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

CARLTON V. MOSLEY,
Plaintiff,

v.

SCOTT KERNAN, *et al.*,
Defendants.

No. CV 17-4849-JAK (PLA)

**ORDER DISMISSING COMPLAINT WITH
LEAVE TO AMEND**

Plaintiff, a state prisoner presently held at California State Prison in Sacramento, California, filed a *pro se* civil rights action herein pursuant to 42 U.S.C. § 1983 on June 30, 2017. Plaintiff subsequently was granted leave to proceed *in forma pauperis*. (ECF No. 6). In the Complaint, plaintiff names as defendants twelve officials at the California State Prison, Los Angeles County in Lancaster (“CSP-LAC”), including the Director, Scott Kernan, and the Warden, Debbie Asuncion. All defendants are named in their official as well as individual capacities. (ECF No. 1 at 5-9). Plaintiff’s claims arise from an incident that occurred while plaintiff was held at CSP-LAC. Plaintiff alleges that, on May 20, 2016, at 8:25 a.m., plaintiff was attacked by two inmates and eight correctional officers on D-Facility Yard. (*Id.* at 10). Plaintiff experienced a “severe trauma episode” and “lay on the ground floor weeping in a fetal position.” (*Id.* at 11). Several defendants used unnecessary force, including pepper spray and batons, before they “dragged plaintiff off the

1 yard.” (*Id.* at 12-15). Plaintiff seeks monetary damages. (*Id.* at 41).

2 In accordance with the mandate of the Prison Litigation Reform Act of 1995 (“PLRA”), the
3 Court has screened the Complaint prior to ordering service for the purpose of determining whether
4 the action is frivolous or malicious; or fails to state a claim on which relief may be granted; or
5 seeks monetary relief against a defendant who is immune from such relief. See 28 U.S.C. §§
6 1915A, 1915(e)(2); 42 U.S.C. § 1997e.

7 The Court’s screening of the pleading under the foregoing statutes is governed by the
8 following standards. A complaint may be dismissed as a matter of law for failure to state a claim
9 for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable
10 legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990); see also Rosati
11 v. Igbinoso, 791 F.3d 1037, 1039 (9th Cir. 2015) (in determining whether a complaint should be
12 dismissed under the PLRA, courts apply the standard of Fed. R. Civ. P. 12(b)(6)). Further, with
13 respect to a plaintiff’s pleading burden, the Supreme Court has held that: “a plaintiff’s obligation
14 to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions,
15 and a formulaic recitation of the elements of a cause of action will not do. ... Factual allegations
16 must be enough to raise a right to relief above the speculative level.” Bell Atlantic Corp. v.
17 Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations omitted,
18 alteration in original); see also Ashcroft v. Iqbal, 556 U.S. 662, 668, 129 S. Ct. 1937, 173 L. Ed.
19 2d 868 (2009) (To avoid dismissal for failure to state a claim, “a complaint must contain sufficient
20 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has
21 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
22 reasonable inference that the defendant is liable for the misconduct alleged.” (internal citation
23 omitted)). Since plaintiff is appearing *pro se*, the Court must construe the allegations of the
24 pleading liberally and must afford plaintiff the benefit of any doubt. See Hebbe v. Pliler, 627 F.3d
25 338, 342 (9th Cir. 2010). Finally, in determining whether a complaint states a claim on which relief
26 may be granted, allegations of material fact are taken as true and construed in the light most
27 favorable to plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the
28 “tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable

1 to legal conclusions.” Iqbal, 556 U.S. at 678.

2 After careful review of the Complaint under the foregoing standards, the Court finds that
3 plaintiff’s allegations appear insufficient to state a claim against any named defendant.
4 Accordingly, the Complaint is dismissed with leave to amend. See Noll v. Carlson, 809 F.2d 1446,
5 1448 (9th Cir. 1987) (holding that a *pro se* litigant must be given leave to amend his complaint
6 unless it is absolutely clear that the deficiencies of the complaint cannot be cured by amendment).

7 **If plaintiff desires to pursue this action, he is ORDERED to file a First Amended**
8 **Complaint no later than August 25, 2017, remedying the deficiencies discussed below.**
9 **Further, plaintiff is admonished that, if he fails to timely file a First Amended Complaint or**
10 **fails to remedy the deficiencies of this pleading as discussed herein, the Court will**
11 **recommend that the action be dismissed without further leave to amend and with**
12 **prejudice.¹**

13
14 **DISCUSSION**

15 **A. PLAINTIFF’S COMPLAINT FAILS TO STATE A SHORT AND PLAIN STATEMENT IN**
16 **COMPLIANCE WITH FEDERAL RULE OF CIVIL PROCEDURE 8.**

17 Plaintiff’s Complaint fails to comply with Federal Rule of Civil Procedure 8(a) and 8(d). Fed.
18 R. Civ. P. 8(a) states:

19 A pleading that states a claim for relief must contain: (1) a short and
20 plain statement of the grounds for the court’s jurisdiction, unless the
21 court already has jurisdiction and the claim needs no new jurisdictional
22 support; (2) **a short and plain statement of the claim showing that**
the pleader is entitled to relief; and (3) a demand for the relief

23 ¹ Plaintiff is advised that this Court’s determination herein that the allegations in the
24 Complaint are insufficient to state a particular claim should not be seen as *dispositive* of that claim.
25 Accordingly, while this Court believes that you have failed to plead sufficient factual matter in your
26 pleading, accepted as true, to state a claim to relief that is plausible on its face, you are not
27 required to omit any claim or defendant in order to pursue this action. However, if you decide to
28 pursue a claim in a First Amended Complaint that this Court has found to be insufficient, then this
Court, pursuant to the provisions of 28 U.S.C. § 636, ultimately will submit to the assigned district
judge a recommendation that such claim be dismissed with prejudice for failure to state a claim,
subject to your right at that time to file Objections with the district judge as provided in the Local
Rules Governing Duties of Magistrate Judges.

1 sought, which may include relief in the alternative or different types of
2 relief.

3 (Emphasis added). Rule 8(d)(1) provides: “Each allegation **must be simple, concise, and direct.**
4 No technical form is required.” (Emphasis added). Although the Court must construe a *pro se*
5 plaintiff’s pleadings liberally, a plaintiff nonetheless must allege a minimum factual and legal basis
6 for each claim that is sufficient to give each defendant fair notice of what plaintiff’s claims are and
7 the grounds upon which they rest. See, e.g., Brazil v. United States Department of the Navy, 66
8 F.3d 193, 199 (9th Cir. 1995); McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991) (complaint
9 must give defendants fair notice of the claims against them). If a plaintiff fails to clearly and
10 concisely set forth allegations sufficient to provide defendants with notice of which defendant is
11 being sued on which theory and what relief is being sought against them, the complaint fails to
12 comply with Rule 8. See, e.g., McHenry v. Renne, 84 F.3d 1172, 1177-79 (9th Cir. 1996); Nevijel
13 v. Northcoast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981). Moreover, failure to comply with
14 Rule 8 constitutes an independent basis for dismissal of a complaint that applies even if the claims
15 in a complaint are not found to be wholly without merit. See McHenry, 84 F.3d at 1179; Nevijel,
16 651 F.2d at 673.

17 First, it is not clear to the Court how many claims plaintiff is purporting to raise against each
18 defendant. Plaintiff incorporates all of the preceding allegations into each of his First, Second, and
19 Third claims (ECF No. 1 at 27, 32, 34), which makes it extremely difficult to discern which factual
20 allegations pertain to what claim. Further, in his Claim I, plaintiff purports to raise a claim under
21 the Eighth Amendment against Director Kernan and Warden Asuncion arising from their “action
22 of intimidation, abuse, harassment, and other violations of law against plaintiff.” (*Id.* at 27).
23 Plaintiff’s Complaint, however, fails to set forth any factual allegations that either defendant took
24 any affirmative action, participated in the action of another, or failed to take an action that he or
25 she was legally required to do that caused any constitutional violation. In order to state a federal
26 civil rights claim against a particular defendant, plaintiff must allege that a specific defendant, while
27 acting under color of state law, deprived him of a right guaranteed under the Constitution or a
28 federal statute. See West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

