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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - EASTERN DIVISION

FRANCISCO XAVIER CARBAJAL,
JR.,

Plaintiff,

v.

FOOD SERVICES, et al.,

Defendants.

Case No. EDCV 20-1029-PA (AS)

**ORDER DISMISSING FIRST AMENDED
COMPLAINT WITH LEAVE TO AMEND**

INTRODUCTION

On May 14, 2020, Francisco Xavier Carbajal, Jr. ("Plaintiff"), a California state prisoner at the California Institute for Men ("CIM") in Chino, California, proceeding pro se, filed a Civil Rights Complaint ("Complaint") pursuant to 42 U.S.C. § 1983. (Dkt. No. 1). On June 30, 2020, the Court screened the Complaint as prescribed by 28 U.S.C. § 1915A and 42 U.S.C. § 1997e, and dismissed it, with leave to amend, because it failed to state a claim for relief. (Dkt. No. 8). On July 23, 2020, Plaintiff filed a First Amended Complaint, along with numerous exhibits. (Dkt. Nos. 9, 9-

1 1, 9-2, 9-3, 9-4, 9-5).¹ For the reasons discussed below, the
2 Court DISMISSES Plaintiff's First Amended Complaint WITH LEAVE TO
3 AMEND.²

4
5 **PLAINTIFF'S COMPLAINT**

6
7 Plaintiff claims that the following thirteen Defendants,
8 associated with the California Department of Corrections and
9 Rehabilitation ("CDCR"), and sued in their individual and official
10 capacities, violated Plaintiff's Eighth Amendment rights: (1) Food
11 Services;³ (2) B. LeMaster, Americans with Disabilities Act ("ADA")
12 Coordinator and Reasonable Accommodation Panel ("RAP") staff
13 member; (3) A. Banvelos, Acting ADA Coordinator and RAP staff
14 member; (4) J. Gandara, Health Care Appeals Coordinator and RAP
15 staff member; (5) T. Nesbitt, Health Care Compliance Analyst and
16 RAP staff member; (6) J. Rivera, Appeals Coordinator and RAP staff
17 member; (7) B. Strobett, Correctional Counselor II and RAP staff
18 member; (8) Kirk Torres, Chief Physician and Surgeon and RAP staff
19 member; (9) Tara Simpson, Correctional Health Care Services

20
21 _____
22 ¹ Citations to the First Amended Complaint refer to the page
23 numbers assigned by the Court's electronic case filing system
24 (CM/ECF).

25 ² Magistrate judges may dismiss a complaint with leave to
26 amend without approval from the district judge. McKeever v. Block,
27 932 F.2d 795, 798 (9th Cir. 1991).

28 ³ It is unclear at this time whether "Food Services" is a
separate entity subject to suit under Section 1983. This need not
be addressed presently, however, because the First Amended
Complaint fails to state any claim against Defendants, for the
reasons discussed below.

1 Administrator II; (10) J.L. Bishop, Associate Warden, Business
2 Services; (11) M. Farooq, Chief Medical Executive; (12) S. Gates,
3 Chief Health Care Correspondence and Appeals Branch; and (13) T.
4 Le, Chief Physician and Surgeon. (Dkt. No. 9 at 3-7).

5
6 Plaintiff claims that Defendants violated the Eighth Amendment
7 through deliberate indifference in "denying, delaying, or ignoring
8 Plaintiff's duly prescribed Lactose-Free Diet," which Plaintiff
9 allegedly needs because he suffers from ulcerative colitis, a
10 gastrointestinal inflammatory bowel disease. (Id. at 8-9). He
11 seeks monetary and injunctive relief. (Dkt. No. 9-1 at 11).

