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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

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|--------------------|---|--------------------------------|
| JOHNNY LEE BRIGGS, |) | NO. CV 17-4615-FMO (E) |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | REPORT AND RECOMMENDATION OF |
| |) | |
| T. ENRIQUEZ, |) | UNITED STATES MAGISTRATE JUDGE |
| |) | |
| Defendant. |) | |
| |) | |
| |) | |
| |) | |

This Report and Recommendation is submitted to the Honorable Fernando M. Olguin, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Plaintiff, a state prisoner, filed this civil rights action pursuant to 42 U.S.C. section 1983 on June 19, 2017, in the United States District Court for the Eastern District of California. Plaintiff alleged claims assertedly arising out of events at the

1 California Men's Colony ("CMC") in San Luis Obispo, California. On
2 June 20, 2017, the Eastern District transferred the action to this
3 Court.

4
5 On August 15, 2017, the Court issued an "Order Dismissing
6 Complaint With Leave to Amend." On September 13, 2017, Plaintiff
7 filed a First Amended Complaint. On September 22, 2017, the Court
8 issued an "Order Dismissing First Amended Complaint With Leave to
9 Amend." Because it appeared to the Court that Plaintiff's claims
10 could implicate the validity of a criminal conviction and/or a
11 disciplinary conviction resulting in a lack of credit, both the
12 August 15, 2017 Order and the September 22, 2017 order required
13 Plaintiff to allege, in any amended pleading, facts showing that the
14 action is not barred by Heck v. Humphrey, 512 U.S. 477 (1994)
15 ("Heck").

16
17 On October 20, 2017, Plaintiff filed a Second Amended Complaint.

18
19 **SUMMARY OF PLAINTIFF'S ALLEGATIONS**

20
21 **I. The Original Complaint**

22
23 In the brief form Complaint, Plaintiff alleged that Defendant
24 Correctional Officer T. Enriquez subjected Plaintiff to excessive
25 force while Plaintiff was incarcerated at CMC. The original Complaint
26 contained no factual allegations supporting this conclusory claim of
27 excessive force. Plaintiff alleged that Defendant "made up two
28 different stories of what happened" (Complaint, p. 3). Plaintiff

1 sought the following relief: "Exception from Battery on a peace
2 officer and Battery By Prisoner through injunctive relief" (id., p.
3 6).

4
5 **II. The First Amended Complaint**

6
7 In the First Amended Complaint, Plaintiff sued Defendant Enriquez
8 in Defendant's individual and official capacities for excessive force
9 allegedly inflicted on October 22, 2016 (First Amended Complaint, p.
10 3). The pleading was not a model of clarity. Plaintiff alleged that
11 he was taken to a hospital by ambulance after Defendant assertedly
12 subjected Plaintiff to excessive force (id., p. 5). Plaintiff
13 confusingly alleged:

14
15 Battery on a peace officer is a lesser included offense of
16 Battery By Prisoner on a non prisoner. I cannot be
17 subjected to serve time in prison on Both offenses for the
18 same alleged conduct.

19
20 (id.).

21
22 Plaintiff purportedly asserted claims for violation of the Fifth,
23 Eighth and Fourteenth Amendments and sought damages and unspecified
24 injunctive relief.

25
26 Plaintiff attached to the First Amended Complaint several
27 documents, including a San Luis Obispo County Superior Court "Case
28 Summary" in People v. Briggs, case number 17F-03739. This document

1 appeared to indicate that on April 24, 2017, the State charged
2 Plaintiff with two counts of battery by a prisoner on a non-confined
3 person in violation of California Penal Code section 4501.5 and one
4 count of resisting or obstructing an officer in violation of
5 California Penal Code section 69 (First Amended Complaint, attachment,
6 third page). The document also indicated that on May 23, 2017,
7 Petitioner pled no contest to one count of battery by a prisoner on a
8 non-prisoner and received a three year prison sentence (id., fourth
9 and fifth pages). A prison document titled "Legal Status Summary"
10 attached to the Complaint indicated that, on November 29, 2016,
11 Plaintiff reportedly suffered a prison disciplinary conviction with an
12 "effective date" of October 22, 2016, as a result of which Plaintiff
13 apparently lost credits (id., p. 9).

14
15 **III. Second Amended Complaint**

16
17 In the Second Amended Complaint, Plaintiff sues Defendant
18 Enriquez in Defendant's individual capacity only. Plaintiff alleges
19 that Enriquez acted under color of law within the meaning of section
20 1983 by assertedly engaging in "misconduct, nuisance, negligence
21 unprofessional [sic]" (Second Amended Complaint, p. 3). The
22 purportedly factual allegations, in their entirety, state:

23
24 T. Enriquez misconduct was excessive and unprofessional
25 [sic] on 10-22-16 at CMC State Prison I Johnny Lee Briggs
26 suffered injurys [sic] due to officers T. Enriquez use of
27 force officers handling of the situation was in violation of
28 Departmental policy engaging in combat with Inmate[.] Heck

1 test does not bar my complaint under cruel and unusual
2 punishment[.] [O]fficer misconduct complaints involving
3 injury to parties is [sic] separate to criminal and
4 institutional charges regarding personal injury for cruel
5 and unusual punishment[.] T. Enriquez misconduct violated
6 my right to be free from harm injury or illegal restraint by
7 Assault libel & slander.

8
9 (Second Amended Complaint, p. 5).

10
11 Plaintiff alleges Defendant assertedly: (1) violated "civil code
12 of procedure (8) . . . [and] (25)": (2) subjected Plaintiff to cruel
13 and unusual punishment; (3) committed professional negligence; and
14 (4) violated the Americans with Disabilities Act, 42 U.S.C. section
15 12321 et seq (Second Amended Complaint, p. 5). Plaintiff seeks
16 compensatory and punitive damages, payment of medical expenses and
17 injunctive relief "for civil harassment" (Second Amended Complaint, p.
18 6).

19
20 **DISCUSSION**

21
22 As the Court previously advised Plaintiff in the August 15, 2017
23 and September 22, 2017 Orders, under Rule 8(a) of the Federal Rules of
24 Civil Procedure, a complaint must contain a "short and plain statement
25 of the claim showing that the pleader is entitled to relief." "Each
26 allegation must be simple, concise, and direct." Fed. R. Civ. P.
27 8(d)(1). "Experience teaches that, unless cases are pled clearly and
28 precisely, issues are not joined, discovery is not controlled, the

1 trial court's docket becomes unmanageable, the litigants suffer, and
2 society loses confidence in the court's ability to administer
3 justice." Bautista v. Los Angeles County, 216 F.3d 837, 841 (9th Cir.
4 2000) (citations and quotations omitted). Despite twice having been
5 advised of the requirements of Rule 8, the Second Amended Complaint
6 again contains only confused and conclusory allegations. See Ashcroft
7 v. Iqbal, 556 U.S. 662, 678, 686 (2009); Ivey v. Board of Regents of
8 Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

9
10 As the Court twice previously advised Plaintiff, the Eighth
11 Amendment prohibits the use of "excessive physical force" against
12 prisoners. Farmer v. Brennan, 511 U.S. 825, 837 (1994); Hudson v.
13 McMillian, 503 U.S. 1, 6 (1992). Whether there has been an Eighth
14 Amendment violation turns on whether force was applied in a good faith
15 effort to maintain or restore prison discipline, or maliciously and
16 sadistically for the very purpose of causing harm. Hudson v.
17 McMillian, 503 U.S. at 6. In the August 15, 2017 and September 22,
18 2017 Order, the Court ordered Plaintiff to assert, in any amended
19 pleading, factual allegations supporting Plaintiff's excessive force
20 claim. Plaintiff has failed to obey these orders. Plaintiff's
21 conclusory allegations again are insufficient to allege a cognizable
22 excessive force claim. See Ashcroft v. Iqbal, 556 U.S. at 678, 686
23 (plaintiff must allege more than an "unadorned, the-defendant-
24 unlawfully-harmed me accusation"; a pleading that "offers labels and
25 conclusions or a formulaic recitation of the elements of a cause of
26 action will not do") (citations and quotations omitted); Bell Atlantic
27 Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Threadbare recitals of
28 the elements of a cause of action, supported by mere conclusory

1 statements, do not suffice."); Cervantes v. Salazar, 2017 WL 1427011,
2 at *1 (E.D. Cal. Apr. 21, 2017) (conclusory excessive force
3 allegations insufficient).
4

5 In both the August 15, 2017 and September 22, 2017 Orders, the
6 Court observed that the original Complaint suggested Plaintiff's claim
7 might implicate the validity of a criminal conviction or a prison
8 disciplinary conviction for battery on an officer. As previously
9 indicated, the First Amended Complaint and attachments thereto
10 appeared to indicate that Plaintiff did suffer a criminal conviction
11 and a disciplinary conviction arising out of the alleged excessive
12 force incident. The Court twice previously advised Plaintiff that, in
13 Heck v. Humphrey, 512 U.S. 477 (1994), the United States Supreme Court
14 held that, in order to pursue a claim for damages arising out of an
15 allegedly unconstitutional conviction or imprisonment, or for other
16 harm caused by actions whose unlawfulness would render a conviction or
17 sentence invalid, a civil rights plaintiff must prove that the
18 conviction or sentence has been "reversed on direct appeal, expunged
19 by executive order, declared invalid by a state tribunal authorized to
20 make such determination, or called into question by a federal court's
21 issuance of a writ of habeas corpus." Heck, 512 U.S. at 486-87. "A
22 claim for damages bearing that relationship to a conviction or
23 sentence that has not been so invalidated is not cognizable under §
24 1983." Id. at 487. In Edwards v. Balisok, 520 U.S. 641 (1997), the
25 Supreme Court applied Heck to a due process challenge to prison
26 disciplinary proceedings resulting in the loss of good time credits.

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1 As the Court previously advised Plaintiff, in some circumstances
2 Heck may not bar an excessive force claim despite a plaintiff's
3 conviction for resisting or battering an officer, as where the
4 excessive force claim arises out of a factual scenario different from
5 that supporting the conviction. See Beets v. County of Los Angeles,
6 669 F.3d 1038, 1042 (9th Cir. 2012) (Heck would not bar an excessive
7 force claim that is "distinct temporally or spatially from the factual
8 basis for the [plaintiff's] conviction") (dicta); Hooper v. County of
9 San Diego, 629 F.3d 1127, 1134 (9th Cir. 2011) (conviction for
10 resisting arrest "does not bar a § 1983 claim for excessive force
11 under Heck when the conviction and the § 1983 claim are based on
12 different actions during 'one continuous transaction'"); Smith v. City
13 of Hemet, 394 F.3d 689, 696 (9th Cir.) (en banc), cert. denied, 545
14 U.S. 1128 (2005) ("Under Heck, Smith would be allowed to bring a §
15 1983 action . . . if the use of excessive force occurred subsequent to
16 the conduct on which his conviction was based."); Shelton v. Chorley,
17 2011 WL 1253655, at *4 (E.D. Cal. Mar. 31, 2011), aff'd, 487 Fed.
18 App'x 368 (9th Cir. 2012) (Heck did not bar prisoner's excessive use
19 of force claim against correctional officer despite plaintiff's prison
20 disciplinary conviction for battery on a peace officer because it was
21 "possible that Plaintiff attempted to batter Defendant and that
22 Defendant used excessive force in subduing Plaintiff"); compare Beets
23 v. County of Los Angeles, 669 F.3d at 1044-45 (Heck barred excessive
24 force claim where "there was no separation between [decendent's]
25 criminal actions and the alleged use of excessive force"); Lozano v.
26 City of San Pablo, 2014 WL 4386151, at *5 (N.D. Cal. Sept. 4, 2014)
27 (Heck applicable where plaintiff could "not divorce the conduct giving
28 rise to his excessive force claim from the conduct giving rise to his

