

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 CARLOS ARMANDO ORTEGA,)

No. C 09-5527 SBA (PR)

4 Plaintiff,)

**ORDER DISMISSING COMPLAINT WITH
LEAVE TO AMEND AND DENYING
PLAINTIFF'S PENDING MOTIONS**

5 v.)

6 MARK RITCHIE, et al.,)

7 Defendants.)

8
9 **INTRODUCTION**

10 Plaintiff, who is currently incarcerated at the Santa Clara County Jail (SCCJ), has filed a pro
11 se civil rights action pursuant to 42 U.S.C. § 1983 alleging that Defendants violated his
12 constitutional rights. His motion for leave to proceed in forma pauperis (IFP) has been granted.

13 Plaintiff has filed a motion for appointment of counsel. He also requests for an extension of
14 time to serve Defendants. However, because he is proceeding IFP he is not responsible for service
15 on Defendants. Therefore, his request is DENIED as unnecessary.

16 Venue is proper because the events giving rise to the claim are alleged to have occurred at
17 SCCJ, which is located in this judicial district. See 28 U.S.C. § 1391(b).

18 In his complaint, Plaintiff names the following Defendants: the City of San Jose; the SCCJ;
19 SCCJ Psychiatrist Dr. Mark Ritchie; SCCJ Officers N. Muhar and A. Chang; and Doe Defendants.¹

20 The Court now conducts its initial review of the complaint pursuant to 28 U.S.C. § 1915A.

21 **BACKGROUND**

22 Plaintiff states that beginning in March, 2007, he was housed at SCCJ as a pretrial detainee
23 facing charges of assault with a deadly weapon. (Compl. at 3a.)² He claims suffers from a "server
24 [sic] mental disorder bi-polar schizopinnia [sic]," and that he has a "history of 12 year medication
25

26 ¹ Plaintiff lists several "John Doe" Correctional Officers as Defendants under the section
27 labeled "Parties." The Court construes these Defendants to be Doe Defendants.

28 ² Plaintiff has attached several pages that are numbered page "3" to his complaint; therefore,
the Court has renumbered them as pages "3a" through "3h."

1 [and] hospitalization 1997 to 2009." (Id.) In September, 2007, he was found "incompetent to stand
2 trial." (Id.) He alleges that from June 6, 2007 through September 4, 2007, he was denied mental
3 health treatment. (Id. at 3c.) He alleges that "low medication dosage made [him] think irrationally
4 and spontaneous to two violent out-burst." (Id.)

5 On December 4, 2007, he was transferred to Metropolitan State Hospital for "seven months"
6 before he was transferred again back to SCCJ on July 16, 2008. (Id. at 1, 3a-3b.) On August 13,
7 2008, his medication was "lowwered causing [him] to suffer three week's no sleep" (Id. at 3d.)

8 On September 3, 2008, Plaintiff claims Defendants Muhar and Chang came to transport him
9 to Metropolitan State Hospital. (Id. at 3e.) Prior to transporting him, Plaintiff claims an "unknow[n]
10 sergant [sic] did and two male philippino [sic] officers pepper[]-sprayed [him], cuffed and beat
11 [him]. (Id.) He was not decontaminated and "put on a van [for a] 6 hour drive" (Id.) Plaintiff
12 claims he "believed they were going to kill [him]" and he "refused to cuff-up;" therefore, he "got [a]
13 black-eye, red abration[s] [on] both eyes, [and a] puffy lip." (Id.) When he arrived at Metropolitan
14 State Hospital, he was "decontaminated and treated." (Id. at 3f.) Plaintiff does not specify when he
15 was transported back to SCCJ.

16 From February 26, 2009 through September 29, 2009, Plaintiff was housed at the "Main Jail"
17 at SCCJ where he was again "denied full mental health treatment." (Id. at 3e.)

18 On March 13, 2009, Plaintiff was "placed in a disciplinary cell called 'Ice Box' cause [of] it's
19 [sic] coldness." (Id. at 3g.) He claimed this was a disciplinary action which he received without a
20 disciplinary hearing or a "write-up." (Id.) Plaintiff also claims he "exhausted all remedies trying to
21 get rehoused." (Id. at 3h.)