1 “A person deprives another ‘of a constitutional right, within the meaning of section 1983, if he does
2 an affirmative act, participates in another’s affirmative acts, or omits to perform an act which he
3 is legally required to do that **causes** the deprivation of which [the plaintiff complains].” Leer v.
4 Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir.
5 1978) (emphasis and alteration in original)). As the Supreme Court has made clear, plaintiff must
6 plead “more than labels and conclusions.” Twombly, 550 U.S. at 555. Moreover, supervisory
7 personnel are not liable under § 1983 on a theory of respondeat superior. See, e.g., Redman v.
8 Cty. of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc). In Iqbal, 556 U.S. at 676, the
9 Supreme Court reaffirmed that: “Government officials may not be held liable for the
10 unconstitutional conduct of their subordinates under a theory of respondeat superior.”
11 Accordingly, plaintiff may not state a federal civil rights claim against any defendant, including
12 Director Kernan and Warden Asuncion, based on his or her role as a supervisor.

13 Second, plaintiff names each defendant in his or her official capacity. All defendants are
14 alleged to be employees of the California Department of Corrections and Rehabilitation (“CDCR”),
15 which is a state agency. In Will v. Michigan Department of State Police, 491 U.S. 58, 64-66, 109
16 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Supreme Court held that states, state agencies, and
17 state officials sued in their official capacities are not persons subject to civil rights suits under 42
18 U.S.C. § 1983. In addition, the Eleventh Amendment bars federal jurisdiction over suits by
19 individuals against a State and its instrumentalities, unless either the State consents to waive its
20 sovereign immunity or Congress abrogates it. Pennhurst State School & Hosp. v. Halderman, 465
21 U.S. 89, 99-100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). To overcome this Eleventh Amendment
22 bar, the State’s consent or Congress’ intent must be “unequivocally expressed.” Pennhurst, 465
23 U.S. at 99. While California has consented to be sued in its own courts pursuant to the California
24 Tort Claims Act, such consent does not constitute consent to suit in federal court. See BV
25 Engineering v. Univ. of California, 858 F.2d 1394, 1396 (9th Cir. 1988); see also Atascadero State
26 Hospital v. Scanlon, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) (holding that Art.
27 III, § 5 of the California Constitution does not constitute a waiver of California’s Eleventh
28 Amendment immunity). Finally, Congress has not repealed State sovereign immunity against suits

1 under 42 U.S.C. § 1983. Plaintiff's Complaint seeks only monetary damages. Accordingly,
2 plaintiff may not maintain a federal civil rights claim against defendants in their official capacities.

3 Third, plaintiff alleges that defendant Nurse Eyan failed to adequately investigate the
4 incident and failed to discipline unspecified officers. Plaintiff's Complaint, however, does not set
5 forth any factual allegations concerning any investigation, and he does not allege that defendant
6 Eyan was aware that plaintiff would suffer a substantial risk of serious harm from the failure to
7 adequately process plaintiff's grievance. (ECF No. 1 at 35). Plaintiff also alleges that defendants
8 "failed to properly investigate and take proper actions to discipline those involved." (*Id.* at 19-20).
9 To the extent that plaintiff may be purporting to raise a civil rights claim based on any prison
10 official's role in reviewing his administrative grievance, plaintiff may not state a federal civil rights
11 claim arising from the administrative grievance process unless he alleges that the reviewing official
12 had actual knowledge of a substantial risk of serious harm to plaintiff. See Peralta v. Dillard, 744
13 F.3d 1076, 1086-88 (9th Cir. 2014) (en banc) (official whose only role was reviewing internal
14 appeal does not act with deliberate indifference absent knowledge of a substantial risk of serious
15 harm).

