

1 These payments shall be collected and forwarded by the appropriate agency to the Clerk of the
2 Court each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in
3 full. 28 U.S.C. § 1915(b)(2).

4 **II. Screening**

5 The court is required to screen complaints brought by prisoners seeking relief against a
6 governmental entity or an officer or employee of a governmental entity. See 28 U.S.C. §
7 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims
8 that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be
9 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
10 U.S.C. § 1915A(b)(1) & (2).

11 **A. Legal Standard**

12 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
13 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
14 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
15 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
16 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
17 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
18 Cir. 1989); Franklin, 745 F.2d at 1227.

19 In considering whether a complaint states a claim upon which relief can be granted, the
20 court must accept the allegations as true, Erickson v. Pardus, 551 U.S. 89, 94 (2007), and construe
21 the complaint in the light most favorable to the plaintiff. See Scheuer v. Rhodes, 416 U.S. 232,
22 236 (1974). Pro se pleadings are held to a less stringent standard than those drafted by lawyers.
23 See Haines v. Kerner, 404 U.S. 519, 520 (1972). Still, to survive dismissal for failure to state a
24 claim, a pro se complaint must contain more than “naked assertions,” “labels and conclusions” or
25 “a formulaic recitation of the elements of a cause of action.” Bell Atlantic Corp. v. Twombly,
26 550 U.S. 544, 555-57 (2007). In other words, “[t]hreadbare recitals of the elements of a cause of
27 action, supported by mere conclusory statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662,
28 678 (2009). Furthermore, a claim upon which the court can grant relief must have facial

1 plausibility. Twombly, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads
2 factual content that allows the court to draw the reasonable inference that the defendant is liable
3 for the misconduct alleged.” Iqbal, 556 U.S. at 678. Attachments to a complaint are considered
4 to be part of the complaint for purposes of a motion to dismiss for failure to state a claim. Hal
5 Roach Studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

6 **B. Discussion**

7 Plaintiff generally alleges that the dental care provided by the California Department of
8 Corrections and Rehabilitation was inadequate; he claims that the delays in treatment caused him
9 pain, infection, and corrective surgery. (ECF No. 1 at 3.) Furthermore, plaintiff alleges that
10 defendant Moreland, a correctional officer, retaliated against him for filing grievances by refusing
11 to let plaintiff seek further treatment after a dental surgery that left plaintiff with an infection.

12 Plaintiff’s complaint appears to state the following cognizable claims for relief pursuant to
13 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b):

14 (1) Retaliation claim pursuant to the First Amendment against defendants Moreland,
15 Sturges, Maciel, Hernandez, and Robinson.

16 **1. Deliberate Indifference Claim(s)**

17 In addition to the retaliation claim, it appears that defendant is attempting to make a
18 deliberate indifference claim against defendants Stuges, Kernan, and California Department of
19 Corrections and Rehabilitation (CDCR). Plaintiff alleges that defendant Kernan is liable as
20 Secretary of CDCR for forcing dentists to only have access to “inmate labs” that are not qualified.
21 (ECF No. 5 at 3.) Plaintiff alleges that defendant Sturges, a dentist, identified infections in
22 plaintiff’s mouth after an implant was installed that did not properly fit. (Id. at 3-4.)

23 When a prisoner’s Eighth Amendment claim arises in the context of medical care, the
24 prisoner must allege and prove “acts or omissions sufficiently harmful to evidence deliberate
25 indifference to serious medical needs.” Estelle, 429 U.S. at 106. A viable Eighth Amendment
26 medical claim states two elements: “the seriousness of the prisoner’s medical need and the nature
27 of the defendant’s response to that need.” McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir.

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1 1991), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997)
2 (en banc).

