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

ALBERTO JOSE DEL MURO,
BOP #40467-198,

Plaintiff,

vs.

FERNANDO A. ARRIOLA, et al.,

Defendants.

Civil No. 09-2571 JM (WMc)

ORDER:

**(1) GRANTING MOTIONS TO
PROCEED *IN FORMA
PAUPERIS*, IMPOSING NO
INITIAL PARTIAL FILING FEE
AND GARNISHING BALANCE
FROM PRISONER’S TRUST
ACCOUNT [Doc. Nos. 2, 4]; AND**

**(2) SUA SPONTE DISMISSING
FIRST AMENDED COMPLAINT
FOR FAILING TO STATE A
CLAIM PURSUANT TO
28 U.S.C. §§ 1915(e)(2) &
1915A(b)**

Plaintiff, Alberto Jose De Muro Guerrero, an inmate currently incarcerated at the Metropolitan Correctional Center (“MCC”) located in San Diego, California and proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983. Before the Court could conduct the required sua sponte screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b), Plaintiff filed a First Amended Complaint (“FAC”) which is now the operative pleading. In addition, Plaintiff filed two Motions to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2, 4].

1 **I. Motions to Proceed IFP [Doc. Nos. 2, 4]**

2 All parties instituting any civil action, suit or proceeding in a district court of the United States,
3 except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a).
4 An action may proceed despite a party's failure to prepay the entire fee only if the party is granted leave
5 to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir.
6 1999). Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in
7 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28 U.S.C. §
8 1915(b)(1) & (2).

9 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner
10 seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or
11 institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of
12 the complaint." 28 U.S.C. § 1915(a)(2). From the certified trust account statement, the Court must
13 assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six
14 months, or (b) the average monthly balance in the account for the past six months, whichever is
15 greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). That
16 institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the
17 preceding month's income, in any month
18 in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire
19 filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

20 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
21 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to 28
22 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that he has
23 insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that
24 "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
25 criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial
26 partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"
27 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack of
28 funds available to him when payment is ordered."). Therefore, the Court **GRANTS** Plaintiff's Motions

1 to Proceed IFP [Doc. Nos. 2, 4] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
2 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the
3 Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

4 **II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

5 **A. Standard**

6 The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and
7 by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced
8 for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
9 probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” *See* 28
10 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any IFP
11 or prisoner complaint, or any portion thereof, which is frivolous, malicious, fails to state a claim, or
12 which seeks damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A;
13 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213
14 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

15 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal
16 of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is frivolous if it lacks
17 an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319, 324 (1989). However 28
18 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing an IFP or prisoner’s suit make
19 and rule on its own motion to dismiss before effecting service of the Complaint by the U.S. Marshal
20 pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits, but requires a district
21 court to dismiss an in forma pauperis complaint that fails to state a claim.”); *see also Barren v.*
22 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

23 “[W]hen determining whether a complaint states a claim, a court must accept as true all
24 allegations of material fact and must construe those facts in the light most favorable to the plaintiff.”
25 *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of
26 Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s duty to liberally construe a pro se’s
27 pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988), is
28 “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

1 **B. Bivens Action**

2 While Plaintiff filed this action pursuant to 42 U.S.C. § 1983, he names only Federal actors as
3 Defendants. Accordingly, the Court will consider Plaintiff’s claims to arise under *Bivens v. Six*
4 *Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Bivens* established that “compensable
5 injury to a constitutionally protected interest [by federal officials alleged to have acted under color of
6 federal law] could be vindicated by a suit for damages invoking the general federal question jurisdiction
7 of the federal courts [pursuant to 28 U.S.C. § 1331].” *Butz v. Economou*, 438 U.S. 478, 486 (1978).
8 “Actions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor
9 under § 1983 by a federal actor under *Bivens*.” *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

10 *Bivens* provides that “federal courts have the inherent authority to award damages against federal
11 officials to compensate plaintiffs for violations of their constitutional rights.” *Western Center for*
12 *Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000). However, a *Bivens* action may only be
13 brought against the responsible federal official in his or her individual capacity. *Daly-Murphy v.*
14 *Winston*, 837 F.2d 348, 355 (9th Cir. 1988). *Bivens* does not authorize a suit against the government
15 or its agencies for monetary relief. *FDIC v. Meyer*, 510 U.S. 471, 486 (1994); *Thomas-Lazear v. FBI*,
16 851 F.2d 1202, 1207 (9th Cir. 1988); *Daly- Murphy*, 837 F.2d at 355.

17 **C. Eighth Amendment - Medical care claims**

18 In his First Amended Complaint, Plaintiff claims that Defendants have violated his Eighth
19 Amendment rights by “ignoring [Plaintiff’s] petition of nose surgery.” (FAC at 2.) Plaintiff alleges that
20 he suffers from sleep apnea. (*Id.* at 4.)

21 Where a prisoner’s Eighth Amendment claim is one of inadequate medical care, the prisoner
22 must allege “acts or omissions sufficiently harmful to evidence deliberate indifference to serious
23 medical needs.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Such a claim has two elements: “the
24 seriousness of the prisoner’s medical need and the nature of the defendant’s response to that need.”
25 *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs.,*
26 *Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). A medical need is serious “if the failure to treat the
27 prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction
28 of pain.’” *McGuckin*, 974 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104). Indications of a serious

1 medical need include “the presence of a medical condition that significantly affects an individual’s daily
2 activities.” *Id.* at 1059-60. By establishing the existence of a serious medical need, a prisoner satisfies
3 the objective requirement for proving an Eighth Amendment violation. *Farmer v. Brennan*, 511 U.S.
4 825, 834 (1994).

