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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ARTHUR LUNA,

Plaintiff,

v.

CALIFORNIA HEALTH CARE
SERVICES, et al.,

Defendants.

CASE NO. 1:10-CV-02076-LJO-MJS (PC)

ORDER DISMISSING COMPLAINT WITH
LEAVE TO AMEND

(ECF NO. 1)

AMENDED COMPLAINT DUE WITHIN
THIRTY (30) DAYS

_____ /

SCREENING ORDER

I. PROCEDURAL HISTORY

On November 9, 2010, Plaintiff Arthur Luna, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.)

Plaintiff's Complaint is before the Court for screening.

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1 **II. SCREENING REQUIREMENT**

2 The Court is required to screen complaints brought by prisoners seeking relief
3 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
4 § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has
5 raised claims that are legally “frivolous, malicious,” or that fail to state a claim upon which
6 relief may be granted, or that seek monetary relief from a defendant who is immune from
7 such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion
8 thereof, that may have been paid, the court shall dismiss the case at any time if the court
9 determines that ... the action or appeal ... fails to state a claim upon which relief may be
10 granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

11
12 A complaint must contain “a short and plain statement of the claim showing that the
13 pleader is entitled to relief” Fed.R.Civ.P. 8(a)(2). Detailed factual allegations are not
14 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
15 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937,
16 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must
17 set forth “sufficient factual matter, accepted as true, to ‘state a claim that is plausible on
18 its face.’” Iqbal, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 555). Facial plausibility
19 demands more than the mere possibility that a defendant committed misconduct and, while
20 factual allegations are accepted as true, legal conclusions are not. Id. at 1949–50.

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23 **III. SUMMARY OF COMPLAINT**

24 Plaintiff is incarcerated at the California Department of Corrections and
25 Rehabilitation, Corcoran Substance Abuse Treatment Facility and State Prison,
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1 (“CSATF/SP”). (Compl. p. 1, ECF No. 1.) Plaintiff complains that he fell from his bunk at
2 CSATF/SP on May 16, 2009, injuring surgical work that had been done on his left shoulder
3 a month earlier. (Id. at 9-11.) Defendants were deliberately indifferent to his resulting
4 serious medical needs in violation of the Eighth Amendment and California Code of Civil
5 Procedure Sections 338-340 and 425.12. (Id. at 5, 28-29.) Plaintiff also alleges that he was
6 discriminated against because of his pre-existing permanent hearing impairment. (Id. at 9.)

8 Plaintiff names the following Defendants in their official and individual capacities:

9 (1) California Health Care Services (“CHCS”), (2) CSATF/SP, (3) Delano, LVN, (4)
10 Ugwueze, Physician, (5) Does I-V at CSATF/SP. Plaintiff seeks injunctive relief and
11 compensatory and punitive damages. (Id. at 2, 6.)

12 Plaintiff had shoulder surgery on April 21, 2009. He alleges that he re-injured the
13 shoulder in the May 16th fall. (Id. at 9.) He was seen by Defendant Delano shortly after the
14 fall. (Id. at 9, 11.) She was disrespectful and unprofessional, and she accused him of lying
15 about the injury. She teased him about his hearing impairment and was biased against him
16 because of it. (Id.) She told him his shoulder was not broken, allegedly without
17 examining/touching it. (Id.) She advised him to promptly put in a medical slip to get an x-ray
18 and follow-up treatment. (Id.) Subsequent x-ray showed dislocation of a screw placed in
19 Plaintiff’s shoulder during the April 21st surgery, necessitating additional surgery and
20 impacting Plaintiff’s daily activities. (Id. at 8, 28.) On June 1, 2009, a non-party, Dr. Smith
21 prescribed morphine for the shoulder injury, but Plaintiff alleges he has not received any.
22 (Id. at 26-27.)

25 Defendant CSATF/SP has custody of Plaintiff and is responsible for his medical
26 care. (Id. at 23.) Defendant CHCS is responsible for hiring and retention of medical staff
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1 at CSATF/SP and providing prisoners with medical services. (Id.) Defendant Delano is
2 employed by California Department of Corrections and Rehabilitation as a Licensed
3 Vocational Nurse, (Id. at 24.) Defendant Ugwueze is employed by California Department
4 of Corrections and Rehabilitation as a physician at CSATF/SP. (Id. at 24.) Defendant
5 Ugwueze was responsible for supervising and training CSATF/SP medical staff, and
6 according to Plaintiff he denied medical treatment for Plaintiff's shoulder injury. (Id. at 24-
7 25, 27.) Plaintiff states that Defendant Does I-V at CSATF/SP denied him access to x-ray
8 or emergency medical treatment. (Id. at 27.)

