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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 ROBERT HAN,

12 Plaintiff,

13 v.

14 DR. D. HJERPE; L. FLORES; C.  
15 SANCHEZ; DOES 1 - 20,

16 Defendants.  
17

Case No. 3:16-cv-00522-BAS-RBB

**ORDER: (1) GRANTING MOTION  
TO PROCEED IN FORMA  
PAUPERIS; AND (2) DISMISSING  
COMPLAINT FOR FAILING TO  
STATE A CLAIM**

18 Robert Han (“Plaintiff”), currently incarcerated at Calipatria State Prison located in  
19 Calipatria, California, and proceeding pro se, has filed a civil rights complaint (“Compl.”)  
20 pursuant to 42 U.S.C. § 1983. (ECF No. 1.)

21 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when  
22 he filed his Complaint; instead, he has filed a Motion to Proceed *In Forma Pauperis*  
23 (“IFP”) pursuant to 28 U.S.C. § 1915(a). (ECF No. 2.)

24 **I. Plaintiff’s Motion to Proceed IFP**

25 All parties instituting any civil action, suit or proceeding in a district court of the  
26 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*  
27 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the  
28 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*

1 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a  
2 prisoner and he is granted leave to proceed IFP, he remains obligated to pay the entire fee  
3 in “increments,” *see Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), regardless  
4 of whether his action is ultimately dismissed. *See* 28 U.S.C. §§ 1915(b)(1) & (2); *Taylor*  
5 *v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

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

18 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust  
19 account statement pursuant to 28 U.S.C. § 1915(a)(2) and Civ. L.R. 3.2. *See Andrews*,  
20 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account activity which shows  
21 he has a current balance of \$0.00. Accordingly, the Court **GRANTS** Plaintiff’s Motion to  
22 Proceed IFP (ECF No. 2) and assesses no initial partial filing fee per 28 U.S.C. §  
23 1915(b)(1). *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be  
24 prohibited from bringing a civil action or appealing a civil action or criminal judgment  
25 for the reason that the prisoner has no assets and no means by which to pay [an] initial  
26 partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a  
27 “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to  
28 pay . . . due to the lack of funds available.”). However, the entire \$350 balance of the

1 filing fee owed must be collected and forwarded to the Clerk of the Court pursuant to the  
2 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

3 **II. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

4 **A. Standard of Review**

5 Notwithstanding Plaintiff's IFP status or the payment of any filing fees, the PLRA  
6 also requires the Court to review complaints filed by all persons proceeding IFP and by  
7 those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of,  
8 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
9 conditions of parole, probation, pretrial release, or diversionary program," "as soon as  
10 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
11 provisions, the Court must sua sponte dismiss any complaint, or any portion of a  
12 complaint, which is frivolous, malicious, fails to state a claim, or seeks damages from  
13 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*  
14 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*  
15 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

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

25 "When there are well-pleaded factual allegations, a court should assume their  
26 veracity, and then determine whether they plausibly give rise to an entitlement to relief."  
27 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
28 ("[W]hen determining whether a complaint states a claim, a court must accept as true all

1 allegations of material fact and must construe those facts in the light most favorable to  
2 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
3 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

4 However, while the court “ha[s] an obligation where the petitioner is pro se,  
5 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
6 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n. 7 (9th Cir.  
7 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir. 1985)), it may not  
8 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of*  
9 *the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory  
10 allegations of official participation in civil rights violations” are simply not “sufficient to  
11 withstand a motion to dismiss.” *Id.*

## 12 **B. 42 U.S.C. § 1983**

13 “Section 1983 creates a private right of action against individuals who, acting  
14 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*  
15 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of  
16 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
17 conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks  
18 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)  
19 deprivation of a right secured by the Constitution and laws of the United States, and (2)  
20 that the deprivation was committed by a person acting under color of state law.” *Tsao v.*  
21 *Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

## 22 **C. Eighth Amendment Claims**

23 Plaintiff alleges that he “suffered an injury to his left index finger” while playing  
24 basketball. (Compl. at 2.) That same day, due to “severe pain,” Plaintiff sought medical  
25 treatment. (*Id.*) Plaintiff, believing his finger was broken, was examined by Defendant  
26 Flores who “took a brief, cursory glance” at Plaintiff’s finger then “grabbed the injured  
27 finger and jerked it up and down, causing excruciating pain.” (*Id.* at 3.) Flores filled out  
28 a “CDC 7362 Medical Request Form” which Plaintiff has attached as Exhibit “1.” (*Id.*,

1 ECF No. 1 at 8, Ex. 1, “Health Care Services Request Form.”) The form notes  
2 “swelling” and “bruising” and it appears that x-rays were ordered by Defendant Flores.  
3 (*Id.*) Plaintiff was sent back to his cell. (*Id.* at 3.)

