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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PHILLIP CHRISTOPHER DISTIN,  
  
Plaintiff,  
  
v.  
  
U.S. ARMY, et al.,  
  
Defendants.

No. 2:23-cv-1369 AC 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 moved for leave to proceed in forma pauperis. ECF No. 2. “A district court may deny leave to proceed in forma pauperis at the outset if it appears from the face of the proposed complaint that the action is frivolous or without merit.” Tripati v. First Nat’l Bank & Tr., 821 F.2d 1368, 1370 (9th Cir. 1987). For the reasons set forth below, the undersigned finds this action to be frivolous and will recommend that plaintiff’s application to proceed in forma pauperis be denied.

II. Statutory Screening of Prisoner Complaints

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).

1 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
2 “frivolous, malicious, or 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).

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 . . . claims which are ‘based on indisputably meritless legal  
7 theories’ or whose ‘factual contentions are clearly baseless.’” Jackson v. Arizona, 885 F.2d 639,  
8 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as  
9 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a  
10 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.  
11 Franklin, 745 F.2d at 1227-28 (citations omitted).

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 “Failure to state a claim under § 1915A incorporates the familiar standard applied in the context  
17 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” Wilhelm v. Rotman,  
18 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure  
19 to state a claim, a complaint must contain more than “a formulaic recitation of the elements of a  
20 cause of action;” it must contain factual allegations sufficient “to raise a right to relief above the  
21 speculative level.” Twombly, 550 U.S. at 555 (citations omitted). “[T]he pleading must contain  
22 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally  
23 cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur  
24 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

25 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
26 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting  
27 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
28 content that allows the court to draw the reasonable inference that the defendant is liable for the

1 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this  
2 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.  
3 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the  
4 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor,  
5 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

6 III. Complaint

7 The complaint alleges that plaintiff is in a state of emergency because he is being tortured  
8 by the United States Army which has been attempting to murder and kidnap him. ECF No. 1 at 3.  
9 Plaintiff asserts that since 2018, the United States Army has been using a top-secret military  
10 weapon that is run by a computer at the army base station to torture him. Id. The California  
11 Department of Corrections and Rehabilitation (CDCR) has refused to investigate or do anything  
12 about plaintiff’s living conditions or injuries. Id. at 5.

13 IV. Failure to State a Claim

14 “[T]he United States may not be sued without its consent and that the existence of consent  
15 is a prerequisite for jurisdiction.” United States v. Mitchell, 463 U.S. 206, 212 (1983). Plaintiff  
16 has the burden of showing a waiver of immunity, Holloman v. Watt, 708 F.2d 1399, 1401 (9th  
17 Cir. 1983) (citation omitted), and has not done so here. The claims against the CDCR are  
18 similarly barred by sovereign immunity because the prison is an arm of the state. See Howlett v.  
19 Rose, 496 U.S. 356, 365 (1990) (the state and arms of the state “are not subject to suit under  
20 § 1983” (citing Will v. Mich. Dep’t of State Police, 491 U.S. 58 (1989))).

21 Moreover, even if plaintiff could name proper defendants (under the Federal Tort Claims  
22 Act, 42 U.S.C. § 1983, or other statute creating a private cause of action), the allegations in the  
23 complaint are fantastical. “[A] court may dismiss a claim as factually frivolous only if the facts  
24 alleged are ‘clearly baseless,’ a category encompassing allegations that are ‘fanciful,’ ‘fantastic,’  
25 and ‘delusional.’ As those words suggest, a finding of factual frivolousness is appropriate when  
26 the facts alleged rise to the level of the irrational or the wholly incredible.” Denton v. Hernandez,  
27 504 U.S. 25, 32-33 (1992) (internal citations omitted). The facts alleged by plaintiff are patently  
28 incredible, and the complaint must therefore be dismissed.

1 The court further notes that, except for a portion of the time period at issue and the prison  
2 at which plaintiff was incarcerated, the allegations in the instant complaint are nearly identical to  
3 those in Distin v. U.S. Army (Distin I), No. 1:20-cv-0860 AWI SAB (E.D. Cal.), which was  
4 dismissed with prejudice at the screening stage for failure to state a claim. Distin I, ECF Nos. 1  
5 (complaint), 17 (order dismissing complaint with prejudice). To the extent plaintiff's claims  
6 overlap those in Distin I, those claims were dismissed with prejudice and cannot be pursued in  
7 this case.

8 V. No Leave to Amend

9 Leave to amend should be granted if it appears possible that the defects in the complaint  
10 could be corrected, especially if a plaintiff is pro se. Lopez v. Smith, 203 F.3d 1122, 1130-31  
11 (9th Cir. 2000) (en banc). However, if, after careful consideration, it is clear that a complaint  
12 cannot be cured by amendment, the court may dismiss without leave to amend. Cato v. United  
13 States, 70 F.3d 1103, 1105-06 (9th Cir. 1995).

14 The undersigned finds that, as set forth above, the complaint fails to state a claim upon  
15 which relief may be granted and that given the nature of the claims, amendment would be futile.  
16 The complaint should therefore be dismissed with prejudice and without leave to amend.

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

18 It is being recommended that your complaint be dismissed with prejudice and without  
19 leave to amend because it fails to state a claim for relief. Also, you cannot reassert claims that  
20 were previously dismissed with prejudice in another case.

21 In accordance with the above, IT IS HEREBY ORDERED that the Clerk of the Court  
22 shall randomly assign a United States District Judge to this action.

23 IT IS FURTHER RECOMMENDED that:

- 24 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 2) be DENIED.  
25 2. The complaint be dismissed with prejudice and without leave to amend for failure to  
26 state a claim.

27 These findings and recommendations are submitted to the United States District Judge  
28 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days

1 after being served with these findings and recommendations, plaintiff may file written objections  
2 with the court. Such a document should be captioned “Objections to Magistrate Judges Findings  
3 and Recommendations.” Plaintiff is advised that failure to file objections within the specified  
4 time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153  
5 (9th Cir. 1991).

6 DATED: July 24, 2023

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8 ALLISON CLAIRE  
9 UNITED STATES MAGISTRATE JUDGE  
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