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

SAMMY THOMAS,
CDCR # F-12551,

Plaintiff,

Civil No. 16cv2211-AJB (JMA)

vs.

J. RODRIGUEZ, P. COLIO, W.L.
MONTGOMERY, M.D. STAINER,
NURSE NUNEZ and DR. ESLOCK,

Defendants,

ORDER:

(1) SUA SPONTE DISMISSING WITHOUT PREJUDICE AND WITH LEAVE TO AMEND ALL CLAIMS AGAINST ALL DEFENDANTS PURSUANT TO 28 U.S.C. §§ 1915 (e)(2) AND 1915A(b), WITH THE EXCEPTION OF PLAINTIFF’S EIGHTH AMENDMENT CLAIM AGAINST DEFENDANTS RODRIGUEZ AND COLIO;

(2) GRANTING LEAVE TO FILE A SECOND AMENDED COMPLAINT OR, ALTERNATELY, LEAVE TO REQUEST THE U.S. MARSHAL TO EFFECT SERVICE OF THE FIRST AMENDED COMPLAINT UPON DEFENDANTS RODRIGUEZ AND COLIO ONLY; AND,

(3) DENYING PLAINTIFF’S MOTION FOR APPOINTMENT OF COUNSEL WITHOUT PREJUDICE

On August 29, 2016, Sammy Thomas (“Plaintiff”), a California state prisoner incarcerated at the California State Prison Los Angeles County, in Lancaster, California, filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983. (ECF No. 1.)

1 Plaintiff alleged that while he was housed at Calipatria State Prison (“Calipatria”) in
2 Imperial, California, he was transported to an outside hospital by two Calipatria
3 Correctional Officers, Defendants J. Rodriguez and P. Colio, the only Defendants named
4 in the Complaint, who he claimed violated his state and federal rights when they failed
5 to secure him with a seatbelt during transport, which resulted in an injury when the van
6 made a sudden stop. (Compl. at 3-6.) Plaintiff did not pay the civil filing fee required
7 by 28 U.S.C. § 1914(a) to commence a civil action, but filed a Motion to Proceed In
8 Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). (ECF No. 2.)

9 On December 1, 2016, the Court granted Plaintiff leave to proceed in forma
10 pauperis. (ECF No. 5.) The Court also dismissed the Complaint for failure to state a
11 claim under 42 U.S.C. § 1983 because Plaintiff had failed to allege facts supporting the
12 objective prong of an Eighth Amendment deliberate indifference claim as he did not
13 provide sufficient details regarding his injury or medical needs to allege they were
14 sufficiently serious, and failed to allege facts supporting the subjective prong of such a
15 claim as he merely alleged that Defendants Rodriguez and Colio acted negligently rather
16 than knowing of and deliberately disregarding a serious risk to his safety or serious
17 medical needs. (Id. at 6-9.) Plaintiff was informed of these deficiencies of his pleading
18 and granted leave to amend his Complaint. (Id.)

19 Plaintiff has now filed a First Amended Complaint [“FAC”], along with a Motion
20 for appointment of counsel, and a Request for the Court to issue a summons and direct
21 the United States Marshal to effect service of the FAC. (ECF Nos. 7, 11, 13.) For the
22 following reasons, the Court finds that the allegations against Defendants Rodriguez and
23 Colio in the FAC are sufficient to survive screening under 28 U.S.C. §§ 1915(e)(2) and
24 1915A(b). However, the FAC also contains allegations which were not presented in the
25 original Complaint, against Defendants not named in the original Complaint, regarding
26 denial of medical care, including the former Acting Director of the Division of Adult
27 Institutions for the California Department of Corrections and Rehabilitation (“CDCR”),
28 the Warden of Calipatria, and a doctor and a nurse employed at Calipatria. As set forth

