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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCELLIOUS TUCKER,  
Plaintiff,  
v.  
JAROM A. DASZKO, M.D., et al.,  
Defendants.

No. 2:17-cv-1798 KJN P

ORDER

I. Introduction

Plaintiff is a state prisoner, proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff's trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly payments of twenty percent of the preceding month's income credited to plaintiff's trust account.

1 These payments will be forwarded by the appropriate agency to the Clerk of the Court each time  
2 the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28 U.S.C.  
3 § 1915(b)(2).

## 4 II. Screening Standards

5 The court is required to screen complaints brought by prisoners seeking relief against a  
6 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The  
7 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally  
8 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek  
9 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

10 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.  
11 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th  
12 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an  
13 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
14 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
15 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
16 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.  
17 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
18 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at  
19 1227.

20 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain  
21 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the  
22 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic  
23 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).  
24 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a  
25 formulaic recitation of the elements of a cause of action;" it must contain factual allegations  
26 sufficient "to raise a right to relief above the speculative level." Id. at 555. However, "[s]pecific  
27 facts are not necessary; the statement [of facts] need only 'give the defendant fair notice of what  
28 the . . . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93

1 (2007) (quoting Bell Atlantic, 550 U.S. at 555, citations and internal quotations marks omitted).  
2 In reviewing a complaint under this standard, the court must accept as true the allegations of the  
3 complaint in question, Erickson, 551 U.S. at 93, and construe the pleading in the light most  
4 favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other  
5 grounds, Davis v. Scherer, 468 U.S. 183 (1984).

### 6 III. Plaintiff's Complaint

7 In his complaint, plaintiff alleges the following: Around December of 2007, plaintiff  
8 suffered a ruptured Achilles tendon in his left foot. On May 15, 2008, plaintiff had surgery,  
9 which he claims went awry and causes him to suffer daily pain, ranging from mild to severe,  
10 unless he receives an injection of cortisone, which he claims eases his pain tremendously. (ECF  
11 No. 1 at 3.) From January to February of 2016, Dr. Daszko prescribed plaintiff an anti-  
12 depressant, allegedly in place of a pain pill for chronic pain in plaintiff's left foot. Dr. Largoza  
13 reviewed plaintiff's appeal and showed deliberate indifference by not pointing out the "grave  
14 injustice" of Dr. Daszko's medical care. (ECF No. 1 at 3.) In November of 2015, Dr. Kuersteen  
15 was deliberately indifferent by invalidating the recommendation of a podiatrist who agreed to  
16 give plaintiff a steroid injection for chronic pain in his left foot. Finally, plaintiff made defendant  
17 Austin aware of the "conflict" and she was deliberately indifferent by "choosing not to be part of  
18 the solution in the grievance process." (ECF No. 1 at 4.) Plaintiff seeks injunctive relief and  
19 money damages. Plaintiff provided copies of his administrative appeals and responses. (ECF No.  
20 1 at 6-22.)

### 21 IV. Medical Standards

22 The Eighth Amendment protects prisoners from inhumane methods of punishment and  
23 inhumane conditions of confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir.  
24 2006). Extreme deprivations are required to make out a conditions-of-confinement claim, and  
25 "only those deprivations denying the minimal civilized measure of life's necessities are  
26 sufficiently grave to form the basis of an Eighth Amendment violation." Hudson v. McMillian,  
27 503 U.S. 1, 9 (1992) (citation omitted). "Prison officials have a duty to ensure that prisoners are  
28 provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." Johnson

1 v. Lewis, 217 F.3d 726, 731 (9th Cir. 2000) (citations omitted). “The circumstances, nature, and  
2 duration of a deprivation of these necessities must be considered in determining whether a  
3 constitutional violation has occurred.” Id. “The more basic the need, the shorter the time it can  
4 be withheld.” Id. (citations omitted).

5 To prevail on an Eighth Amendment claim predicated on the denial of medical care, a  
6 plaintiff must show that: (1) he had a serious medical need; and (2) the defendant’s response to  
7 the need was deliberately indifferent. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006); see  
8 also Estelle v. Gamble, 429 U.S. 97, 106 (1976).

9 For a prison official’s response to a serious medical need to be deliberately indifferent, the  
10 official must “‘know[ ] of and disregard[ ] an excessive risk to inmate health.’” Peralta v. Dillard,  
11 744 F.3d 1076, 1082 (9th Cir. 2014) (*en banc*) (quoting Farmer v. Brennan, 511 U.S. 825, 837  
12 (1994)). “[T]he official must both be aware of facts from which the inference could be drawn  
13 that a substantial risk of serious harm exists, and he must also draw the inference.” Farmer, 511  
14 U.S. at 837.

15 It is well established that “a mere difference of medical opinion . . . [is] insufficient, as a  
16 matter of law, to establish deliberate indifference.” Toguchi v. Chung, 391 F.3d 1051, 1058 (9th  
17 Cir. 2004) (alterations in original) (citation omitted). This rule applies whether the difference is  
18 between the medical professional(s) and a prisoner or two or more medical professionals. Hamby  
19 v. Hammond, 821 F.3d 1085, 1092 (9th Cir. 2016) (citation omitted).

20 In appropriate cases, however, a prisoner may state a claim of deliberate indifference to  
21 medical needs based on a difference of medical opinion. To do so, the prisoner must show that  
22 “the course of treatment the doctors chose was medically unacceptable under the circumstances,”  
23 and that they “chose this course in conscious disregard of an excessive risk to [the prisoner’s]  
24 health.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (citations omitted).

## 25 V. Discussion

### 26 1. Medication Prescription

27 In his administrative appeal, plaintiff contends that he was supposed to be prescribed pain  
28 medication, but was instead prescribed Effexor (Venlafaxine), an antidepressant medication.

1 Plaintiff read a book, “The Pill Book,”<sup>1</sup> and discovered that the medication was prescribed for  
2 depression, anxiety, Major Depressive Disorder, treatment of hot flashes related to menopause,  
3 and the management of pain related to diabetes, none of which plaintiff has. (ECF No. 1 at 12-  
4 13.) The book also said that Venlafaxine can raise blood pressure and increase cholesterol levels,  
5 which plaintiff does suffer. (ECF No. 1 at 12.) Plaintiff stated he was experiencing dizzy spells,  
6 nausea, and memory loss. (ECF No. 1 at 12, 14.) The Effexor prescription started on January 4,  
7 2016, and plaintiff stopped taking the Effexor on or about January 31, 2016. (ECF No. 1 at 8,  
8 14.) The prescription was discontinued on February 10, 2016. (ECF No. 1 at 8.)

9         However, plaintiff’s belief that he was prescribed Effexor in error is rebutted by RN  
10 Baumert who informed plaintiff that “Effexor has multiple applications and is commonly  
11 prescribed to treat pain.”<sup>2</sup> (ECF No. 1 at 8.) Plaintiff was told to notify medical staff if he  
12 experienced any changes to his medical condition so he could be re-evaluated. (*Id.*) Plaintiff was  
13 seen by Dr. Daszko to discuss plaintiff’s refusal to take Effexor. Dr. Daszko offered to taper  
14 plaintiff slowly off the Effexor to avoid withdrawal symptoms, but plaintiff declined. (*Id.*)  
15 Plaintiff was also offered a different medication, Trileptal, but plaintiff again declined, stating he  
16 wanted stronger pain pills such as Vicodin or Morphine. (*Id.*) RN Baumert noted that plaintiff  
17 actually sustained an improvement in his blood pressure while taking the Effexor. (*Id.*) Because  
18 plaintiff stopped taking the medication, rather than tapering it off, it is unclear whether the nausea  
19 and dizziness he was feeling was a side effect of the Effexor or from the discontinuation of it.

20         In any event, plaintiff’s disagreement with defendants about his medication does not  
21 reflect a conscious disregard of plaintiff’s serious medical needs. In addition, defendants’ refusal  
22 to provide plaintiff with the pain medication he preferred does not rise to the level of deliberate  
23 indifference in violation of the Eighth Amendment. *See McGuckin*, 974 F.2d 1050 (a defendant  
24 “must purposefully ignore or fail to respond to a prisoner’s pain or possible medical need in order

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26 <sup>1</sup> “The Pill Book,” (Harold M. Silverman, Pharm. D., ed., 12th ed.). (ECF No. 1 at 12.)

