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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BENJAMIN SPENCER,
12 Booking #16143756,

13 Plaintiff,

14 vs.

15 CITY OF VISTA, et al.,

16 Defendants.
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Case No. 3:16-cv-02313-CAB-KSC

**ORDER DISMISSING CIVIL
ACTION FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. § 1915(e)(2)(B)(ii) AND
§ 1915A(b)(1) AND FOR FAILING
TO PROSECUTE IN COMPLIANCE
WITH COURT ORDER
REQUIRING AMENDMENT**

19 BENJAMIN SPENCER (“Plaintiff”), proceeding pro se, and while detained at the
20 San Diego Sheriff’s Department Vista Detention Facility (“VDF”), filed this civil rights
21 action pursuant to 42 U.S.C. § 1983 on September 6, 2016, alleging excessive force at the
22 time of his arrest, and negligence on the part of unidentified VDF staff when he was later
23 attacked by a fellow detainee. (ECF No. 1 at 4.)

24 **I. Procedural Background**

25 On December 9, 2016, the Court granted Plaintiff leave to proceed in forma pauperis
26 (“IFP”), but dismissed his Complaint for failing to state a claim upon which relief can be
27 granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1) (ECF No. 3). Plaintiff
28 was informed of his pleading deficiencies, and granted leave to amend them. (*Id.* at 5-9.)

1 On January 21, 2017, Plaintiff filed a First Amended Complaint (ECF No. 4),
2 followed a week later by a Motion to Appoint Counsel (ECF No. 6). On February 10, 2017,
3 the Court denied Plaintiff's Motion, and sua sponte dismissed his First Amended
4 Complaint, again because it failed to state a claim (ECF No. 7). Plaintiff was once more
5 apprised of his pleading deficiencies, and granted leave to file a Second Amended
6 Complaint within 45 days. (*Id.* at 9-10.)

7 Almost four months have passed since the Court's February 10, 2017 Order. Plaintiff
8 has not filed a Second Amended Complaint; nor has he requested an extension of time in
9 which to do so. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) ("If a plaintiff
10 does not take advantage of the opportunity to fix his complaint, a district court may convert
11 the dismissal of the complaint into a dismissal of the entire action."); *Edwards v. Marin*
12 *Park*, 356 F.3d 1058, 1065 (9th Cir. 2004) ("The failure of the plaintiff eventually to
13 respond to the court's ultimatum—either by amending the complaint or by indicating to the
14 court that [he] will not do so—is properly met with the sanction of a Rule 41(b) dismissal.").

15 **II. Conclusion and Order**

16 Accordingly, the Court **DISMISSES** this civil action in its entirety without further
17 leave to amend based on Plaintiff's failure to state a claim upon which § 1983 relief can be
18 granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1), and his failure to
19 prosecute pursuant to FED. R. CIV. P. 41(b) in compliance with the Court's February 10,
20 2017 Order (ECF No. 7).

21 The Court further **CERTIFIES** that an IFP appeal would not be taken in good faith
22 pursuant to 28 U.S.C. § 1915(a)(3) and **DIRECTS** the Clerk to enter a final judgment of
23 dismissal and to close the file.

24 **IT IS SO ORDERED.**

25 Dated: June 8, 2017



26
27 Hon. Cathy Ann Bencivengo
28 United States District Judge