1 below, the new allegations against the new Defendants do not survive screening under
2 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and the Court will dismiss these new Defendants
3 without prejudice. The Court will provide Plaintiff the option of filing a Second
4 Amended Complaint in an attempt to cure the pleading deficiencies with respect to his
5 Eighth Amendment deliberate indifference to his medical needs claim, or proceeding
6 with his Eighth Amendment failure claim in the FAC against Defendants Rodriguez and
7 Colio. If Plaintiff chooses to proceed with his FAC, the Court will direct the United
8 States Marshal to effect service of the FAC upon Defendants Rodriguez and Colio. If
9 Plaintiff chooses to file a Second Amended Complaint it will be subject to sua sponte
10 screening under 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and any Defendants not named
11 and any claims not re-alleged will be considered waived.

12 **I. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) and § 1915A**

13 “The Court shall review, before docketing, if feasible or, in any event, as soon as
14 practicable after docketing,” complaints filed by all persons proceeding IFP, and by
15 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,
16 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
17 conditions of parole, probation, pretrial release, or diversionary program.” See 28 U.S.C.
18 §§ 1915(e)(2) and 1915A(b). The Court must sua sponte dismiss complaints, or any
19 portions thereof, which are frivolous, malicious, fail to state a claim, or which seek
20 damages from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A;
21 Lopez v. Smith, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc).

22 All complaints must contain “a short and plain statement of the claim showing
23 that the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations
24 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported
25 by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678
26 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). “Determining
27 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
28 requires the reviewing court to draw on its judicial experience and common sense.” Id.

1 at 679. The “mere possibility of misconduct” falls short of meeting the Iqbal plausibility
2 standard. Id.; see also Moss v. U. S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

3 “When there are well-pleaded factual allegations, a court should assume their
4 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
5 Iqbal, 556 U.S. at 679; see also Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000)
6 (“Under § 1983, when determining whether a complaint states a claim, a court must
7 accept as true all allegations of material fact and must construe those facts in the light
8 most favorable to the plaintiff.”); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.
9 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil
10 Procedure 12(b)(6)”). However, while the court has an “obligation . . . where the
11 petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally
12 and to afford the petitioner the benefit of any doubt,” Hebbe v. Pliler, 627 F.3d 338, 342
13 (9th Cir. 2010), citing Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en
14 banc), it may not, in so doing, “supply essential elements of the claim that were not
15 initially pled.” Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266, 268
16 (9th Cir. 1982).

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

26 **A. Plaintiff’s Allegations**

27 Plaintiff alleges that on the morning of August 12, 2015, while housed at
28 Calipatria, he was transported by Defendants Correctional Officers Rodriguez and Colio

1 from Calipatria to a hospital in Indio, California, for a physical therapy appointment, and
2 was shackled with waist chains and handcuffs. (FAC at 9.) He was placed in a van
3 equipped with seatbelts, but was unable to fasten his seatbelt by himself due to his
4 shackles. (Id. at 10.) He asked Defendants Rodriguez and Colio: “Are you going to
5 fasten my seatbelt?,” to which they replied: “No, you’ll be alright.” (Id.) During
6 transportation to the hospital the van stopped suddenly and Plaintiff was thrown forward,
7 hit his head, and injured his back. (Id. at 11.) When he complained of his injuries
8 Defendants Rodriguez and Colio continued to drive to the hospital and told him his
9 physical therapist would examine him, although Plaintiff pointed out that the physical
10 therapist was not a doctor and was not qualified to examine or treat his injuries. (Id.)
11 At the hospital the physical therapist examined Plaintiff and he completed his physical
12 therapy with difficulty, and was then driven back to Calipatria, this time with a seat belt.
13 (Id. at 12-13.) Plaintiff filed an inmate grievance against Defendants Rodriguez and
14 Colio alleging they had violated CDCR policies and procedures by failing to secure him
15 with a seatbelt and having a physical therapist evaluate him at the hospital rather than
16 a doctor. (FAC Ex. A.) His grievance was granted in part, and the prison admitted that
17 officers Rodriguez and Colio had violated departmental policy, although they refused on
18 the basis of privacy concerns to identify which policy had been violated. (Id.)

