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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JACK ROBERT SMITH,

Plaintiff,

v.

HARRY OREOL, ET AL.,

Defendants.

Case No. EDCV 17-1135-JFW (KK)

ORDER DISMISSING SECOND
AMENDED COMPLAINT WITH
LEAVE TO AMEND

I.

INTRODUCTION

Plaintiff Jack Robert Smith (“Plaintiff”), proceeding *pro se*, has filed a Second Amended Complaints (“SAC”) pursuant to 42 U.S.C. § 1983 (“Section 1983”) against defendants Jesse Henderson and Mercy Poulson (“Defendants”). In the SAC, Plaintiff raises claims against Defendants in their individual capacity for violations of his Fifth, Eighth¹, and Fourteenth Amendment rights. For the reasons discussed below, the Court dismisses the SAC with leave to amend.

¹ To the extent Plaintiff is attempting to raise an excessive force claim against defendant Henderson, the Eighth Amendment does not apply because Plaintiff is not a prisoner-plaintiff, but rather a civilly-committed plaintiff. *Turner v. Graff*, No. C 10-5709-CRB-PR, 2012 WL 3656492, at *2 (N.D. Cal. Aug. 17, 2012) (citing *Hydrick v. Hunter*, 500 F.3d 978, 997–98 (9th Cir. 2007), *rev’d on other grounds*, 129 S. Ct. 2431 (2009)) (“While excessive force claims by prisoners are reviewed under the Eighth Amendment’s malicious and sadistic standard, the more generous Fourteenth Amendment’s objective reasonableness standard applies to those who are civilly confined.”).

1 **II.**

2 **PROCEDURAL HISTORY**

3 On June 4, 2017, Plaintiff constructively filed² a pro se civil rights complaint
4 alleging staff employed by Patton State Hospital violated his First, Fifth, Eighth,
5 and Fourteenth Amendment rights and committed other state law violations. ECF
6 Docket No. (“Dkt.”) 1 at 5. Plaintiff’s claims were based on allegations of
7 “physical abuse [and] ongoing mental abuse & is about [Plaintiff] being illegally
8 detained [at Patton State Hospital].” Id. at 7.

9 On June 20, 2017, the Court dismissed Plaintiff’s Complaint with leave to
10 amend for failure to state a claim. Dkt. 8.

11 On June 24, 2017, Plaintiff filed a First Amended Complaint against
12 defendants Harry Oreol, Jesse Henderson, Jyotila Singh, Jian Zhang, Murad
13 Wadsworth, Gabriel Prempeh, and Chelsea Lucas for intentionally, maliciously,
14 and recklessly violating his First, Fifth, Eighth, and Fourteenth Amendment rights.
15 Dkt. 10, FAC at 3-5. Plaintiff’s claims were based on various allegations of forced
16 medication, deliberate indifference, false reports, and excessive force. See FAC.

17 On July 10, 2017, the Court dismissed Plaintiff’s FAC with leave to amend
18 for failure to state a claim. Dkt. 11.

19 On July 17, 2017, Plaintiff constructively filed the instant SAC against
20 Defendants in their individual capacity. Dkt. 12, SAC.

21 **III.**

22 **ALLEGATIONS IN THE SAC**

23 Plaintiff, who is in the custody of Patton State Hospital, appears to allege (1)
24 an excessive force claim against defendant Henderson; and (2) a due process claim
25 against both Defendants. See SAC.

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27 ² Under the “mailbox rule,” when a pro se inmate gives prison authorities a
28 pleading to mail to court, the court deems the pleading constructively “filed” on
the date it is signed. Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010)
(citation omitted); Douglas v. Noelle, 567 F.3d 1103, 1107 (9th Cir. 2009) (stating
the “mailbox rule applies to § 1983 suits filed by pro se prisoners”).