4 The next morning Plaintiff asked his “unit officer, Correctional Officer C.  
5 Pennington,” if he could return to the medical clinic to be examined by a physician. (*Id.*  
6 at 3-4.) Plaintiff was later called to the yard clinic and examined by another nurse,  
7 Defendant Sanchez. (*Id.* at 4.) Plaintiff told Defendant Sanchez that he could “not sleep  
8 or move his injured left index finger.” (*Id.*) Defendant Sanchez gave Plaintiff  
9 medication for his pain and told Plaintiff that he would receive an x-ray the next day.  
10 (*Id.*) Plaintiff objected and “asked for his finger to be x-rayed that day.” (*Id.*) Defendant  
11 Sanchez refused. (*Id.*)

12 The next day, Plaintiff went to the yard clinic again and inquired about receiving  
13 the x-ray. (*Id.*) Plaintiff was “sent to his cell without treatment.” (*Id.*) Later that same  
14 day, in the afternoon, Plaintiff complained to Correctional Officer Pennington that he was  
15 in “extreme pain.” (*Id.*) Pennington called the clinic to find out the status of the x-rays  
16 and was told that the “order for x-rays had been botched and had to be resubmitted.”  
17 (*Id.*) Plaintiff received x-rays the following day and was examined by a physician. (*Id.*  
18 at 5.)

19 Only “deliberate indifference to serious medical needs of prisoners constitutes the  
20 unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment.”  
21 *Estelle v. Gamble*, 429 U.S. 97, 103, 104 (1976) (citation and internal quotation marks  
22 omitted). “A determination of ‘deliberate indifference’ involves an examination of two  
23 elements: (1) the seriousness of the prisoner’s medical need and (2) the nature of the  
24 defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.  
25 1991), overruled on other grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.  
26 1997) (en banc) (quoting *Estelle*, 429 U.S. at 104).

27 First, “[b]ecause society does not expect that prisoners will have unqualified access  
28 to health care, deliberate indifference to medical needs amounts to an Eighth Amendment

1 violation only if those needs are ‘serious.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992),  
2 citing *Estelle*, 429 U.S. at 103-104. “A ‘serious’ medical need exists if the failure to treat  
3 a prisoner’s condition could result in further significant injury or the ‘unnecessary and  
4 wanton infliction of pain.’” *McGuckin*, 914 F.2d at 1059 (quoting *Estelle*, 429 U.S. at  
5 104). “The existence of an injury that a reasonable doctor or patient would find important  
6 and worthy of comment or treatment; the presence of a medical condition that  
7 significantly affects an individual’s daily activities; or the existence of chronic and  
8 substantial pain are examples of indications that a prisoner has a ‘serious’ need for  
9 medical treatment.” *Id.* (citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir.  
10 1990)); *Hunt v. Dental Dept.*, 865 F.2d 198, 200-01 (9th Cir. 1989).

11 Plaintiff alleges to have suffered a broken finger, which the Court finds sufficient  
12 to plead an objectively serious medical need. *McGuckin*, 914 F.2d at 1059. However,  
13 even assuming Plaintiff’s medical needs are sufficiently serious, his Complaint still fails  
14 to include any further “factual content” to show that any Defendant acted with “deliberate  
15 indifference” to his needs. *Id.* at 1060; *see also Jett v. Penner*, 439 F.3d 1091, 1096 (9th  
16 Cir. 2006); *Iqbal*, 556 U.S. at 678.

17 Specifically, Plaintiff acknowledges that he was seen and examined by Defendants  
18 Flores and Sanchez in the two days following his accident. (*See Compl.* at 3-4.) He  
19 further acknowledges that both Defendants ordered x-rays for his finger and Defendant  
20 Sanchez also provided him with pain medication. (*Id.*) While Plaintiff concludes  
21 Defendants acted with “deliberate indifference” by failing to provide the x-rays in a  
22 timelier manner, his Complaint lacks sufficient factual allegations to demonstrate any  
23 Defendant’s “purposeful act or failure to respond to [his] pain or possible medical need,”  
24 and any “harm caused by [this] indifference.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*,  
25 550 U.S. at 557); *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citing *Jett*,  
26 439 F.3d at 1096). This is because to be deliberately indifferent, Flores and Sanchez’s  
27 acts or omissions must involve more than an ordinary lack of due care. *Snow v.*  
28 *McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (citation and quotation marks omitted);

1 *Wilhelm*, 680 F.3d at 1122. “A difference of opinion between a physician and the  
2 prisoner—or between medical professionals—concerning what medical care is appropriate  
3 does not amount to deliberate indifference.” *Snow*, 681 F.3d at 987 (citing *Sanchez v.*  
4 *Vild*, 891 F.2d 240, 242 (9th Cir. 1989)); *Wilhelm*, 680 F.3d at 1122–23. Instead, Plaintiff  
5 must plead facts sufficient to “show that the course of treatment the doctor[] chose was  
6 medically unacceptable under the circumstances and that the defendant[] chose this  
7 course in conscious disregard of an excessive risk to [his] health.” *Snow*, 681 F.3d at 988  
8 (citation and internal quotations omitted).