19 Plaintiff was examined by Defendant Nurse Nunez immediately upon his return
20 to Calipatria, was given Ibuprofen for his pain and returned to his cell about 12:45 p.m.
21 (FAC at 12-13.) He took a nap in his cell until about 3:20 p.m., at which time he
22 attempted to get up to use the restroom, but could not get off his bunk because his back
23 had seized up. (Id. at 13.) Plaintiff was examined at the Calipatria infirmary, was treated
24 and held overnight for observation. (Id. at 14.) Defendant Dr. Eslock sent Plaintiff back
25 to his cell the next day after prescribing pain medication, and told him she would
26 schedule an outside neurological consultation. (Id.)

27 Plaintiff states that he was transferred to Lancaster before he could be seen by the
28 neurologist, but had a teleconference with an outside doctor on December 17, 2016, who

1 diagnosed him with a degenerative disc disease in his lower back and recommended
2 surgery. (Id. at 14-15.) Plaintiff states that he has agreed to have the surgery, “so he
3 requested authorization from the prison doctors who are denying me the surgery so I now
4 suffer from chronic lower back pain everyday due to the negligence of all parties
5 involved.” (Id. at 14-15.) He does not identify who is preventing him from having
6 surgery, or whether they are at Calipatria or Lancaster. In addition to Defendants
7 Rodriguez, Colio, Dr. Eslock and Nurse Nunez, Plaintiff names as Defendants M.D.
8 Stainer, a former Acting Director of the Division of Adult Institutions for the CDCR, and
9 Warren L. Montgomery, the Warden of Calipatria, but merely alleges these Defendants
10 are “legally responsible” for the operation of Calipatria. (Id. at 17.)

11 **B. Eighth Amendment Failure to Protect Claims**

12 The Court finds that Plaintiff’s allegations against Defendants Rodriguez and
13 Colio survive screening under 28 U.S.C. §§ 1915(e)(2) and 1915A(b) because he has set
14 forth factual allegations that they knew of and deliberately disregarded his need to be
15 safely restrained in the back of the van for the trip to the hospital, and that he suffered
16 a serious injury as a result.¹ See Farmer v. Brennan, 511 U.S. 825, 833 (1994) (holding
17 that a prisoner’s Eighth Amendment rights are violated when prison officials are
18 deliberately indifferent to his need for safety); Brown v. Fortner, 518 F.3d 552, 560 (8th
19 Cir. 2008) (affirming the denial of summary judgment where the “uncontested evidence
20 indicates [a prison official] knew [prisoner] was shackled and restrained in a manner that
21 prevented him from securing his own seatbelt. . . . rejected [prisoner’s] request for a
22 seatbelt. . . . [and] drove recklessly and ignored requests by the inmate passengers in his
23 van for him to slow down.”); Ford v. Fletes, 211 F.3d 1273, 2000 WL 249124 at *1 (9th
24 Cir. 2000) (unpublished memorandum) (recognizing that prisoner may be able to allege
25 deliberate indifference when he was injured from fall out of a vehicle while transported
26 in handcuffs in a vehicle without doors, seat belts or restraints).

27
28 ¹ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of,
and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring.”
Teahan v. Wilhelm, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

1 Thus, as currently pleaded, the Court finds that the FAC is sufficient to survive the
2 sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b) as to
3 Defendants Rodriguez and Colio. Accordingly, if Plaintiff wishes to proceed with the
4 FAC against Defendants Rodriguez and Colio, the Court will direct the U.S. Marshal to
5 effect service of these Defendants on Plaintiff's behalf. See 28 U.S.C. § 1915(d). As set
6 forth below, Plaintiff has the option of requesting the Court to direct service of the FAC
7 on these Defendants or filing a Second Amended Complaint in an attempt to cure the
8 defects of pleading against the remaining Defendants, which are identified immediately
9 below. Plaintiff is cautioned that the Second Amended Complaint will be subject to sua
10 sponte screening under 28 U.S.C. §§ 1915(e)(2) and 1915A(b), that it must be complete
11 in itself without reference to his original pleading, and that any Defendants not named
12 and any claims not re-alleged in the Second Amended Complaint will be considered
13 waived. See S.D. CAL. CIVLR 15.1; Hal Roach Studios, Inc. v. Richard Feiner & Co.,
14 Inc., 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the
15 original.”); Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012) (noting that
16 claims dismissed with leave to amend which are not re-alleged in an amended pleading
17 may be “considered waived if not repled.”)

18 C. Eighth Amendment Medical Claims

19 Plaintiff attempts to state a claim for deliberate indifference to his serious medical
20 needs against the remaining Defendants, but, for the following reasons, the claim does
21 not survive screening under 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Only “deliberate
22 indifference to serious medical needs of prisoners constitutes the unnecessary and
23 wanton infliction of pain proscribed by the Eighth Amendment.” Estelle v. Gamble, 429
24 U.S. 97, 104 (1976) (citation and internal quotation marks omitted). “A determination
25 of ‘deliberate indifference’ involves an examination of two elements: the seriousness of
26 the prisoner’s medical need and the nature of the defendant’s response to that need.”
27 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1991), overruled on other grounds
28 by WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

1 “Because society does not expect that prisoners will have unqualified access to
2 health care, deliberate indifference to medical needs amounts to an Eighth Amendment
3 violation only if those needs are ‘serious.’” Hudson v. McMillian, 503 U.S. 1, 9 (1992),
4 citing Gamble, 429 U.S. at 103-04. “A ‘serious’ medical need exists if the failure to treat
5 a prisoner’s condition could result in further significant injury or the ‘unnecessary and
6 wanton infliction of pain.” McGuckin, 974 F.2d at 1059, quoting Gamble, 429 U.S. at
7 104. Plaintiff’s allegations regarding the ongoing injury to his back, and his allegation
8 that an outside doctor has recommended surgery which Plaintiff wants but is being
9 denied, are sufficient to plead an objectively serious medical need for treatment. See id.
10 at 1059-60 (“The existence of an injury that a reasonable doctor or patient would find
11 important and worthy of comment or treatment; the presence of a medical condition that
12 significantly affects an individual’s daily activities; or the existence of chronic and
13 substantial pain are examples of indications that a prisoner has a ‘serious’ need for
14 medical treatment.”)

15 However, Plaintiff fails to include any further “factual content” to show that any
16 Defendant acted with “deliberate indifference to [his] serious medical needs.” Jett v.
17 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006), quoting Gamble, 429 U.S. at 104. In order
18 to be deliberately indifferent, a defendant’s acts or omissions must involve more than an
19 ordinary lack of due care, as “[a] difference of opinion” between a doctor and an inmate,
20 or even between medical professionals, regarding what medical care is appropriate “does
21 not amount to a deliberate indifference.” Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.
22 1989), citing Gamble, 429 U.S. at 107.

23 Plaintiff alleges that he was treated at the Calipatria infirmary by Defendants Dr.
24 Eslock and Nurse Nunez, but does not allege what these Defendants did or failed to do
25 which demonstrates they were deliberately indifferent to his serious medical needs, or
26 even why he seeks to hold them liable. (FAC at 12-14.) Plaintiff’s FAC contains no
27 facts whatsoever which show that these Defendants acted with deliberate indifference
28 to his serious medical needs by knowing of and disregarding an excessive risk to his

1 health. Rather, he appears to allege they were merely negligent regarding his treatment
2 (see FAC at 15), which is insufficient to state a claim. See Toguchi v. Chung, 391 F.3d
3 1051, 1057 (9th Cir. 2004) (“Mere negligence in diagnosing or treating a medical
4 condition, without more, does not violate a prisoner’s Eighth Amendment rights.”),
5 quoting McGuckin, 974 F.2d at 1059. “Deliberate indifference,” on the other hand, “is
6 a high legal standard,” and claims of medical malpractice or negligence are insufficient
7 to establish a constitutional deprivation. Simmons v. Navajo Cnty., 609 F.3d 1011, 1019
8 (9th Cir. 2010), citing Toguchi, 391 F.3d at 1060.

