

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
CALIFORNIA

Scott v. Hill

Case No. 3:24-cv-2400-WQH-MSB · No. 3:24-cv-2400-WQH-MSB · Decided May 27, 2025

SUMMARY

The United States District Court for the Southern District of California grants Robert Scott’s motion to proceed in forma pauperis in his 42 U.S.C. § 1983 action concerning alleged inadequate medical care for his knees. The court dismisses the complaint without prejudice under 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b) for failure to state a claim, concluding that the allegations did not establish deliberate indifference under the Eighth Amendment. The court grants Scott 60 days to file a First Amended Complaint.

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 SOUTHERN DISTRICT OF
CALIFORNIA 10 11 ROBERT SCOTT, Case No.: 3:24-cv-2400-WQH-MSB CDCR #AK5483,
12 ORDER: (1) GRANTING MOTION Plaintiff, 13 TO PROCEED IN FORMA vs. PAUPERIS
[ECF No. 2]; 14 15 (2) DISMISSING COMPLAINT FOR JAMES HILL, JOHN/JANE DOE,
GAIL FAILURE TO STATE A CLAIM 16 MESSLER, DAVID GULDSETH, PURSUANT TO 28
U.S.C. 17 DAVID CLAYTON, JAMES E. BATES, §§ 1915(e)(2)(B) AND 1915A(b) MARK
JACOBSON, AMIR 18 MOHAMED, PEYMAN SHAKIBA, 19 Defendants.

20 21 I. INTRODUCTION 22 Plaintiff Robert Scott (“Plaintiff” or “Scott”), a state inmate
proceeding pro se, has 23 filed a civil rights complaint pursuant to 42 U.S.C. § 1983, along with a
motion to proceed 24 in forma pauperis (“IFP”). See ECF Nos. 1, 2.

In his Complaint, Scott alleges Defendants 25 violated his Eighth Amendment right to adequate
medical care by delaying total knee 26 replacement surgery for both knees, subsequently
“botching” the surgeries and failing to 27 adequately treat his pain. See generally, ECF No. 1.

As discussed below, the Court grants 28 Plaintiff’s IFP motion and dismisses the Complaint
without prejudice. 1 II. MOTION TO PROCEED IFP 2 All parties instituting any civil action, suit
or proceeding in a district court of the 3 United States, except an application for writ of habeas
corpus, must pay a filing fee of 4 \$405.1 See 28 U.S.C. § 1914(a). A party may initiate a civil
action without prepaying the 5 required filing fee if the Court grants leave to proceed IFP based on
indigency.

28 U.S.C. 6 § 1915(a); *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007). 7 To proceed IFP, plaintiffs must establish their inability to pay by filing an affidavit 8 regarding their income and assets. See *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th Cir. 2015). Prisoners must also submit a “certified copy of the [prisoner’s] trust fund 10 account statement (or institutional equivalent) for... the 6-month period immediately 11 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2).

From the certified trust 12 account statement, the Court assesses an initial payment of 20% of (a) the average monthly 13 deposits in the account for the past six months, or (b) the average monthly balance in the 14 account for the past six months, whichever is greater, unless the prisoner has no assets. See 15 28 U.S.C. §§ 1915(b)(1) & (4). Prisoners who proceed IFP must repay the entire fee in 16 installments regardless of whether their action is ultimately dismissed.

28 U.S.C. 17 § 1915(b)(2); *Bruce v. Samuels*, 577 U.S. 82, 84 (2016). 18 In support of his IFP Motion, Scott has provided a copy of his prison certificate and 19 trust account statement. ECF No. 2. During the six months prior to filing suit, Martinez had 20 an average monthly balance of \$13.90 and average monthly deposits of \$13.14; and at the 21 time he filed suit he had an available account balance of \$0.05.

Id. at 7. Accordingly, the 22 Court GRANTS Plaintiff’s IFP motion. Because the initial installment would amount to 23 more than Plaintiff’s available funds, the Court assesses no initial payment. Instead, Scott 24 must pay the full \$350 filing fee in installments, pursuant to 28 U.S.C. § 1915(b)(2). 25 26 1 Civil litigants must pay an administrative fee of \$55 in addition to the \$350 filing fee.