1 With respect to defendant Henderson, Plaintiff alleges defendant Henderson
2 “physically assaulted [him] twice on separate occasions while playing basketball on
3 unit 37.” Id. at 7. On the first occasion, Plaintiff alleges defendant Henderson
4 “intentionally elbowed [Plaintiff] very hard in the mouth chipping [his] tooth.” Id.
5 When Plaintiff yelled at defendant Henderson telling him “he can’t do that,”
6 defendant Henderson “jumped in [Plaintiff’s] face & yelled what do you want to
7 do about it?” Id. Plaintiff alleged defendant Henderson further stated Plaintiff is
8 “just a patient [and] it doesn’t matter what [defendant Henderson] does.” Id. On
9 the second occasion, Plaintiff claims defendant Henderson again “intentionally
10 thr[ew] an elbow & hit [him] extremely hard above the right eye, almost knocked
11 [Plaintiff] out, split [his] eye open & blood was dripping everywhere.” Id. Plaintiff
12 states he needed stiches as a result of the injury. Id. Plaintiff further alleges that,
13 following the incident, defendant Henderson discussed “how the report should be
14 written” with defendant Poulson so that they could “purposefully falsify the
15 report.” Id.

16 As to defendant Poulson, Plaintiff alleges defendant Poulson is the nurse
17 who gave Plaintiff stiches following the second injury allegedly caused by defendant
18 Henderson. Id. Plaintiff also claims defendant Poulson is the person responsible
19 for writing a report on the incident. Id. According to the SAC, Plaintiff alleges
20 defendant Poulson, with the help of defendant Henderson, “purposely falsified the
21 report” and “lied & covered [the incident] up.” Id. According to Plaintiff, the
22 report stated Plaintiff was injured while “playing basketball, but . . . [he] denied
23 being hit by anybody.” Id.

24 As a result of Plaintiff’s physical injuries, and “extreme amounts of stress &
25 misery,” Plaintiff seeks fifty million dollars in monetary damages. Id. at 6.

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1 IV.

2 **STANDARD OF REVIEW**

3 Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a claim
4 sua sponte and without notice “where the claimant cannot possibly win relief.”
5 Omar v. Sea-Land Serv., Inc., 813 F.2d 986, 991 (9th Cir. 1987); see also Sparling v.
6 Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988) (same). The court’s
7 authority in this regard includes sua sponte dismissal of claims against defendants
8 who have not been served and defendants who have not yet answered or appeared.
9 See Abagnin v. AMVAC Chemical Corp., 545 F.3d 733, 742-43 (9th Cir. 2008).

10 In applying these standards, “a pro se complaint, however inartfully pleaded,
11 must be held to less stringent standards than formal pleadings drafted by lawyers.”
12 Woods v. Carey, 525 F.3d 886, 889-90 (9th Cir. 2008) (citations and internal
13 quotation marks omitted). “[W]e have an obligation where the p[laintiff] is pro se,
14 particularly in civil rights cases, to construe the pleadings liberally and to afford the
15 p[laintiff] the benefit of any doubt.” Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir.
16 2012) (citation omitted). However, “a pro se litigant is not excused from knowing
17 the most basic pleading requirements” or “from following court rules.” Am.
18 Ass’n of Naturopathic Physicians v. Hayhurst, 227 F.3d 1104, 1107-08 (9th Cir.
19 2000) (citation and internal quotation marks omitted); see also Pliler v. Ford, 542
20 U.S. 225, 231, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004) (“District judges have no
21 obligation to act as counsel or paralegal to pro se litigants.”).

22 If the court finds the complaint should be dismissed for failure to state a
23 claim, the court has discretion to dismiss with or without leave to amend. See
24 Moss v. U.S. Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009); Fed. R. Civ. Proc.
25 15(a)(2). Leave to amend should be granted if it appears possible the defects in the
26 complaint could be corrected, especially if the plaintiff is pro se. See Cato v.
27 United States, 70 F.3d 1103, 1106 (9th Cir. 1995). However, if, after careful
28 consideration, it is clear a complaint cannot be cured by amendment, the court may

1 dismiss without leave to amend. Cato, 70 F.3d at 1107-11; see also Moss v. U.S.
2 Secret Serv., 572 F.3d 962, 972 (9th Cir. 2009).

