

1 [Plaintiff] with an opportunity to amend his deliberate indifference claim.” (*Id.*).

2 **B. Re-Screening of Original Complaint**

3 In the complaint, Plaintiff sues multiple defendants for events that took place while
4 Plaintiff was incarcerated at Ely State Prison (“ESP”). (ECF No. 4 at 1). Plaintiff sues
5 Defendants NDOC Medical Director Romeo Aranas, Warden Rene Baker, NDOC Director
6 James Cox, ESP Director of Nursing J. Gardner, and Dr. Koehn. (*Id.* at 2-3). Plaintiff alleges
7 three counts and seeks declaratory relief, injunctive relief, and monetary damages. (*Id.* at 7,
8 11).

9 **i. Count I**

10 In Count I, Plaintiff alleges the following: In September 2013, January 2014, and
11 February 2014, Plaintiff had filed grievances against the medical staff for “contaminating” his
12 prescription speciality drug AmLactin, or lactic acid. (ECF No. 4 at 4). On March 3, 2014, Dr.
13 Koehn had discontinued Plaintiff’s lactic acid prescription in order to destroy evidence of such
14 contamination. (*Id.*). Plaintiff had been receiving that medication from the NDOC since 2008.
15 (*Id.*). Plaintiff alleges First Amendment retaliation. (*Id.*).

16 Prisoners have a First Amendment right to file prison grievances and to pursue civil
17 rights litigation in the courts. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004). “Without
18 those bedrock constitutional guarantees, inmates would be left with no viable mechanism to
19 remedy prison injustices. And because purely retaliatory actions taken against a prisoner for
20 having exercised those rights necessarily undermine those protections, such actions violate
21 the Constitution quite apart from any underlying misconduct they are designed to shield.” *Id.*

22 To state a viable First Amendment retaliation claim in the prison context, a plaintiff must
23 allege: “(1) [a]n assertion that a state actor took some adverse action against an inmate (2)
24 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
25 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
26 legitimate correctional goal.” *Id.* at 567-68.

27 The Court finds that Plaintiff states a colorable claim for retaliation. Based on the
28 allegations, Plaintiff filed grievances against the medical staff for contaminating his lactic acid

1 medication and, as a result, Dr. Koehn stopped Plaintiff's prescription even though Plaintiff had
2 been receiving the medication for over six years. This claim shall proceed against Dr. Koehn.

3 **ii. Count II**

4 In Count II, Plaintiff alleges the following: On March 3, 2014, Dr. Koehn had
5 discontinued chronic care for Plaintiff's "rare genetic disorder" called ichthyosis.¹ (ECF No. 4
6 at 5). According to Plaintiff, his body does not produce lactic acid. (*Id.*). On March 7, 2014,
7 March 14, 2014, and April 11, 2014, Plaintiff had met with Dr. Koehn, but Dr. Koehn had
8 refused to discuss Plaintiff's ichthyosis. (*Id.*). On April 11, 2014, Dr. Koehn told Plaintiff that
9 the medical staff was no longer treating ichthyosis as chronic care. (*Id.*). Plaintiff asserted that
10 Dr. Koehn's course of non-treatment was painful and ineffective. (*Id.* at 6). Baker, Gardner,
11 Cox, and Aranas had failed to intervene. (*Id.*). Plaintiff alleges a due process violation. (*Id.*
12 at 5).

13 Pursuant to the Ninth Circuit remand, this Court is supposed to address Plaintiff's
14 procedural due process claim relating to the discontinuation of medical treatment of his
15 ichthyosis. (ECF No. 11 at 2). This Court finds that Plaintiff cannot state a procedural due
16 process claim for the discontinuation of medical treatment and once again believes that this
17 issue is an Eighth Amendment deliberate indifference to serious medical needs issue.² The
18 Court dismisses the due process claim, without prejudice, with leave to amend. The Court
19 provides Plaintiff with the law for due process and gives Plaintiff the opportunity to state a
20 claim for due process upon amendment.

21 Under the Fourteenth Amendment, prisoners "may not be deprived of life, liberty, or
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23 ¹ According to the National Institute of Arthritis and Musculoskeletal and Skin Diseases
24 ("NIAMS"), "ichthyosis" is a family of disorders characterized by dry or scaly and thickened
25 skin. See NIAMS at http://www.niams.nih.gov/health_info/Ichthyosis/. There is no cure for
ichthyosis but treatment is targeted at managing the signs and symptoms which include
itching, overheating, and pain. *Id.*

26 ² The Court notes that the Ninth Circuit did not provide any case law addressing
27 whether Plaintiff may state a cognizable procedural due process claim for the discontinuation
28 of medical treatment. The Court acknowledges that a plaintiff is entitled to procedural due
process when prison officials forcibly medicate a prisoner. See *Washington v. Harper*, 494
U.S. 210 (1990). However, the Court recognizes that Plaintiff is not alleging forcible
medication in this case.

1 property without due process of law.” *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).
2 However, “the fact that prisoners retain rights under the Due Process Clause in no way implies
3 that these rights are not subject to restrictions imposed by the nature of the regime to which
4 they have been lawfully committed.” *Id.* “[T]here must be mutual accommodation between
5 institutional needs and objectives and the provisions of the Constitution that are of general
6 application.” *Id.*

7 **iii. Count III**

8 In Count III, Plaintiff alleges the following: On March 3, 2014, Dr. Koehn had refused
9 to meaningfully address his order to discontinue Plaintiff’s prescription medication for
10 ichthyosis. (ECF No. 4 at 7). When Plaintiff tried to discuss matter on March 14, 2014 and
11 April 11, 2014, Dr. Koehn had a correctional officer remove Plaintiff from the exam room. (*Id.*).
12 Baker, Gardner, Aranas, and Cox had known about Dr. Koehn’s actions. (*Id.*). Dr. Koehn
13 should have known that the medical staff had been giving Plaintiff a contaminated prescription
14 as early as September 22, 2013 because the medication was causing Plaintiff pain and
15 discomfort. (*Id.*). Dr. Koehn had discontinued the prescription as part of a conspiracy to
16 eliminate any evidence for state and federal health investigators. (*Id.*). Plaintiff alleges an
17 Eighth Amendment violation. (*Id.*).

18 The Court interprets the allegations in Counts II and III as a claim for deliberate
19 indifference to serious medical needs. The Eighth Amendment prohibits the imposition of
20 cruel and unusual punishment and “embodies ‘broad and idealistic concepts of dignity,
21 civilized standards, humanity, and decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A
22 prison official violates the Eighth Amendment when he acts with “deliberate indifference” to
23 the serious medical needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To
24 establish an Eighth Amendment violation, a plaintiff must satisfy both an objective
25 standard—that the deprivation was serious enough to constitute cruel and unusual
26 punishment—and a subjective standard—deliberate indifference.” *Snow v. McDaniel*, 681
27 F.3d 978, 985 (9th Cir. 2012).

28 To establish the first prong, “the plaintiff must show a serious medical need by

1 demonstrating that failure to treat a prisoner's condition could result in further significant injury
2 or the unnecessary and wanton infliction of pain." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th
3 Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference prong, a plaintiff
4 must show "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical
5 need and (b) harm caused by the indifference." *Id.* "Indifference may appear when prison
6 officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the
7 way in which prison physicians provide medical care." *Id.* (internal quotations omitted). When
8 a prisoner alleges that delay of medical treatment evinces deliberate indifference, the prisoner
9 must show that the delay led to further injury. *See Shapley v. Nevada Bd. of State Prison*
10 *Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (holding that "mere delay of surgery, without more,
11 is insufficient to state a claim of deliberate medical indifference").

12 A difference of opinion between medical professionals concerning the appropriate
13 course of treatment generally does not amount to deliberate indifference to serious medical
14 needs. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Additionally, "[a] difference of
15 opinion between a prisoner-patient and prison medical authorities regarding treatment does
16 not give rise to a § 1983 claim." *Franklin v. State of Or., State Welfare Div.*, 662 F.2d 1337,
17 1344 (9th Cir. 1981). To establish that a difference of opinion amounted to deliberate
18 indifference, the prisoner "must show that the course of treatment the doctors chose was
19 medically unacceptable under the circumstances" and "that they chose this course in
20 conscious disregard of an excessive risk to [the prisoner's] health." *Jackson v. McIntosh*, 90
21 F.3d 330, 332 (9th Cir. 1996).

