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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MORRIS MESTER,
Plaintiff,
v.
N. MALAKKLA, et al.,
Defendants.

No. 2:17-cv-1781 AC P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in an action brought under 42 U.S.C. § 1983. On August 30, 2017, the court dismissed plaintiff’s complaint with leave to amend.¹ ECF No. 6 at 7. On September 6, 2017, plaintiff filed a “supplement to complaint” (“supplement”). ECF No. 9. The supplement, four pages in length, did not amend the complaint. Instead, it referred back to the complaint and simply reiterated its general allegations related to defendants’ treatment of plaintiff’s degenerative hip condition and related pain. See generally id. For the reasons stated below, plaintiff will be given a second opportunity to file a first amended complaint.

I. SCREENING REQUIREMENT

The court is required to screen complaints brought by prisoners seeking relief against a

¹ The order was later vacated in part with respect to plaintiff’s preliminary injunction request and the assignment of a district judge to the case. See ECF No. 13.

1 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
2 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
3 “frivolous, malicious, or fail[] to state a claim upon which relief may be granted,” or that “seek[]
4 monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

5 A claim “is [legally] frivolous where it lacks an arguable basis either in law or in fact.”
6 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
7 Cir. 1984). “[A] judge may dismiss . . . claims which are ‘based on indisputably meritless legal
8 theories’ or whose ‘factual contentions are clearly baseless.’” Jackson v. Arizona, 885 F.2d 639,
9 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as
10 stated in Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000). The critical inquiry is whether a
11 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis.
12 Franklin, 745 F.2d at 1227-28 (citations omitted).

13 II. PLEADING STANDARD

14 A. Generally

15 Section 1983 “provides a cause of action for the deprivation of any rights, privileges, or
16 immunities secured by the Constitution and laws of the United States.” Wilder v. Virginia Hosp.
17 Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not itself a source
18 of substantive rights, but merely provides a method for vindicating federal rights conferred
19 elsewhere. Graham v. Connor, 490 U.S. 386, 393-94 (1989).

20 To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a
21 right secured by the Constitution or laws of the United States was violated and (2) that the alleged
22 violation was committed by a person acting under the color of state law. See West v. Atkins, 487
23 U.S. 42, 48 (1988); Ketchum v. Alameda Cty., 811 F.2d 1243, 1245 (9th Cir. 1987).

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)). Plaintiff must set forth “sufficient factual

1 matter, accepted as true, to state a claim to relief that is plausible on its face.” Id. Facial
2 plausibility demands more than the mere possibility that a defendant committed misconduct and,
3 while factual allegations are accepted as true, legal conclusions are not. Id. at 677-78.

4 B. Linkage Requirement

5 Under Section 1983, a plaintiff bringing an individual capacity claim must demonstrate
6 that each defendant personally participated in the deprivation of his rights. See Jones v.
7 Williams, 297 F.3d 930, 934 (9th Cir. 2002). Plaintiff must plead sufficient facts showing that
8 the official has violated the Constitution through his own individual actions by linking each
9 named defendant with some affirmative act or omission that demonstrates a violation of plaintiff’s
10 federal rights. Iqbal, 556 U.S. at 676; see Monell v. Dep’t of Soc. Servs., of the City of New
11 York, 436 U.S. 658, 691, 695 (1978) (mandating actual connection or link between actions of
12 defendants and deprivation alleged to have been suffered by plaintiff).

13 C. Official Capacity Suits

14 A suit against a state officer in his official capacity is a suit against the state. Diamond v.
15 Charles, 476 U.S. 54, 57 n.2 (1986) (citing Kentucky v. Graham, 473 U.S. 159, 165-66 (1985)).
16 The Eleventh Amendment bars federal suits for violations of federal law against state officials
17 sued in their official capacities for damages and other retroactive relief. Will v. Michigan Dept.
18 of State Police, 491 U.S. 58, 71 (1989); Quern v. Jordan, 440 U.S. 332, 337 (1979); Pena v.
19 Gardener, 976 F.2d 469, 472 (9th Cir. 1992); see also Hafer v. Melo, 502 U.S. 21, 27 (1991)
20 (stating state officers sued for damages in their official capacities are not “persons” for purposes
21 of suit because they assume identity of government that employs them).

