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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN DELL HENDERSON,
Plaintiff,
v.
REETIKA KIM KUMAR, et al.,
Defendants.

Case No. [16-cv-06893-JST](#)

**ORDER OF PARTIAL SERVICE;
DISMISSING ONE CLAIM WITH
LEAVE TO AMEND**

Plaintiff, an inmate at Salinas Valley State Prison (“SVSP”), filed this pro se civil rights action under 42 U.S.C. § 1983. Plaintiff’s amended complaint is now before the Court for initial screening pursuant to 28 U.S.C. § 1915A. ECF No. 14 (“Am. Compl.”).

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). Pro se pleadings must be liberally construed. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). “Specific facts are not necessary; the statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Erickson v. Pardus, 551 U.S. 89, 93 (2007) (citations and internal

1 quotations omitted). Although a complaint “does not need detailed factual allegations [in order to
2 state a claim], . . . a plaintiff’s obligation to provide the grounds of his ‘entitle[ment] to relief’
3 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of
4 action will not do. . . . Factual allegations must be enough to raise a right to relief above the
5 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted).
6 A complaint must proffer “enough facts to state a claim to relief that is plausible on its face.” Id.
7 at 570.

8 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
9 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that
10 the alleged violation was committed by a person acting under the color of state law. West v.
11 Atkins, 487 U.S. 42, 48 (1988).

12 **B. Amended Complaint**

13 Plaintiff makes the following allegations in the amended complaint.

14 On or about August 10, 2014, Plaintiff informed SVSP medical officials that he believed
15 that he was having an allergic reaction to pistachios or certain medication because his legs were
16 covered in hives and itchy spots. Am. Compl. at 9–10. In response, on August 12, 2014, named
17 defendant SVSP Dr. Tuvera examined Plaintiff and prescribed him hydrocortisone cream. Id. at
18 10. Dr. Tuvera also considered prescribing Benadryl but did not do so after learning that Benadryl
19 was non-formulary. Id. Dr. Tuvera also ordered a lab test because Plaintiff stated that he might
20 also be suffering from a bacterial infection. Id.

21 On August 13, 2014, Plaintiff informed SVSP medical officials that the allergic reaction
22 had worsened; that his throat had begun to hurt and close up; and that his neck glands were
23 hurting. Am. Compl. at 10. Dr. Tuvera informed Plaintiff that he would see Plaintiff after the lab
24 test results came back even though the lab test was unrelated to Plaintiff’s allergic reaction. Dr.
25 Tuvera failed to give Plaintiff a Kenalog injection. Id.

26 On August 14, 2014, Plaintiff informed Dr. Tuvera that he was getting worse. Dr. Tuvera
27 spoke with Plaintiff; wrote something on a piece of paper; said that he would take care of it; and
28 sent Plaintiff back to his housing unit. Am. Compl. at 11. That evening, Plaintiff’s throat closed

1 up and he was unable to swallow any food. Id. The next morning, Plaintiff informed the nurses
2 that he was unable to swallow and asked when his medication would arrive. The nurses told
3 Plaintiff that whatever the doctor ordered would be sent to him. Id.

4 On August 17, 2014, Plaintiff again informed the nurses that he was unable to swallow or
5 eat due to an allergic reaction. Am. Compl. at 11. Plaintiff informed the nurses that he needed to
6 see a doctor immediately. Plaintiff also submitted a Health Care Service Request Form wherein
7 he reported that his throat was killing him; he could not swallow; his neck glands were in pain;
8 and his lips were swollen. Id. On August 18, 2014, Plaintiff walked to the Facility B medical
9 offices and informed the nurses that he was having an allergic reaction to pistachio. He stated that
10 because of the allergic reaction, he could neither eat nor swallow; a rash, bumps, and purple
11 patches had spread all over his legs and arms; and his throat, face, and lips had swelled up. Id.
12 Plaintiff was sent to the Central Treatment Center via ambulance. Id. at 12. Plaintiff was given
13 300 milligrams of Zantac and directed to watch out for increased swelling, which Plaintiff alleges
14 was insufficient to treat his serious medical need. Id.

15 On August 19, 2014, Plaintiff submitted another Health Care Service Request, reporting
16 that he was in terrible pain; that the inside of his mouth felt extremely sensitive; that his mouth
17 burned when he tried to eat, drink water, or swallow; and that there was a rash on his legs. Am.
18 Compl. at 12.

