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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MANUEL VALENZUELA,
#1044361

Plaintiff,

vs.

HOWARD SKOLNIK, *et al.*,

Defendants.

2:10-cv-01162-PMP-LRL

ORDER

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983.¹ Plaintiff’s application to proceed *in forma pauperis* is granted (docket #3). However, as discussed below, the complaint must be dismissed for failure to exhaust administrative remedies.

I. Screening Standard

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner’s claims, “if the allegation of poverty is untrue,” or if the action “is frivolous or malicious,” “fails to state a claim on which relief may be granted,” or “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss

¹This action has been consolidated with the following actions: *Halverson v. Skolnik, et al.*, 2:10-cv-01132-PMP-LRL (lead case); *Frixione v. Skolnik, et al.*, 2:10-cv-01235; *Rea v. Skolnik, et al.*, 2:10-cv-01217-PMP-LRL; *Jones v. Skolnik, et al.*, 2:10-cv-1214-PMP-LRL; *Powell v. Skolnik, et al.*, 2:10-cv-01182-PMP-LRL; *Charbonnet v. Skolnik, et al.*, 2:10-cv-01273-PMP-LRL. However, each action is proceeding in its own right.

1 a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual
2 contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a constitutional claim,
3 however inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d
4 639, 640 (9th Cir. 1989).

5 Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided
6 for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under Section
7 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under Rule
8 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232
9 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the
10 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief
11 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965
12 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a
13 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,
14 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*
15 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to
16 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

17 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings
18 drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21
19 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). All
20 or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner’s claims
21 lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are
22 untenable (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal
23 interest which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.*
24 fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932
25 F.2d 795, 798 (9th Cir. 1991).

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1 To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained
2 of was committed by a person acting under color of state law; and (2) that the conduct deprived the
3 plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689 (9th Cir.
4 2006).

5 **II. Instant Complaint**

6 Plaintiff, who is incarcerated at Southern Desert Correctional Center (“SDCC”), has sued
7 Nevada Department of Corrections (“NDOC”) Director Howard Skolnik, Nevada Attorney General
8 Catherine Cortez-Masto, SDCC Warden Brian Williams, and Does SDCC medical personnel and
9 “supplier of Nipro syringes.” Plaintiff alleges that he is an insulin-dependent diabetic and that on June
10 28-July 1, 2010, SDCC medical personnel issued him a different type of insulin syringe. He claims that
11 the new syringes were not issued in a blister package, nor are they single-use syringes because the
12 needle portion of the syringe does not retract or otherwise become inoperative after a single use, and
13 medical personnel do not use a “sharps-cutter” to clip needles from used syringes. He alleges that
14 inmate Halverson (plaintiff in lead action) brought it to his attention that the syringes were also past
15 their expiration date. He claims that when this was brought to the attention of medical staff, they
16 examined the packaging, then collected the remaining syringes. He alleges that defendants Skolnik and
17 Williams directed and/or allowed and/or failed to prevent the purchase and use of out of date, non-single
18 use, possibly contaminated syringes. Plaintiff also makes a “note to the court:” and states that SDCC
19 medical personnel obscure or “white-out” the name on their I.D. or wear it reversed so that inmates
20 cannot identify personnel by name.

21 “Prison officials have a duty to take reasonable steps to protect inmates from physical abuse.”
22 *Hoptowit v. Ray*, 682 F.2d 1237, 1250 (9th Cir. 1982); *see also Farmer v. Brennan*, 511 U.S. 825, 833
23 (1994); *Hearns v. Terhune*, 413 F.3d 1036, 1040 (9th Cir. 2005); *Robinson v. Prunty*, 249 F.3d 862, 866
24 (9th Cir. 2001). To establish a violation of this duty, the prisoner must establish that prison officials were
25 “deliberately indifferen[t]” to serious threats to the inmate’s safety. *See Farmer*, 511 U.S. at 834. To
26 demonstrate that a prison official was deliberately indifferent to a serious threat to the inmate’s safety,

