is not a "person" within the meaning of section 1983. See Howlett v. Rose,  
11 496 U.S. 356, 365 (1990). Finally, plaintiff is cautioned that any suit against Governor Brown  
12 cannot succeed based solely on his position as the overall superior to CDCR officials. See Taylor  
13 v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (no respondeat superior liability under Section 1983).

14 Based on the foregoing, plaintiff's complaint will be dismissed and he will be given leave  
15 to amend.

### 16 **IV. Leave to Amend**

17 Plaintiff's complaint is dismissed with leave to amend. If plaintiff chooses to file an  
18 amended complaint it should observe the following:

19 Any amended complaint must identify as a defendant only persons who personally  
20 participated in a substantial way in depriving him of a federal constitutional right. Johnson v.  
21 Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a  
22 constitutional right if he does an act, participates in another's act or omits to perform an act he is  
23 legally required to do that causes the alleged deprivation).

24 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

25 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. See  
26 George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007).

27 Any amended complaint must be written or typed so that it so that it is complete in itself  
28 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended

1 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
2 earlier filed complaint no longer serves any function in the case. See Forsyth v. Humana, 114  
3 F.3d 1467, 1474 (9th Cir. 1997) (the “‘amended complaint supersedes the original, the latter  
4 being treated thereafter as non-existent.’”) (quoting Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.  
5 1967)).

6 Finally, the court notes that any amended complaint should be as concise as possible in  
7 fulfilling the above requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of  
8 procedural or factual background which has no bearing on his legal claims. He should also take  
9 pains to ensure that his amended complaint is as legible as possible. This refers not only to  
10 penmanship, but also spacing and organization. Lengthy, unbroken paragraphs can be difficult to  
11 read when handwritten and plaintiff would do well to avoid them wherever possible.

#### 12 **V. Summary of the Order for Pro Se Plaintiff**

13 You have been granted in forma pauperis status and will not have to pay the entire filing  
14 fee immediately.

15 The court has found that your claims, as stated, are not suitable to proceed. It is unclear  
16 how the defendants were responsible for your infection. Additionally, you cannot pursue a claim  
17 against the CDCR itself because it is not a ‘person’ under section 1983. You also cannot bring a  
18 claim against Governor Brown based on his position as the overall superior to CDCR leadership.

19 You are being given a chance to submit an amended complaint which fixes the problems  
20 with your claims.

#### 21 **VI. Conclusion**

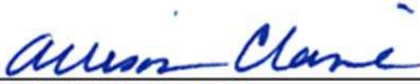
22 Accordingly, IT IS HEREBY ORDERED that:

- 23 1. Plaintiff’s application to proceed in forma pauperis (ECF No. 7) is granted.
- 24 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected  
25 in accordance with the notice to the California Department of Corrections and  
26 Rehabilitation filed concurrently herewith.
- 27 3. Plaintiff’s complaint is dismissed with leave to amend within 30 days of service of  
28 this order.

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4. Failure to comply with this order may result in dismissal of this action.

DATED: June 16, 2017

  
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ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE