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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES BOWELL,  
Plaintiff,  
v.  
CALIFORNIA DEPARTMENT OF  
CORRECTIONS, et al.,  
Defendants.

No. 2:17-cv-0981 KJN P

ORDER

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).

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 Plaintiff names the California Department of Corrections and Rehabilitation (“CDCR”)  
6 and J. Lewis, Deputy Director, Policy & Risk Management, as defendants. Plaintiff alleges that  
7 since August 8, 1991, he has been forced to receive injections of Aplisol and Tubersol in a  
8 Tuberculosis (“TB”) skin test, which he claims are carcinogenics, which have caused him skin  
9 cancer. Plaintiff claims the April 29, 2015 TB test caused a resurgence of basal cell cancer in the  
10 same place where basal cancer was removed via Mohs procedure on May 5, 2016. (ECF No. 1 at  
11 4.) Plaintiff claims that when responding to his administrative appeal, defendant Lewis refused to  
12 exempt plaintiff from the annual TB testing on April 29, 2016. Plaintiff alleges medical  
13 malpractice and negligence, and seeks monetary damages.

#### 14 Improper Defendant

15 Plaintiff names the CDCR as a defendant. The Eleventh Amendment bars suits brought  
16 by private parties against a state or state agency unless the state or the agency consents to such  
17 suit. See Quern v. Jordan, 440 U.S. 332 (1979); Alabama v. Pugh, 438 U.S. 781 (1978) (per  
18 curiam); Jackson v. Hayakawa, 682 F.2d 1344, 1349-50 (9th Cir. 1982). Although the Eleventh  
19 Amendment is not jurisdictional, the court may raise the defect on its own. Wisconsin  
20 Department of Corrections v. Schacht, 524 U.S. 381, 389 (1998); Edelman v. Jordan, 415 U.S.  
21 651, 677-78 (1974). In the instant case, the State of California has not consented to suit.  
22 Accordingly, plaintiff’s claims against the California Department of Corrections and  
23 Rehabilitation are legally frivolous and must be dismissed.

#### 24 Medical Malpractice and Negligence

25 In his pleading, plaintiff focuses on the elements of negligence, including causation and  
26 foreseeability. Plaintiff cites California state cases to support his claims, as well as two Supreme  
27 Court cases (ECF No. 1 at 5-6, 7), all of which are based on negligence causes of action. Plaintiff  
28 also cites Helling v. McKinney, 113 S. Ct. 2475 (1993), where “the inmate stated a cause of

1 action under the Eighth Amendment by alleging the defendants had with ‘deliberate indifference’  
2 exposed him to high levels of ETS that posed an unreasonable risk of serious damage to his future  
3 health.” (ECF No. 1 at 6.)

4 It is well established that a prison official’s deliberate indifference to a substantial risk of  
5 serious harm to an inmate violates the cruel and unusual punishment clause of the Eighth  
6 Amendment. Farmer v. Brennan, 511 U.S. 825, 828-29 (1994); Helling, 509 U.S. at 31-32;  
7 Wilson v. Seiter, 501 U.S. 294, 302 (1991); Estelle v. Gamble, 429 U.S. 97, 104 (1976). “It is  
8 not, however, every injury suffered by one prisoner at the hands of another that translates into  
9 constitutional liability for prison officials responsible for the victim’s safety.” Farmer, 511 U.S.  
10 at 834. There are objective and subjective requirements which must be met to prevail on such an  
11 Eighth Amendment claim. First, for the objective requirement, “the inmate must show that he is  
12 incarcerated under conditions posing a substantial risk of serious harm.” Id. Second, the prison  
13 official must have a sufficiently culpable state of mind. See id. Here the state of mind is one of  
14 deliberate indifference. See id. A prison official who knows of and disregards an excessive risk  
15 to an inmate’s health or safety demonstrates deliberate indifference. See id. at 837. Thus, “the  
16 official must both be aware of facts from which the inference could be drawn that a substantial  
17 risk of serious harm exists, and he must also draw that inference.” Id. However, an official who  
18 knows of a substantial risk to an inmate’s health or safety but acts reasonably under the  
19 circumstances will not be held liable under the cruel and unusual punishment clause, even if the  
20 threatened harm results. See id. at 843.

21 Moreover, “[a] showing of medical malpractice or negligence is insufficient to establish a  
22 constitutional deprivation under the Eighth Amendment.” Farmer, 511 U.S. at 1060. “[E]ven  
23 gross negligence is insufficient to establish a constitutional violation.” Id. (citing Wood v.  
24 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)).

25 Thus, plaintiff’s allegations based on negligence or medical malpractice fail to state a  
26 federal cause of action. Plaintiff appears to argue that his medical malpractice complaint makes  
27 the requisite showing by linking it to Helling. But plaintiff is mistaken. Plaintiff must  
28 specifically allege facts demonstrating that a particular defendant was deliberately indifferent to a

1 substantial risk of serious harm to plaintiff. In addition, the third level appeal decision reflects  
2 that plaintiff's primary care provider advised plaintiff on May 3, 2016, that the "purified protein  
3 derivative and [plaintiff's] skin cancer diagnosis are unrelated." (ECF No. 1 at 8.) Plaintiff is  
4 cautioned that "[a] difference of opinion between a prisoner-patient and prison medical  
5 authorities regarding treatment does not give rise to a § 1983 claim." Franklin v. Oregon, 662  
6 F.2d 1337, 1344 (9th Cir. 1981) (internal citation omitted). In addition, it is not deliberate  
7 indifference for prison officials serving in administrative roles to rely on the opinions of qualified  
8 medical staff in responding to prisoner's grievances. See Peralta v. Dillard, 744 F.3d 1076, 1087  
9 (9th Cir. 2014) (*en banc*), cert. denied, 135 S. Ct. 946 (2015); Doyle v. Cal. Dep't of Corr. &  
10 Rehab., 2015 WL 5590728, at \*9 (N.D. Cal. Sept. 23, 2015) ("It simply cannot be said that, by  
11 signing off on the denials at the second . . . level[ ], defendants . . . disregarded a substantial risk  
12 of harm to [plaintiff]'s health by failing to take reasonable steps to abate it.").

### 13 Conclusion

14 Because plaintiff fails to state a cognizable Eighth Amendment claim, his complaint must  
15 be dismissed. The court will, however, grant leave to file an amended complaint.

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

27 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to  
28 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended

1 complaint be complete in itself without reference to any prior pleading. This requirement exists  
2 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.  
3 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original  
4 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an  
5 original complaint, each claim and the involvement of each defendant must be sufficiently  
6 alleged. However, plaintiff is not required to re-submit his exhibits. Plaintiff may refer to the  
7 prior exhibits or he may ask the Clerk of the Court to append his exhibits to any amended  
8 complaint.

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

10 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

11 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
12 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
13 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
14 Director of the California Department of Corrections and Rehabilitation filed concurrently  
15 herewith.

16 3. Plaintiff's complaint is dismissed.

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

19 a. The completed Notice of Amendment; and

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

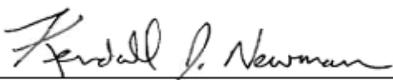
21 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the  
22 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must  
23 also bear the docket number assigned to this case and must be labeled "Amended Complaint."

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

26 5. The Clerk of the Court shall send plaintiff the form for filing a civil rights complaint.

27 Dated: May 16, 2017

28 bowe0981.

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KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

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NOTICE OF AMENDMENT

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

Amended Complaint

DATED: \_\_\_\_\_

\_\_\_\_\_  
Plaintiff