16 Fourth, plaintiff appears to be raising a claim or claims against Nurse Eyan under the Cruel
17 and Unusual Punishment Clause of the Eighth Amendment arising from inadequate medical care,
18 but he alleges in this claim that Nurse Eyan failed to adequately train staff regarding "mental health
19 crisis support" and failed to supervise unspecified individuals. (ECF No. 1 at 35). Plaintiff does
20 not set forth any factual allegations regarding any training by Nurse Eyan. Plaintiff also
21 incorporated all of his preceding paragraphs into his claim alleging deliberate indifference to his
22 medical needs (*id.* at 34), but many of those allegations do not pertain to plaintiff's medical care.
23 Accordingly, it is unclear to the Court what the factual basis is for plaintiff's claim alleging
24 inadequate medical care, or any other claim against Nurse Eyan. To the extent that plaintiff
25 wishes to raise any claims arising from allegedly inadequate medical treatment that he received,
26 plaintiff should set forth a short and plain statement of each such claim (as discussed below) that
27 he wishes to raise against each defendant.

28 Fifth, plaintiff includes factual allegations that some defendants "set all this up with the

1 inmates” and moved an inmate “just to attack plaintiff.” (ECF No. 1 at 12-13). Plaintiff also asserts
2 that prison officials violate the Eighth Amendment when they are deliberately indifferent to an
3 unreasonable risk of harm to a prisoner or ignore an obvious “danger.” (*Id.* at 21-22). It is not
4 clear from the Complaint which defendants are alleged to have ignored what substantial risk of
5 harm. To the extent that plaintiff is purporting to allege a claim under the Eighth Amendment
6 against any specific defendant arising from that official’s deliberate indifference to a “substantial
7 risk of serious harm,” plaintiff should set forth a short and plain statement of any such claim. The
8 Supreme Court has held that prison officials must “take reasonable measures to guarantee the
9 safety of the inmates.” Farmer v. Brennan, 511 U.S. 825, 832-33, 114 S. Ct. 1970, 128 L. Ed. 2d
10 811 (1994). Thus, “[a] prison official’s ‘deliberate indifference’ to a substantial risk of serious harm
11 to an inmate violates the Eighth Amendment.” *Id.* at 828. A prison official is “deliberately
12 indifferent” if that official is “subjectively aware of the risk and does nothing to prevent the resulting
13 harm.” Jeffers v. Gomez, 267 F.3d 895, 913 (9th Cir. 2001) (citing Farmer, 511 U.S. at 828-29).
14 To be subjectively aware of a risk, the prison “official must both be aware of facts from which the
15 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the
16 inference.” Farmer, 511 U.S. at 837. Further, plaintiff must allege that, objectively, “he is
17 incarcerated under conditions posing a substantial risk of serious harm.” *Id.* at 834.

18 Sixth, plaintiff alleges that several defendants made jokes and yelled obscenities at plaintiff
19 during the incident on May 20, 2016 (ECF No. 1 at 12-14), and that no official prevented
20 defendants from “yelling obscenities” at plaintiff (*id.* at 16). However, a prison official’s mere
21 making of threats or harassing comments to a prisoner does not give rise to a federal civil rights
22 claim. See Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996), amended by 135 F.3d 1318 (9th
23 Cir. 1998) (verbal harassment is not cognizable as a constitutional deprivation under § 1983);
24 Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (verbal harassment or abuse is not
25 constitutional deprivation under § 1983); Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (prison
26 guards’ threat of bodily harm failed to state a claim under § 1983).

27 Finally, in plaintiff’s Claim IV, he asserts that a number of defendants violated his “right to
28 petition the government for a redress of grievances” when they threatened plaintiff “with physical

1 violence for exercise of his right to seek redress . . . through use of the prison grievance system.”
2 (ECF No. 1 at 39). Plaintiff does not reference any factual allegations in connection with this
3 claim, and his Complaint does not set forth any factual allegations alleging that any specific
4 defendant took any adverse action in retaliation for plaintiff’s use of the prison grievance system.
5 To the contrary, the only grievance plaintiff alleges that he filed was in response to the incident
6 on May 20, 2016 (*id.* at 23-24, 45-46), and the Complaint does not allege that any defendant took
7 any adverse actions against plaintiff in retaliation for that grievance.

