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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6
7 LIBRADO FORTANEL,

8 Plaintiff,

9 v.

10 C. E. DUCART, et al.,

11 Defendants.

Case No. [16-cv-03946-PJH](#)

**ORDER OF DISMISSAL WITH LEAVE
TO AMEND**

Re: Dkt. No. 39

12
13 Plaintiff, a state prisoner, proceeds with a pro se civil rights complaint under 42
14 U.S.C. § 1983. The court granted defendants' motion to dismiss and dismissed the
15 complaint with leave to amend. Plaintiff has filed a motion to amend that the court
16 construes as an amended complaint.

17 **DISCUSSION**

18 **STANDARD OF REVIEW**

19 Federal courts must engage in a preliminary screening of cases in which prisoners
20 seek redress from a governmental entity or officer or employee of a governmental entity.
21 28 U.S.C. § 1915A(a). In its review the court must identify any cognizable claims, and
22 dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief
23 may be granted, or seek monetary relief from a defendant who is immune from such
24 relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v.*
25 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

26 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement
27 of the claim showing that the pleader is entitled to relief." "Specific facts are not
28 necessary; the statement need only "give the defendant fair notice of what the . . . claim

1 is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)
2 (citations omitted). Although in order to state a claim a complaint "does not need detailed
3 factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]
4 to relief' requires more than labels and conclusions, and a formulaic recitation of the
5 elements of a cause of action will not do. . . . Factual allegations must be enough to
6 raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550
7 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer "enough facts to state
8 a claim to relief that is plausible on its face." *Id.* at 570. The United States Supreme
9 Court has recently explained the "plausible on its face" standard of *Twombly*: "While legal
10 conclusions can provide the framework of a complaint, they must be supported by factual
11 allegations. When there are well-pleaded factual allegations, a court should assume their
12 veracity and then determine whether they plausibly give rise to an entitlement to relief."
13 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

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

18 **LEGAL CLAIMS**

19 Plaintiff states that he has received inadequate medical care.

20 Deliberate indifference to serious medical needs violates the Eighth Amendment's
21 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104
22 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other*
23 *grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en
24 banc). A determination of "deliberate indifference" involves an examination of two
25 elements: the seriousness of the prisoner's medical need and the nature of the
26 defendant's response to that need. *Id.* at 1059.

27 A "serious" medical need exists if the failure to treat a prisoner's condition could
28 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.*

1 The existence of an injury that a reasonable doctor or patient would find important and
2 worthy of comment or treatment; the presence of a medical condition that significantly
3 affects an individual's daily activities; or the existence of chronic and substantial pain are
4 examples of indications that a prisoner has a "serious" need for medical treatment. *Id.* at
5 1059-60.

6 A prison official is deliberately indifferent if he or she knows that a prisoner faces a
7 substantial risk of serious harm and disregards that risk by failing to take reasonable
8 steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must
9 not only "be aware of facts from which the inference could be drawn that a substantial
10 risk of serious harm exists," but he "must also draw the inference." *Id.* If a prison official
11 should have been aware of the risk, but was not, then the official has not violated the
12 Eighth Amendment, no matter how severe the risk. *Gibson v. County of Washoe*, 290
13 F.3d 1175, 1188 (9th Cir. 2002). "A difference of opinion between a prisoner-patient and
14 prison medical authorities regarding treatment does not give rise to a § 1983 claim."
15 *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981).

16 In the original complaint plaintiff alleged that he suffered from coccidioidomycosis,
17 also known as valley fever. He identified nine defendants and stated they failed to
18 properly treat him while at Pelican Bay State Prison. The court granted defendants'
19 motion to dismiss for failure to state a claim noting that plaintiff failed to link the
20 defendants with specific actions or specific failures to treat him. The court noted that
21 plaintiff only provided bare and conclusory allegations that defendants did not provide
22 treatment, and there were no allegations against several of the defendants. The court
23 dismissed the complaint with leave to amend and discussed the best manner to file an
24 amended complaint and reminded plaintiff that he must include all claims, defendants
25 and allegations in the amended complaint.

26 Plaintiff's amended complaint is only three pages long and has failed to cure the
27 deficiencies described by the court. Plaintiff only identifies one defendant but fails to
28 present a cognizable constitutional claim. The amended complaint is dismissed with

1 leave to amend. Plaintiff is again reminded that if he files a second amended complaint
2 he must include all claims, defendants and allegations in the filing. He may not
3 incorporate material from the original complaint by reference.

4 **CONCLUSION**

5 1. The motion to amend (Docket No. 39) is **GRANTED**. The amended complaint
6 is **DISMISSED** with leave to amend in accordance with the standards set forth above.
7 The second amended complaint must be filed no later than **May 16, 2018**, and must
8 include the caption and civil case number used in this order and the words **SECOND**
9 **AMENDED COMPLAINT** on the first page. Because an amended complaint completely
10 replaces the original complaint, plaintiff must include in it all the claims he wishes to
11 present. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). He may not
12 incorporate material from the original complaint by reference. Failure to file an amended
13 complaint may result in dismissal of this case.

14 2. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the
15 court informed of any change of address by filing a separate paper with the clerk headed
16 "Notice of Change of Address," and must comply with the court's orders in a timely
17 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
18 pursuant to Federal Rule of Civil Procedure 41(b).

19 **IT IS SO ORDERED.**

20 Dated: April 20, 2018



21
22 **PHYLLIS J. HAMILTON**
23 United States District Judge

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 LIBRADO FORTANEL,

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8

Case No. [16-cv-03946-PJH](#)

CERTIFICATE OF SERVICE

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
10 District Court, Northern District of California.

11
12 That on April 20, 2018, I SERVED a true and correct copy(ies) of the attached, by placing
13 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
15 receptacle located in the Clerk's office.
16

17 Librado Fortanel ID: J-54101
18 Deuel Vocational Institution
19 P.O. Box 600, Cell D-227
20 Tracy, CA 95378-0600

21 Dated: April 20, 2018

22
23 Susan Y. Soong
24 Clerk, United States District Cour

25 

26 By: _____
27 Kelly Collins, Deputy Clerk to the
28 Honorable PHYLLIS J. HAMILTON