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

ARNOLDO BARRAZA,
CDCR #AM-5372,

Plaintiff,

vs.

W.L. MONTGOMERY; ENDERS;
ELIZONDO; RAMOS; V.J. GARCIA;
CAPTAIN LEE

Defendants.

Case No.: 3:17-cv-1048-MMA-RBB

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[Doc. No. 2]**

AND

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

Arnoldo Barraza (“Plaintiff”), proceeding pro se, is currently incarcerated at Calipatria State Prison located in Calipatria, California, and initially filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 in the Central District of California (Doc. No. 1). United States District Judge David O. Carter determined that venue for this action did not lie in the Central District and transferred the matter to the Southern District on May 22, 2017 (Doc. No. 4). Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) at the time of filing, but instead has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (Doc. No. 2).

1 **I. 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 \$400.¹ 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). However,
7 prisoners who are granted leave to proceed IFP remain obligated to pay the entire fee in
8 “increments” or “installments,” *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629
9 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of
10 whether their action is ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v.*
11 *Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

12 Section 1915(a)(2) also 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
18 balance in the account for the past six months, whichever is greater, unless the prisoner
19 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
20 custody of the prisoner then collects subsequent payments, assessed at 20% of the
21 preceding month’s income, in any month in which his account exceeds \$10, and forwards
22 those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2);
23 *Bruce*, 136 S. Ct. at 629.

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25
26 ¹ 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. June 1, 2016). 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 CDCR Inmate Statement
2 Report. *See* Doc. No. 2 at 4; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398
3 F.3d at 1119. This statements show that Plaintiff had an average monthly balance of
4 \$31.24, and average monthly deposits of \$25.00 to his account over the 6-month period
5 immediately preceding the filing of his Complaint, as well as an available balance of
6 \$25.31 at the time of filing. *See* Doc. No. 3 at 7. Based on this financial information, the
7 Court GRANTS Plaintiff’s Motion to Proceed IFP (Doc. No. 2), and assesses his initial
8 partial filing fee to be \$6.25 pursuant to 28 U.S.C. § 1915(b)(1).

9 However, the Court will direct the Secretary of the California Department of
10 Corrections and Rehabilitation (“CDCR”), or his designee, to collect this initial fee only
11 if sufficient funds are available in Plaintiff’s account at the time this Order is executed.
12 *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited
13 from bringing a civil action or appealing a civil action or criminal judgment for the
14 reason that the prisoner has no assets and no means by which to pay the initial partial
15 filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
16 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based
17 solely on a “failure to pay . . . due to the lack of funds available to him when payment is
18 ordered.”). The remaining balance of the \$350 total fee owed in this case must be
19 collected and forwarded to the Clerk of the Court pursuant to 28 U.S.C. § 1915(b)(1).

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

21 **A. Standard of Review**

22 Notwithstanding Plaintiff’s IFP status or the payment of any partial filing fees, the
23 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP
24 and by those, like Plaintiff, who are “incarcerated or detained in any facility [and]
25 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the
26 terms or conditions of parole, probation, pretrial release, or diversionary program,” “as
27 soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under
28 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,

1 which are frivolous, malicious, fail to state a claim, or which seek damages from
2 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*
3 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*
4 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

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

14 “When there are well-pleaded factual allegations, a court should assume their
15 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
16 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
17 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
18 allegations of material fact and must construe those facts in the light most favorable to
19 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
20 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

21 However, while the court “ha[s] an obligation where the petitioner is pro se,
22 particularly in civil rights cases, to construe the pleadings liberally and to afford the
23 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
24 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
25 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
26 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

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1 B. Plaintiff's Allegations

2 Plaintiff claims that on June 6, 2016, he was “involved in an incident” during
3 which his “left ear was bitten off while Plaintiff was fighting.” (Compl. at 3.) Defendant
4 began to “pepper spray” Plaintiff in his face “causing pain to Plaintiff’s fresh injury.”
5 (*Id.*) Defendants “did not properly decontaminate Plaintiff” and he was “denied proper
6 medical care.” (*Id.*) In addition, Plaintiff alleges that Defendants did not “properly
7 handle the preservation of Plaintiff’s ear.” (*Id.*) Medical personnel were unable to
8 reattach Plaintiff’s “left piece of ear” and Plaintiff will have to “walk around with a piece
9 of his ear missing for the rest of his life.” (*Id.* at 3-4.)

10 C. 42 U.S.C. § 1983

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

20 D. Personal Causation

21 First, the Court finds Plaintiff’s Complaint requires sua sponte dismissal pursuant
22 to 28 U.S.C. § 1915(e)(2)(B)(1) and § 1915A(b)(1) to the extent it seeks relief under
23 § 1983 against Warden Montgomery. “To state a claim under 42 U.S.C. § 1983, the
24 plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of
25 the United States was violated; and (2) that the alleged violation was committed by a
26 person acting under color of state law.” *Campbell v. Washington Dep’t of Soc. Servs.*,
27 671 F.3d 837, 842 n.5 (9th Cir. 2011), citing *Ketchum v. Alameda Cnty.*, 811 F.2d 1243,
28 1245 (9th Cir. 1987). The Complaint contains no factual allegations describing what

1 Defendant Montgomery did, or failed to do. To the extent Plaintiff seeks to hold him
2 liable for the actions of his subordinates, there is no respondeat superior liability under 42
3 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Rather,
4 “deliberate indifference is a stringent standard of fault, requiring proof that a municipal
5 actor disregarded a known or obvious consequence of his action.” *Connick v. Thompson*,
6 563 U.S. 51, 62 (2011) (“A less stringent standard of fault for a failure-to-train claim
7 ‘would result in de facto respondeat superior liability on municipalities’”), quoting
8 *City of Canton, Ohio v. Harris*, 489 U.S. 378, 392 (1989).

9 “The inquiry into causation must be individualized and focus on the duties and
10 responsibilities of each individual defendant whose acts or omissions are alleged to have
11 caused a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988),
12 citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976); *Berg v. Kincheloe*, 794 F.2d 457,
13 460 (9th Cir. 1986); *Estate of Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir.
14 1999) (“Causation is, of course, a required element of a § 1983 claim.”) A person
15 deprives another “of a constitutional right, within the meaning of section 1983, if he does
16 an affirmative act, participates in another’s affirmative acts, or omits to perform an act
17 which he is legally required to do that causes the deprivation of which [the plaintiff
18 complains].” *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Plaintiff has not
19 stated a claim against Defendant Montgomery because he has failed to allege facts
20 regarding what actions were taken or not taken by the Defendant which caused the
21 alleged constitutional violations. *See Canton*, 489 U.S. at 385 (“*Respondeat superior* and
22 vicarious liability will not attach under § 1983.”), citing *Monell*, 436 U.S. at 694-95.

23 E. Eighth Amendment Medical Care Claims

24 Only “deliberate indifference to serious medical needs of prisoners constitutes the
25 unnecessary and wanton infliction of pain ... proscribed by the Eighth Amendment.”
26 *Estelle*, 429 U.S. at 103, 104 (citation and internal quotation marks omitted). “A
27 determination of ‘deliberate indifference’ involves an examination of two elements: (1)
28 the seriousness of the prisoner’s medical need and (2) the nature of the defendant’s

1 response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991),
2 *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997)
3 (en banc) (quoting *Estelle*, 429 U.S. at 104).

4 “Because society does not expect that prisoners will have unqualified access to
5 health care, deliberate indifference to medical needs amounts to an Eighth Amendment
6 violation only if those needs are ‘serious.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992),
7 citing *Estelle*, 429 U.S. at 103-104. “A ‘serious’ medical need exists if the failure to treat
8 a prisoner’s condition could result in further significant injury or the ‘unnecessary and
9 wanton infliction of pain.’” *McGuckin*, 914 F.2d at 1059 (quoting *Estelle*, 429 U.S. at
10 104). “The existence of an injury that a reasonable doctor or patient would find important
11 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.” *Id.*, citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir.
15 1990); *Hunt v. Dental Dept.*, 865 F.2d 198, 200-01 (9th Cir. 1989).

16 At the screening stage of these proceedings, the Court will assume that Plaintiff’s
17 allegation of having lost a portion of his ear is sufficient to show he suffered an
18 objectively serious medical need. However, even assuming Plaintiff’s medical needs
19 were sufficiently serious, his Complaint fails to include any further “factual content” to
20 show that any of the named Defendants acted with “deliberate indifference” to those
21 needs. *McGuckin*, 914 F.2d at 1060; *see also Jett v. Penner*, 439 F.3d 1091, 1096 (9th
22 Cir. 2006); *Iqbal*, 556 U.S. at 678.

23 Plaintiff does not allege that he was denied treatment, aside from the alleged
24 inability to reattach the portion of the ear that had been bitten off. Plaintiff submits an
25 exhibit that purports to be a “Medical Report of Injury or Unusual Occurrence” which
26 identifies Plaintiff and is dated June 6, 2016. *See Compl., Ex.*, Doc. No. 1-1 at 27. In this
27 report, which appears to be the date of the incident, it is noted that injuries were found on
28 Plaintiff including “active bleeding, cut/laceration, O.C. spray area, reddened area, skin

1 flap, and swollen area.” (*Id.*) This report further notes that Plaintiff was sent to “TTA for
2 injury on [left] ear.” (*Id.*) Plaintiff does not provide any factual allegations that he was
3 denied treatment for his injury entirely only that he believes prison officials should have
4 reattached his ear.

