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2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 TERRENCE BROWNLEE,
6 Plaintiff,
7 v.
8 P. LAM, et al.,
9 Defendants.

Case No. [16-cv-07048-WHO](#) (PR)

ORDER OF SERVICE;

**ORDER DIRECTING DEFENDANTS
TO FILE A DISPOSITIVE MOTION
OR NOTICE REGARDING SUCH
MOTION;**

INSTRUCTIONS TO CLERK

Dkt. Nos. 3 and 6

10
11
12 **INTRODUCTION**

13 Plaintiff Terrence Brownlee alleges that medical staff at Salinas Valley State Prison
14 failed to provide him with constitutionally adequate medical care. His 42 U.S.C. § 1983
15 civil rights complaint containing these allegations is now before the Court for review
16 pursuant to 28 U.S.C. § 1915A(a).

17 The complaint has stated claims against some, but not all, of the named defendants.
18 The defendants against whom valid claims have been made shall be served, while the
19 insufficiently stated claims will be dismissed with leave to amend, and the persons named
20 whose claims are being dismissed should not be served. If Brownlee wishes to pursue the
21 dismissed claims, he must file an amended complaint (containing **all** the claims he wishes
22 to pursue, including the valid ones mentioned above, and addressing the deficiencies
23 described below) on or before May 15, 2017.

24 The 90-day period within which defendants may file a response to the current
25 complaint will not start until (1) defendants are served with the amended complaint, if one
26 is filed, or (2) May 16, 2017, if no amended complaint is filed.

27 Defendants are to adhere to the notice provisions detailed in Sections 2.a and 10 of
28

1 the conclusion of this order.

2 DISCUSSION

3 A. Standard of Review

4 A federal court must conduct a preliminary screening in any case in which a
5 prisoner seeks redress from a governmental entity or officer or employee of a
6 governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any
7 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
8 upon which relief may be granted or seek monetary relief from a defendant who is immune
9 from such relief. *See id.* § 1915A(b)(1), (2). Pro se pleadings must be liberally construed.
10 *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

11 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a
12 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
13 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
14 plausibility when the plaintiff pleads factual content that allows the court to draw the
15 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
16 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal
17 conclusions cast in the form of factual allegations if those conclusions cannot reasonably
18 be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55
19 (9th Cir. 1994).

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

24 B. Legal Claims

25 Brownlee, a state prisoner who is proceeding pro se, claims medical staff at Salinas
26 Valley State Prison violated his Eighth Amendment rights. He has stated claims against
27 the following defendants for failing to approve or administer constitutionally adequate
28 medical care: Z. Ahmed; S. Posson; J. Lewis; P. Lam; J. Kalisher; M. Sweet; M. Lester;

1 and T. Friedrichs.

2 But Brownlee has failed to state claims against the following defendants: D.
3 Lamb; K. Hoffman; D. Nananjo; E. Nuano; Julien; V. Mills, J. Palomeno; and T.
4 Fifield. although Brownlee lists these names in his complaint, he fails to provide specific
5 allegations against them. Accordingly, the claims against these persons are DISMISSED
6 without prejudice.

7 If Brownlee wishes to pursue these dismissed claims, he must file an amended
8 complaint on or before May 15, 2017. The amended complaint must include the caption
9 and civil case number used in this order (16-07048 WHO (PR)) and the words FIRST
10 AMENDED COMPLAINT on the first page. Because an amended complaint completely
11 replaces the previous complaints, Brownlee must include in his first amended complaint all
12 the claims he wishes to present and all of the defendants he wishes to sue, including the
13 valid claims listed above. See *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He
14 may not incorporate material from the prior complaint by reference.

15 **MOTIONS**

16 Brownlee moves for the appointment of counsel (Dkt. No. 3.) and a motion for a
17 preliminary injunction (Dkt. No. 6).

18 The decision to request counsel to represent an indigent litigant under 28 U.S.C.
19 § 1915 is within “the sound discretion of the trial court and is granted only in exceptional
20 circumstances.” *Franklin v. Murphy*, 745 F.2d 1221, 1236 (9th Cir. 1984). A finding of
21 “exceptional circumstances” requires an evaluation of the likelihood of the plaintiff’s
22 success on the merits and an evaluation of the plaintiff’s ability to articulate his claims pro
23 se in light of the complexity of the legal issues involved. See *Agyeman v. Corrections*
24 *Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004). Neither the need for discovery,
25 nor the fact that the pro se litigant would be better served with the assistance of counsel,
26 necessarily qualify the issues involved as complex. See *Rand v. Rowland*, 113 F.3d 1520,
27 1525 (9th Cir. 1997).

28 In the Ninth Circuit, roughly one-third of new civil litigants in district court are not

1 represented by counsel. United States Courts for the Ninth Circuit, 2014 Annual Report 39
2 (2015), available at <http://www.ce9.uscourts.gov/publications/AnnualReport2014.pdf>.
3 Most, but by no means all, of these litigants are incarcerated. There is no doubt that not
4 having a lawyer puts a party at a disadvantage in our adversarial system of justice, and the
5 high percentage of civil litigants who cannot afford one threatens our ability to dispense
6 equal justice to rich and poor alike, as the judicial oath demands. That said, I am
7 compelled to follow controlling precedent and determine if “exceptional circumstances”
8 exist to appoint counsel in the cases before me.

