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

10
11 RICO ANTIONE WELCH,
12 CDCR #AX-7756

13 Plaintiff,

14 v.

15 UCSD HOSPITAL,

16 Defendants.

Case No. 16-cv-02884-BAS-BGS

ORDER:

**(1) DISMISSING FIRST AMENDED
COMPLAINT FOR FAILURE TO
STATE A CLAIM**

AND

(2) GRANTING LEAVE TO AMEND

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19 **I. PROCEDURAL HISTORY**

20 On November 18, 2016, Rico Antione Welch (“Plaintiff”), formerly housed at the
21 George Bailey Detention Center (“GBDC”) in San Diego, California, and proceeding *pro*
22 *se*, filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983. (ECF No. 1.)
23 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a), but instead
24 filed a motion to proceed *in forma pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a). (ECF
25 No. 2.) On January 3, 2017, this Court granted Plaintiff’s motion to proceed IFP and
26 simultaneously dismissed the Complaint for failure to state a claim upon which relief could
27 be granted. (ECF No. 4.) Plaintiff was granted forty-five (45) days with leave to file an
28 amended pleading to correct the pleading deficiencies the Court identified. (*Id.* at 8–9.)

1 On May 23, 2018, long after the time period provided by the Court to amend passed,
2 Plaintiff was permitted to file his First Amended Complaint (“FAC”) on the docket by then
3 presiding Judge Benitez. (ECF No. 7.) The FAC states that Plaintiff is currently housed
4 as a state inmate at the Richard J. Donovan Correctional Facility (“RJD”). (*Id.* at 1.) After
5 Judge Benitez recused from the case on June 4, 2018, the matter was transferred to this
6 Court’s docket. (ECF No. 8.)

7 **II. *SUA SPONTE* SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A(b)**

8 **A. Standard of Review**

9 As the Court indicated in its January 3, 2017 Order, “[t]he Court shall review, before
10 docketing, if feasible or, in any event, as soon as practicable after docketing,” complaints
11 filed by all persons proceeding IFP, and by those who are “incarcerated or detained in any
12 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal
13 law or the terms or conditions of parole, probation, pretrial release, or diversionary
14 program.” (ECF No. 4 at 3 (citing 28 U.S.C. §§ 1915(e)(2) and 1915A(b)).) The Court
15 must *sua sponte* dismiss complaints, or any portions thereof, which are frivolous,
16 malicious, fail to state a claim, or which seek damages from defendants who are immune.
17 *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th
18 Cir. 2000).

19 All complaints must contain “a short and plain statement of the claim showing that
20 the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations are
21 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
22 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009),
23 citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Determining whether a
24 complaint states a plausible claim for relief [is] . . . a context-specific task that requires the
25 reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. The
26 “mere possibility of misconduct” falls short of meeting the *Iqbal* plausibility standard. *Id.*;
27 *see also Moss v. U. S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). “When there are
28 well-pleaded factual allegations, a court should assume their veracity, and then determine

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

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

22 **B. Plaintiff’s Allegations**

23 In June 2016, Plaintiff alleges that he “got into an altercation” while housed at the
24 “East Mesa Detention Facility” that resulted in Plaintiff having a “broken jaw.” (FAC at
25 3.) Plaintiff was transported to the UCSD Medical Center where he received surgery and
26 “metal wires” were placed in his mouth. (*Id.*) Following the surgery, Plaintiff was
27 “transferred back to a medical dorm at the George Bailey Detention Facility.” (*Id.*) A
28 week later, Plaintiff was “released” from “incarceration.” (*Id.*) Plaintiff returned to the

1 UCSD Medical Center to have the “wires removed.” (*Id.*) Several “months later,” Plaintiff
2 learned that some “barely noticeable” wire remained in his “gum line” causing him
3 “excruciating pain.” Plaintiff “thought [his] insurance would cover a safe performance of
4 this medical procedure but it did not.” (*Id.*) Plaintiff claims that he has “unbearable” pain
5 in his mouth and he is able to “only eat certain foods that are soft due to the pain.” (*Id.*)
6 Plaintiff also alleges that he is only able to “brush [his] teeth in the morning” because of
7 the pain causing “brown stains” on his teeth. (*Id.*) Plaintiff alleges that he learned of the
8 wire that remained in his mouth when he was incarcerated and housed at the San Diego
9 County Jail again. (*See id.* at 4.) Plaintiff was sent to “Tri-City Medical Center” to confirm
10 the existence of the “remaining metal” but the “County Jail confirmed” that they could not
11 perform the procedure to remove the metal. (*Id.*) Plaintiff alleges he submitted “medical
12 requests” while he was housed at the County Jail. (*Id.*) Plaintiff does allege that the
13 “remaining metal has been removed,” following his sentencing, by medical staff at the
14 “California Rehabilitation Center.” (*Id.*)

15 **C. Individual Defendants**

16 Plaintiff’s only named defendant is a hospital and he fails to identify any specific
17 individual whom he claims was responsible for the alleged violations of his constitutional
18 rights. Therefore, the Court finds that Plaintiff fails to state a claim upon which Section
19 1983 relief can be granted because he sets forth no individualized allegations of
20 wrongdoing by a specific individual.