9 With respect to the remaining Defendants, M.D. Stainer and Warden Montgomery,
10 Plaintiff has failed to set forth any allegations whatsoever regarding what these
11 Defendants knew about his medical condition, how they came about that knowledge, and
12 what and how they knew of any potential risk to his health arising from a failure to
13 provide or delay in providing medical care. Rather, he merely alleges they “are legally
14 responsible” for what goes on at Calipatria. (FAC at 17.) Those allegations are
15 insufficient to state an Eighth Amendment claim. See Farmer, 511 U.S. at 837 (prison
16 officials must know of and act with deliberate indifference to medical needs in order to
17 violate the Eighth Amendment); see also Iqbal, 556 U.S. at 678 (“Threadbare recitals of
18 the elements of a cause of action, supported by mere conclusory statements, do not
19 suffice.”)

20 To the extent Plaintiff seeks to hold Defendants Stainer and Montgomery
21 vicariously liable for the acts or failure to act by persons he contends is preventing him
22 from having surgery or who allegedly provided him with inadequate medical care, the
23 FAC fails to state a claim. A person deprives another “of a constitutional right, within
24 the meaning of section 1983, if he does an affirmative act, participates in another’s
25 affirmative acts, or omits to perform an act which he is legally required to do that causes
26 the deprivation of which [the plaintiff complains].” Johnson v. Duffy, 588 F.2d 740, 743
27 (9th Cir. 1978). There is no respondeat superior liability under 42 U.S.C. § 1983.
28 Palmer v. Sanderson, 9 F.3d 1433, 1437-38 (9th Cir. 1993); see also Iqbal, 556 U.S. at

1 676 (“[V]icarious liability is inapplicable to . . . § 1983 suits,” and Plaintiff “must plead
2 that each Government-official defendant, though the official’s own individual actions,
3 has violated the Constitution.”) The FAC contains no factual allegations describing what
4 these Defendants did, or failed to do, with regard to his medical needs. See Estate of
5 Brooks v. United States, 197 F.3d 1245, 1248 (9th Cir. 1999) (“Causation is, of course,
6 a required element of a § 1983 claim.”) “The inquiry into causation must be
7 individualized and focus on the duties and responsibilities of each individual defendant
8 whose acts or omissions are alleged to have caused a constitutional deprivation.” Leer
9 v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988), citing Rizzo v. Goode, 423 U.S. 362,
10 370-71 (1976); Berg v. Kincheloe, 794 F.2d 457, 460 (9th Cir. 1986).

11 Thus, without some specific “factual content” that might allow the Court to “draw
12 the reasonable inference” that Defendants Stainer and Montgomery may be held
13 personally liable for any unconstitutional conduct directed at Plaintiff, the Court finds
14 the FAC, as currently pleaded, contains the type of allegations which Iqbal makes clear
15 fail to “state a claim to relief that is plausible on its face.” Iqbal, 556 U.S. at 568.

16 Accordingly, the Court finds that Plaintiff’s FAC fails to state an Eighth
17 Amendment claim for deliberate indifference to his serious medical needs against
18 Defendants Stainer, Nunez, Montgomery and Dr. Eslock, and that portion of his FAC
19 against these Defendants is subject to sua sponte dismissal pursuant to 28 U.S.C.
20 §§ 1915(e)(2)(B)(ii) and 1915A(b)(1). See Lopez, 203 F.3d at 1126-27; Rhodes, 621
21 F.3d at 1004. Because Plaintiff is proceeding without counsel, the Court will grant him
22 an opportunity to amend the FAC, if he wishes, and hereby provides him “notice of the
23 deficiencies in his complaint in order to ensure [he] uses the opportunity to amend
24 effectively.” Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012), citing Ferdik v.
25 Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992).

