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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT McCULLOCK,  
CDCR #V-32182,  
  
Plaintiff,  
  
vs.  
  
R. STEVEN THARRATT, et al.,  
  
Defendants.

Case No.: 3:16-cv-0457-LAB-DHB

**ORDER:**

**1) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS PURSUANT TO 28 U.S.C. § 1915(a) [ECF No. 2];**

**2) DENYING MOTION TO APPOINT COUNSEL [ECF No. 3];**

**AND**

**2) GRANTING MOTION FOR ISSUANCE OF SUMMONS AND DIRECTING U.S. MARSHAL TO EFFECT SERVICE OF SUMMONS AND COMPLAINT PURSUANT TO 28 U.S.C. § 1915(d) AND Fed. R. Civ. P. 4(c)(3) [ECF No. 5]**

ROBERT McCULLOCK (“Plaintiff”), currently incarcerated at Richard J. Donovan Correctional Facility (“RJD”) and proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983 (ECF No. 1). Plaintiff has also filed a Motion to

1 Proceed In Forma Pauperis (“IFP”) (ECF No. 2), a Motion to Appoint Counsel (ECF No.  
2 3), and a Motion for Issuance of Summons (ECF No. 5).

3 **I. Plaintiff’s 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 \$400.<sup>1</sup> See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
7 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
8 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
9 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to  
10 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
11 *Bruce v. Samuels*, \_\_\_ U. S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d  
12 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.  
13 See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.  
14 2002).

15 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
16 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the  
17 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
18 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
19 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
20 monthly deposits in the account for the past six months, or (b) the average monthly  
21 balance in the account for the past six months, whichever is greater, unless the prisoner  
22 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having  
23 custody of the prisoner then collects subsequent payments, assessed at 20% of the  
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25  
26 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative  
27 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court  
28 Misc. Fee Schedule, § 14 (eff. Dec. 1, 2014)). The additional \$50 administrative fee does  
not apply to persons granted leave to proceed IFP. *Id.*

1 preceding month's income, in any month in which his account exceeds \$10, and forwards  
2 those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2);  
3 Bruce, 136 S. Ct. at 629.

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

18 Accordingly, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF No. 2),  
19 declines to “exact” any initial filing fee because his prison certificate shows he “has no  
20 means to pay it,” Bruce, 136 S. Ct. at 629, and directs the Secretary of the California  
21 Department of Corrections and Rehabilitation (“CDCR”), or his designee, to collect the  
22 entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and to forward them  
23 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28  
24 U.S.C. § 1915(b)(1). See *id.*

## 25 **II. Motion to Appoint Counsel**

26 Plaintiff has also filed a Motion for Appointment of Counsel (ECF No. 3). Plaintiff  
27 claims he is indigent, imprisoned, and will require assistance investigating and  
28 “elicit[ing] the facts from witnesses and experts.” See *id.* at 1-3.

1           There is no constitutional right to counsel in a civil case. *Lassiter v. Dept. of Social*  
2 *Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district  
3 courts have some limited discretion to “request” that an attorney represent an indigent  
4 civil litigant. *Agyeman v. Corr. Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004).  
5 However, this discretion may be exercised only under “exceptional circumstances.” *Id.*;  
6 see also *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of exceptional  
7 circumstances requires “an evaluation of the likelihood of the plaintiff’s success on the  
8 merits and an evaluation of the plaintiff’s ability to articulate his claims ‘in light of the  
9 complexity of the legal issues involved.’” *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn*  
10 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

11           The Court DENIES Plaintiff’s Motion (ECF No. 3) without prejudice because, as  
12 discussed below, it appears Plaintiff is capable of articulating the factual basis for his  
13 claims, and the likelihood of his success on the merits is not at all yet clear at this  
14 preliminary stage of the proceedings. *Id.* Therefore, neither the interests of justice nor any  
15 exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,  
16 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

### 17 **III. Initial Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A**

18           Notwithstanding Plaintiff’s IFP status or the payment of any filing fees, the PLRA  
19 also requires the Court to review complaints filed by all persons proceeding IFP and by  
20 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,  
21 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
22 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
23 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
24 statutes, the Court must sua sponte dismiss any complaint, or any portion of a complaint,  
25 which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
26 who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203  
27 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621  
28 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

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

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

17 However, while the court “ha[s] an obligation where the petitioner is pro se,  
18 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
19 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.  
20 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not  
21 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of*  
22 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

