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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ELVIS VENABLE,
Plaintiff,
vs.
STAINER, et al.,
Defendants.

1:16-cv-00589-AWI-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE BE
DISMISSED, WITH PREJUDICE, FOR
FAILURE TO STATE A CLAIM
(ECF No. 21.)**
**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN DAYS**

I. BACKGROUND

Elvis Venable (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint commencing this action on April 26, 2016. (ECF No. 1.) The court screened the Complaint and issued an order on June 17, 2016, dismissing the Complaint for failure to state a claim with leave to amend. (ECF No. 7.) After being granted multiple extensions of time, on May 1, 2017, Plaintiff filed the First Amended Complaint, which is now before the court for screening. (ECF No. 25.)

1 **II. SCREENING REQUIREMENT**

2 The court is required to screen complaints brought by prisoners seeking relief against a
3 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).
4 The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are
5 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or
6 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.
7 § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion thereof, that may have been
8 paid, the court shall dismiss the case at any time if the court determines that the action or
9 appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

10 A complaint is required to contain “a short and plain statement of the claim showing
11 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
12 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
13 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell
14 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are
15 taken as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart
16 Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).
17 To state a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to
18 ‘state a claim to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678-79; Moss v. U.S.
19 Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as
20 true, legal conclusions are not. Id. The mere possibility of misconduct falls short of meeting
21 this plausibility standard. Id.

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

23 Plaintiff is presently incarcerated at Kern Valley State Prison (KVSP) in Delano,
24 California, where the events at issue in the First Amended Complaint allegedly occurred when
25 Plaintiff was incarcerated there in the custody of the California Department of Corrections and
26 Rehabilitation (CDCR). Plaintiff names as defendants M.D. Stainer, Martin Biter (KVSP
27 Warden), Michael Hutchinson (Chief Executive Officer), Dr. Richard F. Busch, Dr. Woods,
28 and KVSP (collectively, “Defendants”).

1 Plaintiff's allegations in the First Amended Complaint are largely the same as in his
2 original Complaint. Plaintiff alleges that on March 5, 2014, he was assaulted by two inmates
3 and suffered a broken jaw. He was admitted to Kern Medical Center for an intermaxillary
4 fixation. After a period of recovery suggested by defendant Dr. Busch, defendant Busch
5 performed a procedure to remove the fixation wiring on April 30, 2014. During the procedure
6 defendant Busch broke several of Plaintiff's teeth.

7 Plaintiff brought the issue to the attention of KVSP medical staff. Defendant Woods
8 attempted to repair the broken teeth, but placed fillings that were not completely on Plaintiff's
9 teeth. This led to debris in Plaintiff's mouth and an increase in severe pain from the jaw
10 fracture. It was later discovered that the fracture was not fully healed when the wiring was
11 removed. The "sub-par" treatment caused the fillings to have to be redone in thirty days, which
12 resulted in an increase in Plaintiff's pain. (ECF No. 25 at 2.)

13 The dental surgeon at KVSP noted the "unattended fracture" and indicated that
14 defendant Busch should not have removed the wiring. (ECF No. 25 at 3.) After Plaintiff told
15 defendant Busch of the diagnosis made by the KVSP specialist, defendant Busch said, "If
16 KVSP staff believe your jaw is still broken, they should fix it themselves." (ECF No. 25 at 3.)

17 Plaintiff used the prison grievance system to resolve his jaw issue. However during the
18 process, CDCR suggested that because Plaintiff missed an appointment when he was ill, he
19 caused the deficiencies in the fixation process. Plaintiff contends that he was not responsible
20 for the removal of the fixation wiring, or the fact that one area of his jaw was not fully healed
21 when the wiring was removed.

22 Based on these facts, Plaintiff alleges a violation of the Eighth Amendment. He
23 contends that Defendants failed to perform a required procedure that was needed to correct the
24 fracture of which they were aware. That Defendants were aware of the need to have two
25 fractures repaired yet only one of the necessary repairs was made. Plaintiff contends that when
26 Defendants discovered that one of the repairs was not made the issue was further worsened by
27 defendant Busch when he took the wrong actions to correct the problem.

1 Plaintiff contends that the corrective actions by Defendant Woods caused more pain.
2 Plaintiff alleges that defendant Biter is responsible as supervisor of his subordinates who fail to
3 carry out proper medical operations of prisoners. Plaintiff alleges that defendants, Stainer and
4 Hutchinson reviewed Plaintiff’s administrative appeals and all of the Defendants failed to take
5 corrective medical attention leaving Plaintiff in severe pain and suffering for more than three
6 years. Plaintiff alleges that defendants Biter, Stainer, and Hutchison are all liable under
7 municipal liability under § 1983 for failing to adequately train medical personnel.

8 Plaintiff seeks monetary damages.

9 **IV. PLAINTIFF’S CLAIMS**

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

11 Every person who, under color of any statute, ordinance, regulation, custom, or
12 usage, of any State or Territory or the District of Columbia, subjects, or causes
13 to be subjected, any citizen of the United States or other person within the
14 jurisdiction thereof to the deprivation of any rights, privileges, or immunities
secured by the Constitution and laws, shall be liable to the party injured in an
action at law, suit in equity, or other proper proceeding for redress

15 42 U.S.C. § 1983.

16 “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a
17 method for vindicating federal rights elsewhere conferred.’” Graham v. Connor, 490 U.S. 386,
18 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman
19 v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697
20 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012);
21 Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006). “To the extent that the violation of
22 a state law amounts to the deprivation of a state-created interest that reaches beyond that
23 guaranteed by the federal Constitution, Section 1983 offers no redress.” Id.

24 To state a claim under § 1983, a plaintiff must allege that (1) the defendant acted under
25 color of state law and (2) the defendant deprived him or her of rights secured by the
26 Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir.
27 2006); see also Preschooler v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012)
28 (discussing “under color of state law”). A person deprives another of a constitutional right,

1 “within the meaning of § 1983, ‘if he does an affirmative act, participates in another’s
2 affirmative act, or omits to perform an act which he is legally required to do that causes the
3 deprivation of which complaint is made.’” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479
4 F.3d 1175, 1183 (9th Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)).
5 “The requisite causal connection may be established when an official sets in motion a ‘series of
6 acts by others which the actor knows or reasonably should know would cause others to inflict’
7 constitutional harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743).
8 This standard of causation “closely resembles the standard ‘foreseeability’ formulation of
9 proximate cause.” Arnold v. Int’l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see
10 also Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

11 **A. Prior Screening Order**

12 In the prior screening order of June 17, 2016, the court found that Plaintiff failed to state
13 a cognizable claim in the original Complaint against any Defendant. In screening the First
14 Amended Complaint, the court reaches the same conclusion, as discussed in the following
15 paragraphs.

16 **B. Defendant KVSP – Eleventh Amendment Immunity**

17 Plaintiff seeks to hold Kern Valley State Prison (KVSP) liable for failing to provide him
18 with adequate medical care, in violation of the Eighth Amendment.

19 “The Eleventh Amendment prohibits federal courts from hearing suits brought against
20 an unconsenting state.” Brooks v. Sulphur Springs Valley Elec. Co., 951 F.2d 1050, 1053 (9th
21 Cir.1991); see also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 116 S.Ct. 1114 (1996);
22 Puerto Rico Aqueduct Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144, 113 S.Ct. 684
23 (1993); Tennessee v. Lane, 541 U.S. 509, 517 (2004). The Eleventh Amendment also bars
24 suits against a state’s agencies. See Puerto Rico Aqueduct, 506 U.S. at 144; Brooks, 951 F.2d
25 at 1053; Mitchell v. Los Angeles Community College Dist., 861 F.2d 198, 201 (9th Cir. 1989);
26 Beentjes v. Placer Cnty. Air Pollution Control Dist., 397 F.3d 775, 777 (9th Cir. 2005). Thus,
27 the CDCR is entitled to Eleventh Amendment immunity. In addition, California prisons are
28 entitled to Eleventh Amendment immunity. Lopez v. Wasco State Prison, 2008 WL 5381696,