5 Even if Plaintiff has alleged facts sufficient to establish the existence of a serious medical need,
6 he must also allege that each Defendant’s response to his need was deliberately indifferent. *Farmer*,
7 511 U.S. at 834. In general, deliberate indifference may be shown when prison officials deny, delay,
8 or intentionally interfere with a prescribed course of medical treatment, or it may be shown by the way
9 in which prison medical officials provide necessary care. *Hutchinson v. United States*, 838 F.2d 390,
10 393-94 (9th Cir. 1988). Before it can be said that a prisoner’s civil rights have been abridged with
11 regard to medical care, however, “the indifference to his medical needs must be substantial. Mere
12 ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause of action.” *Broughton*
13 *v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S. at 105-06). *See also*
14 *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

15 Plaintiff claims that an unidentified Doctor has indicated that he needs surgery for his medical
16 condition. (*See* FAC at 4.) However, the documents attached to Plaintiff’s First Amended Complaint
17 indicate that prison officials have given him medication and provided him with medical examinations.
18 (*See* FAC at 33, Response to Administrative Remedy No. 526805-A1). This document reflects that
19 prison officials and Plaintiff have a difference of opinion with regard to the course of treatment for his
20 medical condition. None of the documents attached to Plaintiff’s First Amended Complaint show any
21 documentation of a recommendation by a Doctor that Plaintiff requires surgery for his condition. A
22 mere difference of opinion between an inmate and prison medical personnel regarding appropriate
23 medical diagnosis and treatment are not enough to establish a deliberate indifference claim. *Sanchez*
24 *v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

25 Accordingly, Plaintiff’s Eighth Amendment medical deliberate indifference claims are
26 **DISMISSED** for failing to state a claim upon which relief can be granted.

27 **D. Fourteenth Amendment Equal Protection Claims**
28

1 Plaintiff alleges that he was discriminated against based on his race in violation of his right to
2 equal protection under the law. The “Equal Protection Clause of the Fourteenth Amendment commands
3 that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which
4 is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne*
5 *v. Cleburne Living Center, Inc.* 473 U.S. 432, 439 (1985). In order to state a claim alleging violations
6 of the equal protection clause of the Fourteenth Amendment, Plaintiff must allege facts which
7 demonstrate that he is a member of a protected class. *See Harris v. McRae*, 448 U.S. 297, 323 (1980)
8 (indigents); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (listing
9 suspect classes). In this matter, Plaintiff has sufficiently plead that he is a member of a suspect class
10 but he has failed to plead adequate facts to demonstrate that Defendants acted with an intent or purpose
11 to discriminate against him based upon his membership in a protected class. *See Barren v. Harrington*,
12 152 F.3d 1193, 1194 (9th Cir. 1998), *cert. denied*, 525 U.S. 1154 (1999). Here, Plaintiff only alleges
13 that he “feels” discriminated against because he is Hispanic but he does not allege any specific facts to
14 support this claim. Thus, the Court finds that Plaintiff’s allegations are insufficient to prove invidious
15 discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429
16 U.S. 252, 265 (1977).

17 Accordingly, the Court dismisses Plaintiff’s First Amended Complaint for failing to state a claim
18 upon which relief can be granted. *See* 28 U.S.C. § 1915(e)(2) & § 1915A. However, Plaintiff will be
19 permitted the opportunity to file an Amended Complaint.

20 **III. CONCLUSION AND ORDER**

21 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

- 22 1. Plaintiff’s Motions to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. Nos. 2, 4] are
23 **GRANTED.**
- 24 2. The Warden of the Metropolitan Correctional Center, or his designee, shall collect from
25 Plaintiff’s prison trust account the \$350 balance of the filing fee owed in this case by collecting monthly
26 payments from the account in an amount equal to twenty percent (20%) of the preceding month’s
27 income and forward payments to the Clerk of the Court each time the amount in the account exceeds
28

1 \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
2 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

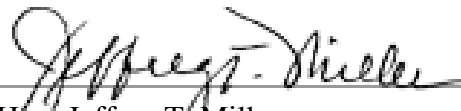
3 3. The Clerk of the Court is directed to serve a copy of this Order on Warden, Metropolitan
4 Correctional Center, 808 Union Street, San Diego, CA 92101.

5 **IT IS FURTHER ORDERED** that:

6 4. Plaintiff's First Amended Complaint is **DISMISSED** without prejudice pursuant to 28
7 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
8 from the date this Order is "Filed" in which to file a Second Amended Complaint which cures all the
9 deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without
10 reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants not named and all
11 claims not re-alleged in the Amended Complaint will be deemed to have been waived. *See King v.*
12 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a
13 claim upon which relief may be granted, it may be dismissed without further leave to amend and
14 may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d
15 1172, 1177-79 (9th Cir. 1996).

16 **IT IS SO ORDERED.**

17
18 DATED: February 5, 2010

19 
20 Hon. Jeffrey T. Miller
United States District Judge