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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

GRANT GORDON OTTE,	)	No. CV 16-1832 DMG (AS)
	)	
Plaintiff,	)	<b>ORDER DISMISSING FIRST AMENDED</b>
v.	)	
	)	<b>COMPLAINT WITH LEAVE TO AMEND</b>
W. HAWKINS, ET AL.	)	
	)	
Defendants.	)	
	)	

**I.  
INTRODUCTION**

On December 19, 2016, Plaintiff Grant Gordon Otte ("Plaintiff"), a prisoner at California State Prison, in Corcoran, California, filed a First Amended Complaint ("FAC") pursuant to 42 U.S.C. § 1983. (Docket Entry No. 9). The FAC names as Defendants: (1) W. Hawkins, Captain of Ironwood State Prison ("ISP"); (2) E. Best, correctional lieutenant; (3) M. Montuy, correctional lieutenant; (4) J. McCallister, correctional sergeant; (5) R. Kellog, correctional sergeant; and (6) C. Saucedo, correctional sergeant. (See FAC 3-4). Plaintiff sues all Defendants in their individual capacities. (Id.).

1 Plaintiff alleges that Defendants subjected him to cruel and unusual  
2 punishment in violation of the Eighth Amendment. (Id. at 5).  
3 Plaintiff seeks declaratory and injunctive relief and \$50,000 in  
4 damages from each defendant. (Id. at 8).

5  
6 The Court has screened the FAC as prescribed by 28 U.S.C.  
7 § 1915A and 42 U.S.C. § 1997e. For reasons discussed below, the  
8 Court DISMISSES the FIRST AMENDED COMPLAINT WITH LEAVE TO AMEND.<sup>1</sup>

9  
10 **II.**

11 **ALLEGATIONS OF THE FIRST AMENDED COMPLAINT**

12  
13 Plaintiff alleges that, while he was housed at ISP, Defendants  
14 deliberately failed to fix potholes and cracks on an ISP jogging  
15 track for inmates. (FAC 7, 8). These cracks and potholes caused  
16 Plaintiff to fracture his foot while running on the track. (Id. at  
17 5-8).

18  
19 On September 5, 2015, Plaintiff was running on the ISP track,  
20 and while attempting to avoid a pothole, he inadvertently stepped  
21 into a large crack and fractured his foot. (Id. at 5). Plaintiff  
22 was examined by medical staff and referred to a doctor who took x-  
23 rays, issued a "cam boot," and prescribed painkillers. (Id. at 5-6).  
24 Plaintiff has allegedly not been able to exercise or walk normally  
25 because of his broken foot. (Id. at 7).

26  
27 <sup>1</sup> Magistrate Judges may dismiss a complaint with leave to  
28 amend without approval from the district judge. McKeever v. Block,  
932 F.2d 795, 798 (9th Cir. 1991).

1 Plaintiff alleges that, at the time of his injury, Defendants  
2 were correctional officers assigned to the ISP Facility A yard;  
3 conducted daily inspections of the ISP track; were "fully aware" of  
4 cracks and potholes on the track; and "have deliberately ignored  
5 these safety issues/hazards, and have deliberately failed to take any  
6 corrective/protective measures of any kind to order or make work  
7 orders to permanently repair these hazards," (id. at 6).

8  
9 **III.**

10 **STANDARD OF REVIEW**

11  
12 Congress mandates that district courts initially screen civil  
13 complaints filed by prisoners seeking redress from a governmental  
14 entity or employee. 28 U.S.C. § 1915A. A court may dismiss such a  
15 complaint, or any portion thereof, before service of process, if the  
16 court concludes that the complaint (1) is frivolous or malicious;  
17 (2) fails to state a claim upon which relief may be granted; or  
18 (3) seeks monetary relief from a defendant who is immune from such  
19 relief. 28 U.S.C. § 1915A(b)(1)-(2); see also Lopez v. Smith,  
20 203 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000) (en banc).

21  
22 Dismissal for failure to state a claim is appropriate if a  
23 complaint fails to proffer "enough facts to state a claim for relief  
24 that is plausible on its face." Bell Atl. Corp. v. Twombly,  
25 550 U.S. 544, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678  
26 (2009). "A claim has facial plausibility when the plaintiff pleads  
27 factual content that allows the court to draw the reasonable  
28 inference that the defendant is liable for the misconduct alleged."

1 Iqbal, 556 U.S. at 678; see also Hartmann v. Cal. Dep't of Corr.  
2 & Rehab., 707 F.3d 1114, 1122 (9th Cir. 2013). A plaintiff must  
3 provide more than "labels and conclusions" or a "formulaic recitation  
4 of the elements" of his claim. Twombly, 550 U.S. at 555; Iqbal,  
5 556 U.S. at 678. However, "[s]pecific facts are not necessary; the  
6 [complaint] need only 'give the defendant fair notice of what the  
7 . . . claim is and the grounds upon which it rests.'" Erickson v.  
8 Pardus, 551 U.S. 89, 93 (2007) (per curiam) (quoting Twombly, 550  
9 U.S. at 555).

