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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
10 **FRESNO DIVISION**  
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13 MYRON HOWARD,  
14 CDCR #F-81131,

15 Plaintiff,

16 vs.

17 ARNOLD SCHWARZENEGGER, et al.,

18 Defendants.  
19

Civil No. 08-1083 MLH (WMc)

**ORDER SUA SPONTE DISMISSING  
COMPLAINT FOR FAILING TO STATE  
A CLAIM PURSUANT TO  
28 U.S.C. §§ 1915(e)(2) and 1915A(b)**

20  
21 **I.**

22 **PROCEDURAL HISTORY**

23 On July 28, 2008, Plaintiff, an inmate currently incarcerated at the California Substance  
24 Abuse Treatment Facility located in Corcoran, California and proceeding pro se, filed a civil  
25 rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing fee  
26 mandated by 28 U.S.C. § 1914(a) to commence a civil action; instead, he filed a Motion to  
27 Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]. The Court  
28 granted Plaintiff’s Motion to Proceed *IFP* on August 4, 2008 [Doc. No. 4].

1 On November 25, 2008, this matter was reassigned to District Judge Roger T. Benitez for  
2 all further proceedings [Doc. No. 9]. Plaintiff later filed a “Motion for Amendment to Health  
3 Care Service” and a “Motion to Press Evidence of Proof of Glaucoma” [Doc. Nos. 10, 11].

## 4 II.

### 5 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

6 The Prison Litigation Reform Act (“PLRA”) obligates the Court to review complaints  
7 filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained  
8 in any 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 diversionary  
10 program,” “as soon as practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b).  
11 Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any  
12 portion thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from  
13 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203  
14 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,  
15 446 (9th Cir. 2000) (§ 1915A).

16 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
17 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
18 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
19 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing  
20 an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting service of  
21 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(3). *Id.* at 1127 (“[S]ection  
22 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint  
23 that fails to state a claim.”); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)  
24 (discussing 28 U.S.C. § 1915A).

25 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
26 allegations of material fact and must construe those facts in the light most favorable to the  
27 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
28 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s

1 duty to liberally construe a pro se's pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,  
2 839 F.2d 621, 623 (9th Cir. 1988), is "particularly important in civil rights cases." *Ferdik v.*  
3 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

4 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
5 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
6 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the  
7 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*  
8 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d  
9 1350, 1354 (9th Cir. 1985) (en banc).

10 **A. Eighth Amendment claim**

11 Plaintiff claims that he was diagnosed with glaucoma on October 4, 2007. (*See* Compl.  
12 at 2.) As a result, Plaintiff claims that he has been denied adequate treatment for his condition  
13 and he seeks a transfer to a facility where he can be seen by a glaucoma specialist at an "outside"  
14 hospital. (*Id.*) In order to assert a claim under the Eighth Amendment for inadequate medical  
15 care, Plaintiff must show that each individual prison doctor and medical staff member that he  
16 seeks to sue were "deliberately indifferent to his serious medical needs." *Helling v. McKinney*,  
17 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Lopez v. Dep't of Health*  
18 *Services*, 939 F.2d 881, 883 (9th Cir. 1991) (per curiam) (holding that private physicians who  
19 contract with prisons to provide specialized medical services to indigent prisoners act under  
20 color of state law).

21 In order to show deliberate indifference, an inmate must allege sufficient facts to indicate  
22 (1) that his medical need is "serious" and (2) that prison officials acted or failed to act in light  
23 of that need with a "culpable state of mind." *Wilson v. Seiter*, 501 U.S. 294, 302 (1991). While  
24 Plaintiff's allegations may be sufficient to allege a serious medical need, he has failed to allege  
25 facts sufficient to demonstrate that any of the named Defendants were deliberately indifferent  
26 to that serious medical need. The exhibits attached to Plaintiff's Complaint demonstrate that he  
27 is currently being treated for his condition. (*See* Compl., Ex. "B," documentation of medicine  
28 provided to Plaintiff.) Plaintiff is seeking treatment at a hospital outside of the prison.