22 Finally, Plaintiff claims that "water is not too well too [sic] drink . . . [and] smells like urine."
23 (Id.)

24 On November 5, 2009, Plaintiff filed the present action while he was housed at Patton State
25 Hospital. Plaintiff does not specify when he was initially transferred to Patton State Hospital.

26 On December 15, 2009, Plaintiff filed a notice of change of address indicating that he has
27 been transferred back to SCCJ.

28

1 Plaintiff seeks monetary damages and injunctive relief in the form of being "rehoused." (Id.
2 at 3d-3g.)

3 DISCUSSION

4 **I. Standard of Review**

5 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
6 redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C.
7 § 1915A(a). In its review, the court must identify cognizable claims and dismiss any claims that are
8 frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief
9 from a defendant who is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings
10 must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
11 (9th Cir. 1988).

12 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
13 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the
14 alleged violation was committed by a person acting under the color of state law. See West v. Atkins,
15 487 U.S. 42, 48 (1988).

16 **II. Exhaustion of Administrative Remedies**

17 Plaintiff raises three claims in his complaint: (1) the use of excessive force; (2) deliberate
18 indifference to his serious medical needs; and (3) a municipal liability claim against the City of San
19 Jose and the SCCJ.³ A threshold question which must be answered before Plaintiff can proceed with
20 these claims is whether he has exhausted available administrative remedies with respect to each
21 claim.

22 The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996)
23 (hereinafter "PLRA"), amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with
24 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
25 confined in any jail, prison, or other correctional facility until such administrative remedies as are

26
27 ³ Plaintiff's remaining allegations in his complaint -- including, that he was placed in a
28 disciplinary cell on March 13, 2009 without a disciplinary hearing and that the water smelled like
urine -- fail to state a cognizable claim for relief; therefore, the Court DISMISSES these claims.

1 available are exhausted." 42 U.S.C. § 1997e(a).

2 Exhaustion is mandatory and no longer left to the discretion of the district court. Woodford
3 v. Ngo, 126 S. Ct. 2378, 2382 (2006) (citing Booth v. Churner, 532 U.S. 731, 739 (2001)).

4 "Prisoners must now exhaust all 'available' remedies, not just those that meet federal standards." Id.
5 The PLRA's exhaustion requirement requires "proper exhaustion" of available administrative
6 remedies. Id. at 2387.

7 An action must be dismissed unless the prisoner exhausted his available administrative
8 remedies before he or she filed suit, even if the prisoner fully exhausts while the suit is pending.
9 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); see Vaden v. Summerhill, 449 F.3d 1047,
10 1051 (9th Cir. 2006) (where administrative remedies are not exhausted before the prisoner sends his
11 complaint to the court it will be dismissed even if exhaustion is completed by the time the complaint
12 is actually filed).

13 If the court concludes that the prisoner has not exhausted non-judicial remedies, the proper
14 remedy is dismissal without prejudice. Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003). A
15 prisoner's concession to non-exhaustion is a valid ground for dismissal, so long as no exception to
16 exhaustion applies. Id. Accordingly, a claim may be dismissed without prejudice if it is clear from
17 the record that the prisoner has conceded that he did not exhaust administrative remedies. See id.

18 The State of California provides its inmates and parolees the right to appeal administratively
19 "any departmental decision, action, condition or policy perceived by those individuals as adversely
20 affecting their welfare." See CAL. CODE REGS. tit. 15, § 3084.1(a). It also provides its inmates the
21 right to file administrative appeals alleging misconduct by correctional officers. See id. § 3084.1(e).
22 In order to exhaust available administrative remedies within this system, a prisoner must proceed
23 through several levels of appeal: (1) informal resolution, (2) formal written appeal on a 602 inmate
24 appeal form, (3) second level appeal to the institution head or designee, and (4) third level appeal to
25 the Director of the California Department of Corrections and Rehabilitation (hereinafter "CDCR").
26 See id. § 3084.5; Barry v. Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997). This satisfies the
27 administrative remedies exhaustion requirement under § 1997e(a). See id. at 1237-38.

