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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LIBRADO FORTANEL,

Plaintiff,

v.

C. E. DUCART, et al.,

Defendants.

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

**ORDER OF DISMISSAL**

Re: Dkt. No. 43

Plaintiff, a state prisoner, proceeds with a pro se civil rights complaint under 42 U.S.C. § 1983. The court granted defendants' motion to dismiss and dismissed the complaint with leave to amend. Plaintiff's amended complaint was dismissed with leave to amend and he has filed a second amended complaint.

**DISCUSSION**

**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. *Id.* at 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." "Specific facts are not 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. Plaintiff's first amended complaint was only  
26 three pages long and failed to provide sufficient information and was dismissed with  
27 leave to amend.

28 Plaintiff's instant second amended complaint while longer and presenting more

1 allegations and factual background still fails to state claim. While plaintiff mentions  
2 deliberate indifference he mostly focuses on medical negligence and alleges that  
3 defendants breached their duty of care. While plaintiff presents allegations against each  
4 defendant, even liberally construed, plaintiff fails to present a cognizable claim of  
5 deliberate indifference. While plaintiff had serious medical needs a review of his various  
6 filings and exhibits demonstrates that he received extensive medical care but he  
7 disagrees with the treatment provided which fails to state a constitutional violation.  
8 Plaintiff also concedes that the symptoms began to subside. He contends that he  
9 suffered adverse effects of the valley fever but has failed to show that this was because  
10 of any lack of treatment on behalf of defendants that would rise to the high standard for  
11 deliberate indifference claims. While plaintiff became asthmatic he was provided an  
12 inhaler and staff is now considering a steroid inhaler. Because plaintiff has already been  
13 provided several opportunities to amend and has still failed to demonstrate a  
14 constitutional violation and further amendment would be futile, this action is dismissed  
15 without leave to amend.

### 16 CONCLUSION

17 1. The motion to file a second amended complaint (Docket No. 43) is **GRANTED**  
18 and the court has considered the filing. For the reasons set forth above this action is  
19 **DISMISSED** with prejudice for failure to state a claim.

20 2. The clerk shall close this case.

21 **IT IS SO ORDERED.**

22 Dated: June 15, 2018

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27 PHYLLIS J. HAMILTON  
28 United States District Judge

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**CERTIFICATE OF SERVICE**

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

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

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

Dated: June 15, 2018

Susan Y. Soong  
Clerk, United States District Court

*Kelly Collins*  
By: \_\_\_\_\_  
Kelly Collins, Deputy Clerk to the  
Honorable PHYLLIS J. HAMILTON