1 at *4 (E.D. Cal. Dec. 22, 2008) (citing Keel v. California Dept. of Corrections and
2 Rehabilitation, 2006 WL 1523121, *2 (E.D. Cal. 2006)). Thus, defendant KVSP is entitled to
3 Eleventh Amendment immunity and must be dismissed.

4 Therefore, Plaintiff fails to state a claim against KVSP.

5 **C. Municipal Liability**

6 Plaintiff seeks to hold defendants Biter, Stainer, and Hutchinson liable under municipal
7 liability under § 1983 for failing to adequately train medical personnel about providing medical
8 assistance beyond emergency first-aid treatment.

9 A local government unit may not be held responsible for the acts of its employees under
10 a *respondeat superior* theory of liability. Monell v. Department of Social Services, 436 U.S.
11 658, 691 (1978); Webb v. Sloan, 330 F.3d 1158, 1163-64 (9th Cir. 2003); Gibson v. Cnty. of
12 Washoe, 290 F.3d 1175, 1185 (9th Cir. 2002). Rather, a local government unit may only be
13 held liable if it inflicts the injury complained of. Gibson, 290 F.3d at 1185.

14 A municipality may be held liable under § 1983 only where an action pursuant to
15 official municipal policy of some nature causes a constitutional tort. 42 U.S.C.A. § 1983.
16 Harper, 533 F.3d at 1010. Generally, a claim against a local government unit for municipal or
17 county liability requires an allegation that “a deliberate policy, custom, or practice . . . was the
18 ‘moving force’ behind the constitutional violation . . . suffered.” Galen v. Cnty. of Los
19 Angeles, 477 F.3d 652, 667 (9th Cir. 2007); City of Canton, Ohio, v. Harris, 489 U.S. 378, 385
20 (1989). Alternatively, and more difficult to prove, municipal liability may be imposed where
21 the local government unit’s omission led to the constitutional violation by its employee.
22 Gibson, 290 F.3d at 1186. Under this route to municipal liability, the “plaintiff must show that
23 the municipality’s deliberate indifference led to its omission and that the omission caused the
24 employee to commit the constitutional violation.” Id. Deliberate indifference requires a
25 showing “that the municipality was on actual or constructive notice that its omissions would
26 likely result in a constitutional violation.” Id.

27 To state a claim against a municipality, Plaintiff must show that (1) the municipality
28 acted under color of state law, and (2) if a constitutional violation occurred, the violation was

1 caused by an official policy or custom of the municipality. Tsao v. Desert Palace, Inc., 698
2 F.3d 1128, 1139 (9th Cir. 2012) (citing see Harper, 533 F.3d at 1024).

3 Here, Plaintiff has not named any municipality he seeks to hold liable under § 1983, nor
4 has he alleged that an official policy or custom of a municipality caused a constitutional
5 violation against him. Therefore, Plaintiff fails to state a claim against any of the Defendants
6 under municipal liability.

7 **D. Eighth Amendment Medical Claim**

8 While the Eighth Amendment of the United States Constitution entitles Plaintiff to
9 medical care, the Eighth Amendment is violated only when a prison official acts with deliberate
10 indifference to an inmate’s serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th
11 Cir. 2012), overruled in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th
12 Cir. 2014); Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d
13 1091, 1096 (9th Cir. 2006). Plaintiff “must show (1) a serious medical need by demonstrating
14 that failure to treat [his] condition could result in further significant injury or the unnecessary
15 and wanton infliction of pain,” and (2) that “the defendant’s response to the need was
16 deliberately indifferent.” Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at 1096). Deliberate
17 indifference is shown by “(a) a purposeful act or failure to respond to a prisoner’s pain or
18 possible medical need, and (b) harm caused by the indifference.” Wilhelm, 680 F.3d at 1122
19 (citing Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective recklessness,
20 which entails more than ordinary lack of due care. Snow, 681 F.3d at 985 (citation and
21 quotation marks omitted); Wilhelm, 680 F.3d at 1122.

22 Here, Plaintiff contends that he received “sub-par” treatment from Defendants Busch
23 and Woods. However, an Eighth Amendment claim may not be premised on even gross
24 negligence by a physician, Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990), and
25 Plaintiff’s claims do not demonstrate that any Defendant acted with the requisite state of mind,
26 i.e., that they “[knew] of and disregard[ed] an excessive risk to [plaintiff’s] health or safety.”
27 Farmer v. Brennan, 511 U.S. 825, 837 (1994).

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1 For example, Plaintiff alleges that defendant Busch broke his teeth while removing the
2 wire at Kern Valley Medical Center, took out the wire too soon and then told Plaintiff that if
3 KVSP staff believed that his jaw was still broken they should fix it. While he may have broken
4 Plaintiff's teeth or removed the wire too soon, there is no indication that he undertook these
5 actions with deliberate indifference. Insofar as defendant Busch told Plaintiff that KVSP should
6 treat his jaw if they felt it required further treatment, instructing Plaintiff to seek treatment from
7 his place of incarceration, is not disregarding an excessive risk to his health or safety.
8 Similarly, Plaintiff fails to demonstrate that defendant Woods, who attempted to fix his broken
9 teeth, performed the procedure with deliberate indifference. The fact that defendant Woods
10 may have erred in some respect, alone, does not rise to the level of an Eighth Amendment
11 violation. Again, even gross negligence is insufficient to state a claim for deliberate
12 indifference to a serious medical need.

13 Plaintiff also alleges that Defendants were aware of the need to have two fractures
14 repaired, yet only one of the necessary repairs was made. He does not, however, connect any
15 specific Defendant to this omission, nor does he provide enough facts to show that the failure to
16 treat was done with deliberate indifference.

17 Plaintiff therefore fails to state a claim under the Eighth Amendment.

18 **E. Supervisory Liability**

19 Supervisory personnel may not be held liable under section 1983 for the actions of
20 subordinate employees based on *respondeat superior*, or vicarious liability. Crowley v.
21 Bannister, 734 F.3d 967, 977 (9th Cir. 2013); accord Lemire v. California Dep't of Corr. and
22 Rehab., 726 F.3d 1062, 1074-75 (9th Cir. 2013); Lacey v. Maricopa County, 693 F.3d 896,
23 915- 16 (9th Cir. 2012) (*en banc*). Rather, “[a] supervisor may be liable only if (1) he or she is
24 personally involved in the constitutional deprivation, or (2) there is a sufficient causal
25 connection between the supervisor’s wrongful conduct and the constitutional violation.”
26 Crowley, 734 F.3d at 977 (citing Snow, 681 F.3d at 989) (internal quotation marks omitted);
27 accord Lemire, 726 F.3d at 1074-75; Lacey, 693 F.3d at 915-16.

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1 Plaintiff suggests that defendants Biter, Stainer, and Hutchinson improperly reviewed
2 Plaintiff's appeal and medical complaints. As a general matter, denying a prisoner's
3 administrative appeal does not cause or contribute to the underlying violation. George v. Smith,
4 507 F.3d 605, 609 (7th Cir. 2007) (quotation marks omitted). However, because prison
5 administrators cannot willfully turn a blind eye to constitutional violations being committed by
6 subordinates, Jett, 439 at 1098, there may be limited circumstances in which those involved in
7 reviewing an inmate appeal can be held liable under section 1983. That circumstance has not
8 been presented here. Plaintiff alleges that there was a factual discrepancy during the appeals
9 process, but he is not entitled to any specific outcome. Ramirez v. Galaza, 334 F.3d 850, 860
10 (9th Cir. 2003); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988).