12
13 Plaintiff alleges that he was prescribed a gluten-free diet
14 for his ulcerative colitis in 2015, but his symptoms worsened by
15 2018, causing him to experience about twenty bowel movements a day,
16 with "liquidy" and bloody stool, as well as chronic pain. (Dkt.
17 No. 9 at 9). Plaintiff alleges that he submitted a Health Care
18 Request on January 8, 2019, seeking a dietitian consultation
19 because he had lost over twenty-five pounds in the previous four
20 months. (Id.; see Dkt. No. 9-1 at 19). When the request went
21 unanswered, Plaintiff submitted a grievance on February 21, 2019,
22 providing general information about the symptoms and dietary needs
23 of his ulcerative colitis condition, and asserting that he was not
24 being provided the recommended gluten-free or low-fiber diets.
25 (Dkt. No. 9 at 9-11; see Dkt. No. 9-2 at 1-2). According to
26 Plaintiff, Defendant Dr. T. Le responded to the grievance on April
27 2, 2019, but "failed to intervene." (Dkt. No. 9 at 11). Dr. Le
28 instead noted that Plaintiff was in the "Chronic Care Program" for

1 his condition, and appropriate diets were provided "as medically
2 or clinically indicated." (Id. at 11; see Dkt. No. 9-2 at 3-4).⁴

3
4 Plaintiff alleges that he submitted an appeal on April 7,
5 2019, contending that the food being provided did not adequately
6 accommodate his dietary needs, particularly his instructions to
7 avoid high amounts of fiber and purines. (Dkt. No. 9 at 11-12;
8 see Dkt. No. 9-2 at 5). Plaintiff asserted that avoiding such
9 foods "place[d] an unnecessary burden" on him and his family "to
10 supplement [his] intake through Canteen and packages," and still

11
12 ⁴ Dr. Le's response also reports that Plaintiff saw a
13 gastroenterologist "via Telemedicine" on January 24, 2019, and saw
14 his primary care physician on February 25. (Dkt. No. 9-2 at 3).
15 According to Dr. Le, Plaintiff had been "instructed to eat a low
16 fiber diet," and a gluten-free diet was "not indicated" at the
17 time. (Id.). Dr. Le also recited the following general policy
18 information:

19 California Correctional Health Care Services shall
20 provide patients with meals based on a standardized
21 master menu consistent with a [CDCR] Heart Healthy diet
22 (a diet plan restricted in sodium and fat while supplying
23 adequate calories, fiber and all essential nutrients,
24 supported by [CDCR] and approved by a Registered
25 Dietitian). The CDCR Heart Healthy diet purposely
26 contains an average of 300-400 calories per day more
27 than required for the average person. This caloric
28 buffer allows patients to choose not to eat certain
foods, either due to food sensitivity or general
dislike, without compromising nutritional health. Diet
instruction, outpatient therapeutic diets,
nourishments, and supplements shall be provided as
medically or clinically indicated. Information regarding
outpatient dietary intervention can be found in the
Inmate Medical Services Policies and Procedures, Volume
4, Chapter 20.2, Outpatient Dietary Intervention
Procedure.

(Id. at 4).

1 caused him to lose almost forty pounds since September 10, 2018.
2 (Id.).

3
4 On April 12, 2019, Plaintiff received a consultation with a
5 physician, Dr. Viernes, and relayed his "continuing, distressing
6 problem of having explosive gas with various types of discharge,
7 and significant weight loss." (Dkt. No. 9 at 9). Dr. Viernes
8 "included the 'Lactose-Free diet' and 'moist wipes' in Plaintiff's
9 treatment plan," and noted that Plaintiff's symptoms "may be
10 representative of suboptimally treated left-sided colitis." (Id.
11 at 9-10; see Dkt. No. 9-2 at 9-10). On April 22, 2019, Plaintiff's
12 primary care provider, Dr. Kerk, ordered the lactose-free diet for
13 Plaintiff, apparently based on Dr. Viernes's assessment. (Dkt.
14 No. 9 at 13; see Dkt. No. 9-2 at 12-13).

15
16 Plaintiff alleges that he subsequently inquired, several
17 times, whether the prescribed lactose-free diet would be provided
18 to him, but Defendant Food Services kept responding that it was
19 not yet available and sometimes takes a while. (Dkt. No. 9 at 13-
20 14; see Dkt. No. 9-2 at 15). Plaintiff alleges that on May 24,
21 2019, Nurse Onoigboria made a phone call regarding Plaintiff's diet
22 request, and relayed to Plaintiff that Food Services does not offer
23 a lactose-free diet. (Dkt. No. 9 at 14).