5 To state an Eighth Amendment claim, Plaintiff must include “further factual
6 enhancement,” *Iqbal*, 556 U.S. at 678, which demonstrates that Defendants’ “purposeful
7 act or failure to respond to [his] pain or possible medical need,” *and* the “harm caused by
8 [this] indifference.” *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citing *Jett*,
9 439 F.3d at 1096). This is because to be deliberately indifferent, Defendants’ acts or
10 omissions must entail more than he has alleged here—an isolated act of alleged
11 negligence and/or lack of due care in preserving the portion of the ear that had been bitten
12 off. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (citation and quotation marks
13 omitted); *Wilhelm*, 680 F.3d at 1122. *See Toguchi*, 391 F.3d at 1057 (“Mere negligence in
14 diagnosing or treating a medical condition, without more, does not violate a prisoner’s
15 Eighth Amendment rights.”). Simply put, an “inadvertent [or negligent] failure to provide
16 adequate medical care” does not state a claim under § 1983. *Jett*, 439 F.3d at 1096 (citing
17 *Estelle*, 429 U.S. at 105).

18 Moreover, to the extent Plaintiff objects to the decision to not surgically reattach
19 the portion of his ear he lost, “[a] difference of opinion between a physician and the
20 prisoner—or between medical professionals—concerning what medical care is appropriate
21 does not amount to deliberate indifference.” *Snow*, 681 F.3d at 987 (citing *Sanchez v.*
22 *Vild*, 891 F.2d 240, 242 (9th Cir. 1989)); *Wilhelm*, 680 F.3d at 1122-23. Instead, Plaintiff
23 must plead facts sufficient to “show that the course of treatment the doctors chose was
24 medically unacceptable under the circumstances and that the defendants chose this course
25 in conscious disregard of an excessive risk to [his] health.” *Snow*, 681 F.3d at 988
26 (citation and internal quotations omitted).

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1 Accordingly, the Court finds that Plaintiff’s Complaint fails to state an Eighth
2 Amendment inadequate medical care claim any of the named Defendants, and that
3 therefore, it is subject to sua sponte dismissal

4 F. Eighth Amendment Excessive Force claims

5 Plaintiff alleges that he was fighting with another inmate which caused Defendant
6 Enders to “use O.C. pepper spray on Plaintiff spraying him in the face area.” (Compl. at
7 3.) Plaintiff further claims that this caused “extreme pain to Plaintiff’s fresh injury.”
8 (*Id.*)

9 The Eighth Amendment prohibits the infliction of “cruel and unusual
10 punishments.” U.S. Const. Amend. VIII. The “unnecessary and wanton infliction of
11 pain” constitutes cruel and unusual punishment prohibited by the United States
12 Constitution. *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Neither accident nor
13 negligence constitutes cruel and unusual punishment, as “[i]t is obduracy and
14 wantonness, not inadvertence or error in good faith, that characterize the conduct
15 prohibited by the Cruel and Unusual Punishments Clause.” *Id.*

16 When prison guards stand accused of using excessive force in violation of the
17 Eighth Amendment, “the core judicial inquiry is ... whether force was applied in a good-
18 faith effort to maintain or restore discipline, or maliciously and sadistically to cause
19 harm.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). The Court considers the following
20 factors: (1) the need for application of force; (2) the relationship between the need and
21 the amount of force used; (3) the extent of the injury inflicted; (4) the threat “reasonably
22 perceived by the responsible officials”; and (5) “any efforts made to temper the severity
23 of a forceful response.” *Id.* (*citing Whitley*, 476 U.S. at 321). “From such considerations
24 inferences may be drawn as to whether the use of force could plausibly have been
25 thought necessary, or instead evinced such wantonness with respect to the unjustified
26 infliction of harm as is tantamount to a knowing willingness that it occur.” *Whitley*, 475
27 U.S. at 321.

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1 However, not “every malevolent touch by a prison guard gives rise to a federal
2 cause of action.” *Hudson*, 503 U.S. at 9. “The Eighth Amendment’s prohibition of ‘cruel
3 and unusual’ punishments necessarily excludes from constitutional recognition de
4 minimis uses of physical force, provided that the use of force is not of a sort repugnant to
5 the conscience of mankind.” *Ibid.* (some internal quotation marks omitted).

6 Plaintiff’s facts show that he was engaged in a physical altercation with another
7 inmate from which he alleges he suffered a serious injury. *See* Compl. at 4. And thus,
8 Plaintiff’s allegations demonstrate that Defendants used pepper spray to “maintain or
9 restore discipline.” *Hudson*, 503 U.S. at 7. Plaintiff’s Complaint is devoid of any facts to
10 show that Defendants used pepper spray in a “malicious or sadistic” manner. *Id.*

11 Thus, the Court finds that Plaintiff’s Complaint fails to state an Eighth Amendment
12 excessive force claim any of the named Defendants, and that therefore, it is subject to sua
13 sponte dismissal.

14 **III. Conclusion and Order**

15 For the reasons explained, the Court:

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

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

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

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