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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 DAVID EARL PARMER,  
12 Booking # 16125004,

13 Plaintiff,

14 vs.

15 SAN DIEGO COUNTY JAIL; SAN  
16 DIEGO MEDICAL OFFICE; DOCTOR  
17 BERKMANN

18 Defendants.  
19  
20  
21

Case No.: 3:17-cv-0794-JLS-WVG

**ORDER:**

**1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
(ECF No. 2)**

**AND**

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

22 Plaintiff David Earl Parmer, currently housed at the San Diego Central Jail, has filed  
23 a civil rights Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1) and a Motion to Proceed  
24 In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2). Because  
25 Plaintiff’s Motion to Proceed IFP complies with 28 U.S.C. § 1915(a)(2), the Court grants  
26 him leave to proceed without full prepayment of the civil filing fees required by 28 U.S.C.  
27 § 1914(a), but dismisses his Complaint for failing to state a claim pursuant to 28 U.S.C. §  
28 1915(e)(2) and § 1915A(b).

1 **I. Plaintiff’s IFP Motion**

2 All parties instituting any civil action, suit or proceeding in a district court of the  
3 United States, except an application for writ of habeas corpus, must pay a filing fee of  
4 \$400.<sup>1</sup> See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
5 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
6 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
7 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to  
8 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
9 *Bruce v. Samuels*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d  
10 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.  
11 See 28 U.S.C. §§ 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

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

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26 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative  
27 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court  
28 Misc. Fee Schedule, § 14 (eff. Dec. 1, 2014)). The additional \$50 administrative fee does  
not apply to persons granted leave to proceed IFP. *Id.*

1 In support of his IFP Motion, Plaintiff has submitted a certified prison certificate,  
2 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. (*See* ECF No. 2, at 5);  
3 *Andrews*, 398 F.3d at 1119. This certificate shows that while Plaintiff had an average  
4 monthly deposit of \$46.00 and an average monthly balance of \$41.50 in his trust account  
5 during the 6-month period preceding the filing of this action, he only has an available  
6 balance of \$1.03 at the time of filing. Therefore, the Court assesses Plaintiff’s initial partial  
7 filing fee to be \$9.20 pursuant to 28 U.S.C. § 1915(b)(1). However, it appears Plaintiff may  
8 be unable to pay that initial fee at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that  
9 “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil  
10 action or criminal judgment for the reason that the prisoner has no assets and no means by  
11 which to pay the initial partial filing fee”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at  
12 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a  
13 prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available  
14 to him when payment is ordered”).

15 Therefore, the Court **GRANTS** Plaintiff leave to proceed IFP, declines to “exact”  
16 the initial \$9.20 filing fee because his prison certificate shows he “has no means to pay it,”  
17 *Bruce*, 136 S. Ct. at 629, and **DIRECTS** the Watch Commander at the San Diego Central  
18 Jail to collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and  
19 forward them to the Clerk of Court pursuant to the installment payment provisions set forth  
20 in 28 U.S.C. § 1915(b)(1). *See id.*

21 **II. Legal Standards for Screening Complaint Pursuant to 28 U.S.C.**  
22 **§§ 1915(e)(2)(B) and 1915A(b)**

23 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-  
24 Answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these statutes,  
25 the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it, which  
26 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are  
27 immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (discussing  
28 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)

1 (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that the  
2 targets of frivolous or malicious suits need not bear the expense of responding.’”  
3 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
4 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

5 “The standard for determining whether a plaintiff has failed to state a claim upon  
6 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
7 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d  
8 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.  
9 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
10 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
11 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,  
12 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,  
13 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

14 Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
15 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
16 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief  
17 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial  
18 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,  
19 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility  
20 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

21 **A. 42 U.S.C. § 1983**

22 Title 42 U.S.C. § 1983 provides a cause of action for the “deprivation of any rights,  
23 privileges, or immunities secured by the Constitution and laws” of the United States. *Wyatt*  
24 *v. Cole*, 504 U.S. 158, 161 (1992). To state a claim under § 1983, a plaintiff must allege  
25 two essential elements: (1) that a right secured by the Constitution or laws of the United  
26 States was violated, and (2) that the alleged violation was committed by a person acting  
27 under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

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1           ***B. Improper Defendants & Municipal Liability***

2           The Court finds that to the extent Plaintiff names the “San Diego County Jail” and  
3 the “San Diego Medical Office” as Defendants, his claims must be dismissed sua sponte  
4 pursuant to both 28 U.S.C. § 1915(e)(2) and § 1915A(b) for failing to state a claim upon  
5 which § 1983 relief can be granted.