22 III. PLAINTIFF’S ALLEGATIONS

23 A. Overview

24 Plaintiff is an inmate housed at the California Health Care Facility (“CHCF”) in Stockton,
25 California. In his initial complaint, he names Dr. N. Malakkla, Chief Medical Officer; Dr. John
26 Krpan, D.O., a primary care physician; Dr. A. Adams, Chief Executive Officer; Dr. Paik,² M.D.

27 ² Throughout the complaint, plaintiff refers to a “Dr. Pike” as well as a “Dr. Paik.” See, e.g.,
28 ECF No. 1 at 2, 5, 7, 54, 61, 63, 64. However, a review of the medical records accompanying the

1 and former primary care physician; Dr. Lwin, M.D., and Dr. Huu Nguyen as defendants. See
2 ECF No. 1 at 1-2. Later in the complaint, plaintiff also identifies Dr. James Williamson and Dr.
3 Howard Church as defendants. See id. at 11. He would like to sue some of them in both their
4 individual and official capacities and others solely in their individual capacities. See id. at 2, 11.

5 Although plaintiff's complaint is convoluted, a second review of it leads the court to find
6 that plaintiff is alleging that his rights under the Eighth Amendment have been violated.

7 Specifically, plaintiff alleges that all the named defendants have demonstrated deliberate
8 indifference to his serious medical need, by (1) unjustifiably delaying and/or failing to approve
9 hip surgery recommended as early as 2011 by three different orthopedic specialists, and/or (2)
10 failing to provide plaintiff with adequate pain management options while awaiting the surgery.

11 See generally ECF No. 1 at 1, 4-12.

12 Plaintiff seeks a declaratory judgment and compensatory damages from each defendant in
13 the amount of \$250,000.00, as well as punitive damages from each defendant. See ECF No. 1 at
14 4, 11. Plaintiff also requests a jury trial on all issues triable by jury as well as any other relief the
15 court deems just, proper and equitable. See id.

16 B. Facts Alleged in Support of Claims

17 Plaintiff contends that he has been diagnosed with advanced bone-on-bone bilateral
18 degenerative hip disease and that three consultations with orthopedic specialists, the first of which
19 was in March 2011,³ have yielded recommendations that he have, at minimum, a total
20 replacement of his right hip. See ECF No. 1 at 4. Since that time, plaintiff states that he has been
21 in acute, chronic pain due to his hip disease, severe back pain, and polyneuropathy, and other

22 complaint indicates that these are likely the same person, and that the correct spelling of the
23 individual's last name is "Paik." See id. at 16 (physician referring to a "Dr. Young Paik").
24 Therefore, the court will refer to the individual as "Dr. Paik" throughout this order. If the
25 presumption is not correct, and these are in fact two different people, plaintiff is to clarify this in
his amended complaint and identify which constitutional violations each individual is alleged to
have committed.

26 ³ It appears that plaintiff's March 2011 diagnosis and recommendation were given prior to
27 plaintiff being transferred to CHCF. See ECF No. 1 at 4. They were made by Dr. Marshall S.
28 Lewis, an orthopedic surgeon. See id. at 4, 14-16. Hip replacement was denied by prison
officials at that time. See id. at 4. Thereafter, in September 2014, plaintiff was transferred to
CHCF. See id.

1 ailments. See id. Plaintiff further asserts that despite his pain and numerous trips to the
2 emergency room, he has been treated with less effective medication like Tylenol with codeine,
3 Motrin, Toradol, or with nothing at all. See ECF No. 1 at 5. No narcotics have been given to him
4 despite the severity of his pain. See id.

5 1. October 2014 – September 2015

6 Plaintiff alleges that in October 2014, prison doctors minimized his “acute chronic
7 change” in back pain. See ECF No. 1 at 9-10. Although he was rushed to the hospital at that
8 time due to his pain, Dr. James Williamson and Dr. Howard Church directed that plaintiff was not
9 to receive narcotics. See id. at 10, 27. Plaintiff believes this was done to punish him and single
10 him out for mistreatment. See id. at 10.