24
25 On May 24, 2019, Plaintiff submitted a "Reasonable
26 Accommodation Request," stating that he was unable to "enjoy the
27 major life activity of eating" because his doctors' orders were
28 not being followed to treat his ulcerative colitis. (Dkt. No. 9

1 at 15; see Dkt. No. 9-2 at 17). On May 30, the Defendants in the
2 Reasonable Accommodation Panel (LeMaster, Banvelos, Gandara,
3 Nesbitt, Rivera, Strobett, and Torres; the "RAP Defendants") issued
4 a response denying intervention and stating that "CDCR does not
5 offer a lactose free diet," while noting that Plaintiff was
6 "encouraged to avoid lactose products." (Dkt. No. 9 at 15-16; see
7 Dkt. No. 9-2 at 18).

8
9 Plaintiff alleges that on June 10, 2019, Defendant Gates
10 responded to one of Plaintiff's appeals (from April 7) denying
11 relief and falsely stating that Plaintiff's primary care physician
12 had "not document[ed] a current recommendation for outpatient
13 therapeutic diet related to ulcerative colitis management." (Dkt.
14 No. 9 at 16; see Dkt. No. 9-2 at 6-7). On July 26, 2019, Defendant
15 Gandara rejected one of Plaintiff's grievances as duplicative,
16 asserting that "[a] lactose free diet is not a Health Care Services
17 issue." (Dkt. No. 9 at 18).⁵ Plaintiff appealed this decision on
18 August 5, 2019, contending that Dr. Viernes and Dr. Kerk had
19 prescribed a lactose-free diet, which Food Services had failed to
20 provide. (Dkt. No. 9 at 19-20; see Dkt. No. 9-3 at 13, 15).
21 Defendant Rivera denied relief on September 12, 2019, noting that
22 the appeal had already been rejected by health care staff "because
23

24
25 _____
26 ⁵ In the attached document, Gandara specifically stated: "A
27 lactose free diet is not a health care services issue over which
28 [CDCR] Health Care Services has jurisdiction. As such,
[Plaintiff's] concerns should be addressed through the appropriate
custody channels at [Plaintiff's] institution." (Dkt. No. 9-3 at
2).

1 it is a CUSTODY issue and NOT a health care issue." (Dkt. No. 9
2 at 20; see Dkt. No. 18).

3
4 Plaintiff alleges that he met with a registered dietitian on
5 September 20, 2019, who "apologized for the 'gap in [Plaintiff's]
6 medical care,'" and remarked that it was "crazy" that Plaintiff
7 had been at CIM for "so long with [his] medical needs, and had not
8 seen the dietitian sooner." (Dkt. No. 9 at 20).

9
10 On September 25, 2019, Defendants Simpson and Bishop responded
11 to an appeal by denying relief and stating that, though Plaintiff's
12 doctor had prescribed a lactose-free diet, lactose-free meals were
13 unavailable. (Dkt. No. 9-1 at 1; see Dkt. No. 9-3 at 1-2). Simpson
14 and Bishop explained that an alternative meal plan was available
15 in place of lactose-free meals, and that Plaintiff was assisted
16 "in making smarter item selections within the meal plan."⁶ (Id.).

17
18 ⁶ In the attached document, Simpson and Bishop stated that on
19 September 20, Plaintiff and the registered dietitian "established
20 an alternate diet meal plan in place of the requested lactose free
21 meal." (Dkt. No. 9-3 at 20). Simpson and Bishop explained that
22 the alternate meal was the "Pre-Renal Diet," which "is the most
23 compatible meal selection" available. (Id.). Simpson and Bishop
24 also stated that the registered dietitian had discussed this diet
25 with Plaintiff "in detail to assist [Plaintiff] in making smarter
26 item selections within the meal plan." (Id. at 19). According
27 to Simpson and Bishop, the "Pre-Renal Diet," had been "approved
28 and implemented as of September 23, 2019." (Id.).

29
30 Plaintiff's September 2019 appointment with the registered
31 dietician was summarized in greater detail in a later appeal
32 response from Dr. Farooq, who wrote:

33
34 The dietician proposed to change to a pre-renal diet to
35 limit dairy foods. Soy milk will be provided once daily
36 with breakfast in the place of dairy milk. You were

1 Plaintiff appealed, and Defendant Rivera rejected the appeal on
2 procedural grounds on October 24, 2019. (Dkt. No. 9-1 at 2-3; see
3 Dkt. No. 9-3 at 14, 16; Dkt. No. 9-4 at 1).

