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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

AUBREY LEE BROTHERS, II,
Plaintiff,
v.
CHITA BUENAFE, et al.,
Defendants.

Case No. 1:17-cv-00607-MJS (PC)
**ORDER DIRECTING CLERK OF
COURT TO ASSIGN DISTRICT
JUDGE TO THIS CASE**
**FINDINGS AND
RECOMMENDATIONS TO DISMISS
SECOND AMENDED COMPLAINT
WITH PREJUDICE**
(ECF No. 15)
**FOURTEEN-DAY OBJECTIONS
DEADLINE**

21 Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil
22 rights action filed pursuant to 42 U.S.C. § 1983 on May 1, 2017. Plaintiff has consented
23 to Magistrate Judge jurisdiction. (ECF No. 5). No other parties have appeared.
24 On July 13, 2017, Plaintiff's complaint was dismissed with leave to amend. (ECF
25 No. 6.) On August 11, 2017, Plaintiff's first amended complaint was filed. (ECF No. 10.)
26 On August 31, 2017, without first seeking leave of the Court, Plaintiff lodged another
27 amended complaint. (ECF No. 11.) The Court screened the more recent of the two
28 amended complaints. (ECF No. 11). On October 19, 2017, the Court dismissed the first

1 amended complaint with thirty days leave to amend. (ECF No. 12.) Plaintiff requested
2 and was granted one extension of time. (ECF Nos. 13; 14.) On December 8, 2017,
3 Plaintiff filed a second amended complaint, which is now before the Court for screening.
4 (ECF No. 15.)

5 For the reasons set forth below, the Court finds Plaintiff has stated no cognizable
6 claims for relief. The Court recommends that Plaintiff's second amended complaint be
7 dismissed with prejudice. The undersigned directs the Clerk of Court to assign a District
8 Judge to this action to rule upon the following recommendations.

9 **I. Screening Requirement**

10 The Court is required to screen complaints brought by prisoners seeking relief
11 against a governmental entity or an officer or employee of a governmental entity. 28
12 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner
13 has raised claims that are legally "frivolous or malicious," that fail to state a claim upon
14 which relief may be granted, or that seek monetary relief from a defendant who is
15 immune from such relief. 28 U.S.C. § 1915A(b)(1), (2). "Notwithstanding any filing fee,
16 or any portion thereof, that may have been paid, the court shall dismiss the case at any
17 time if the court determines that . . . the action or appeal . . . fails to state a claim upon
18 which relief may be granted." 28 U.S.C. § 1915(e)(2)(B)(ii).

19 **II. Pleading Standard**

20 Section 1983 provides a cause of action against any person who deprives an
21 individual of federally guaranteed rights "under color" of state law. 42 U.S.C. § 1983. A
22 complaint must contain "a short and plain statement of the claim showing that the pleader
23 is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
24 required, but "[t]hreadbare recitals of the elements of a cause of action, supported by
25 mere conclusory statements, do not suffice," Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
26 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)), and courts "are not
27 required to indulge unwarranted inferences," Doe I v. Wal-Mart Stores, Inc., 572 F.3d
28 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). While factual

1 allegations are accepted as true, legal conclusions are not. Iqbal, 556 U.S. at 678.

2 Under section 1983, Plaintiff must demonstrate that each defendant personally
3 participated in the deprivation of his rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir.
4 2002). This requires the presentation of factual allegations sufficient to state a plausible
5 claim for relief. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962,
6 969 (9th Cir. 2009). Prisoners proceeding pro se in civil rights actions are entitled to
7 have their pleadings liberally construed and to have any doubt resolved in their favor,
8 Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (citations omitted), but nevertheless,
9 the mere possibility of misconduct falls short of meeting the plausibility standard, Iqbal,
10 556 U.S. at 678; Moss, 572 F.3d at 969.

11 **III. Plaintiff's Allegations**

12 Plaintiff is currently incarcerated at the California State Prison, Los Angeles
13 County in Lancaster, California, however he complains of acts that occurred at the
14 California State Prison, Corcoran in Corcoran, California ("CSPC"). Plaintiff brings this
15 action against three Defendants: Dr. Chita Buenafe, a dentist; N. Flores, a dental
16 assistant; and E. Clark, a medical doctor who reviewed Plaintiff's inmate appeals. Plaintiff
17 alleges that Defendants violated the Eighth Amendment.

18 **A. Original Complaint and Screening Order**

19 In the original complaint, Plaintiff brought an Eighth Amendment claim against
20 Defendants Buenafe and Flores (as well as a third Defendant who is no longer named in
21 this action) for Eighth Amendment violations. (ECF No. 1.) In that version of the
22 complaint, Plaintiff alleged that Defendants Buenafe and Flores used the dental
23 procedure to implant electrodes in Plaintiff's mouth and used them to track and control
24 him. (ECF No. 1.) In the Court's first screening order, the complaint was dismissed as
25 implausible. (ECF No. 6.) Plaintiff was advised that to the extent he actually suffered
26 serious pain after his March 10, 2014 dental appointment, and Defendants were
27 deliberately indifferent to that pain, Plaintiff would be granted leave to amend to
28 demonstrate how Defendants should have but failed to address his objectively serious

1 medical needs. (Id.)

2 **B. First Amended Complaint and Screening Order**

3 In the first amended complaint, Plaintiff alleged that Defendants Buenafe and
4 Flores performed dental surgery on him on March 10, 2014. As a result of the surgery,
5 his left orbital bone was fractured, leaving him in serious pain. Plaintiff verbally
6 complained to defendants about the pain and filed an inmate appeal. Defendant Clark
7 reviewed Plaintiff's inmate appeal and ordered an October 2014 MRI which revealed the
8 left orbital fracture. Despite the MRI findings and Plaintiff's repeated complaints of severe
9 pain, Defendants took no further action to treat Plaintiff's pain or the underlying injury.

10 The Court dismissed the claims against Defendants Buenafe and Flores as being
11 overly vague, speculative and conclusory. Specifically, the undersigned determined that
12 Plaintiff had failed to specify the acts of Defendants that actually caused the fracture of
13 Plaintiff's left orbital wall. (ECF No. 12.) To the extent Plaintiff might want to claim
14 deliberate indifference against these Defendants for not addressing his pain, he had to
15 provide more than the vague statement that he made a complaint of pain and "received
16 no help." (Id.) The same conclusion was reached with regard to Plaintiff's claim that he
17 presented complaints of pain to Defendant Clark and, although ordering an MRI, he failed
18 to treat the pain. Plaintiff was advised of what was necessary to assert such a claim and
19 provided "**one more opportunity**" to submit a cognizable claim against Defendants.
20 (ECF No. 12 at 6-7)

21 **C. Second Amended Complaint**

22 The second amended complaint repeats the basic allegations of the first amended
23 complaint, except that Plaintiff repeatedly emphasizes that the dental procedure was
24 "unrequested" (ECF No. 15 at 3, 5-7, 9), alludes to the allegation in the original
25 complaint about implantation of electrodes (id. at 4-5), and alleges he blacked out and fell
26 as a result of the orbital fracture (id. at 4-5, 9).

27 Plaintiff seeks declaratory judgment and monetary damages.

28

1 **IV. Discussion**

2 **A. Eighth Amendment Deliberate Indifference**

3 **1. Defendants Buenafe and Flores**

4 Plaintiff has not resolved deficiencies identified in the previous screening order
5 (ECF No. 12), so the Court recommends dismissal without further leave to amend.

6 For Eighth Amendment claims arising out of medical care in prison, Plaintiff “must
7 show (1) a serious medical need by demonstrating that failure to treat [his] condition
8 could result in further significant injury or the unnecessary and wanton infliction of pain,”
9 and (2) that “the defendant’s response to the need was deliberately indifferent.” Wilhelm
10 v. Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012) (citing Jett v. Penner, 439 F.3d 1091,
11 1096 (9th Cir. 2006)).

12 “[D]eliberate indifference to serious medical needs of prisoners constitutes the
13 unnecessary and wanton infliction of pain, proscribed by the Eighth Amendment. This is
14 true whether the indifference is manifested by prison doctors in their response to the
15 prisoner’s needs or by prison guards in intentionally denying or delaying access to
16 medical care or intentionally interfering with the treatment once prescribed.” Estelle v.
17 Gamble, 429 U.S. 97, 104-05 (1976) (internal citations, punctuation and quotation marks
18 omitted). “Prison officials are deliberately indifferent to a prisoner’s serious medical needs
19 when they ‘deny, delay or intentionally interfere with medical treatment.’” Wood v.
20 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990) (quoting Hutchinson v. United States,
21 838 F.2d 390, 394 (9th Cir. 1988)).

22 “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could
23 result in further significant injury or the ‘unnecessary and wanton infliction of pain.’”
24 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds,
25 WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc) (quoting Estelle,
26 429 U.S. at 104). Serious medical needs include “[t]he existence of an injury that a
27 reasonable doctor or patient would find important and worthy of comment or treatment;
28 the presence of a medical condition that significantly affects an individual’s daily

1 activities; [and] the existence of chronic and substantial pain.” McGuckin, 974 F.2d at
2 1059-60.

3 To prevail on a claim for deliberate indifference to serious medical needs, a
4 prisoner must demonstrate that a prison official “kn[ew] of and disregard[ed] an excessive
5 risk to inmate health or safety; the official must both be aware of the facts from which the
6 inference could be drawn that a substantial risk of serious harm exists, and he must also
7 draw the inference.” Farmer v. Brennan, 511 U.S. 825, 837 (1994).

8 “In the Ninth Circuit, the test for deliberate indifference consists of two parts. First,
9 the plaintiff must show a serious medical need by demonstrating that failure to treat a
10 prisoner’s condition could result in further significant injury or the unnecessary and
11 wanton infliction of pain. Second, the plaintiff must show the defendant’s response to the
12 need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a
13 purposeful act or failure to respond to a prisoner’s pain or possible medical need and (b)
14 harm caused by the indifference.” Jett, 439 F.3d at 1096 (internal citations, punctuation
15 and quotation marks omitted); accord, Wilhelm v. Rotman, 680 F.3d 1113, 1122 (9th Cir.
16 2012); Lemire v. CDCR, 726 F.3d 1062, 1081 (9th Cir. 2013).

17 “The indifference to a prisoner’s medical needs must be substantial. Mere
18 ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this claim. Even gross
19 negligence is insufficient to establish deliberate indifference to serious medical needs.”
20 Lemire, 726 F.3d at 1081-82 (internal citations, punctuation and quotation marks
21 omitted); accord, Cano v. Taylor, 739 F.3d 1214, 1217 (9th Cir. 2014). Moreover, “[a]
22 difference of opinion between a physician and the prisoner -- or between medical
23 professionals -- concerning what medical care is appropriate does not amount to
24 deliberate indifference.” Snow v. McDaniel, 681 F.3d 978, 987 (9th Cir. 2012) (citing
25 Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.1989)).

26 **a. Left Orbital Fracture**

27 Plaintiff has adequately pled the first element of his claim, namely that he has a
28 serious medical condition which, if left untreated, could be expected to cause, and does

1 cause, pain.

2 However, the second amended complaint fails to resolve the issues identified in
3 the first amended complaint. Specifically, the Court stated previously:

4 If Plaintiff wishes to make a deliberate indifference claim
5 against these Defendants for causing the left orbital fracture,
6 he must allege facts showing that his injury was “a result” of
7 some act or omission by Defendants which they knew would
8 expose him to substantial and unjustifiable risk. At present,
9 the most liberal reading of Plaintiff’s claim is that Defendants
10 made a mistake or did something wrong to cause the fracture.
11 However, the fracture could conceivably be a known or
12 commonly accepted risk of the procedure performed, or it may
13 reflect error or medical malpractice. Neither, however, is
14 enough to support a claim that they violated a right
15 guaranteed under the United States Constitution.

16 (ECF No. 12 at 6.)

17 Concerning the actions of Defendants Buenafe and Flores, Plaintiff alleges only
18 that they conducted an “unrequested” dental procedure “resulting” in Plaintiff’s left orbital
19 wall fracture. (ECF No. 15 at 3-5.) While Plaintiff describes in greater detail the pain, and
20 resulting blackout and fall, he suffered from the fracture, he provides no information to
21 suggest that the fracture resulted from deliberate indifference.

22 This claim is not cognizable and must be dismissed.

23 **b. Pain Allegations**

24 Plaintiff’s allegations concerning Defendants’ treatment of his pain following the
25 dental procedure also remain too vague to state a cognizable claim. The Court previously
26 found the allegation that Plaintiff complained of pain to Defendants Buenafe and Flores
27 and “received no help” insufficient to state a deliberate indifference claim. See Ahdom v.
28 Lopez, No. 1:09-cv-01874-AWI-BAM, 2015 WL 5922020, *6 (where a plaintiff’s
allegations merely stated that he complained to doctors of a lack of effective pain
management and they “failed to do anything to assist” him, the court determined that this
was too vague and conclusory to state a cognizable claim). The Court, here, found that
Plaintiff must allege facts from which the Court could conclude that Defendants were in a

1 position to alleviate Plaintiff's pain and deliberately elected to ignore it. (ECF No. 12 at 7.)

2 Plaintiff's new allegations concerning his pain are that Defendant Buenafe "knew
3 of . . . my serious pain caused by her 3-10-2014 'unrequested' dental procedure resulting
4 in my left orbital wall fracture because I told her the very moment I felt the injury just
5 before I blacked out and fell." (ECF No. 15 at 3.) Plaintiff further alleges that Defendant
6 Flores, as a dental assistant during the March 10 procedure, witnessed Plaintiff "reporting
7 [his] injury as [he] felt it happen[.]" (Id. at 5.) Plaintiff alleges that both Defendants were
8 deliberately indifferent to his medical needs by not reporting his blackout and fall. (Id. at
9 3, 5.) Plaintiff also avers that Defendant Buenafe "failed to provide me pain medication to
10 treat my serious pain which caused blackout from left orbital wall fracture, failing to report
11 injury, failing to report patient blackout and fall delaying the process to getting emergency
12 treatment and by maliciously telling me that [they were] implanting electrodes per court
13 order[.]" (Id. at 3.)

14 As in the first amended complaint, Plaintiff's claim concerning his pain is vague
15 and conclusory. He merely reports that a dental procedure left him in pain and that
16 effective pain medication was not provided. Based upon the allegations stated in the
17 second amended complaint, Defendants Buenafe and Flores were aware only that
18 Plaintiff was in pain during the dental procedure. (Id. at 3, 5.) It is not uncommon for
19 dental procedures to cause temporary pain or discomfort.

20 Plaintiff does allege that he was in serious pain for several months after the left
21 orbital wall fracture (Id. at 7-8.), but does not allege that any of these Defendants were
22 aware of this ongoing pain, and, if they were, how they responded. Plaintiff states he filed
23 healthcare requests with "medical and dental" in the months following the procedure
24 (before filing a 602 inmate appeal), but does not allege that either of these Defendants
25 were aware and failed to respond to them.

26 As stated in the previous screening order, Plaintiff must allege facts from which the
27 Court can conclude that Defendants knew of, and were in a position to alleviate, Plaintiff's
28 pain and deliberately elected to ignore it. The second amended complaint does not

1 provide such information.

2 Plaintiff has been afforded two opportunities to amend his complaint already,
3 further amendment would be futile. Accordingly, the claims against Defendants Buenafe
4 and Flores must be dismissed with prejudice.

5 **2. Defendant Clark**

6 Concerning Defendant Clark, Plaintiff alleges that he reviewed Plaintiff's 602
7 inmate appeal filed in July after the March procedure and ordered an MRI, but did not
8 resolve Plaintiff's pain thereafter. (ECF No. 15 at 6-8.) Plaintiff avers that Defendant Clark
9 was aware of Plaintiff's serious pain and orbital fracture, and was in a position to treat the
10 injury, but did not do so. (Id.) The timeline provided in the second amended complaint
11 contradicts these allegations, however.

12 Specifically, Plaintiff alleges that he filed an inmate appeal concerning his serious
13 pain in July of 2014. In September of 2014, Plaintiff was seen and interviewed by
14 Defendant Clark for this appeal. (Id. at 8.) Defendant Clark then ordered an MRI, which
15 was taken on October 6, 2014. (Id.) According to Plaintiff, the MRI revealed a left orbital
16 wall fracture that had already started to heal and "no medical treatment could be
17 provided." (Id.) Because Plaintiff admits that no treatment could be provided by the time
18 that Defendant Clark became aware of the specific nature of the injury (i.e., after the
19 MRI), Plaintiff cannot allege that Defendant Clark was in a position to treat the injury.
20 Thus, Plaintiff does not present a cognizable claim for deliberate indifference against him.

21 Accordingly, the Court finds that Plaintiff's conclusory allegation that Defendant
22 Clark violated his Eighth Amendment rights is insufficient. Further amendment would be
23 futile, and so the claim must be dismissed with prejudice.

24 **V. Conclusion and Recommendations**

25 IT IS HEREBY ORDERED that the Clerk of Court assign a District Judge to this
26 case for the purposes of ruling on these recommendations.

27 For the foregoing reasons, IT IS HEREBY RECOMMENDED that Plaintiff's second
28 amended complaint be DISMISSED with prejudice for failure to state cognizable claims

1 for relief against all Defendants.

2 These Findings and Recommendations will be submitted to the United States
3 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
4 636(b)(1). Within **fourteen (14) days** after being served with these Findings and
5 Recommendations, the parties may file written objections with the Court. The document
6 should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.”
7 The parties are advised that failure to file objections within the specified time may result
8 in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.
9 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

10
11 IT IS SO ORDERED.

12 Dated: February 27, 2018

/s/ Michael J. Seng
13 UNITED STATES MAGISTRATE JUDGE
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