10 **IV. ANALYSIS**

11 To state a claim under Section 1983, a plaintiff must allege two essential elements:
12 (1) that a right secured by the Constitution or laws of the United States was violated and
13 (2) that the alleged violation was committed by a person acting under the color of state law.
14 See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243,
15 1245 (9th Cir.1987).

17 A complaint must contain "a short and plain statement of the claim showing that the
18 pleader is entitled to relief" Fed.R.Civ.P. 8(a)(2). Detailed factual allegations are not
19 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere
20 conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937,
21 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must
22 set forth "sufficient factual matter, accepted as true, to 'state a claim that is plausible on
23 its face.'" Id. Facial plausibility demands more than the mere possibility that a defendant
24 committed misconduct and, while factual allegations are accepted as true, legal
25 conclusions are not. Id. at 1949–50.

1 **A. Eleventh Amendment**

2 The Eleventh Amendment prohibits suits against state agencies.¹ See Natural Res.
3 Def. Council v. California Dep't of Transp., 96 F.3d 420, 421 (9th Cir. 1996); see also
4 Brooks v. Sulphur Springs Valley Elec. Co-op., 951 F.2d 1050, 1053 (9th 1991); see also
5 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (concluding that Nevada Department
6 of Prisons was a state agency entitled to Eleventh Amendment immunity).
7

8 Defendant CSATF/SP is a state agency and is entitled to Eleventh Amendment
9 immunity from suit absent a waiver or exception. No waiver or exception is apparent based
10 on the allegations in the Complaint.

11 Plaintiff cannot proceed against this entity.

12 **B. Personal Participation and Supervisory Liability**

13 Under Section 1983, Plaintiff must demonstrate that each named Defendant
14 personally participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934
15 (9th Cir.2002). The Supreme Court has emphasized that the term “supervisory liability,”
16 loosely and commonly used by both courts and litigants alike, is a misnomer. Iqbal, 129
17 S.Ct. at 1949. “Government officials may not be held liable for the unconstitutional conduct
18 of their subordinates under a theory of respondeat superior.” Id. at 1948. Rather, each
19 government official, regardless of his or her title, is only liable for his or her own
20 misconduct, and therefore, Plaintiff must demonstrate that each Defendant, through his or
21 her own individual actions, violated Plaintiff's constitutional rights. Id. at 1948–49.
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25 ¹ The Ninth Circuit Court of Appeals has recognized that “[t]he State of California has not waived
26 its Eleventh Amendment immunity with respect to claims brought under § 1983 in federal court, and the
27 Supreme Court has held that § 1983 was not intended to abrogate a State's Eleventh Amendment
immunity.” Dittman v. California, 191 F.3d 1020, 1025–26 (9th Cir.1999).

1 The Court finds that, for purposes of screening, the facts alleged in the Complaint
2 do sufficiently personally link Defendant Delano to the alleged violation of Plaintiff's
3 constitutional rights. Defendant Delano saw Plaintiff shortly after his May 16th fall, allegedly
4 provided inadequate medical care to him, and discriminated against him because of his
5 hearing impairment.

