



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN DRAGASITS,
CDCR #AR-2176,

Plaintiff,

vs.

T. RUCKER; FIGUEROS; L.
MARSHALL; K MITCHELL; V.
SOSA; T. AZENTE,

Defendants.

Case No.: 3:18-cv-00512-WQH-AGS

**ORDER DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
AND § 1915A(b) AND FOR FAILING
TO COMPLY WITH FRCP 8**

I. Procedural History

On March 8, 2018, Stephen Dragasits (“Plaintiff”), currently incarcerated at the Richard J. Donovan Correctional Facility (“RJD”) located in San Diego, California, and proceeding pro se, filed this civil rights action (ECF No. 1), together with a Request to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2). On March 21, 2018, Plaintiff filed exhibits to his Complaint. (ECF No. 6.)

1 On May 10, 2018, Plaintiff's IFP Motion was GRANTED but the Court
2 DISMISSED all the of the claims in this action with the exception of the Eighth
3 Amendment claims against Defendants Marshall and Mitchell and the First Amendment
4 retaliation claims against Defendants Rucker, Figueroa, Marshall, and Mitchell. See May
5 10, 2018 Order, ECF No. 7 at 9-10. Plaintiff was given the option to either: "(1) Notify
6 the Court of the intention to proceed with claims against Rucker, Figueroa, Marshall, and
7 Mitchell only; or (2) File an Amended Complaint which cures all the deficiencies of
8 pleading noted" in the Court's Order. *Id.* at 10.

9 Plaintiff chose to file a sixty-seven (67) page First Amended Complaint ("FAC"),
10 along with nearly five hundred (500) pages of exhibits. (See ECF No. 11.) In his FAC,
11 Plaintiff no longer names Paramo, Stratton, Rojas, Stout, Frost, Aguirre, Voong, and Liu
12 as Defendants. (See *id.* at 1-2, 8-12.) Accordingly, Plaintiff has waived all claims against
13 these Defendants and they are DISMISSED from this action.¹ However, Plaintiff has re-
14 alleged claims against Defendants Mitchell, Marshall, Rucker, Figueroa, and Sosa. In
15 addition, Plaintiff has added Defendant T. Azente despite the fact that the Court did not
16 provide Plaintiff with the option to add new defendants or new claims. See *id.*

17 **II. Sua Sponte Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

18 **A. Standard of Review**

19 As the Court previously informed Plaintiff, because he is a prisoner and is
20 proceeding IFP, his FAC requires a pre-answer screening pursuant to 28 U.S.C.
21 § 1915(e)(2) and § 1915A(b). Under these statutes, the Court must sua sponte dismiss a
22 prisoner's IFP complaint, or any portion of it, which is frivolous, malicious, fails to state a
23 claim, or seeks damages from defendants who are immune. See *Williams v. King*, __ F.3d
24 __, 2017 WL 5180205, at *2 (9th Cir. Nov. 9, 2017) (discussing 28 U.S.C. § 1915(e)(2))

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27 ¹ See S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542,
28 1546 (9th Cir. 1989) ("[A]n amended pleading supersedes the original."); *Lacey*, 693 F.3d at 928 (noting
that claims dismissed with leave to amend which are not re-alleged in an amended pleading may be
"considered waived if not repled.").

1 (citing *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)); *Rhodes v.*
2 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)). “The
3 purpose of [screening] is ‘to ensure that the targets of frivolous or malicious suits need not
4 bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014)
5 (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

6 “The standard for determining whether a plaintiff has failed to state a claim upon
7 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
8 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
9 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
10 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
11 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
12 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,
13 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
14 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

15 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
16 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
17 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief
18 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
19 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
20 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
21 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

22 B. Rule 8

23 Complaints must also comply Federal Rule of Civil Procedure 8, which requires that
24 each pleading include a “short and plain statement of the claim,” FED. R. CIV. P. 8(a)(2),
25 and that “each allegation must be simple, concise, and direct.” FED. R. CIV. P. 8(d)(1). *See*
26 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). In addition to the grounds for sua sponte
27 dismissal set out in § 1915(e)(2)(B), the district court may also dismiss a complaint for
28 failure to comply with Rule 8 if it fails to provide the defendant fair notice of the wrongs