1 the prisoner must show that “the official [knew] of and disregard[ed] an excessive risk to inmate . . .
2 safety; the official must both be aware of facts from which the inference could be drawn that a
3 substantial risk of serious harm exists, and [the official] must also draw the inference.” *Farmer*, 511
4 U.S. at 837; *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1187-88 (9th Cir. 200 2; *Jeffers v.*
5 *Gomez*, 267 F.3d 895, 913 (9th Cir. 2001) (*per curiam*); *Anderson v. County of Kern*, 45 F.3d 1310, 1313
6 (9th Cir. 1995). To prove knowledge of the risk, however, the prisoner may rely on circumstantial
7 evidence; in fact, the very obviousness of the risk may be sufficient to establish knowledge. *See*
8 *Farmer*, 511 U.S. at 842; *Wallis v. Baldwin*, 70 F.3d 1074, 1077 (9th Cir. 1995).

9 In a complaint brought pursuant to § 1983, the plaintiff should specifically identify each
10 defendant to the best of his or her ability, clarify what constitutional right he or she believes each
11 defendant has violated and support each claim with factual allegations about each defendant’s actions.
12 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection
13 between a defendant’s actions and the claimed deprivation. *Rizzo v. Goode*, 423 U.S. 362 (1976); *May*
14 *v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). The
15 plaintiff’s claims must be set forth in short and plain terms, simply, concisely and directly. *See*
16 *Swierkeiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002); Fed. R. Civ. P. 8.

17 Further, before plaintiff can commence a civil rights action with respect to prison conditions,
18 he or she must first exhaust the administrative remedies that are available. 42 U.S.C. § 1997e(a). The
19 “exhaustion requirement applies to all inmate suits about prison life, whether they involve general
20 circumstances or particular episodes, and whether they allege excessive force or some other wrong.”
21 *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 992 (2002). The failure to exhaust is an affirmative
22 defense, which often requires proof of facts not on the face of the complaint. *See Wyatt v. Terhune*, 280
23 F.3d 1238, 1245-46 (9th Cir. 2002). However, when it is clear from the face of the complaint that a
24 prisoner did not exhaust the administrative remedies, then the court must dismiss the action pursuant

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1 to 28 U.S.C. § 1915A. *See Bennett v. King*, 293 F.3d 1096, 1098 (9th Cir. 2002). Here, plaintiff states
2 at page 8 of the complaint that he did not exhaust the available administrative grievance procedures at
3 SDCC, and therefore, the court must dismiss this action.

4 **III. Conclusion**

5 **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma pauperis*
6 (docket #3) without having to prepay the full filing fee is **GRANTED**; plaintiff shall not be required
7 to pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant to 28 U.S.C.
8 § 1915, as amended by the Prisoner Litigation Reform Act of 1996. The movant herein is permitted to
9 maintain this action to conclusion without the necessity of prepayment of fees or costs or the giving of
10 security therefor. This order granting *in forma pauperis* status shall not extend to the issuance of
11 subpoenas at government expense.

12 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the Prisoner
13 Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the Clerk of the
14 United States District Court, District of Nevada, 20% of the preceding month's deposits to the account
15 of Manuel Valenzuela, **Inmate No. 1044361** (in months that the account exceeds \$10.00) until the full
16 \$350 filing fee has been paid for this action. The Clerk shall send a copy of this order to the attention
17 of Albert G. Peralta, Chief of Inmate Services for the Nevada Department of Prisons, P.O. Box 7011,
18 Carson City, NV 89702.

19 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
20 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the
21 Prisoner Litigation Reform Act of 1996.

22 **IT IS FURTHER ORDERED** that plaintiff's complaint is **DISMISSED WITHOUT**
23 **PREJUDICE.**

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IT IS FURTHER ORDERED that the Clerk shall **ENTER JUDGMENT** accordingly and close this case.

DATED: October 21, 2010.



PHILIP M. PRO
United States District Judge