9 Plaintiff’s Complaint, however, contains no facts sufficient to show that either of  
10 Flores or Sanchez acted with deliberate indifference to his plight by “knowing of and  
11 disregarding an[y] excessive risk to his health and safety.” *Farmer v. Brennan*, 511 U.S.  
12 825, 837 (1994). Delays in receiving treatment do not by themselves show deliberate  
13 indifference, unless the delay is alleged to be harmful. *See McGuckin*, 974 F.2d at 1060;  
14 *Shapley v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985). Here,  
15 Plaintiff alleges no facts from which the Court could find that any delay that may have  
16 occurred in diagnosing his broken finger caused any harm.

17 Plaintiff also seeks to hold Defendant Hjerpe liable because “Dr. Hjerpe was not  
18 only made aware of plaintiff’s injury, but also interviewed plaintiff for appeal.” (Compl.  
19 at 5.) However, it appears that any knowledge on the part of Defendant Hjerpe of  
20 Plaintiff’s claims came after he received the treatment. There are no allegations that  
21 Hjerpe was aware of the alleged delays in treatment while they were ongoing. Plaintiff  
22 seeks to hold Defendant Hjerpe liable for his role in responding to Plaintiff’s grievances  
23 but this alone is insufficient to find an Eighth Amendment violation. *See Peralta v.*  
24 *Dillard*, 744 F.3d 1076, 1086 (9th Cir. 2014) (finding no Eighth Amendment deliberate  
25 indifference claim arising from a physician’s response to a grievance where they relied  
26 on the medical opinions of staff who investigated the plaintiff’s “complaints and already  
27 signed off on the treatment plan”).  
28

1           Accordingly, the Court finds that Plaintiff’s Complaint also fails to state an Eighth  
2 Amendment inadequate medical care claim against any named Defendant, and that  
3 therefore, it is subject to sua sponte dismissal in its entirety pursuant to 28 U.S.C.  
4 § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d  
5 at 1004.

6           Because Plaintiff is proceeding without counsel, and has now been provided with  
7 notice of his Complaint’s deficiencies, the Court will grant him leave to amend. *See*  
8 *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not  
9 dismiss a pro se complaint without leave to amend [pursuant to 28 U.S.C.  
10 § 1915(e)(2)(B)(ii)] unless ‘it is absolutely clear that the deficiencies of the complaint  
11 could not be cured by amendment.’”) (quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th  
12 Cir. 2012)).

### 13           **III. Conclusion and Order**

14           For the foregoing reasons, the Court:

15           1.       **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)  
16 (ECF No. 2).

17           2.       **DIRECTS** the Secretary of the CDCR, or his designee, to collect from  
18 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing  
19 monthly payments from his account in an amount equal to twenty percent (20%) of the  
20 preceding month’s income and forwarding those payments to the Clerk of the Court each  
21 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL**  
22 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
23 **ASSIGNED TO THIS ACTION.**

24           3.       **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott  
25 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

26           4.       **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which  
27 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and **GRANTS**  
28 him forty-five (45) days leave from the date of this Order in which to file an Amended




1 Complaint that cures all the deficiencies of pleading noted. Plaintiff's Amended  
2 Complaint must be complete in itself without reference to his original pleading.  
3 Defendants not named and any claims not re-alleged in the Amended Complaint will be  
4 considered waived. *See* Civ. L.R. 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co.,*  
5 *Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the  
6 original.”); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims  
7 dismissed with leave to amend which are not re-alleged in an amended pleading may be  
8 “considered waived if not repled”).

9       5.       **DIRECTS** the Clerk of Court to mail to Plaintiff, together with this Order, a  
10 blank copy of the Court’s form “Complaint under the Civil Rights Act, 42 U.S.C.  
11 § 1983” for his use in amending.

12               **IT IS SO ORDERED.**

13  
14 **DATED: May 4, 2016**

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17 **Hon. Cynthia Bashant**  
18 **United States District Judge**  
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