See 27 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2023)). The additional \$55 administrative fee does not apply to persons granted 28 1 III. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b) 2 A. Legal Standards 3 Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), the Court must screen a 4 prisoner’s IFP complaint and sua sponte dismiss it to the extent that it is frivolous, 5 malicious, fails to state a claim, or seeks damages from defendants who are immune.

See 6 *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc); *Rhodes v. Robinson*, 7 621 F.3d 1002, 1004 (9th Cir. 2010). “The standard for determining whether Plaintiff has 8 failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the 9 same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.” 10 *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir.

2012). Rule 12(b)(6) requires that a 11 complaint “contain sufficient factual matter... to state a claim to relief that is plausible on 12 its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). 13 While detailed factual allegations are not required,

“[t]hreadbare recitals of the elements 14 of a cause of action, supported by mere conclusory statements, do not suffice” to state a 15 claim.

Id. The “mere possibility of misconduct” or “unadorned, the defendant-unlawfully- 16 harmed me accusation[s]” fall short of meeting this plausibility standard. Id. 17 To state a claim under § 1983, a plaintiff must plausibly allege “both (1) deprivation 18 of a right secured by the Constitution and laws of the United States, and (2) that the 19 deprivation was committed by a person acting under color of state law.” *Tsao v. Desert 20 Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir.

2012). 21 B. Plaintiff’s Allegations 22 The facts alleged in the body of the Complaint are somewhat sparse. Scott states 23 that starting in late 2017, he began complaining to RJD medical staff of chronic and 24 “continuous” pain in both knees due to “preexisting osteoarthritis.” ECF No. 1 at 4. 25 Scott was seen by Dr. Messler on occasion between August 2018 and August 2019 26 and during that time Scott continued to suffer extreme pain, but Messler did not prescribe 27 narcotics to treat it.

Id. at 7. Between September 11, 2019 and December 11, 2019, Dr. 28 Guldseth also declined to prescribe Plaintiff narcotics for his knee pain, noting that “not 1 using narcotics[,] as risk outweighs the benefits.” Id. at 8. Scott further alleges Guldseth 2 falsely noted in Scott’s medical chart that his pain level had improved. Id. 3 It appears that Scott was referred to see a surgeon sometime around May 11, 2020.

4 Id. at 9. Scott then had a medical appointment with Dr. Bates to determine if he was a 5 candidate for total knee replacement (“TKR”) surgeries. Id. at 9–10. Ultimately, Scott was 6 approved for the surgeries. Id. 7 On June 19, 2021, Bates performed TKR surgery on Scott’s left knee and on May 8 25, 2022, he performed the same surgery on Scott’s right knee.

Id. at 9. Bates was assisted 9 by Dr. Jacobson for the second surgery. Id. at 10. Scott states that he continued to suffer 10 pain and swelling in both knees after the surgeries. Id. at 9. He alleges both surgeries were 11 “botched” and hardware in both of his knees later became “loose.” Id. at 9–10. 12 After the surgeries, Scott was seen by Dr. Mohamed, who “refus[ed]” to treat his 13 pain with narcotics.

Id. at 10. Dr. Shakiba also treated Scott after the surgeries but 14 minimized his complaints and accused him of “lying about [his] medical needs just to get 15 drugs.” Id. at 11. Shakiba also told Scott it was “impossible to have loose hardware when 16 all you have is a solid-cast implant.” Id. 17 In sum, Scott alleges that starting in September 2017, Defendants were “on notice” 18 that he suffered from osteoarthritis in both knees and failed to adequately treat his pain 19 before and after he received two TKR surgeries.

Id. at 11–12. He also asserts both surgeries 20 were “botched,” and he continues to suffer severe pain as a result. Id. 21 C. Discussion 22 Scott alleges Defendants violated his Eighth Amendment

rights by failing to provide 23 him with adequate medical care. He names nine defendants, in both their official and 24 individual capacities: RJD Warden Hill, RJD “Nurse Executive” John/Jane Doe, and 25 Doctors Messler, Gulseth, Clayton, Bates, Jacobson, Mohamed, and Shakiba.

Id. at 3. He 26 seeks money damages. Id. at 17. 27 1. Rule 8 28 As an initial matter, the Court cautions Plaintiff that his Complaint is subject to 1 Federal Rule of Civil Procedure 8, which requires that it contain “‘a short and plain 2 statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the 3 defendant fair notice of what the... claim is and the grounds upon which it rests.’” Bell 4 Atlantic Corp. v. Twombly, 550 U.S. 554, 555 (2007) (alteration in original).

While Rule 8 5 “does not require ‘detailed factual allegations,’... it demands more than an unadorned, 6 the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 7 550 U.S. at 555). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation 8 of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders 9 ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” Id. (citations omitted).

10 Moreover, a complaint that is too verbose, long, confusing, redundant, irrelevant, or 11 conclusory may be dismissed for failure to comply with Rule 8. See *Cafasso v. Gen. 12 Dynamics C4 Sys.*, 637 F.3d 1047, 1058–59 (9th Cir. 2011) (collecting cases upholding 13 dismissals for those reasons).

The purpose of Rule 8(a) is to ensure that a complaint “fully 14 sets forth who is being sued, for what relief, and on what theory, with enough detail to 15 guide discovery.” *McHenry v. Renne*, 84 F.3d 1172, 1177 (9th Cir. 1996). 16 Here, while some specific facts are alleged in the body of Scott’s Complaint, many 17 allegations are conclusory and lack sufficient detail as to what exactly each individual 18 defendant did to violate Scott’s rights.

Instead, Plaintiff has attached some 24 exhibits, 19 (totaling 151 pages) to the Complaint which he references (without providing citations to 20 a specific page number), presumably to provide factual support for the broad allegations 21 contained in the body of the Complaint. See ECF No. 1-2. A plaintiff may refer to and 22 attach exhibits as necessary to support factual allegations contained in his Complaint; 23 however, the Court is not obligated to sift through multiple exhibits to find a factual basis 24 for Plaintiff’s individual claims.

See *Quezada v. Sherman*, 2018 WL 6111289, at *3 (E.D. 25 Cal. 2018) (stating a plaintiff “may not merely cite to an exhibit and expect the Court to 26 extrapolate specific facts from it upon which Plaintiff might base a claim; rather, must state 27 the factual evidence derived from the exhibit in his allegations and may only cite to the 28 exhibit to bolster/support his factual allegations”); *Stewart v. Nevada*, 2011 WL 588485, 1 at *2 (D.

Nev. 2011) (“The Court will not comb through attached exhibits seeking to determine whether a claim possibly could have been stated where the pleading itself does not state a claim. In short, Petitioner must state a claim, not merely attach exhibits.”). Despite the above, and while “it is not the Court’s duty” when screening a complaint pursuant to 28 U.S.C. § 1915(e) and § 1915A “to wade through exhibits to determine whether cognizable claims have been stated,” *Woodrow v. Cty. of Merced*, 2015 WL 7 164427, at *4 (E.D.

Cal. 2015), in this instance the Court will consider Plaintiff’s exhibits to the extent they flesh out some further detail as to the bases for his claims. See *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) (reaffirming liberal construction of pro se pleadings after *Iqbal*). 2. Eighth Amendment a. Legal Standard The Eighth Amendment prohibits “cruel and unusual punishments.” *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

To state an Eighth Amendment claim based on inadequate medical care, a prisoner must plausibly allege they had a “serious medical need,” and the defendant was “deliberately indifferent” to that need. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). The test for deliberate indifference has objective and subjective components.

To satisfy the objective prong, the plaintiff must show a “serious medical need, by establishing that failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” *Jett*, 439 F.3d at 1096 (quoting *Estelle*, 429 U.S. at 104).

To satisfy the subjective prong, the plaintiff must allege the defendant’s response to the need was deliberately indifferent by showing “(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by the indifference.” *Id.* Put another way, a plaintiff must show the official knew of and disregarded “excessive risk to inmate health and safety.” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir.

2004). “The official must not only be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,” but that official “must also draw the inference.” *Id.* 3 “Deliberate indifference is a high legal standard.” *Id.* at 1060. A showing of negligence or inadvertence is insufficient to establish an Eighth Amendment violation.

Jett, 439 F.3d at 1096; *Estelle*, 429 U.S. at 105–06. b. Official Capacity Claims First, to the extent Scott sues all nine Defendants for money damages in their official capacities (see ECF No. 1 at 3), he has failed to state a claim. An “official-capacity suit is, in all respects other than name, to be treated as a suit against the entity” and as such are treated as claims against the State.

Kentucky v. Graham, 473 U.S. 159, 166 (1985); see also 11 Leer v. Murphy, 844 F.2d 628, 631–32 (9th Cir. 1988) (finding claims against prison 12 correctional officer, warden, and other officials in official capacity to be claims against 13 State).

As such, the Eleventh Amendment bars a prisoner’s § 1983 claims for money 14 damages against state actors sued in their official capacities. Michigan State Police Dep’t 15 v. Will, 491 U.S. 58, 66 (1989) (“We hold that neither a State nor its officials acting in their 16 official capacities are ‘persons’ under § 1983.”); see also Dittman v. California, 191 F.3d 17 1020, 1025–26 (9th Cir.

1999) (“The State of California has not waived its Eleventh 18 Amendment immunity with respect to claims brought under § 1983 in federal court.”). 19 Thus, Scott’s official-capacity claims against Defendants are dismissed as barred by the 20 Eleventh Amendment. But see Hafer v. Melo, 502 U.S. 21, 31 (1991) (“[S]tate officials, 21 sued in their individual capacities, are ‘persons’ within the meaning of § 1983.”) (emphasis 22 added).

23 c. Supervisory Liability: Warden Hill and Nurse Doe 24 Scott also fails to state individual-capacity claims against Defendants Hill, the 25 Warden of RJD, and Doe, who he describes as RJD’s “Chief Nurse Executive.” ECF No. 26 1 at 6. “Under Section 1983, supervisory officials are not liable for actions of subordinates 27 on any theory of vicarious liability.” Crowley v. Bannister, 734 F.3d 967, 977 (9th Cir.

28 2013) (citation and internal quotation marks omitted). While there is no vicarious liability 1 under § 1983, a “supervisor may be liable only if (1) he or she is personally involved in the 2 constitutional deprivation, or (2) there is a sufficient causal connection between the 3 supervisor’s wrongful conduct and the constitutional violation.” Id. (citation and internal 4 quotation marks omitted).

5 Here, the Court presumes Scott suffered a serious medical need. But nonetheless, 6 Scott fails to state a claim against Hill because he alleges no wrongful conduct or personal 7 involvement on Hill’s part related to a purported violation of his Eighth Amendment rights. 8 See Iqbal, 556 U.S. at 676 (“Because vicarious liability is inapplicable to Bivens and § 9 1983 suits, a plaintiff must plead that each Government-official defendant, through the 10 official’s own individual actions, has violated the Constitution.”).

Instead, Scott merely 11 alleges that, as warden, Hill was “on notice” as early as September 2017, that he needed 12 TKR surgery because the information was “contained in his medical records.” ECF No. 1 13 at 4. Scott asserts that during that time, Hill had a “responsibilit[y]” under the California 14 Department of Corrections and Rehabilitation (“CDCR”) Health Care Department 15 Operations Manual § 2.1.1 to “‘implement [and conduct] monitoring and evaluation’” of 16 the prison’s medical services, which he alleges extended to ensur[ing] [he] received access 17 to

necessary medical services for his TKR surgery on his left knee without substantial 18 delay.” Id. at 5.

He further claims Hill bears some responsibility for his surgeries being 19 “botched.” Id. at 6. 20 However, none of the above allegations (and none of the attached exhibits) show 21 Hill had personal knowledge of Scott’s medical condition, any connection to the purported 22 delay in surgery, or involvement in (or personal knowledge of) the results of Scott’s 23 surgeries.

And Scott’s allegation that Hill did not adhere to prison regulations concerning 24 medical care does not establish that he acted with deliberate indifference to Scott’s serious 25 medical needs. See e.g., *Cousins v. Lockyer*, 568 F.3d 1063, 1070 (9th Cir. 2009) (stating 26 violations of “CDCR operations manual” or other “state departmental regulations” do not 27 establish Section 1983 liability unless state violation also causes federal constitutional 28 deprivation) (citing cases); *Solomon v. Felker*, 2013 WL 5375538, at *12 (E.D.

Cal. 2013) 1 (“Plaintiff’s allegation that the defendants failed to adhere to the prison’s own institutional 2 policies and procedures does not, by itself” give rise to a constitutional violation.). 3 Therefore, Scott failed to state a claim against Hill. See *Crowley*, 734 F.3d at 977. 4 Scott also fails to state a claim against Chief Nurse Doe because, again, he fails to 5 allege facts suggesting Doe had personal knowledge of his medical condition, care or 6 surgeries.

Scott cites to CDCR regulations and states Doe was “responsible” for “daily 7 clinic operations,” including “coordination and scheduling for timely access to necessary 8 medical services.” ECF No. 1 at 6–7. Yet no facts in the body of the Complaint or exhibits 9 plausibly suggest Doe was personally involved in any alleged constitutional violation(s). 10 Thus, Plaintiff has failed to state a claim against Doe.

See *Edgerly v. City and County of 11 San Francisco*, 599 F.3d 946, 961–62 (9th Cir. 2010) (stating that where there is no 12 evidence that the supervisor was personally involved or connected to the alleged 13 constitutional violation, the supervisor may not be liable). 14 Accordingly, the Court dismisses Scott’s claims against Defendants Hill and Nurse 15 Doe for failure to state a claim.

See 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1); *Iqbal*, 16 556 U.S. at 678. 17 d. *Messler, Guldseth and Clayton* 18 Scott also fails to state individual-capacity Eighth Amendment claims against 19 Defendants *Messler, Guldseth and Clayton*.

As to all three doctors, Scott alleges they failed 20 to adequately treat his pain by declining to prescribe him narcotics.² ECF No. 1 at 7–9. He 21 22 2 Scott also appears to allege that *Guldseth* “fabricated” a chart notation indicating that Scott 23 reported his pain was “7/10 down from 9–10/10” after a steroid shot. ECF No. 1 at 8; ECF No. 1- 24 2, Ex. U at 122.

He also alleges Clayton “falsely” noted Scott indicated his “pain was manageable” and he was “feeling better” after epidural shots. ECF No. 1 at 8; ECF 1-2, Ex. U at 129. There is 25 no cognizable Eighth Amendment claim for the falsification of medical records in and of itself. 26 See *Bartholomew v. Traquina*, 2011 WL 4085479, at *3 (E.D. Cal. 2011) (“The falsification of records itself is insufficient to state a cognizable claim of deliberate indifference to plaintiff’s 27 serious medical needs.”); *Phillips v. Borders*, 2016 WL 11518600, at *5 (C.D.

Cal. 2016) (same). And “[w]hile falsification or alteration of medical records may supply facts relevant to an Eighth 28 1 points to medical records showing he received treatment from all three doctors. See ECF 2 No. 1-2, Exs. S–U at 114–131.

The records show Scott had visits with Dr. Messler prior to 3 his surgery in 2018 and 2019, during which time Messler gave Scott steroid injections in 4 his knees, and noted he was taking gabapentin and Tylenol No. 3 (with codeine) for pain. 5 See ECF No. 1-2, Ex. S at 116–117. Scott was also receiving physical therapy during that 6 period. *Id.* at 118. During visits with Guldseth in late 2019, Scott was offered Elavil or 7 Cymbalta for pain but refused it.

Id., Ex. T at 121. Guldseth also noted Scott had recently 8 received steroid shots for pain and that Scott’s primary care physician had “recommended 9 not using narcotics as [the] risk outweighs the benefits.” *Id.* at 120–21. And as for Scott’s 10 visits with Clayton, the medical records suggest the visits primarily concerned Scott’s 11 issues with lower back pain and indicate he received lumbar epidural injections for it.

See 12 *id.*, Ex. U at 129. To the extent Scott’s knee pain was discussed, it was noted that Scott was 13 in the process of getting approved for TKR surgeries. *Id.* 14 Based on the above, it is clear Messler, Guldseth and Clayton all provided treatment 15 for Scott’s pain with non-narcotic medications, steroids, physical therapy, or a combination 16 thereof. That Scott disagrees with the specific way they addressed his pain merely amounts 17 to “differences of medical opinion” between himself and the three doctors as to the 18 appropriate treatment for his pain.

This is insufficient to rise to the level of deliberate 19 indifference. See *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (“A difference 20 of opinion between a physician and the prisoner—or between medical professionals— 21 concerning what medical care is appropriate does not amount to deliberate indifference.”); 22 see also *Bowers v. Owolabi*, 2023 WL 5435973, at *5 (E.D.

Cal. 2023) (“Plaintiff is not 23 entitled to his choice of pain medication.”). In sum, Scott has not plausibly alleged the 24 treatment he received from Messler, Guldseth and Clayton “was medically unacceptable 25 26 Prison, 2015 WL 3486950, at *5 (E.D. Cal. 2015), even assuming the notations inaccurately 27 described the level of Scott’s pain, both Guldseth and Clayton noted Scott complained of knee pain and provided treatment for it.

See ECF No. 1-2, Exs. T– U at 121–31. Therefore, Scott has 28 1 under the circumstances,” and was chosen “in conscious disregard of an excessive risk to 2 [his] health.” See *Toguchi*, 391 F.3d at 1058; see also *Estelle*, 429 U.S. at 107.

Therefore, 3 Scott has failed to state an Eighth Amendment claim against Messler, Guldseth and 4 Clayton. See 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1); *Iqbal*, 556 U.S. at 678. 5 e. Bates and Jacobson 6 Scott alleges Drs. Bates and Jacobson, both of whom performed his TKR surgeries, 3 7 were deliberately indifferent when they “botched” the procedures. ECF No. 1 at 9–10.

Scott 8 states that after the surgeries, he suffered “extreme pain” and swelling, caused at least in 9 part by the presence of “loose hardware” in his knees. *Id.* Scott also claims Bates was 10 responsible for a “13-month delay between being referred” for surgery and the surgery 11 being performed. *Id.* at 9. 12 To the extent Scott alleges Bates and Jacobson “botched” his TKR surgeries, he fails 13 to state a claim.

His allegations that he suffered post-operative pain and swelling after a 14 surgical procedure do not amount to deliberate indifference. Moreover, that the hardware 15 implanted in his knees became “loose” after the surgeries amounts to, at worst, negligence 16 or malpractice, both of which are insufficient to show deliberate indifference on the part of 17 Bates or Jacobson.⁴ See *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir.

2016) (“A 18 showing of medical malpractice or negligence is insufficient to establish a constitutional 19 deprivation under the Eighth Amendment.”). 20 Scott also fails to state a claim against Bates based on a purported delay of his 21 surgery. Scott presents no specific facts as to how Bates “purposefully” caused delay or 22 how it amounted to a “conscious disregard of an excessive risk” to Scott’s health.

See *id.* 23 24 3 It appears Bates performed both of Scott’s TKR surgeries, while Jacobson was involved only in 25 the second TKR surgery on Scott’s right knee. See ECF No. 1 at 9–10; see also ECF No. 1-2, Ex. 26 M at 62, Ex. I at 42. 27 4 Medical records from April 25, 2024 indicate Scott was then being treated for a possible “aseptic loosening of right TKA” and included a recommendation he be referred to a specialist.

ECF No. 28 1 Medical records show Scott was first evaluated by an orthopedic surgeon on May 11, 2020. 2 ECF No. 1-2, Ex. U at 130. That surgeon did not perform TKR surgeries and therefore, he 3 referred Scott to Bates. Scott then had an initial tele-appointment with Bates on July 13, 4 2020, followed by an in-person appointment. *Id.* Scott had additional imaging of his knees 5 performed on March 21, 2021, and an evaluation by Bates on April 5, 2021, after which he 6 was medically cleared for the procedures on April 5, 2021.

Id., see also, Ex. E at 28, 32. 7 While Scott was awaiting surgery, records show he continued to be seen by health care 8 providers. See generally *id.*, Exs. S–U. In short, Plaintiff provides no facts

suggesting the 9 amount of time from initial referral to his first surgery was due to purposeful conduct by 10 Bates or that the delay amounted to deliberate indifference.

11 Therefore, Scott has failed to state an Eighth Amendment claim against Bates and 12 Jacobson. See 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1); *Iqbal*, 556 U.S. at 678. 13 f. Mohamed and Shakiba 14 Finally, Scott alleges Drs. Mohamed and Shakiba violated the Eighth Amendment 15 by failing to adequately treat him after his surgery. Scott states Mohamed and Shakiba both 16 failed to prescribe appropriate pain medication.

ECF No. 1 at 10–11. He also states they 17 failed to “ensure” he received corrective surgery after x-rays purportedly showed “possible 18 loosening of hardware” in his knees. *Id.* at 11. 19 Scott fails to state a claim against Mohamed and Shakiba. Medical notes from Scott’s 20 visit with Mohamed show Scott was given morphine after his May 25, 2022 surgery, which 21 was discontinued on June 9, 2022, after which he received over-the-counter pain 22 medication.

