



1 *Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41  
2 (1957)); see also Fed. R. Civ. P. 12(b)(6). “[A] plaintiff’s obligation to provide the ‘grounds’ of  
3 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of  
4 a cause of action’s elements will not do. Factual allegations must be enough to raise a right to  
5 relief above the speculative level on the assumption that all of the complaint’s allegations are  
6 true.” *Id.* (citations omitted). Dismissal is appropriate based either on the lack of cognizable  
7 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.  
8 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

9 In reviewing a complaint under this standard, the court must accept as true the allegations  
10 of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740  
11 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in  
12 the plaintiff’s favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A pro se plaintiff must  
13 satisfy the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule  
14 8(a)(2) “requires a complaint to include a short and plain statement of the claim showing that the  
15 pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the  
16 grounds upon which it rests.” *Twombly*, 550 U.S. at 562-563 (2007).

## 17 II. Analysis

18 Like its predecessor, the amended complaint raises claims related to a “soft tissue mass”  
19 in plaintiff’s upper back. He claims that defendant Schmidt diagnosed the mass after a physical  
20 exam. ECF No. 12 at 2. X-rays and MRI examinations confirmed the diagnosis. *Id.* Plaintiff  
21 then had a consultation with defendant Steen Jensen, at which he was allegedly informed that an  
22 excision of the mass would be scheduled. *Id.* He alleges that the excision procedure was  
23 approved on an official form. *Id.*

24 At some point after the consultation with Jensen, plaintiff alleges that defendant Ralph  
25 Delgado – a secondary medical reviewer - denied the excision. *Id.* at 3. In his decision, Delgado  
26 allegedly noted that “it is not clear from the evidence that [the mass] interferes with ADLS or that  
27 the pain is severe in nature.” *Id.* Delgado went on to note that “[t]he pain needs to be better  
28

1 defined . . . [i]f the lipoma is impacting [undecipherable]<sup>1</sup> please document what and how.” *Id.*  
2 Plaintiff alleges that the severity of his pain was well documented, however. *Id.* at 4. As result of  
3 Delgado’s decision, plaintiff states that his mass increased in size and he suffered greater negative  
4 effects therefrom. *Id.* at 4-5.

5 As an initial matter, although plaintiff names Schmidt and Jensen as defendants to this  
6 complaint, it is entirely unclear from his allegations how either engaged in deliberate indifference.  
7 As noted *supra*, both examined his mass and the ultimate result of these examinations was a  
8 referral for excision – a procedure plaintiff obviously believes was necessary. Consequently, both  
9 of these defendants should be dismissed.<sup>2</sup>

10 Whether plaintiff has sufficiently alleged deliberate indifference on the part of Delgado  
11 presents a closer call. The court begins by noting that it does not appear from the allegations that  
12 Delgado’s denial of the excision procedure was either dismissive or final. Rather, he appears to  
13 have had doubts about the necessity of the procedure based on the record before him and desired  
14 clarification before approving excision. Obviously, plaintiff feels that Delgado’s reading of the  
15 record was incorrect and that, at the time of the denial, there was a sufficient basis for moving  
16 forward with excision. Simple mistake, however, does not equate to deliberate indifference. *See*  
17 *Hutchison v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (“Mere negligence in diagnosing or  
18 treating a medical condition, without more, does not violate a prisoner’s Eighth Amendment  
19 rights.”). Rather, deliberate indifference requires a state of mind comparable to criminal  
20 recklessness. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994). No facts are alleged in the  
21 complaint which indicate that Delgado exhibited that level of disregard for plaintiff’s condition.

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23 <sup>1</sup> Plaintiff transcribed the notes to Delgado’s decision rather than submitting the document  
24 itself in conjunction with his complaint.

25 <sup>2</sup> Near the end of the complaint, plaintiff vaguely alleges that Schmidt “did not make  
26 available any form of treatment for the pain or slowly [e]nlarging lipoma . . . .” ECF No. 12 at  
27 15. This is insufficient to establish deliberate indifference, especially since the allegations appear  
28 to indicate that plaintiff’s consultation with Jensen and referral for excision resulted from  
Schmidt’s diagnosis. Thus, Schmidt cannot credibly be alleged to have ignored the condition she  
diagnosed.

1 Rather, he highlighted – mistakenly perhaps – certain omissions that needed clarification before  
2 approving a surgical procedure.

### 3 Leave to Amend

4 Having determined that this amended complaint, like its predecessor, fails to state a viable  
5 claim, the court must determine whether to grant plaintiff further leave to amend. In light of  
6 plaintiff’s *pro se* status and the fact that his allegations against Delgado come close to stating a  
7 cognizable claim, the court will grant him one final opportunity to amend.

8 Plaintiff is cautioned that any amended complaint must identify as a defendant only  
9 persons who personally participated in a substantial way in depriving him of his constitutional  
10 rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the  
11 deprivation of a constitutional right if he does an act, participates in another’s act or omits to  
12 perform an act he is legally required to do that causes the alleged deprivation). Plaintiff may also  
13 include any allegations based on state law that are so closely related to his federal allegations that  
14 “they form the same case or controversy.” *See* 28 U.S.C. § 1367(a).

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

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

19 Any amended complaint must be written or typed so that it so that it is complete in itself  
20 without reference to any earlier filed complaint. E.D. Cal. L.R. 220. This is because an amended  
21 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the  
22 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114  
23 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter  
24 being treated thereafter as non-existent.””) (*quoting Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.  
25 1967)).

26 Any amended complaint should be as concise as possible in fulfilling the above  
27 requirements. Fed. R. Civ. P. 8(a). Plaintiff should avoid the inclusion of procedural or factual  
28 background which has no bearing on his legal claims. He should also take pains to ensure that his

1 amended complaint is as legible as possible. This refers not only to penmanship, but also spacing  
2 and organization. Plaintiff should carefully consider whether each of the defendants he names  
3 actually had involvement in the constitutional violations he alleges. A “scattershot” approach in  
4 which plaintiff names dozens of defendants will not be looked upon favorably by the court.

5 Conclusion

6 Accordingly, it is ORDERED that:

- 7 1. Plaintiff’s amended complaint (ECF No. 12) is dismissed with leave to amend within  
8 30 days of service of this order; and  
9 2. Failure to comply with any part of this this order may result in dismissal of this action.

10 DATED: May 20, 2019.

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12 EDMUND F. BRENNAN  
13 UNITED STATES MAGISTRATE JUDGE  
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