1 allegedly committed. *See McHenry v. Renne*, 84 F.3d 1172, 1178–80 (9th Cir. 1996)
2 (upholding Rule 8(a) dismissal of complaint that was “argumentative, prolix, replete with
3 redundancy, and largely irrelevant”); *Cafasso, United States ex rel. v. General Dynamics*
4 *C4 Systems, Inc.*, 637 F.3d 1047, 1059 (9th Cir. 2011) (citing cases upholding Rule 8
5 dismissals where pleadings were “verbose,” “confusing,” “distracting, ambiguous, and
6 unintelligible,” “highly repetitious,” and comprised of “incomprehensible rambling,” while
7 noting that “[o]ur district courts are busy enough without having to penetrate a tome
8 approaching the magnitude of *War and Peace* to discern a plaintiff’s claims and
9 allegations.”).

10 Here, Plaintiff’s FAC is nearly seventy (70) pages long and attaches nearly five
11 hundred (500) pages of exhibits. The Court finds Plaintiff’s FAC, which is overly verbose
12 and repetitive, along with the attachment of hundreds of documents, violates Rule 8 of the
13 FRCP. Moreover, Plaintiff’s FAC violates the Court’s local rule that provides, in part, that
14 “[c]omplaints by prisoners under the Civil Rights Act, 42 U.S.C. § 1983” are to be written
15 on forms “supplied by the court” and “additional pages not to exceed fifteen (15) in
16 number.” S.D. Cal. CivLR 8.2(a). Accordingly, the Court DISMISSES the entire FAC on
17 Rule 8 grounds, and for violating the Court’s local rules, but will permit Plaintiff to file an
18 amended pleading that complies with Rule 8 and S.D. Cal. CivLr 8.2(a).

19 C. Plaintiff’s factual allegations

20 Plaintiff’s cell was first searched by Defendants Rucker and Figueroa on February
21 9, 2015. (*See* FAC at 20.) During this search, Plaintiff claims Rucker and Figueroa “took
22 possession of (3) items” that Plaintiff owned. (*Id.*) Plaintiff “refused to sign the cell search
23 slip” because he claimed he rightfully owned this property and it was not contraband. (*Id.*)
24 This led to an “argument” with Rucker and Figueroa which Plaintiff claims led to a
25 retaliatory second search of his cell. (*Id.*) Rucker and Figueroa “did not provide a receipt
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1 for the second search.” (*Id.*) Later, “Officer Corona²,” after speaking with Plaintiff, “wrote
2 out a cell search receipt of all the items taken” during the second search of Plaintiff’s cell.
3 (*Id.* at 22.)

4 Plaintiff “wrote a CDCR 602 form against Defendants Rucker and Figueroa because
5 of the personal property taken unlawfully.” (*Id.*) However, Plaintiff claims this grievance
6 was “intentionally destroyed or lost by Defendants Sosa, Azente, and Self³ Appeal
7 Coordinators as retaliation against Plaintiff’s protected speech.” (*Id.*)

8 On February 9, 2016, one year after the first search of his cell, Plaintiff claims that
9 he had been sick and “took a decongestive.” (*Id.* at 23-24.) Plaintiff left his cell that
10 afternoon to “pick up his regular medication” which includes medication for Hepatitis C
11 “that makes him drowsy.” (*Id.* at 24.) Plaintiff returned to his cell and told his cellmate
12 that he “was not going to dinner and was going to sleep.” (*Id.*) Plaintiff “personally
13 believes that there was an attempt to wake him up while he was sleeping” but the
14 “medication did not allow him to wake up.” (*Id.*)

15 While Plaintiff was sleeping, he “believe[d] he heard the cell door moving and then
16 it eventually shut loudly.” (*Id.*) Plaintiff claims when he woke up that evening he
17 discovered that some of his property was missing, including “a pair of orthopedic shoes
18 that were approved” by an “order of treatment by prison doctor” to “alleviate pain from the
19 bottom of his feet.” (*Id.* at 24-25.) Plaintiff could see his personal property “laying outside
20 on the dayroom floor.” (*Id.* at 25.) Plaintiff claims “it struck him building Officers
21 Marshall and Mitchell came into his cell while he was sleeping and removed all” of
22 Plaintiff’s personal property. (*Id.*)

23 Later that evening, Plaintiff “saw Defendant Marshall was standing about 10 feet
24 from his cell door.” (*Id.* at 26.) Plaintiff claims he asked Marshall why his personal
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27 ² Corona is not a named Defendant.

28 ³ While Plaintiff refers to Self as a Defendant in these allegations, Self is not clearly identified as a
Defendant in Plaintiff’s original Complaint or in the caption of his FAC.

1 property was laying on the dayroom floor and she responded “are you going to come out
2 now?” (*Id.*) Plaintiff alleges his personal property “was stolen, lost and/or destroyed by
3 both Defendants Marshall and Mitchell.” (*Id.*)

4 Approximately “10 to 12 minutes later,” Plaintiff’s cell was searched again by four
5 unnamed correctional officers. (*Id.* at 28.) Plaintiff states that the four officers “did not
6 know the situation of what actually occurred previous to them arriving or about the
7 previously searched cell.” (*Id.*) Plaintiff did inform them that his personal property had
8 been taken, including his orthopedic shoes. (*See id.*) Plaintiff claims Marshall said “I need
9 receipts” in “front of the other four officers.” (*Id.*) Marshall also told Plaintiff that she
10 “need[ed] to see chrono for the shoes.” (*Id.*) Plaintiff returned to his cell. (*See id.*)

11 The following day, Plaintiff claims Marshall “ignored” him and refused to provide
12 him with a receipt for his personal items. (*Id.* at 29.) Plaintiff alleges “this went on for
13 months” and it was Marshall and Mitchell’s “way of further retaliation against Plaintiff by
14 withholding his personal property hostage.” (*Id.*)

15 Plaintiff alleges that he “could not get treatment from the prison doctor to replace
16 the orthopedic shoes without months of delay in treatment.” (*Id.* at 30.) Plaintiff alleges
17 that using “standard prison-issue shoes caused Plaintiff “constant pain” and resulted in an
18 injury “that required surgery.” (*Id.*)

19 D. Retaliation claims

20 Plaintiff alleges four separate actions taken by Defendants against him that were in
21 retaliation for the exercising of his First Amendment rights. Plaintiff claims that he was
22 retaliated against for arguing with Defendants and for filing administrative grievances.

23 A viable claim of retaliation entails five basic elements: (1) an assertion that a state
24 actor took some adverse action against an inmate (2) because of (3) the inmate’s protected
25 conduct and that the adverse action (4) chilled the inmate’s exercise of his First
26 Amendment rights and (5) did not reasonably advance a legitimate penological purpose.
27 *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (quoting *Rhodes v. Robinson*, 408
28 F.3d 559, 567-568 (9th Cir. 2005)).

1 As a preliminary matter, Plaintiff makes numerous references to “retaliation”
2 throughout his FAC, but legal “labels and conclusions” like this “are not entitled to the
3 assumption of truth” and fail to state a plausible claim for relief unless they are supported
4 by “further factual enhancement” that “allows the court to draw the reasonable inference
5 that [each] defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678-79.

6 1. First cell search

7 Plaintiff alleges that the cell search conducted by Rucker and Figueroa on February
8 9, 2015 was conducted in retaliation “because the prior day there was an isolated incident
9 between building 17 officers and one white prisoner attack.” (FAC at 38.) Plaintiff further
10 claims the search was “group punishment and deliberate retaliation treatment of the whole
11 building 17.” (*Id.*) These facts do not describe any individualized “protected conduct” on
12 the part of Plaintiff. *Brodheim*, 584 F.3d at 1269. Nowhere in his FAC does Plaintiff allege
13 that he was personally engaged in “protected conduct” that led to the purported first
14 retaliatory cell search on February 9, 2015. *See Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir.
15 2014) (“We have repeatedly held that mere speculation that defendants acted out of
16 retaliation is not sufficient.”). Thus, Plaintiff has failed to state a retaliation claim as to the
17 first cell search.

18 2. Second cell search

19 Plaintiff claims Defendants Rucker and Figueroa conducted the second cell search
20 on February 9, 2015 because “Plaintiff and Defendants argued about the first cell search
21 property” that was purportedly taken from Plaintiff’s cell. (FAC at 39.) Plaintiff claims
22 Defendants “took an adverse action against Plaintiff’s protected speech” by conducting a
23 second cell search that “would chill or silence a person of ordinary firmness.” (*Id.*)
24 However, it is not clear that a verbal disagreement with the Defendants rises to the level of
25 protected conduct under the First Amendment.

