

1
2
3
4
5
6
7

8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10
11
12
13
14
15
16
17

DAVID PONCE,
v.
HANFORD POLICE DEPARTMENT K-9
UNIT,
Defendant.

Case No. 1:21-cv-01110-AWI-BAM
FINDINGS AND RECOMMENDATIONS TO
DISMISS ACTION AS DUPLICATIVE
(Doc. 1)
FOURTEEN (14) DAY DEADLINE

18 Plaintiff David Ponce (“Plaintiff”), proceeding *pro se*, filed this civil rights action on July
19 22, 2021, along with an application to proceed *in forma pauperis*. (Docs. 1, 2.) By separate
20 order, the Court has concurrently granted Plaintiff’s *in forma pauperis* application. Plaintiff’s
21 complaint is currently before the Court for screening. (Doc. 1.)

22 **I. Screening Requirement and Standard**

23 The Court screens complaints brought by persons proceeding *pro se* and *in forma*
24 *pauperis*. 28 U.S.C. § 1915(e)(2). Plaintiff’s complaint, or any portion thereof, is subject to
25 dismissal if it is frivolous or malicious, if it fails to state a claim upon which relief may be
26 granted, or if it seeks monetary relief from a defendant who is immune from such relief. 28
27 U.S.C. § 1915(e)(2)(B)(ii).

28 A complaint must contain “a short and plain statement of the claim showing that the

1 pleader is entitled to relief . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
2 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
3 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
4 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken as
5 true, courts “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*,
6 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

7 To survive screening, Plaintiffs’ claims must be facially plausible, which requires
8 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable
9 for the misconduct alleged. *Iqbal*, 556 U.S. at 678; *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969
10 (9th Cir. 2009). The sheer possibility that a defendant acted unlawfully is not sufficient, and mere
11 consistency with liability falls short of satisfying the plausibility standard. *Iqbal*, 556 U.S. at 678;
12 *Moss*, 572 F.3d at 969.

13 **II. Plaintiff’s Allegations**

14 Plaintiff brings this action against a Hanford Police Department K-9 Unit officer. Plaintiff
15 alleges excessive force in violation of the Fourth Amendment, denial of due process in violation
16 of the Fifth Amendment and protection of his rights under the Ninth Amendment. Plaintiff’s
17 claims arise from an incident on March 22, 2021, when a police officer allegedly released a K-9
18 dog on Plaintiff without warning. Plaintiff asserts that he had over 62 dog teeth that ripped
19 through his flesh, causing damage to his arms and butt, along with visible marks.

20 **III. *Ponce v. Hanford Police Department K-9 Unit*, No. 1:21-cv-01045-DAD-BAM**

21 On July 2, 2021, Plaintiff filed *Ponce v. Hanford Police Department K-9 Unit*, No. 1:21-
22 cv-01045 (hereinafter “*Ponce I*”).¹

23 In *Ponce I*, Plaintiff initially filed suit against the Hanford Police Department K-9 unit
24 alleging violations of his Fourth, Fifth and Ninth Amendment rights. Plaintiff’s claims arise from
25 an incident in which a police allegedly released a K-9 dog on Plaintiff, which resulted in Plaintiff
26 receiving over 62 dog teeth that ripped through his flesh, causing damage to his arms and butt,
27 along with visible marks. (See *Ponce I*, Doc. 1.)

28 ¹ The Court takes judicial notice of the files in that case. Fed. R. Evid. 201.

1 The Court screened Plaintiff's complaint in *Ponce I* on August 9, 2021, and granted him
 2 leave to amend. Plaintiff filed a first amended complaint on August 19, 2021. In his amended
 3 complaint, Plaintiff names the Hanford Police Department and Officer Scandura as defendants.
 4 He alleges a violation of his rights under the Fourth, Eighth and Ninth Amendments. Plaintiff's
 5 claims arise from an incident on March 22, 2021, when a police officer released the K-9 dog on
 6 Plaintiff, which resulted in Plaintiff receiving over 62 bites. (See *Ponce I*, Doc. 5.) The Court
 7 screened Plaintiff's first amended complaint on August 24, 2021, and granted Plaintiff a final
 8 opportunity to amend his complaint within thirty (30) days. (See *Ponce I*, Doc. 8.) Plaintiff has
 9 not yet filed an amended complaint.

10 **IV. Discussion**

11 Duplicative lawsuits filed by a plaintiff proceeding in forma pauperis are subject to
 12 dismissal as either frivolous or malicious under 28 U.S.C. § 1915(e). *See, e.g., Cato v. United*
 13 *States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995); *McWilliams v. State of Colo.*, 121 F.3d 573, 574
 14 (10th Cir. 1997); *Pittman v. Moore*, 980 F.2d 994, 994–95 (5th Cir. 1993); *Bailey v. Johnson*, 846
 15 F.2d 1019, 1021 (5th Cir. 1988). A complaint that merely repeats pending or previously litigated
 16 claims may be considered abusive and dismissed under § 1915. *Cato*, 70 F.3d at 1105 n.2;
 17 *Bailey*, 846 F.2d at 1021. “Dismissal of the duplicative lawsuit, more so than the issuance of a
 18 stay or the enjoinder of proceedings, promotes judicial economy and the comprehensive
 19 disposition of litigation.” *Adams v. Cal. Dep’t of Health Servs.*, 487 F.3d 684, 692–93 (9th Cir.
 20 2007), *overruled on other grounds by Taylor v. Sturgell*, 553 U.S. 880, 904 (2008).

21 “[I]n assessing whether the second action is duplicative of the first, we examine whether
 22 the causes of action and relief sought, as well as the parties or privies to the action, are the same.”
 23 *Adams*, 487 F.3d at 689 (citations omitted). “Plaintiffs generally have no right to maintain two
 24 separate actions involving the same subject matter at the same time in the same court and against
 25 the same defendant.” *Id.* at 688 (internal quotations and citations omitted).

26 As discussed above, the original complaint in *Ponce I* is virtually identical in all material
 27 respects to the complaint filed in the instant case. In both cases, Plaintiff raises the same claims
 28 of excessive force, arising out of the same events, involving the same parties and defendants

1 (Hanford Police Department and a K-9 officer), and infringing upon the same rights, including
2 the Fourth Amendment. Therefore, the Court finds that this case should be dismissed because it
3 is duplicative of *Ponce I*, his earlier filed, currently pending case.

4 **V. Conclusion and Recommendation**

5 Based on the foregoing, the Court HEREBY RECOMMENDS that this action be
6 dismissed as duplicative.

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

15
16 IT IS SO ORDERED.

17 Dated: September 7, 2021

18 /s/ Barbara A. McAuliffe
19 UNITED STATES MAGISTRATE JUDGE

20
21
22
23
24
25
26
27
28