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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ELMER DOSIO,
Plaintiff,
vs.
N. ODELUGA, et al.,
Defendants.

1:19-cv-00675-DAD-GSA-PC

**FINDINGS AND RECOMMENDATIONS,
RECOMMENDING THAT THIS CASE
PROCEED AGAINST DEFENDANT LVN
ELMA FERNANDEZ ON PLAINTIFF'S
MEDICAL CLAIM, AND THAT ALL
OTHER CLAIMS BE DISMISSED FOR
FAILURE TO STATE A CLAIM UNDER
§ 1983
(ECF No. 11.)**

**OBJECTIONS, IF ANY, DUE WITHIN
FOURTEEN (14) DAYS**

I. BACKGROUND

Elmer Dosio (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action under 42 U.S.C. § 1983. On May 16, 2019, Plaintiff filed the Complaint commencing this action. (ECF No. 1.) On August 12, 2020, the court screened the Complaint and dismissed it for failure to state a claim under § 1983, with leave to amend. (ECF No. 10.) On September 16, 2020, Plaintiff filed the First Amended Complaint. (ECF No. 11.) On September 23, 2020, the court dismissed the First Amended Complaint for failure to state a claim, with leave to amend. (ECF No. 14.) On November 6, 2020, Plaintiff filed the Second Amended Complaint which is now before the court for screening. (ECF No. 18.) 28 U.S.C. § 1915.

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). The
4 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
5 “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek
6 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).
7 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall
8 dismiss the case at any time if the court determines that the action or appeal fails to state a claim
9 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 that
11 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
12 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 taken
15 as true, courts “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores,
16 Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted). To state
17 a viable claim, Plaintiff must set forth “sufficient factual matter, accepted as true, to ‘state a claim
18 to relief that is plausible on its face.’” Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service,
19 572 F.3d 962, 969 (9th Cir. 2009). While factual allegations are accepted as true, legal
20 conclusions are not. Id. The mere possibility of misconduct falls short of meeting this
21 plausibility standard. Id.

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

23 Plaintiff is presently incarcerated at North Kern State Prison (NKSP) in Delano,
24 California, in the custody of the California Department of Corrections and Rehabilitation
25 (CDCR), where the events at issue in the Second Amended Complaint allegedly took place.
26 Plaintiff names as sole defendant Elma Fernandez (LVN) (“Defendant”).

27 A summary of Plaintiff’s allegations follows:

28 The gravamen of Plaintiff’s Second Amended Complaint is that he was not provided

1 with adequate medical care resulting in blindness in his right eye. Plaintiff alleges that he
2 experienced pain in his right eye from June 2016 through October 2016, when he lost his sight
3 in that eye.

4 On June 22, 2016, Plaintiff submitted a CDCR form 7362 Healthcare Services Request
5 stating that he had been experiencing pain and blurriness in his eye. On June 22, 2016, Plaintiff's
6 right eye was: sphere -125 cylinder -05, vision 20/20; and his left eye was: sphere -50 cylinder
7 0.75, vision 20/20.

8 Documentation shows that after a face-to-face triage on or about June 24, 2016, Plaintiff
9 was referred to an eye specialist. On June 30, 2016, Plaintiff was diagnosed with inflammation
10 in his right eye. Dr. O. Beregovskaya, Internal Medicine, made the diagnosis. From June 30,
11 2016 through October 2016, Plaintiff received medication for pain and several injections in his
12 right eye to treat the blurriness. Dr. D. Gines ordered the medication.

13 On October 26, 2016, Plaintiff received his fourth injection in the right eye. Dr. Tawansy
14 [not a defendant] supervised all of the outside medical visits and examinations. On October 27,
15 2016, Plaintiff developed an infection in his right eye with pain, blurry vision, and pus oozing
16 out of his eye. Plaintiff went to the facility clinic seeking medical attention and relief from the
17 pain in his eye and advised defendant LVN Fernandez, who was on staff at that time, of his
18 symptoms and pain. Defendant Fernandez ignored Plaintiff's obvious signs of distress and
19 urgent need of medical treatment when it was medically obvious that immediate and adequate
20 care was needed to mitigate Plaintiff's prolonged suffering. Defendant Fernandez advised
21 Plaintiff that there was nothing she could do and that it didn't look like anything was wrong with
22 his eye.

23 On October 28, 2016, with symptoms having worsened, Plaintiff again returned to the
24 facility clinic where Defendant Fernandez was on staff and once more advised Defendant
25 Fernandez of pus leaking from his right eye, with a high level of pain. Defendant Fernandez
26 again told Plaintiff that there was nothing she could do as the doctors were aware of his situation
27 and would be back in a day or so. Defendant Fernandez refused to entertain the idea that she had
28 the ability to send Plaintiff to the Treatment Triage Annex (TTA) to be examined by a staff

1 physician or a concerned RN familiar with his current treatment. Defendant Fernandez did not
2 contact anyone or make any effort to alleviate the signs of distress that Plaintiff was showing that
3 day and had been receiving treatment for since June 2016.

4 On October 29, 2016, Plaintiff submitted another 7362 Request for Healthcare Services
5 advising of a complete loss of sight and an increased level of pain since the October 26, 2016
6 injection in his eye. On October 29, 2016, Plaintiff again attempted to get help for the pain and
7 pus in his right eye, but Defendant Fernandez indifferently told Plaintiff again that there was
8 nothing she could do because the supervisors were all aware of his eye problem and that Plaintiff
9 should leave. At none of the many interactions that Defendant Fernandez had with Plaintiff did
10 she attempt to actually give Plaintiff any constitutionally adequate medical attention other than
11 telling Plaintiff that his eye looked fine to her. Defendant Fernandez did not take triage notes or
12 notify Plaintiff's treating physicians or supervisory staff familiar with the several outpatient visits
13 and eye treatments Plaintiff had been undergoing since June 2016.

14 On October 29, 2016, at about 1930 hours, Plaintiff walked into the facility clinic
15 complaining of pain level 10/10 and complete loss of vision in his right eye, which LVN Tomay
16 [not a defendant] observed and immediately called TTA RN Albano [not a defendant] about the
17 seriousness of the situation. RN Albano [arranged] for the Plaintiff to be sent to TTA. Plaintiff
18 was escorted by a prison guard at the request of Albano. At about 2100 hours Plaintiff was
19 examined by Dr. Alphonso [not a defendant] who was on call that shift and who stated that
20 Plaintiff had a loss of vision in his right eye as a possible result of an Avastain injection that
21 Plaintiff had received on October 26, 2016. Dr. Alphonso further documented that Plaintiff's
22 right eye pupil was small, had a sluggish reaction to light, and had a lens that was white. Dr.
23 Alphonso ordered an ambulance to take Plaintiff to San Joaquin Community Hospital ASAP.
24 Plaintiff was admitted to the receiving hospital overnight where he was seen by his treating
25 physician Dr. K. Tawansy [not a defendant] who gave Plaintiff at least four more injections in
26 an attempt to save Plaintiff's right eye.

27 From October 27, 2016, through October 29, 2016, Plaintiff made several attempts to
28 seek medical attention and treatment that would have saved his eyesight in his right eye, including

1 Healthcare Services Requests and personally advising medical staff, Defendant LVN Fernandez,
2 that he had an urgent medical concern. Plaintiff has shown that his medical needs were
3 sufficiently serious to require more than a dismissive acknowledgement, or telling him it looked
4 fine when it could not, by any objective observer, be shown to look fine with pus oozing out and
5 a white lens, which failure to treat has resulted in further significant injury and the wanton and
6 unnecessary infliction of pain. Plaintiff's delay in adequate medical treatment by Defendant
7 LVN Fernandez directly resulted in the loss of vision in Plaintiff's right eye, which may have
8 been avoided had the Defendant not shown deliberate indifference to Plaintiff's obvious medical
9 need.

10 On November 1, 2016, Plaintiff had surgery on his right eye which proved unsuccessful,
11 and Dr. Tawansy advised Plaintiff that he would never be able to see out of his right eye again
12 or focus. After the surgery on Plaintiff's right eye, x-rays showed that Plaintiff's eye was
13 completely black.

14 Plaintiff was under the impression that the treatment and therapy that Plaintiff had been
15 receiving would restore his eye to some form of functionality, but for the deliberate indifference
16 of the Defendant Fernandez. Defendant's failure to take any corrective action taken is a violation
17 of Plaintiff's Eighth Amendment rights. Defendant's actions did not advance any penological
18 goal, nor were the actions narrowly tailored to achieve such a goal.

19 Plaintiff requests monetary damages, including punitive damages, declaratory relief, and
20 attorney's fees.

21 **IV. PLAINTIFF'S CLAIMS**

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

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

42 U.S.C. § 1983.

“[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a

1 method for vindicating federal rights elsewhere conferred.” Graham v. Connor, 490 U.S. 386,
2 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman v.
3 Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697 F.3d
4 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012); Anderson v.
5 Warner, 451 F.3d 1063, 1067 (9th Cir. 2006). “To the extent that the violation of a state law
6 amounts to the deprivation of a state-created interest that reaches beyond that guaranteed by the
7 federal Constitution, Section 1983 offers no redress.” Id.

8 To state a claim under § 1983, a plaintiff must allege that (1) the defendant acted under
9 color of state law and (2) the defendant deprived him or her of rights secured by the Constitution
10 or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); see also
11 Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing “under color of
12 state law”). A person deprives another of a constitutional right, “within the meaning of § 1983,
13 ‘if he does an affirmative act, participates in another’s affirmative act, or omits to perform an act
14 which he is legally required to do that causes the deprivation of which complaint is made.’”
15 Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting
16 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite causal connection may be
17 established when an official sets in motion a ‘series of acts by others which the actor knows or
18 reasonably should know would cause others to inflict’ constitutional harms.” Preschooler II, 479
19 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of causation “closely resembles
20 the standard ‘foreseeability’ formulation of proximate cause.” Arnold v. Int’l Bus. Mach. Corp.,
21 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City of Los Angeles, 533 F.3d 1010,
22 1026 (9th Cir. 2008).

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

24 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
25 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091,
26 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two-part test for
27 deliberate indifference requires the plaintiff to show (1) “‘a serious medical need’ by
28 demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury

1 or the unnecessary and wanton infliction of pain,” and (2) “the defendant’s response to the need
2 was deliberately indifferent.” Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050,
3 1059 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133,
4 1136 (9th Cir. 1997) (*en banc*) (internal quotations omitted)). Deliberate indifference is shown
5 by “a purposeful act or failure to respond to a prisoner’s pain or possible medical need, and harm
6 caused by the indifference.” Id. (citing McGuckin, 974 F.2d at 1060). Deliberate indifference
7 may be manifested “when prison officials deny, delay or intentionally interfere with medical
8 treatment, or it may be shown by the way in which prison physicians provide medical care.” Id.
9 Where a prisoner is alleging a delay in receiving medical treatment, the delay must have led to
10 further harm in order for the prisoner to make a claim of deliberate indifference to serious medical
11 needs. McGuckin at 1060 (citing Shapely v. Nevada Bd. of State Prison Comm’rs, 766 F.2d 404,
12 407 (9th Cir. 1985)).

13 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d 1051,
14 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be aware of the
15 facts from which the inference could be drawn that a substantial risk of serious harm exists,’ but
16 that person ‘must also draw the inference.’” Id. at 1057 (quoting Farmer v. Brennan, 511 U.S.
17 825, 837 (1994)). “‘If a prison official should have been aware of the risk, but was not, then the
18 official has not violated the Eighth Amendment, no matter how severe the risk.’” Id. (quoting
19 Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1188 (9th Cir. 2002)). “A showing of
20 medical malpractice or negligence is insufficient to establish a constitutional deprivation under
21 the Eighth Amendment.” Id. at 1060. “[E]ven gross negligence is insufficient to establish a
22 constitutional violation.” Id. (citing Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)).

23 “A difference of opinion between a prisoner-patient and prison medical authorities
24 regarding treatment does not give rise to a § 1983 claim.” Franklin v. Oregon, 662 F.2d 1337,
25 1344 (9th Cir. 1981) (internal citation omitted). To prevail, a plaintiff “must show that the course
26 of treatment the doctors chose was medically unacceptable under the circumstances . . . and . . .
27 that they chose this course in conscious disregard of an excessive risk to plaintiff’s health.”
28 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (internal citations omitted).

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2 The court finds that liberally construed, Plaintiff states a cognizable medical claim against
3 Defendant LVN Fernandez, to which Defendant should be required to respond.

4 **B. Request for Relief**

5 Besides monetary damages, Plaintiff requests declaratory relief and attorney's fees as
6 relief.

7 Plaintiff's request for declaratory relief should be denied because it is subsumed by
8 Plaintiff's damages claim. See Rhodes v. Robinson, 408 F.3d 559, 565-66 n.8 (9th Cir. 2005)
9 (because claim for damages entails determination of whether officers' alleged conduct violated
10 plaintiff's rights, the separate request for declaratory relief is subsumed by damages action); see
11 also Fitzpatrick v. Gates, No. CV 00-4191-GAF (AJWx), 2001 WL 630534, at *5 (C.D. Cal.
12 Apr. 18, 2001) ("Where a plaintiff seeks damages or relief for an alleged constitutional injury
13 that has already occurred declaratory relief generally is inappropriate[.]")

14 With regard to attorney's fees, "[i]n any action or proceeding to enforce a provision of
15 section[] 1983. . . , the court, in its discretion, may allow the prevailing party. . . reasonable
16 attorney's fees. . . ." 42 U.S.C. § 1988(b). Plaintiff's contention that he is entitled to attorney's
17 fees if he prevails is without merit. Plaintiff is representing himself in this action. Because
18 Plaintiff is not represented by an attorney, he is not entitled to recover attorney's fees if he
19 prevails. See Friedman v. Arizona, 912 F.2d 328, 333 n.2 (9th Cir. 1990), superseded by statute
20 as stated in Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005); Gonzalez v. Kangas, 814
21 F.2d 1411, 1412 (9th Cir. 1987); see also Rickley v. Cnty. of Los Angeles, 654 F.3d 950, 954
22 (9th Cir. 2011) ("The Court accordingly adopted a per se rule, categorically precluding an award
23 of attorney's fees under § 1988 to a *pro se* attorney-plaintiff.")

24 Based on the nature of the claims at issue in this action, which involve past conduct,
25 Plaintiff is confined to seeking money damages for the violations of his federal rights.

26 **V. RECOMMENDATIONS AND CONCLUSION**

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1 For the reasons set forth above, the court finds that Plaintiff states a cognizable claim in
2 the Second Amended Complaint against sole Defendant LVN Elma Fernandez for inadequate
3 medical care in violation of the Eighth Amendment.

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

- 5 1. This case proceed against Defendant LVN Elma Fernandez with Plaintiff's
6 medical claim under the Eighth Amendment, and all other claims be dismissed
7 from this action based on Plaintiff's failure to state a claim; and
- 8 2. This case be referred back to the Magistrate Judge for further proceedings,
9 including initiation of service.

10 These findings and recommendations will be submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen days**
12 of the date of service of these findings and recommendations, Plaintiff may file written objections
13 with the court. The document should be captioned "Objections to Magistrate Judge's Findings
14 and Recommendations." Plaintiff is advised that failure to file objections within the specified
15 time may result in waiver of the right to appeal the district court's order. Wilkerson v. Wheeler,
16 772 F.3d 834, 839 (9th Cir. Nov. 18, 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
17 Cir. 1991)).

18
19 IT IS SO ORDERED.

20 Dated: March 8, 2021

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