27 <sup>2</sup> The court is not required to accept as true conclusory allegations which are contradicted by  
28 documents referred to in the complaint. *See Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir.  
2002); *Steckman v. Hart Brewing*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

1 for deliberate indifference to be established.”); see also Parlin v. Sodhi, 2012 WL 5411710 at \*4  
2 (C.D. Cal. Aug. 8, 2012) (“At its core, plaintiff’s claim is that he did not receive the type of  
3 treatment and pain medication that he wanted when he wanted it. His preference for stronger  
4 medication -- Vicodin, Tramadol, etc., -- represents precisely the type of difference in medical  
5 opinion between a lay prisoner and medical personnel that is insufficient to establish a  
6 constitutional violation.”); Tran v. Haar, 2012 WL 37506 at \*3-4 (C.D. Cal. Jan. 9, 2012)  
7 (plaintiff’s allegations that defendants refused to prescribe “effective medicine” such as Vicodin  
8 and instead prescribed Ibuprofen and Naproxen reflected a difference of opinion between plaintiff  
9 and defendants as to the proper medication necessary to relieve plaintiff’s pain and failed to state  
10 an Eighth Amendment claim); Ruiz v. Akintola, 2010 WL 1006435 at \*7 (E.D. Cal. Mar. 17,  
11 2010) (granting summary judgment in favor of defendants on plaintiff’s inadequate medical care  
12 claim where he presented no expert evidence that the Ultram which defendants prescribed,  
13 instead of the Norco that U.C. Davis physicians had recommended, was not medically warranted  
14 or reasonable), *aff’d* No. 10-16516 (9th Cir. Nov. 2, 2011). Finally, plaintiff cannot “refuse  
15 treatment and then claim deliberate indifference to his medical condition.” McNeil v. Singh,  
16 2013 WL 1876127, at \*19 n.59 (May 3, 2013) (where plaintiff had declined surgery on at least  
17 two occasions and refused medication “because he felt that it was improper or medically  
18 harmful,” plaintiff could not claim deliberate indifference to his medical condition).

19 Thus, the documents provided by plaintiff demonstrate that Dr. Daszko did not mis-  
20 prescribe Effexor, but that Effexor is commonly prescribed for pain. Plaintiff’s belief that he  
21 should not have been prescribed Effexor is, at best, a difference of opinion from Dr. Daszko and  
22 RN Baumert, and does not rise to the level of deliberate indifference. Moreover, plaintiff cannot  
23 state a cognizable civil rights claim based on his personal preference to be prescribed Vicodin or  
24 Morphine. Thus, plaintiff’s claim is dismissed.

## 25 2. Steroid Injection

26 In the appeal responses, it was noted that on June 2, 2015, plaintiff was seen for  
27 orthopedic consultation for pain in his left foot, Achilles tendon area, but the “specialist

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1 recommended injection into the heel only if the pain increased in severity due to [the] possibility  
2 of rupturing the tendon.” (ECF No. 1 at 6.)

3 Thus, contrary to plaintiff’s claim that the failure to provide him the steroid injection was  
4 due to deliberate indifference, the records provided by plaintiff demonstrate that he was denied  
5 the injection because of the “risk of rupture and lack of clear benefit.” (ECF No. 1 at 6.) Plaintiff  
6 was provided extra-depth boots to minimize the pain in plaintiff’s left foot and heel, as  
7 recommended by the specialist. (Id.) Moreover, the orthopedic specialist stated that plaintiff  
8 should receive the injection “only” if plaintiff’s pain increased in severity. Plaintiff alleges no  
9 facts demonstrating that his pain increased. Rather, he claims that since the surgery in 2008, his  
10 pain fluctuates from mild to severe, for which plaintiff was prescribed pain medication.

11 Plaintiff fails to allege facts demonstrating that any defendant was deliberately indifferent  
12 to plaintiff’s serious medical needs in connection with the failure to provide him with the steroid  
13 injection. Although the appeal decision reflects that plaintiff was willing to take the risk and have  
14 the injection administered, the Institutional Utilization Management Committee reviewed the  
15 request on two separate occasions and determined that due to the risk of rupture and lack of clear  
16 benefit, the injection should be denied. (ECF No. 1 at 6.) Thus, plaintiff’s claim constitutes a  
17 difference of opinion between him and his prison doctors, and does not rise to the level of  
18 deliberate indifference. Therefore, the complaint must be dismissed.

19 3. Defendants Largoza and Austin

20 Plaintiff’s allegations as to defendants Largoza and Austin are too vague and conclusory  
21 to state an Eighth Amendment claim based on deliberate indifference to plaintiff’s serious  
22 medical needs. Plaintiff does not articulate any facts meeting the two prongs of Farmer as to  
23 either defendant. Absent facts not pled here, their involvement in the appeals process does not  
24 necessarily demonstrate awareness of a constitutional violation, or contribute to the underlying  
25 constitutional violation Peralta v. Dillard, 744 F.3d 1076, 1086-97 (9th Cir. 2014).