8 An action taken in retaliation for the exercise of a First Amendment right is actionable under
9 § 1983. See Hines v. Gomez, 108 F.3d 265, 267 (9th Cir 1997); Pratt v. Rowland, 65 F.3d 802,
10 806 (9th Cir. 1995). Filing a grievance with prison officials is protected activity under the First
11 Amendment. See Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009). As the Ninth Circuit
12 explained in Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012) (alterations and emphasis
13 in original), an inmate’s retaliation claim has five elements:

14 First, the plaintiff must allege that the retaliated-against conduct is protected. The
15 filing of an inmate grievance is protected conduct. Rhodes v. Robinson, 408 F.3d
16 559, 568 (9th Cir. 2005). Second, the plaintiff must claim the defendant took
17 adverse action against the plaintiff. *Id.* at 567. The adverse action need not be an
18 independent constitutional violation. Pratt, 65 F.3d at 806. “[T]he mere *threat* of
19 harm can be an adverse action . . .” Brodheim, 584 F.3d at 1270. [¶] Third, the
20 plaintiff must allege a causal connection between the adverse action and the
21 protected conduct. Because direct evidence of retaliatory intent rarely can be
22 pleaded in a complaint, allegation of a chronology of events from which retaliation
23 can be inferred is sufficient to survive dismissal. See Pratt, 65 F.3d at 808 (“timing
24 can properly be considered as circumstantial evidence of retaliatory intent”); Murphy
25 v. Lane, 833 F.2d 106, 108-09 (7th Cir. 1987). [¶] Fourth, the plaintiff must allege
26 that the “official’s acts would chill or silence a person of ordinary firmness from
27 future First Amendment activities.” Robinson, 408 F.3d at 568 (internal quotation
28 marks and emphasis omitted). “[A] plaintiff who fails to allege a chilling effect may
still state a claim if he alleges he suffered some other harm,” Brodheim, 584 F.3d
at 1269, that is “more than minimal,” Robinson, 408 F.3d at 568 n.11. That the
retaliatory conduct did not chill the plaintiff from suing the alleged retaliator does not
defeat the retaliation claim at the motion to dismiss stage. *Id.* at 569. [¶] Fifth, the
plaintiff must allege “that the prison authorities’ retaliatory action did not advance
legitimate goals of the correctional institution . . .” Rizzo v. Dawson, 778 F.2d 527,
532 (9th Cir. 1985). A plaintiff successfully pleads this element by alleging, in
addition to a retaliatory motive, that the defendant’s actions were arbitrary and
capricious, *id.*, or that they were “unnecessary to the maintenance of order in the
institution,” Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir. 1984).

Here, plaintiff’s Complaint fails to allege any of these elements against any defendant.

Accordingly, it is not clear to the Court what the legal or factual basis may be for each of

1 plaintiff's claims against each defendant. The Court is mindful that, because plaintiff is appearing
2 *pro se*, the Court must construe the allegations of the Complaint liberally and must afford plaintiff
3 the benefit of any doubt. See Alvarez v. Hill, 518 F.3d 1152, 1158 (9th Cir. 2008) (because a
4 prisoner was proceeding *pro se*, "the district court was required to 'afford [him] the benefit of any
5 doubt' in ascertaining what claims he 'raised in his complaint'") (alteration in original). Further, the
6 Court may not dismiss a claim because a *pro se* plaintiff has failed to set forth a complete legal
7 theory supporting the claim alleged. See Johnson v. City of Shelby, 135 S. Ct. 346, 346, 190 L.
8 Ed. 2d 309 (2014) (*per curiam*) (noting that the Fed. Rules of Civ. Proc. "do not countenance
9 dismissal of a complaint for imperfect statement of the legal theory supporting the claim
10 asserted"). That said, the Supreme Court has made it clear that the Court has "no obligation to
11 act as counsel or paralegal to *pro se* litigants." Pliler v. Ford, 542 U.S. 225, 231, 124 S. Ct. 2441,
12 159 L. Ed. 2d 338 (2004); see also Noll, 809 F.2d at 1448 ("courts should not have to serve as
13 advocates for *pro se* litigants").