4
5 Plaintiff alleges that on November 18, 2019, Defendant Farooq
6 continued to deny Plaintiff his "duly prescribed Lactose-Free Diet"
7 and "plac[ed] the burden on Plaintiff 'to shop at Canteen for
8 protein substitutes (plain chicken, ham, etc.) when menu entrée
9 items contain dairy,' rather than adequately supply[ing] food."⁷
10 (Dkt. No. 9-1 at 3-4; see Dkt. No. 9-4 at 8-9). When Plaintiff
11 appealed, Defendant Gates denied relief on February 3, 2020. (Dkt.
12 No. 9-1 at 4-6, 7; see Dkt. No. 9-4 at 6-7, 11-12).

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15 _____
16 educated to shop at canteen for protein substitutes
17 (plain chicken, ham, etc.) when menu entree items
18 contain dairy. Avoid fiber (or other irritating foods)
19 during flare-ups only. You were encouraged to avoid
20 lactose. You were given handouts on "Lactose
21 Intolerance" and California Correctional Health Care
22 Services (CCHCS) menus.

23 (Dkt. No. 9-4 at 9).

24
25 ⁷ In the attached document, Dr. Farooq states that the
26 registered dietitian in September 2019 had, among other things,
27 "educated [Plaintiff] to shop at canteen for protein substitutes
28 (plain chicken, ham, etc.) when menu entrée items contain dairy."
(Dkt. No. 9-4 at 9). Dr. Farooq also noted that when Plaintiff
received a follow-up evaluation from the registered dietitian on
October 1, 2019, Plaintiff "reported satisfaction with the change
to renal diet and soy milk substitution" and "stated it seemed to
be working," resulting in fewer bowel movements and increased
appetite. (Id.). According to Dr. Farooq, Plaintiff's primary
care physician also placed an order for a lactase enzyme
replacement on October 2, at the dietitian's recommendation.
(Id.).

1 On December 3, 2019, Plaintiff submitted a grievance
2 complaining that Dr. Riaz had denied his request for a sedative.
3 (Dkt. No. 9-1 at 6; see Dkt. No. 9-4 at 17). Plaintiff contended
4 that he needed a sedative because his ulcerative colitis and
5 arthritic gout were causing pain and physical distress that made
6 it difficult for him to relax. (Id.). According to Plaintiff,
7 Dr. Riaz had "implicitly agreed" that Plaintiff needed a sedative,
8 but the policy did not permit it. (Id.). Defendant Farooq denied
9 relief on February 14, 2020, determining that a sedative was "not
10 medically indicated."⁸ (Dkt. No. 9-1 at 7-8; see Dkt. No. 9-4 at
11 18-19).

12
13 Plaintiff additionally alleges that he submitted numerous
14 requests and appeals regarding his inadequate fecal-incontinence
15 supplies, such as wipes and diapers, which he allegedly needed
16 urgently because his frequent and uncontrollable bowel movements
17 often caused him to soil his clothing and bedding.⁹ (See Dkt. Nos.
18
19
20

21 ⁸ Dr. Farooq also explained, among other things, that Plaintiff
22 was being given 650 mg Tylenol three times a day, and he had an
23 MRI exam on February 7, 2020, due to his pain symptoms, the results
of which were pending. (Dkt. No. 9-4 at 18-19).

24 ⁹ Among these allegations, Plaintiff alleges that Gates
25 "ignored the 'medical indication warranting wipes.'" (Dkt. No. 9-
26 1 at 1). In the attached document, however, Gates wrote that there
27 was "no recent documentation" that Plaintiff had "utiliz[ed] the
28 approved processes for concerns related to wet wipes," but
Plaintiff was "encouraged to discuss [his] concerns regarding wet
wipes" with his primary care provider in his next appointment.
(Dkt. No. 9-5 at 15-16).

1 9 at 12-15, 18-19; Dkt. No. 9-1 at 1-2, 8-10; Dkt. No. 9-5 at 8-
2 14, 17-22).