26 The filing of an inmate grievance is protected conduct, *Rhodes*, 408 F.3d at 568, as
27 are the rights to speech or to petition the government, *Rizzo v. Dawson*, 778 F.2d 527, 532
28 (9th Cir. 1985); *see also Valandingham v. Bojorquez*, 866 F.2d 1135 (9th Cir. 1989); *Pratt*

1 v. *Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). Here, Plaintiff engaged in an argument with
2 Defendants but does not allege that the search was the result of his threatening to file a
3 grievance or actually filing a grievance against Defendants.

4 The Supreme Court held “a prison inmate [only] retains those First Amendment
5 rights that are not inconsistent with his status as a prisoner or with the legitimate
6 penological objectives of the corrections system.” *Pell v. Procunier*, 417 U.S. 817, 822
7 (1974). The Court finds that Plaintiff has not sufficiently alleged facts to show that he was
8 engaged in protected conduct at the time the second cell search was conducted, and
9 therefore, he has failed to state a retaliation claim as to this search.

10 3. Claims against Sosa and Azente

11 Plaintiff claims that he submitted grievances relating to the taking and destruction
12 of his personal property following the cell searches. (*See* FAC at 42-43.) However,
13 Plaintiff alleges that Defendant Sosa “deliberately lied about having received any appeal
14 regarding property.” (*Id.*) He further claims Defendants Sosa and Azente denied “that any
15 appeal exists for property in retaliation” for Plaintiff filing grievances. (*Id.* at 43.)

16 On April 30, 2015, Plaintiff submitted a CDCR 22 Inmate/Parolee Request inquiring
17 as to why his previous grievances have not been answered. (*See* FAC at 100, Ex. E
18 “Inmate/Parolee Request for Interview, Item or Service.”) On May 20, 2015, Defendant
19 Sosa responded “a review of our records indicates no appeal regarding property in 2015
20 has been received, please indicate if this is a 2014 or 2015 appeal.” (*Id.*) Plaintiff was
21 instructed to “please review and submit appeal.” (*Id.*)

22 Plaintiff responded on June 2, 2015 by indicating that he had “turned in (2) 602’s in
23 March of 2015” which “listed all items taken” from the cell searches. *Id.* Defendant
24 Azente wrote back to Plaintiff on June 29, 2015 indicating “as previously mentioned, there
25 is no record of RJDCF appeals office receiving appeals for you concerning the issue stated
26 above.” (*Id.*)

27 Plaintiff’s allegations Defendants Sosa and Azente retaliated against him by simply
28 reviewing and/or denying his administrative grievances fails to state a claim. *See Pratt*, 65

1 F.3d at 806 (plaintiff bears the burden of pleading the “absence of legitimate correctional
2 goals” for the conduct about which he complains); *see also Burgos v. Canino*, 641 F. Supp.
3 2d 443, 455 (E.D. Pa. 2009) (“The mere denial of grievances does not rise to the level of
4 adverse action sufficient to deter a person of ordinary firmness from exercising his
5 constitutional rights.”); *Dacey v. Hanks*, No. 2:14-cv-2018 JAM AC P, 2015 WL 4879627,
6 at *5 (E.D. Cal. Aug. 14, 2015) (collecting cases) (“[D]enial of a grievance neither
7 constitutes an adverse action that is more than de minimis nor is it sufficient to deter a
8 prisoner of “ordinary firmness” from further First Amendment activities.”); *accord Wong*
9 *v. Ponce*, No. 2:16-CV-00501 AC P, 2017 WL 784913, at *6 (E.D. Cal. Mar. 1, 2017);
10 *Morris v. Green*, No. 2:13-CV-0589 JAM CKD P, 2016 WL 4044930, at *4 (E.D. Cal.
11 July 28, 2016); *Payan v. Tate*, No. 1:13-CV-00807 LJO BAM PC, 2017 WL 880422, at *3
12 (E.D. Cal. Mar. 6, 2017) (“Plaintiff cannot state a claim for retaliation because defendants
13 partially granted and/or denied his prison grievances.”), *report and recommendation*
14 *adopted*, No. 1:13-CV-00807 LJO BAM PC, 2017 WL 1214015 (E.D. Cal. Mar. 31, 2017).

