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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF CALIFORNIA
7

8 CURTIS LEE HENDERSON, SR.,

9 Plaintiff,

10 vs.

11 DR. SMITH, et al.,

12 Defendants.
13

1:13-cv-00287-LJO-GSA-PC

FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM
(ECF No. 24.)

OBJECTIONS, IF ANY, DUE WITHIN
THIRTY DAYS

14 **I. BACKGROUND**

15 Curtis Lee Henderson, Sr. (“Plaintiff”) is a state prisoner proceeding pro se and in forma
16 pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint
17 commencing this action on February 27, 2013. (ECF No. 1.)

18 On May 8, 2014, the Court dismissed Plaintiff’s Complaint for failure to state a claim,
19 with leave to amend. 28 U.S.C. § 1915A; 28 U.S.C. § 1915(e). (ECF No. 20.) On July 16,
20 2014, Plaintiff filed the First Amended Complaint, which is now before the court for screening.
21 (ECF No. 24.)

22 **II. SCREENING REQUIREMENT**

23 The court is required to screen complaints brought by prisoners seeking relief against a
24 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
25 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
26 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
27 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
28 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been

1 paid, the court shall dismiss the case at any time if the court determines that the action or
2 appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

3 A complaint is required to contain “a short and plain statement of the claim showing
4 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
5 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
6 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937,
7 1949 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955
8 (2007)). While a plaintiff’s allegations are taken as true, courts “are not required to indulge
9 unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009)
10 (internal quotation marks and citation omitted). Plaintiff must set forth “sufficient factual
11 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Iqbal 556 U.S.
12 at 678. While factual allegations are accepted as true, legal conclusions are not. Id.

13 To state a viable claim for relief, Plaintiff must set forth sufficient factual allegations to
14 state a plausible claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572
15 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls short of meeting this
16 plausibility standard. Id.

17 **III. SUMMARY OF FIRST AMENDED COMPLAINT**

18 Plaintiff is presently incarcerated at Mule Creek State Prison in Ione, California, in the
19 custody of the California Department of Corrections and Rehabilitation (CDCR). The events at
20 issue in the First Amended Complaint allegedly occurred at the California Substance Abuse
21 Treatment Facility (SATF) in Corcoran, California, when Plaintiff was incarcerated at there.
22 Plaintiff names as defendants Dr. Smith, Dr. Jackson, Dr. Brown, LVN Morris, LVN Gonzalez,
23 LVN Matha, and RN Powel (collectively “Defendants”). Defendants were all employed by
24 the CDCR at SATF at the time of the events at issue. Plaintiff’s factual allegations follow.

25 On May 31, 2011, Plaintiff was the victim of an assault when a riot occurred at SATF
26 and he suffered serious injuries. He was rushed to San Joaquin Community Hospital and
27 underwent surgery to reconstruct his cheek bone. The surgery was performed by a plastic
28 surgeon, Dr. Freman [not a defendant], and it took two plates and about ten screws to complete

1 the repairs. Plaintiff also had several teeth removed and suffered from a broken clavicle. The
2 Defendants were told by Dr. Adle [not a defendant] to re-set the bone within two weeks.
3 Defendants ignored that order for six months. Plaintiff was in constant pain, and Defendants'
4 failure to re-set the bone violated the Eighth Amendment and California Government Code
5 §845.6, based on inadequate medical care. For six months, Plaintiff did not receive any
6 medical treatment, despite his pleading for medical care and his need to have the bone re-set.

7 Finally, on November 9, 2011, Plaintiff underwent surgery (open reduction and internal
8 fixation of non-union right clavicle fracture utilizing five hole reconstruction plate and allograft
9 bone graft). On November 19, 2011, 27 staples were removed from Plaintiff's right clavicle, at
10 which time the LVN pushed too hard on his clavicle, causing two of the lateral screws to back
11 out of the bone. Plaintiff was in extreme pain and could not move his arm. X-rays revealed
12 that the two screws had come out of the bone. On November 22, 2011, Plaintiff was seen by
13 Defendant Dr. David G. Smith, who took another x-ray and ordered urgent surgery. Plaintiff
14 was left in this condition for 18 days before receiving corrective surgery.

15 On December 7, 2011, Plaintiff underwent surgery to replace the two lateral screws.
16 Also a cerclage wire was used at the end of the fracture to hold the plate in place. Something
17 went wrong during surgery that Plaintiff was not informed about, and upon returning to the
18 prison, he could not breathe, began coughing up blood, and went into respiratory distress. He
19 was rushed to Kaweah Delta Health Care District. On the way, the ambulance transporting
20 Plaintiff to the hospital had a collision due to the paramedic's reckless driving, and Plaintiff had
21 to be moved to another ambulance. Plaintiff was admitted into the cardiac care unit and
22 underwent another surgery to repair his lung. It was discovered that Dr. Smith had hit
23 Plaintiff's lung while doing surgery on his clavicle causing hemotysis. The third surgery was
24 not only painful but frightening, because a bronchoscope had to be inserted in Plaintiff's nose
25 to reach his lung. Oxygen-gel was placed in his nose, which Plaintiff had to breathe, causing
26 him to feel like he was drowning. He then spent 3 days in intensive care. Upon returning to
27 the prison, Plaintiff had to stay 30 days in the infirmary.

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1 Plaintiff was still in extreme pain because the two lateral screws were pushing out of his
2 bone and attempting to come through his skin. On December 22, 2011, x-rays showed that the
3 screws had once again backed out of the bone. Plaintiff requested that another doctor remove
4 the screws, but Dr. Smith told him he could not choose the doctor. Plaintiff explained that he
5 was afraid because of what happened the last time. For another 6 months, Plaintiff walked
6 around in extreme pain. He asked Dr. Smith to remove the screws because he was in extreme
7 pain, but Dr. Smith said he could not do anything. Plaintiff asked him for pain medication but
8 was denied.

9 Plaintiff asked Dr. Jackson to provide him surgery and pain medication, and he just
10 laughed at Plaintiff. Plaintiff asked defendant LVN Matha to place him on the doctors line to
11 see another doctor, but she stated that he didn't need medication and should deal with it.
12 Plaintiff asked defendant LVN Gonsalez to place him on the line to see a different doctor, and
13 she stated, "You're done," and told him she did not want to see him back at the clinic ever
14 again.

15 After the fourth operation, Plaintiff was assaulted by another inmate, causing the staples
16 at the operation site to come apart, and Plaintiff contracted a painful infection. On July 21,
17 2012, when Nurse Nalett [not a defendant] was changing his dressing, defendant LVN Morris
18 stormed out of the storage room and yelled at Plaintiff, telling him he could not have any more
19 dressing changes, because supplies cost too much to be wasted on him, and all he really wanted
20 was to see Nurse Nalett, inferring that he was there for sexual reasons. Plaintiff informed
21 defendant Morris that he was there for medical reasons, that his clavicle was bleeding and
22 discharging pus. Defendant Morris then began yelling at Nurse Nalett, who was only helping
23 Plaintiff. Sergeant S. Herberling [not a defendant] had to calm defendant Morris down, and
24 told Morris that she did not like all of the yelling and unethical conduct. Plaintiff alleges that
25 defendant Morris's conduct was retaliation against Plaintiff for complaints he had filed against
26 staff for medical treatment. Plaintiff filed a complaint against defendant Morris, which was
27 granted and determined that Morris violated policy. As a result, Plaintiff was left to change his

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1 own dressing every day until the discharge stopped, and to ask other inmates for help, fearing
2 more retaliation.

3 Plaintiff saw defendant Dr. Tiggs-Brown and pleaded with her for medical care,
4 including pain medication and a soft food diet, as he had a previous order for these. He also
5 requested to have the hardware removed, but she did nothing to help him.

6 On February 6, 2013, Plaintiff met defendant RN Powel at the work change gate and
7 informed her that his administrative appeals for medical care had been granted, and the medical
8 narcotics board had approved the request for renewal of his order for 30mg of morphine for
9 pain. They walked to the clinic, and defendants Jackson, Gonzalez, and Morris were there.
10 Plaintiff showed the defendants his documentation. Defendant Gonzalez told Plaintiff that on
11 February 5, she had instructed defendant Jackson to give Plaintiff Tylenol-3 and that was it,
12 and that he didn't need his hardware removed. Defendant Powel stated that she wouldn't help
13 Plaintiff if she could, because the other defendants did not like the fact that he complained
14 about his treatment, and she walked away leaving Plaintiff standing there. Plaintiff explained
15 to defendants Jackson, Gonzalez, and Matha that he needed the plate removed, and he was told
16 that it was only going to be temporary.

17 Plaintiff requests monetary damages, injunctive relief, and declaratory relief.

18 **IV. PLAINTIFF'S CLAIMS**

19 The Civil Rights Act under which this action was filed provides:

20 Every person who, under color of [state law] . . . subjects, or
21 causes to be subjected, any citizen of the United States . . . to the
22 deprivation of any rights, privileges, or immunities secured by
23 the Constitution . . . shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for
redress.

24 42 U.S.C. § 1983. "Section 1983 . . . creates a cause of action for violations of the federal
25 Constitution and laws." Sweaney v. Ada County, Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997)
26 (internal quotations omitted). "To the extent that the violation of a state law amounts to the
27 deprivation of a state-created interest that reaches beyond that guaranteed by the federal
28 Constitution, Section 1983 offers no redress." Id.