3 4 **STANDARD OF REVIEW**

5
6 Congress mandates that district courts initially screen civil
7 complaints filed by prisoners seeking redress from a governmental
8 entity or employee. 28 U.S.C. § 1915A. A court may dismiss such
9 a complaint, or any portion thereof, if the court concludes that
10 the complaint: (1) is frivolous or malicious, (2) fails to state a
11 claim upon which relief may be granted, or (3) seeks monetary
12 relief from a defendant who is immune from such relief. Id.
13 § 1915A(b); see also id. § 1915(e)(2) (The court "shall dismiss
14 the case at any time if the court determines that . . . the
15 action . . . (i) is frivolous or malicious; (ii) fails to state a
16 claim on which relief may be granted; or (iii) seeks monetary
17 relief against a defendant who is immune from such relief.");
18 accord Lopez v. Smith, 203 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000)
19 (en banc). In addition, dismissal may be appropriate if a complaint
20 violates Rule 8 of the Federal Rules of Civil Procedure. McHenry
21 v. Renne, 84 F.3d 1172, 1179 (9th Cir. 1996); Nevijel v. Northcoast
22 Life Ins. Co., 651 F.2d 671, 673 (9th Cir. 1981).

23
24 In considering whether to dismiss a complaint, a court is
25 generally limited to the pleadings and must construe "[a]ll factual
26 allegations set forth in the complaint . . . as true and . . . in
27 the light most favorable" to the plaintiff. Lee v. City of Los
28 Angeles, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted).

1 Moreover, pro se pleadings are "to be liberally construed" and
2 "held to less stringent standards" than those drafted by a lawyer.
3 Erickson v. Pardus, 551 U.S. 89, 94 (2007)(citation omitted).
4 Nevertheless, dismissal for failure to state a claim can be
5 warranted based on either the lack of a cognizable legal theory or
6 the absence of factual support for a cognizable legal theory.
7 Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th
8 Cir. 2008).

10 DISCUSSION

11
12 Plaintiff's First Amended Complaint warrants dismissal
13 because it violates Rule 8 of Federal Rules of Civil Procedure and
14 fails to state a claim for relief. Leave to amend is granted,
15 however, because it is not "absolutely clear that the deficiencies
16 of the complaint could not be cured by amendment." Akhtar v. Mesa,
17 698 F.3d 1202, 1212 (9th Cir. 2012).

19 **A. The First Amended Complaint Violates Federal Rule of Civil** 20 **Procedure 8**

21
22 Rule 8 governs how to plead claims in a complaint.
23 Specifically, Rule 8(a)(2) requires that a complaint contain "'a
24 short and plain statement of the claim showing that the pleader is
25 entitled to relief,' in order to 'give the defendant fair notice
26 of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting
27 Fed. R. Civ. P. 8(a)). To comply with Rule 8, moreover, each
28

1 allegation of a complaint must be "simple, concise, and direct,"
2 Fed. R. Civ. P. 8(d)(1), though conclusory allegations are
3 insufficient. See Ashcroft v. Iqbal, 556 U.S. 662, 678, 686 (2009).
4 A complaint is subject to dismissal for violating Rule 8 if "one
5 cannot determine from the complaint who is being sued, for what
6 relief, and on what theory." McHenry v. Renne, 84 F.3d 1172, 1178
7 (9th Cir. 1996).

8
9 Plaintiff's First Amended Complaint violates Rule 8 because
10 it fails to provide each Defendant with fair notice of what that
11 Defendant allegedly did to violate Plaintiff's rights. Plaintiff
12 instead lumps all his claims and allegations against thirteen
13 different Defendants in a single "claim," which includes over
14 twenty handwritten pages of allegations that reference a variety
15 of prison officials and medical staff along with the named
16 Defendants. This makes it difficult for each Defendant to clearly
17 discern the claims and allegations at issue, and to effectively
18 respond. Plaintiff further confuses the matter because he
19 initially claims that Defendants violated the Eighth Amendment by
20 denying a lactose-free diet, but he then provides many allegations
21 relating to requests for other items, such as wipes or sedatives.

22
23 Because the First Amended Complaint deprives the individual
24 Defendants of fair notice of the specific claims being asserted
25 against them, and the grounds upon which the claims rest, it
26 warrants dismissal, with leave to amend, for violation of Rule 8.

