

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 17 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARCUS BRENT FIELDS,

Plaintiff-Appellant,

v.

GAVIN NEWSOM, Governor, State of
California; et al.,

Defendants-Appellees.

No. 22-55519

D.C. No. 3:22-cv-00044-LL-MDD
Southern District of California,
San Diego

ORDER

Before: CANBY, CALLAHAN, and BADE, Circuit Judges.

The district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On May 26, 2022, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's May 26, 2022 order, and the opening briefs, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 5, 10, 16, and 19) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

No further filings will be entertained in this closed case.

DISMISSED.

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Southern District of California,
San Diego

ORDER

A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith and has revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

- (1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), or
- (2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant files a statement that the appeal should go forward, appellant also must:

- (1) file in this court a motion to proceed in forma pauperis, OR

(2) pay to the district court \$505.00 for the filing and docketing fees for this appeal AND file in this court proof that the \$505.00 was paid.

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice. If the court dismisses the appeal as frivolous, this appeal may be counted as a strike under 28 U.S.C. § 1915(g).

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Joseph Williams
Deputy Clerk
Ninth Circuit Rule 27-7



United States District Court
SOUTHERN DISTRICT OF CALIFORNIA

Marcus Brent Fields

Plaintiff,

v.

Gavin Newsom, Governor, State of California; M.D.
Nadine Burke Harris, California Surgeon General; Kathleen
Allison, Secretary, CDCR; S. Gates Chief, CDCR Health
Care Appeals; D. Gouldy, Deputy Director, Policy and
Risk Management, CDCR; J. Clerk Kelso, Federal
Receiver, money holder and money direction director,
CDCR

Defendant.

Civil Action No. 22-cv-00044-LL-MDD

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED:

The court dismisses this civil action without further leave to amend for failure to state a claim upon which § 1983 relief can be granted and as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). The court denies Plaintiff's Motion to Appoint Counsel [ECF No.[16]] and certifies that an IFP appeal would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). Case is closed.

Date: 5/16/22

CLERK OF COURT
JOHN MORRILL, Clerk of Court
By: s/ D.Frank

D.Frank, Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARCUS BRENT FIELDS,
CDCR #V-46240,

Plaintiff,

vs.

GAVIN NEWSOM, Governor; NADINE BURKE HARRIS, California Surgeon General; KATHLEEN ALLISON, CDCR Secretary; S. GATES, Chief of Health Care Appeals,

Defendants.

Case No.: 22-cv-0044-LL-MDD

**ORDER DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§ 1915(e)(2)(B) AND
28 U.S.C. § 1915A(b)**

[ECF No. 12]

I. Procedural History

On January 12, 2022, Plaintiff Marcus Brent Fields, while incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, filed a civil rights complaint filed pursuant to 42 U.S.C. § 1983. *See* ECF No. 1 (“Compl.”) at 1. In addition, Plaintiff filed a Motion for Leave to Proceed *in forma pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a), along with a Motion to Appoint Counsel. *See* ECF Nos. 2, 3.

1 The Court conducted the required sua sponte screening pursuant to pursuant to 28
 2 U.S.C. § 1915(e)(2) and found that Plaintiff failed to state a plausible claim for relief
 3 against any of the named Defendants. *See* Compl. at 6, 10. Plaintiff's Complaint was
 4 dismissed and he was given leave to file an amended pleading in order to correct the
 5 deficiencies of pleading identified in the Court's Order. *Id.* at 10-11.

6 On March 18, 2022, Plaintiff filed a document captioned "My Leave to Amend
 7 Complaint" and in this body of this filing he describes the document as his "amended
 8 complaint." *See* ECF No. 12 at 1. Thus, the Court will construe this filing as his First
 9 Amended Complaint ("FAC"). Plaintiff has also filed a second Motion to Appoint
 10 Counsel. *See* ECF No. 16.

11 **II. Sua Sponte Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

12 **A. 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

13 As the Court previously informed Plaintiff, because he is a prisoner,¹ his FAC
 14 requires a pre-answer screening pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b).
 15 Under these statutes, the Court must *sua sponte* dismiss a prisoner's IFP complaint, or any
 16 portion of it that is frivolous, malicious, failing to state a claim, or seeking damages from
 17 defendants who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)
 18 (en banc) (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004
 19 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)). "The purpose of [screening] is 'to
 20 ensure that the targets of frivolous or malicious suits need not bear the expense of
 21 responding.'" *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (citation omitted).