1 **A. Medical Claim – Eighth Amendment**

2 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an
3 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d
4 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285 (1976)).
5 The two-part test for deliberate indifference requires the plaintiff to show (1) “‘a serious
6 medical need’ by demonstrating that ‘failure to treat a prisoner’s condition could result in
7 further significant injury or the unnecessary and wanton infliction of pain,’” and (2) “‘the
8 defendant’s response to the need was deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting
9 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX
10 Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal quotations
11 omitted)). Deliberate indifference is shown by “a purposeful act or failure to respond to a
12 prisoner’s pain or possible medical need, and harm caused by the indifference.” Id. (citing
13 McGuckin, 974 F.2d at 1060). Deliberate indifference may be manifested “when prison
14 officials deny, delay or intentionally interfere with medical treatment, or it may be shown by
15 the way in which prison physicians provide medical care.” Id. Where a prisoner is alleging a
16 delay in receiving medical treatment, the delay must have led to further harm in order for the
17 prisoner to make a claim of deliberate indifference to serious medical needs. McGuckin at
18 1060 (citing Shapely v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404, 407 (9th Cir.
19 1985)).

20 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
21 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the
22 facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but
23 that person ‘must also draw the inference.’” Id. at 1057 (quoting Farmer v. Brennan, 511 U.S.
24 825, 837, 114 S.Ct. 1970 (1994)). “If a prison official should have been aware of the risk, but
25 was not, then the official has not violated the Eighth Amendment, no matter how severe the
26 risk.” Id. (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir.
27 2002)). “A showing of medical malpractice or negligence is insufficient to establish a
28 constitutional deprivation under the Eighth Amendment. Id. at 1060. “[E]ven gross negligence

1 is insufficient to establish a constitutional violation.” Id. (citing Wood v. Housewright, 900
2 F.2d 1332, 1334 (9th Cir. 1990)).

3 “A difference of opinion between a prisoner-patient and prison medical authorities
4 regarding treatment does not give rise to a § 1983 claim.” Franklin v. Oregon, 662 F.2d 1337,
5 1344 (9th Cir. 1981) (internal citation omitted). To prevail, plaintiff “must show that the course
6 of treatment the doctors chose was medically unacceptable under the circumstances . . . and . . .
7 that they chose this course in conscious disregard of an excessive risk to plaintiff’s health.”
8 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (internal citations omitted).

9 **Discussion**

10 Plaintiff’s First Amended Complaint recites nearly the same allegations found in
11 Plaintiff’s original Complaint. Plaintiff has demonstrated that he had a serious medical need
12 because he was the victim of an assault and suffered serious injuries to his cheek and mouth,
13 requiring reconstruction surgery. Also, his clavicle was broken, requiring more surgery to re-
14 set the bone. He also suffered extreme pain from the injuries, surgeries, and complications
15 from the surgeries. Thus, the court finds that Plaintiff shows that he had a serious medical
16 need.

17 However, Plaintiff fails in the First Amended Complaint, as in the original Complaint,
18 to allege facts showing that any of the Defendants acted against him with deliberate
19 indifference. Plaintiff has not alleged facts demonstrating that any of the Defendants acted, or
20 failed to act, while knowing about and disregarding a serious risk to his health. According to
21 the allegations, Plaintiff received regular treatment for his condition, including surgeries,
22 medication, and visits with medical staff. While there were delays in his treatment, Plaintiff
23 has not shown that the delays caused him further harm. Plaintiff suffered pain both before and
24 after surgery, and he still suffers pain. Plaintiff alleges that he was denied pain medication, but
25 he also alleges that at some point in his treatment, he was approved for treatment with
26 morphine for pain. Plaintiff’s allegations that he could not choose his own doctor, that he was
27 not treated kindly during the course of his treatment, that he was subject to a vehicular accident,
28 and that complications arose during and after surgery, do not demonstrate deliberate

1 indifference. As discussed above, even gross negligence or medical malpractice do not rise to
2 the level of deliberate indifference. Plaintiff alleges that medical staff did respond favorably to
3 his requests for surgery and medication, demonstrating a difference of opinion about his
4 medical care, which does not constitute deliberate indifference. The fact that Plaintiff was
5 given Tylenol-3 instead of morphine does not state a claim for relief. With respect to
6 Plaintiff's complaints that the plates in his face, which he was told were temporary, have not
7 been removed, Plaintiff has not shown more than a disagreement with his course of treatment.
8 Plaintiff has not alleged that immediate removal of the plates, or other surgical hardware, is
9 medically indicated or that any of the Defendants acted with deliberate indifference in refusing
10 to remove the plates. Therefore, Plaintiff fails to state a cognizable Eighth Amendment
11 medical claim.

