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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF CALIFORNIA
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9 THOMAS BODNAR,

10 Plaintiff,

11 v.

12 MADDAX, et al.,

13 Defendants.
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Case No. 1:17-cv-00845-AWI-EPG (PC)

FINDINGS AND RECOMMENDATIONS TO
DISMISS FEDERAL CLAIMS WITH
PREJUDICE FOR FAILURE TO STATE A
CLAIM AND DISMISS STATE CLAIMS
WITHOUT PREJUDICE FOR LACK OF
JURISDICTION

(ECF NO. 1)

OBJECTIONS DUE WITHIN TWENTY-ONE
(21) DAYS

17 Thomas Bodnar (“Plaintiff”) is a prisoner proceeding *pro se* and *in forma pauperis* with
18 this civil rights action pursuant filed to 42 U.S.C. § 1983. Plaintiff filed the Complaint
19 commencing this action on June 20, 2017, in the Central District of California. (ECF No. 1). It
20 was transferred to this District on June 22, 2017. (ECF No. 4).

21 Plaintiff alleges that multiple prison primary care physicians and medical professionals
22 failed to treat his pain and worsening symptoms related to a surgery in 2006. Although they
23 committed to refer him to an orthopedic surgeon, they repeatedly failed to do so. When
24 Plaintiff finally saw the orthopedic surgeon, they failed to allow him to see the orthopedic
25 surgeon again after various tests were taken.

26 The Court has reviewed the complaint and recommends that it be dismissed because it
27 fails to state a violation of the constitution because what Plaintiff describes amounts to
28 negligence, and not deliberate indifference as that term is used in the relevant case law.

1 Plaintiff has also asserted state law claims for professional negligence and medical malpractice.
2 The Court recommends declining to exercise jurisdiction over these claims in light of the
3 dismissal of Plaintiff's federal claims (Plaintiff may file a lawsuit in state court regarding these
4 state law claims if he so chooses).

5 **I. SCREENING REQUIREMENT**

6 The Court is required to screen complaints brought by prisoners seeking relief against a
7 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
8 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
9 legally "frivolous or malicious," that fail to state a claim upon which relief may be granted, or
10 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
11 § 1915A(b)(1), (2). As Plaintiff is proceeding *in forma pauperis* (ECF No. 7), the Court may
12 also screen the complaint under 28 U.S.C. § 1915. "Notwithstanding any filing fee, or any
13 portion 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 granted."
15 28 U.S.C. § 1915(e)(2)(B)(ii).

16 A complaint is required to contain "a short and plain statement of the claim showing
17 that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
18 not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere
19 conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
20 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Plaintiff must set forth "sufficient
21 factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id.
22 (quoting Twombly, 550 U.S. at 570). The mere possibility of misconduct falls short of meeting
23 this plausibility standard. Id. at 679. While a plaintiff's allegations are taken as true, courts
24 "are not required to indulge unwarranted inferences." Doe I v. Wal-Mart Stores, Inc., 572 F.3d
25 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). Additionally, a
26 plaintiff's legal conclusions are not accepted as true. Iqbal, 556 U.S. at 678.

27 Pleadings of *pro se* plaintiffs "must be held to less stringent standards than formal
28 pleadings drafted by lawyers." Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (holding that

1 *pro se* complaints should continue to be liberally construed after Iqbal).

2 **II. SUMMARY OF COMPLAINT**

3 Plaintiff alleges that, in 2006, he had surgery placing metal plates and screws in his left
4 shoulder. In 2009, Plaintiff was incarcerated at Ironwood State Prison (“ISP”). In 2012,
5 Plaintiff began to experience sharp pain inside his left shoulder and numbness in digits 4 and 5
6 of his left hand. Plaintiff’s Primary Care Physician (“PCP”) ordered x-rays. After seeing them,
7 the PCP put in a Request for Services (“RFS”) for Plaintiff to see an orthopedic surgeon.
8 Plaintiff went to Riverside Regional Medical Center, and the orthopedic surgeon ordered tests
9 to be done and then asked for Plaintiff to return.

10 However, Plaintiff was then transferred to Valley State Prison (“VSP”). Defendant Dr.
11 Maddax was Plaintiff’s first PCP upon arrival at VSP. Plaintiff told Maddax about his shoulder
12 injury. Dr. Maddax stated she would put in an RFS for Plaintiff to see an orthopedic surgeon
13 close to VSP.

14 Plaintiff waited 90 days and then asked about the referral. It took another 3 weeks for
15 Plaintiff to see Dr. Maddax. When he did, Dr. Maddax said she had not done the RFS, but now
16 would do so. Dr. Maddax did not perform any tests herself or try any treatment, despite
17 Plaintiff explaining that the pain inside his left shoulder was getting more frequent, as well as
18 the numbness and tingling in digits 4 and 5 of his left hand.

19 Again, Plaintiff waited and then put in a medical request. After several weeks, Plaintiff
20 saw Dr. Maddax. Again, she had not issued the RFS. This scenario happened several times.
21 Dr. Maddax would say that she would issue an RFS for an orthopedic surgeon and then failed
22 to do it. Dr. Maddax never provided any care (although she kept Plaintiff’s pain medication
23 where it was before 2012).

24 After approximately a year, Defendant Dr. Johnson became Plaintiff’s PCP. Plaintiff
25 explained the medical complaints, the recommendation to see the orthopedic surgeon in order
26 to determine the cause, and how Dr. Maddax kept saying she would do an RFS. Dr. Johnson
27 ordered x-rays. Once they came back, Dr. Johnson stated she would do an RFS to an
28 orthopedic surgeon.

1 Plaintiff again waited over 90 days, then put in a medical request. Weeks later Plaintiff
2 saw Dr. Johnson, who said that she had not done the RFS but would put it in. However, she
3 again failed to do an RFS. This was a repeated scenario, and lasted through 2014. Dr. Johnson
4 only did x-rays. Dr. Johnson kept the medication at the same levels, despite increasing pain.

5 At some point, Plaintiff was able to see an orthopedist, after getting a referral from
6 another PCP who is not named as a defendant. The orthopedist said he would order a diabetes
7 test and neurology tests of Plaintiff's left shoulder and hand. If the tests come back negative,
8 then the doctor would proceed with other tests or possible exploratory surgery. The
9 neurological and diabetes tests were done and both came back negative.

10 Plaintiff was then assigned to PCP C. Sisodia. Defendant Physician Assistant C.
11 Sisodia went over the x-rays and the test results. Plaintiff told PA Sisodia that the orthopedic
12 surgeon wanted to see Plaintiff after the tests were done. PA Sisodia said she would put in an
13 RFS to see the orthopedic surgeon. Plaintiff waited over 90 days, put in a medical request, and
14 went back to see PA Sisodia. PA Sisodia said she had never put in the RFS, but would do so.
15 This happened several times. PA Sisodia never did anything about Plaintiff's complaints. PA
16 Sisodia only kept the pain medication at the same level as it was before Plaintiff's complaints
17 of increasing left shoulder pain and numbness in digits 4 and 5 of his left hand.

18 When an inmate puts in a medical request form, he first sees the registered nurse
19 ("RN"), who reviews the medical issues and makes a decision whether to refer the inmate to a
20 PCP. Plaintiff put in several medical requests related to his shoulder pain and the numbness in
21 his hand, but both Wall and Sanchez failed to refer Plaintiff to his PCP. This resulted in even
22 further delays.

23 **III. ANALYSIS OF PLAINTIFF'S CLAIMS**

24 **A. Legal Standards**

25 The Civil Rights Act under which this action was filed provides:

26 Every person who, under color of any statute, ordinance,
27 regulation, custom, or usage, of any State or Territory or the
28 District of Columbia, subjects, or causes to be subjected, any
citizen of the United States or other person within the jurisdiction
thereof to the deprivation of any rights, privileges, or immunities

1 secured by the Constitution and laws, shall be liable to the party
2 injured in an action at law, suit in equity, or other proper
 proceeding for redress....

3 42 U.S.C. § 1983. “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely
4 provides ‘a method for vindicating federal rights elsewhere conferred.’” Graham v. Connor,
5 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see
6 also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los
7 Angeles, 697 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir.
8 2012); Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

9 To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted
10 under color of state law, and (2) the defendant deprived him of rights secured by the
11 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
12 2006); see also Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing
13 “under color of state law”). A person deprives another of a constitutional right, “within the
14 meaning of § 1983, ‘if he does an affirmative act, participates in another's affirmative act, or
15 omits to perform an act which he is legally required to do that causes the deprivation of which
16 complaint is made.’” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th
17 Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite
18 causal connection may be established when an official sets in motion a ‘series of acts by others
19 which the actor knows or reasonably should know would cause others to inflict’ constitutional
20 harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of
21 causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.”
22 Arnold v. Int'l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City
23 of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

24 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
25 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d
26 1091, 1096 (9th Cir. 2006), (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This
27 requires a plaintiff to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat
28 a prisoner’s condition could result in further significant injury or the unnecessary and wanton

1 infliction of pain,” and (2) that “the defendant's response to the need was deliberately
2 indifferent.” Id. (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992) (citation
3 and internal quotations marks omitted), overruled on other grounds WMX Technologies v.
4 Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc)).

5 Deliberate indifference is established only where the defendant *subjectively* “knows of
6 and disregards an *excessive risk* to inmate health and safety.” Toguchi v. Chung, 391 F.3d
7 1051, 1057 (9th Cir. 2004) (emphasis added) (citation and internal quotation marks omitted).

8 Deliberate indifference can be established “by showing (a) a purposeful act or failure to
9 respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.”
10 Jett, 439 F.3d at 1096 (citation omitted). Civil recklessness (failure “to act in the face of an
11 unjustifiably high risk of harm that is either known or so obvious that it should be known”) is
12 insufficient to establish an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825,
13 836-37 & n.5 (1994) (citations omitted).

14 A difference of opinion between an inmate and prison medical personnel—or between
15 medical professionals—regarding appropriate medical diagnosis and treatment is not enough to
16 establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);
17 Toguchi, 391 F.3d at 1058. Additionally, “a complaint that a physician has been negligent in
18 diagnosing or treating a medical condition does not state a valid claim of medical mistreatment
19 under the Eighth Amendment. Medical malpractice does not become a constitutional violation
20 merely because the victim is a prisoner.” Estelle, 429 U.S. at 106.

21 **B. Application to Plaintiff’s Complaint**

22 Plaintiff’s allegations do not state a claim for violation of the Eighth Amendment’s
23 cruel and unusual punishment clause based on deliberate indifference to serious medical needs
24 under these legal standards.

25 The Court is sympathetic to Plaintiff’s medical situation. Plaintiff has described a
26 pattern of incompetence from the medical professionals at his prison. He describes how they
27 repeatedly failed to follow up on referrals that they promised to provide. Moreover, they did
28 not undertake to solve his medical issues in any way, short of ordering x-rays and keeping

1 Plaintiff on pain medication. Plaintiff has alleged that he experiences pain and worsening
2 symptoms from his surgery many years ago.

3 However, these allegations do not state a claim for violation of the Constitution for two
4 reasons. First, Plaintiff's facts set forth medical negligence or malpractice, but not deliberate
5 indifference to serious medical needs. There are no allegations that a medical professional was
6 aware of a treatment that would help his needs and yet purposefully failed to provide it.
7 Instead, Defendants Maddox, Johnson, and Sisodia apparently negligently failed to follow
8 through with the referrals they committed to do. While Plaintiff did not get referrals these
9 defendants, Plaintiff was still receiving treatment in the form of pain medication.

10 As to Defendants Wall and Sanchez, Plaintiff has not alleged any denial of care that
11 occurred because they did not allow Plaintiff to see his PCP. While Plaintiff alleges that the
12 actions of Defendants Wall and Sanchez led to further delays, it does not appear that these
13 delays had any impact on Plaintiff's treatment. After seeing his PCPs, it does not appear that
14 Plaintiff's treatment changed at all. Accordingly, it does not appear that Defendants Wall and
15 Sanchez were deliberately indifferent to Plaintiff's serious medical needs by not referring
16 Plaintiff to a PCP when he asked to see one.

17 Second, Plaintiff has not alleged a treatment that the defendants have failed to provide.
18 Even the orthopedic surgeon does not yet have a diagnosis or proposed treatment. After several
19 years of waiting, when Plaintiff saw the orthopedic surgeon, the surgeon suggested tests to
20 attempt to learn what was wrong. Those tests were negative, i.e., did not indicate the source of
21 the problem. The orthopedic surgeon said that if those tests were negative, the surgeon may try
22 other tests or exploratory surgery. These are attempts to diagnose the issue. They are not
23 treatments. It is not known yet what is wrong with Plaintiff's hand or what could solve the
24 problem, if anything. While the Court understands Plaintiff's legitimate desire to keep getting
25 tests and diagnostics to find a solution to his painful symptoms, his allegations do not show that
26 medical professionals are withholding a treatment that might help Plaintiff. Instead, it seems
27 that the medical professionals do not know how to treat Plaintiff and are at most being
28 negligent in not exploring tests that *might* reveal a solution. Again, while such actions might

1 constitute medical malpractice, they fall short of the requirement for a constitutional claim for
2 cruel and unusual punishment under the Eighth Amendment under the legal standards described
3 above.

4 **C. State Law Claims**

5 Plaintiff has also asserted state law claims for professional negligence and medical
6 malpractice. Because Plaintiff has not asserted any proper federal claims, the Court should
7 decline to adjudicate the state law claims. 28 U.S.C. § 1367(a); Herman Family Revocable
8 Trust v. Teddy Bear, 254 F.3d 802, 805 (9th Cir. 2001); see also Gini v. Las Vegas Metro.
9 Police Dep't, 40 F.3d 1041, 1046 (9th Cir. 1994). “When...the court dismisses the federal claim
10 leaving only state claims for resolution, the court should decline jurisdiction over the state
11 claims and dismiss them without prejudice.” Les Shockley Racing v. National Hot Rod Ass'n,
12 884 F.2d 504, 509 (9th Cir. 1989). Plaintiff may choose to file a state lawsuit asserting these
13 claims in state court.

14 **IV. CONCLUSION**

15 The Court finds that Plaintiff’s Complaint (ECF No. 1) fails to state any cognizable
16 federal claims upon which relief may be granted under § 1983. The remaining claims are state
17 law claims, which should be raised in a state lawsuit.

18 The Court does not recommend providing leave to amend. This is not a situation where
19 more facts could state further claims. Plaintiff’s complaint is very detailed and explains what
20 happened very clearly. Based on the facts alleged, the Court finds that Plaintiff cannot
21 establish a violation of the Constitution for the reasons described above. Further amendment
22 would be futile.

23 Accordingly, this Court recommends that the assigned district judge dismiss all federal
24 claims with prejudice and dismiss the state law claims without prejudice.¹

25 These findings and recommendations will be submitted to the United States district
26 judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
27

28 ¹ Under applicable law, the Court would construe a dismissal for the above described reasons as
constituting a “strike” under 28 U.S.C. § 1915.

1 twenty-one (21) days after being served with these findings and recommendations, Plaintiff
2 may file written objections with the Court. The document should be captioned “Objections to
3 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file
4 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
5 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
6 (9th Cir. 1991)).

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8 IT IS SO ORDERED.

9 Dated: **March 28, 2018**

/s/ Eric P. Gray
10 UNITED STATES MAGISTRATE JUDGE
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