

1 However, the Court found that the complaint did not state any other cognizable claims. The
2 Court directed Plaintiff either file an amended complaint or notify the Court of his intent to
3 proceed against Defendant Wang on the claim found to be cognizable.

4 On April 5, 2017, Plaintiff notified the Court of his intent to proceed only against
5 Defendant Wang in his individual capacity for the alleged Eighth Amendment violation. (ECF
6 No. 8.) On April 6, 2017, the Court ordered service to be initiated against Dr. Wang for
7 Plaintiff's complaint alleging a violation of the Eighth Amendment due to deliberate indifference
8 to a serious medical need, and ordered that the remaining claims were dismissed. (ECF No. 9.)

9 As noted above, on June 30, 2017, Defendant Wang consented to the jurisdiction of a
10 United States Magistrate Judge, through counsel. (ECF No. 12.) On July 18, 2017, Defendant
11 Wang answered the complaint. (ECF No. 14.) On July 19, 2017, the Court issued a discovery
12 and scheduling order. (ECF No. 15.) Pursuant to that order, the deadline for amending the
13 pleadings is January 19, 2018. (*Id* at 2.)

14 II.

15 MOTION TO AMEND

16 Currently before the Court is Plaintiff's motion for leave to file an amended complaint,
17 filed on October 6, 2017. (ECF No. 19.) Plaintiff seeks leave to amend the complaint to add
18 allegations regarding his exhaustion of administrative remedies, including dates, and to add
19 additional facts about what was said between him and Defendant Dr. Wang. Plaintiff also seeks
20 to add exhibits. Plaintiff's proposed amended complaint is attached to his motion. The time for
21 Defendant to respond to Plaintiff's motion has passed, and no response was filed. The motion is
22 deemed submitted. Local Rule 230(l).

23 Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party's
24 pleading once as a matter of course twenty-one days after serving, or if a response was filed,
25 within twenty-one days after service of the response. Fed. R. Civ. P. 15(a)(1). Otherwise, a party
26 may amend only by leave of the court or by written consent of the adverse party. Fed. R. Civ. P.
27 15(a)(2). Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so
28 requires.'" AmerisourceBergen Corp. v. Dialysis West, Inc., 465 F.3d 946, 951 (9th Cir. 2006)

1 (quoting Fed. R. Civ. P. 15(a)). However, courts “need not grant leave to amend where the
2 amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue
3 delay in the litigation; or (4) is futile.” AmerisourceBergen Corp., 465 F.3d at 951.

4 Here, Defendant Wang has answered the original complaint in this action on July 18,
5 2017. Plaintiff’s amended complaint was not filed within twenty-one days of that date.
6 Therefore, Plaintiff requires leave of court to file an amended complaint.

7 The Court has reviewed Plaintiff’s proposed amended complaint, and finds that it adds
8 more detailed factual allegations than his original complaint, but does not seek to add any
9 additional unrelated claims, allegations, or events. The Court finds that Plaintiff does not seek
10 leave to amend in bad faith. Nor is the amendment futile or prejudicial to Defendant Wang, and
11 it will not result in undue delay in the litigation. Accordingly, Plaintiff’s motion for leave to
12 amend the complaint will be granted. The Clerk of the Court will be directed to file Plaintiff’s
13 lodged proposed amended complaint, with exhibits, on the docket.

14 The Court now proceeds to screening the allegations of Plaintiff’s First Amended
15 Complaint.

16 **III.**
17 **SCREENING REQUIREMENT**

18 The Court is required to screen complaints brought by prisoners seeking relief against a
19 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
20 Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
21 legally “frivolous or malicious,” that “fail[] to state a claim on which relief may be granted,” or
22 that “seek[] monetary relief against a defendant who is immune from such relief.” 28 U.S.C. §
23 1915(e)(2)(B).

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

1 that each defendant personally participated in the deprivation of Plaintiff's rights. Jones v.
2 Williams, 297 F.3d 930, 934 (9th Cir. 2002).

3 Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings
4 liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d
5 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff's claims must be
6 facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer
7 that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss
8 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The "sheer possibility that a defendant
9 has acted unlawfully" is not sufficient, and "facts that are 'merely consistent with' a defendant's
10 liability" fall short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d
11 at 969.

12 IV.

13 COMPLAINT ALLEGATIONS

14 Plaintiff is a state inmate in the custody of the California Department of Corrections and
15 Rehabilitation ("CDCR") at the Corcoran State Prison ("CSP"), which is where the events at
16 issue here occurred. Plaintiff names Dr. Wang, a doctor at CSP, as Defendant.

17 Plaintiff alleges as follows: on September 11, 2015, at approximately 8:00 p.m. during
18 an adverse cell move, Plaintiff fell down the stairs and twisted his right ankle. Plaintiff attempted
19 to walk, but simultaneously fell. Plaintiff was placed in a wheelchair and escorted to the facility
20 medical clinic, and was seen by Nurse Serna.

21 Approximately a few hours later, Plaintiff was escorted via wheelchair to the institutional
22 hospital ("ACH") and seen by Nurse E. Crawford, to whom Plaintiff explained his ankle injury.
23 Plaintiff was also seen by unknown medical staff, and explained his ankle injury. Medical staff
24 ignored Plaintiff's ankle injury and symptoms, administered Ibuprofen to him for his ankle pain,
25 and discharged him to his cell.

26 The next day, at approximately 11:00 a.m. or 12:00 p.m., on September 12, 2015, after
27 Plaintiff repeatedly complained to custody staff about his severe pain to his ankle, Plaintiff
28 returned to ACH for a follow-up with Defendant Wang. Defendant Wang asked Plaintiff what

1 happened, and Plaintiff relied that he fell down the stairs while carrying personal property.
2 Plaintiff repeatedly complained about serious pain and swelling to his right ankle, and that he
3 could not sleep due to pain. Defendant Wang replied, “[t]here is nothing I can do for you besides
4 prescribe pain medication.” Plaintiff responded, “I cannot sleep because of my ankle pain and the
5 medication you gave me is not working.” Defendant Wang then told Plaintiff, “[g]rown man
6 [sic] handle pain.” Plaintiff was ordered to leave the exam room and was returned back to his
7 housing cell unit, where he endured severe pain, excessive swelling, and further loss of sleep.
8 Plaintiff complained to medical staff, but was denied treatment due to Defendant Wang’s orders.

9 On September 13, 2015, at approximately 11:00 a.m. or 12:00 p.m., Plaintiff was seen by
10 R.N. Sparlin at ACH and Plaintiff expressed his pain and requested treatment for his ankle.
11 Plaintiff asked to be sent to a hospital, and stated that he had not slept in over 2 days, and that the
12 Ibuprofen was not relieving his pain and suffering. Plaintiff was sent back to his housing unit.

13 On September 14, 2015, at approximately 11:00 a.m., Plaintiff had x-rays taken at ACH
14 and was seen by Defendant Wang after x-rays were completed. Plaintiff was subsequently
15 transferred to Dignity Health Mercy Hospital in Bakersfield, where Dr. Shultz indicated in his
16 report his opinion that Plaintiff had a comminuted fracture of the distal fibula.

17 On the same day, when Plaintiff was at Mercy Hospital for treatment, Plaintiff was asked
18 by Dr. Ahmed when the injury occurred. Plaintiff replied that it occurred on September 11,
19 2015.¹ Dr. Ahmed stated, “I wonder why it took so long to send you, because now the swelling
20 is so bad I can’t set the bone.” Plaintiff replied, “I don’t know.” Plaintiff was admitted to the
21 hospital and received treatment for the excessive swelling, and in the days that followed received
22 a cast for his ankle.

23 Plaintiff alleges an Eighth Amendment claim for deliberate indifference to serious
24 medical needs against Defendant Wang. Plaintiff seeks declaratory relief, a preliminary and
25 permanent injunction, compensatory and punitive damages, attorney’s fees, and costs.

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28 ¹ Plaintiff states September 11, 2016, but this appears to be a typographical error.

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V.

DISCUSSION

A. Eighth Amendment Claim

A prisoner's claim of inadequate medical care does not constitute cruel and unusual punishment in violation of the Eighth Amendment unless the mistreatment rises to the level of "deliberate indifference to serious medical needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two part test for deliberate indifference requires Plaintiff to show (1) "a 'serious medical need' by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain,' " and (2) "the defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096.

A defendant does not act in a deliberately indifferent manner unless the defendant "knows of and disregards an excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. 825, 837 (1994). "Deliberate indifference is a high legal standard," Simmons v. Navajo County Ariz., 609 F.3d 1011, 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004), and is shown where there was "a purposeful act or failure to respond to a prisoner's pain or possible medical need" and the indifference caused harm. Jett, 439 F.3d at 1096.

In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's civil rights have been abridged, "the indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-106).

"[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106; see also Anderson v. County of Kern, 45 F.3d 1310, 1316 (9th Cir. 1995). Even gross negligence is insufficient to establish deliberate indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

1 Additionally, a prisoner's mere disagreement with diagnosis or treatment does not support a
2 claim of deliberate indifference. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989).

3 Based on Plaintiff's allegations in the complaint, the Court finds that Plaintiff states a
4 cognizable claim for deliberate indifference to a serious medical need against Defendant Wang
5 in his individual capacity.

6 **B. Declaratory Relief**

7 As noted above, Plaintiff seeks declaratory relief. However, his claim for damages
8 necessarily entails a determination whether his rights were violated. Therefore, his separate
9 request for declaratory relief is subsumed by those claims. Rhodes v. Robinson, 408 F.3d 559,
10 566 n. 8 (9th Cir. 2005). Therefore, Plaintiff's claim for declaratory relief will be dismissed.

11 **C. Preliminary Injunction**

12 The Court notes that Plaintiff's prayer for relief seeks a preliminary and permanent
13 injunction ordering Defendant Wang to send Plaintiff to an off-site doctor to perform surgery on
14 Plaintiff's right ankle, and for physical therapy until recovery. Defendant Wang will be served
15 with this screening order and the amended complaint, and will be required to respond to
16 Plaintiff's request.

17 **VI.**

18 **CONCLUSION**

19 For the foregoing reasons, it is HEREBY ORDERED that:

- 20 1. Plaintiff's motion for leave to file an amended complaint is granted;
- 21 2. The Clerk of the Court is directed to file pages 3 through 45 of the motion to
22 amend as Plaintiff's first amended complaint on the docket;
- 23 3. This case proceeds on Plaintiff's first amended complaint against Defendant
24 Wang in his individual capacity for deliberate indifference to a serious medical need in violation
25 of the Eighth Amendment;
- 26 4. Defendant Wang shall respond to Plaintiff's first amended complaint within
27 **fourteen (14) days** of service of this order. Fed. R. Civ. P. 15(a)(3); and

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1 5. Defendant Wang shall respond to Plaintiff's request for a preliminary injunction
2 within **twenty-one (21) days** of service of this order. Plaintiff may file a reply to Defendant's
3 response within **seven (7) days** of service of the response.

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6 IT IS SO ORDERED.

7 Dated: November 30, 2017


UNITED STATES MAGISTRATE JUDGE