19 On August 20, 2014, Plaintiff went to the Facility B medical offices and complained of
20 shortness of breath; trouble swallowing; a burning sensation when swallowing; and that Dr.
21 Tuvera had failed to treat him for his allergies. Am. Compl. at 12. Plaintiff alleges that, in
22 response to his complaint, Dr. Tuvera discontinued Plaintiff's prescription for Tylenol 3 with
23 codeine, leaving Plaintiff with no treatment for his chronic pain. Id. at 13.

24 By August 22, 2014, Plaintiff's gums were bleeding; Plaintiff had bleeding holes in the
25 back of his throat; and Plaintiff had lost twenty pounds. Am. Compl. at 13.

26 On August 25, 2014, Plaintiff informed Dr. Tuvera that he continued to suffer from a
27 severe allergic reaction. Am. Compl. at 13. Plaintiff complained that he had waited over a week
28 before his blood was drawn for the lab test ordered on August 10, 2014; complained about

1 treatment he received from two other doctors regarding his mouth; and communicated his intent to
2 sue Dr. Tuvera. Id. Dr. Tuvera administered a Kenalog injection to address the allergic reaction.
3 Id. at 14. Not long after, Plaintiff complained that he was having an allergic reaction to the
4 Kenalog injection, but Dr. Tuvera told Plaintiff to allow the injection more time to work. Id. Two
5 days later, on August 27, 2014, Plaintiff was found in his cell unconscious, unresponsive, and
6 lying in his urine. Id. Plaintiff was immediately transported to Natividad Medical Center
7 (“NMC”) where he was taken to the ICU and treated with an IV infusion of Benadryl and Solu-
8 Medrol, a steroid. Id.

9 On August 29, 2014, Plaintiff was speaking with named defendant NMC Dr. Swiney,
10 when named defendant NMC Dr. Duesdieker noticed Plaintiff’s handwritten notes that listed the
11 names of various doctors, including Dr. Deusdieker, and the notation “cruel and unusual
12 punishment.” Am. Compl. at 14–15. Dr. Duesdieker grabbed the notes and scratched his name
13 out, and Plaintiff responded that Dr. Duesdieker could not destroy his notes and that he wanted to
14 file a complaint against Dr. Duesdieker. Id. at 15. Dr. Duesdieker then gestured to all the doctors
15 to leave the room and all the doctors left. Dr. Duesdieker returned to the room approximately ten
16 minutes later and informed the prison officers guarding Plaintiff that he was immediately
17 discharging Plaintiff back to the prison. Plaintiff was discharged without any medication other
18 than Metropolol, a high blood pressure medication, and Plaintiff was not fully healed at the time
19 of his discharge. Id. at 22.

20 On August 31, 2014, Plaintiff’s throat closed back up, and, on September 1, 2014, he was
21 rushed to the Twin Cities Hospital where he was treated with the medications he had received
22 while at NMC. Am. Compl. at 16. On September 3, 2014, Plaintiff was discharged from Twin
23 Cities Hospital with orders to treat his allergic reaction with Benadryl and prednisone; and to treat
24 his chronic back, leg, and sciatic nerve pain with morphine.

25 **C. Legal Claims**

26 Plaintiff has named as defendants Dr. Tuvera, Dr. Kumar, Dr. Swiney, Dr. Duesdieker, and
27 NMC. Am. Compl. at 7–9. Plaintiff alleges that Defendants’ actions and inactions constituted
28 deliberate indifference to his serious medical needs, in violation of the Eighth and Fourteenth

1 Amendments.

2 Plaintiff's Fourteenth Amendment claim is DISMISSED without leave to amend. In
3 relevant part, the Fourteenth Amendment provides that no state shall "deprive any person of life,
4 liberty, or property, without due process of law; nor deny to any person within its jurisdiction the
5 equal protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiff has not alleged either a due
6 process claim or equal protection claim, and the facts alleged do not support such claims. See,
7 e.g., County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998) (touchstone of due process is
8 protection of individual against arbitrary action of government, whether fault lies in denial of
9 fundamental procedural fairness or in exercise of power without any reasonable justification in
10 service of legitimate governmental interest); City of Cleburne v. Cleburne Living Center, 473 U.S.
11 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)) ("The Equal Protection Clause
12 of the Fourteenth Amendment commands that no State shall 'deny to any person within its
13 jurisdiction the equal protection of the laws,' which is essentially a direction that all persons
14 similarly situated should be treated alike."). The Court therefore dismisses the Fourteenth
15 Amendment claims with prejudice because amendment would be futile. Carrico v. City and Cnty.
16 of San Francisco, 656 F.3d 1002, 1008 (9th Cir. 2011) (leave to amend properly denied if
17 amendment would be futile).