22 "The standard for determining whether a plaintiff has failed to state a claim upon
 23 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
 24 Civil Procedure 12(b)(6) standard for failure to state a claim." *Watison v. Carter*, 668 F.3d
 25 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
 26 2012) (noting that screening pursuant to § 1915A "incorporates the familiar standard
 27 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
 28 12(b)(6)"). Federal Rules of Civil Procedure 8(a) and 12(b)(6) require a complaint to

1 “contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible
 2 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted);
 3 *Wilhelm*, 680 F.3d at 1121.

4 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
 5 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
 6 *Iqbal*, 556 U.S. at 678. The court “ha[s] an obligation where the petitioner is pro se,
 7 particularly in civil rights cases, to construe the pleadings liberally and to afford the
 8 petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
 9 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). However, it may
 10 not “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents
 11 of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

12 **B. 42 U.S.C. § 1983**

13 “Section 1983 creates a private right of action against individuals who, acting under
 14 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*,
 15 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive
 16 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”
 17 *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation marks and citation
 18 omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a
 19 right secured by the Constitution and laws of the United States, and (2) that the deprivation
 20 was committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*,
 21 698 F.3d 1128, 1138 (9th Cir. 2012).

22 **C. Plaintiff’s Allegations**

23 Plaintiff’s FAC contains virtually no factual allegations and instead, he lists pages
 24 of case citations that he appears to argue support the claims he made in his original
 25 Complaint. However, the Court did not dismiss his original Complaint because he failed
 26 to supply legal authority to support his factual claims. On the contrary, it was the failure
 27 to allege specific *factual* allegations to plausibly support the causes of action listed in his
 28 original Complaint that was the basis of the dismissal.

1 In his FAC, Plaintiff's core issue appears to be the claim that he received a Covid-
 2 19 vaccine that was "tainted" and caused him "hurt, pain, and irreversible side effects."
 3 FAC at 4. He further alleges the "U.S. Government acknowledges that over 15,000 of its
 4 citizens have died and hundreds of thousands have been harmed as a direct result of these
 5 vaccines." *Id.* In support of these allegations, Plaintiff contends that "baseball legend
 6 Hank Aaron died shortly after he publicly took the vaccine shot." *Id.*

7 Plaintiff names California Governor Gavin Newsom, California Surgeon General
 8 Nadine Burke Harris, CDCR Secretary Kathleen Allison, and CDCR Chief of Inmate
 9 Appeals S. Gates as the Defendants. *Id.* at 1.

10 **D. Eighth Amendment & Personal Liability**

11 Again, the Court finds that Plaintiff's FAC fails to state any plausible claim for relief
 12 against any of the named Defendants. Plaintiff claims that Surgeon General Harris
 13 "fail[ed] to do her job, by review of incoming Pfizer vaccines which were brought into the
 14 State under [Governor] Newsom." *Id.* at 3. He further claims that Surgeon General Harris
 15 failed to issue a "policy" that would have provided Chief of Inmate Appeals Gates "the
 16 tools for appropriate decision making." *Id.* Plaintiff's FAC is devoid of factual allegations
 17 that any of the named Defendants were aware of his claims or had any direct involvement
 18 in his medical care.

19 Because "vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead
 20 that each Government-official defendant, through the official's own individual actions, has
 21 violated the Constitution." *Iqbal*, 556 U.S. at 676; *Palmer v. Sanderson*, 9 F.3d 1433,
 22 1437-38 (9th Cir. 1993) (noting there is no respondeat superior liability under 42 U.S.C.
 23 § 1983). Supervisory officials may only be held liable under § 1983 if the plaintiff alleges
 24 their "personal involvement in the constitutional deprivation, or . . . a sufficient causal
 25 connection between the supervisor's wrongful conduct and the constitutional violation."
 26 *Keates v. Koile*, 883 F.3d 1228, 1242–43 (9th Cir. 2018); *Starr v. Baca*, 652 F.3d 1202,
 27 1207 (9th Cir. 2011). In other words, "a supervisor is liable for the acts of his subordinates
 28 'if the supervisor participated in or directed the violations, or knew of the violations of

1 subordinates and failed to act to prevent them.”” *Corales v. Bennett*, 567 F.3d 554, 570
 2 (9th Cir. 2009) (citations omitted).

