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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

WILLIAM HENRY SHEPPARD,
CDCR #C-61934,

Plaintiff,

vs.

RODNEY G. HOOD, MD, et al.,

Defendants.

Civil No. 15-cv-0049 BAS (RBB)

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
PURSUANT TO 28 U.S.C. § 1915(a)
[ECF Doc. No. 2]**

AND

**2) DISMISSING COMPLAINT
FOR FAILING TO STATE A
CLAIM PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(B)(ii)
AND 1915A(b)(1)**

William Henry Sheppard (“Plaintiff”), currently incarcerated at California Men’s Colony (“CMC”) in San Luis Obispo, California, and proceeding pro se, has filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983 (ECF Doc. No. 1).

Plaintiff claims six doctors employed by Alvarado Hospital in San Diego provided him inadequate treatment and committed “medical malpractice” in 2010 after he was transported there from Centinela State Prison (“CEN”) for emergency gallbladder surgery. (*See* Compl., ECF Doc. No. 1, at 1, 3.) Plaintiff claims that

1 during the surgery Defendants inserted a “ERCP stent,” and that it was not until
2 sometime in 2013, after he developed an infection, pancreatitis, and diabetes, that he
3 was told by unidentified prison medical officials at CEN that his ailments were
4 “caused by” the stent which was intended to be temporary. (*Id.*) Plaintiff seeks \$6
5 million in general and compensatory damages against the doctors at Alvarado. (*Id.* at
6 7.)

7 Plaintiff has not prepaid the filing fees required by 28 U.S.C. § 1914(a) to
8 commence a federal civil action; instead, he has filed a Motion to Proceed In Forma
9 Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2.)

10 **I. MOTION TO PROCEED IFP**

11 All parties instituting any civil action, suit or proceeding in a district court of
12 the United States, except an application for writ of habeas corpus, must pay a filing
13 fee of \$400. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff’s
14 failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to
15 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007);
16 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is
17 granted leave to proceed IFP remains obligated to pay the entire fee in “increments”
18 *see Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of
19 whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor*
20 *v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

21 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
22 (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of
23 [his] trust fund account statement (or institutional equivalent) for . . . the six-month
24 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);
25 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust
26

27 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional
28 administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of
Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2014)). The additional \$50
administrative fee does not apply to persons granted leave to proceed IFP. *Id.*

1 account statement, the Court assesses an initial payment of 20% of (a) the average
2 monthly deposits in the account for the past six months, or (b) the average monthly
3 balance in the account for the past six months, whichever is greater, unless the
4 prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
5 institution having custody of the prisoner then collects subsequent payments, assessed
6 at 20% of the preceding month’s income, in any month in which his account exceeds
7 \$10, and forwards those payments to the Court until the entire filing fee is paid. *See*
8 28 U.S.C. § 1915(b)(2).

9 In support of his IFP Motion, Plaintiff has submitted a certified copy of his
10 trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.
11 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account
12 statement, as well as the attached prison certificate issued by an accounting officer at
13 CMC verifying his available balances. Plaintiff’s statements show that while he had
14 average monthly deposits of \$24.67 to his account, and an average monthly balance
15 of \$4.26 during the 6-month period preceding the filing of this action, he had only
16 \$.02 in his account at the time of filing. Thus, while the Court assesses Plaintiff’s
17 initial partial filing fee at \$4.93 pursuant to 28 U.S.C. § 1915(b)(1), it appears he is
18 unable to pay that initial fee at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that
19 “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing
20 a civil action or criminal judgment for the reason that the prisoner has no assets and
21 no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850
22 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a
23 prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds
24 available to him when payment is ordered.”).

25 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF Doc.
26 No. 2), and will direct the California Department of Corrections and Rehabilitation
27 (“CDCR”) to collect the entire \$350 balance of the filing fees mandated by 28 U.S.C.
28

1 § 1914 and forward them to the Clerk of the Court pursuant to the installment
2 payment provisions set forth in 28 U.S.C. § 1915(b)(1).

3 **II. INITIAL SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2) AND § 1915A**

4 **A. Standard of Review**

5 Notwithstanding Plaintiff’s IFP status or the payment of any partial filing fees,
6 the PLRA also obligates the Court to review complaints filed by all persons
7 proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any
8 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
9 criminal law or the terms or conditions of parole, probation, pretrial release, or
10 diversionary program,” “as soon as practicable after docketing.” 28 U.S.C.