18 Deliberate indifference to serious medical needs violates the Eighth Amendment's
19 proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104
20 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds,
21 WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A "serious"
22 medical need exists if the failure to treat a prisoner's condition could result in further significant
23 injury or the "unnecessary and wanton infliction of pain." McGuckin, 974 F.2d at 1059 (citing
24 Estelle, 429 U.S. at 104). The existence of an injury that a reasonable doctor or patient would find
25 important and worthy of comment or treatment; the presence of a medical condition that
26 significantly affects an individual's daily activities; or the existence of chronic and substantial pain
27 are examples of indications that a prisoner has a "serious" need for medical treatment. Id. at
28 1059–60 (citing Wood v. Housewright, 900 F.2d 1332, 1337–41 (9th Cir. 1990)). A prison

1 official is deliberately indifferent if he knows that a prisoner faces a substantial risk of serious
2 harm and disregards that risk by failing to take reasonable steps to abate it. Farmer v. Brennan,
3 511 U.S. 825, 837 (1994).

4 Plaintiff's only allegations regarding the treatment received for his bacterial infection and
5 his chronic pain are as follows. On August 10, 2014, Plaintiff complained of a bacterial infection
6 and, in response, Dr. Tuvera ordered a lab test. On August 20, 2014, Dr. Tuvera discontinued
7 Plaintiff's prescription for Tylenol 3 with codeine, leaving Plaintiff with no treatment for his
8 chronic pain. These allegations are insufficient to state cognizable Eighth Amendment claims that
9 are plausible on their face. Accordingly, Plaintiff's Eighth Amendment claims related to the
10 treatment received for his bacterial infection and his chronic pain are DISMISSED from this
11 action with leave to amend.

12 Plaintiff's allegation that Dr. Kumar caused the lack of proper medical for his allergic
13 reaction by failing to review his triage and treatment flow sheet as required by prison procedures,
14 and by failing to supervise or control her subordinates states a cognizable Eighth Amendment
15 claim. Am. Compl. at 12. A supervisor may be held liable for under section 1983 upon a showing
16 of either "(1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient
17 causal connection between the supervisor's wrongful conduct and the constitutional violation."
18 Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011); see also Taylor v. List, 880 F.2d 1040, 1045
19 (9th Cir. 1989) ("A supervisor is only liable for constitutional violations of his subordinates if
20 [he] . . . directed the violations, or knew of the violations and failed to act to prevent them."). The
21 requisite causal connection may be proved by (i) the supervisor's "own culpable action or inaction
22 in the training, supervision, or control of subordinates;" (ii) his "acquiescence in the constitutional
23 deprivation of which a complaint is made;" or (iii) "conduct that showed a reckless or callous
24 indifference to the rights of others." Cunningham v. Gates, 229 F.3d 1271, 1292 (9th Cir. 2000).

25 The Court also finds that Plaintiff has stated a cognizable Eighth Amendment claims
26 against Dr. Tuvera, Dr. Swiney and Dr. Duesdiker. Plaintiff has alleged that Dr. Tuvera failed to
27 treat his serious allergic reaction. Plaintiff has also alleged that Dr. Swiney and Dr. Duesdiker
28 knew of his serious medical needs, and discharged him from Natividad Medical Center without

1 prescribing the necessary medication to address his serious medical needs.

