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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICARDO DELATORRE,
CDCR #D-74486,

Plaintiff,

vs.

RICHARD J. DONOVAN SAN DIEGO
STATE PRISON, DR. SHAKIBA, DR.
CLAYTON,

Defendants.

Case No. 21cv59-MMA-KSC

**ORDER GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS;**

[Doc. No. 2]

**DISMISSING CLAIMS AGAINST
R.J. DONOVAN PURSUANT TO 28
U.S.C. § 1915(e)(2)(B)(ii) AND 28
U.S.C. § 1915A(b)(1) WITHOUT
LEAVE TO AMEND;**

**DISMISSING COMPLAINT
PURSUANT TO 28 U.S.C.
§ 1915(e)(2)(B)(ii) AND 28 U.S.C.
§ 1915A(b)(1)**

On January 11, 2021, Ricardo Delatorre (“Plaintiff” or “Delatorre”), currently incarcerated at Ironwood State Prison (“ISP”) located in Blythe, California, and proceeding *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. *See* Doc. No. 1. Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a);

1 instead, he filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. §
2 1915(a). *See* Doc. No. 2.

3 **I. 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 \$402.¹ *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*, 577 U.S. 82, 85 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th
12 Cir. 2015), and regardless of whether his action is ultimately dismissed. *See* 28 U.S.C.
13 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

14 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
15 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
16 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
17 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
18 trust account statement, the Court assesses an initial payment of 20% of (a) the average
19 monthly deposits in the account for the past six months, or (b) the average monthly
20 balance in the account for the past six months, whichever is greater, unless the prisoner
21 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution
22 having custody of the prisoner then collects subsequent payments, assessed at 20% of the
23 preceding month’s income, in any month in which his account exceeds \$10, and forwards
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27 ¹ 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. 1, 2020). The additional \$52 administrative fee does not apply to persons granted leave to
proceed IFP. *Id.*

1 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. §
2 1915(b)(2); *Bruce*, 577 U.S. at 85.

3 Delatorre has submitted a Prison Certificate signed by an RJD Accounting Officer
4 attesting as to his monthly balances and deposits. *See* Doc. No. 2; 28 U.S.C.
5 § 1915(a)(2); S.D. Cal. CivLR 3.2; *Andrews*, 398 F.3d at 1119. These statements show
6 Delatorre had \$0.00 in monthly deposits to his account, maintained an average balance of
7 \$0.00 in his account over the six month period preceding the filing of his Complaint, and
8 had an available balance of \$0.00 to his credit at ISP as of January 5, 2021. *See* Doc. No.
9 2 at 1; 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited
10 from bringing a civil action or appealing a civil action or criminal judgment for the
11 reason that the prisoner has no assets and no means by which to pay the initial partial
12 filing fee.”); *Bruce*, 577 U.S. at 85; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
13 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based
14 solely on a “failure to pay . . . due to the lack of funds available to him when payment is
15 ordered.”).

16 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP, declines to exact
17 any initial filing fee because his trust account statement shows he now “has no means to
18 pay it,” *Bruce*, 577 U.S. 84-85, and directs the Secretary of the CDCR to collect the
19 entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and forward them to
20 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. Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

23 A. Standard of Review

24 Because Delatorre is a prisoner, his Complaint requires a pre-answer screening
25 pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). Under these statutes, the Court
26 must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it, which is
27 frivolous, malicious, fails to state a claim, or seeks damages from defendants who are
28 immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)

1 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
2 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
3 the targets of frivolous or malicious suits need not bear the expense of responding.’”
4 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (citation omitted).

5 “The standard for determining whether [a] Plaintiff has failed to state a claim upon
6 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
7 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
8 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
9 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
10 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
11 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter,
12 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
13 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

14 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
15 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
16 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
17 relief [is] . . . a context-specific task that requires the reviewing court to draw on its
18 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
19 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
20 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
21 (9th Cir. 2009).

22 B. Plaintiff’s Allegations

23 Delatorre, who is diabetic, claims he woke up early on the morning of December
24 27, 2019, presumably while housed at R.J. Donovan State Prison (“RJD”), and found a
25 red mark on his hand. Compl. at 3. His hand was painful, so when Delatorre went to get
26 his insulin, he states he had the nurse look at it. The nurse allegedly told Delatorre he
27 was “ok.” *Id.* The next day, Delatorre claims his hand was worse and a nurse sent him to
28 “central health,” where he was put on antibiotics. *Id.* For the next three days, December

1 29, 2019 to January 1, 2020, Delatorre alleges his hand got worse and he was in
2 significant pain. He claims he submitted medical forms to get Defendants Dr. Shakiba
3 and Dr. Clayton to see him, to no avail.

4 On January 2, 2020, Delatorre was seen by a nurse. *Id.* at 4. According to
5 Delatorre, the nurse was alarmed at the state of his hand, which he claims was swollen to
6 three times its normal size. She allegedly told Delatorre to “do man down” and pushed
7 the button in order to get medical attention. *Id.* Delatorre alleges the nurse told him it
8 was an emergency situation. He was transported to Alvarado Hospital for treatment.
9 When he returned from the hospital and saw Dr. Shakiba, Delatorre claims Shakiba
10 smiled at the large scar on his hand. Delatorre believes the failure of Dr. Shakiba and Dr.
11 Clayton to treat him was done in retaliation for a grievance he filed against them.