26 **II. Motion for Appointment of Counsel**

27 Finally, Plaintiff has filed a Motion for appointment of counsel, arguing that he
28 is unable to afford an attorney, his imprisonment will limit his ability to litigate, and the

1 legal issues are likely to involve conflicting testimony. (ECF No. 11.) There is no
2 constitutional right to counsel in a civil case. Lassiter v. Dept. of Social Servs, 452 U.S.
3 18, 25 (1981). And while 28 U.S.C. § 1915(e)(1) grants the district court limited
4 discretion to “request” that an attorney represent an indigent civil litigant, Agyeman v.
5 Corr. Corp. of America, 390 F.3d 1101, 1103 (9th Cir. 2004), this discretion may be
6 exercised only under “exceptional circumstances.” Id.; see also Terrell v. Brewer, 935
7 F.2d 1015, 1017 (9th Cir. 1991). A finding of exceptional circumstances requires “an
8 evaluation of the likelihood of the plaintiff’s success on the merits and an evaluation of
9 the plaintiff’s ability to articulate his claims ‘in light of the complexity of the legal issues
10 involved.’” Agyeman, 390 F.3d at 1103, quoting Wilborn v. Escalderon, 789 F.2d 1328,
11 1331 (9th Cir. 1986).

12 Nothing in the record at this stage of the proceedings suggests Plaintiff is
13 incapable of articulating the factual basis for his claims, and evaluation of the likelihood
14 of success on the merits is premature. Because no exceptional circumstances warrant the
15 appointment of counsel at this time, Plaintiff’s Motion for Appointment of Counsel is
16 **DENIED** without prejudice. Terrell, 935 F.2d at 1017.

17 **III. Conclusion and Order**

18 Good cause appearing, the Court:

19 1. **DENIES** without prejudice Plaintiff’s Motion for Appointment of Counsel
20 (ECF No. 11).

21 2. **DIRECTS** the Clerk of Court to dismiss Defendants M. D. Stainer, Warren
22 Montgomery, Dr. Eslock and Nurse Nunez from this action without prejudice for failing
23 to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2) and
24 § 1915A(b).

25 3. **GRANTS** Plaintiff leave to, **on or before April 3, 2017**, either: (1) file a
26 Second Amended Complaint which cures all the deficiencies of pleading noted as to
27 Defendants M. D. Stainer, Warren Montgomery, Dr. Eslock and Nurse Nunez, and/or
28 his Eighth Amendment claim for deliberate indifference to his serious medical needs; or

1 (2) notify the Court of his intent to proceed with the First Amended Complaint against
2 Defendants Rodriguez and Colio.

3 If Plaintiff chooses to file a Second Amended Complaint, it must be complete in
4 itself without reference to his original pleading. Defendants not named and any claims
5 not re-alleged in the Second Amended Complaint will be considered waived. See S.D.
6 CAL. CIVLR 15.1; Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542,
7 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the original.”); Lacey v.
8 Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with
9 leave to amend which are not re-alleged in an amended pleading may be “considered
10 waived if not repled.”)

11 If Plaintiff chooses to notify the Court of his intent to proceed with the First
12 Amended Complaint against Defendants Rodriguez and Colio, the Court will issue an
13 Order dismissing the remaining claims and Defendants without leave to amend and will
14 direct the United States Marshal to serve the FAC on Defendants Rodriguez and Colio.

15 4. The Clerk of Court is **DIRECTED** to send Plaintiff a blank Southern
16 District of California § 1983 amended complaint form along with a copy of this Order.

17 **IT IS SO ORDERED.**

18 DATED: February 28, 2017

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21 Hon. Anthony J. Battaglia
22 U.S. District Judge
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