1 **B. The First Amended Complaint Fails to State an Eighth Amendment**
2 **Claim**

3
4 The First Amended Complaint asserts that Defendants violated
5 Plaintiff's rights under the Eighth Amendment. The Eighth
6 Amendment's prohibition against cruel and unusual punishment
7 protects prisoners from inhumane conditions of confinement. Morgan
8 v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing Farmer
9 v. Brennan, 511 U.S. 825, 832 (1994)). Prison officials therefore
10 have a "duty to ensure that prisoners are provided with adequate
11 shelter, food, clothing, sanitation, medical care, and personal
12 safety." Johnson v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000). To
13 establish a violation of this duty, a prisoner must satisfy both
14 an objective and subjective component. See Wilson v. Seiter, 501
15 U.S. 294, 298 (1991).

16
17 First, a prisoner must demonstrate an objectively serious
18 deprivation, one that amounts to "a denial of 'the minimal
19 civilized measures of life's necessities.'" Keenan v. Hall, 83
20 F.3d 1083, 1089 (9th Cir. 1996) (quoting Rhodes v. Chapman, 452
21 U.S. 337, 346 (1981)). A plaintiff can satisfy the objective
22 component of the deliberate indifference standard by demonstrating
23 that a failure to treat the plaintiff's condition could result in
24 further significant injury or the unnecessary and wanton infliction
25 of pain. Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014)
26 (citation omitted). Indications that a prisoner has a sufficiently
27 serious medical need, so as to implicate the Eighth Amendment,
28 include "[t]he existence of an injury that a reasonable doctor or

1 patient would find important and worthy of comment or treatment;
2 the presence of a medical condition that significantly affects an
3 individual's daily activities; or the existence of chronic and
4 substantial pain." McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th
5 Cir. 1992), overruled in part on other grounds by WMX Techs., Inc.
6 v. Miller, 104 F.3d 1133 (9th Cir. 1997); accord Wilhelm v. Rotman,
7 680 F.3d 1113, 1122 (9th Cir. 2012); Lopez, 203 F.3d at 1131.

8
9 Second, a prisoner must also demonstrate that prison officials
10 acted with a sufficiently culpable state of mind, that of
11 "deliberate indifference." Wilson, 501 U.S. at 303; Johnson, 217
12 F.3d at 733. A plaintiff can satisfy the subjective component of
13 the deliberate indifference standard by showing that a prison
14 official "knows of and disregards an excessive risk to inmate
15 health and safety." Toguchi v. Chung, 391 F.3d 1051, 1057 (9th
16 Cir. 2004). A prison official must "both be aware of facts from
17 which the inference could be drawn that a substantial risk of
18 serious harm exists, and he must also draw the inference." Farmer,
19 511 U.S. at 837. "This second prong - defendant's response to the
20 need was deliberately indifferent - is satisfied by showing (a) a
21 purposeful act or failure to respond to a prisoner's pain or
22 possible medical need and (b) harm caused by the indifference.
23 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). "[A]n
24 official's failure to alleviate a significant risk that he should
25 have perceived but did not, while no cause for commendation, cannot
26 . . . be condemned as the infliction of punishment." Farmer, 511
27 U.S. at 838.

1 Where a prison doctor has chosen one course of action and a
2 plaintiff contends that the doctor should have chosen another
3 course of action, the plaintiff "must show that the course of
4 treatment the doctor[] chose was medically unacceptable under the
5 circumstances, . . . and the plaintiff must show that [the doctor]
6 chose this course in conscious disregard of an excessive risk to
7 plaintiff's health." Jackson v. McIntosh, 90 F.3d 330, 332 (9th
8 Cir. 1996) (internal citations omitted); see also Snow v. McDaniel,
9 681 F.3d 978, 987 (9th Cir. 2012) ("[a] difference of opinion
10 between a physician and the prisoner - or between medical
11 professionals - concerning what medical care is appropriate does
12 not amount to deliberate indifference" unless the chosen care was
13 "medically unacceptable under the circumstances") (citation and
14 internal quotations omitted), overruled on other grounds, Peralta
15 v. Dillard, 744 F.3d 1076 (9th Cir. 2014) (en banc); see also Hamby
16 v. Hammond, 821 F.3d 1085, 1092 (9th Cir. 2016) (same). An inmate's
17 disagreement with the nature of his treatment does not suffice to
18 state a claim for deliberate indifference. See Franklin v. State
19 of Oregon, State Welfare Div., 662 F.2d 1337, 1344 (9th Cir. 1981)
20 ("A difference of opinion between a prisoner-patient and prison
21 medical authorities regarding treatment does not give rise to a §
22 1983 claim.") (citation omitted).

