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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CARLTON V. MOSLEY,

Plaintiff, v. SCOTT KERNAN, et al.,

Defendants.

No. CV 17-4849-JAK (PLA)

ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND

Plaintiff, a state prisoner presently held at California State Prison in Sacramento, California, filed a pro se civil rights action herein pursuant to 42 U.S.C. § 1983 on June 30, 2017. Plaintiff subsequently was granted leave to proceed in forma pauperis. (ECF No. 6). In the Complaint, plaintiff names as defendants twelve officials at the California State Prison, Los Angeles County in Lancaster ("CSP-LAC"), including the Direc tor, Scott Kernan, and the Warden, Debbie Asuncion. All defendants are named in their official as well as individual capacities. (ECF No. 1 at 5-9). Plaintiff's claims aris e from an incident that occurred while plaintiff was held at CSP-LAC. Plaintiff alleges that, on May 20, 2016, at 8:25 a.m., plaintiff was attacked by two inmates and eight correctional officers on D-Facility Yard. (Id. at 10). Plaintiff experienced a "severe trauma episode" and "lay on the ground floor weeping in a fetal position." (Id. at 11). Several defendants used unnecessary force, including pepper spray and batons, before they "dragged plaintiff off the 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

yard." (Id. at 12-15). Plaintiff seeks monetary damages. (Id. at 41).

In accordance with the mandate of the Prison Litigation Reform Act of 1995 ("PLRA"), the Court has screened the Complaint prior to ordering service for the purpose of determining whether the action is frivolous or malicious; or fails to state a claim on which relief may be granted; or seeks monetary

relief against a defendant who is immune from such relief. See 28 U.S.C. §§ 1915A, 1915(e)(2); 42 U.S.C. § 1997e.

The Court's screening of the pleading under t he foregoing statutes is governed by the following standards. A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police Dep't , 901 F.2d 696, 699 (9th Cir. 1990); see also Rosati v. Igbinoso, 791 F.3d 1037, 1039 (9th Cir. 2015) (in determining whether a complaint should be dismissed under the PLRA, courts apply the standard of Fed. R. Civ. P. 12(b)(6)). Further, with respect to a plaintiff's pleading burden, the Supreme Court has held that: "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. … Factual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (internal citations omitted, alteration in original); see also Ashcroft v. Iqbal, 556 U.S. 662, 668, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (To avoid dismissal for failure to state a claim, "a co mplaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (internal citation omitted)). Since plaintiff is appearing pro se, the Court must construe the allegations of the pleading liberally and must afford plaintiff the benefit of any doubt. See Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010). Finally, in determining whether a complaint states a claim on which relief may be granted, allegations of material fact are taken as true and construed in the light most favorable to plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable

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to legal conclusions." Iqbal , 556 U.S. at 678.

After careful review of the Complaint under the foregoing standards, the Court finds that plaintiff's allegations appear insufficient to state a claim against any named defendant. Accordingly, the Complaint is dismissed with leave to amend. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987) (holding that a pro se litigant must be given leave to amend his complaint unless it is absolutely clear that the deficiencies of the complaint cannot be cured by amendment).

If plaintiff desires to pursue this action, he is ORDERED to file a First Amended Complaint no later than August 25, 2017, remedying the deficiencies discussed below. Further, plaintiff is admonished that, if he fails to timely file a First Amended Complaint or fails to remedy the deficiencies of this pleading as discussed herein, the Court will recommend that the action be dismissed without further leave to amend and with prejudice. 1

DISCUSSION A. PLAINTIFF'S COMPLAINT FAILS TO STATE A SHORT AND PLAIN STATEMENT IN

COMPLIANCE WITH FEDERAL RULE OF CIVIL PROCEDURE 8.

Plaintiff's Complaint fails to comply with Feder al Rule of Civil Procedure 8(a) and 8(d). Fed. R. Civ. P. 8(a) states:

A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief

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Plaintiff is advised that this Court's determination herein that the allegations in the Complaint are insufficient to state a particular claim should not be seen as dispositive of that claim. Accordingly, while this Court believes that you have failed to plead sufficient factual matter in your pleading, accepted as true, to state a claim to relief that is plausible on its face, you are not required to omit any claim or defendant in order to pursue this action. However, if you decide to pursue a claim in a First Amended Complaint that this Court has found to be insufficient, then this Court, pursuant to the provisions of 28 U.S.C. § 636, ultimately will submit to the assigned district judge a recommendation that such claim be dismissed with prejudice for failure to state a claim, subject to your right at that time to file Objections with the district judge as provided in the Local Rules Governing Duties of Magistrate Judges.

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sought, which may include relief in the alternative or different types of relief.

(Emphasis added). Rule 8(d)(1) provides: "Each allegation must be simple, concise, and direct. No technical form is required." (Emphasis added). Although the Court must construe a pro se plaintiff's pleadings liberally, a pl aintiff nonetheless must allege a minimum factual and legal basis for each claim that is sufficient to give each defendant fair notice of what plaintiff's claims are and the grounds upon which they rest. See, e.g., Brazil v. United States Department of the Navy, 66 F.3d 193, 199 (9th Cir. 1995); McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991) (complaint must give defendants fair notice of the claims against them). If a plaintiff fails to clearly and concisely set forth allegations sufficient to provide defendants with notice of which defendant is being sued on which theory and what relief is being sought against them, the complaint fails to comply with Rule 8. See, e.g., McHenry v. Renne, 84 F.3d 1172, 1177-79 (9th Cir. 1996); Nevijel v. Northcoast Life Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981). Moreover, failure to comply with Rule 8 constitutes an independent

basis for dismissal of a complaint that applies even if the claims in a complaint are not found to be wholly without merit. See McHenry, 84 F.3d at 1179; Nevijel, 651 F.2d at 673.

First, it is not clear to the Court how many claims plaintiff is purporting to raise against each defendant. Plaintiff incorporates all of the preceding allegations into each of his First, Second, and Third claims (ECF No. 1 at 27, 32, 34), which makes it extremely difficult to discern which factual allegations pertain to what claim. Further, in his Claim I, plaintiff purports to raise a claim under the Eighth Amendment against Director Kernan and Warden Asuncion arising from their "action of intimidation, abuse, harassment, and other violations of law against plaintiff." (Id. at 27). Plaintiff's Complaint, however, fails to set forth any factual allegations that either defendant took any affirmative action, participated in the action of another, or failed to take an action that he or she was legally required to do that caused any constitutional violation. In order to state a federal civil rights claim against a particular defendant, plaintiff must allege that a specific defendant, while acting under color of state law, deprived him of a right guaranteed under the Constitution or a federal statute. See West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

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"A person deprives another 'of a constitutional righ t, within the meaning of section 1983, if he does an affirmative act, participates in another's affirma tive acts, or omits to perform an act which he is legally required to do that causes the deprivation of which [the plaintiff complains].'" Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (emphasis and alteration in original)). As the Supreme Court has made clear, plaintiff must plead "more than labels and conclusions." Twombly , 550 U.S. at 555. Moreover, supervisory personnel are not liable under § 1983 on a theory of respondeat superior. See, e.g., Redman v. Cty. of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc). In Iqbal, 556 U.S. at 676, the Supreme Court reaffirmed that: "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior." Accordingly, plaintiff may not state a federal civil rights claim against any defendant, including Director Kernan and Warden Asuncion, based on his or her role as a supervisor.

Second, plaintiff names each defendant in his or her official capacity. All defendants are alleged to be employees of the California Department of Corrections and Rehabilitation ("CDCR"), which is a state agency. In Will v. Michigan Department of State Police, 491 U.S. 58, 64-66, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), the Supreme Court held that states, state agencies, and state officials sued in their official capacities are not persons subject to civil rights suits under 42 U.S.C. § 1983. In addition, the Eleventh Amendment bars federal jurisdiction over suits by individuals against a State and its instrumentalities, unless either the State consents to waive its sovereign immunity or Congress abrogates it. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99-100, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). To overcome this Eleventh Amendment bar, the State's consent or Congress' intent must be "unequivocally expressed." Pennhurst , 465 U.S. at 99. While California has consented to be

sued in its own courts pursuant to the California Tort Claims Act, such consent does not constitute consent to suit in federal court. See BV Engineering v. Univ. of California, 858 F.2d 1394, 1396 (9th Cir. 1988); see also Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) (holding that Art. III, § 5 of the California Constitution does not constitute a waiver of California's Eleventh Amendment immunity). Finally, Congress has not repealed State sovereign immunity against suits

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under 42 U.S.C. § 1983. Plaintiff's Complaint seeks only monetary damages. Accordingly, plaintiff may not maintain a federal civil rights claim against defendants in their official capacities.

Third, plaintiff alleges that defendant Nurse Eyan failed to adequately investigate the incident and failed to discipline unspecified officers. Plaintiff's Complain t, however, does not set forth any factual allegations concerning any investigation, and he does not allege that defendant Eyan was aware that plaintiff would suffer a substantial risk of serious harm from the failure to adequately process plaintiff's grievance. (ECF No. 1 at 35). Plaintiff also alleges that defendants "failed to properly investigat e and take proper actions to discipline those involved." (Id. at 19-20). To the extent that plaintiff may be purporting to raise a civil rights claim based on any prison official's role in reviewing his administrative grie vance, plaintiff may not state a federal civil rights claim arising from the administrative grievance process unless he alleges that the reviewing official had actual knowledge of a substantial risk of serious harm to plaintiff. See Peralta v. Dillard, 744 F.3d 1076, 1086-88 (9th Cir. 2014) (en banc) (official whose only role was reviewing internal appeal does not act with deliberate indifference absent knowledge of a substantial risk of serious harm).

Fourth, plaintiff appears to be raising a claim or claims against Nurse Eyan under the Cruel and Unusual Punishment Clause of the Eighth Amendment arising from inadequate medical care, but he alleges in this claim that Nurse Eyan failed to adequately train staff regarding "mental health crisis support" and failed to supervise unspecified individuals. (ECF No. 1 at 35). Plaintiff does not set forth any factual allegations regarding any training by Nurse Eyan. Plaintiff also incorporated all of his preceding paragraphs into his claim alleging deliberate indifference to his medical needs (id. at 34), but many of those allegations do not pertain to plaintiff's medical care. Accordingly, it is unclear to the Court what the factual basis is for plaintiff's claim alleging inadequate medical care, or any other claim against Nurse Eyan. To the extent that plaintiff wishes to raise any claims arising from allegedly inadequate medical treatment that he received, plaintiff should set forth a short and plain statement of each such claim (as discussed below) that he wishes to raise against each defendant.

Fifth, plaintiff includes factual allegations that some defendants "set all this up with the

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inmates" and moved an inmate "just to attack plaintiff." (ECF No. 1 at 12-13). Plaintiff also asserts that prison officials violate the Eighth Amendment when they are deliberately indifferent to an unreasonable risk of harm to a prisoner or ignore an obvious "danger." (Id. at 21-22). It is not clear from the Complaint which defendants are alleged to have ignored what substantial risk of harm. To the extent that plaintiff is purporting to allege a claim under the Eighth Amendment against any specific defendant arising from that official's deliberate indifference to a "substantial risk of serious harm," plai ntiff should set forth a short and plain statement of any such claim. The Supreme Court has held that prison officials must "'take reasonable measures to guarantee the safety of the inmates.'" Farmer v. Brennan , 511 U.S. 825, 832-33, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). Thus, "[a] prison officia l's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." Id. at 828. A prison official is "deliberately indifferent" if that official is "subjectively awar e of the risk and does nothing to prevent the resulting harm." Jeffers v. Gomez , 267 F.3d 895, 913 (9th Cir. 2001) (citing Farmer, 511 U.S. at 828-29). To be subjectively aware of a risk, the prison "offi cial must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer , 511 U.S. at 837. Further, plaintiff must allege that, objectively, "he is incarcerated under conditions posing a substantial risk of serious harm." Id. at 834.