14 Although plaintiff need not set forth detailed factual allegations, he must plead "factual
15 content that allows the court to draw the reasonable inference that the defendant is liable for the
16 misconduct alleged." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555-56). A pleading
17 that merely alleges "naked assertion[s] devoid of further factual enhancement" is insufficient. Id.
18 (alteration in original, internal quotation marks omitted). In its present format, it would be difficult
19 for each defendant to discern what specific facts or legal theories apply to which potential claims,
20 and, as a result, it would be extremely difficult to formulate applicable defenses.

21 Therefore, the Court finds that plaintiff's Complaint fails to comply with Rule 8.

22
23 **B. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UNDER THE EIGHTH**
24 **AMENDMENT FOR INADEQUATE MEDICAL CARE.**

25 The Eighth Amendment's proscription against cruel and unusual punishment also
26 encompasses the government's obligation to provide adequate medical care to those whom it is
27 punishing by incarceration. See Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed 2d
28 251 (1976). In order to establish a claim under the Eighth Amendment for inadequate medical

1 care, a prisoner must show that a specific defendant was deliberately indifferent to his serious
2 medical needs. See Helling v. McKinney, 509 U.S. 25, 32, 113 S. Ct. 2475, 125 L. Ed. 2d 22
3 (1993); Estelle, 429 U.S. at 106. “This includes both an objective standard -- that the deprivation
4 was serious enough to constitute cruel and unusual punishment -- and a subjective standard --
5 deliberate indifference.” Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (internal
6 quotation marks omitted).

7 First, to meet the objective element of a deliberate indifference claim, “a prisoner must
8 demonstrate the existence of a serious medical need.” Colwell, 763 F.3d at 1066. “A medical
9 need is serious if failure to treat it will result in significant injury or the ‘unnecessary and wanton
10 infliction of pain.’” Peralta, 744 F.3d at 1081 (internal quotation marks omitted).

11 Second, to meet the subjective element, a prisoner must “demonstrate that the prison
12 official acted with deliberate indifference.” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004).
13 Deliberate indifference may be manifest by the intentional denial, delay or interference with a
14 plaintiff’s medical care. See Estelle, 429 U.S. at 104-05. The prison official, however, “must not
15 only ‘be aware of facts from which the inference could be drawn that a substantial risk of serious
16 harm exists,’ but that person ‘must also draw the inference.’” Toguchi, 391 F.3d at 1057 (quoting
17 Farmer, 511 U.S. at 837). Thus, an inadvertent failure to provide adequate medical care,
18 negligence, a mere delay in medical care (without more), or a difference of opinion over proper
19 medical treatment, are all insufficient to constitute an Eighth Amendment violation. See Estelle,
20 429 U.S. at 105-07; Toguchi, 391 F.3d at 1059-60; Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.
21 1989); Shapley v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir. 1985).
22 Moreover, the Eighth Amendment does not require optimal medical care or even medical care that
23 comports with the community standard of medical care. “[A] complaint that a physician has been
24 negligent in diagnosing or treating a medical condition does not state a valid claim of medical
25 mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional
26 violation merely because the victim is a prisoner.” Estelle, 429 U.S. at 106.

