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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KENNETH SCHULTZ,

CASE NO. 1:11-cv-00988-MJS (PC)

Plaintiff,

ORDER DISMISSING PLAINTIFF'S
ACTION FOR FAILURE TO STATE A
CLAIM

v.

(ECF NO. 9)

CLERK TO CLOSE CASE

STATE OF CALIFORNIA DEPARTMENT
OF CORRECTIONS AND
REHABILITATION, et al.,

DISMISSAL IS SUBJECT TO 28 U.S.C. §
1915(g)

Defendants.

_____ /

SECOND SCREENING ORDER

I. PROCEDURAL HISTORY

Kenneth Schultz (Plaintiff), a state prisoner in Corcoran State Prison (CSP) where the events in issue occurred, is proceeding pro se and in forma pauperis in this civil rights action filed June 15, 2011 pursuant to 42 U.S.C. § 1983. (Compl., ECF No. 1.)

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1 The Court screened and dismissed Plaintiff's Complaint, but allowed leave to
2 amend. (Order Dismiss Compl., ECF No. 8.) Plaintiff filed a First Amended Complaint (First
3 Am. Compl., ECF No. 9) which is now before the Court for screening.

4 Plaintiff has consented to Magistrate Judge jurisdiction. (Consent, ECF No. 5.)

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6 **II. SCREENING REQUIREMENT**

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

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17 Section 1983 "provides a cause of action for the 'deprivation of any rights, privileges,
18 or immunities secured by the Constitution and laws' of the United States." Wilder v. Virginia
19 Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not
20 itself a source of substantive rights, but merely provides a method for vindicating federal
21 rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393–94 (1989).

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1 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

2 Plaintiff re-asserts claims for inadequate medical care under the Eighth Amendment
3 and for violation of his due process rights under the Fourteenth Amendment.¹ He alleges:

4 In January 2009, Plaintiff began to experience progressively worsening, widespread
5 pain which interfered with movement and sleep. (First Am. Compl. at 4.) He was given
6 blood tests which came back normal. (Id.) He continued to visit the prison medical clinic
7 with complaints of pain. (Id.)

8 He saw Defendant Kim, a doctor at the prison clinic, in July 2009 for a skin lesion
9 and self-diagnosed “chronic sepsis” (Id. at 9, 14-16), told him of the extreme pain and
10 requested medication and further medical testing. (Id. at 4.) Dr. Kim refused, saying he
11 was tired of inmates self-diagnosing . He told Plaintiff to learn to live with the pain. (Id.)

12 Plaintiff saw Defendant Kim again in September 2009 on a follow-up for skin lesion
13 surgery and again complained of widespread pain and requested medication. (Id. at 5.) Dr.
14 Kim told him that visit was not for the purpose of making complaints and that he should
15 “put in a sick call slip.” (Id.)

16 He grieved Defendant Kim’s “deliberate indifference” through the prison appeal
17 process and requested to be seen by another doctor. (Id.).

18 Dr. Kazan later examined him at the prison clinic and diagnosed probable
19 polymyalgia rheumatica for which Plaintiff is being treated. (Id.)

20 He names as Defendant Dr. J. Kim. (Id. at 2.)

21 He seeks \$100,000 in general and punitive damages. (Id. at 3.)

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26 ¹ The First Amended Complaint omits previously named defendant State of California Department
27 of Corrections and Rehabilitation and a previously alleged First Amendment retaliation claim.

1 **IV. ANALYSIS**

2 **A. Pleading Requirements Generally**

3 To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that
4 a right secured by the Constitution or laws of the United States was violated and (2) that
5 the alleged violation was committed by a person acting under the color of state law. See
6 West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d 1243, 1245
7 (9th Cir.1987).

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

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20 **B. Inadequate Medical Care**

21 Plaintiff reiterates his claim that Defendant Kim was deliberately indifferent to his
22 extreme pain by refusing to order tests and provide treatment and medication.

23 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
24 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439
25 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). The
26 two prong test for deliberate indifference requires the plaintiff to show (1) “a serious
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1 medical need' by demonstrating that 'failure to treat a prisoner's condition could result in
2 further significant injury or the unnecessary and wanton infliction of pain,'" and (2) "the
3 defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096
4 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992)).

5 Deliberate indifference is shown by "a purposeful act or failure to respond to a
6 prisoner's pain or possible medical need, and harm caused by the indifference." Jett, 439
7 F.3d at 1096 (citing McGuckin, 974 F.2d at 1060). In order to state a claim for violation of
8 the Eighth Amendment, a plaintiff must allege sufficient facts to support a claim that the
9 named defendants "[knew] of and disregard[ed] an excessive risk to [plaintiff's] health"
10 Farmer v. Brennan, 511 U.S. 825, 837 (1994).

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

26 A difference of opinion between medical professionals concerning the appropriate
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1 course of treatment generally does not amount to deliberate indifference to serious
2 medical needs. Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004) ; Sanchez v.
3 Vild, 891 F.2d 240, 242 (9th Cir. 1989). Also, “a difference of opinion between a
4 prisoner-patient and prison medical authorities regarding treatment does not give rise to
5 a [§] 1983 claim.” Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). To establish
6 that such a difference of opinion amounted to deliberate indifference, the prisoner “must
7 show that the course of treatment the doctors chose was medically unacceptable under
8 the circumstances” and “that they chose this course in conscious disregard of an
9 excessive risk to [the prisoner’s] health.” See Jackson v. McIntosh, 90 F.3d 330, 332
10 (9th Cir. 1996). A prisoner's mere disagreement with diagnosis or treatment does not
11 support a claim of deliberate indifference. Sanchez, 891 F.2d at 242.