3 Plaintiff’s FAC “pleads no factual content that allows the court to draw the
 4 reasonable inference that [Governor Newsom, Surgeon General Harris, Secretary Allison,
 5 or Chief of Appeals Gates are] liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.
 6 Plaintiff includes no specific factual allegations with respect to any of the named
 7 Defendants, and he does not describe what any of them either did, or failed to do, with
 8 respect to his housing, health, safety, or medical treatment. *Id.* at 679 (“Determining
 9 whether a complaint states a plausible claim for relief [is] a context-specific task.”).

10 “The Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws
 11 cruel and unusual ‘punishments.’” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, to
 12 be held personally liable for Plaintiff’s injuries under the Eighth Amendment Defendants
 13 must be specifically alleged to have acted with deliberate indifference to a serious risk to
 14 Plaintiff’s health or safety. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1068 (9th Cir.
 15 2016); *Iqbal*, 556 U.S. at 678. “A prison official acts with ‘deliberate indifference
 16 only if the [prison official] knows of and disregards an excessive risk to inmate health and
 17 safety.’” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (quoting *Gibson v. Cnty.
 18 of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002), *overruled on other grounds by Castro*,
 19 833 F.3d at 1076. “Under this standard, the prison official must not only ‘be aware of facts
 20 from which the inference could be drawn that a substantial risk of serious harm exists,’ but
 21 that person ‘must also draw the inference.’” *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825,
 22 837 (1994)). Thus, even “[p]rison official[s] who actually kn[o]w of a substantial risk to
 23 inmate health or safety may be found free from liability if they respond[] reasonably to the
 24 risk, even if the harm ultimately [i]s not averted.” *Farmer*, 511 U.S. at 844.

25 As the Court previously acknowledged in its March 4, 2022 Order, Covid-19 poses
 26 a substantial risk of serious harm. *See Plata v. Newsom*, 445 F. Supp. 3d 557, 559 (N.D.
 27 Cal. Apr. 17, 2020) (“[N]o one questions that [Covid-19] poses a substantial risk of serious
 28 harm” to prisoners.). However, in order to plead a viable Eighth Amendment claim,

1 Plaintiff must provide more than conclusory statements that supervisory prison officials
 2 provided a “tainted Pfizer vaccine.” *See Iqbal*, 556 U.S. at 678. In situations where the
 3 challenged “conduct is harmful enough to satisfy the objective component of an Eighth
 4 Amendment claim, whether it can be characterized as ‘wanton’ depends upon the
 5 constraints facing *the official*.” *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (citations
 6 omitted) (emphasis original). Because “only the unnecessary and wanton infliction of pain
 7 implicates the Eighth Amendment,” prisoners alleging cruel and unusual punishment must
 8 plead some factual content to plausibly suggest each defendant acted with a “sufficiently
 9 culpable state of mind.” *Id.* at 297 (internal quotation marks, emphasis and citations
 10 omitted). As the Court stated above, Plaintiff’s FAC is devoid of any facts sufficient to
 11 plausibly suggest any of the named Defendants were personally aware of his underlying
 12 medical vulnerabilities, or that he was at risk for any health complications if he received
 13 the vaccine.

14 While Federal Rule of Civil Procedure 8 “does not require ‘detailed factual
 15 allegations,’” it “demands more than an unadorned, the-defendant-unlawfully-harmed-me
 16 accusation.” *Iqbal*, 556 U.S. at 678 (citation omitted). In order “[t]o survive a motion to
 17 dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a
 18 claim for relief that is plausible on its face.’” *Id.* (citations omitted). As currently pleaded,
 19 however, nothing in Plaintiff’s Complaint plausibly suggests Defendants “through [their]
 20 own individual actions, . . . violated the Constitution.” *Iqbal*, 556 at 676; *see also Jones v.*
 21 *Cnty. Redev. Agency of L.A.*, 733 F.2d 646, 649 (9th Cir. 1984) (even pro se plaintiff must
 22 “allege with at least some degree of particularity overt acts which defendants engaged in”
 23 in order to state a claim).

24 Therefore, Plaintiff’s Eighth Amendment claims all named Defendants must be
 25 dismissed *sua sponte* for failing to state an Eighth Amendment claim upon which § 1983
 26 relief can be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See*
 27 *Watison* 668 F.3d at 1112; *Wilhelm*, 680 F.3d at 1121.

