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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JEAN-MAX DARBOUZE,

12 Plaintiff,

13 v.

14 DR. SPENCER, et al.,

15 Defendants.
16
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No. 2:23-cv-1419 KJN P

ORDER SEVERING CLAIMS AGAINST
DEFENDANT DR. HLA, AND ORDER
FINDING SERVICE OF COMPLAINT
APPROPRIATE FOR EIGHTH
AMENDMENT CLAIMS AGAINST
DEFENDANTS DR. SPENCER AND DR.
KIM, AND DIRECTING SERVICE

18 Plaintiff is a state prisoner, proceeding without counsel. Plaintiff seeks relief pursuant to
19 42 U.S.C. § 1983, and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.
20 This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302.

21 Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a).
22 Accordingly, the request to proceed in forma pauperis is granted.

23 Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C.
24 §§ 1914(a), 1915(b)(1). By this order, plaintiff is assessed an initial partial filing fee in
25 accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct
26 the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and
27 forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly
28 payments of twenty percent of the preceding month's income credited to plaintiff's prison trust

1 account. These payments will be forwarded by the appropriate agency to the Clerk of the Court
2 each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28
3 U.S.C. § 1915(b)(2).

4 Screening Standards

5 The court is required to screen complaints brought by prisoners seeking relief against a
6 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
7 court must dismiss a complaint or portion thereof if the prisoner raised claims that are legally
8 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
9 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
11 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
12 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an
13 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
14 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
15 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
16 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
17 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
18 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at
19 1227.

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
21 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
22 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
23 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
24 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a
25 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
26 sufficient "to raise a right to relief above the speculative level." Id. However, "[s]pecific facts
27 are not necessary; the statement [of facts] need only 'give the defendant fair notice of what the . .
28 . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007)

1 (quoting Bell Atlantic Corp., 550 U.S. at 555) (citations and internal quotations marks omitted).
2 In reviewing a complaint under this standard, the court must accept as true the allegations of the
3 complaint in question, id., and construe the pleading in the light most favorable to the plaintiff.
4 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468
5 U.S. 183 (1984).

6 Plaintiff's Complaint

7 Plaintiff alleges that while housed at High Desert State Prison ("HDSP"), in 2019, his
8 Eighth Amendment rights were violated by Dr. Spencer's refusal to change plaintiff's medication
9 for his serious mental health needs including severe depression and chronic insomnia, despite
10 plaintiff informing Dr. Spencer on multiple occasions that the prescribed medications were not
11 working, and such refusal made plaintiff's symptoms worse. Dr. Spencer diagnosed plaintiff as
12 suffering from polysubstance personality dependence, adjustment disorder with anxiety and
13 disturbance of mood, with anti-social personality disorder. Dr. Spencer allegedly informed
14 plaintiff that he could "target his own symptoms of depression" by establishing and maintaining a
15 level of participation in assigned and prescribed programming to improve [plaintiff's] insight into
16 [his] numerous mental health difficulties." (ECF No. 1 at 9.) Plaintiff claims he repeatedly
17 informed Dr. Spencer that plaintiff was "completely [in]capacitated due to severe depression,
18 suicidal ideations, lack of sleep and lack of appetite." (Id.)

19 While at HDSP, on September 15, 2020, plaintiff reported he was suffering from left arm
20 and shoulder pain. Plaintiff's primary care physician, Dr. Kim, refused to provide alternative
21 pain medication when plaintiff reported that the Tylenol and Naproxen failed to treat plaintiff's
22 chronic and severe shoulder pain, and refused to prescribe Lyrica. In early 2021, plaintiff
23 informed Dr. Kim that plaintiff's chronic and severe pain was now in both shoulders, and he was
24 having difficulty breathing at night due to the pain, his asthma, and his inability to sleep due to
25 his severe episodes of depression, and plaintiff requested a CPAP to assist him at night, which
26 was denied. Plaintiff also informed Dr. Kim that in 2011 he suffered a serious head injury as well
27 as injury to his torso from a motor vehicle accident. Plaintiff requested a CT scan of his brain due
28 to his headaches and increased depression and other mental health issues which were worsening.

1 But Dr. Kim refused to schedule plaintiff for any additional tests or to see specialists trained in
2 head injuries.

3 Plaintiff was subsequently transferred to Mule Creek State Prison (“MCSP”) where his
4 primary care physician, Dr. Nyo Hla, failed to treat plaintiff’s severe abdominal pain and refused
5 to provide plaintiff a CPAP machine for his breathing issues, which also put plaintiff’s safety at
6 risk due to threats from his cellmates.

7 Plaintiff seeks, inter alia, money damages.

8 Discussion

9 The court reviewed plaintiff’s complaint and, for the limited purposes of § 1915A
10 screening, finds that it states potentially cognizable Eighth Amendment claims against defendants
11 Dr. Spencer and Dr. Kim at HDSP. See 28 U.S.C. § 1915A.

12 However, the court finds that plaintiff’s claims as to Dr. Hla are not related to the claims
13 against Dr. Spencer or Dr. Kim, the challenged medical care by Dr. Hla took place at a different
14 prison and thus should proceed in a separate action. Therefore, plaintiff’s Eighth Amendment
15 claims against defendant Dr. Hla are severed from this action, and Dr. Hla is dismissed from this
16 action. The Clerk of the Court is directed to assign a new case number to plaintiff’s Eighth
17 Amendment claims against defendant Dr. Hla, and the filings from this case (No. 2:23cv1419
18 KJN P) shall be included on the docket in the newly opened civil case. The filing fee for the new
19 civil case is waived in accordance with Rule 21 of the Federal Rules of Civil Procedure. Cortinas
20 v. Colvin, 2024 WL 115766, *1 (E.D. Cal. Jan. 10, 2024).

21 Claims Proceeding in 2:23-cv-1419 KJN P

22 The Court orders that this case proceed on plaintiff’s complaint (ECF No. 1) against
23 defendant Dr. Spencer and Dr. Kim for alleged violations of plaintiff’s Eighth Amendment rights.
24 The allegations in the pleading are sufficient to state potentially cognizable Eighth Amendment
25 claims against defendants Dr. Spencer and Dr. Kim. See 28 U.S.C. § 1915A.

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. Plaintiff’s request for leave to proceed in forma pauperis is granted.
- 28 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff

1 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.

2 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
3 Director of the California Department of Corrections and Rehabilitation filed concurrently
4 herewith.

5 3. Plaintiff's Eighth Amendment claims against defendant Hla are severed from this
6 action, and Dr. Hla is terminated from this action.

7 4. The Clerk of the Court is directed to:

8 (a) assign a new case number to plaintiff's Eighth Amendment claims against defendant
9 Dr. Hla;

10 (b) assign the same magistrate judge to the new action in the interest of judicial economy,
11 and make appropriate adjustment in the assignment of civil cases to compensate for this direct
12 assignment;

13 (c) the filings from this case (No. 2:23-cv-1419 KJN P) shall be included on the docket in
14 the newly opened civil case;

15 (d) the filing fee for the new civil case is waived in accordance with Rule 21 of the
16 Federal Rules of Civil Procedure; and

17 (e) update the docket in No. 2:23-cv-1419 KJN P to reflect that defendant Dr. Hla has
18 been terminated as a named defendant in this action.

19 5. In accordance with 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c), the Court has
20 screened and found service of the complaint appropriate. If either defendant either waives service
21 or is personally served, the defendant is required to reply to the complaint. 42 U.S.C.
22 § 1997e(g)(2).