12
13 Here Plaintiff’s medical condition is sufficiently serious to satisfy the first element
14 of deliberate indifference.² However, Plaintiff again fails to allege facts that would enable
15 the Court to find Defendant Kim was deliberately indifferent in his response to this
16 serious medical need.

17
18 Defendant Kim, in his professional judgment, determined that Plaintiff’s pain
19 complaint did not require immediate treatment and could be appropriately addressed on
20 subsequent visits.³ (First Am. Compl. at 13-16.) Disagreement with Dr. Kim’s decision that
21 the pain complaint did not need urgent treatment, even if that decision proved wrong or
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24 ² See McGuckin, 974 F.2d at 1059–60 (“the existence of an injury that a reasonable doctor or
25 patient would find important and worthy of comment or treatment; the presence of a medical condition that
significantly affects an individual's daily activities; or the existence of chronic and substantial pain are
examples of indications that a prisoner has a ‘serious’ need for medical treatment.”)

26
27 ³ Plaintiff saw Defendant Kim for a skin lesion and self-diagnosed “chronic sepsis”. (First Am.
Compl. at 9, 14-16.) Plaintiff subsequently saw Dr. Karan for his pain complaints, was diagnosed with
probable rheumatic disease and began treatment. (First Am. Compl. at 5, 14-16.)

1 negligently rendered, is not sufficient to show deliberate indifference. The Eighth
2 Amendment does not require that prisoners receive “unqualified access to health care.”
3 Hudson v. McMillian, 503 U.S. 1, 9 (1992). The allegations against Defendant Kim, taken
4 as true on screening, amount to no more than dissatisfaction with his opinion, which may
5 in fact have been negligently rendered, as to course of care and treatment. There are no
6 facts alleged which could plausibly support a claim that Defendant Kim intentionally acted
7 in a medically unacceptable manner.

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9 Plaintiff has failed to successfully amend this claim notwithstanding having been
10 given instructions as to how to do so and an opportunity to do so. No useful purpose would
11 be served by giving those same instructions and that opportunity again. Further leave to
12 amend would be futile and will not be granted.

13 **C. Due Process**

14 Plaintiff alleges Defendant Kim has violated his due process rights, citing to the
15 alleged deliberate indifference and his related prison appeals.

16
17 The deliberate indifference claim is properly analyzed under the Eighth Amendment
18 rather than the Fourteenth Amendment. Where a particular amendment provides an explicit
19 textual source of constitutional protection against a particular sort of government behavior,
20 that Amendment, not the more generalized notion of substantive due process, must be the
21 guide for analyzing a plaintiff’s claims. Patel v. Penman, 103 F.3d 868, 874 (9th Cir. 1996),
22 overruled in part on other grounds as recognized by Nitco Holding Corp. v. Boujikian, 491
23 F.3d 1086 (9th Cir. 2007). Plaintiff may not state a Fourteenth Amendment claim for
24 inadequate medical care.
25

26 Defendant’s actions in responding to a prison appeal alone cannot give rise to a
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1 claim for relief under § 1983 for violation of due process. “[A prison] grievance procedure
2 is a procedural right only, it does not confer any substantive right upon the inmates.”
3 Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993) (citing Azeez v. DeRobertis, 568
4 F.Supp. 8, 10 (N.D. Ill. 1982)); see also Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir.
5 2003) (no liberty interest in processing of appeals because no entitlement to a specific
6 grievance procedure); Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) (existence of
7 grievance procedure confers no liberty interest on prisoner); accord Mann v. Adams, 855
8 F.2d 639, 640 (9th Cir. 1988). “[The grievance procedure] does not give rise to a protected
9 liberty interest requiring the procedural protections envisioned by the Fourteenth
10 Amendment.” Azeez, 568 F.Supp. at 10; accord Spencer v. Moore, 638 F.Supp. 315, 316
11 (E.D.Mo. 1986). Actions in reviewing a prisoner’s administrative appeal cannot serve as the
12 basis for liability under a § 1983 action. Buckley, 997 F.2d at 495.

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14 Thus, since he has neither a liberty interest nor a substantive right to the procedures
15 involved in inmate appeals, Plaintiff can not state a claim in this regard. Plaintiff was so
16 advised in the initial screening order.
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18 **V. CONCLUSION AND ORDER**

19 The Court finds that Plaintiff’s First Amended Complaint fails to state any cognizable
20 § 1983 claim. Any further leave to amend would be futile for the reasons set out above and
21 will not be granted.⁴

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25 ⁴ Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend “shall be freely given
26 when justice so requires.” However, leave to amend may be denied where the court determines that “the
27 pleading could not possibly be cured by the allegation of other facts.” Lopez v. Smith, 203 F.3d 1122, 1130
(9th Cir. 2000) (citing Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995).

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

- 2 1. This action shall be dismissed with prejudice for failure to state a claim,
3 2. Dismissal is subject to the “three strikes” provision set forth in 28 U.S.C. §
4 1915(g); Silva v. Di Vittorio 658 F.3d 1090 (9th Cir. 2011), and
5 3. The Clerk shall close the file in this case.
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8 IT IS SO ORDERED.

9 Dated: April 21, 2012

10 *Isl. Michael J. Seng*
11 UNITED STATES MAGISTRATE JUDGE
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