11 Plaintiff also suggests that defendants Biter, Stainer, and Hutchinson failed to ensure
12 adequate treatment providers, but he does not connect this alleged failure to his alleged
13 deprivation. Plaintiff states that they were aware of his treatment issues through the appeals.
14 Further, Plaintiff has not stated a viable claim against defendants Busch or Woods for denying
15 him medical care. Absent the presentation of facts sufficient to show that an Eighth
16 Amendment violation occurred in the first place, Plaintiff cannot pursue a claim against those
17 who reviewed the administrative appeal grieving the underlying denial of medical care.
18 Plaintiff therefore fails to state a claim against Defendants Biter, Stainer and Hutchinson based
19 on supervisory liability.

20 **F. Medical Malpractice**

21 "The elements of a medical malpractice claim are (1) the duty of the professional to use
22 such skill, prudence, and diligence as other members of his profession commonly possess and
23 exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent
24 conduct and resulting injury; and (4) actual loss or damage resulting from the professional's
25 negligence." Avivi v. Centro Medico Urgente Medical Center, 159 Cal.App.4th 463, 468, n.2,
26 71 Cal.Rptr.3d 707, 711 (Cal. Ct. App. 2008) (internal quotations and citation omitted). To the
27 extent that Plaintiff seeks to pursue tort claims under California law, the Government Claims
28 Act requires exhaustion of those claims with the California Victim Compensation and

1 Government Claims Board, and Plaintiff is required to specifically allege compliance in his
2 complaint. Shirk v. Vista Unified Sch. Dist., 42 Cal.4th 201, 208-09 (Cal. 2007); State v.
3 Superior Court of Kings Cnty. (Bodde), 32 Cal.4th 1234, 1239 (Cal. 2004); Mabe v. San
4 Bernardino Cnty. Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1111 (9th Cir. 2001); Mangold v.
5 California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995); Karim-Panahi v. Los
6 Angeles Police Dep't, 839 F.2d 621, 627 (9th Cir. 1988). He has not done so.

7 Moreover, because Plaintiff fails to allege a viable federal claim in the First Amended
8 Complaint, the court will not exercise supplemental jurisdiction over his state law claim. 28
9 U.S.C. § 1367(c)(3); Parra v. PacifiCare of Az., Inc., 715 F.3d 1146, 1156 (9th Cir. 2013);
10 Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 805 (9th Cir. 2001).

11 **V. CONCLUSION AND RECOMMENDATIONS**

12 The court finds that Plaintiff's First Amended Complaint fails to state any claims upon
13 which relief may be granted under § 1983. The court previously granted Plaintiff leave to
14 amend the complaint, with ample guidance by the court. Plaintiff has now filed two complaints
15 without stating any claims upon which relief may be granted under § 1983. The court finds that
16 the deficiencies outlined above are not capable of being cured by amendment, and therefore
17 further leave to amend should not be granted. 28 U.S.C. § 1915(e)(2)(B)(ii); Lopez v. Smith,
18 203 F.3d 1122, 1127 (9th Cir. 2000).

19 Therefore, based on the foregoing, **IT IS HEREBY RECOMMENDED** that:

- 20 1. This case be DISMISSED, with prejudice, for failure to state a claim upon
21 which relief may be granted under § 1983; and
- 22 2. The Clerk be ordered to CLOSE this case.

23 These findings and recommendations are submitted to the United States District Judge
24 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within**
25 **fourteen (14) days** from the date of service of these findings and recommendations, Plaintiff
26 may file written objections with the court. Such a document should be captioned "Objections
27 to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that failure to file
28 objections within the specified time may result in the waiver of rights on appeal. Wilkerson v.

1 Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394
2 (9th Cir. 1991)).

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4 IT IS SO ORDERED.

5 Dated: March 15, 2018

/s/ Gary S. Austin
6 UNITED STATES MAGISTRATE JUDGE
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