11 Plaintiff also alleges that he has had allergic reactions to some of the prescribed, less
12 effective medication. See id. He states that in September 2015, Dr. Paik and the pain
13 management committee insisted that he take Tylenol with codeine to manage his pain. See ECF
14 No. 1 at 5. Plaintiff told them that he was allergic to that medication, but they insisted that he
15 take it before they prescribed him anything else. See id. After a week of taking it, plaintiff had a
16 severe reaction and was rushed to the hospital. See id. at 5-6. To this day, plaintiff asserts, the
17 doctors at CHCF refuse to acknowledge that plaintiff is allergic to Tylenol with codeine. See id.
18 at 6.

19 2. May 2016 – February 2017

20 Plaintiff alleges that a May 2016 consultation with a second orthopedic surgeon yielded
21 another recommendation that plaintiff have hip surgery. See id. at 7. Thereafter, Dr. Malakkla
22 required plaintiff to consult with Dr. Gabriel Williams prior to receiving the surgery. See id.
23 However, plaintiff refused to consult with Dr. Williams because he was suing Dr. Williams at the
24 time, and therefore believed that the consultation created a “conflict of interest.” See id. As a
25 result, plaintiff alleges he was left in severe pain and suffering for another eleven months without
26 pain medication. See ECF No. 1 at 7-8.

27 Plaintiff further alleges that despite knowing that he was allergic to Tylenol with codeine,
28 Dr. Nguyen prescribed it for him in February 2017, to take four times a day. See id. at 6. In a

1 subsequent visit to the ER in June 2017, despite plaintiff's protests, Dr. Lwin also prescribed a
2 twice a day Tylenol regimen to plaintiff. See id. When plaintiff eventually took the Tylenol
3 because he was in so much pain, he had a serious adverse reaction. His hands became swollen
4 and he fell ill. See id. The emergency room was called, but no one from emergency services
5 ever came to attend to him. See id. Plaintiff asserts that Dr. Nguyen's and Dr. Lwin's course of
6 treatment constituted a conscious disregard of an excessive risk to plaintiff's health. See id. at 7.

7 3. March 2017 – July 2017

8 Plaintiff alleges that in March 2017, Dr. Krpan reviewed the recommendation that
9 plaintiff have surgery. See ECF No. 1 at 10. In response, Dr. Krpan refused to submit the
10 documents for surgery and instead recommended that plaintiff receive physical therapy first. See
11 id. According to plaintiff, this was the second time that Drs. Krpan, Malakkla, and Adams did
12 not follow the hip replacement recommendations of an orthopedic surgeon and denied him pain
13 management prior to surgery. See ECF No. 1 at 10-11. Plaintiff asserts that this was another
14 unjustified surgery delay that caused him physical and mental pain and suffering and put his
15 health at risk. See id. at 11.

16 On April 25, 2017, plaintiff had a third outside consultation at San Joaquin General
17 Hospital with orthopedic surgeon John Casey. See ECF No. 1 at 8. Dr. Casey conducted a full,
18 in-person examination of plaintiff. See id. at 8, 19-20. He then recommended bilateral hip
19 replacement and "norco pain medication" every six hours until plaintiff had the surgery. See id.
20 Drs. Malakkla and Adams "denied" these recommendations, and in May 2017, Dr. Krpan told
21 plaintiff he would not follow the pain medication recommendation and that plaintiff would not
22 receive any pain medication until after the surgery. See id. at 8, 50. Dr. Krpan also
23 recommended not to refer plaintiff for hip surgery and instead referred plaintiff to Dr. Williams
24 for potential surgery. See id. at 8. This unnecessarily delayed plaintiff's surgery. See id.