3 A medical need is serious “if the failure to treat the prisoner’s condition could result in
4 further significant injury or the ‘unnecessary and wanton infliction of pain.’” McGuckin, 974
5 F.2d at 1059 (quoting Estelle, 429 U.S. at 104). By establishing the existence of a serious
6 medical need, a prisoner satisfies the objective requirement for proving an Eighth Amendment
7 violation. Farmer v. Brennan, 511 U.S. 825, 834 (1994). If a prisoner establishes the existence of
8 a serious medical need, he must then show that prison officials responded to it with deliberate
9 indifference. Farmer, 511 U.S. at 834. In general, a prisoner may show deliberate indifference
10 with evidence that officials denied, delayed, or intentionally interfered with medical treatment, or
11 he may show it by the way in which prison officials actively provided medical care. Hutchinson
12 v. United States, 838 F.2d 390, 393-94 (9th Cir. 1988). “[T]he indifference to his medical needs
13 must be substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support
14 this cause of action.” Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing
15 Estelle, 429 U.S. at 105-06). See also Toguchi v. Soon Hwang Chung, 391 F.3d 1051, 1057 (9th
16 Cir. 2004) (“Mere negligence in diagnosing or treating a medical condition, without more, does
17 not violate a prisoner’s Eighth Amendment rights.”); McGuckin, 974 F.2d at 1059 (same).
18 Deliberate indifference is “a state of mind more blameworthy than negligence” and “requires
19 ‘more than ordinary lack of due care for the prisoner’s interests or safety.’” Farmer, 511 U.S. at
20 835 (quoting Whitley, 475 U.S. at 319).

21 Other than establishing his particular injury, an infected mouth after inadequate dental
22 care, plaintiff does not make sufficient allegations concerning the purported deliberate
23 indifference of defendants. Specifically, plaintiff does not identify overt acts or omissions by the
24 named defendants that could possibly amount to deliberate indifference.

25 To state a claim under the Eighth Amendment for deliberate indifference to a serious
26 medical need, plaintiff must allege that the course of treatment doctors chose was “medically
27 unacceptable under the circumstances” and was chosen “in conscious disregard of an excessive
28 risk to [the prisoner’s] health.” See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996)

1 (citations omitted); see also Snow v. McDaniel, 681 F.3d 978, 988 (9th Cir. 2012) (finding that “a
2 reasonable jury could conclude that the decision of the non-treating, non-specialist physicians to
3 repeatedly deny the recommendations for surgery was medically unacceptable under the
4 circumstances”), overruled on other grounds by Peralta v. Dillard, 744 F.3d 1076, 1083 (9th Cir.
5 2014) (en banc).

6 Plaintiff’s allegation that his implant was delayed, inadequate, and led to infection does
7 not establish this element of a deliberate indifference claim. Similarly, the conclusory statement
8 that defendant Kernan limiting dentists to “inmate labs” is unconstitutional, fails to establish that
9 any course of treatment was medically unacceptable or was chosen “in conscious disregard of an
10 excessive risk to [plaintiff’s] health.” See Jackson v. McIntosh, 90 F.3d at 332.

11 Accordingly, any claim for deliberate indifference must be dismissed. However, the court
12 will grant plaintiff leave to amend his complaint in accordance with the instructions below.

13 **2. Institutional Defendant**

14 Plaintiff names CDCR as a defendant in this action. However, CDCR is not a proper
15 party for relief in this matter.

16 The Eleventh Amendment prohibits federal courts from hearing a Section 1983 lawsuit in
17 which damages or injunctive relief is sought against state agencies (such as the California
18 Department of Corrections and Rehabilitation) and individual prisons, absent “a waiver by the
19 state or a valid congressional override” Dittman v. California, 191 F.3d 1020, 1025 (9th Cir.
20 1999). “The Eleventh Amendment bars suits which seek either damages or injunctive relief
21 against a state, ‘an arm of the state,’ its instrumentalities, or its agencies.” See Fireman’s Fund
22 Ins. Co. v. City of Lodi, Cal., 302 F.3d 928, 957 n. 28 (9th Cir. 2002) (internal quotation and
23 citations omitted), cert. denied, 538 U.S. 961 (2003). “The State of California has not waived its
24 Eleventh Amendment immunity with respect to claims brought under § 1983 in federal court . . .
25 .” Dittman, 191 F.3d at 1025–26 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241
26 (1985)); see also Brown v. Cal. Dep’t. of Corr., 554 F.3d 747, 752 (9th Cir. 2009). “However,
27 under Ex Parte Young, 209 U.S. 123 (1908), the Eleventh Amendment does not bar actions
28 seeking only prospective declaratory or injunctive relief against state officers in their official

1 capacities[,]” Fireman’s Fund, 302 F.3d at 957 n. 28 (internal quotation and citation omitted), or,
2 in appropriate instances, in their individual capacities, Idaho v. Coeur d’Alene Tribe of Idaho,
3 521 U.S. 261, (1997) (citing Ex Parte Young, 209 U.S. at 123).

4 In any amended complaint that he may file, plaintiff should carefully consider whom he
5 may properly name as a defendant in this action.

6 **3. Leave to Amend**

7 While plaintiff’s first amended complaint is dismissed without prejudice, the court grants
8 him the opportunity to file another amended complaint addressing the shortfalls identified above.

9 Any amended complaint must show the federal court has jurisdiction, the action is brought
10 in the right place, and plaintiff is entitled to relief if plaintiff’s allegations are true. It must
11 contain a request for particular relief. Plaintiff must identify as a defendant only persons who
12 personally participated in a substantial way in depriving plaintiff of a federal constitutional right.
13 Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation
14 of a constitutional right if he does an act, participates in another’s act or omits to perform an act
15 he is legally required to do that causes the alleged deprivation). If plaintiff contends he was the
16 victim of a conspiracy, he must identify the participants and allege their agreement to deprive him
17 of a specific federal constitutional right.

18 The amended complaint should contain separate, clearly identified claims -- for example,
19 Eighth Amendment Claim, Retaliation Claim, etc. -- clearly identified at the beginning of each
20 claim. The allegations of the complaint must be set forth in sequentially numbered paragraphs
21 (each paragraph number is one greater than the one before, each paragraph has its own number,
22 and no paragraph number is repeated anywhere in the complaint). Each paragraph should be
23 limited “to a single set of circumstances” where possible. Fed. R. Civ. P. 10(b). Plaintiff must
24 avoid excessive repetition of the same allegations. Plaintiff must avoid narrative and storytelling.
25 That is, the complaint should not include every detail of what happened, nor recount the details of
26 conversations. Rather, the amended complaint should contain only those facts needed to show
27 how a specific, named defendant legally wronged the plaintiff.

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1 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to
2 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended
3 complaint be complete in itself without reference to any prior pleading. This is because, as a
4 general rule, an amended complaint supersedes the original complaint. See Pacific Bell
5 Telephone Co. v. Linkline Communications, Inc., 555 U.S. 438, 456 (2009) ("Normally, an
6 amended complaint supersedes the original complaint") (citing 6 C. Wright & A. Miller, Federal
7 Practice & Procedure § 1476, pp. 556–557 (2d ed.1990)). Therefore, in an amended complaint,
8 as in an original complaint, each claim and the involvement of each defendant must be
9 sufficiently alleged.

10 **III. Conclusion**

11 In accordance with the above, IT IS HEREBY ORDERED that:

- 12 1. Plaintiff's request for leave to proceed in forma pauperis (ECF No. 3) is granted.
- 13 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. The
14 fee shall be collected and paid in accordance with this court's order to the Director of the
15 California Department of Corrections and Rehabilitation filed concurrently herewith.
- 16 3. Plaintiff's first amended complaint (ECF No. 5) is dismissed.
- 17 4. Plaintiff is granted thirty days from the date of service of this order to file an
18 amended complaint that complies with the requirements of the Civil Rights Act, the Federal Rules
19 of Civil Procedure, and the Local Rules of Practice. The amended complaint must bear the
20 docket number assigned this case and must be labeled "Second Amended Complaint." Plaintiff
21 must file an original and two copies of the amended complaint. Failure to file an amended
22 complaint or otherwise respond to this order will result in a recommendation that this action be
23 dismissed for failure to prosecute.

24 Dated: September 27, 2017

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27 DEBORAH BARNES
28 UNITED STATES MAGISTRATE JUDGE