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6 **UNITED STATES DISTRICT COURT**  
78 EASTERN DISTRICT OF CALIFORNIA  
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10 STEVEN HAIRL WILHELM,

CASE NO. 1:10-cv-00001-GBC PC

11 v. Plaintiff,

ORDER DISMISSING COMPLAINT, WITH  
LEAVE TO AMEND, FOR FAILURE TO STATE  
A CLAIM

12 ARON ROTMAN, et al.,

(ECF No. 1)

13 Defendants.

THIRTY-DAY DEADLINE  
1415 **I. Screening Requirement**16 Plaintiff Steven Hairl Wilhelm is a state prisoner proceeding pro se and in forma pauperis  
17 in this civil rights action pursuant to 42 U.S.C. § 1983. Currently pending before the Court is the  
18 complaint, filed December 31, 2009. (Compl., ECF No. 1.)19 The Court is required to screen complaints brought by prisoners seeking relief against a  
20 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
21 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally  
22 “frivolous or malicious,” that “fails to state a claim on which relief may be granted,” or that “seeks  
23 monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B).24 In determining whether a complaint states a claim, the Court looks to the pleading standard  
25 under Federal Rule of Civil Procedure 8(a). Under Rule 8(a), a complaint must contain “a short and  
26 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).  
27 “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it  
28 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v.

1 Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555  
2 (2007)).

3 Under section 1983, Plaintiff must demonstrate that each defendant personally participated  
4 in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). This requires  
5 the presentation of factual allegations sufficient to state a plausible claim for relief. Iqbal, 129 S. Ct.  
6 at 1949-50; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). “[A] complaint [that]  
7 pleads facts that are ‘merely consistent with’ a defendant’s liability . . . ‘stops short of the line  
8 between possibility and plausibility of entitlement to relief.’” Iqbal, 129 S. Ct. at 1949 (quoting  
9 Twombly, 550 U.S. at 557). Further, although a court must accept as true all factual allegations  
10 contained in a complaint, a court need not accept a plaintiff’s legal conclusions as true. Iqbal, 129  
11 S. Ct. at 1949. “Threadbare recitals of the elements of a cause of action, supported by mere  
12 conclusory statements, do not suffice.” Id. (quoting Twombly, 550 U.S. at 555).

13 **II. Complaint Allegations**

14 Plaintiff is in the custody of the California Department of Corrections and Rehabilitation and  
15 is currently housed at the California Substance Abuse Treatment Facility in Corcoran. Plaintiff was  
16 diagnosed with a hernia on October 7, 2005. On July 15, 2008, Plaintiff was examined by Defendant  
17 Rotman who confirmed that Plaintiff had a double hernia. On September 5, 2008, Plaintiff was seen  
18 by a surgeon, Defendant Schuster, who briefly examined Plaintiff, told him that he did not have a  
19 hernia, and refused to operate on Plaintiff. On September 8, 2008, Plaintiff submitted a medical  
20 request to see Defendant Rotman regarding Defendant Schuster’s findings. (Compl. at 3, ECF 1.)

21 On October 12, 2008, Plaintiff submitted a letter to Defendant Rotman informing him that  
22 Plaintiff wanted to be seen about his hernia. Plaintiff saw Defendant Rotman on November 11,  
23 2008, and requested an ultra-sound or x-ray be performed to determine if he had a hernia. Defendant  
24 Rotman informed Plaintiff that those tests would not show anything and that they would discuss his  
25 hernia at his next appointment. On December 7, 2008, Plaintiff sent a letter to Defendant Rotman  
26 requesting an appointment. On December 11, 2008, Plaintiff submitted a medical request to see  
27 Defendant Rotman. On December 24, 2008, Plaintiff saw Defendant Rotman, who indicated he  
28 would examine Plaintiff to see if he had a hernia at his next appointment. (Id. at 5.) Plaintiff saw

1 Defendant Rotman on January 27, 2009, and was informed that he would be placed on the list for  
2 an appointment with a surgeon. During this time period Plaintiff was told that he had medical  
3 appointments on several occasions, but was not called for the appointments. (Id. at 5-6.) On March  
4 26, 2009, Plaintiff saw Defendant Rotman again and asked why he had not been seen by the surgeon.  
5 (Id. at 6.)

6 On July 17, 2009, Plaintiff was interviewed in response to an inmate grievance and was told  
7 that he was removed from the list to see a surgeon because Defendant Rotman failed to file the  
8 correct paperwork. In response to a letter sent to the prison law office Plaintiff was sent to see a  
9 surgeon and surgery was scheduled. On August 26, 2009, Plaintiff was seen by Defendant Pierre  
10 who informed him that he was scheduled to be transferred to Soledad. (Id.) Plaintiff asked  
11 Defendant Pierre to put a medical hold on him so that the surgery could be performed and Defendant  
12 Pierre refused. (Id. at 6-7.)

13 Plaintiff alleges that he was in daily pain, endured significant pain and suffering, and was  
14 unable to do his normal exercise or daily routine for four years<sup>1</sup> due to the hernia . (Id. at 20.) He  
15 brings this suit against Defendants Rotman, Schuster, and Pierre for deliberate indifference in  
16 violation of the Eighth Amendment seeking monetary damages. (Id. at 16-1, 217.) For the reasons  
17 set forth below, Plaintiff has failed to state a cognizable claim for relief. Plaintiff shall be given the  
18 opportunity to file an amended complaint curing the deficiencies described by the Court in this order.  
19 In the paragraphs that follow, the Court will provide Plaintiff with the legal standards that appear to  
20 apply to his claims. Plaintiff should carefully review the standards and amend only those claims that  
21 he believes, in good faith, are cognizable.