9 At least at this stage of the proceedings, Brownlee has not shown that exceptional
10 circumstances exist. Brownlee’s filings are reasoned and well-written, and the suit does
11 not present complex legal issues. Accordingly, Brownlee’s motion for the appointment of
12 counsel is DENIED. When I review a motion for summary judgment in these cases, and
13 can evaluate Brownlee’s likelihood of success on the merits, I will reconsider the necessity
14 of appointing counsel.

15 Brownlee’s motion for a preliminary injunction (Dkt. No. 6) is DENIED. There is
16 insufficient evidence at this stage to determine the likelihood of success on the merits or
17 the threat of irreparable injury.

18 **CONCLUSION**

19 For the foregoing reasons, the Court orders as follows:

20 1. The Clerk of the Court shall issue summons and the United States
21 Marshal shall serve, without prepayment of fees, a copy of the operative complaint in this
22 matter (Docket No. 1), all attachments thereto, and a copy of this order upon Z. Ahmed;
23 S. Posson; P. Lam; J. Kalisher; M. Sweet; M. Lester; and T. Friedrichs at Salinas Valley
24 State Prison; and to J. Lewis at the CDCR in Sacramento. The Clerk shall also mail
25 courtesy copies of the operative complaint and this order to the California Attorney
26 General’s Office.

27 2. If Brownlee wishes to pursue the dismissed claims, he must file an
28 amended complaint (containing **all** the claims he wishes to pursue, including the valid ones

1 mentioned above, and addressing the deficiencies described below) on or before May 15,
2 2017. The 90-day period within which defendants may file a response to the current
3 complaint will not start until the first of the following triggering dates occurs: (1)
4 defendants are served with the amended complaint, if one is filed, or (2) May 16, 2017, if
5 no amended complaint is filed.

6 2. No later than ninety (90) days from when one of the triggering events listed
7 above occurs, defendants shall file a motion for summary judgment or other dispositive
8 motion with respect to the claims in the complaint found to be cognizable above.

9 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
10 failed to exhaust his available administrative remedies as required by 42 U.S.C.
11 § 1997e(a), defendants shall do so in a motion for summary judgment, as required by
12 *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

13 b. Any motion for summary judgment shall be supported by adequate
14 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
15 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
16 qualified immunity found, if material facts are in dispute. If any defendant is of the
17 opinion that this case cannot be resolved by summary judgment, he shall so inform the
18 Court prior to the date the summary judgment motion is due.

19 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court
20 and served on defendants no later than forty-five (45) days from the date defendants'
21 motion is filed.

22 4. Defendants shall file a reply brief no later than fifteen (15) days after
23 plaintiff's opposition is filed.

24 5. The motion shall be deemed submitted as of the date the reply brief is due.
25 No hearing will be held on the motion unless the Court so orders at a later date.

26 6. All communications by the plaintiff with the Court must be served on
27 defendants, or defendants' counsel once counsel has been designated, by mailing a true
28 copy of the document to defendants or defendants' counsel.

1 7. Discovery may be taken in accordance with the Federal Rules of Civil
2 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
3 Rule 16-1 is required before the parties may conduct discovery.

4 8. It is plaintiff’s responsibility to prosecute this case. Plaintiff must keep the
5 court informed of any change of address and must comply with the court’s orders in a
6 timely fashion. Failure to do so may result in the dismissal of this action for failure to
7 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

8 9. Extensions of time must be filed no later than the deadline sought to be
9 extended and must be accompanied by a showing of good cause.

10 10. A decision from the Ninth Circuit requires that pro se prisoner-plaintiffs be
11 given “notice of what is required of them in order to oppose” summary judgment motions
12 at the time of filing of the motions, rather than when the court orders service of process or
13 otherwise before the motions are filed. *Woods v. Carey*, 684 F.3d 934, 939-41 (9th Cir.
14 2012). Defendants shall provide the following notice to plaintiff when they file and serve
15 any motion for summary judgment:

16 The defendants have made a motion for summary judgment by which they
17 seek to have your case dismissed. A motion for summary judgment under
18 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
19 case.

20 Rule 56 tells you what you must do in order to oppose a motion for summary
21 judgment. Generally, summary judgment must be granted when there is no
22 genuine issue of material fact — that is, if there is no real dispute about any
23 fact that would affect the result of your case, the party who asked for
24 summary judgment is entitled to judgment as a matter of law, which will end
25 your case. When a party you are suing makes a motion for summary
26 judgment that is properly supported by declarations (or other sworn
27 testimony), you cannot simply rely on what your complaint says. Instead,
28 you must set out specific facts in declarations, depositions, answers to
interrogatories, or authenticated documents, as provided in Rule 56(e), that
contradict the facts shown in the defendants’ declarations and documents and
show that there is a genuine issue of material fact for trial. If you do not
submit your own evidence in opposition, summary judgment, if appropriate,
may be entered against you. If summary judgment is granted, your case will
be dismissed and there will be no trial.

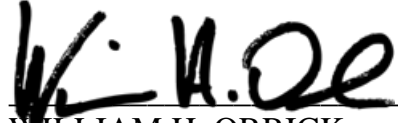
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Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998).

11. The Clerk shall terminate Dkt. Nos. 3 and 6.

IT IS SO ORDERED.

Dated: April 7, 2017



WILLIAM H. ORRICK
United States District Judge