23 Plaintiff alleges various medical officials employed by both California  
24 Correctional Health Care Services and RJD acted with deliberate indifference to his  
25 serious medical needs by failing to notify him and take action after an outside specialist  
26 recommended he undergo a skin cancer biopsy in early 2015 (ECF No. 1 at 10-15). As  
27 currently pled, the Court finds Plaintiff’s Complaint contains Eighth Amendment claims  
28 sufficient to survive the “low threshold” for proceeding past the sua sponte screening

1 required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). See *Wilhelm v. Rotman*, 680 F.3d  
2 1113, 1123 (9th Cir. 2012). Deliberate indifference to the serious medical needs of an  
3 inmate constitutes “cruel and unusual punishment” under the Eighth Amendment. See  
4 *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976). “To demonstrate deliberate indifference,  
5 ‘plaintiffs must show that [prison officials] were (a) subjectively aware of the serious  
6 medical need and (b) failed to adequately respond.’” *Rosati v. Igbinoso*, 791 F.3d 1037,  
7 1039 (9th Cir. 2015) (quoting *Conn v. City of Reno*, 591 F.3d 1081, 1096 (9th Cir. 2010),  
8 vacated, 563 U.S. 915 (2011), reinstated in relevant part, 658 F.3d 897 (9th Cir. 2011)).

9 Accordingly, the Court will GRANT Plaintiff’s Motion for Issuance of Summons  
10 (ECF No. 5) and direct the U.S. Marshal to effect service upon the Defendants on  
11 Plaintiff’s behalf. See 28 U.S.C. § 1915(d) (“The officers of the court shall issue and  
12 serve all process, and perform all duties in [IFP] cases.”); FED. R. CIV. P. 4(c)(3) (“[T]he  
13 court may order that service be made by a United States marshal or deputy marshal . . . if  
14 the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915.”).

### 15 **III. Conclusion and Orders**

16 Good cause appearing, the Court:

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

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

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

28 4. **DENIES** Plaintiff’s Motion to Appoint Counsel (ECF No. 3);

1           5.       **GRANTS** Plaintiff’s Motion for Issuance of Summons (ECF No. 5) and  
2 **DIRECTS** the Clerk to issue a summons as to Plaintiff’s Complaint (ECF No. 1) upon  
3 Defendants and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each  
4 Defendant. In addition, the Clerk will provide Plaintiff with a certified copy of this Order,  
5 a certified copy of his Complaint (ECF No. 1), and the summons so that he may serve the  
6 Defendants. Upon receipt of this “IFP Package,” Plaintiff must complete the Form 285s  
7 as completely and accurately as possible, and return them to the United States Marshal  
8 according to the instructions the Clerk provides in the letter accompanying his IFP  
9 package;

10           6.       **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons  
11 upon Defendants as directed by Plaintiff on the USM Form 285s provided to him. All  
12 costs of that service will be advanced by the United States. See 28 U.S.C. § 1915(d); FED.  
13 R. CIV. P. 4(c)(3);

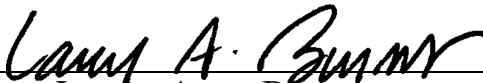
14           7.       **ORDERS** Defendants to reply to Plaintiff’s Complaint within the time  
15 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). See 42  
16 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to “waive the  
17 right to reply to any action brought by a prisoner confined in any jail, prison, or other  
18 correctional facility under section 1983,” once the Court has conducted its sua sponte  
19 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a  
20 preliminary determination based on the face on the pleading alone that Plaintiff has a  
21 “reasonable opportunity to prevail on the merits,” the defendant is required to respond);  
22 and

23           8.       **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to  
24 serve upon Defendants, or, if appearance has been entered by counsel, upon Defendants’  
25 counsel, a copy of every further pleading, motion, or other document submitted for the  
26 Court’s consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must include with every  
27 original document he seeks to file with the Clerk of the Court, a certificate stating the  
28 manner in which a true and correct copy of that document has been was served on

1 Defendants or their counsel, and the date of that service. See S.D. CAL. CIVLR 5.2. Any  
2 document received by the Court which has not been properly filed with the Clerk or  
3 which fails to include a Certificate of Service upon Defendants may be disregarded.

4 **IT IS SO ORDERED.**

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6 Dated: May 18, 2016

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8 \_\_\_\_\_  
9 HON. LARRY ALAN BURNS  
10 United States District Judge

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