28

1 A prisoner's concession to nonexhaustion is a valid ground for dismissal, so long as no
2 exception to exhaustion applies. Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir.), cert. denied, 124
3 S. Ct. 50 (2003). Accordingly, a claim may be dismissed without prejudice if it is clear from the
4 record that the prisoner has conceded that he did not exhaust administrative remedies. Id.

5 Here, the claims raised in Plaintiff's complaint appear not to have been exhausted through the
6 administrative grievance procedure. Plaintiff states specifically that "all issues were ignored or
7 passed." (Compl. at 2.) Plaintiff adds that he "tried to exhaust [his] remedies to fix [his] medication
8 and get full treatment care being housed in the mental health ward." (Id. at 3f.) Plaintiff "presented
9 other grievances to Department of Corrections never returned." (Id.) It is unclear whether Plaintiff
10 allowed for enough time to have his grievances returned to him, or if they were simply ignored for
11 an unknown reason. From the face of the complaint, therefore, it appears that Plaintiff's claims are
12 unexhausted and subject to dismissal. If Plaintiff did exhaust his administrative remedies with
13 respect to any or all of those claims before filing this action, he may amend his complaint to so
14 allege, as set forth below.

15 **III. Legal Claims**

16 **A. Use of Excessive Force**

17 The Due Process Clause of the Fourteenth Amendment protects a post-arraignment pretrial
18 detainee from the use of excessive force that amounts to punishment. Graham v. Connor, 490 U.S.
19 386, 395 n.10 (1989) (citing Bell v. Wolfish, 441 U.S. 520, 535-39 (1979)); see Gibson v. County of
20 Washoe, Nev., 290 F.3d 1175, 1197 (9th Cir. 2002) ("The Due Process clause protects pretrial
21 detainees from the use of excessive force that amounts to punishment Graham therefore
22 explicates the standards applicable to a pretrial detention excessive force claim in this circuit.")
23 (citations omitted).⁴

24 To determine whether particular restrictions and conditions accompanying pretrial detention
25

26
27 ⁴ Cf. Pierce v. Multnomah County, Oregon, 76 F.3d 1032, 1043 (9th Cir. 1996) (Fourth
28 Amendment reasonableness standard applies to allegations of use of excessive force against pre-
arraignment detainee).

1 amount to punishment in the constitutional sense of the word, the Court first looks to whether the
2 disability imposed is for the purpose of punishment or whether it is but an incident of some other
3 legitimate governmental purpose. See Bell, 441 U.S. at 538. Absent a showing of an express intent
4 to punish, whether a restriction amounts to punishment will generally turn on whether there is an
5 alternative, rational purpose for the restriction, and whether the restriction then appears excessive in
6 relation to that purpose. See id. If a restriction or condition is not reasonably related to a legitimate
7 goal, i.e., if it is arbitrary or purposeless, the court may infer that the purpose of the action is
8 punishment. See id. at 539.

9 Plaintiff alleges that on September 3, 2008, he was subjected to excessive force when an
10 "unknown sergeant" and "two male philippino [sic] officers" used pepper spray on him and "cuffed
11 and beat" him. (Compl. at 3e.) Plaintiff also alleges that he was not decontaminated until after a six
12 hour drive to Metropolitan State Hospital. (Id. at 3f.) He claims he suffered a "black-eye, red
13 abrasion[s] [on] both eyes, [and a] puffy lip." (Id.)

14 Liberally construed, Plaintiff's complaint states a cognizable excessive force claim stemming
15 from the incident on September 3, 2008.

16 As mentioned above, in the section of the complaint form where he sets forth his allegations
17 of excessive force Plaintiff identifies an "unknown sergeant" and "two male philippino [sic] officers"
18 as those who were present and participated in the use of force. However, the excessive force claim
19 cannot proceed until Plaintiff provides the Court with additional information regarding these
20 Defendants specifically the names of these Defendants, so that they may be served. Accordingly,
21 this claims is DISMISSED WITH LEAVE TO AMEND. Plaintiff will be provided with **sixty (60)**
22 **days** in which to notify the Court of this information in an amended complaint, as directed below.
23 Failure to do so within sixty days will result in dismissal of this claim without prejudice.
24