22 **III. Discussion**

23 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate  
24 must show “deliberate indifference to serious medical needs.”” Jett v. Penner, 439 F.3d 1091, 1096  
25 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two part test for

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27 <sup>1</sup>The Court notes that, although Plaintiff is alleging he endured pain and suffering for four years, the  
28 incidents alleged in the complaint occurred in the seventeen months prior to the filing of the complaint. It would  
appear Plaintiff's complaint contains allegations for a period of time prior to these Defendants being involved in his  
medical care.

1 deliberate indifference requires the plaintiff to show (1) “a ‘serious medical need’ by demonstrating  
2 that failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary  
3 and wanton infliction of pain,’” and (2) “the defendant’s response to the need was deliberately  
4 indifferent.” Conn v. City of Reno, 591 F.3d 1081, 1095 (9th Cir. 2010) (quoting Jett, 439 F.3d at  
5 1096).

6 Deliberate indifference is shown where there was “a purposeful act or failure to respond to  
7 a prisoner’s pain or possible medical need” and the indifference caused harm. Conn, 591 F.3d at  
8 1095 (quoting Jett, 439 F.3d at 1096). “Deliberate indifference is a high legal standard.” Simmons  
9 v. Navajo County, Arizona, 609 F.3d 1011, 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051,  
10 1060 (9th Cir. 2004). The prison official must be aware of facts from which he could make an  
11 inference that “a substantial risk of serious harm exists” and he must make the inference. Farmer  
12 v. Brennan, 511 U.S. 825, 837 (1994).

13 Plaintiff fails to allege facts demonstrating that his hernia was a serious medical condition  
14 requiring surgery. The mere fact that Plaintiff was diagnosed with a hernia does not state a plausible  
15 claim that he required surgery. Iqbal, 129 S. Ct. at 1949-50. The complaint is devoid of any facts  
16 that would indicate his hernia was not being appropriately treated, that Defendants were aware that  
17 Plaintiff could suffer any further significant injury, or there was ‘unnecessary and wanton infliction  
18 of pain. Conn, 591 F.3d 1095. Plaintiff’s disagreement regarding treatment fails to state a  
19 cognizable claim. Franklin v. Oregon, 662 F.2d 1337, 1355 (9th Cir. 1981); Mayfield v. Craven,  
20 433 F.2d 873, 874 (9th Cir. 1970). Additionally, while Plaintiff was requesting surgery, the facts  
21 fail to allege that he suffered any significant harm from the delay in surgery. Hallett v. Morgan, 296  
22 F.3d 732, 746 (9th Cir. 2002); Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Shapley  
23 v. Nevada Board of State Prison Commissioners, 766 F.2d 404, 407 (9th Cir. 1984).

24 Plaintiff alleges that Defendant Schuster failed to diagnose his hernia and recommend  
25 surgery, however, a difference of opinion between medical providers regarding treatment does not  
26 amount to deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Nor does  
27 an allegation by a prisoner that a physician has been merely indifferent or negligent or has committed  
28 medical malpractice in diagnosing or treating a medical condition state a constitutional claim.

1 Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980); Toguchi, 391 F.3d at 1057.  
2 “Medical malpractice does not become a constitutional violation merely because the victim is a  
3 prisoner.” Estelle, 429 U.S. at 106.

4 **IV. Conclusion and Order**

5 For the reasons stated, Plaintiff’s complaint does not state a cognizable claim for relief for  
6 a violation of his constitutional rights. Plaintiff is granted leave to file an amended complaint within  
7 thirty days. Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987). Plaintiff may not change the  
8 nature of this suit by adding new, unrelated claims in his amended complaint. George v. Smith, 507  
9 F.3d 605, 607 (7th Cir. 2007) (no “buckshot” complaints).

10 Plaintiff’s amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what each  
11 named defendant did that led to the deprivation of Plaintiff’s constitutional or other federal rights,  
12 Iqbal, 129 S. Ct. at 1948-49. “The inquiry into causation must be individualized and focus on the  
13 duties and responsibilities of each individual defendant whose acts or omissions are alleged to have  
14 caused a constitutional deprivation.” Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988). Although  
15 accepted as true, the “[f]actual allegations must be [sufficient] to raise a right to relief above the  
16 speculative level . . . .” Twombly, 550 U.S. at 555 (citations omitted).

17 Finally, an amended complaint supercedes the original complaint, Forsyth v. Humana, Inc.,  
18 114 F.3d 1467, 1474 (9th Cir. 1997); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987), and must  
19 be “complete in itself without reference to the prior or superceded pleading,” Local Rule 220. “All  
20 causes of action alleged in an original complaint which are not alleged in an amended complaint are  
21 waived.” King, 814 F.2d at 567 (citing to London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th  
22 Cir. 1981)); accord Forsyth, 114 F.3d at 1474.

23 Based on the foregoing, it is HEREBY ORDERED that:

24 1. The Clerk’s Office shall send Plaintiff a civil rights complaint form;  
25 2. Plaintiff’s complaint, filed December 31, 2009, is dismissed for failure to state a  
26 claim upon which relief may be granted under section 1983;  
27 3. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file an  
28 amended complaint; and

1           4. If Plaintiff fails to file an amended complaint in compliance with this order, this  
2           action will be dismissed, with prejudice, for failure to state a claim.

3           IT IS SO ORDERED.

4           Dated: February 7, 2011

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6           UNITED STATES MAGISTRATE JUDGE

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