

1 1915(e)(2)(B)(ii).

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

9 To survive screening, Plaintiff’s claims must be facially plausible, which requires
10 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable
11 for the misconduct alleged. Iqbal, 556 U.S. at 678 (quotation marks omitted); Moss v. U.S.
12 Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted
13 unlawfully is not sufficient, and mere consistency with liability falls short of satisfying the
14 plausibility standard. Iqbal, 556 U.S. at 678 (quotation marks omitted); Moss, 572 F.3d at 969.

15 **II. Plaintiff’s Allegations**

16 Plaintiff is currently housed at the California Substance Abuse Treatment Facility
17 (“CSATF”) in Corcoran, California, where the events in the complaint are alleged to have
18 occurred. Plaintiff names Dr. Winfred M. Kokor, a physician at CSATF, as the sole defendant.

19 Plaintiff alleges that he suffers from muscle cramps and pain. He has Type II diabetes,
20 hypertension, vision impairment and muscle weakness behind both legs. Dr. Kokor has been his
21 primary care physician from about September 3, 2011 to August 2017, and is aware that Plaintiff
22 has hypertension, diabetes and suffers from muscle cramps and pain.

23 Plaintiff informed Dr. Kokor and Nurse Powell that he was having pain and muscle
24 cramps behind both legs during chronic care visits in September 2011 through April 2017. Dr.
25 Kokor reportedly took no action to ensure that Plaintiff received necessary medical care. Plaintiff
26 reportedly had been complaining to Dr. Kokor about pain in his legs and his inability walk from
27 September 3, 2011 through April 10, 2017.

28 On September 1, 2015, Plaintiff was seen by medical staff about his inability to walk.

1 Plaintiff alleges that Dr. Kokor was aware that he had been having pain and cramping in
2 both his legs since January 2012, but Dr. Kokor ignored his complaints and caused his condition
3 to worsen. Dr. Kokor's alleged failure to treat Plaintiff's complaints of pain and muscle cramping
4 caused him unstable walking (less than 100 feet).

5 In 2017, Plaintiff initiated an ADA Accommodation Appeal requesting a wheelchair. On
6 June 16, 2017, Plaintiff received the wheelchair. Plaintiff alleges that Dr. Kokor violated
7 Plaintiff's Eighth Amendment rights by causing cruel and unusual punishment with lack of
8 medical care and delaying his medical care.

9 Dr. Kokor diagnosed Plaintiff with myopathy, and indicated that Plaintiff's muscled pain
10 was possibly due to statin side effect. On June 1, 2017, Dr. Kokor discontinued Plaintiff's
11 Gabapentin because it was not relieving pain.

12 Plaintiff informed his psychologist that he was depressed for being in a wheelchair.

13 **III. Discussion**

14 A prisoner's claim of inadequate medical care does not constitute cruel and unusual
15 punishment in violation of the Eighth Amendment unless the mistreatment rises to the level of
16 "deliberate indifference to serious medical needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
17 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two part test for deliberate
18 indifference requires Plaintiff to show (1) "a 'serious medical need' by demonstrating that failure
19 to treat a prisoner's condition could result in further significant injury or the 'unnecessary and
20 wanton infliction of pain,' " and (2) "the defendant's response to the need was deliberately
21 indifferent." Jett, 439 F.3d at 1096.

22 A defendant does not act in a deliberately indifferent manner unless the defendant "knows
23 of and disregards an excessive risk to inmate health or safety." Farmer v. Brennan, 511 U.S. 825,
24 837 (1994). "Deliberate indifference is a high legal standard," Simmons v. Navajo Cty. Ariz., 609
25 F.3d 1011, 1019 (9th Cir. 2010); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004), and is
26 shown where there was "a purposeful act or failure to respond to a prisoner's pain or possible
27 medical need" and the indifference caused harm. Jett, 439 F.3d at 1096.

28 In applying this standard, the Ninth Circuit has held that before it can be said that a

1 prisoner’s civil rights have been abridged, “the indifference to his medical needs must be
2 substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause
3 of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle,
4 429 U.S. at 105–106). “[A] complaint that a physician has been negligent in diagnosing or
5 treating a medical condition does not state a valid claim of medical mistreatment under the Eighth
6 Amendment. Medical malpractice does not become a constitutional violation merely because the
7 victim is a prisoner.” Estelle, 429 U.S. at 106; see also Anderson v. County of Kern, 45 F.3d
8 1310, 1316 (9th Cir. 1995). Even gross negligence is insufficient to establish deliberate
9 indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir.
10 1990).