2 The Court DISMISSES with prejudice Plaintiff's Eighth Amendment claim against NMC.
3 Plaintiff proffers two theories of liability for NMC. First, Plaintiff argues that, NMC's Policy of
4 Condition of Admission ("Policy") constituted a policy whereby NMC assumed responsibility and
5 liability for its doctors' unconstitutional acts, and required its medical staff to execute physicians'
6 orders. Am. Compl. at 8-9 and 16. As explained in the Court's April 4, 2017 Order of Dismissal
7 with Leave to Amend (ECF No. 8), there is no respondeat superior liability under § 1983. See
8 Monell v. Dep't of Social Svcs. of City of New York, 436 U.S. 658, 694 (1978). To impose
9 municipal liability on NMC under § 1983 for a violation of constitutional rights, Plaintiff must
10 allege that (1) Plaintiff possessed a constitutional right of which he was deprived; (2) that NMC
11 had a policy; (3) that this policy amounted to deliberate indifference to Plaintiff's constitutional
12 rights; and (4) that the policy was the moving force behind the constitutional violation. See
13 Plumeau v. School Dist. # 40 County of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997). NMC's
14 Policy appears to be standard admission paperwork, not a policy. To the extent that the Policy
15 describes hospital policies, the policies described were not the "moving force" in that they did not
16 cause Drs. Swiney and Duesdiker's allegedly unconstitutional acts. Plaintiff has identified Drs.
17 Swiney and Duesdiker as his physicians, and the nursing staff executed Drs. Swiney and
18 Duesdiker's orders. To the extent that NMC agreed to assume liability for Drs. Swiney and
19 Duesdiker's actions in the Policy, this does not establish liability for a § 1983 violation.

20 Second, Plaintiff argues that NMC failed to have a policy in place that would have
21 prevented Drs. Swiney and Duesdiker from discharging Plaintiff without the appropriate
22 medication. Id. at 16. As an initial matter, the Court notes that Plaintiff's second theory of
23 liability (lack of policy) is inconsistent with his first theory (Policy requires NMC to assume
24 liability). More importantly, the amended complaint fails to allege facts sufficient to support
25 § 1983 liability based on a failure to train. A failure to train may establish § 1983 liability in
26 limited circumstances, Connick v. Thompson, 563 U.S. 51 at 61 (2011), but only where the failure
27 to train reflects a deliberate or conscious choice can the shortcoming be properly thought of as a
28 policy or custom that is actionable under § 1983. City of Canton v. Harris, 489 U.S. 378, 389

1 (1989). In addition, ordinarily, “a pattern of similar constitutional violations” by untrained
2 employees is necessary to establish that the failure to train or supervise is a deliberate policy.
3 Connick, 563 U.S. 51 at 52. The Court therefore dismisses NMC from this action with prejudice
4 because amendment would be futile. Carrico, 656 F.3d at 1008.

5 CONCLUSION

6 1. Plaintiff has stated cognizable Eighth Amendment claims related to the medical
7 treatment received for his allergic reaction against Dr. Tuvera, Dr. Kumar, Dr. Swiney, and Dr.
8 Duesdiker. NMC is DISMISSED from this action with prejudice. Plaintiff’s claims regarding
9 medical treatment for his bacterial infection and chronic pain are DISMISSED with leave to
10 amend.

11 2. Should Plaintiff wish to amend his claims regarding the medical treatment received
12 for his bacterial infection and chronic pain, he shall file a second amended complaint within 30
13 days of this order. The pleading must be simple and concise and must include the caption and
14 civil case number used in this order and the words SECOND AMENDED COMPLAINT on the
15 first page. Plaintiff should include in the second amended complaint the claims which the Court
16 has found cognizable. Plaintiff is advised that the second amended complaint will supersede the
17 prior complaints and all other pleadings. Claims and defendants not included in the second
18 amended complaint will not be considered by the Court. See King v. Atiyeh, 814 F.2d 565, 567
19 (9th Cir. 1987). If Plaintiff fails to file a proper second amended complaint within the designated
20 time, the amended complaint (ECF No. 14) will remain the operative complaint.

21 3. The Clerk of the Court shall issue summons and the United States Marshal shall
22 serve, without prepayment of fees, a copy of the amended complaint (ECF No. 14), and a copy of
23 this order upon **Dr. Fernando Tuvera and Dr. Reetika Kim Kumar at Salinas Valley State**
24 **Prison, P. O. Box 1020, Soledad, CA 93960-1020**, and upon **Dr. Swiney and Dr. Duesdiker at**
25 **Natividad Medical Center, 1441 Constitution Blvd, Salinas, CA 93906**. The Clerk shall also
26 mail a courtesy copy of the amended complaint and this order to the California Attorney General’s
27 Office.