25 On July 9, 2017, a doctor saw plaintiff and prescribed him 15 mg of morphine twice a day
26 for his pain. See ECF No. 1 at 8-9. However, because plaintiff has hepatitis C, he was unable to
27 take it or methadone as both cause severe reactions in him. See id. at 9. Plaintiff contends that

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1 there are other narcotics for acute pain that could be prescribed to him, but he is being treated
2 differently than other patients. See id.

3 4. Plaintiff's Conclusions

4 Plaintiff asserts that the delay in his hip replacement surgery violates the Constitution
5 because the delay is medically unjustified and likely to make the problem worse. See ECF No. 1
6 at 11. He further contends that physical therapy and hip injections were only temporary
7 treatments to determine whether surgery was necessary. He also argues that because physical
8 therapy at this point is “totally obsolete,” and has “no bearing or significance,” the delay of his
9 hip surgery is unjustified. See id. at 12.

10 IV. APPLICABLE LAW: EIGHTH AMENDMENT DELIBERATE INDIFFERENCE

11 “The Constitution does not mandate comfortable prisons, but neither does it permit
12 inhumane ones.” Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal quotation marks and
13 citations omitted). “[A] prison official violates the Eighth Amendment only when two
14 requirements are met. First, the deprivation alleged must be, objectively, sufficiently serious; a
15 prison official’s act or omission must result in the denial of the minimal civilized measure of
16 life’s necessities.” Id. at 834 (internal quotation marks and citations omitted). This first
17 requirement is satisfied by “demonstrating that failure to treat a prisoner’s condition could result
18 in further significant injury or the unnecessary and wanton infliction of pain.” Lemire v.
19 California Dept. of Corrections and Rehabilitation, 726 F.3d 1062, 1081 (9th Cir. 2013).

20 Second, the prison official must have a sufficiently culpable state of mind, “one of
21 deliberate indifference to inmate health or safety.” Farmer, 511 U.S. at 834 (internal quotation
22 marks and citations omitted). This second prong is “satisfied by showing (a) a purposeful act or
23 failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by the
24 indifference.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (internal citations, punctuation
25 and quotation marks omitted); accord, Lemire, 726 F.3d at 1081; Wilhelm v. Rotman, 680 F.3d
26 1113, 1122 (9th Cir. 2012). Deliberate indifference “may appear when prison officials deny,
27 delay or intentionally interfere with medical treatment, or it may be shown by the way in which
28 prison physicians provide medical care.” Jett, 439 F.3d at 1096 (quoting Hutchinson v. United

1 States, 838 F.2d 390, 394 (9th Cir. 1988)); accord, Lemire, 726 F.3d at 1081; Wilhelm, 680 F.3d
2 at 1122.

3 Whether a defendant had requisite knowledge of a substantial risk of harm is a question of
4 fact. Farmer, 511 U.S. at 842. Thus, liability may be avoided by presenting evidence that the
5 defendant lacked knowledge of the risk and/or that his response was reasonable in light of all the
6 circumstances. See id. at 844–45; see also Simmons v. Navajo Cty Ariz. 609 F.3d 1011, 1017-18
7 (9th Cir. 2010) (requiring official be subjectively aware of serious medical need and fail to
8 adequately respond to need to establish deliberate indifference). Mere negligent failure to protect
9 an inmate from harm is not actionable under Section 1983. See Farmer, 511 U.S. at 835. Even
10 gross negligence is insufficient to establish deliberate indifference to serious medical needs.
11 Lemire, 726 F.3d at 1082 (citing Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)).

12 V. DISCUSSION

13 The facts plaintiff has provided appear to allege two distinct Eighth Amendment
14 violations by the CHCF defendants: (1) deliberate indifference to plaintiff’s serious medical need
15 by failing to schedule and provide specialist-recommended hip surgery over an extended period
16 of time since 2014, and (2) deliberate indifference to plaintiff’s serious medical need by failing to
17 provide him with adequate medication to effectively manage his hip and back pain while awaiting
18 hip surgery. The court examines the alleged actions of each defendant under these two rubrics.

