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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JORGE PALACIOS,
Plaintiff,
v.
KEVIN SMITH, et al.,
Defendants.

No. 2:17-cv-2500 CKD P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, 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.

I. Application to Proceed In Forma Pauperis

Plaintiff has submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). ECF No. 7. 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 for monthly payments of twenty percent of the preceding month’s income credited to plaintiff’s prison trust account. These payments will be forwarded by the appropriate agency to the Clerk of the Court each time

1 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.
2 § 1915(b)(2).

3 II. Statutory Screening of Prisoner Complaints

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
7 "frivolous, malicious, or 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).

9 A claim "is [legally] frivolous where 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). "[A] judge may dismiss . . . claims which are 'based on indisputably meritless legal
12 theories' or whose 'factual contentions are clearly baseless.'" Jackson v. Arizona, 885 F.2d 639,
13 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as
14 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a
15 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.
16 Franklin, 745 F.2d at 1227-28 (citations omitted).

17 "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the
18 claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of
19 what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550
20 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
21 "Failure to state a claim under § 1915A incorporates the familiar standard applied in the context
22 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6)." Wilhelm v. Rotman,
23 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure
24 to state a claim, a complaint must contain more than "a formulaic recitation of the elements of a
25 cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the
26 speculative level." Twombly, 550 U.S. at 555 (citations omitted). "[T]he pleading must contain
27 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
28 cognizable right of action." Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur

1 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

2 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
3 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
4 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
5 content that allows the court to draw the reasonable inference that the defendant is liable for the
6 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this
7 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.
8 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976), as well as construe the pleading in the
9 light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, Jenkins v.
10 McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

11 III. Complaint

12 In the complaint, plaintiff alleges that defendant doctors Smith and Horowitz and nurses
13 Micael and Brecheen violated his Eighth Amendment rights. (ECF No. 6 at 3.) He claims that
14 Smith’s deliberate indifference resulted in a “painful inguinal hernia, that result in (10) ten weeks
15 without access to [his] regular meals from 4-30-17 to 7-13-17,” resulting in symptoms of
16 malnutrition. (Id.) Plaintiff also alleges that his cane was confiscated, resulting in three falls, and
17 that medical would not give him the totally effective remedy of surgery. (Id.) Defendants Micael
18 and Brecheen allegedly “obstruct[ed] [his] access to med. services, with discrimination, mockery
19 and push[ed] [him] out of clinic.” (Id.) He further claims that defendant Horowitz refused to
20 give him medical assistance, an examination, pain killers, and other unspecified treatment, even
21 though he needed a wheelchair to transport him to the clinic. (Id.) Finally, plaintiff asserts that
22 custody staff do not believe him about enemy concerns from 2004; that vulnerable, elderly
23 inmates are being housed with aggressive inmates; contagious inmates are being housed with
24 healthy inmates; and that mental health staff do not care about his anxiety caused by living in the
25 dorms. (Id.)

26 IV. Failure to State a Claim

27 A. Deliberate Indifference

28 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate

1 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091,
2 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This requires plaintiff
3 to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition
4 could result in further significant injury or the unnecessary and wanton infliction of pain,” and
5 (2) “the defendant’s response to the need was deliberately indifferent.” Id. (some internal
6 quotation marks omitted) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992)).

7 Deliberate indifference is established only where the defendant *subjectively* “knows of and
8 disregards an *excessive risk* to inmate health and safety.” Toguchi v. Chung, 391 F.3d 1051, 1057
9 (9th Cir. 2004) (emphasis added) (citation and internal quotation marks omitted). Deliberate
10 indifference can be established “by showing (a) a purposeful act or failure to respond to a
11 prisoner’s pain or possible medical need and (b) harm caused by the indifference.” Jett, 439 F.3d
12 at 1096 (citation omitted). Civil recklessness (failure “to act in the face of an unjustifiably high
13 risk of harm that is either known or so obvious that it should be known”) is insufficient to
14 establish an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825, 836-37 & n.5
15 (1994) (citations omitted).

16 A difference of opinion between an inmate and prison medical personnel—or between
17 medical professionals—regarding appropriate medical diagnosis and treatment is not enough to
18 establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);
19 Toguchi, 391 F.3d at 1058. Additionally, “a complaint that a physician has been negligent in
20 diagnosing or treating a medical condition does not state a valid claim of medical mistreatment
21 under the Eighth Amendment. Medical malpractice does not become a constitutional violation
22 merely because the victim is a prisoner.” Estelle, 429 U.S. at 106.

23 Although it is clear that plaintiff is complaining about the sufficiency of the medical care
24 he is receiving, his claims regarding the actions of the defendants are too vague and conclusory to
25 state a claim. He alleges that Smith’s deliberate indifference resulted in his hernia, but it is not
26 clear what Smith did that was deliberately indifferent. Furthermore, while plaintiff alleges that
27 his cane was confiscated and he was denied treatment, it is not clear that Smith was responsible
28 for these actions, as the claims appear to be against medical staff generally. Similarly, while

1 plaintiff claims that Micael and Brecheen obstructed his access to medical services, he does not
2 identify what services they denied him, making it impossible to tell whether he was denied
3 treatment for a serious medical need. As to Horowitz, plaintiff fails to identify what condition he
4 was denied treatment for or how it related to his need to be transported to the clinic by
5 wheelchair. Because plaintiff has failed to allege sufficient facts to state claims for relief against
6 the defendants, the claims against them will be dismissed with leave to amend.

7 **B. Personal Involvement**

8 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or
9 connection between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S.
10 362, 371, 376 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980). "Vague and
11 conclusory allegations of official participation in civil rights violations are not sufficient." Ivey v.
12 Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982) (citations omitted).

13 Plaintiff makes various allegations regarding his housing and mental health treatment.
14 However, none of the allegations appear directed at the named defendants and he has not
15 identified any custody staff or mental health staff as defendants. Without any personal
16 involvement by defendants, these allegations cannot state a claim and must be dismissed with
17 leave to amend.

18 **C. Leave to Amend**

19 If plaintiff chooses to file a first amended complaint, he must demonstrate how the
20 conditions about which he complains resulted in a deprivation of his constitutional rights. Rizzo
21 v. Goode, 423 U.S. 362, 370-71 (1976). Also, the complaint must allege in specific terms how
22 each named defendant is involved. Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355 (9th
23 Cir. 1981). There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link
24 or connection between a defendant's actions and the claimed deprivation. Id.; Johnson v. Duffy,
25 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, "[v]ague and conclusory allegations of official
26 participation in civil rights violations are not sufficient." Ivey v. Bd. of Regents, 673 F.2d 266,
27 268 (9th Cir. 1982) (citations omitted).

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1 Plaintiff is also informed that the court cannot refer to a prior pleading in order to make
2 his first amended complaint complete. Local Rule 220 requires that an amended complaint be
3 complete in itself without reference to any prior pleading. This is because, as a general rule, an
4 amended complaint supersedes the original complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.
5 1967), overruled in part by Lacey v. Maricopa County, 693 F.3d 896, 929 (9th Cir. 2012) (claims
6 dismissed with prejudice and without leave to amend do not have to be re-pled in subsequent
7 amended complaint to preserve appeal). Once plaintiff files a first amended complaint, the
8 original complaint no longer serves any function in the case. Therefore, in an amended
9 complaint, as in an original complaint, each claim and the involvement of each defendant must be
10 sufficiently alleged.

11 V. Requests for Medical Treatment

12 Plaintiff has filed several requests for an order directing the California Department of
13 Corrections to provide medical care and transfer him to California Men’s Colony. (ECF Nos. 15-
14 18.) These requests are essentially requests for a temporary restraining order or preliminary
15 injunction. A temporary restraining order is an extraordinary measure of relief that a federal
16 court may impose without notice to the adverse party if, in an affidavit or verified complaint, the
17 movant “clearly show[s] that immediate and irreparable injury, loss, or damage will result to the
18 movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A). The
19 purpose in issuing a temporary restraining order is to preserve the *status quo* pending a fuller
20 hearing. The standard for issuing a temporary restraining order is essentially the same as that for
21 issuing a preliminary injunction. Stuhlbarg Int’l Sales Co. v. John D. Brush & Co., 240 F.3d 832,
22 839 n.7 (9th Cir. 2001) (stating that the analysis for temporary restraining orders and preliminary
23 injunctions is “substantially identical”).

24 “A plaintiff seeking a preliminary injunction must establish [(1)] that he is likely to
25 succeed on the merits, [(2)] that he is likely to suffer irreparable harm in the absence of
26 preliminary relief, [(3)] that the balance of equities tips in his favor, and [(4)] that an injunction is
27 in the public interest.” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citations
28 omitted). The Ninth Circuit has held that “‘serious questions going to the merits’ and a balance

1 of hardships that tips sharply towards the plaintiff can support issuance of a preliminary
2 injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and
3 that the injunction is in the public interest,” even if the moving party cannot show that he is likely
4 to succeed on the merits. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir.
5 2011). However, under either formulation of the principles, preliminary injunctive relief should
6 be denied if the probability of success on the merits is low. Johnson v. Cal. State Bd. of
7 Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995) (“[E]ven if the balance of hardships tips
8 decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is
9 a fair chance of success on the merits.” (quoting Martin v. Int’l Olympic Comm., 740 F.2d 670,
10 675 (9th Cir. 1984))).

11 Because the complaint is being dismissed with leave to amend, plaintiff cannot show that
12 he has a likelihood of success on the merits. Furthermore, although plaintiff has made allegations
13 that he is suffering as a result of the failure to transfer him and provide him adequate medical
14 care, he has not provided any evidence that supports these claims aside from his own conclusory
15 statements. Herb Reed Enters., LLC v. Fla. Entm’t Mgmt., Inc., 736 F.3d 1239, 1251 (9th Cir.
16 2013) (“Those seeking injunctive relief must proffer evidence sufficient to establish a likelihood
17 of irreparable harm.”). Instead, the records that he provides demonstrate that he cannot be
18 transferred to the prison of his choice because of other health concerns (ECF No. 16 at 4, 10-14);
19 that he has been evaluated on several occasions by different medical providers, including non-
20 defendants (ECF No. 15 at 3-5, 9, 22; ECF No. 17 at 8-13, 17, 23-25); and he refused to be
21 transported to a necessary pre-surgery cardiology evaluation (ECF No. 15 at 4, 26-29). These
22 documents weigh against finding a likelihood of success on the merits or that plaintiff will suffer
23 irreparable harm, and his request for a temporary restraining order or preliminary injunction
24 should therefore be denied.

25 Plaintiff is advised that a request for a preliminary injunction is also premature insofar as
26 no defendant has been served. Zepeda v. United States Immigration & Naturalization Serv., 753
27 F.2d 719, 727 (9th Cir. 1985) (“A federal court may issue an injunction if it has personal
28 jurisdiction over the parties and subject matter jurisdiction over the claim; it may not attempt to

1 determine the rights of persons not before the court.”). Accordingly, plaintiff is advised that even
2 if he chooses to file another motion for preliminary injunction, the court is unlikely to take any
3 action until the defendants from whom he seeks relief have been served and had an opportunity to
4 respond to the motion.

5 VI. Plain Language Summary of this Order for a Pro Se Litigant

6 Your request to proceed in forma pauperis is granted and you are not required to pay the
7 entire filing fee immediately.

8 The complaint is dismissed with leave to amend because the facts you have alleged are not
9 enough to state a claim for relief. In order to state a claim against the defendants you must
10 identify your medical problems and explain what each defendant did or did not do to treat them.
11 Just saying that defendants were deliberately indifferent or did not treat you, without explaining
12 what they did or what medical condition they did not treat, is not enough. It is being
13 recommended that your requests to be transferred and for medical care be denied because you
14 have not shown that you have a chance of succeeding on your claims or that you will suffer
15 irreparable harm.

16 If you choose to amend your complaint, the first amended complaint must include all of
17 the claims you want to make because the court will not look at the claims or information in the
18 original complaint. **Any claims and information not in the first amended complaint will not**
19 **be considered.**

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

- 21 1. Plaintiff’s request for leave to proceed in forma pauperis (ECF No. 7) is granted.
- 22 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
23 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
24 § 1915(b)(1). All fees shall be collected and paid in accordance with this court’s order to the
25 Director of the California Department of Corrections and Rehabilitation filed concurrently
26 herewith.
- 27 3. Plaintiff’s complaint is dismissed with leave to amend.
- 28 4. Within thirty days from the date of service of this order, plaintiff may file an amended

1 complaint that complies with the requirements of the Civil Rights Act, the Federal Rules of Civil
2 Procedure, and the Local Rules of Practice. The amended complaint must bear the docket
3 number assigned this case and must be labeled "First Amended Complaint." Plaintiff must file an
4 original and two copies of the amended complaint. Failure to file an amended complaint in
5 accordance with this order will result in dismissal of this action.

6 5. The Clerk of the Court is directed to send plaintiff a copy of the prisoner complaint
7 form used in this district.

8 6. The Clerk of the Court shall randomly assign a United States District Judge to this
9 action.

10 IT IS FURTHER RECOMMENDED that plaintiff's requests for a temporary restraining
11 order or preliminary injunction (ECF Nos. 15-18) be denied.

12 These findings and recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
14 after being served with these findings and recommendations, plaintiff may file written objections
15 with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings
16 and Recommendations." Plaintiff is advised that failure to file objections within the specified
17 time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153
18 (9th Cir. 1991).

19 Dated: November 30, 2018

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21 _____
22 CAROLYN K. DELANEY
23 UNITED STATES MAGISTRATE JUDGE

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