3 V.

4 **DISCUSSION**

5 **PLAINTIFF FAILS TO STATE A FIFTH OR FOURTEENTH**
6 **AMENDMENT DUE PROCESS CLAIM AGAINST DEFENDANTS**

7 **(1) APPLICABLE LAW**

8 The Due Process Clause of the Fifth and Fourteenth Amendment protects
9 individuals against deprivations of life, liberty, or property in such a way that
10 “shocks the conscience” or “interferes with rights implicit in the concept of
11 ordered liberty.” United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95
12 L. Ed. 2d 697 (1987); U.S. Const. amends. V, XIV. While the Due Process Clause
13 of the Fourteenth Amendment applies to the states, “the Due Process Clause of
14 the Fifth Amendment . . . appl[ies] only to actions of the federal government.” Lee
15 v. City of Los Angeles, 250 F.3d 668, 687 (9th Cir. 2001) (citing Schweiker v.
16 Wilson, 450 U.S. 221, 227, 101 S. Ct. 1074, 67 L. Ed. 2d 186 (1981)). “A threshold
17 requirement to a substantive or procedural due process claim is the plaintiff’s
18 showing of a liberty or property interest protected by the Constitution.” Stiesberg
19 v. State of Cal., 80 F.3d 353, 356 (9th Cir. 1996) (quoting Wedges/Ledges of
20 California, Inc. v. City of Phoenix, Ariz., 24 F.3d 56, 62 (9th Cir. 1994)).

21 **(2) ANALYSIS**

22 Here, Plaintiff appears to attempt to raise a Fifth and Fourteenth
23 Amendment due process claim based on Defendants allegedly drafting a false
24 report about Plaintiff’s injuries. See Dkt. 12 at 7. However, Plaintiff has failed to
25 state a due process claim against Defendants under either amendment.

26 As to the Fifth Amendment, Plaintiff fails to state a claim because he has not
27 alleged Defendants are federal actors. According to the SAC, Defendants are
28 employees of Patton State Hospital. See SAC at 3. Thus, because the Fifth

1 Amendment applies “only to actions of the federal government,” Plaintiff has
2 failed to state a Fifth Amendment due process claim against Defendants. See Lee,
3 250 F.3d at 687 (citations omitted).

4 With respect to the Fourteenth Amendment, Plaintiff fails to state a claim
5 because Plaintiff does not claim the false reports allegedly drafted by Defendants
6 deprived Plaintiff of any constitutional protections. Endsley v. Luna, 750 F. Supp.
7 2d 1074, 1098 (C.D. Cal. 2010), *aff’d*, 473 F. App’x 745 (9th Cir. 2012)³. To the
8 extent Plaintiff is claiming Defendants are attempting to cover up defendant
9 Henderson’s use of excessive force, Plaintiff’s claim is premature because the
10 action challenging defendant Henderson’s conduct is pending. See Karim-Panahi
11 v. Los Angeles Police Dept., 839 F.2d 621, 625 (9th Cir. 1988) (holding cover-up
12 “allegations may state a federally cognizable claim provided that defendants’
13 actions can be causally connected to a failure to succeed in the present lawsuit”);
14 Dell v. Espinoza, No. 1:16-CV-1769-MJS-PC, 2017 WL 531893, at *7 (E.D. Cal.
15 Feb. 7, 2017) (“Allegations that officials engaged in a cover-up state a
16 constitutional claim only if the cover-up deprived a plaintiff of his right of access to
17 courts by causing him to fail to obtain redress for the constitutional violation that
18 was the subject of the cover-up.”); Rose v. City of Los Angeles, 814 F. Supp. 878,
19 881 (C.D. Cal. 1993) (“Because the ultimate resolution of the present suit remains
20 in doubt, [p]laintiff’s cover-up claim is not ripe for judicial consideration.”). Thus,
21 Plaintiff’s Fourteenth Amendment due process claim against Defendants for
22 allegedly creating false reports about Plaintiff must be dismissed.

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28 ³ The Court may cite to unpublished Ninth Circuit opinions issued on or after
January 1, 2007. U.S. Ct. App. 9th Cir. R. 36-3(b); Fed. R. App. P. 32.1(a).

1 VI.

2 **LEAVE TO FILE A THIRD AMENDED COMPLAINT**

3 For the foregoing reasons, the SAC is subject to dismissal. As the Court is
4 unable to determine whether amendment would be futile, leave to amend is
5 granted. See Lucas v. Dep't of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per
6 curiam).

7 Accordingly, IT IS ORDERED THAT **within twenty-one (21) days** of the
8 service date of this Order, Plaintiff choose one of the following three options:

9 1. Plaintiff may proceed on the Fourteenth Amendment excessive force
10 claim raised against defendant Henderson in his individual capacity only. **If**
11 **Plaintiff intend to select this option, he must file a statement clearly indicating**
12 **his wish to proceed on this claim only and voluntarily dismiss all other claims.**

13 2. Alternatively, Plaintiff may file a Third Amended Complaint to
14 attempt to cure the deficiencies discussed above. **The Clerk of Court is directed**
15 **to mail Plaintiff a blank Central District civil rights complaint form to use for**
16 **filing the Third Amended Complaint, which the Court encourages Plaintiff to**
17 **use.**

18 If Plaintiff chooses to file a Third Amended Complaint, Plaintiff must clearly
19 designate on the face of the document that it is the "Third Amended Complaint,"
20 it must bear the docket number assigned to this case, and it must be retyped or
21 rewritten in its entirety, preferably on the court-approved form. Plaintiff shall not
22 include new defendants or new allegations that are not reasonably related to the
23 claims asserted in the SAC. In addition, the Third Amended Complaint must be
24 complete without reference to the SAC, FAC, Complaint or any other pleading,
25 attachment, or document.

26 An amended complaint supersedes the preceding complaint. Ferdik v.
27 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992). After amendment, the Court will
28 treat all preceding complaints as nonexistent. Id. Because the Court grants

1 Plaintiff leave to amend as to all his claims raised here, any claim raised in a
2 preceding complaint is waived if it is not raised again in the Third Amended
3 Complaint. Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012).

4 The Court advises Plaintiff that it generally will not be well-disposed toward
5 another dismissal with leave to amend if Plaintiff files a Third Amended Complaint
6 that continues to include claims on which relief cannot be granted. “[A] district
7 court’s discretion over amendments is especially broad ‘where the court has
8 already given a plaintiff one or more opportunities to amend his complaint.’”
9 Ismail v. County of Orange, 917 F. Supp.2d 1060, 1066 (C.D. Cal. 2012) (citations
10 omitted); see also Ferdik, 963 F.2d at 1261. Thus, **if Plaintiff files a Third
11 Amended Complaint with claims on which relief cannot be granted, the Third
12 Amended Complaint will be dismissed without leave to amend and with
13 prejudice.**

14 **Plaintiff is explicitly cautioned that failure to timely file a Third
15 Amended Complaint will result in this action being dismissed with prejudice
16 for failure to state a claim, prosecute and/or obey Court orders pursuant to
17 Federal Rule of Civil Procedure 41(b).**

18 3. Alternatively, Plaintiff may voluntarily dismiss the action without
19 prejudice, pursuant to Federal Rule of Civil Procedure 41(a). **The Clerk of Court
20 is directed to mail Plaintiff a blank Notice of Dismissal Form, which the Court
21 encourages Plaintiff to use.**

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23 Dated: July 27, 2017



HONORABLE KENLY KIYA KATO
United States Magistrate Judge

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