UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTONIO A. CALLES, Plaintiff, v. DR. JOHANNES HAAR, Defendant.	Case No. EDCV 16-1382-R (AS) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

I.

INTRODUCTION

On June 27, 2016, Antonio A. Calles ("Plaintiff"), then an inmate at the California Men's Colony ("CMC") in San Luis Obispo, California, filed a Complaint pursuant to 42 U.S.C. § 1983, ("Compl.," Docket Entry No. 1), asserting claims against (1) the California Department of Corrections and Rehabilitation ("CDCR"); and (2) Dr. Johannes Haar ("Haar") in his individual and official capacities. (Compl. at 1, 3 (continuous pagination of Plaintiff's filings used throughout this Order)). On July 27, 2016, the Court issued an order dismissing the

complaint with leave to amend for failure to state a claim. (Docket Entry No. 5).

On August 25, 2016, Plaintiff filed a First Amended Complaint asserting claims against Haar in his individual capacity. ("FAC," Docket Entry No. 6). On September 30, 2016, the Court ordered that the First Amended Complaint be served on Haar in his individual capacity. (Docket Entry Nos. 7, 8, 9). On January 6, 2017, Haar filed an Answer. (Docket Entry No. 18).

On January 20, 2017, Haar filed the instant Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c). ("Motion," Docket Entry No. 20). On April 5, 2017, Plaintiff filed a "Response" to the Motion. ("Response," Docket Entry No. 27). On April 20, 2017, Haar filed a Reply in Further Support of the Motion. ("Reply," Docket Entry No. 28). On May 5, 2017, Plaintiff filed a Surreply styled as an additional "Response" to the Motion. ("Surreply," Docket Entry No. 29).[1]

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[1] Haar filed Objections to the Surreply, arguing that the Surreply was filed without prior written permission of the Court in violation of C.D. Cal. Rule 7-10. (Docket Entry No. 30 at 2). The Court agrees that the Surreply violates C.D. Cal. Rule 7-10, but the Surreply raises no new claims and, as discussed infra, it clarifies and arguably limits the nature of Plaintiff's claims and the scope of this action. (Surreply at 1-3 (setting forth several propositions that Plaintiff "does not argue" as well as "[t]he questions that must be addressed")). The Court therefore exercises its discretion to OVERRULE Haar's Objections. See Harper v. Ramirez, 2015 WL 9918409 at *2 (C.D. Cal. 2015) (acknowledging that pro se surreply violated C.D. Cal. Rule 7-10 but nevertheless considering the surreply); Schmidt v. Shah, 696 F. Supp. 2d 44, 59 (D.D.C. 2010) ("The decision to grant or deny leave to file a surreply is committed to the sound discretion of the court.").

For the reasons set forth below, Haar's Motion is granted insofar as the First Amended Complaint is dismissed, but the Motion is denied insofar as the Motion seeks dismissal with prejudice and without leave to amend. The First Amended Complaint is therefore dismissed with leave to amend.[2]

II.

PLAINTIFF'S ALLEGATIONS

Plaintiff suffers from bilateral foot pain, fibromas in the arches of both feet, and plantar fasciitis. (See FAC at 5-6). Before the events at issue in this action, Plaintiff was an inmate at Centinela State Prison, where he was treated by a podiatrist and orthopedic specialist and received orthopedic soft sole shoes and orthopedic insoles – i.e., orthopedic "appliances." (See id.). Starting in January 2013, following Plaintiff's transfer to CMC, Plaintiff began visiting Haar for medical care. (See id.).

At a chronic care office visit on March 8, 2013, Plaintiff informed Haar that, while he was at Centinela State Prison, Plaintiff had been treated by a podiatrist and orthopedic specialist for his fibromas and plantar fasciitis. (Id. at 6). Plaintiff also informed Haar that his orthopedic appliances were worn out and needed to be replaced. (Id.). Haar said that, if Plaintiff wanted new shoes, he

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[2] Magistrate Judges may dismiss a complaint with leave to amend without approval from the district judge. McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991).

should "ask [his] family for a pair," and Haar informed Plaintiff that "this matter was to be heard at a later date." (Id.). Haar's treatment notes from that visit do not describe this conversation: Haar noted "some tenderness on the plantar surface" but "no indication for [Plaintiff] to having [sic] orthopedic shoes."[3] (Id. at 15). The treatment notes state that Haar would order x-rays, but Plaintiff's symptoms were "very more consistent with plantar fasciitis" and Haar would also give Plaintiff a "stretching exercise sheet" for that condition. (Id.).