23 6. Service shall be initiated on the following defendants: **Dr. Spencer, psychiatrist, and**
24 **Dr. Kim, both employed at High Desert State Prison.**

25 7. Service on the parties in this case shall proceed under the Court's E-Service pilot
26 program for civil rights cases for the Eastern District of California. The purpose of the program
27 is to get the complaint served on defendants faster so that they respond to the complaint sooner.
28 "E-Service" means that instead of having plaintiffs fill out service paperwork for the United

1 States Marshal to mail to the defendants or through personal service, the Court will provide
2 paperwork regarding the defendants electronically to the California Department of Corrections
3 and Rehabilitation (CDCR) and the California Attorney General's Office, each of which has
4 agreed to participate in this program. If those entities are unable to effectuate service, then the
5 matter will be referred to the United States Marshal for service. However, to the extent that these
6 individuals are unable to effectuate service of process, the Court may make further orders
7 requiring the plaintiff to assist in providing additional information in order to effectuate service.
8 Plaintiff need not attempt service on the defendants and need not request waiver of service.

9 8. In accordance with the pilot program, the Clerk of the Court is directed to serve this
10 order via email on the CDCR, along with a summons, the operative complaint, and copies of the
11 form Consent to Proceed Before a United States Magistrate Judge. No later than 40 days after
12 service of this order, CDCR shall file with the Court the "CDCR Notice of E-Service Waiver"
13 advising the Court which defendant(s) in this order will be waiving service of process without the
14 need for personal service by the United States Marshal. CDCR shall also notify the Court
15 whether any defendant(s) decline to waive service or could not be reached. The CDCR's Notice
16 of Waiver shall also be served on the California Attorney General's Office and the United States
17 Marshal.

18 9. Within 30 days after the filing of CDCR's Notice of E-Service Waiver, the California
19 Attorney General's Office shall file a waiver of service of process for any defendant who is
20 waiving service of process consistent with Fed. R. Civ. P. 4(d)(1). A defendant who timely
21 waives service need not serve an answer to the complaint until 60 days after the waiver of service
22 of process was sent – or until 90 days after it was filed to any defendant outside any judicial
23 district of the United States. For any defendant that the CDCR advises will be waiving service,
24 the date the CDCR files its Notice of E-Service Waiver will be considered the date the request for
25 waiver was sent. If relief from this order is necessary, the Attorney General may seek relief by
26 way of special appearance. Any special appearance shall not be construed as personal appearance
27 on behalf of any defendant and does not waive service of any defects in service, unless and until a
28 waiver of service or responsive pleading is filed.

1 10. Upon filing the Notice of Waiver, the Clerk of Court shall provide a copy to the
2 United States Marshal of the operative complaint, the summons and this Order, for any defendant
3 who has not waived service according to the CDCR Notice of E-Service Waiver. Upon receipt of
4 those documents, the United States Marshal shall serve process of the complaint, summons, and
5 this Order upon each defendant who has not waived service pursuant to Rule 4 of the Federal
6 Rules of Civil Procedure and 28 U.S.C. § 566(c). The United States Marshal may command all
7 necessary assistance from the Office of Legal Affairs for CDCR and may seek the assistance of a
8 Special Investigator if the Litigation Officer at the institution is unable to assist in identifying
9 and/or locating defendants. If any confidential information is provided by a third party to
10 effectuate service, including CDCR, the United States Marshal shall maintain the confidentiality
11 of all information provided to them.

12 11. Within 10 days after personal service is effected, the United States Marshal shall file
13 the return of service, along with evidence of any attempts to secure a waiver of service of process
14 and of the costs subsequently incurred in effecting service. These costs shall be enumerated on
15 the USM-285 form and shall include the costs incurred by the United States Marshal for
16 photocopying additional copies of the summons and complaint and for preparing new USM-285
17 forms, if required. Costs of service will be taxed against each personally served defendant in
18 accordance with the provisions of Fed. R. Civ. P. 4(d)(2). The United States Marshal shall file
19 the returned waivers of service, or the requests for waiver of service if returned as undelivered,
20 once received.

21 12. If a defendant subsequently waives service, the defendant is required to return the
22 signed waivers to the United States Marshal. The filing of an answer or a responsive motion does
23 not relieve a defendant of this requirement, and the failure to return the signed waivers may
24 subject the defendant to an order to pay the costs of service pursuant to Fed. R. Civ. P. 4(d)(2).

25 Dated: February 2, 2024

26 
27 KENDALL J. NEWMAN
28 UNITED STATES MAGISTRATE JUDGE

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