19 A. Deliberate Indifference: Failure to Prescribe Plaintiff Effective Pain Medication

20 1. Dr. James Williamson and Dr. Howard Church

21 Plaintiff’s allegations that Dr. Williamson and Dr. Church failed to prescribe narcotic pain
22 medication in October 2014 (see ECF No. 1 at 9-10) fail to state a claim under the Eighth
23 Amendment. Plaintiff’s disagreement with his doctors about the appropriate medication regime
24 does not amount to deliberate indifference to serious medical needs. Toguchi v. Chung, 391 F.3d
25 1051, 1058 (9th Cir. 2004). The complaint contains no facts which, if true, would demonstrate
26 that the course of pain treatment the doctors chose was “medically unacceptable under the
27 circumstances.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996). The relevant
28 circumstances in this case, which are documented in the exhibits to the complaint, include the

1 facts that plaintiff was prescribed Baclofen, Toradol and another medication at the time, and that
2 prison medical staff considered narcotics inappropriate because of plaintiff's history of opiate
3 abuse and the belief that he was engaging in drug seeking behavior. See ECF No. 1 at 27.⁴ Even
4 if the defendants were wrong about plaintiff's history and/or intentions, such error would
5 constitute negligence at most. Negligence is insufficient to support an Eighth Amendment claim
6 as a matter of law. Farmer, 511 U.S. at 835.

7 Moreover, the complaint does not allege facts which, if true, would establish that Drs.
8 Williamson and Church knew that their failure to prescribe narcotic drugs would cause harm or
9 that it did so. See Lemaire, 726 F.3d at 1081 (defendant's conduct must cause significant injury
10 or wanton infliction of pain). Finally, plaintiff provides no specific factual allegations to support
11 his assertion that defendants denied him effective pain relief in order to punish him and single
12 him out for mistreatment. See ECF No. 1 at 9-10.

13 For all these reasons, plaintiff's allegations fail to state a claim against Drs. Williamson
14 and Church regarding the treatment of his pain in October 2014. This claim is subject to
15 dismissal as pleaded, but plaintiff will be provided the option to amend.

16 2. Dr. Paik, Dr. Nguyen and Dr. Lwin

17 Plaintiff's allegations that Dr. Paik, Dr. Nguyen, and Dr. Lwin required that he take a
18 medication to which he had had allergic reactions in the past, and to which they knew he was
19 allergic (see ECF No. 1 at 5-7), states a claim for deliberate indifference. See Estelle, 429 U.S. at
20 104 n.10 (pointing to administration of penicillin with knowledge plaintiff was allergic as
21 example of deliberate indifference) (citation omitted); see also Beaver v. Western State Hosp.,
22 No. 10-35583, 2011 WL 5188991, at *639 (9th Cir. Nov. 2, 2011) (knowing prescription of
23 medication to which plaintiff was allergic was sufficient to allege violation constitutional right);
24 see also Actkinson v. Vargo, No. 06-35367, 2008 WL 2607927, at *472 (9th Cir. July 2, 2008)

25 ⁴ Additionally, the March 2014 visit notes of a Dr. Gregory LeBleu indicate that in the past,
26 plaintiff had been treated with a number of medications and that those available to treat plaintiff's
27 pain were limited. See ECF No. 1 at 33-34. Finally, plaintiff admits that when prescribed
28 morphine twice a day in July 2017, he was unable to continue with the treatment protocol, nor
was he able to take methadone because both, which are narcotics, elicit severe reactions in him
such as vomiting, diarrhea, drowsiness and swelling. See ECF No. 1 at 9.

1 (prescription of medication to which plaintiff was allergic raises triable issue of fact as to whether
2 physician should have known plaintiff's rights were being violated). Consequently, plaintiff has
3 presented cognizable deliberate indifference claims against Dr. Paik, Dr. Nguyen and Dr. Lwin
4 for prescribing him medication to which he is allergic and/or has adverse reactions. Defendants
5 Dr. Paik, Dr. Nguyen, and Dr. Lwin will be required to respond to this claim.