At a chronic care visit on June 7, 2013, Plaintiff requested that Haar examine both of the arches of Plaintiff's feet "where the fibromas could be found." (Id. at 6). Haar visually inspected Plaintiff's feet but did not perform a physical examination. (See id. at 7). Plaintiff again requested to be seen by a podiatrist or orthopedic specialist to ensure that he would receive the "proper appliances." (Id.). Haar did not refer Plaintiff to a podiatrist or orthopedic specialist but referred Plaintiff to a physical therapist and ordered that Plaintiff be treated with pain medication and foot injections. (Id.). Plaintiff informed Haar that his proposed treatments had not proven effective in the past and that Plaintiff's foot pain had been alleviated by the use of orthopedic appliances. (Id.). According to Plaintiff, Haar knew that Plaintiff "would refuse to administer" pain medications. (Id.).

[3] In adjudicating Haar's Motion, the Court considers "material which is properly submitted as part of the [First Amended C]omplaint," including exhibits. See Lee v. City of Los Angeles, 250 F.3d 668, 688–89 (9th Cir. 2001).

Haar's treatment notes from the visit state that "[i]t is not clear . . . that [diabetic insoles and diabetic shoes] are indicated" and that Plaintiff "has a normal appearing foot with normal x-rays, but we will see what Medical Administration has to say and see if perhaps an injection for the plantar fascia may be in order." (Id. at 18). According to the treatment notes, Plaintiff was "not willing" to take Pamelor "when they crush and float On-Line."[4] (Id. at 17).

On June 9, 2013, a pain specialist evaluated Plaintiff and recommended orthopedic appliances. (Id. at 8).

During a September 20, 2013, office visit, Plaintiff contends that Haar informed Plaintiff that he would not address Plaintiff's "bilateral foot issues because [Plaintiff] had already been seen by a pain specialist and the issue was considered died." (Id. at 8). Plaintiff walked out of Haar's office. (Id. at 8). Haar's treatment notes indicate that Haar informed Plaintiff that he would discuss Plaintiff's "pain issues" only after Haar finished discussing Plaintiff's other medications. (Id. at 22). According to the treatment notes, Haar ultimately agreed to discuss Plaintiff's foot pain when Plaintiff became argumentative, but Plaintiff nevertheless left the room. (Id.). Haar's treatment notes indicate that Haar would refer Plaintiff "to Mental Health for evaluation as he clearly has

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[4] Pamelor is a drug commonly prescribed "off-label" as a treatment for chronic pain. See Cox v. Levenhagen, 2013 WL 3322034 at *1 (N.D. Ind. 2013). "Crushing and floating" a medication involves grinding the medication into a powder and placing it in water. See Wright v. Swingle, 2011 WL 2622689 at *2 n.4 (E.D. Cal. 2011).

anger issues and perhaps some psychiatric treatment might be indicated." (Id. at 23). Haar's treatment notes also state that Plaintiff had refused physical therapy, Pamelor, and carbamazepine.[5] (Id. at 22).

Plaintiff later learned from reading Haar's treatment notes that Haar had changed Plaintiff's medication without consulting Plaintiff. (Id. at 8). According to Plaintiff, Haar changed Plaintiff's medication "to cover the fact that [Haar] refused to discuss the [Plaintiff's] chief complaint [of] his bilateral foot issues." (Id.). Plaintiff acknowledges that Haar ordered "extra depth shoes with arch supports" after the office visit, but claims that these were the "wrong appliances" to meet Plaintiff's needs. (Id.). After the September 2013 office visit, Plaintiff "became aware that [Haar] was not working in [Plaintiff's] best interest and from this point forward [Plaintiff] simply refused to be seen by [Haar]" until November 3, 2015. (Id. at 8).

On October 10, 2013, Plaintiff was evaluated by a mental health professional to discuss his unwillingness to be treated by Haar. (Id. at 9). Plaintiff told the mental health professional that he was angry because Haar refused to refer Plaintiff to a podiatrist and "knowingly" ordered the wrong appliances to treat Plaintiff's foot pain. (Id.). The mental health professional determined that Plaintiff did not meet

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[5] Carbamazepine is an anticonvulsant sometimes prescribed to treat nerve pain. See Krejci v. Comm'r of Soc. Sec., 2016 WL 4651371 at *4 n.5 (M.D. Fla. 2016).

the criteria for mental health treatment. (Id. at 9, 25). Haar also referred Plaintiff to mental health treatment in November 2014 and August 2015. (Id.).

In November 2014, January 2015, and June 2015, Haar wrote progress notes indicating that Plaintiff had requested medical treatment but refused to meet with Haar. (See id. at 36-37, 41-42).

On August 13, 2015, a CMC nurse submitted on Plaintiff's behalf a 7362 request for healthcare services. (Id. at 10; see also Compl. at 101). The form requested that Plaintiff be seen by a podiatrist or foot specialist "due to extreme pain, getting worse with every step." (Compl. at 101). The form was sent to Haar. (FAC at 10). During the following three months, several other 7362 forms complaining of foot pain were filed and reviewed by a triage nurse, who prepared "encounter form[s]" for submission to Haar. (Id.).

By the end of October 2015, Plaintiff "could no longer tolerat[e] the excruciating bilateral foot pain." (Id. at 10). Plaintiff asked to visit Haar, requesting that a correctional officer be present. (Id.). During a November 3, 2015 office visit, Haar "refuse[d] to address [Plaintiff's] bilateral foot pain." (Id.). Haar stated that, if Plaintiff wanted to be "seen for his foot problems," Plaintiff could submit a 7362 request form. (Id.). Plaintiff contends that "there was no reason" for Haar to require Plaintiff to file another 7362 form because several 7362 forms and "encounter forms" addressing Plaintiff's foot pain had already been submitted to Haar. (Id. at 11). Haar's treatment notes from this visit indicate that Plaintiff's "sign out

report" had requested "[f]ollowup of the Chronic Care Program" for diabetes, hypertension, hypothyroidism and hyperlipidemia. (Id. at 55). According to the treatment notes, during the meeting Plaintiff indicated that he would "only [be seen] for [his] feet," and Haar stated that the visit was for an evaluation of "his other medical issues." (Id.). According to the treatment notes, Plaintiff again stated that he "would only be seen for his feet," Haar told him to "submit a 7362[] to be seen for his feet," and Plaintiff "made disparaging remarks and walked out the door." (Id.).

By November 29, 2015, Plaintiff "could no longer tolerat[e] or ambulate because of the extreme foot pain." (Id. at 11).

On December 3, 2015, Plaintiff was seen by a different physician, Dr. Mark Ward, "who immediately performed a physical examination of [Plaintiff's] feet and found that both feet had fibromas on both arch areas of the feet and one large mass/lump on the right arch area of the right foot." (Id. at 11). "Without question Ward immediately recommended and ordered a MRI, and referred [Plaintiff] to a podiatrist and a pain management specialist." (Id.). On January 25, 2016, the MRI that Dr. Ward had ordered was performed. (Id.).

On February 22, 2016, Plaintiff saw podiatrist Dr. James W. Breedlove. (Id. at 11, 60-62). Dr. Breedlove prepared a report recommending that Plaintiff be provided with custom molded orthopedic shoes with orthopedic insoles. (Id. at 62). In a letter dated June 10, 2016, Dr. Breedlove noted that Plaintiff still had not received the recommended orthopedic shoes and insoles. (Id. at 11, 63-64). The

First Amended Complaint claims that Plaintiff has not yet received the proper shoes. (Id. at 11).

Plaintiff alleges that Haar's conduct violated the Eighth Amendment and California law. (Id.). Plaintiff seeks money damages. (Id. at 13).

III.
STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(c) ("Rule 12(c)") provides that, "[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Rule 12(c) is 'functionally identical' to Rule 12(b)(6) and . . . 'the same standard of review' applies to motions brought under either rule." See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (quoting Dworkin v. Hustler Magazine, Inc., 867 F.2d 1118, 1192 (9th Cir. 1989)). Thus, the relevant inquiry is whether a pleading "fail[s] to state a claim upon which relief can be granted[.]" See Fed. R. Civ. P. 12(b)(6).

Dismissal for failure to state a claim is appropriate if Plaintiff fails to proffer sufficient "facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678; see also Hartmann v. Cal. Dep't of Corr. & Rehab., 707 F.3d 1114, 1122 (9th Cir.

2013). Although a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do," Twombly, 550 U.S. at 555; Iqbal, 556 U.S. at 678, "[s]pecific facts are not necessary; the [First Amended Complaint] need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (per curiam) (citations and internal quotation marks omitted); see also Twombly, 550 U.S. at 555.