6 Plaintiff fails to allege any facts personally linking Defendant Ugwueze to the alleged
7 rights violation. There is no evidence that Defendant Ugwueze personally participated in
8 the events alleged in Plaintiff's Complaint. Defendant Ugwueze cannot be held liable based
9 solely on his position as supervising prison physician at CSATF/SP. Plaintiff cannot
10 proceed against Defendant Ugwueze unless he truthfully alleges how this Defendant
11 *personally* violated, or knowingly directed a violation of his constitutional rights.
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13 Plaintiff fails to allege any facts personally linking Defendant CHCS to the alleged
14 rights violation. Plaintiff should note that the mere fact CHCS conducted third level review
15 of Plaintiff's prison appeal in this matter is not a sufficient basis to link CHCS to a violation
16 of Plaintiff's constitutional rights.² Plaintiff cannot proceed against Defendant CHCS unless
17 he truthfully alleges how this Defendant *personally* violated his constitutional rights.
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19 Plaintiff fails to allege any facts personally linking Defendant Does I-V to the alleged
20 rights violation. Plaintiff cannot proceed against these Doe Defendants unless he truthfully
21 alleges how these Defendants each *personally* violated his constitutional rights.
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23 **C. Inadequate Medical Care**
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25 ² "Inmates lack a separate constitutional entitlement to a specific prison grievance procedure."
26 Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (citing Mann v. Adams, 855 F.2d 639, 640 (9th Cir.
27 1988). See Buckley v. Barlow, 997 F.2d 494,495 (8th Cir.1993) (Actions in reviewing a prisoner's
administrative appeal cannot serve as the basis for liability under § 1983).

1 Plaintiff claims that he received inadequate medical care in violation of the Eighth
2 Amendment. “[T]o maintain an Eighth Amendment claim based on prison medical
3 treatment, an inmate must show ‘deliberate indifference to serious medical needs.’” Jett v.
4 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106
5 (1976)). The two prong test for deliberate indifference requires the plaintiff to show (1) “a
6 serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition could
7 result in further significant injury or the unnecessary and wanton infliction of pain,” and (2)
8 “the defendant’s response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096
9 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992)). Deliberate indifference
10 is shown by “a purposeful act or failure to respond to a prisoner’s pain or possible medical
11 need, and harm caused by the indifference.” Jett, 439 F.3d at 1096 (citing McGuckin, 974
12 F.2d at 1060). In order to state a claim for violation of the Eighth Amendment, a plaintiff
13 must allege sufficient facts to support a claim that the named defendants “[knew] of and
14 disregard[ed] an excessive risk to [plaintiff’s] health” Farmer v. Brennan, 511 U.S. 825,
15 837 (1994).

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18 In applying this standard, the Ninth Circuit has held that before it can be said that a
19 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be
20 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this
21 cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing
22 Estelle, 429 U.S. at 105–06). “[A] complaint that a physician has been negligent in
23 diagnosing or treating a medical condition does not state a valid claim of medical
24 mistreatment under the Eighth Amendment. Medical malpractice does not become a
25 constitutional violation merely because the victim is a prisoner.” Estelle, 429 U.S. at 106;
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1 see also Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir.1995); see also
2 McGuckin, 974 F.2d at 1050. Even gross negligence is insufficient to establish deliberate
3 indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th
4 Cir. 1990).

5 Also, “a difference of opinion between a prisoner-patient and prison medical
6 authorities regarding treatment does not give rise to a § 1983 claim.” Franklin v. Oregon,
7 662 F.2d 1337, 1344 (9th Cir. 1981). To prevail, Plaintiff “must show that the course of
8 treatment the doctors chose was medically unacceptable under the circumstances ... and
9 ... that they chose this course in conscious disregard of an excessive risk to plaintiff’s
10 health.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.1986). A prisoner’s mere
11 disagreement with diagnosis or treatment does not support a claim of deliberate
12 indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).

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15 Plaintiff claims that his May 16th fall caused trauma to his recent shoulder surgery,
16 resulting in ongoing pain, and impairment of his daily activities. This injury, if not properly
17 treated could potentially cause significant injury. See Jones v. Johnson, 781 F.2d 769,
18 771–72 (9th Cir.1986) (held that a hernia which caused severe pain and an inability to work
19 stated a serious medical need); see also McGuckin, 947 F.2d at 1059–60 (“[T]he existence
20 of an injury that a reasonable doctor or patient would find important and worthy of comment
21 or treatment; the presence of a medical condition that significantly affects an individual’s
22 daily activities; or the existence of chronic and substantial pain are examples of indications
23 that a prisoner has a ‘serious’ need for medical treatment.”). Plaintiff has alleged, for
24 purposes of screening, a serious medical need sufficient to satisfy the first prong of
25 deliberate indifference.
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1 However, Plaintiff has not included sufficient allegations to support a claim that any
2 of the Defendants were deliberately indifferent to Plaintiff's medical needs. Plaintiff alleges
3 no facts that Defendants CHCS, CSATF/SP, Ugwueze, and Does I-V participated in the
4 alleged rights violation. The allegations against Defendant Delano, that she was
5 disrespectful and failed to examine Plaintiff's shoulder injury, taken as true might well
6 suggest negligence, but not deliberate indifference. Defendant Delano interviewed Plaintiff,
7 treated him with an ice pack, and advised him to promptly submit a medical slip to receive
8 follow-up treatment including a shoulder x-ray. There is no evidence that any Defendant
9 knowingly disregarded an excessive risk of harm to Plaintiff's left shoulder, or that the
10 chosen course of treatment was medically unacceptable and impacted plaintiff's treatment
11 and recovery. The Eighth Amendment does not require that prisoners receive "unqualified
12 access to health care." Johnson 433 F.3d at 1013 (citing Hudson v. McMillian, 503 U.S. 1,
13 9 (1992)).
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16 Plaintiff also alleges that in the weeks following the injury he saw a nonparty, Dr.
17 Smith, who prescribed morphine. Plaintiff complains that he has not received the morphine.
18 (Compl. at 26-27.) This allegation is attributed neither to the Defendants, nor to any
19 deliberate indifference, and standing thus can not support a claim. Further this allegation
20 appears contradicted by Plaintiff's statement that he is "receiving medication" (Id. at 16.)
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22 Plaintiff has failed to state a claim for inadequate medical care against Defendants
23 CHCS, CSATF/SP, Delano, Ugwueze, and Does I-V . The Court will give Plaintiff leave to
24 amend his Complaint with regard to the alleged inadequate medical care. In order to state
25 a claim for a violation of the Eighth Amendment based on inadequate medical care, Plaintiff
26 needs to set forth sufficient facts showing (1) a serious medical need, and (2) a deliberately
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1 indifferent response to that need on the part of the Defendants.

2 **D. Harassment**

3 Plaintiff may complain that Defendant Delano harassed him in violation his Eighth
4 Amendment right to be free from cruel and unusual punishment. To constitute cruel and
5 unusual punishment in violation of the Eighth Amendment, prison conditions must involve
6 “the wanton and unnecessary infliction of pain” Rhodes v. Chapman, 452 U.S. 337, 347
7 (1981).
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9 “Verbal harassment or abuse ... is not sufficient to state a constitutional
10 deprivation....” Whitley v. Lopez, 2011 WL 5101944, *3 (E.D. Cal. Oct.25, 2011) (citing
11 Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir.1987)). Verbal harassment is not a
12 “sufficiently serious” deprivation to satisfy the first element of Plaintiff’s Eighth Amendment
13 claim. See Farmer, at 834 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)). Thus, to the
14 extent Plaintiff wishes to assert such a claim, it can not stand and is hereby dismissed with
15 prejudice.
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17 **E. Title II of the ADA**

18 Plaintiff does not specifically state that he is pursuing any claims based on violation
19 of Title II of the Americans with Disabilities Act (“ADA”). However, Plaintiff filed an ADA
20 Accommodation request on May 19, 2009, three days after his fall, alleging Defendant
21 Delano was “biased against [Plaintiff’s] hearing” when treating him for the May 16th fall.
22 (Compl. at 9.) Plaintiff has a permanent hearing impairment and must wear hearing aids.
23 (Id. at 9-12.) Title II of the ADA provides that “no qualified individual with a disability shall,
24 by reason of such disability, be excluded from participation in or be denied the benefits of
25 the services, programs, or activities of a public entity, or be subject to discrimination by such
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1 entity.” 42 U.S.C. § 12132. In order to state a claim under the ADA, plaintiff must have
2 been “improperly excluded from participation in, and denied the benefits of, a prison service,
3 program, or activity on the basis of his physical handicap.” Armstrong v. Wilson, 124 F.3d
4 1019, 1023 (9th Cir. 1997). Plaintiff has alleged no facts demonstrating such exclusion or
5 denial. Plaintiff’s allegations of inadequate medical care do not state a claim under the ADA.
6 Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (“The ADA does not create a remedy
7 for medical malpractice.”) Nor may Plaintiff pursue ADA claims against an individually
8 named Defendant.³

10 **F. Doe Defendants**

11 Plaintiff names Does I-V CSATF/SP as Defendants in this action. “As a general rule,
12 the use of ‘John Doe’ to identify a defendant is not favored.” Gillespie v. Civiletti, 629 F.2d
13 637, 642 (9th Cir. 1980). “It is permissible to use Doe defendant designations in a complaint
14 to refer to defendants whose names are unknown to plaintiff. Although the use of Doe
15 defendants is acceptable to withstand dismissal of a complaint at the initial review stage,
16 using Doe defendants creates its own problem: those persons cannot be served with
17 process until they are identified by their real names.” Robinett v. Correctional Training
18 Facility, 2010 WL 2867696, *4 (N.D. Cal. July 20, 2010).