11 Further, a “difference of opinion between a physician and the prisoner—or between
12 medical professionals—concerning what medical care is appropriate does not amount to
13 deliberate indifference.” Snow v. McDaniel, 681 F.3d 978, 987 (9th Cir. 2012) (citing Sanchez v.
14 Vild, 891 F.2d 240, 242 (9th Cir. 1989)), overruled in part on other grounds, Peralta v. Dillard,
15 744 F.3d 1076, 1082–83 (9th Cir. 2014); Wilhelm v. Rotman, 680 F.3d 1113, 1122–23 (9th Cir.
16 2012) (citing Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986)). Rather, Plaintiff “must
17 show that the course of treatment the doctors chose was medically unacceptable under the
18 circumstances and that the defendants chose this course in conscious disregard of an excessive
19 risk to [his] health.” Snow, 681 F.3d at 988 (citing Jackson, 90 F.3d at 332) (internal quotation
20 marks omitted).

21 Here, Plaintiff’s allegations are not sufficient to state a cognizable claim for deliberate
22 indifference to serious medical needs against Dr. Kokor. Plaintiff’s first amended complaint
23 omits a majority of the factual allegations included in his original complaint. However, Plaintiff
24 cannot simply omit prior factual allegations in an attempt to state a claim. See, e.g., Baker v.
25 German, No. 1:16-cv-01873-AWI-SAB PC, 2017 WL 1549953, at *2 (E.D. Cal. May 1, 2017);
26 Norwood v. Diaz, No. 1:13-cv-01143-BAM PC, 2015 WL 418231, at *6 (E.D. Cal. Jan. 30, 2015)
27 (“Plaintiff may not merely omit factual allegations in order to state a claim for relief.”).

28 Furthermore, according to the exhibits attached to Plaintiff’s first amended complaint,

1 Dr. Kokor provided treatment to Plaintiff on April 10, 2017. At that time, Dr. Kokor determined
2 that Plaintiff's myopathy was possibly due to statin side effects and therefore discontinued
3 Plaintiff's statins. Dr. Kokor also ordered a trial of gabapentin for pain because ns aids were not
4 helpful. Dr. Kokor also ordered labs and a follow-up appointment. (ECF No. 11 at p. 46.)

5 Plaintiff was temporarily approved for and received a wheelchair on June 16, 2017. (ECF
6 No. 11 at pp. 28, 30.) Dr. Kokor ordered a wheelchair for Plaintiff on June 19, 2017. (Id. at p.
7 26.) Plaintiff also saw Dr. Kokor on June 19, 2017. At that time, Plaintiff's creatine levels were
8 discussed and he would continue to be monitored. There was no reported muscle damage. (Id. at
9 p. 21.) In June and August 2017, repeated labs to address Plaintiff's creatine levels were
10 collected and reviewed with his doctor on October 19, 2017. Plaintiff was not in any acute
11 distress and he presented with a steady gait and 5/5 strength in all extremities. However, due to
12 complaints of muscle cramps and mildly increased creatine kinase levels, additional diagnostic
13 testing was ordered, along with a lower extremity ultrasound. (Id. at p. 17.)

14 There is no indication from the factual allegations that Dr. Kokor failed to respond to
15 Plaintiff's complaints. Plaintiff's conclusory allegations to the contrary are not sufficient.
16 Moreover, any disagreement between Plaintiff and Dr. Kokor regarding the appropriate course of
17 treatment for his condition does not amount to a claim of deliberate indifference in violation of
18 the Eighth Amendment.

19 **IV. Conclusion and Recommendation**

20 Plaintiff's complaint fails to state a cognizable Eighth Amendment claim for relief.
21 Despite being provided with the relevant pleading and legal standards, along with an opportunity
22 to amend, Plaintiff has been unable to cure the deficiencies in his complaint. Further leave to
23 amend is therefore not warranted. Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

24 Accordingly, for the reasons explained above, the Court HEREBY RECOMMENDS that
25 this action be dismissed, with prejudice, for the failure to state a claim upon which relief may be
26 granted.

27 These Findings and Recommendation will be submitted to the United States District Judge
28 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen**

1 (14) days after being served with these Findings and Recommendation, Plaintiff may file written
2 objections with the Court. The document should be captioned “Objections to Magistrate Judge’s
3 Findings and Recommendation.” Plaintiff is advised that failure to file objections within the
4 specified time may result in the waiver of the “right to challenge the magistrate’s factual
5 findings” on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v.
6 Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

7
8 IT IS SO ORDERED.

9 Dated: May 30, 2018

/s/ Barbara A. McAuliffe
10 UNITED STATES MAGISTRATE JUDGE