26 In addition, the Due Process Clause protects plaintiff against the deprivation of liberty  
27 without the procedural protections to which he is entitled under the law. Wilkinson v. Austin,  
28 545 U.S. 209, 221 (2005). However, plaintiff has no stand-alone due process rights related to the

1 administrative grievance process. Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003); Mann v.  
2 Adams, 855 F.2d 639, 640 (9th Cir. 1988). A prison official’s denial of a grievance does not  
3 itself violate the constitution. Evans v. Skolnik, 637 Fed. Appx. 285, 288 (9th Cir. 2015), cert.  
4 dism’d, 136 S. Ct. 2390 (2016). Thus, the denial, rejection, or cancellation of a grievance does  
5 not constitute a due process violation. See, e.g., Wright v. Shannon, 2010 WL 445203, at \*5  
6 (E.D. Cal. Feb. 2, 2010) (plaintiff’s allegations that prison officials denied or ignored his inmate  
7 appeals failed to state a cognizable claim under the First Amendment); Towner v. Knowles, 2009  
8 WL 4281999 at \*2 (E.D. Cal. Nov. 20, 2009) (plaintiff’s allegations that prison officials screened  
9 out his inmate appeals without any basis failed to indicate a deprivation of federal rights);  
10 Williams v. Cate, 2009 WL 3789597, at \*6 (E.D. Cal. Nov. 10, 2009) (“Plaintiff has no protected  
11 liberty interest in the vindication of his administrative claims.”).

12 Thus, plaintiff’s claims against defendants Largoza and Austin are dismissed. In light of  
13 the above analysis, it does not appear that plaintiff can amend his complaint to state a cognizable  
14 Eighth Amendment claim against defendants Largoza and Austin.

#### 15 VI. Leave to Amend

16 It is not clear that plaintiff can allege facts demonstrating deliberate indifference.  
17 However, in an abundance of caution, the court grants plaintiff leave to file an amended  
18 complaint.

19 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
20 about which he complains resulted in a deprivation of plaintiff’s constitutional rights. Rizzo v.  
21 Goode, 423 U.S. 362, 371 (1976). Also, the complaint must allege in specific terms how each  
22 named defendant is involved. Id. There can be no liability under 42 U.S.C. § 1983 unless there is  
23 some affirmative link or connection between a defendant’s actions and the claimed deprivation.  
24 Id.; May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743  
25 (9th Cir. 1978). Furthermore, vague and conclusory allegations of official participation in civil  
26 rights violations are not sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

27 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to  
28 make plaintiff’s amended complaint complete. Local Rule 220 requires that an amended

1 complaint be complete in itself without reference to any prior pleading. This requirement exists  
2 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.  
3 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original  
4 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an  
5 original complaint, each claim and the involvement of each defendant must be sufficiently  
6 alleged.

7 In accordance with the above, IT IS HEREBY ORDERED that:

8 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

9 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff  
10 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.  
11 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the  
12 Director of the California Department of Corrections and Rehabilitation filed concurrently  
13 herewith.

14 3. Plaintiff's complaint is dismissed.

15 4. Within thirty days from the date of this order, plaintiff shall complete the attached  
16 Notice of Amendment and submit the following documents to the court:

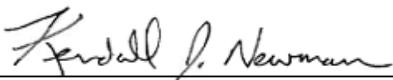
17 a. The completed Notice of Amendment; and

18 b. An original and one copy of the Amended Complaint.

19 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the  
20 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must  
21 also bear the docket number assigned to this case and must be labeled "Amended Complaint."

22 Failure to file an amended complaint in accordance with this order may result in the  
23 dismissal of this action.

24 Dated: September 28, 2017

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26 \_\_\_\_\_  
KENDALL J. NEWMAN  
27 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARCELLIOUS TUCKER,  
Plaintiff,  
v.  
JAROM A. DASZKO, M.D., et al.,  
Defendants.

No. 2:17-cv-1798 KJN P

ORDER

Plaintiff hereby submits the following document in compliance with the court's order  
filed \_\_\_\_\_.

Amended Complaint

DATED: \_\_\_\_\_

\_\_\_\_\_  
Plaintiff