In determining whether a plaintiff has stated a facially plausible claim, a court must accept the allegations in the complaint as true, Erickson, 551 U.S. at 93-94; Albright v. Oliver, 510 U.S. 266, 267 (1994), construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Berg v. Popham, 412 F.3d 1122, 1125 (9th Cir. 2005). A court, however, does not have to accept as true mere legal conclusions. See Iqbal, 556 U.S. at 678 ("Threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." (citing Twombly, 550 U.S. at 555)). The court must set aside conclusory statements and bare allegations and then consider whether a complaint plausibly states a claim for relief. See id. at 679.

In addition, pro se pleadings are "to be liberally construed" and held to a less stringent standard than those drafted by a lawyer. Erickson, 551 U.S. at 94; Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam); see also Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) ("Iqbal incorporated the Twombly pleading standard and Twombly did not alter courts' treatment of pro se filings; accordingly, we

continue to construe pro se filings liberally when evaluating them under Iqbal."). A court, however, may not supply essential elements of a claim that the pro se plaintiff did not initially plead. Pena v. Gardner, 976 F.2d 469, 471-72 (9th Cir. 1992). Dismissal for failure to state a claim can be warranted based on either the lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. See Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint may also be dismissed for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. Franklin v. Murphy, 745 F.2d 1221, 1228-29 (9th Cir. 1984).

IV.

DISCUSSION

For the following reasons, Haar's Motion is granted insofar as the First Amended Complaint is dismissed, but the Motion is denied insofar as the Motion seeks dismissal with prejudice and without leave to amend. The First Amended Complaint is therefore dismissed with leave to amend.

A. Plaintiff's § 1983 Inadequate Medical Care Claim Is Subject to Dismissal

To state a § 1983 claim for inadequate medical care that violates the Eighth Amendment's proscription against cruel and unusual punishment, a plaintiff must allege acts or omissions by a prison official that are sufficiently harmful to evidence deliberate indifference to an inmate's "serious medical needs." Farmer v.

Brennan, 511 U.S. 825, 834 (1994); see also Estelle v. Gamble, 429 U.S. 97, 104 (1976). The objective component of this standard requires a plaintiff to establish that he has a serious medical need. A plaintiff can do so by demonstrating that a failure to treat the plaintiff's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (citation omitted); see also Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). In assessing whether a medical need is "serious," a court should consider whether a reasonable doctor would think that the condition is worthy of comment, the condition significantly affects the prisoner's daily activities, and the condition is chronic and accompanied by substantial pain. Lopez, 203 F.3d at 1131-32; Doty v. County of Lassen, 37 F.3d 540, 546 n.3 (9th Cir. 1994). As Haar acknowledges, Plaintiff's allegations appear to satisfy the "serious medical need" requirement. (Motion at 8).

Although Plaintiff satisfies the objective component of an inadequate medical care claim, he does not establish the subjective "deliberate indifference" component. A prison official acts with "deliberate indifference . . . only if the [official] knows of and disregards an excessive risk to inmate health and safety." Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). To be liable for "deliberate indifference," a correctional official must "both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. "[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as the infliction of punishment." Id. at 838. Thus, inadequate treatment due to mistake or

negligence does not amount to a constitutional violation. Estelle, 429 U.S. at 105-06 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."); see also Toguchi, 391 F.3d at 1059.

Similarly, a difference of opinion between medical professionals concerning the appropriate course of treatment does not amount to deliberate indifference to a serious medical need. Toguchi, 391 F.3d at 1059-60; Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Instead, a prisoner "must show that the course of treatment the doctor[] chose was medically unacceptable under the circumstances" and that the doctor "chose this course in conscious disregard of an excessive risk to [the prisoner's] health." Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); see also Toguchi, 391 F.3d at 1058. An inmate's disagreement with his medical treatment or a difference of opinion over the type or course of treatment also does not support an Eighth Amendment claim. Toguchi, 391 F.3d at 1058; Franklin v. Or. State Welfare Div., 662 F.2d 1337, 1344 (9th Cir. 1981) (citation omitted); Buckley v. Gomez, 36 F. Supp. 2d 1216, 1225 (S.D. Cal. 1997).

