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7 **UNITED STATES DISTRICT COURT**

8 EASTERN DISTRICT OF CALIFORNIA

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10 JESUS FLORES,

Case No. 1:13-cv-01130-SKO (PC)

11 Plaintiff,

SECOND SCREENING ORDER  
DISMISSING ACTION, WITH PREJUDICE,  
FOR FAILURE TO STATE A CLAIM  
UNDER SECTION 1983

12 v.

13 D. SMILEY, et al.,

(Doc. 10)

14 Defendants.  
15 \_\_\_\_\_/

16 **Second Screening Order**

17 **I. Procedural History**

18 Plaintiff Jesus Flores, a state prisoner proceeding pro se and in forma pauperis, filed this  
19 civil rights action pursuant to 42 U.S.C. § 1983, 42 U.S.C. § 12132 (Americans with Disabilities  
20 Act), and California law on July 22, 2013. On May 9, 2014, the Court dismissed Plaintiff's  
21 complaint, with leave to amend, for failure to state any claims. On June 30, 2014, Plaintiff filed  
22 an amended complaint alleging a claim under section 1983 for violation of the Eighth  
23 Amendment.<sup>1</sup>

24 **II. Screening Requirement and Standard**

25 The Court is required to screen Plaintiff's complaint and dismiss the case, in whole or in  
26 part, if the Court determines it fails to state a claim upon which relief may be granted. 28 U.S.C. §

27 \_\_\_\_\_  
28 <sup>1</sup> Plaintiff expressly abandoned his ADA claim and he neither re-alleged his negligence claim nor alleged compliance with the Government Claims Act, which prohibits him from pursuing a negligence claim under California law. *Shirk v. Vista Unified Sch. Dist.*, 42 Cal.4th 201, 208-09 (Cal. 2007).

1 1915(e)(2)(B)(ii). A complaint must contain “a short and plain statement of the claim showing  
2 that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
3 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
4 conclusory statements, do not suffice,” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937  
5 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007)), and  
6 courts “are not required to indulge unwarranted inferences,” *Doe I v. Wal-Mart Stores, Inc.*, 572  
7 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). While factual  
8 allegations are accepted as true, legal conclusions are not. *Iqbal*, 556 U.S. at 678.

9 Pro se litigants are entitled to have their pleadings liberally construed and to have any  
10 doubt resolved in their favor, *Wilhelm v. Rotman*, 680 F.3d 1113, 1121-23 (9th Cir. 2012); *Hebbe*  
11 *v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010), but Plaintiff’s claims must be facially plausible to  
12 survive screening, which requires sufficient factual detail to allow the Court to reasonably infer  
13 that each named defendant is liable for the misconduct alleged, *Iqbal*, 556 U.S. at 678 (quotation  
14 marks omitted); *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The sheer  
15 possibility that a defendant acted unlawfully is not sufficient, and mere consistency with liability  
16 falls short of satisfying the plausibility standard. *Iqbal*, 556 U.S. at 678 (quotation marks  
17 omitted); *Moss*, 572 F.3d at 969.

### 18 **III. Discussion**

#### 19 **A. Plaintiff’s Allegations**

20 Plaintiff, who is incarcerated at California Substance Abuse Treatment Facility and State  
21 Prison in Corcoran, California, brings this action against A. F. Alphonso, M.D., for violating his  
22 rights under the Eighth Amendment of the United States Constitution. Plaintiff alleges that in  
23 2009, he suffered a massive stroke which left him with a debilitating esophageal disorder called  
24 dysphagia. Plaintiff’s condition makes it extremely difficult for him to swallow food, drink liquid,  
25 or talk, and he carries around a pen and paper in order to communicate. Plaintiff also has  
26 difficulty breathing, especially at night; he awakens three to four times a night choking, coughing,  
27 and gasping for air; and it hurts even attempting to talk.