21 Plaintiff’s FAC contains no factual allegations describing what any individual knew,
22 did, or failed to do, with regard to Plaintiff’s medical needs. *Estate of Brooks v. United*
23 *States*, 197 F.3d 1245, 1248 (9th Cir. 1999) (“Causation is, of course, a required element
24 of a § 1983 claim.”). “The inquiry into causation must be individualized and focus on the
25 duties and responsibilities of each individual defendant whose acts or omissions are alleged
26 to have caused a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir.
27 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370–71 (1976)); *Berg v. Kincheloe*, 794 F.2d
28 457, 460 (9th Cir. 1986). Without some specific “factual content” that might allow the

1 Court to “draw the reasonable inference” that a specific individual may be held personally
2 liable for any unconstitutional conduct directed at Plaintiff, the Court finds his FAC, as
3 currently pleaded, contains allegations which *Iqbal* makes clear fail to “state a claim to
4 relief that is plausible on its face.” *Iqbal*, 556 U.S. at 568.

5 **D. Inadequate medical care**

6 Plaintiff has also failed to state an Eighth Amendment claim based on a delay or
7 denial of medical care. Only “deliberate indifference to serious medical needs of prisoners
8 constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth
9 Amendment.” *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation and internal quotation
10 marks omitted). Plaintiff claims in his FAC that unnamed medical personnel at UCSD
11 Hospital failed to properly conduct a surgical procedure to remove the metal wires in his
12 mouth. (*See* FAC at 3–4.) However, Plaintiff also acknowledges that he was not
13 incarcerated or detained when he underwent this procedure. (*See id.* at 3.) “The Cruel and
14 Unusual Punishments Clause ‘was designed to protect those convicted of crimes,’” and
15 therefore “the Clause applies ‘only after the State has complied with the constitutional
16 guarantees traditionally associated with criminal prosecutions.’” *Whitley v. Albers*, 475
17 U.S. 312, 318 (1986) (citing *Ingraham v. Wright*, 430 U.S. 651, 671 (1977)). Here,
18 Plaintiff was neither a prisoner, nor a detainee at the time he returned to undergo the
19 procedure he claims was inadequate at UCSD Hospital and thus, neither the Eighth or
20 Fourteenth Amendment apply to Plaintiff’s claims.

21 To the extent that Plaintiff suggests he was denied adequate medical treatment when
22 he was later housed at the San Diego County Jail, Plaintiff must provide specific factual
23 allegations to support that claim which show a violation of constitutional rights. The
24 allegations in the FAC include negligence and medical malpractice, but a Section 1983
25 claim cannot sound merely in negligence. *Farmer*, 511 U.S. at 835 (holding that a mere
26 negligent failure to protect an inmate from harm is not actionable under § 1983); *Toguchi*
27 *v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (“Mere negligence in diagnosing or treating
28 a medical condition, without more, does not violate a prisoner’s Eighth Amendment

1 rights.”). Even if Plaintiff were to claim that his constitutional rights were violated when
2 he was housed at the County Jail, the FAC lacks any specific allegations that any San Diego
3 County Jail individuals acted with deliberate indifference to his plight by “knowing of and
4 disregarding an excessive risk to his health and safety.” *Farmer v. Brennan*, 511 U.S. 825,
5 837 (1994); *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557. If Plaintiff wishes to
6 proceed with a claim for deliberate indifference to his serious medical needs based on a
7 lack of adequate medical care, he must identify the individuals whom he alleges were
8 involved and provide sufficient allegations of their knowledge. The Court will provide
9 Plaintiff with a final opportunity to address the pleading deficiencies discussed in this
10 Order, if he can. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik*
11 *v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

12 **III. CONCLUSION & ORDER**

13 For the foregoing reasons, the Court hereby:

14 1. **DISMISSES** Plaintiff’s FAC for failure to state a claim upon which relief
15 may be granted pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and **GRANTS** him
16 forty-five (45) days leave from the date of this Order in which to file an amended complaint
17 which cures all the deficiencies of pleading noted. Plaintiff’s amended complaint must be
18 complete in itself without reference to his original pleading. Defendants not named and
19 any claims not re-alleged in the amended complaint will be considered waived. *See S.D.*
20 *Cal. Civ. L.R. 15.1; Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542,
21 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the original.”); *Lacey v.*
22 *Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave
23 to amend which are not re-alleged in an amended pleading may be “considered waived if
24 not repled.”).


25 Plaintiff’s amended complaint shall be filed **no later than August 2, 2018**.
26 This deadline will be strictly enforced by the Court given the length of time in which this
27 case has been pending since its initial filing without proceeding past the pleading stage and
28 Plaintiff’s over year-long delay in amending the original complaint after notice of pleading

1 deficiencies. Failure to file an amended complaint by this deadline will result in dismissal
2 of the Complaint without prejudice.

3 2. **DIRECTS** the Clerk of Court to mail to Plaintiff, together with this Order, a
4 blank copy of the Court's form "Complaint under the Civil Rights Act, 42 U.S.C. § 1983"
5 for his use in amending.

6 **IT IS SO ORDERED.**

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8 **DATED: June 19, 2018**


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Hon. Cynthia Bashant
United States District Judge