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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

SHAWN ANDERSON,  
  
Plaintiff,  
  
v.  
  
CHRIS KR PAN, et al.,  
  
Defendants.

Case No. 1:14-cv-01380-AWI-MJS (PC)  
  
**ORDER STRIKING FIRST AMENDED  
COMPLAINT AND REQUIRING  
PLAINTIFF TO FILE A SIGNED  
AMENDED PLEADING**  
  
**(ECF No. 9)**  
  
**THIRTY-DAY DEADLINE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed on September 4, 2014 pursuant to 42 U.S.C. § 1983. The Complaint was dismissed for failure to state a claim.

Before the Court for screening is the First Amended Complaint.

**I. SCREENING REQUIREMENT**

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, malicious,” or that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). “Notwithstanding any filing fee,

1 or any portion thereof, that may have been paid, the court shall dismiss the case at any  
2 time if the court determines that . . . the action or appeal . . . fails to state a claim upon  
3 which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

## 4 **II. PLEADING STANDARD**

5 Section 1983 “provides a cause of action for the deprivation of any rights,  
6 privileges, or immunities secured by the Constitution and laws of the United States.”

7 *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 (1990), quoting 42 U.S.C. § 1983.

8 Section 1983 is not itself a source of substantive rights, but merely provides a method  
9 for vindicating federal rights conferred elsewhere. *Graham v. Connor*, 490 U.S. 386,  
10 393-94 (1989).

11 To state a claim under § 1983, a plaintiff must allege two essential elements: (1)  
12 that a right secured by the Constitution or laws of the United States was violated and (2)  
13 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).

16 A complaint must contain “a short and plain statement of the claim showing that  
17 the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
18 are not required, but “[t]hreadbare recitals of the elements of a cause of action,  
19 supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S.  
20 662, 678 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

21 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim that is  
22 plausible on its face.” *Id.* Facial plausibility demands more than the mere possibility that  
23 a defendant committed misconduct and, while factual allegations are accepted as true,  
24 legal conclusions are not. *Id.* at 667-68.

1 **III. THE FIRST AMENDED COMPLAINT**

2 Plaintiff names as Defendants (1) Chris Krpan, Sierra Conservation Camp  
3 (“SCC”) Physician, and (2) Michael Foster, SCC Physician.

4 His allegations can be summarized essentially as follows:

5  
6 Plaintiff had reconstructive ankle surgery in February 2012. Following surgery, he  
7 suffered pain and swelling, and his ankle was unstable. He was wheelchair bound for a  
8 while and then was dependent on a cane.

9 Plaintiff transferred to SCC in late 2012. He saw Defendant Foster for an initial  
10 medical evaluation on November 6, 2012. Foster noted the ankle was swollen, heard  
11 Plaintiff’s complaints of ongoing severe pain, and reviewed Plaintiff’s medical records  
12 including an August 2012 MRI showing a possible dislocation of the fibula. Foster stated  
13 he would refer Plaintiff to an orthopedic specialist. Foster did not refer Plaintiff to an  
14 orthopedist until January 13, 2013.

15  
16 Plaintiff was examined by Defendant Krpan on February 14, 2013. Krpan noted  
17 the swollen ankle, reviewed Plaintiff’s medical records including the August MRI and a  
18 February 2013 x-ray showing floating bone particles in the ankle. Krpan also noted  
19 physical therapy had not improved Plaintiff’s symptoms. Krpan did not confirm the fibula  
20 dislocation and correct it. Krpan did not refer Plaintiff for surgery to remove the bone  
21 particles.

22  
23 Plaintiff maintains both Defendants viewed his urgent need for medical treatment  
24 as simply routine, delaying treatment of the possibly dislocated fibula and floating bone  
25 fragments, and causing Plaintiff continuing and worsening ankle pain and swelling.

26 Plaintiff seeks monetary damages, an order that he receive adequate medical  
27 treatment and declaratory relief.

1 **IV. DISCUSSION**

2 **A. Pleading Unsigned**

3 The First Amended Complaint is unsigned. The Court cannot consider unsigned  
4 filings and therefore, the First Amended Complaint shall be stricken from the record.  
5 Plaintiff has thirty days to file a signed amended pleading that complies with Federal  
6 Rule of Civil Procedure 8(a) and this Order.  
7

8 **B. No Cognizable Claim**

9 Even if the First Amended Complaint were signed, it sets forth no cognizable  
10 claim for reasons stated in the initial screening order (See ECF No. 5), summarized as  
11 follows.

12 1. Medical Indifference

13  
14 “[T]o maintain an Eighth Amendment claim based on prison medical treatment,  
15 an inmate must show deliberate indifference to serious medical needs.” *Jett v. Penner*,  
16 439 F.3d 1091, 1096 (9th Cir. 2006), quoting *Estelle v. Gamble*, 429 U.S. 97, 106  
17 (1976). This requires Plaintiff to show (1) “a serious medical need by demonstrating that  
18 failure to treat a prisoner's condition could result in further significant injury or the  
19 unnecessary and wanton infliction of pain,” and (2) “the defendant's response to the  
20 need was deliberately indifferent.” *Jett*, 439 F.3d at 1096, quoting *McGuckin v. Smith*,  
21 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, *WMX Techs., Inc. v.*  
22 *Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). Mere negligence is not indifference. See  
23 *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980), citing *Estelle*, 429 U.S. at  
24 105-06 (1976).  
25

26 Plaintiff's post-surgical ankle presented a serious need for medical treatment.  
27 *Jett*, 439 F.3d at 1096. *McGuckin*, 974 F.2d at 1059–60 (the existence of an injury that a  
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1 reasonable doctor or patient would find important and worthy of comment or treatment;  
2 the presence of a medical condition that significantly affects an individual's daily  
3 activities; or the existence of chronic and substantial pain are examples of indications  
4 that a prisoner has a serious need for medical treatment).

5  
6         However, Plaintiff's belief that his ankle required urgent treatment appears to be  
7 based solely on his lay opinion and speculation. He does not reference any medical  
8 findings or opinions or other evidence in support of these claims nor any facts which  
9 would suggest he is qualified to diagnose such conditions, Plaintiff's beliefs in these  
10 regards, no matter how sincerely held, and his desire for alternative treatment, are not a  
11 basis for a civil rights claim. Here, nothing suggests Defendants intentionally provided  
12 medically unacceptable care. So long as his treatment was adequate, that Plaintiff might  
13 have preferred different treatment does not give rise to a civil rights violation. *Evan v.*  
14 *Manos*, 336 F.Supp.2d 255, 261 (W.D.N.Y. 2004); see also *Veloz v. New York*, 339  
15 F.Supp.2d 505, 521 (S.D.N.Y. 2004) ("To establish deliberate indifference, plaintiff must  
16 demonstrate that the defendants actually wished him harm, or at least, were totally  
17 unconcerned with his welfare."), citing *Hathaway v. Coughlin*, 37 F.3d 63, 69 (2d Cir.  
18 1994).

19  
20 Mere disagreement with treatment decisions is not a basis for an inadequate medical  
21 care claim unless the treatment chosen is medically unacceptable and in conscious  
22 disregard of an excessive risk to the prisoner's health. See *Franklin v. Oregon*, 662 F.2d  
23 1337, 1344 (9th Cir. 1981); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).  
24 Plaintiff makes no such showing here.

25  
26         There is no factual basis to claim Defendants Foster and Krpan knowingly  
27 denied, delayed, or interfered with medically necessary consultation and treatment, or  
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1 provided medically unacceptable care, causing harm to Plaintiff. See *Toguchi v. Chung*,  
2 391 F.3d 1051, 1058–60 (9th Cir. 2004); cf., *Wilhelm v. Rotman*, 680 F.3d 1113, 1123  
3 (9th Cir. 2012) (doctor's awareness of need for treatment followed by his unnecessary  
4 delay in implementing the prescribed treatment sufficient to plead deliberate  
5 indifference).

6  
7       Significantly, Plaintiff omits description of the diagnosis, prognosis and treatment  
8 plan created as a result of his January 2013 consultation with the orthopedic specialist.  
9 Plaintiff was previously instructed that merely citing to CDCR medical policy, without  
10 facts showing intentional indifference to the policy and resulting harm does not state a  
11 federal rights violations.

12  
13       Plaintiff will be given leave to file an amended pleading. If he chooses to do so,  
14 he must allege facts demonstrating how each Defendant knowingly denied, delayed or  
15 interfered with medically necessary care for his ankle, or knowingly provided care that  
16 was medically unacceptable, causing him harm.

## 17               2.       Injunctive Relief

18       Plaintiff may not seek injunctive relief where, as here, there is no underlying  
19 federal claim. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983) (plaintiff must  
20 show a “case or controversy” and “real and immediate” threat of injury). His  
21 disagreement with Defendants’ care and treatment of his post-surgical ankle does not  
22 alone suggest a present and immediate threat of irreparable harm. *Id.*

23  
24       Plaintiff’s amended pleading does not state any cognizable claim against named  
25 Defendants for the reasons summarized above and stated with greater specificity in the  
26 initial screening order. Injunctive relief is moot.

1                   3.     Declaratory Relief

2                   Plaintiff seeks declaratory relief, but because his claims for damages necessarily  
3 entail a determination whether his rights were violated, his separate request for  
4 declaratory relief is subsumed by those claims. *Rhodes v. Robinson*, 408 F.3d 559, 566  
5 n.8 (9th Cir. 2005). Therefore, this action properly proceeds as one for damages and  
6 injunctive relief only.  
7

8 **V.     CONCLUSIONS AND ORDER**

9                   The First Amended Complaint is unsigned and fails to state any cognizable  
10 claim. The Court will provide Plaintiff with **one final** opportunity to file an amended  
11 complaint, duly signed, that cures noted deficiencies. *Noll v. Carlson*, 809 F.2d 1446,  
12 1448-49 (9th Cir. 1987).  
13

14                  If Plaintiff opts to amend, his amended complaint should be brief, Fed. R. Civ. P.  
15 8(a), but must state what each named Defendant did or did not do that led to the  
16 deprivation of Plaintiff's constitutional or other federal rights, *Iqbal*, 556 U.S. at 677-78,  
17 consistent with this Order. Although accepted as true, the “[f]actual allegations must be  
18 [sufficient] to raise a right to relief above the speculative level . . . .” *Twombly*, 550 U.S.  
19 at 555. Further, Plaintiff may not change the nature of this suit by adding new, unrelated  
20 claims in his amended complaint. *George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).  
21

22                  Finally, an amended complaint supersedes the original complaint, *Lacey v.*  
23 *Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012), and must be “complete in itself  
24 without reference to the prior or superseded pleading.” Local Rule 220.

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

- 26                  1.     The First Amended Complaint (ECF No. 9) is STRICKEN from the record  
27                         for lack of signature,  
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- 1           2.     Clerk's Office shall send Plaintiff (1) a blank civil rights amended complaint  
2                     form and (2) a copy of his First Amended Complaint filed October 3, 2014,  
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4           3.     Plaintiff shall file a signed amended complaint within thirty (30) days from  
5                     service of this Order, and  
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7           4.     If Plaintiff fails to file a signed amended complaint in compliance with this  
8                     Order, the undersigned will recommend the action be dismissed, with  
9                     prejudice, for failure to state a claim and failure to prosecute, subject to  
10                    the "three strikes" provision set forth in 28 U.S.C. § 1915(g). *Silva v, Di*  
11                    *Vittorio*, 658 F.3d 1090, 1098 (9th Cir. 2011).

12 IT IS SO ORDERED.

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14 Dated: October 24, 2014

15 */s/ Michael J. Seng*  
16 UNITED STATES MAGISTRATE JUDGE  
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