6 3. Dr. Malakkla, Dr. Krpan and Dr. Adams

7 Plaintiff's Eighth Amendment claims against Dr. Malakkla, Dr. Krpan and Dr. Adams,
8 predicated on inadequate pain management in March 2017 and April 2017 prior to hip surgery
9 (see ECF No. 1 at 8, 10-11), fail for the same reasons as the claims against Drs. Williamson and
10 Church for denial of narcotic pain medication in 2014. Plaintiff alleges that Dr. Malakkla, Dr.
11 Krpan and Dr. Adams failed to follow the surgeon's recommendation for Norco. However, a
12 difference of opinion among medical professionals does not amount to deliberate indifference to
13 serious medical needs. Toguchi, 391 F.3d at 1059-60. Plaintiff's own disagreement with the
14 doctors' decisions cannot support relief. Id. at 1058. Moreover, the medical records attached to
15 the complaint fail to support the contention that these defendants denied plaintiff
16 all treatment for his pain.⁵

17 For all these reasons, this claim is subject to dismissal as pleaded. Plaintiff will, however,
18 be provided the option to amend.

19 B. Deliberate Indifference: Failure to Schedule and/or Perform Plaintiff's Hip
20 Surgery

21 Plaintiff claims that his Eighth Amendment rights were violated by (1) Dr. Malakkla's
22 May 2016 requirement and Dr. Krpan's May 2017 requirement that plaintiff consult with Dr.
23 Williams prior to having hip surgery; (2) Dr. Krpan's March 2017 requirement that plaintiff
24 participate in physical therapy prior to having hip surgery, and (3) Dr. Malakkla and Dr. Adams'

25 _____
26 ⁵ Although the May 2017 document attached to Dr. Krpan's March 2017 notes excluded opiate
27 narcotics as a treatment option for plaintiff, the document also indicates that a trial of Cymbalta
28 was to be recommended to plaintiff instead to help him manage his pain and that the seven
physicians present during the discussion all agreed on this treatment plan. See ECF No. 1 at 29.

1 failure to comply with Dr. Casey's April 2017 recommendation that plaintiff receive hip surgery.
2 See ECF No. 1 at 7-8, 10-11. These allegations fail to state a claim upon which relief may be
3 granted. This is because Drs. Malakkla, Adams and Krpan did not outright deny plaintiff's hip
4 surgery. They simply required that plaintiff take additional, possibly mitigative steps in his
5 treatment prior to scheduling his surgery.

6 Plaintiff's beliefs that consulting with Dr. Williams created a "strong conflict" and thus,
7 was an "unnecessary delay" (see ECF No. 1 at 7-8), and that participating in physical therapy
8 prior to having the surgery was "unjustified" and has "no bearing or significance" to his case (id.
9 at 8, 10, 12), are irrelevant and do not support relief. Similarly, plaintiff's disagreement with the
10 physicians' decision not to follow Dr. Casey's surgery and medication recommendations does not
11 demonstrate deliberate indifference. See Colwell v. Bannister, 763 F.3d 1060, 1068 (9th Cir.
12 2014).

13 To state a claim for deliberate indifference claim related to treatment, plaintiff must show
14 that the courses of treatment defendants chose were medically unacceptable under the
15 circumstances. Colwell, 763 F.3d at 1068; Jackson, 90 F.3d at 332. The complaint contains no
16 specific allegations of fact which would support such a showing here.

17 Finally, the complaint and exhibits indicate that plaintiff refused the consultation with Dr.
18 Williams, and refused to do physical therapy, both of which were required prior to receiving hip
19 surgery. See ECF No. 1 at 7, 11-12, 30-31. Plaintiff contends that he was "in severe pain" and
20 experienced "suffering due to an unnecessary delay of surgery." See ECF No. 1 at 7-8, 11-12.
21 However, a prisoner has no right to refuse treatment and then claim deliberate indifference to his
22 medical condition. Lipsev v. Samaniego, No. 1:17-cv-01703 MJS PC, 2018 WL 500576, at *5
23 (E.D. Cal. Jan. 22, 2018) (citing to McNeil v. Singh, No. 1:12-cv-01005 RRB, 2013 WL
24 1876127, at *19 n.59 (E.D. Cal. May 3, 2013)). Accordingly, the allegations that Dr. Malakkla,
25 Dr. Krpan and Dr. Adams prevented necessary hip surgery fail to state a claim for deliberate
26 indifference to plaintiff's serious medical need.

27 For all these reasons, this claim is subject to dismissal as pleaded. Plaintiff will, however,
28 be provided the option to amend.

1 C. Suits in Official Capacities; Declaratory Relief

2 Plaintiff has stated that he would like to sue some of the named defendants in their official
3 capacities and that he seeks monetary damages from them. See ECF No. 1 at 2, 4, 11. Suits for
4 damages must be brought against state actors in their individual capacities, otherwise they are
5 barred by the Eleventh Amendment. See Will, 491 U.S. at 71; Quern, 440 U.S. at 337. State
6 officials are properly sued in their official capacity only when plaintiff seeks prospective
7 injunctive relief, and the named defendant is the state official who is in a position to provide the
8 relief. Will, 491 U.S. at 71 n. 10. The complaint does not seek prospective injunctive relief.
9 ECF No. 1 at 4. Accordingly, the court construes the complaint as suing all defendants in their
10 individual capacities only.

11 To the extent plaintiff seeks declaratory relief, see id., plaintiff is informed that a federal
12 court is not empowered to issue retrospective declaratory relief with respect to allegedly
13 unconstitutional conduct that has ended. See National Audubon Society, Inc. v. Davis, 703 F.3d
14 835, 847-48 (9th Cir. 2002); see also Los Angeles Cty. Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th
15 Cir. 1992) (stating declaratory relief against state official may not be premised on wholly past
16 violation of federal law).

17 VI. LEAVE TO AMEND

18 A. Plaintiff's Options for Proceeding

19 In sum, the court finds that plaintiff has stated cognizable claims against Dr. Paik, Dr.
20 Nguyen and Dr. Lwin. As a result, plaintiff will be permitted to proceed with his claims against
21 them in their individual capacities. Plaintiff has not, however, stated cognizable claims against
22 defendants Williamson, Church, Malakkla, Krpan and Adams. Accordingly, plaintiff is being
23 given the following options: Plaintiff may either: (1) proceed immediately on his claims against
24 defendants Paik, Nguyen and Lwin, and voluntarily withdraw all other non-viable claims, or (2)
25 try to amend the complaint to state viable claims against the other defendants.

26 If plaintiff wishes to proceed without amending the complaint, the court will recommend
27 that defendants Williamson, Church, Malakkla, Krpan and Adams as well as the claims against
28 them be dismissed. If, however, plaintiff chooses to amend the complaint, it must include all

1 claims and requests for relief that he wishes to make, including the ones that have already been
2 found to state a claim, because the court will not look at the claims or information in the original
3 complaint. **In other words, any claims not in the amended complaint will not be considered.**⁶

4 In the amended complaint, if plaintiff includes the same claims and requests for relief which the
5 court has already determined are not viable, he can expect that the court will recommend that they
6 be dismissed.

7 Plaintiff must complete the attached notification indicating which option he chooses to
8 pursue and return it to the court. Once the court receives the notice, it will issue an order telling
9 plaintiff what he needs to do next (e.g., file an amended complaint or complete and return service
10 paperwork).

11 B. Format of Amended Complaint

12 If plaintiff chooses to amend the complaint, the court provides the following information
13 as a guide:

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

19 It must also contain a caption including the names of all defendants. Fed. R. Civ. P. 10(a).
20 Plaintiff may not change the nature of this suit by alleging new, unrelated claims. See George v.
21 Smith, 507 F.3d 605, 607 (7th Cir. 2007).

22 Any amended complaint must be written or typed so that it so that it is complete in itself
23 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended
24 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
25 earlier filed complaint no longer serves any function in the case. See Rhodes v. Robinson, 621

27 ⁶ However, should plaintiff choose to amend the complaint, the court will direct the Clerk of
28 Court to attach the exhibits that were filed with plaintiff's original complaint with plaintiff's
amended complaint.