ECF No. 1-2, Ex. K at 53. That Scott believes he should have continued to 23 receive morphine amounts to no more than a difference of opinion. See *Toguchi*, 391 F.3d 24 at 1058. Furthermore, Scott’s allegation that Shakiba ignored his post-operative pain is 25 belied by medical records which show that on June 19, 2023, Shakiba referred him for a 26 CT scan of his knees to determine if corrective surgery might be necessary.

ECF No. 1-2, 27 Ex. X at 149. Again, Scott’s dissatisfaction with the treatment provided by Shakiba 28 amounts to a mere difference of opinion. See *Sloan v. Oakland Police Dep’t*, 376 F. App’x 1 738, 740 (9th Cir. 2010) (“[Plaintiff’s] contentions against the doctors—that he should 2 have received surgery, been given stronger pain medication, and should not have been 3 forced to walk—are differences of medical opinions that do not give rise to an Eighth 4 Amendment violation.”).

Therefore, he has failed to state a claim against Mohamed and 5 Shakiba. See 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1); *Iqbal*, 556 U.S. at 678. 6 D. Leave to Amend 7 Given Plaintiff’s pro se status, the Court GRANTS him leave to amend his 8 Complaint, as detailed below. See *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) 9 (“A district court should not dismiss a pro se complaint without leave to amend [pursuant 10 to 28 U.S.C. § 1915(e)(2)(B)(ii)] unless ‘it is absolutely clear that the deficiencies of the 11 complaint could not be cured by amendment.’”) (quoting *Akhtar v Mesa*, 698 F.3d 1202, 12 1212 (9th Cir.

2012)). 13 If Plaintiff chooses to amend, he is cautioned that all relevant facts in support of his 14 claim(s) must be alleged in the body of his amended complaint. As discussed above, while 15 a plaintiff is free to include exhibits, he must “state the [relevant] factual evidence derived 16 from the exhibit in his allegations [contained in his complaint] and may only cite to the 17 exhibit to bolster/support his factual allegations.” See *Quezada*, 2018 WL 6111289, at *3; 18 see also *Fed.*

R. Civ. P. 8(a). 19 IV. CONCLUSION AND ORDER 20 Accordingly, the Court: 21 1. GRANTS Plaintiff's Motion to Proceed IFP (ECF No. 2). 22 2. ORDERS the Secretary of the CDCR, or his designee, to collect the \$350 23 filing fee owed in this case by collecting monthly payments from the account in an amount 24 equal to twenty percent (20%) of the preceding month's income and forward payments to 25 the Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 26 28 U.S.C. § 1915(b)(2).

All payments must clearly identify the name and case number 27 assigned to this action. 28 3. DIRECTS the Clerk of the Court to serve a copy of this Order on Jeff 1 ||Macomber, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001, by 2 Mail, or by forwarding an electronic copy to trusthelpdesk@cdcr.ca.gov. 3 4. DISMISSES the Complaint in its entirety for failure to state a claim pursuant 4 || to 28 U.S.C. §§ 1915(e)(2)(B)(ai) & 1915A(b)(1).

5 5. GRANTS Plaintiff sixty (60) days leave from the date of this Order in which 6 ||to file a First Amended Complaint which cures the deficiencies of pleading noted in this 7 || Order. Plaintiff's Amended Complaint must be complete by itself without reference to his 8 original Complaint. See \$.D. Cal. CivLR 15.1; Hal Roach Studios, Inc. v. Richard Feiner 9 || & Co., Inc., 896 F.2d 1542, 1546 (9th Cir.

1989) (“[A]n amended pleading supersedes the 10 original.”); Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims 11 ||dismissed with leave to amend which are not re-alleged in an amended pleading may be 12 || “considered waived if not repled.”). 13 If Plaintiff fails to timely file a First Amended Complaint, the Court will enter a final 14 || Order dismissing this civil action based both on failure to state a claim upon which relief 15 be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ai) and § 1915A(b)(1), and failure to 16 || prosecute in compliance with a court order requiring amendment.

See Lira v. Herrera, 427 17 || F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take advantage of the opportunity 18 ||to fix his complaint, a district court may convert the dismissal of the complaint into 19 || dismissal of the entire action.”). 20 IT IS SO ORDERED. 21 Dated: May 27, 2025 BME: ie Z. Maa 22 Hon. William Q. Hayes 3 United States District Court 24 25 26 27 28 14