28 4. In order to expedite the resolution of this case, the Court orders as follows:

a. No later than 91 days from the date this order is filed, Defendants must file

1 and serve a motion for summary judgment or other dispositive motion. A motion for summary
2 judgment also must be accompanied by a Rand notice so that Plaintiff will have fair, timely and
3 adequate notice of what is required of him in order to oppose the motion. Woods v. Carey, 684
4 F.3d 934, 939 (9th Cir. 2012) (notice requirement set out in Rand v. Rowland, 154 F.3d 952 (9th
5 Cir. 1998), must be served concurrently with motion for summary judgment).¹

6 If Defendants are of the opinion that this case cannot be resolved by summary judgment,
7 Defendants must so inform the Court prior to the date the motion is due.

8 b. Plaintiff's opposition to the summary judgment or other dispositive motion
9 must be filed with the Court and served upon Defendants no later than 28 days from the date the
10 motion is filed. Plaintiff must bear in mind the notice and warning regarding summary judgment
11 provided later in this order as he prepares his opposition to any motion for summary judgment.

12 c. Defendants shall file a reply brief no later than 14 days after the date the
13 opposition is filed. The motion shall be deemed submitted as of the date the reply brief is due. No
14 hearing will be held on the motion.

15 5. Plaintiff is advised that a motion for summary judgment under Rule 56 of the
16 Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must
17 do in order to oppose a motion for summary judgment. Generally, summary judgment must be
18 granted when there is no genuine issue of material fact — that is, if there is no real dispute about
19 any fact that would affect the result of your case, the party who asked for summary judgment is
20 entitled to judgment as a matter of law, which will end your case. When a party you are suing
21 makes a motion for summary judgment that is properly supported by declarations (or other sworn
22 testimony), you cannot simply rely on what your complaint says. Instead, you must set out
23 specific facts in declarations, depositions, answers to interrogatories, or authenticated documents,
24 as provided in current Rule 56(c), that contradict the facts shown in Defendants' declarations and

25 ¹ If Defendants assert that Plaintiff failed to exhaust his available administrative remedies as
26 required by 42 U.S.C. § 1997e(a), Defendants must raise such argument in a motion for summary
27 judgment, pursuant to the Ninth Circuit's opinion in Albino v. Baca, 747 F.3d 1162 (9th Cir.
28 2014) (en banc) (overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003), which held
that failure to exhaust available administrative remedies under the Prison Litigation Reform Act,
should be raised by a defendant as an unenumerated Rule 12(b) motion). Such a motion should
also incorporate a modified Wyatt notice in light of Albino. See Wyatt v. Terhune, 315 F.3d
1108, 1120, n.14 (9th Cir. 2003); Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012).

1 documents and show that there is a genuine issue of material fact for trial. If you do not submit
2 your own evidence in opposition, summary judgment, if appropriate, may be entered against you.
3 If summary judgment is granted, your case will be dismissed and there will be no trial. Rand v.
4 Rowland, 154 F.3d 952, 962–63 (9th Cir. 1998) (en banc) (App. A).²

5 6. All communications by Plaintiff with the Court must be served on Defendants’
6 counsel by mailing a true copy of the document to Defendants’ counsel. The Court may disregard
7 any document which a party files but fails to send a copy of to his opponent. Until Defendants’
8 counsel has been designated, Plaintiff may mail a true copy of the document directly to
9 Defendants, but once Defendants are represented by counsel, all documents must be mailed to
10 counsel rather than directly to Defendants.

11 7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
12 No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is required
13 before the parties may conduct discovery.

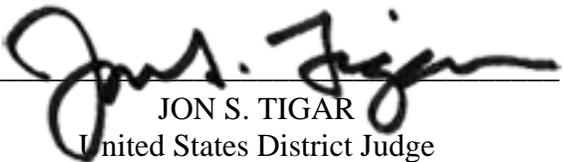
14 8. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep the
15 Court informed of any change of address and must comply with the Court’s orders in a timely
16 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant
17 to Federal Rule of Civil Procedure 41(b). Plaintiff must file a notice of change of address in every
18 pending case every time he is moved to a new facility.

19 9. Any motion for an extension of time must be filed no later than the deadline sought
20 to be extended and must be accompanied by a showing of good cause.

21 10. Plaintiff is cautioned that he must include the case name and case number for this
22 case on any document he submits to the Court for consideration in this case.

23 IT IS SO ORDERED.

24 Dated: October 11, 2017

25 
26 JON S. TIGAR
27 United States District Judge

28 ² This Rand notice does not excuse Defendants’ obligation to serve said notice again concurrently
with a motion for summary judgment. Woods, 684 F.3d at 939.