20 Plaintiff is advised that Doe Defendants cannot be served by the United States
21 Marshal until Plaintiff has identified them as actual individuals and amended his complaint
22 to substitute the Defendants' actual names. The burden remains on Plaintiff to promptly
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25 ³ Roundtree v. Adams, No. 1:01-CV-06502 OWW LJO, 2005 WL 3284405, at *8 (E.D.Cal. Dec. 1,
26 2005) (citing 42 U.S.C. § 12131(1)(A)-(B)). Public entity, “as it is defined within the statute, does not
27 include individuals.” Id. (quoting Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999)).

1 discover the full names of Doe Defendants. Id.

2 **V. CONCLUSION AND ORDER**

3 Plaintiff's Complaint does not state a claim for relief under Section 1983. The Court
4 will grant Plaintiff an opportunity to file an amended complaint. Lopez v. Smith, 203 F.3d
5 1122, 1130 (9th Cir. 2000); Noll v. Carlson, 809 F.2d 1446, 1448-49 (9th Cir. 1987).

6 If Plaintiff opts to amend, he must demonstrate that the alleged acts resulted in a
7 deprivation of his constitutional rights. Iqbal, 129 S.Ct. at 1948–49. Plaintiff must set forth
8 “sufficient factual matter ... to ‘state a claim that is plausible on its face.’” Id. at 1949 (quoting
9 Twombly, 550 U.S. at 555). Plaintiff must also demonstrate that each named Defendant
10 personally participated in a deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934
11 (9th Cir. 2002).

12 Plaintiff should note that although he has been given the opportunity to amend, it is
13 not for the purposes of adding new claims. George v. Smith, 507 F.3d 605, 607 (7th Cir.
14 2007). Plaintiff should carefully read this Screening Order and focus his efforts on curing
15 the deficiencies set forth above.

16 Finally, Plaintiff is advised that Local Rule 220 requires that an amended complaint
17 be complete in itself without reference to any prior pleading. As a general rule, an amended
18 complaint supersedes the original complaint. See Loux v. Rhay, 375 F.2d 55, 57 (9th Cir.
19 1967). Once an amended complaint is filed, the original complaint no longer serves any
20 function in the case. Therefore, in an amended complaint, as in an original complaint, each
21 claim and the involvement of each defendant must be sufficiently alleged. The amended
22 complaint should be clearly and boldly titled “First Amended Complaint,” refer to the
23 appropriate case number, and be an original signed under penalty of perjury. Plaintiff's
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1 amended complaint should be brief. Fed.R.Civ.P. 8(a). Although accepted as true, the
2 “[f]actual allegations must be [sufficient] to raise a right to relief above the speculative
3 level....” Twombly, 550 U.S. at 555.

4 Based on the foregoing, it is **HEREBY ORDERED** that:

5 The Clerk's Office shall send Plaintiff (1) a blank civil rights amended complaint form
6 and (2) a copy of his Complaint, filed November 9, 2010.

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8 Plaintiff's Complaint is dismissed for failure to state a claim upon which relief may be
9 granted.

10 Plaintiff shall file an amended complaint within thirty (30) days from filing of this order.

11 If Plaintiff fails to file an amended complaint in compliance with this order, it will be
12 recommended that this action be dismissed, with prejudice, for failure to state a claim and
13 failure to prosecute, and that the dismissal be subject to the “three strikes” provision set
14 forth in 28 U.S.C. § 1915(g). Silva v. Di Vittorio 658 F.3d 1090 (9th Cir. 2011).

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17 IT IS SO ORDERED.

18 Dated: December 29, 2011

Is! Michael J. Seng

UNITED STATES MAGISTRATE JUDGE

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