1 F.3d 1002, 1005 (9th Cir. 2010) (stating amended complaint supersedes original, the latter being
2 treated thereafter as non-existent) (citation omitted); see also Ferdik v. Bonzelet, 963 F.2d 1258,
3 1262 (9th Cir. 1992).

4 Finally, the court notes that any amended complaint should be as concise as possible in
5 fulfilling the above requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of
6 procedural or factual background which has no bearing on his legal claims. He should also take
7 pains to ensure that his amended complaint is as legible as possible. This refers not only to
8 penmanship, but also spacing and organization. Lengthy, unbroken paragraphs can be difficult to
9 read when handwritten, and plaintiff would do well to avoid them wherever possible. See, e.g.,
10 Fed. R. Civ. Proc. 10(b) (indicating claims must be stated in numbered paragraphs).

11 VII. PLAIN LANGUAGE SUMMARY OF THIS ORDER FOR A PRO SE LITIGANT

12 Your original complaint and the supplement that you filed did not clearly identify, in an
13 organized way, precisely what your claims were and against whom. The court has made a
14 considerable effort to try to identify the claims you have attempted to bring. The court concludes
15 that you have attempted to allege deliberate indifference by the defendants to your serious
16 medical needs, in violation of the Eighth Amendment, by delaying and/or failing to approve hip
17 surgery as recommended in 2011, and by failing to provide you with adequate pain management
18 options.

19 The facts you have alleged support a claim against Dr. Paik, Dr. Nguyen and Dr. Lwin
20 for prescribing medication to which you are allergic. All your other allegations against all the
21 other defendants fail to state a claim under the Eighth Amendment.

22 You have a choice how to proceed. If you wish, you can serve defendants Paik,
23 Nguyen and Lwin now and proceed on that claim alone, voluntarily withdrawing all other
24 claims. Or, you can try to amend the complaint to state viable claims against defendants
25 Williamson, Church, Malakkla, Krpan and Adams.

26 If you choose to file an amended complaint, it must include all claims and requests for
27 relief, including those the court has already determined are viable. The amended complaint

28 ///

1 must not refer back to your previously filed pleadings. It must be a full and complete
2 document that stands on its own.

3 Accordingly, IT IS HEREBY ORDERED that:

4 1. Plaintiff is being given a final opportunity to amend his complaint;

5 2. Within 14 days from the date of service of this order, plaintiff is to fill out and
6 file the attached "Plaintiff's Notice on How to Proceed" form with the court indicating how he
7 wishes to proceed in this matter;

8 3. If plaintiff chooses to amend the complaint, within thirty days from the date of
9 service of this order, plaintiff may file a first amended complaint that complies with the Civil
10 Rights Act, the Federal Rules of Civil Procedure, and the Local Rules of Practice. The
11 amended complaint must bear the docket number assigned to this case, and it must be labeled
12 "First Amended Complaint." Plaintiff must file an original and two copies of the amended
13 complaint. Failure to file an amended complaint in accordance with this order will result in a
14 dismissal of this action.

15 4. The Clerk of Court is directed to send plaintiff a copy of the prisoner complaint
16 form used in this district.

17 DATED: May 24, 2018

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19 ALLISON CLAIRE
20 UNITED STATES MAGISTRATE JUDGE
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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MORRIS MESTER,
Plaintiff,
v.
N. MALAKKLA, et al.,
Defendants.

No. 2:17-cv-1781 AC P

PLAINTIFF'S NOTICE ON HOW TO
PROCEED

CHECK ONE:

_____ Plaintiff would like to proceed immediately on his Eighth Amendment claims against defendants Paik, Nguyen and Lwin without amending the complaint. By choosing to go forward without amending the complaint, plaintiff consents to the dismissal without prejudice of defendants Williamson, Church, Malakkla, Krpan and Adams and the claims against them.

_____ Plaintiff would like to amend the complaint.

DATED: _____

Morris Mester
Plaintiff Pro Se