15 Therefore, the Court finds that Plaintiff has failed to state a retaliation claim against
16 Defendants Sosa and Azente and dismisses those claims without leave to amend. *See*
17 *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir.1996) (denial of a leave to amend
18 is not an abuse of discretion where further amendment would be futile).

19 4. February 9, 2016 cell search

20 Plaintiff claims that on the one year “anniversary” of the cell search conducted in
21 February of 2015 by Defendants Rucker and Figueroa, Defendants Mitchell and Marshall
22 searched “the cell of Plaintiff in retaliation.” (FAC at 47.) Plaintiff claims that he had
23 taken medication the evening of February 9, 2016 which caused him to fall asleep. (*See*
24 *id.* at 48.) Plaintiff believes that “there was an attempt to wake him up” but he “went back
25 to sleep.” (*Id.*) While he was asleep Plaintiff “believes he heard the cell door moving and
26 then it eventually shut loudly.” (*Id.*) When Plaintiff awoke he discovered that some of
27 his personal property was missing. (*See id.*) He claims when he looked out of his cell he
28 “saw all his personal property laying outside on the dayroom floor.” (*Id.* at 49.) Plaintiff

1 alleges that it “struck” him that the building floor officers Marshall & Mitchell came into
2 his cell,” while “he was sleeping.” (*Id.*)

3 Based on Plaintiff’s speculative factual allegations, the Court finds Plaintiff has
4 failed to state a retaliation claim against Defendants Marshall and Mitchell. First, Plaintiff
5 acknowledges that he was not actually aware that either Defendant was in his cell because
6 he was asleep. Second, there are no plausible allegations that the actions purportedly taken
7 on February 9, 2016 have any nexus to the actions that happened one year prior. *See*
8 *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (plaintiff must
9 allege the protected conduct was a “substantial” or “motivating” factor in the defendant’s
10 decision to act). Moreover, Plaintiff fails to identify any “protected conduct” that he was
11 engaged in that allegedly caused Marshall and Mitchell to retaliate against him.

12 Plaintiff’s retaliation claims against Marshall and Mitchell are dismissed for failing
13 to state a claim.

14 E. Eighth Amendment claims

15 As stated above, on February 9, 2016, Plaintiff claims that his cell was searched and
16 personal property was removed from his cell. Included in his personal property, which
17 Plaintiff claims later went missing and never recovered, was “orthopedic shoes.” (FAC at
18 27.) Plaintiff “informed” Defendants Marshall and Mitchell that these shoes were missing
19 and claims “they knew that the orthopedic shoes were ordered by the Doctor and they knew
20 they were needed by Plaintiff for his feet.” (*Id.* at 27-28.)

21 Plaintiff alleges he made numerous attempts to retrieve his personal property from
22 Defendant Marshall but was ignored by Defendant Marshall. *See id.* at 27-29. Plaintiff
23 states that “in 2016 and now, inferences could be drawn from the pleadings that each
24 Defendant Marshall [and] Mitchell purposely threw away Plaintiff’s doctor prescribed
25 orthopedic shoes.” (*Id.* at 29-30.)

26
27 To state an Eighth Amendment deliberate indifference to a serious medical need
28 claim, Plaintiff must first allege he suffered from or faced an objectively “serious medical

1 need.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Mendiola-Martinez v. Arpaio*,
2 836 F.3d 1239, 1248 (9th Cir. 2016). “A medical need is serious when the failure to treat
3 it could result in significant injury or the unnecessary and wanton infliction of pain.” *Jett*,
4 439 F.3d at 1096; *see also McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992),
5 *overruled on other grounds by WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir.
6 1997).