23
24 Here, assuming that Plaintiff's ulcerative colitis condition
25 itself constitutes a serious medical condition, Plaintiff fails to
26 allege sufficient facts showing that Defendants failed to provide
27 constitutionally adequate treatment or otherwise caused him serious
28 harm. To the contrary, Plaintiff's allegations and attached

1 exhibits (from his administrative grievances and appeals) suggest
2 that he received fairly regular consultations with medical doctors,
3 who gave him dietary instructions that involved avoiding certain
4 foods that seemed to contribute to his symptoms. Although
5 Plaintiff contends that Defendants failed to provide him with meals
6 that catered exclusively to these dietary needs - such as by
7 providing specifically "lactose-free meals" - Plaintiff does not
8 allege sufficient facts showing that he was actually unable to
9 obtain enough foods to fulfill the dietary recommendations, and he
10 does not allege that the medical recommendations themselves were
11 constitutionally deficient.

12
13 For example, Plaintiff alleges that after his condition
14 started worsening in 2018, he submitted a request for a dietary
15 consultation on January 8, 2019. (Dkt. No. 9 at 9). Although
16 Plaintiff asserts that Defendants then failed to grant him the
17 consultation or to provide him the recommended gluten-free or low-
18 fiber diets (Dkt. No. 9 at 9-12), his attached exhibits indicate,
19 among other things, that Plaintiff saw a gastroenterologist on
20 January 24 and his primary care physician on February 25, and was
21 instructed to eat a low-fiber diet. (Dkt. No. 9-2 at 3). Plaintiff
22 contends that avoiding high-fiber foods (as well as high purine
23 food due to gout) "place[d] an unnecessary burden" on him and his
24 family "to supplement [his] intake through Canteen and packages."
25 (Dkt. No. 9 at 11-12). However, he does not clarify the nature of
26 this "burden," and he does not clearly indicate that he was unable
27 to obtain adequate low-fiber foods by such means. In addition, to
28 the extent that a low-fiber diet did not relieve his symptoms,

1 Plaintiff does not allege facts showing that this medical
2 recommendation was "medically unacceptable" and was done "in
3 conscious disregard of an excessive risk to [P]laintiff's health."
4 Jackson, 90 F.3d at 332.

5
6 Plaintiff alleges that in April 2019, his doctors prescribed
7 a lactose-free diet, and Defendants failed to ever provide him with
8 specifically "lactose-free meals." (See Dkt. No. 9 at 9-15).
9 However, while Plaintiff claims this "plac[ed] the burden on
10 Plaintiff to shop at Canteen for protein substitutes (plain
11 chicken, ham, etc.) when menu entrée items contain dairy" (Dkt.
12 No. 9-1 at 3-4) (internal quotation omitted), he does not indicate
13 how it "burden[ed]" him, and he does not allege facts showing that
14 he was actually unable to obtain enough non-dairy foods. Moreover,
15 according to attached documents, at least by September 2019,
16 Plaintiff was provided with an alternative meal plan in the form
17 of the "Pre-Renal Diet," with soy milk substitution, along with
18 instruction from a dietitian about how to avoid dairy foods and
19 obtain adequate protein substitutes from the canteen when needed.
20 (See Dkt. No. 9-3 at 19; Dkt. No. 9-4 at 9). Although Plaintiff
21 complains that this placed the "burden" on him, he does not
22 contradict the report, in an attached document, stating that in an
23 October 1, 2019 follow-up consultation with the dietitian,
24 Plaintiff "reported satisfaction with the change to renal diet and
25 soy milk substitution" and "stated it seemed to be working,"
26 resulting in fewer bowel movements and increased appetite. (Dkt.
27 No. 9-4 at 9). Plaintiff was also apparently provided with a
28

1 lactase enzyme replacement, in October 2019, based on the
2 dietitian's recommendation. (Id.).

3
4 Even if Plaintiff may have continued to suffer serious
5 symptoms, Plaintiff fails to demonstrate that this was caused by
6 Defendants' own conduct (or inaction), and that such conduct was
7 carried out knowing the serious risk of harm to Plaintiff.
8 Moreover, even if Plaintiff alleges that Defendants knew the
9 seriousness of Plaintiff's symptoms, Plaintiff fails to show that
10 each Defendant had the ability to alleviate those symptoms and
11 failed to do so. Such allegations are required to state a claim
12 against Defendants. See Leer v. Murphy, 844 F.2d 628, 633 (9th
13 Cir. 1988) (allegations regarding Section 1983 causation "must be
14 individualized and focus on the duties and responsibilities of each
15 individual defendant whose acts or omissions are alleged to have
16 caused a constitutional deprivation").

17
18 Because Plaintiff fails to provide such allegations
19 demonstrating that Defendants violated his rights under the Eighth
20 Amendment, the First Amended Complaint warrants dismissal, with
21 leave to amend, for failure to state a claim for relief.

22
23 **CONCLUSION**

24
25 For the reasons discussed above, the Court DISMISSES
26 Plaintiff's claims WITH LEAVE TO AMEND.

1 If Plaintiff still wishes to pursue this action, he shall file
2 a Second Amended Complaint no later than 30 days from the date of
3 this Order. The Second Amended Complaint must cure the pleading
4 defects discussed above and shall be complete in itself without
5 reference to prior pleadings. See L.R. 15-2 (“Every amended
6 pleading filed as a matter of right or allowed by order of the
7 Court shall be complete including exhibits. The amended pleading
8 shall not refer to the prior, superseding pleading.”). This means
9 that Plaintiff must allege and plead any viable claims in the
10 again.

11
12 In any amended complaint, Plaintiff should identify the nature
13 of each separate legal claim and confine his allegations to those
14 operative facts supporting each of his claims. For each separate
15 legal claim, Plaintiff should state the civil right that has been
16 violated and the supporting facts for that claim only. Pursuant
17 to Federal Rule of Civil Procedure 8(a), all that is required is a
18 “short and plain statement of the claim showing that the pleader
19 is entitled to relief.” However, Plaintiff is advised that the
20 allegations in the Second Amended Complaint should be consistent
21 with the authorities discussed above. In addition, the Second
22 Amended Complaint may not include new defendants or claims not
23 reasonably related to the allegations in the previously filed
24 complaint. Plaintiff is strongly encouraged to utilize the
25 standard civil rights complaint form when filing any amended
26 complaint, a copy of which is attached.

1 Plaintiff is explicitly cautioned that failure to timely file
2 a Second Amended Complaint, or failure to correct the deficiencies
3 described above, may result in a recommendation that this action,
4 or portions thereof, be dismissed with prejudice for failure to
5 prosecute and/or failure to comply with court orders. See Fed. R.
6 Civ. P. 41(b); Applied Underwriters, Inc. v. Lichtenegger, 913 F.3d
7 884, 891 (9th Cir. 2019) ("The failure of the plaintiff eventually
8 to respond to the court's ultimatum - either by amending the
9 complaint or by indicating to the court that it will not do so -
10 is properly met with the sanction of a Rule 41(b) dismissal."
11 (emphasis omitted; quoting Edwards v. Marin Park, Inc., 356 F.3d
12 1058, 1065 (9th Cir. 2004))). Plaintiff is further advised that
13 if he no longer wishes to pursue this action in its entirety or
14 with respect to particular defendants or claims, he may voluntarily
15 dismiss all or any part of this action by filing a Notice of
16 Dismissal in accordance with Federal Rule of Civil Procedure
17 41(a)(1). A form Notice of Dismissal is attached for Plaintiff's
18 convenience.

19
20 **IT IS SO ORDERED.**

21
22 Dated: August 25, 2020.

23 _____/s/_____
24 ALKA SAGAR
25 UNITED STATES MAGISTRATE JUDGE
26
27
28