Sixth, plaintiff alleges that several defendants made jokes and yelled obscenities at plaintiff during the incident on May 20, 2016 (ECF No. 1 at 12-14), and that no official prevented defendants from "yelling obscenities" at plaintiff (id. at 16). However, a prison official's mere making of threats or harassing comments to a prisoner does not give rise to a federal civil rights claim. See Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996), amended by 135 F.3d 1318 (9th Cir. 1998) (verbal harassment is not cognizable as a constitutional deprivation under § 1983); Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) (verbal harassment or abuse is not constitutional deprivation under § 1983); Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987) (prison guards' threat of bodily harm failed to state a claim under § 1983). Finally, in plaintiff's Claim IV, he asserts that a number of defendants violated his "right to petition the government for a redress of grievances" when they th reatened plaintiff "with physical

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violence for exercise of his right to seek redress . . . through use of the prison grievance system." (ECF No. 1 at 39). Plaintiff does not reference any factual allegations in connection with this claim, and his Complaint does not set forth any factual allegations alleging that any specific defendant took any adverse action in retaliation for plaintiff's use of the prison grievance system. To the contrary, the only grievance plaintiff alleges that he filed was in response to the incident on May 20, 2016 (id. at 23-24, 45-46), and the Complaint does not allege that any defendant took any adverse actions against plaintiff in retaliation for that grievance.

An action taken in retaliation for the exercise of a First Amendment right is actionable under § 1983.

See Hines v. Gomez, 108 F.3d 265, 267 (9th Cir 1997); Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995). Filing a grievance with prison officials is protected activity under the First Amendment. See Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009). As the Ninth Circuit explained in Watison v. Carter, 668 F.3d 1108, 1114-15 (9th Cir. 2012) (alterations and emphasis in original), an inmate's reta liation claim has five elements:

First, the plaintiff must allege that the retaliated-against conduct is protected. The filing of an inmate grievance is protected conduct. Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005). Second, the plaintiff must claim the defendant took adverse action against the plaintiff. Id. at 567. The adverse action need not be an independent constitutional violation. Pratt, 65 F.3d at 806. "[T]he mere threat of harm can be an adverse action …" Brodheim , 584 F.3d at 1270. [¶] Third, the plaintiff must allege a causal connection between the adverse action and the protected conduct. Because direct evidence of retaliatory intent rarely can be pleaded in a complaint, allegation of a chronology of events from which retaliation can be inferred is sufficient to survive dismissal. See Pratt, 65 F.3d at 808 ("timing can properly be considered as circumstantial evidence of retaliatory intent"); Murphy v. Lane, 833 F.2d 106, 108-09 (7th Cir. 1987). [¶] Fourth, the plaintiff must allege that the "official's acts would chill or silence a person of ordinary firmness from future First Amendment activities." Robinson , 408 F.3d at 568 (internal quotation marks and emphasis omitted). "[A] plainti ff who fails to allege a chilling effect may still state a claim if he alleges he suffered some other harm," Brodheim , 584 F.3d at 1269, that is "more than minimal," Robinson , 408 F.3d at 568 n.11. That the retaliatory conduct did not chill the plaintiff from suing the alleged retaliator does not defeat the retaliation claim at the motion to dismiss stage. Id. at 569. [¶] Fifth, the plaintiff must allege "that the prison author ities' retaliatory action did not advance legitimate goals of the correctional institution …" Rizzo v. Dawson , 778 F.2d 527, 532 (9th Cir. 1985). A plaintiff successfully pleads this element by alleging, in addition to a retaliatory motive, that the defendant's actions were arbitrary and capricious, id., or that they were "unnecessary to the maintenance of order in the institution," Franklin v. Murphy , 745 F.2d 1221, 1230 (9th Cir. 1984). Here, plaintiff's Complaint fails to all ege any of these elements against any defendant.