25 Plaintiff also names SCCJ Officers N. Muhar and A. Chang. Plaintiff alleges that these
26 officers came to his cell at around 4:45 AM with the intention of transporting him to Metropolitan
27 State Hospital. (Comp. at 3d.) However, he does not link them to the excessive force violation.
28

1 Liability may be imposed on an individual defendant under § 1983 if the plaintiff can show that the
2 defendant proximately caused the deprivation of a federally protected right. See Leer v. Murphy,
3 844 F.2d 628, 634 (9th Cir. 1988); Harris v. City of Roseburg, 664 F.2d 1121, 1125 (9th Cir. 1981).
4 A person deprives another of a constitutional right within the meaning of § 1983 if he does an
5 affirmative act, participates in another's affirmative act or omits to perform an act which he is legally
6 required to do, that causes the deprivation of which the plaintiff complains. See Leer, 844 F.2d at
7 633. The inquiry into causation must be individualized and focus on the duties and responsibilities
8 of each individual defendant whose acts or omissions are alleged to have caused a constitutional
9 deprivation. See id. Sweeping conclusory allegations will not suffice; the plaintiff must instead "set
10 forth specific facts as to each individual defendant's" deprivation of protected rights. Id. at 634.

11 Because Plaintiff has not linked Defendants Muhar and Chang to his excessive force
12 allegations, this claim cannot proceed against these Defendants and thus it is also DISMISSED
13 WITH LEAVE TO AMEND for Plaintiff to cure this pleading deficiency. If Plaintiff does not
14 intend to bring an excessive force claim against these Defendants, he must so inform the Court.

15 **B. Deliberate Indifference to Serious Medical Needs**

16 Deliberate indifference to serious medical needs violates the Eighth Amendment's
17 proscription against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976).
18 A pre-trial detainee's claim for deliberate indifference to medical needs derives from the due process
19 clause rather than the Eighth Amendment's protection against cruel and unusual punishment.
20 Gibson v. County of Washoe, 290 F.3d 1175, 1187 (9th Cir. 2002) (citing Bell v. Wolfish, 441 U.S.
21 520, 535 (1979)). A determination of "deliberate indifference" involves an examination of two
22 elements: the seriousness of the prisoner's medical need and the nature of the defendant's response to
23 that need. See McGuckin, 974 F.2d at 1059. A "serious" medical need exists if the failure to treat a
24 prisoner's condition could result in further significant injury or the "unnecessary and wanton
25 infliction of pain." Id. (citing Estelle v. Gamble, 429 U.S. at 104). A prison official is deliberately
26 indifferent if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk
27
28

1 by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

2 Plaintiff alleges a deliberate indifference claim based on the denial of "full mental health
3 treatment" while he was housed at the "Main Jail" at SCCJ from February 26, 2009 through
4 September 29, 2009. (Compl. at 3e.)

5 In the section of the complaint form where Plaintiff is asked to write the names of all
6 Defendants, he names SCCJ Psychiatrist Dr. Mark Ritchie and various Doe Defendants. However,
7 he does not link these Defendants to his deliberate indifference claim. In order to state cognizable
8 deliberate indifference claim, Plaintiff must (a) identify the responsible individual or individuals for
9 each incident; (b) allege that the responsible individual or individuals were subjectively aware that
10 Plaintiff had serious medical needs; and (c) allege facts demonstrating that the individual or
11 individuals acted or failed to act with deliberate indifference toward his serious medical needs.
12 Because Plaintiff has not yet made sufficient allegations to state cognizable claims for deliberate
13 indifference toward his serious medical needs or to name the responsible individuals, these claims
14 are DISMISSED WITH LEAVE TO AMEND. Plaintiff may reassert the claims in an amended
15 complaint if he can make the allegations noted above.

16
17 **C. Municipal Liability Claims**

18 Finally, Plaintiff has not alleged grounds for municipal liability against the City of San Jose
19 and the SCCJ based on any theory other than that of respondeat superior. This is not a sufficient
20 ground for municipal liability. See Monell v. Dep't of Social Servs., 436 U.S. 658, 691 (1978) (local
21 governments cannot be liable under § 1983 under respondeat superior theory).

22 Accordingly, Plaintiff's claims against the City of San Jose and the SCCJ are DISMISSED
23 WITH LEAVE TO AMEND. If Plaintiff can in good faith assert facts which state constitutionally
24 cognizable claims for relief against these municipal Defendants he may include them in his
25 amendment to the complaint.

26 **D. Claims Against Doe Defendants**

27 As mentioned above, Plaintiff names Doe Defendants whose names he apparently intends to
28

1 learn through discovery. The use of Doe Defendants is not favored in the Ninth Circuit. See
2 Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). However, where the identity of alleged
3 defendants cannot be known prior to the filing of a complaint, the plaintiff should be given an
4 opportunity through discovery to identify them. Id. Failure to afford the plaintiff such an
5 opportunity is error. See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999).
6 Accordingly, Plaintiff's claims against the Doe Defendants are DISMISSED. Should Plaintiff learn
7 the identities of these Doe Defendants, he may move for leave to amend to add them as named
8 defendants. See Brass v. County of Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir. 2003).

9 **IV. Motion for Appointment of Counsel**

10 On September 8, 2010, Plaintiff filed a letter with the Court requesting appointment of
11 counsel to represent him in this action, stating that he cannot litigate this action on his own behalf
12 because he suffers from a "mental-illness."

13 The Court is unable to assess at this time whether exceptional circumstances exist which
14 would warrant seeking volunteer counsel to accept a pro bono appointment. The proceedings are at
15 an early stage and it is premature for the Court to determine Plaintiff's likelihood of success on the
16 merits. Moreover, Plaintiff has been able to articulate his claims adequately pro se in light of the
17 complexity of the issues involved. See Agyeman v. Corrections Corp. of America, 390 F.3d 1101,
18 1103 (9th Cir. 2004). In addition, Plaintiff has been directed to file an amended complaint to cure
19 the pleading deficiencies of his complaint. Accordingly, the interests of justice do not require
20 appointment of counsel at this time, and Plaintiff's request (docket no. 14) is DENIED.
21

22 This does not mean, however, that the Court will not consider appointment of counsel at a
23 later juncture in the proceedings; that is, after Plaintiff files his amended complaint, after the Court
24 serves the cognizable claims, and after Defendants have filed their dispositive motion such that the
25 Court will be in a better position to consider the procedural and substantive matters at issue.

26 **CONCLUSION**

27 For the foregoing reasons, the Court orders as follows:
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1. Within **sixty (60) days** from the date of this Order, Plaintiff shall file an amended complaint to correct the pleading deficiencies set forth above. Plaintiff must use the attached civil rights form, write the case number for this action -- Case No. C 09-5527 SBA (PR) -- on the form, clearly label the complaint "Amended Complaint," and complete all sections of the form. Because an amended complaint completely replaces the original complaint, Plaintiff must include in it all the claims he wishes to present. See Ferdik v. Bonzelet, 963 F.2d 1258, 1262 (9th Cir.), cert. denied, 506 U.S. 915 (1992); King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987); London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981). He may not incorporate material from the original complaint by reference. **Plaintiff's failure to file an amended complaint within the sixty-day deadline will result in the dismissal of this action without prejudice.**

2. Plaintiff's request for appointment of counsel (docket no. 14) is DENIED. His request for an extension of time to serve Defendants (docket no. 14) is DENIED as unnecessary.

3. The Clerk of the Court is directed to send Plaintiff a blank civil rights complaint form with his copy of this Order.

4. This Order terminates Docket no. 14.

IT IS SO ORDERED.

DATED: 5/2/11


SAUNDRA BROWN ARMSTRONG
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 CARLOS A. ORTEGA,

Case Number: CV09-05527 SBA

6 Plaintiff,

CERTIFICATE OF SERVICE

7 v.

9 SAN JOSE CITY OF et al,

10 Defendant.
11 _____/

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
13 Court, Northern District of California.

14 That on May 3, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
16 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
17 located in the Clerk's office.

18
19 Carlos A. Ortega #09071890
20 Santa Clara County Corrections - San Jose
21 #CTL532
22 885 N. San Pedro Street
23 San Jose, CA 95110

24 Dated: May 3, 2011

Richard W. Wiekling, Clerk

By: LISA R CLARK, Deputy Clerk