

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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

JARROD GORDON,  
CDCR #BB-8328,  
  
Plaintiff,  
  
vs.  
  
DR. MUDD; TRI CITY MEDICAL  
CENTER; NURSE ERIN,  
  
Defendants.

Case No.: 3:18-cv-00376-MMA-AGS

**ORDER:**

**1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
[Doc. No. 3]**

**AND**

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

Jarrold Gordon (“Plaintiff”), currently incarcerated at Chuckawalla Valley State Prison (“CVSP”) located in Blythe, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 (Doc. No. 1). Plaintiff has not paid the civil filing fee required by 28 U.S.C. § 1914(a); instead he has filed a Motion to Proceed In Forma Pauperis pursuant to 28 U.S.C. § 1915(a) (Doc. No. 3).

///

///

1 **I. Motion to Proceed In Forma Pauperis**

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 granted leave to proceed  
8 IFP remains obligated to pay the entire fee in “increments” or “installments,” *Bruce v.*  
9 *Samuels*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182,  
10 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. See 28  
11 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 6-  
14 month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);  
15 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account  
16 statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits  
17 in the account for the past six months, or (b) the average monthly balance in the account  
18 for the past six months, whichever is greater, unless the prisoner has no assets. See 28  
19 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner  
20 then collects subsequent payments, assessed at 20% of the preceding month’s income, in  
21 any month in which his account exceeds \$10, and forwards those payments to the Court  
22 until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

23  
24  
25  
26  
27  
28  

---

<sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court 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 copy of his CDCR Inmate  
2 Statement Report. *See* ECF No. 3 at 5-7; 28 U.S.C. § 1915(a)(2); S.D. Cal. CivLR 3.2;  
3 *Andrews*, 398 F.3d at 1119. This statement shows that while Plaintiff carried an average  
4 monthly balance of \$751.45 and had average monthly deposits of \$8.81 to his account over  
5 the 6-month period immediately preceding the filing of his Complaint, he had an available  
6 balance of .04 at the time of filing. *See* ECF No. 3 at 4. Thus, the Court assesses Plaintiff’s  
7 initial partial filing fee to be \$150.20 pursuant to 28 U.S.C. § 1915(b)(1), but acknowledges  
8 he may be unable to pay that initial fee at this time. *See* 28 U.S.C. § 1915(b)(4) (providing  
9 that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing  
10 a civil action or criminal judgment for the reason that the prisoner has no assets and no  
11 means by which to pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281  
12 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing  
13 dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of  
14 funds available to him when payment is ordered.”).

15 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (Doc. No. 3),  
16 declines to exact any initial filing fee because his prison certificate indicates he may have  
17 “no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California  
18 Department of Corrections and Rehabilitation (“CDCR”), or his designee, to instead collect  
19 the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and forward them  
20 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28  
21 U.S.C. § 1915(b)(1). *See id.*

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

### 23 **A. Standard of Review**

24 Notwithstanding Plaintiff’s IFP status or the payment of any partial filing fees, the  
25 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP  
26 and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
27 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
28 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as

1 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
2 statutes, the Court must sua sponte dismiss complaints, or any portions thereof, which are  
3 frivolous, malicious, fail to state a claim, or which seek damages from defendants who are  
4 immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203 F.3d 1122,  
5 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004  
6 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

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

16 “When there are well-pleaded factual allegations, a court should assume their  
17 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
18 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
19 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
20 allegations of material fact and must construe those facts in the light most favorable to the  
21 plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
22 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

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

1           B.     Plaintiff's Allegations

2           On January 24, 2018, Plaintiff was “admitted into Tri-City Medical Center for a  
3 dental procedure.” (Compl. at 3.) Plaintiff alleges that he was to “have a surgical drain  
4 removed,” as well as “stitches removed from his gums and inner cheek.” (*Id.*) However,  
5 Plaintiff told the medical staff that he was “going to refuse all treatment and would not sign  
6 any consent to have any treatment or further procedure” by “Tri-City Medical Center or  
7 any of their employees.” (*Id.*)

8           The following day, Dr. Mudd “removed the surgical drain stitches and a few other  
9 stitches” from Plaintiff’s mouth “without [Plaintiff’s] consent.” (*Id.*) Plaintiff claims that  
10 Dr. Mudd “prescribed a narcotic and motrin for pain.” (*Id.*) He alleges that Dr. Mudd  
11 “used Nurse Erin’s cell phone light” to see inside his mouth and refused to perform the  
12 removal of the stitches in the operating room. (*Id.*) Nurse Erin “placed gauze” in his mouth  
13 to “stop the constant bleeding.” (*Id.*) Plaintiff claims he was never “given an I.V.” during  
14 these procedures. (*Id.*) In addition, he alleges Dr. Mudd “falsified my medical records  
15 stating that he removed all the stitches from my mouth when he did not.” (*Id.* at 3-4.)

16           Plaintiff was released from Tri-City Medical Center on January 25, 2018 and “sent  
17 back to Chuckawalla Valley State Prison.” (*Id.* at 4.) Plaintiff “informed several nurses”  
18 that he was “having difficulty feeling the left side” of his tongue and he was having  
19 “constant pain” in the “area of [his] mouth which had the stitches.” (*Id.*) Plaintiff “pleaded  
20 with several nurses” to examine his mouth because he believed he still had stitches in his  
21 mouth but all refused to examine his mouth. (*Id.*) Plaintiff also submitted an “emergency  
22 grievance” requesting to be seen by a dentist “but even the dental assistant and dentist  
23 (Dentist Rivera) insisted” that Plaintiff did not have any remaining stitches in his mouth.  
24 (*Id.*)

25           C.     42 U.S.C. § 1983

26           “Section 1983 creates a private right of action against individuals who, acting under  
27 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*,  
28 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive

1 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”  
2 *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations  
3 omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a right  
4 secured by the Constitution and laws of the United States, and (2) that the deprivation was  
5 committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698  
6 F.3d 1128, 1138 (9th Cir. 2012).

7 D. Eighth Amendment claim

8 Only “deliberate indifference to serious medical needs of prisoners constitutes the  
9 unnecessary and wanton infliction of pain ... proscribed by the Eighth Amendment.”  
10 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (citation and internal quotation marks  
11 omitted). “A determination of ‘deliberate indifference’ involves an examination of two  
12 elements: (1) the seriousness of the prisoner’s medical need and (2) the nature of the  
13 defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.  
14 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th  
15 Cir. 1997) (en banc) (quoting *Estelle*, 429 U.S. at 104).

16 “Because society does not expect that prisoners will have unqualified access to  
17 health care, deliberate indifference to medical needs amounts to an Eighth Amendment  
18 violation only if those needs are ‘serious.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992),  
19 citing *Estelle*, 429 U.S. at 103-104. “A ‘serious’ medical need exists if the failure to treat  
20 a prisoner’s condition could result in further significant injury or the ‘unnecessary and  
21 wanton infliction of pain.’” *McGuckin*, 914 F.2d at 1059 (quoting *Estelle*, 429 U.S. at  
22 104). “The existence of an injury that a reasonable doctor or patient would find important  
23 and worthy of comment or treatment; the presence of a medical condition that  
24 significantly affects an individual’s daily activities; or the existence of chronic and  
25 substantial pain are examples of indications that a prisoner has a ‘serious’ need for  
26 medical treatment.” *Id.*, citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir.  
27 1990); *Hunt v. Dental Dept.*, 865 F.2d 198, 200-01 (9th Cir. 1989).

28

1 At the screening stage of these proceedings, the Court will assume that Plaintiff's  
2 allegation of having suffered a dental injury grave enough to require surgical intervention  
3 is sufficient to show he suffered an objectively serious medical need. *See* Compl. at 3;  
4 *McGuckin*, 914 F.2d at 1059.

5 However, even assuming Plaintiff's dental needs were sufficiently serious, his  
6 Complaint fails to include any further "factual content" to show that either Dr. Mudd or  
7 Nurse Erin acted with "deliberate indifference" to those needs. *McGuckin*, 914 F.2d at  
8 1060; *see also Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Iqbal*, 556 U.S. at  
9 678.

10 Specifically, Plaintiff claims only that Dr. Mudd removed some stitches from his  
11 mouth "without his consent" and prescribed pain medication following the procedure.  
12 (Compl. at 3.) Plaintiff also alleges that Nurse Erin provided him with gauze to stop the  
13 bleeding from the procedure. (*Id.*) Plaintiff does not complain of any pain before his  
14 release from Tri-City Medical Center. Instead, after Plaintiff returns to CVSP he  
15 complained of pain to medical and dental officials at CVSP. CVSP is located in  
16 Riverside County. If Plaintiff is attempting to state an Eighth Amendment deliberate  
17 indifference claim as to CVSP medical and dental officials, he would need to file a  
18 separate action in the Central District of California. *See* 28 U.S.C. § 84(c)(1) ("The  
19 Eastern Division [of the Central District of California] comprises the counties of  
20 Riverside and San Bernardino.").

21 To state an Eighth Amendment claim, Plaintiff must include "further factual  
22 enhancement," *Iqbal*, 556 U.S. at 678, which demonstrates both Dr. Mudd and Nurse  
23 Erin's "purposeful act or failure to respond to [his] pain or possible medical need," *and*  
24 the "harm caused by [this] indifference." *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th  
25 Cir. 2012) (citing *Jett*, 439 F.3d at 1096). This is because to be deliberately indifferent,  
26 both Mudd and Erin's acts or omissions must entail more than he has alleged here—an  
27 isolated act of alleged negligence and/or lack of due care. *Snow v. McDaniel*, 681 F.3d  
28 978, 985 (9th Cir. 2012) (citation and quotation marks omitted); *Wilhelm*, 680 F.3d at

1 1122. *See Toguchi*, 391 F.3d at 1057 (“Mere negligence in diagnosing or treating a  
2 medical condition, without more, does not violate a prisoner’s Eighth Amendment  
3 rights.”). Simply put, an “inadvertent [or negligent] failure to provide adequate medical  
4 care” does not state a claim under § 1983. *Jett*, 439 F.3d at 1096 (citing *Estelle*, 429 U.S.  
5 at 105).

6 Moreover, to the extent Plaintiff objects to the decisions made by Dr. Mudd as to  
7 how he would remove the stitches, “[a] difference of opinion between a physician and the  
8 prisoner—or between medical professionals—concerning what medical care is appropriate  
9 does not amount to deliberate indifference.” *Snow*, 681 F.3d at 987 (citing *Sanchez v.*  
10 *Vild*, 891 F.2d 240, 242 (9th Cir. 1989)); *Wilhelm*, 680 F.3d at 1122-23. Instead, Plaintiff  
11 must plead facts sufficient to “show that the course of treatment the doctors chose was  
12 medically unacceptable under the circumstances and that the defendants chose this course  
13 in conscious disregard of an excessive risk to [his] health.” *Snow*, 681 F.3d at 988  
14 (citation and internal quotations omitted).

15 Finally, the pain and related issues Plaintiff alleges occurred following his release  
16 from Tri-City Medical Center and there are no allegations that Dr. Mudd or Nurse Erin  
17 were at all aware Plaintiff was alleging that he was suffering from complications due to  
18 the procedure. A plaintiff must allege fact to establish a causal link between the  
19 Defendants’ conduct and an alleged injury. Without causation, there is no deprivation of  
20 a plaintiff’s constitutional rights. *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976).

21 Accordingly, the Court finds that Plaintiff’s Complaint fails to state an Eighth  
22 Amendment inadequate medical care claim against either Dr. Mudd or Nurse Erin, and  
23 that therefore, it is subject to sua sponte dismissal in its entirety pursuant to 28 U.S.C.  
24 § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d  
25 at 1004. Because he is proceeding pro se, however, the Court having now provided him  
26 with “notice of the deficiencies in his complaint,” will also grant Plaintiff an opportunity  
27 to amend. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v.*  
28 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).



1 **III. Conclusion and Orders**

2 For the reasons explained, the Court:

3 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)  
4 (Doc. No. 3);

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

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

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

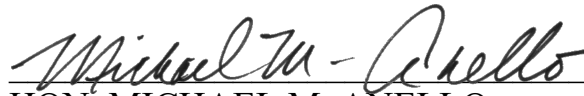
25 If Plaintiff fails to file an Amended Complaint within the time provided, the Court  
26 will enter a final Order dismissing this civil action based both on Plaintiff’s failure to state  
27 a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and  
28 1915A(b), and his failure to prosecute in compliance with a court order requiring

1 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does  
2 not take advantage of the opportunity to fix his complaint, a district court may convert the  
3 dismissal of the complaint into dismissal of the entire action.”).

4 5. The Clerk of Court is directed to mail a court approved form civil rights  
5 complaint to Plaintiff.

6 **IT IS SO ORDERED.**

7 DATE: March 16, 2018



8 HON. MICHAEL M. ANELLO  
9 United States District Judge

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28