Accordingly, it is not clear to the Court what the legal or factual basis may be for each of

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plaintiff's claims against each def endant. The Court is mindful that, because plaintiff is appearing pro se, the Court must construe the allegations of the Complaint liberally and must afford plaintiff the benefit of any doubt. See Alvarez v. Hill, 518 F.3d 1152, 1158 (9th Cir. 2008) (because a prisoner was proceeding pro se, "the district court was required to 'afford [him] the benefit of any doubt' in ascertaining what claims he 'raised in his co mplaint'") (alteration in or iginal). Further, the Court may not dismiss a claim because a pro se plaintiff has failed to set forth a complete legal theory supporting the claim alleged. See Johnson v. City of Shelby, 135 S. Ct. 346, 346, 190 L. Ed. 2d 309 (2014) (per curiam) (noting that the Fed. Rules of Civ. Proc. "do not countenance dismissal of a

complaint for imperfect statement of the legal theory supporting the claim asserted"). That said, the Supreme Court has m ade it clear that the Court has "no obligation to act as counsel or paralegal to pro se litigants." Pliler v. Ford , 542 U.S. 225, 231, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004); see also Noll, 809 F.2d at 1448 ("courts should not have to serve as advocates for pro se litigants").

Although plaintiff need not set forth detailed factual allegations, he must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal , 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555-56). A pleading that merely alleges "naked assertion[s] devoid of further factual enhancement" is insufficient. Id. (alteration in original, internal quotation marks omitted). In its present format, it would be difficult for each defendant to discern what specific facts or legal theories apply to which potential claims, and, as a result, it would be extremely difficult to formulate applicable defenses.

Therefore, the Court finds that plaintiff' s Complaint fails to comply with Rule 8.

B. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UNDER THE EIGHTH

AMENDMENT FOR INADEQUATE MEDICAL CARE.

The Eighth Amendment's proscription against cruel and unusual punishment also encompasses the government's obligation to prov ide adequate medical care to those whom it is punishing by incarceration. See Estelle v. Gamble, 429 U.S. 97, 103, 97 S. Ct. 285, 50 L. Ed 2d 251 (1976). In order to establish a claim under the Eighth Amendment for inadequate medical

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care, a prisoner must show that a specific defendant was deliberately indifferent to his serious medical needs. See Helling v. McKinney, 509 U.S. 25, 32, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993); Estelle, 429 U.S. at 106. "This in cludes both an objective standard -- that the deprivation was serious enough to constitute cruel and unusual punishment -- and a subjective standard -- deliberate indifference." Colwell v. Bannister , 763 F.3d 1060, 1066 (9th Cir. 2014) (internal quotation marks omitted).

First, to meet the objective element of a deliberate indifference claim, "a prisoner must demonstrate the existence of a serious medical need." Colwell , 763 F.3d at 1066. "A medical need is serious if failure to treat it will result in significant injury or the 'unnecessary and wanton infliction of pain.'" Peralta , 744 F.3d at 1081 (internal quotation marks omitted).

Second, to meet the subjective element, a prisoner must "demonstrate that the prison official acted with deliberate indifference." Toguchi v. Chung , 391 F.3d 1051, 1057 (9th Cir. 2004). Deliberate indifference may be manifest by the intentional denial, delay or interference with a plaintiff's

medical care. See Estelle, 429 U.S. at 104-05. The prison official, however, "must not only 'be aware of facts from whic h the inference could be drawn that a substantial risk of serious harm exists,' but that person 'must al so draw the inference.'" Toguchi , 391 F.3d at 1057 (quoting Farmer, 511 U.S. at 837). Thus, an inadvertent failure to provide adequate medical care, negligence, a mere delay in medical care (without more), or a difference of opinion over proper medical treatment, are all insufficient to constitute an Eighth Amendment violation. See Estelle, 429 U.S. at 105-07; Toguchi, 391 F.3d at 1059-60; Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Shapley v. Nevada Bd. of State Prison Comm'rs , 766 F.2d 404, 407 (9th Cir. 1985). Moreover, the Eighth Amendment does not require optimal medical care or even medical care that comports with the community standard of medical care. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle , 429 U.S. at 106.