10  
11 In considering whether to dismiss a complaint, a court is  
12 generally limited to the pleadings and must construe all "factual  
13 allegations set forth in the complaint . . . as true and . . . in the  
14 light most favorable" to the plaintiff. Lee v. City of L.A.,  
15 250 F.3d 668, 679 (9th Cir. 2001). Moreover, pro se pleadings are  
16 "to be liberally construed" and held to a less stringent standard  
17 than those drafted by a lawyer. Erickson, 551 U.S. at 94; see also  
18 Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) ("Iqbal  
19 incorporated the Twombly pleading standard and Twombly did not alter  
20 courts' treatment of pro se filings; accordingly, we continue to  
21 construe pro se filings liberally when evaluating them under  
22 Iqbal"). Nevertheless, dismissal for failure to state a claim can  
23 be warranted based on either the lack of a cognizable legal theory or  
24 the absence of factual support for a cognizable legal theory.  
25 Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir.  
26 2008). A complaint may also be dismissed for failure to state a  
27 claim if it discloses some fact or complete defense that will  
28

1 necessarily defeat the claim. Franklin v. Murphy, 745 F.2d 1221,  
2 1228-29 (9th Cir. 1984).

3  
4 **IV.**

5 **DISCUSSION**

6  
7 The FAC contains deficiencies warranting dismissal, although  
8 leave to amend will be granted. See 28 U.S.C. § 1915A(b)(1).

9  
10 **A. The FAC Fails To State An Eighth Amendment Claim For Inhumane**  
11 **Conditions Of Confinement**

12  
13 Plaintiff maintains that Defendants violated his Eighth  
14 Amendment rights by failing to fill potholes and cracks on an ISP  
15 jogging track for inmates. (FAC 5-8). Plaintiff alleges that he  
16 fractured his foot as a result of the unmaintained track. (Id. 6-7).

17  
18 The Eighth Amendment's prohibition against cruel and unusual  
19 punishment protects prisoners from inhumane conditions of  
20 confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir.  
21 2006) (citing Farmer v. Brennan, 511 U.S. 825, 832 (1994)). Prison  
22 officials therefore have a "duty to ensure that prisoners are  
23 provided with adequate shelter, food, clothing, sanitation, medical  
24 care, and personal safety." Johnson v. Lewis, 217 F.3d 726, 731 (9th  
25 Cir. 2000). The Eighth Amendment thus protects prisoners from a  
26 denial of "the minimal civilized measures of life's necessities."  
27 Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996) (quoting Rhodes v.  
28 Chapman, 452 U.S. 337, 346 (1981)). If a necessity of this severity

1 was denied, a plaintiff must demonstrate that prison officials acted  
2 with a sufficiently culpable state of mind, that of "deliberate  
3 indifference." Wilson, 501 U.S. at 303; Johnson, 217 F.3d at 733. A  
4 prison official is liable for denying an inmate humane conditions of  
5 confinement only if "the official knows of and disregards an  
6 excessive risk to inmate health and safety; the official must both be  
7 aware of facts from which the inference could be drawn that a  
8 substantial risk of serious harm exists, and he must also draw the  
9 inference." Farmer, 511 U.S. at 837.

10  
11 As explained in this Court's prior Order dismissing the  
12 complaint with leave to amend, Plaintiff fails to allege an Eighth  
13 Amendment claim. (Docket Entry No. 5). Plaintiff does not show that  
14 he suffered an objectively serious deprivation of "the minimal  
15 civilized measures of life's necessities" when he fractured his foot  
16 on a poorly maintained track as a prisoner at ISP. Keenan, 83 F.3d  
17 at 1089 (quoting Rhodes, 452 U.S. at 346 (1981)). Life's necessities  
18 include adequate food and heat – not a maintained track for exercise.  
19 See Johnson, 217 F.3d at 731. Access to regular "[e]xercise has been  
20 determined to be one of the basic human necessities protected by the  
21 Eighth Amendment," but Plaintiff does not allege that he was denied  
22 an opportunity to exercise. LeMaire v. Maass, 12 F.3d 1444 (9th Cir.  
23 1993). Rather Plaintiff alleges that he was given the opportunity to  
24 exercise and fractured his foot in the process. (FAC at 6-8).  
25 Plaintiff has not stated facts that could plausibly meet the  
26 objective component of an Eighth Amendment claim for inhumane  
27 conditions of confinement. Therefore, Plaintiff's claim against  
28 defendants must be dismissed with leave to amend.

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V.

ORDER

For the reasons discussed above, the Court DISMISSES the FAC 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 the original Complaint. See L.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, superseding pleading."). This means that Plaintiff must allege and plead any viable claims in the FAC 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. 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." However, Plaintiff 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 claims not reasonably related to the allegations in the previously filed complaints. **Plaintiff is strongly encouraged to once again utilize the standard civil rights complaint form when filing any amended complaint, a copy of which is attached.**