22 Based on the allegations as a whole, it appears that Plaintiff disagrees with Dr. Koehn's
23 course of treatment for Plaintiff's ichthyosis. It appears that Dr. Koehn had decided to
24 discontinue treating Plaintiff's ichthyosis as a chronic care condition. The Court finds that the
25 basis of Plaintiff's complaint is the disagreement with Dr. Koehn's decision not to treat the
26 ichthyosis. As such, this difference of opinion between what Plaintiff thinks his course of
27 treatment should be and what Dr. Koehn decided the course of treatment should be does not
28 state a § 1983 claim. The Court finds that Plaintiff fails to state a claim. However, in light of

1 the Ninth Circuit's remand, the Court grants Plaintiff leave to amend this claim. If Plaintiff
2 chooses to amend, he should focus his allegations on how Dr. Koehn denied, delayed or
3 intentionally interfered with Plaintiff's medical treatment and should describe the type of pain
4 caused by those actions.

5 **C. Leave to Amend**

6 Plaintiff is granted leave to file an amended complaint to cure the deficiencies of the
7 complaint. If Plaintiff chooses to file an amended complaint he is advised that an amended
8 complaint supersedes the original complaint and, thus, the amended complaint must be
9 complete in itself. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542,
10 1546 (9th Cir. 1989) (holding that "[t]he fact that a party was named in the original complaint
11 is irrelevant; an amended pleading supersedes the original"); see also *Lacey v. Maricopa*
12 *Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (holding that for claims dismissed with prejudice, a
13 plaintiff is not required to reallege such claims in a subsequent amended complaint to preserve
14 them for appeal). Plaintiff's amended complaint must contain all claims, defendants, and
15 factual allegations that Plaintiff wishes to pursue in this lawsuit. Moreover, Plaintiff must file
16 the amended complaint on this Court's approved prisoner civil rights form and it must be
17 entitled "First Amended Complaint."

18 The Court notes that if Plaintiff chooses to file an amended complaint curing the
19 deficiencies of his procedural due process and deliberate indifference claims, as outlined in
20 this order, Plaintiff shall file the amended complaint within 30 days from the date of entry of
21 this order. If Plaintiff chooses not to file an amended complaint curing the stated deficiencies,
22 this action shall proceed against Dr. Koehn on the retaliation claim only.

23 **II. CONCLUSION**

24 For the foregoing reasons, IT IS ORDERED that the Clerk of the Court shall reinstate
25 the application to proceed *in forma pauperis* (ECF No. 1) in light of the Ninth Circuit remand.

26 IT IS FURTHER ORDERED that Count I, alleging retaliation, shall proceed against
27 Defendant Dr. Koehn.

28 IT IS FURTHER ORDERED that Count II, alleging procedural due process violations,

1 is dismissed, without prejudice, with leave to amend.

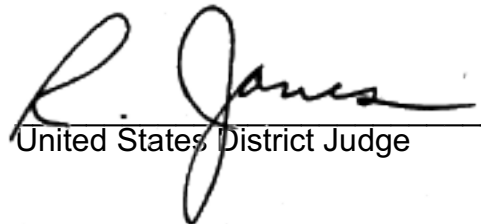
2 IT IS FURTHER ORDERED that Count III, alleging deliberate indifference to serious
3 medical needs, is dismissed, without prejudice, with leave to amend.

4 IT IS FURTHER ORDERED that if Plaintiff chooses to file an amended complaint curing
5 the deficiencies of his complaint, as outlined in this order, Plaintiff shall file the amended
6 complaint within 30 days from the date of entry of this order.

7 IT IS FURTHER ORDERED that the Clerk of the Court shall send to Plaintiff the
8 approved form for filing a § 1983 complaint, instructions for the same, and a copy of his
9 original complaint (ECF No. 4). If Plaintiff chooses to file an amended complaint, he must use
10 the approved form and he shall write the words "First Amended" above the words "Civil Rights
11 Complaint" in the caption.

12 IT IS FURTHER ORDERED that if Plaintiff chooses not to file an amended complaint
13 curing the stated deficiencies of the complaint, this action shall proceed on the First
14 Amendment retaliation claim only.

15 Dated: July 14, 2015.

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19 United States District Judge
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