6           Local law enforcement departments, like the San Diego Sheriff’s Department,  
7 municipal agencies, or subdivisions of that department or agency, are not proper defendants  
8 under § 1983. *See Vance v. County of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996)  
9 (“Naming a municipal department as a defendant is not an appropriate means of pleading  
10 a § 1983 action against a municipality.”) (citation omitted); *Powell v. Cook County Jail*,  
11 814 F. Supp. 757, 758 (N.D. Ill. 1993) (“Section 1983 imposes liability on any ‘person’  
12 who violates someone’s constitutional rights ‘under color of law.’ Cook County Jail is not  
13 a ‘person.’”).

14           The County of San Diego *itself* may be considered a “person” and therefore, a proper  
15 defendant under § 1983. *See Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978);  
16 *Hammond v. County of Madera*, 859 F.2d 797, 801 (9th Cir. 1988). As a municipality, the  
17 County *may* be held liable under § 1983—but only where the Plaintiff alleges facts to show  
18 that a constitutional deprivation was caused by the implementation or execution of “a  
19 policy statement, ordinance, regulation, or decision officially adopted and promulgated”  
20 by the County, or a “final decision maker” for the County. *Monell*, 436 U.S. at 690; *Bd. of*  
21 *the Cty. Commissioners v. Brown*, 520 U.S. 397, 402–04 (1997); *Navarro v. Block*, 72 F.3d  
22 712, 714 (9th Cir. 1995). In other words, “respondeat superior and vicarious liability are  
23 not cognizable theories of recovery against a municipality.” *Miranda v. Clark Cty., Nev.*,  
24 279 F.3d 1102, 1109–10 (9th Cir. 2002). “Instead, a *Monell* claim exists only where the  
25 alleged constitutional deprivation was inflicted in ‘execution of a government’s policy or  
26 custom.’” *Id.* (quoting *Monell*, 436 U.S. at 694).

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1 As currently pleaded, Plaintiff's Complaint fails to state a claim under 28 U.S.C. §§  
2 1915(e)(2) and 1915A(b) because he has failed to allege any facts which "might plausibly  
3 suggest" that the County itself violated his constitutional rights. *See Hernandez v. County*  
4 *of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) (applying *Iqbal's* pleading standards to *Monell*  
5 claims); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (42 U.S.C. § 1983 provides  
6 for relief only against those who, through their personal involvement as evidenced by  
7 affirmative acts, participation in another's affirmative acts, or failure to perform legally  
8 required duties, cause the deprivation of plaintiff's constitutionally protected rights).

### 9 C. Medical Care Claims

10 Plaintiff's allegations are far from clear. However, it appears that Plaintiff was  
11 allegedly accused of hoarding medication and as a result, Defendant Berkmann allegedly  
12 stopped providing this medication to Plaintiff. (*See Compl.* at 3.) Plaintiff claims that the  
13 medication "help[ed] a lot with the pain." (*Id.*) Plaintiff claims he was provided with  
14 different medication but that it gives him "no relief" from his pain." (*Id.* at 4.) Plaintiff  
15 claims that Defendant Berkmann gave him a "shot of teridol" on April 9, 2017 but claims  
16 Defendant Berkmann knew it "was not really going to help." (*Id.*) Plaintiff alleges he  
17 suffers from "spinal stenosis" and "lipomatosis." (*Id.*)

18 Prison officials are liable only if they are deliberately indifferent to the prisoner's  
19 serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976); *see also Clouthier*  
20 *v. Cty. of Contra Costa*, 591 F.3d 1232, 1241–44 (9th Cir. 2010) (applying *Estelle's* Eighth  
21 Amendment deliberate indifference standard to inadequate medical care claims alleged to  
22 violate a pretrial detainees' due process rights).