27 Here, plaintiff purports to raise his Claim III for deliberate indifference to a serious medical
28 need, but the only defendant he references is Nurse Eyan. (ECF No. 1 at 34-37). Within Claim

1 III, plaintiff does not set forth any factual allegations. In the body of the Complaint, the only factual
2 allegation pertaining to this defendant is that Nurse Eyan “observed plaintiff being attack [sic]”
3 during the incident on May 20, 2016. (*Id.* at 11). Plaintiff also alleges, without any supporting
4 facts, that Nurse Eyan and other defendants “knew or should have known that plaintiff was
5 suffering from mental health crisis episode when they viewed him in their program.” (*Id.* at 20).
6 The Court does not accept as true conclusory allegations unsupported by factual allegations. See
7 Iqbal, 556 U.S. at 681 (“[We do not reject these bald allegations on the ground that they are
8 unrealistic or nonsensical. . . . It is the conclusory nature of [the] allegations, rather than their
9 extravagantly fanciful nature, that disentitles them to the presumption of truth.”); see also Chavez
10 v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012) (“a court discounts conclusory statements,
11 which are not entitled to the presumption of truth, before determining whether a claim is
12 plausible”).

13 Further, in the Complaint plaintiff alleges that he was held in the “D-Facility gym for fourteen
14 hours after the incident without any medical treatment” and that he “finally made it to [CSP-LAC’s]
15 drop-in clinic fourteen hours later” (*id.* at 13, 15, 20), but he also alleges that he was treated by
16 an unidentified medical technical assistant, who contacted an “on-call psychiatrist” at 9:00 p.m.
17 on May 20, 2016, which is only twelve hours after the underlying incident began at 8:25 a.m. (*id.*
18 at 5, 17). A brief delay in providing medical attention, without more, is insufficient to give rise to
19 a federal civil rights claim. See, e.g., Shapley, 766 F.2d at 407 (a mere delay, without more, is
20 insufficient to state a claim of deliberate medical indifference).

21 Plaintiff also alleges that a psychiatrist was contacted on May 20, 2016, at 9:00 p.m., that
22 he was referred to a psychiatric crisis bed that night, that he received x-rays, and that he was seen
23 by a psychiatrist and a “medical doctor” the following morning. (ECF No. 1 at 17-18). In addition,
24 plaintiff was sent to an outside hospital for a “stress test” and he was given medication. (*Id.* at 18).
25 Then, despite the earlier factual allegations regarding the medical care that he received following
26 the incident, plaintiff alleges: “since May 20, 2016, plaintiff had not received any medical treatment
27 for his injuries over a year ago.” (*Id.* at 18). It is not clear if plaintiff is purporting to allege that
28 other (unnamed) prison officials failed to provide medical treatment for serious medical needs that

1 plaintiff continued to suffer at some date after the incident on May 20, 2016.

2 In addition, plaintiff's Complaint fails to set forth any factual allegations showing that any
3 named defendant was subjectively aware that plaintiff suffered from a mental health issue that
4 placed him at a substantial risk of serious harm. See Toguchi, 391 F.3d at 1057. Further, to the
5 extent that plaintiff is purporting to allege that any defendant should have know that plaintiff
6 required medical assistance when he refused multiple orders to get up from the ground, plaintiff's
7 Complaint does not include any factual allegations that raise a reasonable inference that any
8 specific defendant was subjectively aware that plaintiff was suffering from a serious medical need
9 that required immediate medical assistance. (See ECF No 1 at 12-14, 20).

10 Accordingly, even construing plaintiff's factual allegations liberally and affording plaintiff the
11 benefit of any doubt, it is not clear to the Court which defendant or defendants plaintiff is alleging
12 was subjectively aware of facts from which the inference could be drawn that a substantial risk of
13 serious harm existed to plaintiff from the failure to provide immediate medical assistance in
14 connection with the incident on May 20, 2016, or in the following twelve hours before plaintiff was
15 provided with medical care. If plaintiff wishes to proceed with any Eighth Amendment claim
16 against any defendant for inadequate medical care, plaintiff should set forth a short and plain
17 statement of each such claim in a First Amended Complaint that is sufficient to provide each
18 defendant with notice of the factual basis for each such claim.

