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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

CESAR LUNA,

Plaintiff,

v.

MATTHEW CATE, et al.,

Defendants.

CASE NO. 1:10-cv-01107-GBC PC

ORDER DISMISSING ACTION, WITHOUT  
PREJUDICE, FOR FAILURE TO STATE A  
CLAIM

(Doc. 11)

ORDER COUNTING DISMISSAL AS A  
STRIKE UNDER 28 U.S.C. § 1915(G)

**I. Screening Requirement**

Plaintiff Cesar Luna (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The Court screened the first amended complaint and issued an order on December 6, 2010, dismissing the complaint, with leave to amend, for failure to state a claim. (Doc. 10.) Currently pending before the Court is Plaintiff’s second amended complaint, filed November 29, 2010. (Doc. 9.)

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that “fails to state a claim on which relief may be granted,” or that “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C § 1915(e)(2)(B).

In determining whether a complaint states a claim, the Court looks to the pleading standard under Federal Rule of Civil Procedure 8(a). Under Rule 8(a), a complaint must contain “a short and

1 plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).  
2 “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it  
3 demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Ashcroft v.  
4 Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555  
5 (2007)). “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
6 relief that is plausible on its face.’” Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570).  
7 Further, although a court must accept as true all factual allegations contained in a complaint, a court  
8 need not accept a plaintiff’s legal conclusions as true. Iqbal, 129 S. Ct. at 1949. “Threadbare  
9 recitals of the elements of a cause of action, supported by mere conclusory statements, do not  
10 suffice.” Id. (quoting Twombly, 550 U.S. at 555).

## 11 **II. Discussion**

12 Plaintiff is in the custody of the California Department of Corrections and Rehabilitation and  
13 is incarcerated at Sierra Conservation Center (“SCC”). Plaintiff brings suit against Defendants Cate,  
14 St. Clair, Forster, Bangi, Lovett, and Mark Twain St. Joseph Hospital. He is seeking compensatory  
15 and punitive damages.

16 Plaintiff states that Defendant Cate is responsible for overseeing each institution and the  
17 policies and procedures to ensure that proper medical treatment is received by the prisoners.  
18 Defendant Cate’s fiduciary duty to provide adequate medical services was not met and Plaintiff has  
19 pain and trauma to his knee. (Doc. 11, p. 3.)

20 Defendant St. Clair, Chief Medical Officer, was responsible for implementing policies and  
21 procedures. He approved an orthroscopy, M.R.I., physical therapy, and other services for Plaintiff.  
22 Defendant St. Clair was aware of Plaintiff’s serious medical need and did not continue Plaintiff’s  
23 therapy and he now has popping and locking in his knee. (Id., p. 4.)

24 Defendant Forster provided inadequate medical treatment throughout the process. On  
25 February 20, 2008, Defendant Forster led Plaintiff to believe that M.R.I.’s are accurate. Plaintiff  
26 relied on this statement and due to that his knee pain has gotten worse. Defendant Forster was aware  
27 that a substantial risk of harm existed, because “anytime there is a surgery something bad can  
28 happen.” (Id., p. 5.)

1 Defendant Lovett was aware that Plaintiff had a serious medical need because he  
2 recommended that Plaintiff have surgery. Defendant Lovett did not issue Plaintiff a wheelchair or  
3 crutches when he was released from the hospital. Plaintiff had to walk to the van, approximately  
4 fifty yards, while he was shackled which was very painful. Defendant Lovett did not tell Plaintiff  
5 that he was to be weight bearing as tolerated. He wasn't informed of this until told by Defendant  
6 Bangi after he returned to the prison. Defendant Lovett terminated Plaintiff's therapy because he  
7 stated it was not needed, however Plaintiff's knee was stiff and sore. (Id., p. 6.)

8 Plaintiff alleges that he suffers from popping and locking in his knee as a result of Defendant  
9 Mark Twain Hospital failing to provide him with crutches or a wheelchair when he was released.  
10 Plaintiff states that patients are usually given crutches or a wheelchair after surgery. An inmate who  
11 had a similar surgery was given a wheelchair to escort him to the van. (Id., p. 7.)