23 Here, Plaintiff claims he suffers from "spinal stenosis" but he fails to include any  
24 further "factual matter" sufficient to show or describe how or to what extent his medical  
25 needs were objectively serious. *See McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.  
26 1991) (defining a "serious medical need" as one which the "failure to treat . . . could result  
27 in further significant injury or the 'unnecessary and wanton infliction of pain.'"), *overruled*  
28 *on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc)

1 (citing *Estelle*, 429 U.S. at 104); *Iqbal*, 556 U.S. at 678 (“[A] complaint must contain  
2 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its  
3 face.’”) (quoting *Twombly*, 550 U.S. at 570). The “existence of an injury that a reasonable  
4 doctor or patient would find important and worthy of comment or treatment; the presence  
5 of a medical condition that significantly affects an individual’s daily activities; or the  
6 existence of chronic and substantial pain are examples of indications that a prisoner has a  
7 ‘serious’ need for medical treatment.” *McGuckin*, 974 F.3d at 1059–60.

8 Moreover, even if the Court assumes Plaintiff’s medical conditions were  
9 “objectively serious,” nothing in his Complaint supports a “reasonable inference that [any  
10 individual] defendant” acted with deliberate indifference to his plight. *Iqbal*, 556 U.S. at  
11 678. “In order to show deliberate indifference, an inmate must allege sufficient facts to  
12 indicate that prison officials acted with a culpable state of mind.” *Wilson v. Seiter*, 501  
13 U.S. 294, 302 (1991). The indifference to medical needs also must be substantial;  
14 inadequate treatment due to malpractice, or even gross negligence, does not amount to a  
15 constitutional violation. *Estelle*, 429 U.S. at 106; *Toguchi v. Chung*, 391 F.3d 1051, 1060  
16 (9th Cir. 2004) (“Deliberate indifference is a high legal standard.” (citing *Hallett v.*  
17 *Morgan*, 296 F.3d 732, 1204 (9th Cir. 2002)); *Wood v. Housewright*, 900 F.2d 1332, 1334  
18 (9th Cir. 1990)).

19 Here, while Plaintiff obviously disagrees with Defendant Berkmann’s assessment of  
20 his need for a certain type of medication to treat his pain, his disagreement, without more,  
21 does not provide sufficient “factual content” to plausibly suggest that his physician acted  
22 with deliberate indifference. *Iqbal*, 556 U.S. at 678 (“The plausibility standard is not akin  
23 to a ‘probability requirement,’ but it ask for more than the sheer possibility that a defendant  
24 has acted unlawfully.”).

25 “A difference of opinion between a physician and the prisoner—or between medical  
26 professionals—concerning what medical care is appropriate does not amount to deliberate  
27 indifference.” *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (citing *Sanchez v. Vild*,  
28 891 F.2d 240, 242 (9th Cir. 1989)); *Wilhelm*, 680 F.3d at 1122–23. Rather, Plaintiff “must

1 show that the course of treatment the doctors chose was medically unacceptable under the  
2 circumstances and that the defendants chose this course in conscious disregard of an  
3 excessive risk to [his] health.” *Snow*, 681 F.3d at 988 (citing *Jackson v. McIntosh*, 90 F.3d  
4 330, 332 (9th Cir. 1996)) (internal quotation marks omitted).

5 Accordingly, the Court finds that Plaintiff has failed to adequately allege an  
6 inadequate medical care claim upon which § 1983 relief can be granted. *See* 28 U.S.C.  
7 §§ 1915(e)(2), 1915A(b).

#### 8 **D. Leave to Amend**

9 A pro se litigant must be given leave to amend his or her complaint to state a claim  
10 unless it is absolutely clear the deficiencies of the complaint cannot be cured by  
11 amendment. *See Lopez*, 203 F.3d at 1130 (noting leave to amend should be granted when  
12 a complaint is dismissed under 28 U.S.C. § 1915(e) “if it appears at all possible that the  
13 plaintiff can correct the defect”). Therefore, while the Court finds Plaintiff’s Complaint  
14 fails to state any claim upon which relief can be granted, it will provide him a chance to fix  
15 the pleading deficiencies discussed in this Order. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212  
16 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

#### 17 **III. Conclusion and Order**

18 Good cause appearing, the Court:

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

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

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