7 Here, Plaintiff claims he suffers from an unspecified foot condition requiring
8 orthopedic shoes but he fails to include any further “factual matter” sufficient to show or
9 describe how or to what extent his medical needs were objectively serious. *See McGuckin*
10 *v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991) (defining a “serious medical need” as one
11 which the “failure to treat ... could result in further significant injury or the ‘unnecessary
12 and wanton infliction of pain.’”), *overruled on other grounds by WMX Techs., Inc. v.*
13 *Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc) (citing *Estelle*, 429 U.S. at 104); *Iqbal*, 556
14 U.S. at 678 (“[A] complaint must contain sufficient factual matter, accepted as true, to
15 ‘state a claim to relief that is plausible on its face.’”) (quoting *Twombly*, 550 U.S. at 570).
16 The “existence of an injury that a reasonable doctor or patient would find important and
17 worthy of comment or treatment; the presence of a medical condition that significantly
18 affects an individual’s daily activities; or the existence of chronic and substantial pain are
19 examples of indications that a prisoner has a ‘serious’ need for medical treatment.”
20 *McGuckin*, 974 F.3d at 1059-60.

21 Moreover, even if the Court assumes Plaintiff’s medical conditions were
22 “objectively serious,” nothing in his FAC supports a “reasonable inference that [any
23 individual] defendant” acted with deliberate indifference to his plight. *Iqbal*, 556 U.S. at
24 678. Plaintiff admits that he is speculating that Defendants threw away his shoes. (*See*
25 *FAC* at 30.) Plaintiff claims that Defendants intentionally “interfere[ed] with his treatment
26 once prescribed” from “2014 through 2018 and now” but other than losing his shoes, he
27 does not allege that he was ever denied the ability to seek medical care. Plaintiff does not
28 allege that Defendants ever interfered with any attempts, nor does Plaintiff allege he every

1 made any attempts, to seek replacement of these shoes through the prison's medical
2 department.

3 Inadvertent failures to provide adequate medical care, mere negligence or medical
4 malpractice, delays in providing care (without more), and differences of opinion over what
5 medical treatment or course of care is proper, are all insufficient to constitute an Eighth
6 Amendment violation. *Gamble*, 429 U.S. at 105-07; *Sanchez v. Vild*, 891 F.2d 240, 242
7 (9th Cir.1989); *Shapley v. Nev. Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir.
8 1985).

9 To state an Eighth Amendment claim, Plaintiff must include "further factual
10 enhancement," *Iqbal*, 556 U.S. at 678, which demonstrates Defendants' "purposeful act or
11 failure to respond to [his] pain or possible medical need," and the "harm caused by [this]
12 indifference." *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citing *Jett*, 439
13 F.3d at 1096). Defendants' acts or omissions must entail more than Plaintiff alleges in his
14 FAC—an isolated act of alleged negligence and/or lack of due care. *See Snow v. McDaniel*,
15 681 F.3d 978, 985 (9th Cir. 2012) (citation and quotation marks omitted); *Wilhelm*, 680
16 F.3d at 1122.

17 Therefore, the Court dismisses Plaintiff's Eighth Amendment claims for failing to
18 state a claim upon which relief may be granted.

19 **III. Conclusion and Order**

20 Good cause appearing, **IT IS HEREBY ORDERED** that:

21 1. The Court **DISMISSES** Plaintiff's FAC for failing to state a claim pursuant
22 to 28 U.S.C. § 1915(e)(2) and § 1915A(b) and for violating Rule 8 of the FRCP.

23 2. The Court **GRANTS** Plaintiff thirty (30) days leave from the date of this
24 Order to file an Amended Complaint which cures all the deficiencies of pleading noted.
25 Plaintiff's Amended Complaint must be complete in itself without reference to his original
26 pleading. Defendants not named and any claims not re-alleged in the Amended Complaint
27 will be considered waived. *See S.D. CAL. CIVLR 15.1; Hal Roach Studios, Inc. v. Richard*
28 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) ("[A]n amended pleading

1 supersedes the original.”); *Lacey*, 693 F.3d at 928 (noting that claims dismissed with leave
2 to amend which are not re-alleged in an amended pleading may be “considered waived if
3 not repled.”). In addition, Plaintiff’s Amended Complaint must comply with Rule 8 of the
4 FRCP and S.D. Cal. CivLr 8.2(a).

5 3. The Clerk of Court is directed to mail Plaintiff a court approved form civil
6 rights complaint.

7 **IT IS SO ORDERED.**

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10 Dated:

9/15/18



11 HON. WILLIAM Q. HAYES
12 United States District Judge
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