12 Although Plaintiff was previously given the legal standards that applied to his claim in the  
13 order issued on October 25, 2010, Plaintiff has failed to allege that he had "a 'serious medical need.'  
14 Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). Plaintiff was again advised of the need to state  
15 a serious medical need and to link Defendants to an act or failure to act in response in the order  
16 issued December 6, 2010. Plaintiff has not alleged facts to show "a purposeful act or failure to  
17 respond to [his] pain or possible medical need" and that he suffered harm. Jett, 439 F.3d at 1096.  
18 This requires, at a minimum, that Plaintiff allege facts to show that the defendant was aware of facts  
19 from which he could make an inference that "a substantial risk of serious harm exists" and the  
20 defendant made the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

21 The facts as alleged in the complaint show that Plaintiff had a medical need and surgery was  
22 performed. Defendant St. Clair approved medical testing, surgery, and physical therapy for Plaintiff.  
23 The therapy was discontinued when it was no longer considered necessary by Defendants St. Clair  
24 and Lovett. Plaintiff states he continues to have pain, popping, and locking of his knee. A difference  
25 of opinion between a prisoner and prison medical authorities as to proper treatment does not give  
26 rise to a claim. Franklin v. Oregon, 662 F.2d 1337, 1355 (9th Cir. 1981); Mayfield v. Craven, 433  
27 F.2d 873, 874 (9th Cir. 1970). To state a claim under these conditions requires the plaintiff "show  
28 that the course of treatment the doctors choose was medically unacceptable under the circumstances,

1 . . . and . . . they chose this course in conscious disregard of an excessive risk to plaintiff's health."  
2 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996). As alleged, the facts do not indicate that the  
3 decision to discontinue therapy caused an excessive risk to Plaintiff's health.

4 Plaintiff's allegation that he was to be weight bearing as tolerated and was allowed to walk  
5 to the van after surgery does not rise to the level of an objectively serious risk to Plaintiff's safety  
6 in the circumstances alleged in the complaint. Nor does the fact that another inmate received  
7 different treatment than Plaintiff after surgery state a cognizable claim.

8 Additionally, Plaintiff alleges that there are policies and procedures at the prison and he did  
9 not receive adequate medical care. However, Plaintiff has failed to show that the care he received  
10 was inadequate and has not identified any policies or procedures at either the prison or the hospital  
11 that caused him to suffer harm.

12 Plaintiff has failed to allege facts to show that any named defendant was deliberately  
13 indifferent to his medical needs. On the contrary, he received medical testing, surgery, and post  
14 operative therapy. The substance of Plaintiff's complaint appears to be that he did not receive the  
15 expected result from his surgery. An allegation by a prisoner that a physician has been merely  
16 indifferent or negligent or has committed medical malpractice in diagnosing or treating a medical  
17 condition does not state a constitutional claim. Broughton v. Cutter Laboratories, 622 F.2d 458, 460  
18 (9th Cir. 1980); Toguchi, 391 F.3d at 1057. "Medical malpractice does not become a constitutional  
19 violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106.

### 20 **III. Conclusion and Order**

21 Plaintiff's complaint fails to state a claim upon which relief may be granted under section  
22 1983. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend 'shall be freely  
23 given when justice so requires,'" Fed. R. Civ. P. 15(a), and "[l]eave to amend should be granted if  
24 it appears at all possible that the plaintiff can correct the defect," Lopez v. Smith, 203 F.3d 1122,  
25 1130 (9th Cir. 2000) (internal citations omitted). However, in this action Plaintiff has been granted  
26 two opportunities to amend the complaint, with guidance by the Court. Plaintiff has now filed three  
27 complaints without alleging facts against any of the defendants sufficient to state a claim under §  
28 1983. The Court finds that the deficiencies outlined above are not capable of being cured by

1 amendment, and therefore further leave to amend should not be granted. 28 U.S.C. §  
2 1915(e)(2)(B)(ii); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

3 This action is HEREBY ORDERED dismissed, without prejudice, for failure to state a claim  
4 under section 1983, and the Clerk's Office shall enter judgment. This dismissal counts as a strike  
5 under 28 U.S.C. § 1915(g).

6 IT IS SO ORDERED.

7 Dated: January 21, 2011

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UNITED STATES MAGISTRATE JUDGE