Plaintiff alleges that Haar: (1) failed to provide Plaintiff with appropriate orthopedic appliances and refer him to appropriate specialists; (2) prescribed treatments that had previously failed to alleviate Plaintiff's symptoms and medications that Haar knew Plaintiff would not take and, on one occasion, provided Plaintiff with the "wrong" appliances; and (3) failed to perform an appropriate examination, i.e., a physical examination rather than a visual inspection. (FAC at 6-10; Response at 1-2; Surreply at 3). Plaintiff

also observes that Dr. Ward "immediately" recommended an MRI and a referral to a podiatrist and pain management specialist and Dr. Breedlove prescribed orthopedic shoes with orthopedic insoles. (FAC at 11; Response at 1-3; Surreply at 3).

The foregoing facts, even if true, do not establish that Haar acted with deliberate indifference. Haar did not deny Plaintiff all medical treatment but rather ordered various alternative treatments. Neither Plaintiff's disagreement with Haar's course of treatment choices nor the different and allegedly more successful treatments prescribed by Dr. Ward and Dr. Breedlove support an Eighth Amendment claim. Cf. Toguchi, 391 F.3d at 1058-60; Jackson, 90 F.3d at 332; Franklin, 662 F.2d at 1344; Sanchez, 891 F.2d at 242; Buckley, 36 F. Supp. 2d at 1225. Moreover, even assuming that some of Haar's recommendations were inappropriate under the circumstances, such allegations amount at most to negligence, and negligent conduct is not sufficient to establish the deliberate indifference required to state an Eighth Amendment claim. Cf. Toguchi, 391 F.3d at 1059.

Instead, to state a claim of deliberate indifference premised upon Haar's course of treatment and the different treatments prescribed by Dr. Ward and Dr. Breedlove, Plaintiff must allege facts plausibly suggesting that treatment provided by Haar was "medically unacceptable under the circumstances" and that Haar "chose this course in conscious disregard of an excessive risk to [Plaintiff's] health." Jackson, 90 F.3d at 332; see also Toguchi, 391 F.3d at 1058.

The allegations in the First Amended Complaint, even if true, do not satisfy the foregoing standard. To the contrary, Plaintiff

acknowledges and the First Amended Complaint, and its exhibits establish, that Haar actively treated Plaintiff's bilateral foot pain with numerous interventions. (FAC at 15-17, 22-23, 55-56; see also Surreply at 2-3 (acknowledging that Haar ordered x-rays, various medications, physical therapy, a referral to a pain specialist, and "wrong" orthopedic appliances)). Plaintiff also acknowledges, and the exhibits establish, that Plaintiff refused to meet with Haar between September 2013 and November 2015. (FAC at 31-32, 34-38, 41; see also Surreply at 2-3 ("The plaintiff does not argue that he refused to be seen or treated by the defendant [s]tarting in September of 2013. Plaintiff simply refused to see [Haar] because the plaintiff not only f[e]ared [f]or his health and safety but also did not want to argue or be threaten by [Haar] anymore.")).

The First Amended Complaint also observes that Haar failed to discuss Plaintiff's foot pain during the November 3, 2015 visit, further noting that Haar would not discuss Plaintiff's foot pain without an additional 7362 form even though Plaintiff had already filed several. (FAC at 10-11). However, Plaintiff does not appear to raise an independent "failure to treat" claim based on this visit; instead, it appears that these allegations are provided in further support of allegations that Haar had repeatedly been informed of the nature of Plaintiff's foot pain and, had he not been acting with reckless disregard for Plaintiff's health, he would have prescribed proper appliances and a referral to a podiatrist or orthopedic specialist. (Surreply at 1, 3 ("Plaintiff does not argue that the defendant did not provide medical care, but on[ly] argues that [] the defendant refused to provide the correct medical care . . . The questions that must be addressed: (a) [w]hy did it take a neutral physician (3 yr. later) to

perform a 30 second examination and without question executes the proper medical procedure that by sending the plaintiff to be seen by a podiatry who also without question orders the correct appliances that the plaintiff had been requesting for Well over three (3) years[;] (b) The medical history i.e. the plaintiffs exhibits not only provides the evidence that shows the defendants course of treatment i.e. the lack of correct treatment but also shows that he failed to refer the plaintiff to the correct medical physician and/or order the correct medical appliances.")).

Also, as the Court noted supra, Haar actively treated Plaintiff's foot pain throughout the period when Plaintiff was under his care, notwithstanding Plaintiff's repeated refusal to meet with Haar between September 2013 and November 2015. (See ODLA at 14); see also Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990) ("In determining deliberate indifference, we scrutinize the particular facts and look for substantial indifference in the individual case, indicating more than mere negligence or isolated occurrences of neglect.")). Moreover, as the Court has previously found, "Haar did not refuse to treat Plaintiff, but rather, as alleged, informed Plaintiff that he was willing to address Plaintiff's other health concerns on the date of Plaintiff's visit and would address Plaintiff's foot pain on another date provided that Plaintiff filed a specific written request to address his foot pain." (ODLA at 14). The First Amended Complaint does not appear to assert any claims based specifically on Haar's conduct during the November 3, 2015 visit, nor is it obvious that a plausible deliberate indifference claim could be raised on this basis.

For the foregoing reasons, Plaintiff has not alleged acts or omissions by Haar sufficient to evidence deliberate indifference to Plaintiff's serious medical needs. Cf. Farmer, 511 U.S. at 834. Plaintiff, therefore, has not stated an Eighth Amendment § 1983 claim for inadequate medical care against Haar in his individual capacity.[6]

B. Leave To Amend Shall Be Granted

Federal Rule of Civil Procedure 15(a) provides in relevant part that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely grant leave when justice so requires." Fed. R. Civ. P. 15(a)(2). When determining whether to grant leave to amend, courts weigh the following factors: "undue delay, bad faith or dilatory motive on the part of [the party who wishes to amend a pleading], repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment[.]" Foman v. Davis, 371 U.S. 178, 182 (1962). A district court has broad discretion to grant or deny leave to amend, particularly where the court has already given a plaintiff one or more opportunities to amend his complaint to allege federal claims. Mir v. Fosburg, 646 F.2d 342, 347 (9th Cir. 1980).

Haar alleges that, because Plaintiff has already received one opportunity to amend his complaint, granting further leave to amend

[6] Because Plaintiff's federal claims are subject to dismissal as currently pled, the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims. See 28 U.S.C. § 1367(c)(3). Accordingly, Plaintiff's state law claims are dismissed without prejudice.

would be futile. (See Motion at 10; Reply at 5). However, the Court cannot conclude with certainty that granting further leave to amend would be futile, particularly after granting the pro se Plaintiff only one opportunity to amend his complaint. Granting Plaintiff a final opportunity to amend is consistent with the principle of granting leave "freely . . . when justice so requires," Fed. R. Civ. P. 15(a)(2), and is within the district court's broad discretion. Mir, 646 F.2d at 347. Therefore, the First Amended Complaint is dismissed with leave to amend.

V.

ORDER

For the reasons discussed above, Haar's Motion is **GRANTED** insofar as the First Amended Complaint is dismissed, but the Motion is **DENIED** insofar as the Motion seeks dismissal with prejudice and without leave to amend. The First Amended Complaint is therefore **DISMISSED WITH LEAVE TO AMEND.**

If Plaintiff still wishes to pursue this action, he shall file a Second Amended Complaint **no later than 30 days from the date of this Order**. **The Second Amended Complaint must cure the pleading defects discussed above and shall be complete in itself without reference to any prior complaint. See C.D. Cal. R. 15-2 ("Every amended pleading filed as a matter of right or allowed by order of the Court shall be complete including exhibits. The amended pleading shall not refer to the prior, superseded pleading."). This means that Plaintiff must allege and plead any viable claims in any prior complaint again.**

In any amended complaint, Plaintiff should identify the nature of each separate legal claim and confine his allegations to those operative facts supporting each of his claims. For each separate legal claim, Plaintiff should state the civil right that has been violated and the supporting facts for that claim only. Pursuant to Federal Rule of Civil Procedure 8(a), all that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief." **Plaintiff, however, is advised that the allegations in the Second Amended Complaint should be consistent with the authorities discussed above.** In addition, the Second Amended Complaint may not include new defendants or new claims not reasonably related to the allegations in his prior pleadings. **Plaintiff is strongly encouraged to use the standard civil rights complaint form when filing any amended complaint, a copy of which is attached.**

Plaintiff is explicitly cautioned that **failure to timely file a Second Amended Complaint, or failure to correct the deficiencies described above, may result in a recommendation that this action, or portions thereof, be dismissed with prejudice for failure to prosecute and/or failure to comply with court orders pursuant to Federal Rule of Civil Procedure 41(b).**

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Plaintiff is further advised that if he no longer wishes to pursue this action in its entirety or with respect to particular defendant or claim, he may voluntarily dismiss all or any part of this action by filing a Notice of Dismissal in accordance with Federal Rule of Civil Procedure 41(a)(1). A form Notice of Dismissal is attached for Plaintiff's convenience. IT IS SO ORDERED.

DATED: May 11, 2017.

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE