

1 “frivolous, malicious, or fail[] to state a claim upon which relief may be granted,” or that “seek[]
2 monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

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7 640 (9th Cir. 1989) (quoting Neitzke, 490 U.S. at 327), superseded by statute on other grounds as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

11 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the
12 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of
13 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550
14 U.S. 544, 555 (2007) (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
15 “Failure to state a claim under § 1915A incorporates the familiar standard applied in the context
16 of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).” Wilhelm v. Rotman,
17 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). In order to survive dismissal for failure
18 to state a claim, a complaint must contain more than “a formulaic recitation of the elements of a
19 cause of action;” it must contain factual allegations sufficient “to raise a right to relief above the
20 speculative level.” Twombly, 550 U.S. at 555 (citations omitted). “[T]he pleading must contain
21 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
22 cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright & Arthur
23 R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

24 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
25 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting
26 Twombly, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual
27 content that allows the court to draw the reasonable inference that the defendant is liable for the
28 misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). In reviewing a complaint under this

1 standard, the court must accept as true the allegations of the complaint in question, Hosp. Bldg.
2 Co. v. Trs. of the Rex Hosp., 425 U.S. 738, 740 (1976) (citation omitted), as well as construe the
3 pleading in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor,
4 Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citations omitted).

5 II. THE THIRD AMENDED COMPLAINT

6 Plaintiff brings suit against twelve defendants, eight of whom are members of the medical
7 staff at Mule Creek State Prison, three of whom are doctors at San Joaquin General Hospital, and
8 one of whom is a correctional officer at MCSP. ECF No. 23 at 1-2. The Third Amended
9 Complaint presents five claims, all alleging deliberate indifference to plaintiff's serious medical
10 needs, and all arising from the aftermath of an inmate assault on plaintiff on March 17, 2018,
11 which broke plaintiff's jaw. Plaintiff alleges in sum as follows.

12 Claim One is stated against MCSP defendants Massey, a nurse; Canello, a correctional
13 officer; and Horowitz, a doctor. Immediately following the assault plaintiff was taken to the
14 Triage Treatment Area (TTA) and seen by Nurse Massey. Plaintiff realized from past experience
15 that his jaw was broken. Plaintiff told Massey that his jaw was broken in the location of a
16 previous fracture, that he was in extreme pain, and that he needed an x-ray, to see a doctor, and to
17 be given pain medicine. These are "required" procedures when a broken bone is suspected.
18 Defendant Massey failed to provide these things after being told by Officer Canello to only treat
19 plaintiff for swelling. Officer Canello said that if Massey diagnosed a broken bone, they would
20 have to write up the other inmate for assault which custody staff did not want to do "because the
21 other inmate had did them a favor by assaulting [plaintiff]." Massey then ordered plaintiff
22 returned to his cell. Thirteen hours later, plaintiff was returned to the TTA with even worse
23 swelling and pain. RN Massey finally agreed to consult the on-call doctor and have plaintiff sent
24 to an outside hospital for evaluation and treatment. Plaintiff claims that Massey delayed
25 medically necessary evaluation and treatment, and that Dr. Horowitz, the on-call physician, had a
26 duty to evaluate plaintiff personally rather than just relying on Massey's report and sending him
27 to SJGH on that basis. These actions caused plaintiff unnecessary pain and suffering until he
28 received fentanyl at the hospital thirteen hours after the assault. His pain was so severe that he

1 needed two doses of fentanyl. ECF No. 23 at 4-9.

2 Claim Two is brought against SJGH doctors Willett, Kelly, and Lerokamos and Dr.
3 Horowitz of MCSP. Plaintiff alleges in sum that these doctors consulted with each other and
4 collectively agreed, after plaintiff's fracture had been diagnosed by CT scan and he was provided
5 pain medication, to return him to the prison without surgically stabilizing his jaw. Plaintiff
6 alleges that broken jaws are "typically" stabilized to prevent further damage, and that the
7 defendants' failure to do so caused him extreme pain and unspecified permanent damage. Id. at
8 10-11.

9 Claim Three is brought against MCSP nurse Saini and the unnamed doctor who was on-
10 call for the Triage Treatment Area on March 20, 2018. Plaintiff alleges that he was returned to
11 MCSP from the hospital with instructions to prison staff to notify SJGH doctors if his condition
12 worsened. On March 20, plaintiff felt his jaw "snap" when he yawned, and realized that it had
13 "fractured further." He went to the clinic and was seen by LVN Pelayo, who spoke to RN Saini
14 about whether plaintiff should come to triage for immediate attention. Defendant Saini consulted
15 with the on-call doctor and reported back that staff were aware of plaintiff's condition, and that if
16 he wanted to be seen again he should submit a request for treatment form and someone would get
17 back to him in 24-48 hours. On March 21 plaintiff was finally seen by a dentist, DDS Francis,
18 and dental x-rays revealed additional fractures to his jaw. These were caused by the failure to
19 stabilize the fracture. As a result, plaintiff experienced extreme pain and unspecified permanent
20 damage. Id. at 12-14.

21 Claim Four is brought against MCSP doctors Horowitz and Smith (the Chief Medical
22 Examiner), Rudas, and Matharu; MCSP dentist Francis; and SJGH doctors Willett, Kelly, and
23 Lerokamos. Plaintiff alleges that his jaw injury should have been treated from the outset by an
24 oral surgeon, but that MCSP had him initially treated at SJGH by an ENT doctor. When plaintiff
25 was eventually seen at MCSP by DDS Francis, both his original injury and the subsequent
26 damage from defendants' failure to stabilize were identified as dental issues but plaintiff was
27 again sent to triage for care by a medical doctor (Dr. Rudas) and not an oral surgeon. It was
28 MCSP's policy to send inmates with dental injuries to ENTs to save money. This caused plaintiff

1 extreme pain and unspecified permanent damage. Id. at 15-17.

2 Claim Five is brought against the following MCSP defendants: CME Smith; doctors
3 Rudas, Matharu, and Horowitz; and nurses Saini and Rana. Plaintiff alleges that he was returned
4 to MCSP from SJGH with orders that he receive a liquid diet. It was the specified defendants'
5 duty to ensure that he received the ordered liquid diet, but he did not get it until March 21, 2018.
6 Plaintiff repeatedly told defendants that he could not chew and had orders for a liquid diet. Id. at
7 18-19.

8 III. EIGHTH AMENDMENT STANDARDS

9 To state a § 1983 claim for violation of the Eighth Amendment based on inadequate
10 medical care, a plaintiff must allege “acts or omissions sufficiently harmful to evidence deliberate
11 indifference to serious medical needs.” Estelle v. Gamble, 429 U.S. 97, 106 (1976). To prevail,
12 plaintiff must show both that his medical needs were objectively serious, and that defendants
13 possessed a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 299 (1991). A
14 serious medical need exists if the failure to treat a prisoner’s condition could result in further
15 significant injury or the unnecessary and wanton infliction of pain. See Wood v. Housewright,
16 900 F. 2d 1332, 1337-41 (9th Cir. 1990). The requisite state of mind is “deliberate indifference.”
17 Hudson v. McMillian, 503 U.S. 1, 4 (1992).

18 In Farmer v. Brennan, 511 U.S. 825 (1994), the Supreme Court established a very strict
19 standard which a plaintiff must meet in order to establish “deliberate indifference.” Negligence
20 and even recklessness are insufficient. Farmer, 511 U.S. at 835, 836-37. Neither is it sufficient
21 that a reasonable person would have known of the risk or that a defendant should have known of
22 the risk. Id. at 842. A prison official acts with deliberate indifference only if he subjectively
23 knows of and disregards an excessive risk to inmate health and safety. Toguchi v. Chung, 391
24 F.3d 1051, 1057 (9th Cir. 2004).

25 IV. CLAIM FOR WHICH A RESPONSE IS REQUIRED

26 As amended, Claim One includes sufficient factual allegations to state a deliberate
27 indifference claim against Nurse Massey and Officer Canello. Construed liberally and assumed
28 to be true, plaintiff’s allegations show that Massey knew that there was reason to believe

1 plaintiff's jaw had been broken and that he was in excruciating pain, but failed to take immediate
2 action to address this emergency because of Officer Canellos' expressed hostility to plaintiff. The
3 allegations are also sufficient to support the inference that Officer Canello deliberately interfered
4 in plaintiff's medical care with disregard for his serious condition, which can support liability on
5 the part of custodial staff as well as medical personnel. See Estelle, 429 U.S. at 104-105.
6 Accordingly, the Third Amended Complaint should be served on defendants Massey and Canello
7 and they should be required to respond to Claim One.

8 V. FAILURE TO STATE A CLAIM

9 Claim One fails to state a claim against Dr. Horowitz. There are no factual allegations
10 which would support a conclusion that she was subjectively aware that plaintiff urgently required
11 x-rays or immediate transport to an outside hospital when he was first brought to the TTA, and
12 that her alleged failure to act was accompanied by a culpable state of mind. She is not alleged to
13 have been influenced by custody staff as Nurse Massey was. Plaintiff's allegations that Dr.
14 Horowitz violated her "duty" to independently examine him, rather than relying on Nurse
15 Massey's verbal report, suggests only negligence or medical malpractice, which are not
16 actionable under § 1983 and the Eighth Amendment. See Broughton v. Cutter Laboratories, 622
17 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06); see also Toguchi, 391 F.3d at
18 1057.

19 Claims Two (failure to surgically stabilize jaw) and Four (treatment by M.D.s rather than
20 by an oral surgeon) are fundamentally predicated on plaintiff's difference of opinion with medical
21 professionals about the treatment that was appropriate for him. Such differences of opinion fail to
22 state an Eighth Amendment claim as a matter of law. Jackson v. McIntosh, 90 F.3d 330 (9th Cir.
23 1996). Moreover, there are no concrete factual allegations as to any defendants named in these
24 claims that demonstrate any of them acted with the requisite culpable state of mind. Negligence
25 and malpractice are insufficient as a matter of Eighth Amendment jurisprudence, Broughton, 622
26 F.2d at 460; conclusory allegations as to an element of liability are insufficient as a matter of
27 applicable pleading standards, Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).
28 Accordingly, Claims Two and Four fail to state viable claims for relief.

1 To the extent that Claim Three (involving plaintiff’s experience of a “snap” while
2 yawning, allegedly demonstrating a further jaw fracture in the days after his return to the prison)
3 is based on harm from the failure of SJGH doctors¹ to surgically stabilize plaintiff’s jaw, it does
4 not state a claim for the same reason as Claim Two. To the extent that Claim Three seeks to
5 impose liability for the delay of follow-up medical care after plaintiff reported feeling the “snap”
6 on March 20, 2018, the claim fails because there are no facts showing a deliberately indifferent
7 state of mind on the part of any defendant, or identifying concrete injury from the delay. See
8 Hallett v. Morgan, 296 F.3d 732, 745-46 (9th Cir. 2002) (to establish deliberate indifference
9 arising from delay in providing care, plaintiff must show that the delay itself was harmful); see
10 also Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir. 1994); McGuckin v. Smith, 974 F.2d 1050,
11 1059 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir. 1990); Hunt v. Dental
12 Dep’t, 865 F.2d 198, 200 (9th Cir. 1989); Shapley v. Nevada Bd. of State Prison Comm’rs, 766
13 F.2d 404, 407 (9th Cir. 1985).

14 Finally, Claim Five (denial of liquid diet) fails for several reasons. First, plaintiff has
15 previously been informed that more facts were needed to show a denial of nutrition significant
16 enough to implicate constitutional standards. See Foster v. Runnels, 554 F.3d 807, 812-813 (9th
17 Cir. 2009) (finding that denial of 16 meals over 23 days constitutes a serious deprivation within
18 the meaning of the Eighth Amendment). The Third Amended Complaint specifies that plaintiff
19 did not receive canned “Boost” nutrition drinks until March 21, but plaintiff has again failed to
20 specify what foods were in fact provided to him. The availability of soft foods could have made
21 the 2-3 day absence of a completely liquid diet constitutionally permissible; plaintiff has not
22 presented facts from which the seriousness of the alleged deprivation can be assessed. Even if the
23 court were to assume a serious deprivation, however, plaintiff’s allegations do not identify actions
24 of any particular named defendant that caused it. Under § 1983, liability lies only for actions that
25 cause a constitutional violation. See Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

26 ¹ Because of the other problems with plaintiff’s claims, it is unnecessary to consider whether the
27 SJGH defendants were acting under color of State law as required for § 1983 liability. See West
28 v. Atkins, 487 U.S. 42, 58 (1988); Lopez v. Dep’t of Health Servs., 939 F.2d 881 (9th Cir. 1991)
(per curiam).

1 General allegations that medical personnel were responsible by virtue of their positions for
2 ensuring plaintiff's nutrition are insufficient to support liability. See Iqbal, 556 U.S. at 676 (no
3 respondeat superior liability under § 1983). Individual officials cannot be liable on the theory
4 that something went wrong on their watch, but only if their own actions or omissions caused the
5 constitutional violation. See Starr v. Baca, 652 F.3d 1202, 1205-06 (9th Cir. 2011). Plaintiff's
6 allegations that the defendants breached their professional duties to ensure his health and safety
7 sound in negligence; they do not support an Eighth Amendment violation. For all these reasons,
8 the allegations of Claim Five fail to state a claim for relief.

9 VI. FURTHER LEAVE TO AMEND IS NOT APPROPRIATE

10 Leave to amend need not be granted when amendment would be futile. Hartmann v.
11 CDCR, 707 F.3d 1114, 1130 (9th Cir. 2013). A history of failure to cure deficiencies supports
12 denial of further leave to amend. See Foman v. Davis, 371 U.S. 178, 182 (1962). Plaintiff has
13 twice been informed of the legal standards governing Eighth Amendment deliberate indifference
14 claims, the principles governing liability under 42 U.S.C. § 1983, and applicable pleading
15 standards. With his Third Amended Complaint, he has succeeded in stating a claim against
16 defendants Massey and Canello for the initial delayed response to his broken jaw. However, it
17 appears from the history of amendments in this case that plaintiff has now presented all the facts
18 known to him and his amendments have not resulted in any additional viable claims. The
19 undersigned concludes that further leave to amend would be futile.

20 CONCLUSION

21 In accordance with the above, IT IS HEREBY RECOMMENDED that:

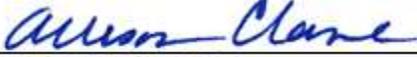
22 1. This case proceed on Claim One of the Third Amended Complaint against defendants
23 Massey and Canello only; and

24 2. All other claims and defendants be dismissed pursuant to 28 U.S.C. § 1915A.

25 These findings and recommendations are submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)
27 days after being served with these findings and recommendations, plaintiff may file written
28 objections with the court and serve a copy on all parties. Such a document should be captioned

1 “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that
2 failure to file objections within the specified time may waive the right to appeal the District
3 Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: January 7, 2022

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6 ALLISON CLAIRE
7 UNITED STATES MAGISTRATE JUDGE
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