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

EDUARDO PEGUEROS,
BOP #12026-298,

Plaintiff,

vs.

JUAN VILLASENOR; DAVID LUSCHE;
FARIES; FEDERAL BUREAU OF
PRISONS,

Defendants.

Civil No. 10cv1866 JLS (BLM)

ORDER:

**(1) GRANTING PLAINTIFF’S
MOTION TO PROCEED *IN
FORMA PAUPERIS*, IMPOSING
INITIAL PARTIAL FILING FEE
AND GARNISHING BALANCE
FROM PRISONER’S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a); and**

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

Plaintiff, Eduardo Pegueros, an inmate currently incarcerated at the Metropolitan Correctional Center located in San Diego, California, has filed a civil rights action pursuant to 42 U.S.C. § 1983. In addition, 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**

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 he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
6 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
7 remains obligated to pay the entire fee in installments, regardless of whether his action is
8 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
9 (9th Cir. 2002).

10 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
11 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
12 statement (or institutional equivalent) for the prisoner for the six-month period immediately
13 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
14 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
15 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
16 (b) the average monthly balance in the account for the past six months, whichever is greater,
17 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
18 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
19 of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and
20 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
21 § 1915(b)(2).

22 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
23 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.
24 Plaintiff’s statement shows a current available balance of \$440.00, an average monthly balance
25 of \$28.23, and average monthly deposits totaling \$464.20. Based on this financial information,
26 the Court GRANTS Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and assesses an initial partial
27 filing fee of \$85.65 pursuant to 28 U.S.C. § 1915(b)(1).

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

2 **A. Standard**

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

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

22 “[W]hen determining whether a complaint states a claim, a court must accept as true all
23 allegations of material fact and must construe those facts in the light most favorable to the
24 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
25 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
26 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
27 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
28 *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
3 actors and a Federal Agency as Defendants. Accordingly, the Court will consider Plaintiff’s
4 claims to arise under *Bivens v. Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388 (1971).
5 *Bivens* established that “compensable injury to a constitutionally protected interest [by federal
6 officials alleged to have acted under color of federal law] could be vindicated by a suit for
7 damages invoking the general federal question jurisdiction of the federal courts [pursuant to 28
8 U.S.C. § 1331].” *Butz v. Economou*, 438 U.S. 478, 486 (1978). “Actions under § 1983 and
9 those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a
10 federal actor under *Bivens*.” *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

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

20 **C. Inadequate Medical Care Claims**

21 Plaintiff claims that his Eighth Amendment rights have been violated by inadequate
22 medical care. However, because it is not clear whether Plaintiff was a pre trial detainee at the
23 time he alleges the violations occurred or a prisoner serving a criminal sentence, the Eighth
24 Amendment may not apply to him. *Bell v Wolfish*, 441 U.S. 520, 535 n.16 (1979) (“Eighth
25 Amendment scrutiny is appropriate only after the State has complied with the constitutional
26 guarantees traditionally associated with criminal prosecutions. . . . [and] the State does not
27 acquire the power to punish with which the Eighth Amendment is concerned until after it has
28 secured a formal adjudication of guilt in accordance with due process of law.”); *Gibson v.*

1 *County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (“Because [petitioner] had not been
2 convicted of a crime, but had only been arrested, his rights derive from the due process clause
3 rather than the Eighth Amendment’s protection against cruel and unusual punishment.”).

4 Rather, Plaintiff’s conditions of confinement claims must be analyzed under “the more
5 protective” substantive due process standard. *Jones v. Blanas*, 393 F.3d 918, 931-33 (9th Cir.
6 2004); *see also Wolfish*, 441 U.S. at 538-39 (“Absent a showing of an express intent to punish
7 on the part of detention facility officials, . . . if a particular condition or restriction of pretrial
8 detention is reasonably related to a legitimate governmental objective, it does not, without more,
9 amount to ‘punishment.’”); *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998)
10 (“The concept of ‘substantive due process,’ semantically awkward as it may be, forbids the
11 government from depriving a person of life, liberty, or property in such a way that ‘shocks the
12 conscience’ or ‘interferes with rights implicit in the concept of ordered liberty.’”) (quoting
13 *United States v. Salerno*, 481 U.S. 739, 746 (1987)). However, “the due process clause imposes,
14 *at a minimum*, the same duty the Eighth Amendment imposes: ‘persons in custody ha(ve) the
15 established right not to have officials remain deliberately indifferent’” to their needs. *Gibson*,
16 290 F.3d at 1187 (quoting *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996)); *Lolli v. County*
17 *of Orange*, 351 F.3d 410, 418-19 (9th Cir. 2003). The Court will therefore look to Eighth
18 Amendment standards to determine the minimum level of protection afforded Plaintiff.