1 Plaintiff alleges that although he was sent for an exam which revealed no throat  
2 obstructions, that is not his medical issue and despite the seriousness of his condition, Defendant  
3 Alphonso, his primary care provider, refuses to accommodate his request for a second opinion.  
4 Plaintiff alleges that Defendant Alphonso is rude and disrespectful, and he tells Plaintiff there is  
5 nothing further he can do. Plaintiff alleges that “[t]o add insult to injury, he would order  
6 [Plaintiff] Tylenol, which does absolutely nothing to ease [the] suffering.” (Amend. Comp., pp.  
7 10-11.)

8 **B. Medical Care Claim**

9 While the Eighth Amendment of the United States Constitution entitles Plaintiff to medical  
10 care, the Eighth Amendment is violated only when a prison official acts with deliberate  
11 indifference to an inmate’s serious medical needs. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir.  
12 2012) ), *overruled in part on other grounds*, *Peralta v. Dillard*, 744 F.3d 1076, 1082-83 (9th Cir.  
13 2014); *Wilhelm*, 680 F.3d at 1122; *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). Plaintiff  
14 “must show (1) a serious medical need by demonstrating that failure to treat [his] condition could  
15 result in further significant injury or the unnecessary and wanton infliction of pain,” and (2) that  
16 “the defendant’s response to the need was deliberately indifferent.” *Wilhelm*, 680 F.3d at 1122  
17 (citing *Jett*, 439 F.3d 1091, 1096 (9th Cir. 2006)). Deliberate indifference is shown by “(a) a  
18 purposeful act or failure to respond to a prisoner’s pain or possible medical need, and (b) harm  
19 caused by the indifference.” *Wilhelm*, 680 F.3d at 1122 (citing *Jett*, 439 F.3d at 1096). The  
20 requisite state of mind is one of subjective recklessness, which entails more than ordinary lack of  
21 due care. *Snow*, 681 F.3d at 985 (citation and quotation marks omitted); *Wilhelm*, 680 F.3d at  
22 1122.

23 Plaintiff’s allegations support the existence of a serious medical need arising out of his  
24 post-stroke esophageal dysphagia. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000).  
25 However, Plaintiff’s amended complaint is devoid of any specific facts which support his claim  
26 that Defendant Alphonso is acting with deliberate indifference to his condition.<sup>2</sup> Plaintiff’s belief

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27 <sup>2</sup> Plaintiff’s original complaint was supported by exhibits, which Plaintiff omitted in his amended complaint. As noted  
28 by the Court in its first screening order, these exhibits belie a claim that Plaintiff’s medical needs are being  
disregarded. *See Air Aromatics, LLC v. Opinion Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th

1 that he is entitled to a second opinion and his disagreement with Defendant's decision to deny that  
2 request do not support a claim under section 1983. *Snow*, 681 F.3d at 987; *Wilhelm*, 680 F.3d at  
3 1122-23.

4 **IV. Conclusion and Order**

5 Plaintiff's amended complaint fails to state a claim upon which relief may be granted under  
6 section 1983. Plaintiff was previously given leave to amend to cure the deficiencies but he was  
7 unable to do so, and based on the nature of the deficiencies, further leave to amend is not  
8 warranted. *Akhtar v. Mesa*, 698 F.3d 1202, 1212-13 (9th Cir. 2012); *Lopez*, 203 F.3d at 1130.  
9 Accordingly, it is HEREBY ORDERED that:

- 10 1. This action is DISMISSED, with prejudice, for failure to state a claim under section  
11 1983;
- 12 2. The Clerk's Office shall enter judgment; and
- 13 3. The dismissal of this action qualifies as a strike under 28 U.S.C. § 1915(g). *Silva v.*  
14 *Di Vittorio*, 658 F.3d 1090, 1098-99 (9th Cir. 2011).

15  
16 IT IS SO ORDERED.

17 Dated: **February 19, 2015**

**/s/ Sheila K. Oberto**  
UNITED STATES MAGISTRATE JUDGE

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27 Cir. 2014) ("A party cannot amend pleadings to 'directly contradict an earlier assertion made in the same  
28 proceeding.'") (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)). The Court recognizes Plaintiff's  
frustration with his significant medical issues, but his desire for a second opinion and his bare assertion that Defendant  
is acting with deliberate indifference do not support a claim for violation of the Eighth Amendment.