Here, plaintiff purports to raise his Claim III for deliberate indifference to a serious medical need, but the only defendant he references is Nurse Eyan. (ECF No. 1 at 34-37). Within Claim

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III, plaintiff does not set forth any factual allegations. In the body of the Complaint, the only factual allegation pertaining to this defendant is that Nurse Eyan "observed plaintiff being attack [sic]" during the incident on May 20, 2016. (Id. at 11). Plaintiff also alleges, without any supporting facts, that Nurse Eyan and other defendants "knew or should hav e known that plaintiff was suffering from mental health crisis episode when they viewed him in their program." (Id. at 20). The Court does not accept as true conclusory allegations unsupported by factual allegations. See Iqbal, 556 U.S. at 681 ("[We do not reject these bald allegations on the ground that they are unrealistic or nonsensical. . . . It is the conclusory nature of [the] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); see also Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012) ("a c ourt discounts conclusory statements, which are not entitled to the presumption of truth, before determining whether a claim is plausible").

Further, in the Complaint plaintiff alleges that he was held in the "D-Facility gym for fourteen hours after the incident without any medical treatment" and that he "f inally made it to [CSP-LAC's] drop-in clinic fourteen hours later" (id. at 13, 15, 20), but he also alleges that he was treated by an unidentified medical technical assistant, who contacted an "on-call psychia trist" at 9:00 p.m. on May 20, 2016, which is only twelve hours after the underlying incident began at 8:25 a.m. (id. at 5, 17). A brief delay in providing medical attention, without more, is insufficient to give rise to a federal civil rights claim. See, e.g., Shapley, 766 F.2d at 407 (a mere delay, without more, is insufficient to state a claim of deliberate medical indifference).

Plaintiff also alleges that a psychiatrist was contacted on May 20, 2016, at 9:00 p.m., that he was

referred to a psychiatric crisis bed that night, that he received x-rays, and that he was seen by a psychiatrist and a "medical doctor" the following morning. (ECF No. 1 at 17-18). In addition, plaintiff was sent to an outside hospital for a "stress test" and he was given medication. (Id. at 18). Then, despite the earlier factual allegations regarding the medical care that he received following the incident, plaintiff alleges: "since May 20, 2016, plaintiff had not received any medical treatment for his injuries over a year ago." (Id. at 18). It is not clear if plaintiff is purporting to allege that other (unnamed) prison officials failed to provide medical treatment for serious medical needs that

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plaintiff continued to suffer at some date after the incident on May 20, 2016.

In addition, plaintiff's Complain t fails to set forth any factual allegations showing that any named defendant was subjectively aware that plaintiff suffered from a mental health issue that placed him at a substantial risk of serious harm. See Toguchi, 391 F.3d at 1057. Further, to the extent that plaintiff is purporting to allege that any defendant should have know that plaintiff required medical assistance when he refused multiple orders to get up from the ground, plaintiff's Complaint does not include any factual allegations that raise a reasonable inference that any specific defendant was subjectively aware that plaintiff was suffering from a serious medical need that required immediate medical assistance. (See ECF No 1 at 12-14, 20).

Accordingly, even construing plaintiff's factual allegations liber ally and affording plaintiff the benefit of any doubt, it is not clear to the Court which defendant or defendants plaintiff is alleging was subjectively aware of facts from which the inference could be drawn that a substantial risk of serious harm existed to plaintiff from the failure to provide immediate medical assistance in connection with the incident on May 20, 2016, or in the following twelve hours before plaintiff was provided with medical care. If plaintiff wishes to proceed with any Eighth Amendment claim against any defendant for inadequate medical care, plaintiff should set forth a short and plain statement of each such claim in a First Amended Complaint that is sufficient to provide each defendant with notice of the factual basis for each such claim.

C. PLAINTIFF MAY BE ABLE TO STATE CLAIMS FOR THE EXCESSIVE USE OF FORCE.

The use of excessive force by a prison official constitutes a violation of the Eighth Amendment. Hudson v. McMillian, 503 U.S. 1, 6-7, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992). However, not every push or shove, even if it may later seem unnecessary, violates a prisoner's constitutional rights. See Meredith v. Arizona, 523 F.2d 481, 483 (9th Cir. 1975). In Farmer, 511 U.S. at 835, the Supreme Court held that, when prison officials are accused of using excessive physical force, application of the deliberate indifference standard is inappropriate, and that the claimant must show more than " 'indifference,' deliberate or other wise." "Force does not amount to a constitutional violation in this respect if it is applied in a good faith effort to restore discipline

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and order." Clement v. Gomez , 298 F.3d 898, 903 (9th Cir. 2002) (citing Whitley v. Albers, 475 U.S. 312, 320, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986)). The Supreme Court also "has clearly and repeatedly held that 'when prison officials malic iously and sadistically use force to cause harm, contemporary standards of decency are always violated.'" Schwenk v. Hartford , 204 F.3d 1187, 1196 (9th Cir. 2000) (quoting Hudson, 503 U.S. at 9) (emphasis added in Schwenk).

Here, plaintiff alleges that several officers unnecessarily used pepper spray "at close range" on plaintiff while he was on the ground, and that officers jabbed, poked, or hit him with batons, but he also alleges that "he was not able to speak or to get up and walk." (ECF No. 1 at 12-15). Plaintiff alleges that he was ordered to stand up multiple times. (Id. at 12-14). Accepting as true plaintiff's factual allegations, plaintiff was attacked by two inmates who had to be "placed in restraints and escorted" off the Yard. (Id. at 10, 15). Because plaintiff alleges that he was laying on the ground "weeping in a fetal position" (id. at 11) during the incident, it is not clear that any named defendant was aware that plaintiff was unable to comply with their orders rather than resisting their efforts to restore discipline and order following the violent incident.

Accordingly, the Court finds that the allegations in plaintiff's Complaint are insufficient to nudge any claim under the Eighth Amendment against any defendant "across the line from conceivable to plausible." Twombly , 550 U.S. at 570 (to survive dismissal, plaintiffs must do something to "nudge[ ] their claims across the line from conceivable to plausible"). **********

If plaintiff desires to pursue this action, he must file a First Amended Complaint no later than August 25, 2017; the First Amended Complaint must bear the docket number assigned in this case; be labeled "First Amended Compla int"; and be complete in and of itself without reference to the original Complaint, or any other pleading, attachment or document. Further, if plaintiff chooses to proceed with this action, plaintiff must use the blank Central District civil rights complaint form accompanying this order, must sign and date the form, must completely and accurately fill out the form, and must use the space provided in the form to set forth all of the claims that he wishes to assert in a First Amended Complaint.

The Clerk is directed to provide plaintiff with a blank Central District civil rights complaint

13 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

form.

Further, plaintiff is admonished that, if he fails to timely file a First Amended Complaint or fails to remedy the deficiencies of this pleading as discussed herein, the Court will recommend that the action be dismissed without further leave and with prejudice.

In addition, if plaintiff no longer wishes to pursue this action, he may request a voluntary dismissal of the action pursuant to Federal Rule of Civil Procedure 41(a). The clerk also is directed to attach a Notice of Dismissal form for plaintiff's convenience.

IT IS SO ORDERED.

DATED: July 28, 2017

PAUL L. ABRAMS UNITED STATES MAGISTRATE JUDGE

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