12 **B. Retaliation**

13 As discussed by the Ninth Circuit in Watison v. Carter:

14 "A retaliation claim has five elements. Brodheim v. Cry,
15 584 F.3d 1262, 1269 (9th Cir. 2009). First, the plaintiff must
16 allege that the retaliated-against conduct is protected. The filing
of an inmate grievance is protected conduct. Rhodes v.
Robinson, 408 F.3d 559, 568 (9th Cir. 2005).

17 Second, the plaintiff must claim the defendant took
18 adverse action against the plaintiff. Id. at 567. The adverse
19 action need not be an independent constitutional violation. Pratt
v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995). "[T]he mere
20 *threat* of harm can be an adverse action...." Brodheim, 584 F.3d
at 1270.

21 Third, the plaintiff must allege a causal connection
22 between the adverse action and the protected conduct. Because
23 direct evidence of retaliatory intent rarely can be pleaded in a
24 complaint, allegation of a chronology of events from which
retaliation can be inferred is sufficient to survive dismissal. See
Pratt, 65 F.3d at 808 ("timing can properly be considered as
25 circumstantial evidence of retaliatory intent"); Murphy v. Lane,
26 833 F.2d 106, 108–09 (7th Cir. 1987).

27 Fourth, the plaintiff must allege that the "official's acts
28 would chill or silence a person of ordinary firmness from future
First Amendment activities." Robinson, 408 F.3d at 568 (internal
quotation 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

1 retaliatory conduct did not chill the plaintiff from suing the
2 alleged retaliator does not defeat the retaliation claim at the
3 motion to dismiss stage. Id. at 569.

4 Fifth, the plaintiff must allege “that the prison authorities’
5 retaliatory action did not advance legitimate goals of the
6 correctional institution...” Rizzo v. Dawson, 778 F.2d 527, 532
7 (9th Cir.1985). A plaintiff successfully pleads this element by
8 alleging, in addition to a retaliatory motive, that the defendant’s
9 actions were arbitrary and capricious, id., or that they were
10 “unnecessary to the maintenance of order in the institution,”
11 Franklin v. Murphy, 745 F.2d 1221, 1230 (9th Cir.1984).”

12 Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012).

13 Plaintiff alleges that he filed prison grievances against prison staff members for
14 inadequate medical treatment, and sometime afterward defendant Morris yelled at him,
15 accusing him of requesting medical care for improper purposes and wasting costly medical
16 supplies. While Plaintiff has shown that adverse action was taken against him, he has not
17 shown any causal connection between the filing of grievances and defendant Morris’s conduct.
18 Plaintiff has not shown direct evidence of retaliatory intent, nor has he alleged facts from which
19 retaliation can be inferred. Plaintiff’s allegations provide no evidence of retaliatory motive to
20 satisfy the third element of a retaliation claim. Therefore, Plaintiff fails to state a cognizable
21 claim for retaliation.

22 **C. State Law Claims**

23 Plaintiff alleges that Defendants violated California Government Code § 845.6 when
24 they failed to re-set his bone. Plaintiff is advised that violation of state law is not sufficient to
25 state a claim for relief under § 1983. To state a claim under § 1983, there must be a deprivation
26 of federal constitutional or statutory rights. See Paul v. Davis, 424 U.S. 693 (1976). Although
27 the court may exercise supplemental jurisdiction over state law claims, Plaintiff must first have
28 a cognizable claim for relief under federal law. See 28 U.S.C. § 1367. In this instance, the
Court fails to find any cognizable federal claims in the First Amended Complaint. Therefore,
Plaintiff’s state law claim fails.

29 **V. CONCLUSION AND RECOMMENDATIONS**

The Court finds that Plaintiff’s First Amended Complaint fails to state any cognizable
claims upon which relief may be granted under § 1983. The Court previously granted Plaintiff

1 leave to amend the complaint, with ample guidance by the Court. Plaintiff has now filed two
2 complaints without stating any claims upon which relief may be granted under § 1983. The
3 Court finds that the deficiencies outlined above are not capable of being cured by amendment,
4 and therefore further leave to amend should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii);
5 Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

6 Therefore, **IT IS HEREBY RECOMMENDED** that pursuant to 28 U.S.C. § 1915A
7 and 28 U.S.C. § 1915(e), this action be dismissed with prejudice for failure to state a claim
8 upon which relief may be granted under § 1983, and that this dismissal be subject to the “three-
9 strikes” provision set forth in 28 U.S.C. § 1915(g). Silva v. Vittorio, 658 F.3d 1090, 1098 (9th
10 Cir. 2011).

11 These Findings and Recommendations will be submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
13 **thirty (30) days** after being served with these Findings and Recommendations, Plaintiff may
14 file written objections with the court. The document should be captioned “Objections to
15 Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file
16 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.
17 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
18 (9th Cir. 1991)).

19
20 IT IS SO ORDERED.

21 Dated: June 23, 2015

21 /s/ Gary S. Austin
22 UNITED STATES MAGISTRATE JUDGE