19
20 **C. PLAINTIFF MAY BE ABLE TO STATE CLAIMS FOR THE EXCESSIVE USE OF FORCE.**

21 The use of excessive force by a prison official constitutes a violation of the Eighth
22 Amendment. Hudson v. McMillian, 503 U.S. 1, 6-7, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992).
23 However, not every push or shove, even if it may later seem unnecessary, violates a prisoner's
24 constitutional rights. See Meredith v. Arizona, 523 F.2d 481, 483 (9th Cir. 1975). In Farmer, 511
25 U.S. at 835, the Supreme Court held that, when prison officials are accused of using excessive
26 physical force, application of the deliberate indifference standard is inappropriate, and that the
27 claimant must show more than "indifference, deliberate or otherwise." "Force does not amount
28 to a constitutional violation in this respect if it is applied in a good faith effort to restore discipline

1 and order.” Clement v. Gomez, 298 F.3d 898, 903 (9th Cir. 2002) (citing Whitley v. Albers, 475
2 U.S. 312, 320, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986)). The Supreme Court also “has clearly
3 and repeatedly held that ‘when prison officials maliciously and sadistically use force to cause
4 harm, contemporary standards of decency are *always* violated.” Schwenk v. Hartford, 204 F.3d
5 1187, 1196 (9th Cir. 2000) (quoting Hudson, 503 U.S. at 9) (emphasis added in Schwenk).

6 Here, plaintiff alleges that several officers unnecessarily used pepper spray “at close range”
7 on plaintiff while he was on the ground, and that officers jabbed, poked, or hit him with batons, but
8 he also alleges that “he was not able to speak or to get up and walk.” (ECF No. 1 at 12-15).
9 Plaintiff alleges that he was ordered to stand up multiple times. (*Id.* at 12-14). Accepting as true
10 plaintiff’s factual allegations, plaintiff was attacked by two inmates who had to be “placed in
11 restraints and escorted” off the Yard. (*Id.* at 10, 15). Because plaintiff alleges that he was laying
12 on the ground “weeping in a fetal position” (*id.* at 11) during the incident, it is not clear that any
13 named defendant was aware that plaintiff was unable to comply with their orders rather than
14 resisting their efforts to restore discipline and order following the violent incident.

15 Accordingly, the Court finds that the allegations in plaintiff’s Complaint are insufficient to
16 nudge any claim under the Eighth Amendment against any defendant “across the line from
17 conceivable to plausible.” Twombly, 550 U.S. at 570 (to survive dismissal, plaintiffs must do
18 something to “nudge[] their claims across the line from conceivable to plausible”).

19 *****

20 **If plaintiff desires to pursue this action, he must file a First Amended Complaint no**
21 **later than August 25, 2017**; the First Amended Complaint must bear the docket number assigned
22 in this case; be labeled “First Amended Complaint”; and be complete in and of itself without
23 reference to the original Complaint, or any other pleading, attachment or document. Further, if
24 plaintiff chooses to proceed with this action, plaintiff must use the blank Central District civil rights
25 complaint form accompanying this order, must sign and date the form, **must completely and**
26 **accurately fill out the form**, and must use the space provided in the form to set forth all of the
27 claims that he wishes to assert in a First Amended Complaint.

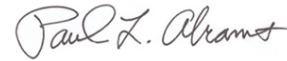
28 The Clerk is directed to provide plaintiff with a blank Central District civil rights complaint

1 form.

2 **Further, plaintiff is admonished that, if he fails to timely file a First Amended**
3 **Complaint or fails to remedy the deficiencies of this pleading as discussed herein, the**
4 **Court will recommend that the action be dismissed without further leave and with**
5 **prejudice.**

6 In addition, if plaintiff no longer wishes to pursue this action, he may request a voluntary
7 dismissal of the action pursuant to Federal Rule of Civil Procedure 41(a). The clerk also is
8 directed to attach a Notice of Dismissal form for plaintiff's convenience.

9 **IT IS SO ORDERED.**

10 

11 DATED: July 28, 2017

12 _____
13 PAUL L. ABRAMS
14 UNITED STATES MAGISTRATE JUDGE

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