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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSEPH WAYNE FOSTER,  
Plaintiff,  
v.  
LESLIE SCHMIDT, et al.,  
Defendants.

No. 2:17-cv-2199-MCE-EFB P

ORDER

Plaintiff, a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983, has filed an application to proceed in forma pauperis. ECF No. 5.

I. Application to Proceed In Forma Pauperis

The second of plaintiff’s applications (*id.*) 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 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

1 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

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6 885 F.2d 639, 640 (9th Cir. 1989) (citation and internal quotations omitted), *superseded by statute*  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

10 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the  
11 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of  
12 what the . . . claim is and the grounds upon which it rests.’” *Bell Atl. Corp. v. Twombly*, 550 U.S.  
13 544, 555 (2007) (alteration in original) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

14 However, in order to survive dismissal for failure to state a claim, a complaint must contain more  
15 than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
16 allegations sufficient “to raise a right to relief above the speculative level.” *Id.* (citations  
17 omitted). “[T]he pleading must contain something more . . . than . . . a statement of facts that  
18 merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (alteration in original)  
19 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, 1216 (3d  
20 ed. 2004)).

21 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
22 relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*  
23 *Corp.*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content  
24 that allows the court to draw the reasonable inference that the defendant is liable for the  
25 misconduct alleged.” *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 556). In reviewing a complaint  
26 under this standard, the court must accept as true the allegations of the complaint in question,  
27 *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), as well as construe the pleading

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1 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor, *Jenkins v.*  
2 *McKeithen*, 395 U.S. 411, 421 (1969).

3 III. Screening Order

4 Plaintiff alleges that, in early 2016, an MRI revealed a "soft tissue mass" in his upper  
5 back. ECF No. 1 at 4. He claims that the mass affected his daily activities, making it difficult to  
6 sleep and limiting his movements. *Id.* Plaintiff claims that treatment for the mass was initially  
7 approved on March 1, 2016. *Id.* at 5. However, defendant Ralph Delgado allegedly denied the  
8 treatment on March 22, 2016. *Id.*

9 The court finds that the allegations in the complaint are insufficiently detailed to state a  
10 cognizable claim. First, plaintiff has sued four defendants, but has only alleged wrongdoing  
11 against defendant Delgado. It is unclear what allegations, if any, he seeks to pursue against  
12 defendants Leslie Schmidt, Steen Jensen,<sup>1</sup> and Alphonso Swaby. Second, plaintiff's allegations  
13 against Delgado lack sufficient detail to establish deliberate indifference. He claims that Delgado  
14 denied the recommended treatment, but it is unclear what rationale underlay this decision.

15 A claim of deliberate indifference requires factual allegations showing that the defendant,  
16 acting with a state of mind more blameworthy than negligence, denied, delayed, or interfered with  
17 the treatment of Plaintiff's serious medical needs. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994);  
18 *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). The indifference to medical needs must be  
19 substantial; mere malpractice, or even gross negligence, does not constitute cruel and unusual  
20 punishment. *Estelle*, 429 U.S. at 106. Absent some indication as to what information was  
21 presented to Delgado and what reasons he gave for rejecting the recommended treatment, it is  
22 impossible to determine whether Delgado acted with deliberate indifference or mere negligence.<sup>2</sup>

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24 <sup>1</sup> The complaint references Jensen, but states only that he recommended medical treatment  
25 for plaintiff's condition. ECF No. 1 at 4.

26 <sup>2</sup> Plaintiff does allege that Delgado's decision to deny the treatment "was made with clear  
27 disregard to the excessive risk to plaintiff's health." *Id.* at 5. This conclusory allegation is not  
28 supported by any specific details, however. Thus, it is unclear how Delgado became aware of the  
risk and disregarded it. Indeed, plaintiff provides no allegation that Delgado ever examined him  
or came to recognize the severity of plaintiff's condition in any other way.

1 IV. Leave to Amend

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

4 Any amended complaint must identify as a defendant only persons who personally  
5 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*  
6 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a  
7 constitutional right if he does an act, participates in another's act or omits to perform an act he is  
8 legally required to do that causes the alleged deprivation). The complaint should also describe,  
9 in sufficient detail, how each defendant personally violated or participated in the violation of his  
10 rights. The court will not infer the existence of allegations that have not been explicitly set forth  
11 in the amended complaint.

12 The amended complaint must contain a caption including the names of all defendants.  
13 Fed. R. Civ. P. 10(a).

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

16 Any amended complaint must be written or typed so that it so that it is complete in itself  
17 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended  
18 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
19 earlier filed complaint no longer serves any function in the case. See *Forsyth v. Humana*, 114  
20 F.3d 1467, 1474 (9th Cir. 1997) (the "'amended complaint supersedes the original, the latter  
21 being treated thereafter as non-existent.'" (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.  
22 1967))).

23 Finally, the court notes that any amended complaint should be as concise as possible in  
24 fulfilling the above requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of  
25 procedural or factual background which has no bearing on his legal claims.

26 V. Conclusion


27 Accordingly, IT IS HEREBY ORDERED that:

- 28 1. Plaintiff's application to proceed in forma pauperis (ECF No. 2) is GRANTED;

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2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected in accordance with the notice to the California Department of Corrections and Rehabilitation filed concurrently herewith;
3. Plaintiff's complaint is dismissed with leave to amend within 30 days of the date of service of this order; and
4. Failure to comply with this order may result in dismissal of this action.

DATED: July 2, 2018.

  
EDMUND F. BRENNAN  
UNITED STATES MAGISTRATE JUDGE