

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LORENZO CRAMER,

No. 2:14-cv-1472-TLN-EFB P

Plaintiff,

V.

EVALYN HOROWITZ, et al.,

ORDER GRANTING IFF AND SCREENING  
COMPLAINT AND RECOMMENDATION  
TO DENY PLAINTIFF'S MOTION FOR A  
PRELIMINARY INJUNCTION

## Defendants.

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. In addition to filing a complaint, he has filed an application to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a motion for a preliminary injunction.

## **I. Request to Proceed In Forma Pauperis**

Plaintiff's application makes the showing required by 28 U.S.C. § 1915(a)(1) and (2). Accordingly, by separate order, the court directs the agency having custody of plaintiff to collect and forward the appropriate monthly payments for the filing fee as set forth in 28 U.S.C. § 1915(b)(1) and (2).

## II. Screening Requirement and Standards

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion

1 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which  
2 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such  
3 relief.” *Id.* § 1915A(b).

4 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)  
5 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and  
6 plain statement of the claim showing that the pleader is entitled to relief, in order to give the  
7 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*  
8 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).  
9 While the complaint must comply with the “short and plain statement” requirements of Rule 8,  
10 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 556  
11 U.S. 662, 679 (2009).

12 To avoid dismissal for failure to state a claim a complaint must contain more than “naked  
13 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of  
14 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of  
15 a cause of action, supported by mere conclusory statements do not suffice.” *Iqbal*, 556 U.S. at  
16 678.

17 Furthermore, a claim upon which the court can grant relief must have facial plausibility.  
18 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual  
19 content that allows the court to draw the reasonable inference that the defendant is liable for the  
20 misconduct alleged.” *Iqbal*, 556 U.S. at 678. When considering whether a complaint states a  
21 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*  
22 *Pardus*, 551 U.S. 89 (2007), and construe the complaint in the light most favorable to the  
23 plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

24 **III. Screening Order**

25 The complaint names Dr. Horowitz, Dr. Smith, Dr. Hawkins, Warden Knipp, and Federal  
26 Receiver Clark Kelso as defendants. For the limited purposes of § 1915A screening and liberally  
27 construed, the complaint states a potentially cognizable Eighth Amendment deliberate  
28 indifference to medical needs claim against defendant Horowitz, plaintiff’s primary care

1 physician. *See* ECF No. 1 (alleging that defendant Horowitz was dismissive of plaintiff’s  
2 repeated complaints of pain following an injury in June 2013, that she reduced and ultimately  
3 stopped plaintiff’s pain medication based on only “sparse” information suggesting that plaintiff  
4 was selling it, and that she really just wanted to limit all inmates to the “basic pain meds”). As  
5 discussed below, the complaint fails to state a claim against any of the other named defendants.

6 To state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal  
7 constitutional or statutory right; and (2) that the violation was committed by a person acting under  
8 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d  
9 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the  
10 facts establish the defendant’s personal involvement in the constitutional deprivation or a causal  
11 connection between the defendant’s wrongful conduct and the alleged constitutional deprivation.  
12 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44  
13 (9th Cir. 1978). That is, plaintiff may not sue any official on the theory that the official is liable  
14 for the unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 556 U.S. 662, 679  
15 (2009). In sum, plaintiff must identify the particular person or persons who violated his rights.  
16 He must also plead facts showing how that particular person was involved in the alleged  
17 violation.

18 To succeed on an Eighth Amendment claim predicated on the denial of medical care, a  
19 plaintiff must establish that he had a serious medical need and that the defendant’s response to  
20 that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *see also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A serious medical need exists if the failure to  
21 treat the condition could result in further significant injury or the unnecessary and wanton  
22 infliction of pain. *Jett*, 439 F.3d at 1096. Deliberate indifference may be shown by the denial,  
23 delay or intentional interference with medical treatment or by the way in which medical care is  
24 provided. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

25 To act with deliberate indifference, a prison official must both be aware of facts from  
26 which the inference could be drawn that a substantial risk of serious harm exists, and he must also  
27 draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a defendant is liable if  
28

1 he knows that plaintiff faces “a substantial risk of serious harm and disregards that risk by failing  
2 to take reasonable measures to abate it.” *Id.* at 847. A physician need not fail to treat an inmate  
3 altogether in order to violate that inmate’s Eighth Amendment rights. *Ortiz v. City of Imperial*,  
4 884 F.2d 1312, 1314 (9th Cir. 1989). A failure to competently treat a serious medical condition,  
5 even if some treatment is prescribed, may constitute deliberate indifference in a particular case.

6 *Id.*

7 It is important to differentiate common law negligence claims of malpractice from claims  
8 predicated on violations of the Eighth Amendment’s prohibition of cruel and unusual punishment.  
9 In asserting the latter, “[m]ere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not  
10 support this cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.  
11 1980) (citing *Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976); *see also Toguchi v. Chung*, 391  
12 F.3d 1051, 1057 (9th Cir. 2004)).

13 Plaintiff fails to state a claim against defendants Hawkins, Knipp, or Kelso because he  
14 does not include any factual allegations linking them to a violation of a federal constitutional or  
15 statutory right. The alleged supervisory roles of Knipp and Kelso are not a proper basis for  
16 liability. Plaintiff’s naming of defendants Knipp and Kelso simply because their positions are “all  
17 the way to the top,” *see* ECF No. 1 at 7, falls far short of what is required to demonstrate their  
18 involvement or personal participation in any constitutional deprivation.

19 Plaintiff also fails to state a claim against defendant Smith, the Chief Physician and  
20 Surgeon at Mule Creek State Prison. Plaintiff claims that Smith was deliberately indifferent to  
21 his medical needs because in responding to plaintiff’s administrative appeals complaining of  
22 defendant Horowitz’s conduct, Smith “sided with his staff” and their choice not to provide  
23 diagnostic tests to determine the extent of plaintiff’s injury. Unlike defendant Horowitz,  
24 defendant Smith was not plaintiff’s primary care physician. Smith’s involvement in plaintiff’s  
25 care was limited to his review of plaintiff’s administrative appeals. Smith’s opinion that his staff  
26 had provided plaintiff with proper medical care does not amount to deliberate indifference to  
27 plaintiff’s medical needs. Moreover, there are no constitutional requirements regarding how a  
28 grievance system is operated. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (holding

1 that prisoner's claimed loss of a liberty interest in the processing of his appeals does not violate  
2 due process because prisoners lack a separate constitutional entitlement to a specific prison  
3 grievance system). Thus, plaintiff may not impose liability on defendant Smith simply because  
4 he played a role in processing plaintiff's inmate appeals.

5 Accordingly, plaintiff may either proceed only on the Eighth Amendment claim against  
6 defendant Horowitz or he may amend his complaint to attempt to cure the deficiencies in his  
7 claims against the other named defendants. Plaintiff is not obligated to amend his complaint.

8 Any amended complaint must cure the deficiencies identified above and also adhere to the  
9 following requirements:

10 Any amended complaint must identify as a defendant only persons who personally  
11 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*  
12 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a  
13 constitutional right if he does an act, participates in another's act or omits to perform an act he is  
14 legally required to do that causes the alleged deprivation).

15 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).

16 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. *George*  
17 *v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007).

18 Any amended complaint must be written or typed so that it so that it is complete in itself  
19 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended  
20 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
21 earlier filed complaint no longer serves any function in the case. See *Forsyth v. Humana*, 114  
22 F.3d 1467, 1474 (9th Cir. 1997) (the "amended complaint supersedes the original, the latter  
23 being treated thereafter as non-existent.") (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.  
24 1967)).

25 The court cautions plaintiff that failure to comply with the Federal Rules of Civil  
26 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.  
27 See Local Rule 110.

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1      **IV. Motion for Preliminary Injunction**

2      Plaintiff claims that since he was injured during a fight on June 13, 2013, he has  
3      experienced “excruciating” pain in his shoulders and neck. ECF No. 2 at 2. He states that on  
4      October 21, 2013, a radiologist determined that he “suffered severe degenerative changes in the  
5      cervical region on the spine.” *Id.* He moves for a preliminary injunction to prevent defendants  
6      from interfering with his ability to receive “medical treatment in the form of adequate diagnostic  
7      procedures, neck-stability equipment, and surgery (if necessary).” *Id.* at 3. He claims he will  
8      suffer irreparable harm “if the injunction is not granted” because there will be “an increase in pain  
9      and further injury.” *Id.*

10     A preliminary injunction will not issue unless necessary to prevent threatened injury that  
11     would impair the courts ability to grant effective relief in a pending action. *Sierra On-Line, Inc.*  
12     *v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984); *Gon v. First State Ins. Co.*, 871  
13     F.2d 863 (9th Cir. 1989). A preliminary injunction represents the exercise of a far reaching  
14     power not to be indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter, Inc.*,  
15     326 F.2d 141, 143 (9th Cir. 1964). In order to be entitled to preliminary injunctive relief, a party  
16     must demonstrate “that he is likely to succeed on the merits, that he is likely to suffer irreparable  
17     harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an  
18     injunction is in the public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir.  
19     2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008)). The Ninth Circuit has  
20     also held that the “sliding scale” approach it applies to preliminary injunctions—that is, balancing  
21     the elements of the preliminary injunction test, so that a stronger showing of one element may  
22     offset a weaker showing of another—survives *Winter* and continues to be valid. *Alliance for Wild  
23     Rockies v. Cottrell*, 622 F.3d 1045, 1050 (9th Cir. 2010). “In other words, ‘serious questions  
24     going to the merits,’ and a hardship balance that tips sharply toward the plaintiff can support  
25     issuance of an injunction, assuming the other two elements of the *Winter* test are also met.” *Id.*  
26     In cases brought by prisoners involving conditions of confinement, any preliminary injunction  
27     “must be narrowly drawn, extend no further than necessary to correct the harm the court finds  
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1 requires preliminary relief, and be the least intrusive means necessary to correct the harm.” 18  
2 U.S.C. § 3626(a)(2).

3 Plaintiff fails to show that he is likely to succeed on the merits. This action is only at the  
4 pleading stage and no defendant has been served. The only claim found to be cognizable is the  
5 Eighth Amendment claim against defendant Horowitz, and that determination is made on  
6 allegations only. There is no evidence presented showing that plaintiff is likely to succeed on the  
7 merits of that claim. Nor is there any evidence that plaintiff is likely to suffer irreparable harm in  
8 the absence of preliminary relief. While plaintiff claims his pain will increase and he will be  
9 further injured, his statement is not sworn and apart from his general belief in this regard, there is  
10 no evidence that he will be irreparably injured absent preliminary relief. There is no evidence  
11 suggesting that plaintiff is in need of diagnostic testing, a neck stability device, or surgery. Nor is  
12 there any evidence that such medical procedures would alleviate plaintiff’s alleged pain.

13 During the course of this action, plaintiff will have the opportunity to conduct discovery  
14 and present evidence. Presently, however, plaintiff fails to make a clear showing that he is  
15 entitled to the extraordinary remedy of a preliminary injunction. Plaintiff also has not shown that  
16 the balance of equities tips in his favor or that the injunction he seeks is in the public interest.  
17 Therefore, the court recommends that plaintiff’s motion for a preliminary injunction be denied.

18 **V. Summary of Order and Recommendation**

19 Accordingly, IT IS HEREBY ORDERED that:

- 20 1. Plaintiff’s request to proceed in forma pauperis (ECF No. 3) is granted.
- 21 2. Plaintiff shall pay the statutory filing fee of \$350. All payments shall be collected  
22 in accordance with the notice to the CDCR filed concurrently herewith.
- 23 3. The allegations in the pleading are sufficient at least to state a potentially  
24 cognizable Eighth Amendment deliberate indifference to medical needs claim  
25 against defendant Horowitz. All remaining defendants are dismissed with leave to  
26 amend within 30 days of service of this order. Plaintiff is not obligated to amend  
27 his complaint.

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1 4. With this order the Clerk of the Court shall provide to plaintiff a blank summons, a  
2 copy of the June 6, 2014 complaint (ECF No. 1), one USM-285 form and  
3 instructions for service of process on defendant Horowitz. Within 30 days of  
4 service of this order plaintiff may return the attached Notice of Submission of  
5 Documents with the completed summons, the completed USM-285 form, and two  
6 copies of the endorsed complaint. The court will transmit them to the United  
7 States Marshal for service of process pursuant to Rule 4 of the Federal Rules of  
8 Civil Procedure. Defendant Horowitz will be required to respond to plaintiff's  
9 allegations within the deadlines stated in Rule 12(a)(1) of the Federal Rules of  
10 Civil Procedure.

11 5. Failure to comply with this order may result in a recommendation that this action  
12 be dismissed.

13           Further, IT IS HEREBY RECOMMENDED that plaintiff's motion for a preliminary  
14 injunction (ECF No. 2) be denied.

15 These findings and recommendations are submitted to the United States District Judge  
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
17 after being served with these findings and recommendations, any party may file written  
18 objections with the court and serve a copy on all parties. Such a document should be captioned  
19 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
20 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
21 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

22 | Dated: February 9, 2015.

  
EDMUND F. BRENNAN

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

10 LORENZO CRAMER,  
11 Plaintiff,  
12 v.  
13 EVALYN HOROWITZ, et al.,  
14 Defendants.  
No. 2:14-cv-1472-TLN-EFB P  
NOTICE OF SUBMISSION OF  
DOCUMENTS

16 Plaintiff hereby submits the following documents in compliance with the court's  
17 Screening Order:

19                   1                   completed summons form  
20                   1                   completed forms USM-285  
21                   2                   copies of the endorsed June 6, 2014 complaint

22 || Dated: