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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

YOUNG LEE,
CDCR #V-32076,

Plaintiff,

vs.

CHARLES TACHE, et al.;

Defendants.

Civil No. 09cv2169 BTM (WMc)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350.00
BALANCE FROM PRISONER'S
TRUST ACCOUNT [Doc. No. 2];**

**(2) DISMISSING COMPLAINT
FOR FAILURE TO STATE A
CLAIM PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) AND 1915A(b)**

Young Lee, a state prisoner currently incarcerated at Centinela State Prison located in Imperial, California, and proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

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1 **I. Motion to Proceed IFP [Doc. No. 2]**

2 All parties instituting any civil action, suit or proceeding in a district court of the United
3 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
4 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
5 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). However,
6 prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments,
7 regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

8 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
9 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Therefore, the Court **GRANTS**
10 Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and assesses no initial partial filing fee per 28
11 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fee mandated shall be
12 collected and forwarded to the Clerk of the Court pursuant to the installment payment provisions
13 set forth in 28 U.S.C. § 1915(b)(1).

14 **II. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

15 Notwithstanding IFP status or the payment of any partial filing fees, the Court must
16 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening
17 and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a
18 claim upon which relief may be granted, or seeking monetary relief from a defendant immune
19 from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir.
20 2001); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc).

21 “[W]hen determining whether a complaint states a claim, a court must accept as true all
22 allegations of material fact and must construe those facts in the light most favorable to the
23 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). In addition, the Court has a duty
24 to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839
25 F.2d 621, 623 (9th Cir. 1988), which is “particularly important in civil rights cases.” *Ferdik v.*
26 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

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1 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
2 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
3 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
4 United States. *See* 42 U.S.C. § 1983.

5 In his Complaint, Plaintiff alleges that two unnamed Orthopedic surgeons determined that
6 Plaintiff required surgery for his knee. *See* Compl. at 3. Plaintiff claims that the “CDCR denied
7 the surgery” so he filed an administrative grievance. *Id.* Defendants Tache, a Registered Nurse,
8 and Galen Church, a Chief Medical Officer for an “out of state correctional facility,” denied
9 Plaintiff’s administrative grievance at the second level of review. *Id.* Plaintiff claims that he
10 submitted his grievance to the Director’s Level of Review, but as of the date he filed this action
11 he had not received a response. *Id.*

12 In order to assert a claim for inadequate medical care, Plaintiff must allege facts which
13 are sufficient to show that each person sued was “deliberately indifferent to his serious medical
14 needs.” *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106
15 (1976); *Hunt v. Dental Dept.*, 865 F.2d 198, 200 (9th Cir. 1989). To be liable, prison officials
16 must purposefully ignore or fail to respond to Plaintiff’s pain or medical needs. *Estelle*, 429 U.S.
17 at 105-06.

18 Thus, to state a claim, Plaintiff must allege facts sufficient to show both: (1) an
19 objectively “serious” medical need, i.e., one that a reasonable doctor would think worthy of
20 comment, one which significantly affects his daily activities, or one which is chronic and
21 accompanied by substantial pain, *see Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994);
22 and (2) a subjective, and “sufficiently culpable” state of mind on the part of each individual
23 Defendant. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991).

24 The indifference to medical needs also must be substantial; inadequate treatment due to
25 malpractice, or even gross negligence, does not amount to a constitutional violation. *Estelle*, 429
26 U.S. at 106; *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). Here, Plaintiff pleads
27 very few facts from which the Court could find that he has sufficiently alleged a serious medical
28 need. Additionally, Plaintiff has failed to plead sufficient facts to show how any of the named

1 Defendants were “deliberately indifferent.” A mere difference of opinion between an inmate and
2 prison medical personnel regarding appropriate medical diagnosis and treatment is not enough
3 to establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).
4 Thus, the Court finds that Plaintiff has failed to allege an Eighth Amendment deliberate
5 indifference to a serious medical need claim.

6 The Court also cautions Plaintiff that while he may file an Amended Complaint, his
7 Complaint may ultimately be dismissed for failing to exhaust his administrative remedies *prior*
8 to filing this action. The PLRA provides, in part, that “[n]o action shall be brought with respect
9 to prison conditions under section 1983 . . . by a prisoner confined in any jail, prison or other
10 correctional facility until such administrative remedies as are available are exhausted.” 42
11 U.S.C. § 1997e(a). “Once within the discretion of the district court, exhaustion in cases covered
12 by § 1997e(a) is now mandatory.” *Porter v. Nussle*, 534 U.S. 516 (2002). “The ‘available’
13 ‘remed[y]’ must be ‘exhausted’ before a complaint under § 1983 may be entertained,” *Booth*
14 *v. Churner*, 532 U.S. 731, 738 (2001), and “regardless of the relief offered through
15 administrative procedures.” *Id.* at 741. Moreover, the Supreme Court held in *Woodford v. Ngo*,
16 548 U.S. 81, 90 (2006) that “[p]roper exhaustion demands compliance with an agency’s
17 deadlines and other critical procedural rules because no adjudicative system can function
18 effectively without imposing some orderly structure on the course of its proceedings.” *Id.*

19 The Ninth Circuit has also held that Section 1997e(a) “clearly contemplates exhaustion
20 *prior* to the commencement of the action as an indispensable requirement. Exhaustion
21 subsequent to the filing of the suit will not suffice.” *McKinney v. Carey*, 311 F.3d 1198 (9th Cir.
22 2002) (quoting *Medina-Claudio v. Rodriquez-Mateo*, 292 F.3d 31, 36 (1st Cir. 2002)).

23 Thus, because Plaintiff concedes that he failed to exhaust his available administrative
24 remedies prior to bringing this action, his action is subject to dismissal for failing to satisfy 42
25 U.S.C. § 1997e(a). *See Wyatt v. Terhune*, 315 F.3d 1108, 1121 (9th Cir. 2003) (“A prisoner’s
26 concession to nonexhaustion is a valid ground for dismissal, so long as no exception to
27 exhaustion applies.”). If Plaintiff chooses to file an Amended Complaint, he must be able to
28 show that an exception exists that would permit him to file this action before he completed the

1 administrative grievance process. *Id.*

2 **III. Conclusion and Order**

3 Good cause appearing, **IT IS HEREBY ORDERED** that:

4 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
5 **GRANTED.**

6 2. The Secretary of California Department of Corrections and Rehabilitation, or his
7 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
8 owed in this case by collecting monthly payments from the account in an amount equal to twenty
9 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
10 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
11 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
12 **ASSIGNED TO THIS ACTION.**

13 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
14 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
15 Sacramento, California 95814.

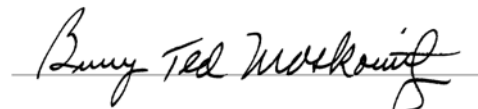
16 **IT IS FURTHER ORDERED** that:

17 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
18 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
19 from the date this Order is "Filed" in which to file a First Amended Complaint which cures all
20 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
21 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants
22 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been
23 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

24 5. The Clerk is directed to mail a court approved § 1983 complaint form to Plaintiff.

25 **IT IS SO ORDERED.**

26 DATED: November 12, 2009

27 
28 Honorable Barry Ted Moskowitz
United States District Judge