1 conviction"); Velarde v. Duarte, 937 F. Supp. 2d 1204, 1216 (S.D. Cal.
2 2013) (Heck applied where, among other things, plaintiff's excessive
3 force allegations were "based on the exact same acts that were
4 considered in the prison disciplinary proceeding, and these facts
5 [were] not in any way divisible from the facts alleged in the
6 Complaint").

7
8 In the August 15, 2017 "Order, etc.," the Court inter alia
9 ordered that, in any First Amended Complaint, Plaintiff should plead
10 facts attempting to show that Heck does not bar Plaintiff's claim.
11 The First Amended Complaint did not contain any such factual
12 allegations. Indeed, it appeared from the pleading and attachments
13 thereto that the excessive force incident upon which the First Amended
14 Complaint was based is the same incident which assertedly gave rise to
15 Plaintiff's criminal and/or disciplinary convictions.

16
17 In the September 22, 2017 Order, the Court again required
18 Plaintiff, in any Second Amended Complaint, to plead facts attempting
19 to show that Heck did not bar Plaintiff's claim. The Second Amended
20 Complaint again contains no such factual allegations.

21
22 **CONCLUSION**

23
24 Although the Court has afforded Plaintiff multiple opportunities
25 to amend his pleading to state a cognizable federal claim for relief,
26 Plaintiff has proven unable to do so. In the present circumstances,
27 further amendment would be futile. See Zucco Partners, LLC v.
28 Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009) (affirming

1 dismissal without leave to amend where court advised plaintiff of
2 pleading deficiencies but plaintiff failed to correct those
3 deficiencies in amended pleading); Simon v. Value Behavioral Health,
4 Inc., 208 F.3d 1073, 1084 (9th Cir. 2000), amended, 234 F.3d 428 (9th
5 Cir. 2000), cert. denied, 531 U.S. 1104 (2001), overruled on other
6 grounds, Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.), cert.
7 denied, 552 U.S. 985 (2007) (affirming dismissal without leave to
8 amend where plaintiff failed to correct deficiencies in complaint,
9 where court had afforded plaintiff opportunities to do so, and had
10 discussed with plaintiff the substantive problems with his claims);
11 Plumeau v. School District #40, County of Yamhill, 130 F.3d 432, 439
12 (9th Cir. 1997) (denial of leave to amend appropriate where further
13 amendment would be futile). The Second Amended Complaint and the
14 action should be dismissed without leave to amend but without
15 prejudice. See Trimble v. City of Santa Rosa, 49 F.3d 583, 586 (9th
16 Cir. 1995) (court should dismiss a claim barred by Heck without
17 prejudice "so that [the plaintiff] may reassert his claims if he ever
18 succeeds in invalidating his conviction.").¹

19
20 **RECOMMENDATION**

21
22 For the reasons discussed above, IT IS RECOMMENDED that the Court
23 issue an order: (1) accepting and adopting this Report and

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27 ¹ This dismissal also would be without prejudice to the
28 reassertion of any state law claims attempted to be alleged in
the Second Amended Complaint. See 28 U.S.C. § 1367(c)(3).

1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of
3 Appeals, but may be subject to the right of any party to file
4 objections as provided in the Local Rules Governing the Duties of
5 Magistrate Judges and review by the District Judge whose initials
6 appear in the docket number. No notice of appeal pursuant to the
7 Federal Rules of Appellate Procedure should be filed until entry of
8 the judgment of the District Court.

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