11 §§ 1915(e)(2) and 1915A(b). Under these screening statutes, the Court must sua
12 sponte dismiss complaints, or any portions thereof, which are frivolous, malicious,
13 fail to state a claim, or which seek damages from defendants who are immune. *See* 28
14 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th
15 Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th
16 Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

17 All complaints must contain “a short and plain statement of the claim showing
18 that the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual
19 allegations are not required, but “[t]hreadbare recitals of the elements of a cause of
20 action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*,
21 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
22 (2007)). “Determining whether a complaint states a plausible claim for relief [is] . . . a
23 context-specific task that requires the reviewing court to draw on its judicial
24 experience and common sense.” *Id.* The “mere possibility of misconduct” falls short
25 of meeting this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572
26 F.3d 962, 969 (9th Cir. 2009).

27 “When there are well-pleaded factual allegations, a court should assume their
28 veracity, and then determine whether they plausibly give rise to an entitlement to

1 relief.” *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir.
2 2000) (“[W]hen determining whether a complaint states a claim, a court must accept
3 as true all allegations of material fact and must construe those facts in the light most
4 favorable to the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.
5 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil
6 Procedure 12(b)(6)”).

7 However, while the Court “ha[s] an obligation where the petitioner is pro se,
8 particularly in civil rights cases, to construe the pleadings liberally and to afford the
9 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th
10 Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may
11 not “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of*
12 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

13 **B. 42 U.S.C. § 1983**

14 “Section 1983 creates a private right of action against individuals who, acting
15 under color of state law, violate federal constitutional or statutory rights.” *Devereaux*
16 *v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
17 substantive rights, but merely provides a method for vindicating federal rights
18 elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal
19 quotation marks and citations omitted). “To establish § 1983 liability, a plaintiff must
20 show both (1) deprivation of a right secured by the Constitution and laws of the
21 United States, and (2) that the deprivation was committed by a person acting under
22 color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

23 **C. State Action**

24 First, the Court finds Plaintiff’s Complaint fails to state a claim and must be
25 dismissed pursuant to 28 U.S.C. §1915(e)(2)(B)(ii) and § 1915A(b)(1) because it
26 alleges no facts to show that any of the named Defendants, all identified only as
27 physicians employed by Alvarado Hospital, acted under color of state law. *Lopez*, 203
28 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

1 “[P]rivate parties [do] not generally act[] under color of state law.” *Price v.*
2 *Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). Therefore, courts “start with the
3 presumption that private conduct does not constitute governmental action.” *Sutton v.*
4 *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). “In order for
5 private conduct to constitute governmental action, ‘something more’ must be
6 present.” *Id.* (citing *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982)).

7 In the context of medical services provided to prisoners like Plaintiff, the
8 Supreme Court has held that “something more,” requires him to allege that the
9 “private physician or hospital,” he seeks to sue has “contract[ed] with a public prison
10 system to provide treatment for inmates,” and has “perform[ed] a public function”
11 sufficient to “be found to [have] act[ed] under color of law for purposes of § 1983.”
12 *West v. Atkins*, 487 U.S. 42, 56 n.15 (1988).

13 Here, Plaintiff has failed to allege that the Alvarado doctors he seeks to hold
14 liable were employed by or acted under contract with the state of California to
15 provide medical services to its prisoners when they treated him in 2010. Therefore,
16 his Complaint fails to state a claim under § 1983 because it lacks the “factual content”
17 required to show Defendants’ actions were “fairly attributable to the State.” *Id.* at 54;
18 *Iqbal*, 556 U.S. at 678; *cf. Lopez v. Dep’t of Health Servs.*, 939 F.2d 881, 883 (9th
19 Cir. 1991) (finding district court’s sua sponte dismissal improper where prisoner’s
20 complaint contained allegations that defendants, a private hospital and ambulance
21 service *did* act “under contract with the state of Arizona to provide medical services
22 to indigent citizens.”).

23 **D. Individual Liability**

24 Second, even if Plaintiff had alleged the Alvarado doctors he has named as
25 Defendants acted under color of state law, his Complaint also fails to “plead that each
26 . . . defendant, through the official’s own individual actions, has violated the
27 Constitution.” *Iqbal*, 556 U.S. at 676; *see also Jones v. Cmty. Redev. Agency of City*
28 *of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (even pro se plaintiff must “allege

1 with at least some degree of particularity overt acts which defendants engaged in” in
2 order to state a claim); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
3 (“Liability under § 1983 must be based on the personal involvement of the
4 defendant.”).

5 As currently pleaded, Plaintiff’s Complaint simply lists six individual
6 physicians as Defendants in the caption, *see* Compl. at 1, 2, but the body of his
7 pleading makes no further mention of any of these doctors, except for Dr. Hood, who
8 is alleged in only a perfunctory and wholly conclusory fashion to have “showed
9 deliberate indifference to [his] serious medical needs.” *Id.* at 3.

10 Each defendant may be held liable under § 1983 only if he or she is alleged to
11 have been “personally involved in the constitutional deprivation.” *Lolli v. Cnty. of*
12 *Orange*, 351 F.3d 410, 418 (9th Cir. 2003). Plaintiff’s Complaint, however, fails to
13 include *any* “factual content that [would] allow[] the court to draw [a] reasonable
14 inference” in support of an individualized constitutional violation personally
15 committed by any of the named doctors. *Iqbal*, 556 U.S. at 678 (“A pleading that
16 offers ‘labels and conclusions’ or a ‘formulaic recitation of the elements of a cause of
17 action will not do.’”) (quoting *Twombly*, 550 U.S. at 555, 557.) To show personal
18 liability, Plaintiff must include in his pleading at least some description of personal
19 acts taken by each individual defendant which he believes caused his Eighth
20 Amendment rights to be violated. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989);
21 *Iqbal*, 556 U.S. at 678 (noting that while “detailed factual allegations” are not
22 required, “unadorned, the defendant-unlawfully-harmed-me accusation[s]” are
23 insufficient to state a claim to relief that is “plausible on its face.”) (citing *Twombly*,
24 550 U.S. at 555, 570.)

25 For this additional reason, the Court finds Plaintiff’s Complaint fails to state a
26 claim upon which relief can be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii),
27 § 1915A(b)(1); *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

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1 **E. Inadequate Medical Care**

2 Finally, the Court finds that Plaintiff’s Complaint also fails to adequately plead
3 a constitutional violation—namely, an Eighth Amendment claim based on inadequate
4 medical care. A prisoner’s claim of inadequate medical care does not constitute cruel
5 and unusual punishment unless it rises to the level of “deliberate indifference to
6 serious medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). “Deliberate
7 indifference is a high legal standard.” *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th
8 Cir. 2004). This standard “consists of two parts,” one objective, and one subjective.
9 *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

10 First, the alleged deprivation must be, in objective terms, “sufficiently serious.”
11 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294,
12 298 (1991)). Second, the prison official must act with a “sufficiently culpable state of
13 mind,” which entails more than mere negligence, but less than conduct undertaken
14 “for the very purpose of causing, harm.” *Id.* at 837. A prison official does not act with
15 deliberate indifference unless he or she “knows of and disregards an excessive risk to
16 inmate health or safety.” *Id.* “If a [prison official] should have been aware of the risk,
17 but was not, then the [official] has not violated the Eighth Amendment, no matter
18 how severe the risk.” *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1188 (9th
19 Cir. 2002) (citation omitted).

20 Moreover, “the indifference to [a prisoner’s] medical needs must be substantial.
21 Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause
22 of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980)
23 (quoting *Estelle*, 429 U.S. at 105-06.) “[A] complaint that a physician has been
24 negligent in diagnosing or treating a medical condition does not state a valid claim of
25 medical mistreatment under the Eighth Amendment. Medical malpractice does not
26 become a constitutional violation merely because the victim is a prisoner.” *Estelle*,
27 429 U.S. at 106; *see also Anderson v. County of Kern*, 45 F.3d 1310, 1316 (9th Cir.
28 1995); *McGuckin v. Smith*, 974 F.2d 1050, 1050 (9th Cir. 1992), *overruled on other*

1 grounds, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).
2 Even gross negligence is insufficient to establish deliberate indifference to serious
3 medical needs. *See Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).

4 Here, the Court finds Plaintiff’s claims of having suffered an infection,
5 pancreatitis, and diabetes, which he alleges were “caused by the prolonged and
6 excessive implantation of [a] temporary stent,” (Compl., ECF Doc. No. 1 at 3), are
7 sufficient to show a facially plausible and objectively serious medical need. *See*
8 *McGuckin*, 974 F.2d at 1059-60 (The “existence of an injury that a reasonable doctor
9 or patient would find important and worthy of comment or treatment; the presence of
10 a medical condition that significantly affects an individual’s daily activities; or the
11 existence of chronic and substantial pain are examples of indications that a prisoner
12 has a ‘serious’ need for medical treatment.”); *Rodenhurst v. Hawaii*, No.
13 CV10-1237-PHX-GMS, 2010 WL 3719296, at *6 (D. Ariz. Sept. 15, 2010) (finding
14 prisoner’s “pancreatitis, high cholesterol, diabetes and renal insufficiency” sufficient
15 to show he suffered a “serious medical need”), *aff’d sub nom. Rodenhurst v. Bauman*,
16 509 F. App’x 634 (9th Cir. 2013); *Iqbal*, 556 U.S. at 678.

17 However, Plaintiff’s Complaint fails to further contain enough “factual
18 content” which would “allow the court to draw a reasonable inference” of deliberate
19 indifference on the part of any named Defendant. *Iqbal*, 556 U.S. at 678. At most, and
20 assuming Plaintiff’s allegations are true, the error he describes sounds only in
21 negligence; indeed, he himself claims his injuries were the result of “medical
22 malpractice,” “negligence,” and “incompetence.” (Compl., Doc. No. 1, at 3.) And
23 while he also describes Dr. Hood as having acted with “deliberate indifference,” (*id.*),
24 he does not further support this conclusion by alleging facts to show that Hood, or
25 any other Defendant, “kn[ew] of and disregard[ed] an excessive risk to [his] health or
26 safety” when implanted the stent which is alleged to have caused him harm three
27 years later. *Farmer*, 511 U.S. at 837. Deliberate indifference is “a state of mind more
28 blameworthy than negligence” and it “requires ‘more than ordinary lack of due care

1 for the prisoner's interests or safety.'" *Id.* at 835 (quoting *Whitley v. Albers*, 475 U.S.
2 312, 319 (1986)).

3 Therefore, the Court finds that Plaintiff's Complaint fails to allege facts
4 sufficient to support an Eighth Amendment claim against any Defendant and that it is
5 subject to dismissal for this additional reason pursuant to 28 U.S.C. § 1915(e)(2)(B)
6 and § 1915A(b)(1). *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

7 **F. Leave to Amend**

8 Because Plaintiff is proceeding without counsel, and it is not "absolutely clear
9 that no amendment can cure" the defects of pleading set forth above, the Court will
10 grant him an opportunity to amend. *See Lucas v. Dept. of Corr.*, 66 F.3d 245, 248
11 (9th Cir. 1995); *Lopez*, 203 F.3d at 1131.

12 **III. CONCLUSION AND ORDER**

13 For the reasons set forth above, the Court:

14 1. **GRANTS** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C.
15 § 1915(a) (ECF Doc. No. 2).

16 2. **DIRECTS** the Secretary of the CDCR, or his designee to collect from
17 Plaintiff's prison trust account the \$350 filing fee owed in this case by collecting
18 monthly payments from the account in an amount equal to twenty percent (20%) of
19 the preceding month's income and forwarding them to the Clerk of the Court each
20 time the amount in his account exceeds \$10 in accordance with 28 U.S.C.

21 § 1915(b)(2). **ALL PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE**
22 **NAME AND NUMBER ASSIGNED TO THIS ACTION.**

23 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Jeffrey
24 A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O.
25 Box 942883, Sacramento, California, 94283-0001.


26 4. **DISMISSES** Plaintiff's Complaint for failing to state a claim upon
27 which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and
28 § 1915A(b)(1), and **GRANTS** him forty-five (45) days leave from the date of this

1 Order in which to file an Amended Complaint that cures the deficiencies of pleading
2 described above. Plaintiff's Amended Complaint must be complete by itself without
3 reference to his original complaint. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios,*
4 *Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n
5 amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896,
6 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not
7 re-alleged in an amended pleading may be “considered waived if not repled.”).

8 Should Plaintiff elect *not* to proceed by filing a Amended Complaint within the
9 time provided, the Court will enter a final Order of dismissal of this civil action for
10 failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1),
11 and for failure to prosecute in compliance with a Court Order requiring amendment.

12 **IT IS SO ORDERED.**

13 **DATED: April 22, 2015**


Hon. Cynthia Bashant
United States District Judge

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