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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 MARCUS ANTONIO OCHOA,  
12 CDCR #F-81217

13 Plaintiff,

14 vs.

15  
16 JAMES HILL, Warden; DR. JOHN  
17 HODGES; DR. LUZVIMINDA SAIDRO;  
18 JANE DOE, Registered Nurse,

19 Defendants.  
20  
21

Case No.: 23-cv-2058-MMA-MMP

**ORDER: (1) GRANTING MOTION  
TO PROCEED IN FORMA  
PAUPERIS; AND**

[Doc. No. 2]

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

22 **I. INTRODUCTION**

23 Marcus Antonio Ochoa (“Plaintiff” or “Ochoa”), currently incarcerated at  
24 California State Prison – Los Angeles County (“CSP-LAC”) located in Lancaster,  
25 California and proceeding *pro se*, has filed a civil rights complaint pursuant to 42 U.S.C.  
26 § 1983. *See* Doc. No. 1 (“Compl.”). Plaintiff has also filed a certified copy of his prison  
27 trust account fund statement, which the Court construes as Plaintiff’s Motion to Proceed  
28 In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). Doc. No. 2.

1 For the reasons discussed below, the Court **GRANTS** Plaintiff’s IFP motion but  
2 **DISMISSES** his Complaint without prejudice and with leave to amend.

3 **II. MOTION TO PROCEED IFP**

4 All parties instituting any civil action, suit or proceeding in a district court of the  
5 United States, except an application for writ of habeas corpus, must pay a filing fee of  
6 \$402.<sup>1</sup> See 28 U.S.C. § 1914(a). A party may initiate a civil action without prepaying  
7 the required filing fee if the Court grants leave to proceed IFP based on indigency. 28  
8 U.S.C. § 1915(a); *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007).

9 To proceed IFP, plaintiffs must establish their inability to pay by filing an affidavit  
10 regarding their income and assets. See *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th  
11 Cir. 2015). Prisoners seeking to establish an inability to pay must also submit a “certified  
12 copy of the [prisoner’s] trust fund account statement (or institutional equivalent) for . . .  
13 the 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
14 § 1915(a)(2). From the certified trust account statement, the Court assesses an initial  
15 payment of 20% of (a) the average monthly deposits in the account for the past six  
16 months, or (b) the average monthly balance in the account for the past six months,  
17 whichever is greater, unless the prisoner has no assets. See 28 U.S.C. §§ 1915(b)(1) &  
18 (4). Prisoners who proceed IFP must repay the entire fee in installments regardless of  
19 whether their action is ultimately dismissed. 28 U.S.C. § 1915(b)(2); *Bruce v. Samuels*,  
20 577 U.S. 82, 84 (2016).

21 Plaintiff has provided a Prison Certificate authorized by a CSP-LAC accounting  
22 officer. Doc. No. 2 at 2. During the six months prior to filing suit, Plaintiff had an  
23 average monthly balance of \$8.34, average monthly deposits of \$8.33, and an available  
24 account balance of \$5.01 at the time he filed suit. *Id.* Accordingly, The Court **GRANTS**  
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27 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$52.  
28 See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14  
(eff. Dec., 2022)). The additional \$52 administrative fee does not apply to persons granted leave to  
proceed IFP. *Id.*

1 Plaintiff's IFP motion. The Court assesses an initial partial filing fee of \$1.67. Plaintiff  
2 remains obligated to pay the remaining \$348.33 in monthly installments even if this  
3 action is ultimately dismissed. 28 U.S.C. §§ 1915(b)(1) & (2).

### 4 **III. SCREENING PURSUANT TO 28 U.S.C. § 1915(e) AND § 1915A(b)**

#### 5 **A. Legal Standards**

6 Pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b), the Court must screen a  
7 prisoner's IFP complaint and *sua sponte* dismiss it to the extent that it is frivolous,  
8 malicious, fails to state a claim, or seeks damages from defendants who are immune. *See*  
9 *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (*en banc*); *Rhodes v. Robinson*,  
10 621 F.3d 1002, 1004 (9th Cir. 2010). “The standard for determining whether Plaintiff has  
11 failed to state a claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the  
12 same as the Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a  
13 claim.” *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). Rule 12(b)(6) requires  
14 that a complaint to “contain sufficient factual matter . . . to state a claim to relief that is  
15 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation  
16 marks omitted). While detailed factual allegations are not required, “[t]hreadbare recitals  
17 of the elements of a cause of action, supported by mere conclusory statements, do not  
18 suffice” to state a claim. *Id.* The “mere possibility of misconduct” or “unadorned, the  
19 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 **B. Plaintiff's Allegations**

22 Plaintiff's Complaint contains very few specific factual allegations of the events  
23 that took place giving rise to this action. It appears at an unspecified time, that Plaintiff  
24 was informed by Sergeant Mitchell (“Mitchell”), the ADA Liaison Officer, that he was  
25 going to be moved to a different cell because “they wanted to put another inmate in the  
26 cell that I was occupying.” Compl. at 6. Plaintiff informed Mitchell that he could not  
27 move cells because he “couldn't walk up the stairs because [he] had a tendency to trip on  
28 them due to [his] mobility impairments.” *Id.* However, Mitchell told Plaintiff that

1 “medical had cleared [him]” and “threatened to put [Plaintiff] in Administrative  
2 Segregation if [he] did not comply.” *Id.*

3 Plaintiff seeks to hold Defendant Doctor John Hodges (“Hodges”) liable as he  
4 claims his medical placement status was changed “without conducting a proper  
5 medical/physical examination.” *Id.* at 5. As a result, Plaintiff was “moved to an upper  
6 tier from where [he] had a terrible fall due to [Hodges] negligent recommendation.” *Id.*  
7 Plaintiff also claims “Nurse Jane Doe” was not qualified to conduct a physical  
8 examination and her examination was purportedly the “basis for everything that ensued.”  
9 *Id.* Plaintiff alleges Defendant Doctor Luzviminda Saidro (“Saidro”) is his primary care  
10 provider and she informed Plaintiff that she would not take any action with Hodges’  
11 decision to change Plaintiff’s medical placement because she allegedly “wasn’t going to  
12 go against her supervisor’s decision.” *Id.*

### 13 **C. Discussion**

#### 14 *1. Official Capacity Claims*

15 As an initial matter, the Court notes that Plaintiff brings this action against the  
16 named Defendants in their individual and official capacities. A suit brought against  
17 prison officials in their official capacity is generally equivalent to a suit against the prison  
18 itself. *McRorie v. Shimoda*, 795 F.2d 780, 783 (9th Cir. 1986). Therefore, prison  
19 officials may be held liable only if “‘policy or custom’ . . . played a part in the violation of  
20 federal law.” *Id.* (quoting *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)). The official  
21 may be liable where the act or failure to respond reflects a conscious or deliberate choice  
22 to follow a course of action when various alternatives were available. *Clement v. Gomez*,  
23 298 F.3d 898, 905 (9th Cir. 2002) (quoting *City of Canton v. Harris*, 489 U.S. 378, 389  
24 (1989); see *Long v. County of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006); *Waggy*  
25 *v. Spokane County Washington*, 594 F.3d 707, 713 (9th Cir. 2010). To prove liability for  
26 an action policy the plaintiff “must . . . demonstrate that his deprivation resulted from an  
27 official policy or custom established by a . . . policymaker possessed with final authority  
28 to establish that policy.” *Waggy*, 594 F.3d at 713. Here, Plaintiff has failed to include

1 factual allegations that the violations at issue in this action were the result of a policy or  
2 custom of the CDCR. As such, Plaintiff fails to state an official capacity claim against  
3 any named Defendant, and his official capacity claims must be dismissed.

4 2. *Eighth Amendment*

5 Plaintiff alleges his Eighth Amendment rights were violated when he was moved  
6 to an upper tier cell which he alleges caused him to fall. *See* Compl. at 5–6.

7 a. Respondeat Superior – Warden James Hill

8 Plaintiff fails to state an Eighth Amendment claim against Warden Hill. There is  
9 no respondeat superior liability under § 1983. *Jones v. Williams*, 297 F.3d 930, 934 (9th  
10 Cir. 2002). Specifically, liability may not be imposed on supervisory personnel for the  
11 actions or omissions of their subordinates. *Iqbal*, 556 U.S. at 676–77. Supervisors may  
12 be held liable only if they “participated in or directed the violations, or knew of the  
13 violations and failed to act to prevent them.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th  
14 Cir. 1989); *Starr v. Baca*, 652 F.3d 1202, 1205–06 (9th Cir. 2011).

15 As to Warden Hill, Plaintiff merely alleges that Hill is in charge of [Richard J.  
16 Donovan Correctional Facility (“RJD”)] and “nothing happens without his consent.”  
17 Compl. at 6. Plaintiff, however, fails to set forth any specific facts to demonstrate Hill  
18 knew of any medical decisions impacting Plaintiff or that a change in cells would result  
19 to any injury to Plaintiff. *See Taylor*, 880 F.3d at 1045. Plaintiff fails to state a claim  
20 because he fails to provide *any* factual allegations which plausibly allege personal  
21 participation on the part of Warden Hill. *See Iqbal*, 556 U.S. at 676 (“Because vicarious  
22 liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each Governmental-  
23 official defendant, through the official’s own individual actions, has violated the  
24 Constitution.”). Therefore, Plaintiff has failed to state a plausible claim against Warden  
25 Hill. *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1); *see also Lopez*, 203 F.3d at 1126–  
26 27.

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1           b.     Failure to Protect

2           Plaintiff’s Complaint lacks sufficient specific factual allegations that would  
3 provide more information that forms the basis of his claims. However, it does appear that  
4 Plaintiff alleges Hodges, Jane Doe, Mitchell, and Saidro all violated his Eighth  
5 Amendment rights because of a change of placement in the “Disability Placement  
6 Program” caused him to be housed in a cell that led to his fall. *See* Compl. at 5–6.

7           The Eighth Amendment requires that prison officials take reasonable measures to  
8 guarantee the safety and well-being of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832–  
9 33 (1994); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). To state an Eighth  
10 Amendment failure to protect claim, however, Plaintiff must allege facts sufficient to  
11 plausibly show that (1) he faced conditions posing a “substantial risk of serious harm” to  
12 his health or safety, and (2) the individual prison official he seeks to hold liable was  
13 “deliberately indifferent” to those risks. *Farmer*, 511 U.S. at 837; *Thomas v. Ponder*,  
14 611 F.3d 1144, 1150 (9th Cir. 2010). To demonstrate deliberate indifference, Plaintiff  
15 must allege facts sufficiently to plausibly show that the defendant both knew of and  
16 disregarded a substantial risk of serious harm to his health and safety. *Farmer*, 511 U.S.  
17 at 837. Thus, Plaintiff must allege “the official [was] both be aware of facts from which  
18 the inference could be drawn that a substantial risk of serious harm exist[ed], and [that]  
19 he . . . also dr[e]w that inference.” *Id.*

20           Plaintiff’s Complaint lacks specific factual allegations sufficient to demonstrate  
21 that he faced “substantial risk of serious harm” if he was moved to a different cell. He  
22 fails to allege facts to identify the basis for his need to be housed in a particular cell or on  
23 a particular tier. Plaintiff does allege that he had a “terrible fall down the stairs” but he  
24 does not identify his physical or medical condition that would place any Defendant on  
25 notice that being housed on the second tier would potentially cause him harm. He also  
26 does not allege any facts with regard to when the fall occurred and when his change to his  
27 status was made and therefore, it is unclear which Defendants would have been aware of  
28 a risk to his safety. In order to sufficiently allege plausible allegations that any of the

1 individual Defendants were deliberately indifferent to a risk of serious harm to his health  
2 and safety, Plaintiff would need to allege that they knew of a substantial risk to his health  
3 and safety *before* the alleged harm occurred. There are insufficient facts from which the  
4 Court could find that Plaintiff has alleged that any of the named Defendants were  
5 deliberately indifferent to a risk to his safety.

6 c. Inadequate Medical Care

7 To the extent that Plaintiff is also bringing Eighth Amendment inadequate medical  
8 care claims against Defendants, the Court finds that he has failed to state a claim.

9 Prisoners are entitled to “ready access to adequate medical care,” *Hoptowit v. Ray*, 682  
10 F.2d 1237, 1253 (9th Cir. 1982), and “deliberate indifference to serious medical needs of  
11 prisoners” violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

12 “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could  
13 result in further significant injury or the ‘unnecessary and wanton infliction of pain.’”  
14 *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (quoting *Estelle*, 429 U.S. at  
15 104) *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th  
16 Cir. 1997; *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *Mendiola-Martinez v.*  
17 *Arpaio*, 836 F.3d 1239, 1248 (9th Cir. 2016). Again, Plaintiff’s Complaint lacks any  
18 specific factual allegations relating to his medical needs and thus, at this time Plaintiff  
19 has not alleged any facts from which the Court could find that he suffers from a “serious”  
20 medical need.

21 Moreover, in order to plead a viable Eighth Amendment claim for inadequate  
22 medical care, Plaintiff must also allege Defendants acted with deliberate indifference to  
23 his serious medical needs. *See Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir.  
24 2014) (citing *Estelle*, 429 U.S. at 104). “Deliberate indifference is a high legal standard”  
25 and is established only where the defendant subjectively “knows of and disregards an  
26 excessive risk to inmate health and safety.” *Toguchi v. Chung*, 391 F.3d 1051, 1057,  
27 1060 (9th Cir. 2004) (citation and internal quotation marks omitted). The prisoner must  
28 allege facts sufficient to show “(a) a purposeful act or failure to respond to [his] pain or

1 possible medical need and (b) harm caused by the indifference.” *Jett*, 439 F.3d at 1096  
2 (citation omitted). Inadvertent failures to provide adequate medical care, mere  
3 negligence or medical malpractice, delays in providing care (without more), and  
4 differences of opinion over what medical treatment or course of care is proper, are all  
5 insufficient to constitute an Eighth Amendment violation.” *Norvell v. Roberts*, No. 20-  
6 cv-0512 JLS (NLS), 2020 WL 4464454, at \*4 (S.D. Cal. Aug. 4, 2020) (citing *Estelle*,  
7 429 U.S. at 105–07; *Wood v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990); *Sanchez*  
8 *v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989); *Shapley v. Nev. Bd. of State Prison Comm’rs*,  
9 766 F.2d 404, 407 (9th Cir. 1985)).

10 Plaintiff alleges Nurse Jane Doe was “not qualified to do a proper examination.”  
11 Compl. at 5. However, there are no specific factual allegations about how the purported  
12 actions of this Defendant caused him any harm. Plaintiff alleges Hodges changed his  
13 “medical restrictions” but offers no other allegations as to the basis on which Plaintiff’s  
14 medical status was changed by Hodges. As for Saidro, Plaintiff’s alleges that she was his  
15 Primary Care Provider who informed him that she was going to agree with Dr. Hodges  
16 opinion with regard to Plaintiff’s medical treatment. He also apparently seeks to hold  
17 Defendant Sergeant Mitchell (“Mitchell”) liable because he would not stop Plaintiff’s cell  
18 transfer because he was informed that “medical had cleared [Plaintiff].” *Id.* Once again,  
19 there are simply not enough facts from which the Court could find that Plaintiff  
20 allegations rise to the level of “deliberate indifference.”

21 A difference of opinion between an inmate and prison medical personnel—or  
22 between medical professionals—regarding appropriate medical diagnosis and treatment is  
23 not enough to support a viable deliberate indifference claim. *Sanchez*, 891 F.2d at 242;  
24 *Toguchi*, 391 F.3d at 1058. Essentially, Plaintiff contends that Hodges was wrong for  
25 changing his medical status and the other Defendants should have overturned or  
26 disregarded Hodges’ medical opinion. But to hold these Defendants liable for violating  
27 the Eighth Amendment’s prohibition of cruel and unusual punishment, he must plead  
28 facts sufficient to plausibly show their medical opinions and treatment decisions were



1 “medically unacceptable under the circumstances” and was chosen “in conscious  
2 disregard of an excessive risk” to his health. *Hamby v. Hammond*, 821 F.3d 1085, 1092  
3 (9th Cir. 2016) (citations omitted); *Iqbal*, 556 U.S. at 678. He has not.

4 Accordingly, the Court finds that Plaintiff has failed to state a claim upon which  
5 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A.

#### 6 **D. Leave to Amend**

7 Given Plaintiff’s pro se status, the Court grants him leave to amend to attempt to  
8 sufficiently allege a claim if he can. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th  
9 Cir. 2015) (“A district court should not dismiss a pro se complaint without leave to  
10 amend [pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)] unless it is absolutely clear that the  
11 deficiencies of the complaint could not be cured by amendment.”) (internal quote marks  
12 omitted).

### 13 **IV. CONCLUSION**

14 For the reasons set forth above, the Court hereby:

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

17 2. **ORDERS** the Secretary of the CDCR, or his designee, to collect from  
18 Plaintiff’s prison trust account the \$1.67 initial filing fee as well as the remaining balance  
19 of the \$350 filing fee owed in this case by collecting monthly payments from the account  
20 in an amount equal to twenty percent (20%) of the preceding month’s income and  
21 forward payments to the Clerk of the Court each time the amount in the account exceeds  
22 \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS MUST CLEARLY**  
23 **IDENTIFY THE NAME AND CASE NUMBER ASSIGNED TO THIS ACTION.**

24 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Jeff  
25 Macomber, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001, by  
26 U.S. Mail, or by forwarding an electronic copy to [trusthelpdesk@cdcr.ca.gov](mailto:trusthelpdesk@cdcr.ca.gov).

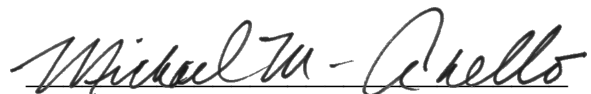
27 4. **DISMISSES** the Complaint without prejudice and with leave to amend  
28 pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

1           5.           **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in  
2 which to file a First Amended Complaint which cures the deficiencies of pleading noted  
3 in this Order. Plaintiff’s Amended Complaint must be complete by itself without  
4 reference to any previous version of his pleading; Defendants not named and any claims  
5 not re-alleged in the Amended Complaint will be considered waived. *See* S.D. Cal.  
6 CivLR 15.1; *Hal Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (noting  
7 that claims dismissed with leave to amend which are not re-alleged in an amended  
8 pleading may be “considered waived if not repled”); *Roach Studios, Inc. v. Richard*  
9 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989). If Plaintiff fails to timely  
10 amend, the Court will enter a final Order dismissing this civil action. *See Lira v.*  
11 *Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take advantage of  
12 the opportunity to fix his complaint, a district court may convert the dismissal of the  
13 complaint into dismissal of the entire action.”).

14           6.           The Clerk of Court is directed to mail Plaintiff a court approved civil rights  
15 form for his use in amending.

16           **IT IS SO ORDERED.**

17 Dated: November 16, 2023

18 

19 HON. MICHAEL M. ANELLO  
20 United States District Judge