1 The indifference to medical needs rising to an Eighth Amendment claim must be  
2 substantial; inadequate treatment due to malpractice, or even gross negligence, does not amount  
3 to a constitutional violation. *Estelle*, 429 U.S. at 106; *Wood v. Housewright*, 900 F.2d 1332,  
4 1334 (9th Cir. 1990). Here, Plaintiff does not identify, with any specificity, how each individual  
5 Defendant was deliberately indifferent to his serious medical need. In addition, Plaintiff's  
6 claims against the named Defendants amounts to no more than a difference of opinion between  
7 medical professionals and their patient, and as such, is insufficient to show the "deliberate  
8 indifference" required to support a claim of cruel and unusual punishment under the Eighth  
9 Amendment. *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (finding difference of  
10 opinion between a physician and prisoner concerning the appropriate course of treatment does  
11 not amount to deliberate indifference); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

#### 12 **B. Respondeat Superior**

13 In his Complaint, Plaintiff appears to seek to hold Ken Clark, Warden, and Arnold  
14 Schwarzenegger, Governor of California, liable in their supervisory capacities for his claims  
15 that he was denied adequate medical care in violation of his constitutional rights. (*See Compl.*  
16 *at 7-8.*) However, there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v.*  
17 *Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, "[t]he inquiry into causation must be  
18 individualized and focus on the duties and responsibilities of each individual defendant whose  
19 acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844  
20 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)).

21 In order to avoid the respondeat superior bar, Plaintiff must allege personal acts by each  
22 individual Defendant which have a direct causal connection to the constitutional violation at  
23 issue. *See Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040,  
24 1045 (9th Cir. 1989). As a supervisor, a Defendant may only be held liable for the allegedly  
25 unconstitutional violations of his subordinates if Plaintiff alleges specific facts which show: (1)  
26 how or to what extent this supervisor personally participated in or directed Defendants' actions,  
27 and (2) in either acting or failing to act, the supervisor was an actual and proximate cause of the  
28 deprivation of his constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

1 As currently pleaded, however, Plaintiff's Complaint in no way sets forth facts which might be  
2 liberally construed to support an individualized constitutional claim against Defendants Clark  
3 or Schwarzenegger.

4 **C. Municipal Liability**

5 Finally, Plaintiff names Kings County as a Defendant because he claims they should be  
6 held liable for "letting the State of California . . . build a state system facility on the Kings  
7 County grounds." (Compl. at 10.) "[A] municipality cannot be held liable solely because it  
8 employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on  
9 a respondeat superior theory." *Monell v. Department of Social Services*, 436 U.S. 658, 691  
10 (1978). A municipality may be liable under § 1983 for monetary, declaratory, or injunctive  
11 relief where the constitutional deprivation was caused by the implementation or execution of "a  
12 policy statement, ordinance, regulation, or decision officially adopted and promulgated by that  
13 body's officers." *Monell*, 436 U.S. at 690; *Board of the County Commissioners v. Brown*, 520  
14 U.S. 397, 117 S. Ct. 1382, 1388 (1997); *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995).

15 To establish municipal liability, plaintiff must show: (1) he was deprived of a  
16 constitutional right; (2) the city had a policy; (3) the policy amounted to deliberate indifference  
17 to plaintiff's constitutional right; and (4) the policy was the "moving force behind the  
18 constitutional violation." *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996); *see*  
19 *Board of the County Commissioners v. Brown*, 520 U.S. 397, 117 S. Ct. at 1388; *Trevino v.*  
20 *Gates*, 99 F.3d 911, 918 (9th Cir. 1996). Thus, in order to state a § 1983 claim against Kings  
21 County, Plaintiff must allege facts showing that his injury was caused by individual officers  
22 whose conduct conformed to an official city policy, custom or practice. *See Karim-Panahi*, 839  
23 F.2d at 624. Therefore, Plaintiff has not stated a § 1983 claim because he has failed to allege  
24 that any individual officer's conduct conformed to an official city policy, custom or practice.

25 Accordingly, the Court finds that Plaintiff's Complaint fails to state a section 1983 claim  
26 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.  
27 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend  
28 his pleading to cure the defects set forth above.

1 **III.**

2 **CONCLUSION AND ORDER**

3 Good cause appearing, **IT IS HEREBY ORDERED** that:

4 Plaintiff's Complaint [Doc. No. 1] is **DISMISSED** without prejudice for failing to state  
5 a claim upon which relief may be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b).  
6 However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed"  
7 in which to file a First Amended Complaint which cures all the deficiencies of pleading noted  
8 above. Defendants not named and all claims not re-alleged in the Amended Complaint will be  
9 deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

10 Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief  
11 may be granted, it may be dismissed without further leave to amend and may hereafter be  
12 counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79  
13 (9th Cir. 1996).

14 **IT IS FURTHER ORDERED** that:

15 Plaintiff's "Motion for Amendment to Health Care Service" and "Motion to Press  
16 Evidence of Proof of Glaucoma" are **DENIED** as moot [Doc. Nos. 10, 11].

17 DATED: January 28, 2009

18   
19 **HON. MARILYN L. HUFF**  
20 **United States District Judge**