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1 In addition, some of Plaintiff's claims are devoid of a plausible claim. "The purpose
 2 of [screening] is 'to ensure that the targets of frivolous or malicious suits need not bear the
 3 expense of responding.'" *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014)
 4 (citation omitted). A pleading is "factual[ly] frivolous[]" if "the facts alleged rise to the
 5 level of the irrational or the wholly incredible, whether or not there are judicially noticeable
 6 facts available to contradict them." *Denton v. Hernandez*, 504 U.S. 25, 25–26 (1992). "[A]
 7 complaint, containing as it does both factual allegations and legal conclusions, is frivolous
 8 where it lacks an arguable basis either in law or in fact. . . . [The] term 'frivolous,' when
 9 applied to a complaint, embraces not only the inarguable legal conclusion, but also the
 10 fanciful factual allegation." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). When
 11 determining whether a complaint is frivolous, the court need not accept the allegations as
 12 true, but must "pierce the veil of the complaint's factual allegations," *id.* at 327, to
 13 determine whether they are "'fanciful,' 'fantastic,' [or] 'delusional.'" *Denton*, 504 U.S. at
 14 33 (quoting *Neitzke*, 490 U.S. at 328).

15 In his FAC, Plaintiff claims that the "U.S. government acknowledges that over
 16 15,000 of its citizens have died and hundreds of thousands have been harmed as a direct
 17 result of these [Covid-19] vaccines." FAC at 4. There are no factual allegations to support
 18 this claim. Thus, because Plaintiff's pleadings appear grounded on a wholly unfounded
 19 belief that he was harmed by receiving a "tainted" Covid-19 vaccine with no plausible
 20 allegation as to how he was harmed, [see FAC at 3-4], his case demands *sua sponte*
 21 dismissal as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and § 1915A(b)(1). *See*
 22 *Iqbal*, 556 U.S. at 676; *Denton*, 504 U.S. at 25-26; *Neitzke*, 490 U.S. at 324.

23 **E. Leave to Amend**

24 Because Plaintiff has already been provided a statement of his pleading deficiencies,
 25 as well as an opportunity to amend those claims to no avail, the Court finds granting further
 26 leave to amend would be futile. *See Gonzalez v. Planned Parenthood*, 759, F.3d 1112, 1116
 27 (9th Cir. 2014) ("'Futility of amendment can, by itself, justify the denial of . . . leave to
 28 amend.'") (quoting *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)); *Zucco Partners*,

1 *LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (“[W]here the plaintiff has
2 previously been granted leave to amend and has subsequently failed to add the requisite
3 particularity to its claims, [t]he district court’s discretion to deny leave to amend is
4 particularly broad.” (internal quotation marks omitted) (second alteration in original)).

5 **F. Motion to Appoint Counsel**

6 Plaintiff has also filed a Motion for Appointment of Counsel. *See* ECF No. 16. All
7 documents filed pro se are liberally construed, and “a *pro se* complaint, however inartfully
8 pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.”
9 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). There is no constitutional right to counsel in
10 a civil case, and the decision to appoint counsel under 28 U.S.C. § 1915(e)(1) is within “the
11 sound discretion of the trial court and is granted only in exceptional circumstances.”
12 *Agyeman*, 390 F.3d at 1103. Exceptional circumstances exist where there is a cumulative
13 showing of both a likelihood of success on the merits and an inability of the pro se litigant
14 to articulate his claims in light of their legal complexity. *Palmer v. Valdez*, 560 F.3d 965,
15 970 (9th Cir. 2009).

16 Plaintiff’s FAC demonstrates he is capable of legibly articulating the facts and
17 circumstances relevant to his claims, however as discussed above, he is unable to show a
18 likelihood of success on the merits. Accordingly, Plaintiff’s motion for appointment of
19 counsel is **DENIED**.

20 **III. CONCLUSION**

21 For the foregoing reasons, the Court:

22 1) **DISMISSES** this civil action without further leave to amend for failure to
23 state a claim upon which § 1983 relief can be granted and as frivolous pursuant to 28 U.S.C.
24 § 1915(e)(2)(B) and § 1915A(b);
25 2) **DENIES** Plaintiff’s Motion to Appoint Counsel [ECF No. 16];
26 3) **CERTIFIES** that an IFP appeal would not be taken in good faith pursuant to
27 28 U.S.C. § 1915(a)(3), and

1 4) **DIRECTS** the Clerk of Court to enter a final judgment of dismissal and close
2 the file.

3 **IT IS SO ORDERED.**

4 Dated: May 16, 2022



5
6 Honorable Linda Lopez
7 United States District Judge

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