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

JONATHAN AYALA,  
CDCR #F-25736,

Plaintiff,

vs.

W. FERMON; W.L. MONTGOMERY,

Defendants.

Civil No. 14cv1794 GPC (JLB)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*  
[Doc. No. 3]**

**AND**

**(2) DISMISSING COMPLAINT  
FOR FAILING TO STATE A  
CLAIM PURSUANT TO  
28 U.S.C. § 1915(e)(2)(B)(ii)  
AND § 1915A(b)(1)**

Jonathan Ayala (“Plaintiff”), a state prisoner currently incarcerated at Calipatria State Prison (“CAL”) located in Calipatria, California, and proceeding pro se, has filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983 (Doc. No. 1).

Plaintiff has not prepaid the civil filing fee; instead he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (Doc. No. 3).

**I.**

**PLAINTIFF’S MOTION TO PROCEED IFP**

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of

1 \$400. *See* 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite a plaintiff’s failure to  
2 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
3 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a  
4 prisoner granted leave to proceed IFP remains obligated to pay the entire fee in  
5 installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C.  
6 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

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

20 In support of his IFP Motion, Plaintiff has submitted a certified copies of his trust  
21 account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.  
22 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account statement,  
23 as well as the prison certificate issued by an accounting clerk at CAL verifying his  
24 available balances, and has determined that he has no money in his account, and no  
25 monthly deposits or balance in his account during the 6-month period preceding the

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27 <sup>1</sup> In addition to the \$350 statutory fee, all parties filing civil actions on or after  
28 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a)  
(Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule) (eff. May 1,  
2013). However, the additional \$50 administrative fee is waived if the plaintiff is  
granted leave to proceed IFP. *Id.*

1 filing of this action. Therefore, Plaintiff has no available funds from which to pay an  
2 initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no  
3 event shall a prisoner be prohibited from bringing a civil action or appealing a civil  
4 action or criminal judgment for the reason that the prisoner has no assets and no means  
5 by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28  
6 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case  
7 based solely on a “failure to pay . . . due to the lack of funds available to him when  
8 payment is ordered.”).

9 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (Doc. No. 3) and  
10 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350  
11 balance of the filing fees mandated will be collected by the CDCR and forwarded to the  
12 Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.  
13 § 1915(b)(1).

## 14 II.

### 15 INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A(b)

#### 16 A. Standard of Review

17 Notwithstanding Plaintiff’s IFP status or the payment of any partial filing fees, the  
18 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP  
19 and by those, like Plaintiff, who are “incarcerated or detained in any facility [and]  
20 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the  
21 terms or conditions of parole, probation, pretrial release, or diversionary program,” “as  
22 soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under  
23 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,  
24 which are frivolous, malicious, fail to state a claim, or which seek damages from  
25 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*  
26 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*  
27 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

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1 All complaints must contain “a short and plain statement of the claim showing that  
2 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are  
3 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by  
4 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)  
5 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining  
6 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that  
7 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*  
8 The “mere possibility of misconduct” falls short of meeting this plausibility standard.  
9 *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

10 “When there are well-pleaded factual allegations, a court should assume their  
11 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
12 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
13 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
14 allegations of material fact and must construe those facts in the light most favorable to  
15 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
16 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

17 However, while the court “ha[s] an obligation where the petitioner is pro se,  
18 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
19 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.  
20 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not  
21 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*  
22 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

### 23 **B. Plaintiff’s Complaint**

24 Plaintiff’s Complaint contains very few factual allegations but he does allege that  
25 Defendant Ferman used excessive force against him when he used “his state issued  
26 40mm launcher” by “negligently discharging a round and effectively impacting my upper  
27 eye brow on my right side, I lost consciousness.” (Compl. at 1.)

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1 Any physical application of force against a person in custody, whether it be  
2 through brute strength, chemical or other weaponry, or mechanical restraint, may not be  
3 excessive. *See Whitley v. Albers*, 475 U.S. 312 (1986) (prison shooting); *Hudson v.*  
4 *McMillian*, 503 U.S. 1 (1992) (prison beating); *LeMaire v. Maass*, 12 F.3d 1444, 1450-  
5 53, 1457, 1460 (9th Cir. 1993) (prison’s use of in-shower and in-cell leg and waist  
6 restraints). “That is not to say that every malevolent touch by a prison guard gives rise  
7 to a federal cause of action.” *Hudson*, 503 U.S. at 10 (citing *Johnson v. Glick*, 481 F.2d  
8 1028, 1033 (2d Cir. 1973) (“Not every push or shove, even if it may later seem  
9 unnecessary in the peace of a judge’s chambers, violates a prisoner’s constitutional  
10 rights”). In order to violate the Eighth Amendment, the Defendant must use force which  
11 is “unnecessary” and “wanton.” *Whitley*, 475 U.S. at 319. “It is obduracy and  
12 wantonness, not inadvertence or error in good faith, that characterize the conduct  
13 prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs  
14 in connection with establishing conditions of confinement, supplying medical needs, or  
15 restoring official control over a tumultuous cellblock.” *Id.*

16 Thus, a constitutional violation can only be established if force was used  
17 “maliciously and sadistically for the purpose of causing harm.” *Id.*; *see also Wilson v.*  
18 *Seiter*, 501 U.S. 294, 298 (1991) (claims that an official has inflicted cruel and unusual  
19 punishment contain both an objective component as well as a subjective “inquiry into the  
20 prison official’s state of mind”). Here, the Court finds that Plaintiff’s claims, due in part  
21 to a lack of sufficient factual allegations, fail to rise to the level of an Eighth Amendment  
22 violation. There are no factual allegations, other than a claim of negligence, from which  
23 the Court could find that any of the named Defendants acted with malicious or sadistic  
24 intent.

25 Accordingly, the Court finds that Plaintiff has failed to state an Eighth Amendment  
26 against any of the named Defendants, and that these claims must be dismissed pursuant  
27 to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*,  
28 213 F.3d at 446.

1 Because Plaintiff is proceeding *pro se*, however, the Court having now provided  
2 him with “notice of the deficiencies in his complaint,” will also grant him an opportunity  
3 to “effectively” amend. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing  
4 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

5 **III.**

6 **CONCLUSION AND ORDER**

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

8 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF  
9 Doc. No. 3) is **GRANTED**.

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

17 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey  
18 A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O. Box  
19 942883, Sacramento, California, 94283-0001.

20 **IT IS FURTHER ORDERED** that:

21 4. Plaintiff’s Complaint is **DISMISSED** without prejudice for failing to state  
22 a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is  
23 **GRANTED** forty five (45) days leave from the date this Order is entered into the Court’s  
24 docket in which to file a First Amended Complaint which cures all the deficiencies of  
25 pleading noted above. Plaintiff’s Amended Complaint must be complete in itself without  
26 reference to his original pleading. *See S.D. CAL. CIVLR 15.1; Hal Roach Studios, Inc.*  
27 *v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended  
28 pleading supersedes the original.”); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)

1 (citation omitted) (“All causes of action alleged in an original complaint which are not  
2 alleged in an amended complaint are waived.”).

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

5 DATED: September 3, 2014

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8 HON. GONZALO P. CURIEL  
United States District Judge

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