19 In his Complaint, Plaintiff alleges that Defendants refused to treat his medical condition
20 which he claims is a rash that causes “high levels of pain.” (Compl. at 3.) Where a prisoner’s
21 Eighth Amendment claim is one of inadequate medical care, the prisoner must allege “acts or
22 omissions sufficiently harmful to evidence deliberate indifference to serious medical needs.”
23 *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Such a claim has two elements: “the seriousness
24 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*
26 *Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997). A medical need is serious “if the
27 failure to treat the prisoner’s condition could result in further significant injury or the
28 ‘unnecessary and wanton infliction of pain.’” *McGuckin*, 974 F.2d at 1059 (quoting *Estelle*, 429

1 U.S. at 104). Indications of a serious medical need include “the presence of a medical condition
2 that significantly affects an individual’s daily activities.” *Id.* at 1059-60. By establishing the
3 existence of a serious medical need, a prisoner satisfies the objective requirement for proving
4 an Eighth Amendment violation. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

5 Plaintiff’s Complaint lacks sufficient allegations to demonstrate that he has a “serious”
6 medical need. Even if Plaintiff has alleged facts sufficient to establish the existence of a serious
7 medical need, he must also allege that each Defendant’s response to his need was deliberately
8 indifferent. *Farmer*, 511 U.S. at 834. In general, deliberate indifference may be shown when
9 prison officials deny, delay, or intentionally interfere with a prescribed course of medical
10 treatment, or it may be shown by the way in which prison medical officials provide necessary
11 care. *Hutchinson v. United States*, 838 F.2d 390, 393-94 (9th Cir. 1988). Before it can be said
12 that a prisoner’s civil rights have been abridged with regard to medical care, however, “the
13 indifference to his medical needs must be substantial. Mere ‘indifference,’ ‘negligence,’ or
14 ‘medical malpractice’ will not support this cause of action.” *Broughton v. Cutter Laboratories*,
15 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle*, 429 U.S. at 105-06). *See also Toguchi v.*
16 *Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

17 Plaintiff has attached documents to his Complaint that shows he was medically examined
18 on a number of occasions in response to his complaints of a skin rash. (*See Compl.*,
19 *Attachments*.) The response by those that examined Plaintiff indicate that they did not observe
20 a rash and thus, were not able to provide him with treatment. (*Id.*) A difference of opinion
21 between an inmate and prison medical personnel regarding appropriate medical diagnosis and
22 treatment are not enough to establish a deliberate indifference claim. *Sanchez v. Vild*, 891 F.2d
23 240, 242 (9th Cir. 1989).

24 Accordingly, the Court dismisses Plaintiff’s Eighth Amendment inadequate medical care
25 claims for failing to state a claim upon which relief can be granted.

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1 The Court dismisses Plaintiff's Complaint for failing to state a claim upon which relief
2 can be granted. See 28 U.S.C. § 1915(e)(2) & § 1915A. However, Plaintiff will be permitted
3 the opportunity to file an Amended Complaint.

4 **III. CONCLUSION AND ORDER**

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

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

8 2. The Warden for the Metropolitan Correctional Center, or his designee, is ordered
9 to collect the \$5.65 initial partial filing fee assessed by this Order and forward that amount
10 to the Clerk of Court, *if those funds are available at the time this Order is executed*. **THE**
11 **INITIAL PARTIAL FILING FEE SHALL BE CLEARLY IDENTIFIED BY THE NAME AND**
12 **NUMBER ASSIGNED TO THIS ACTION.**

13 3. The Warden for the Metropolitan Correctional Center, or his designee, is ordered
14 to collect from Plaintiff's prison trust account the balance of the \$350 filing fee owed in this case
15 by collecting monthly payments from Plaintiff's prison trust account in an amount equal to
16 twenty percent (20%) of the preceding month's income credited to the account and forward
17 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in accord-
18 ance with 28 U.S.C. § 1915(b)(2). **ALL MONTHLY PAYMENTS SHALL BE CLEARLY**
19 **IDENTIFIED BY THAT NAME AND NUMBER ASSIGNED TO THIS ACTION.**

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

22 **IT IS FURTHER ORDERED** that:


23 5. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim
24 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b).
25 However, Plaintiff is further **GRANTED** forty five (45) days leave from the date this Order is
26 filed in which to file a First Amended Complaint which cures all the deficiencies of pleading
27 noted above. Plaintiff's Amended Complaint must be complete in itself without reference to
28 his previous pleading. See S.D. CAL. CIVLR 15.1. Defendants not named and all claims not re-

1 alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565,
2 567 (9th Cir. 1987).

3 6. The Clerk of Court is directed to mail a Court approved form civil rights complaint
4 to Plaintiff.

5 **IT IS SO ORDERED.**

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7 DATED: October 12, 2010

8 
9 Honorable Janis L. Sammartino
10 United States District Judge

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