12 Delatorre states that as a result of all of this, his hand is numb, and he also
13 experiences a tingling and burning sensation. *Id.* at 5. He alleges he can only close his
14 fist to 65% even after physiotherapy. *Id.* Based on these allegations, he brings claims
15 against RJD and Drs. Shakiba and Clayton.

16 C. 42 U.S.C. § 1983

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

26 D. Discussion

27 Delatorre first claims that all three Defendants violated his Eighth Amendment
28 rights by delaying and denying medical care for a spider bite on his hand. Compl. at 3–4.

1 Delatorre further claims that Drs. Shakiba and Clayton delayed and denied him medical
2 treatment in retaliation for a 602 grievance he filed against them. *Id.* at 5.

3 1. R. J. Donovan State Prison

4 “Persons” under § 1983 are state and local officials sued in their individual
5 capacities, private individuals and entities which act under color of state law, and/or the
6 local governmental entity itself. *Vance v. County of Santa Clara*, 928 F. Supp. 993, 995–
7 96 (N.D. Cal. 1996). CDCR Medical Contracting is not a “person” subject to suit under
8 § 1983 and it is entitled to immunity from suit for monetary damages under the Eleventh
9 Amendment. *Id.*; see *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 53–54 (1996);
10 *Groten v. California*, 251 F.3d 844, 851 (9th Cir. 2001) (citing *Hale v. Arizona*, 993 F.2d
11 1387, 1398–99 (9th Cir. 1993) (holding that a state department of corrections is an arm of
12 the state, and thus, not a “person” within the meaning of § 1983); see also *Dragasits v.*
13 *California*, No. 3:16-cv-01998-BEN-JLB, 2016 WL 680947, at *3 (S.D. Cal. Nov. 15,
14 2016) (stating that “[t]he State of California’s Department of Corrections and
15 Rehabilitation and any state prison, correctional agency, sub-division, or department
16 under its jurisdiction, are not ‘persons’ subject to suit under § 1983) (citing *Groten*, 251
17 F.3d at 851). Therefore, Plaintiff cannot pursue any § 1983 civil rights claims against
18 RJD. See e.g., *Boone v. Deutsche Bank Nat’l Tr. Co.*, No. 2:16-CV-1293-GEB-KJN-PS,
19 2017 WL 117966, at *3 (E.D. Cal. Jan. 12, 2017) (stating that “[b]ecause the Solano
20 County Sheriff’s Department is not a ‘person’ within the meaning of Section 1983,
21 plaintiffs cannot maintain their claims against it under that statute as a matter of law.”).

22 Accordingly, the Court **DISMISSES** Delatorre’s claims against RJD without leave
23 to amend for failure to state a claim upon which relief pursuant to section 1983 may be
24 granted. See 28 U.S.C. § 1915(e)(2)(B)(ii); *Watison*, 668 F.3d 1108, 1112 (9th Cir.
25 2012).

26 2. Eighth Amendment Claim

27 Threats to both Plaintiff’s safety and health are subject to the Eighth Amendment’s
28 demanding deliberate indifference standard. See *Farmer v. Brennan*, 511 U.S. 825, 834,

1 837 (1994); *Hamby v. Hammond*, 821 F.3d 1085, 1092 (9th Cir. 2016). “A prison
2 official acts with ‘deliberate indifference . . . only if the [official] knows of and disregards
3 an excessive risk to inmate health and safety.’” *Toguchi v. Chung*, 391 F.3d 1051, 1057
4 (9th Cir. 2004) (quoting *Gibson v. Cnty. of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002),
5 overruled on other grounds by *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1076 (9th
6 Cir. 2016)). “Under this standard, the prison official must not only ‘be aware of facts
7 from which the inference could be drawn that a substantial risk of serious harm exists,’
8 but that person ‘must also draw the inference.’” *Id.* (quoting *Farmer*, 511 U.S. at 837).
9 In addition, a Plaintiff must allege he suffered a physical injury which is more than de
10 minimus. *Oliver v. Keller*, 289 F.3d 623, 627 (9th Cir. 2002); *Fournerat v. Fleck*, 2020
11 WL 4495483 (C.D. California, July 7, 2020).

12 Delatorre makes two specific allegations against Drs. Shakiba and Clayton. First,
13 he claims that despite filling out medical forms and requesting medical attention on
14 December 29, 2019, December 30, 2019, and January 1, 2020, neither doctor “call[ed]
15 [him] for medical attention” and he was in pain “every second, minute by minute.”
16 Compl. at 3. Second, he claims Drs. Shakiba and Clayton’s lack of medical attention
17 “put him at risk to lose [his] hand.” *Id.* at 4. But he also notes that after his first visit to
18 the prison medical facilities he was prescribed antibiotics, and on January 2, 2020, Dr.
19 Shakiba examined his hand and sent him to Alvarado Hospital. *Id.* at 3–4. Taken
20 together, these facts do not plausibly rise to the level of an Eighth Amendment violation.
21 *Iqbal*, 556 U.S. at 678. While Delatorre’s allegations may be sufficient to suggest Dr.
22 Shakiba was aware that Delatorre’s hand was infected, and thus that his health and safety
23 were at risk, they are not sufficient to show he *disregarded* the risk to Delatorre’s health
24 and safety. *Toguchi*, 391 F.3d at 1057; *Iqbal*, 556 U.S. at 678.

25 The allegations against Dr. Clayton are likewise insufficient to state a plausible
26 Eighth Amendment claim. Delatorre does not plausibly allege that Dr. Clayton “drew the
27 inference” that there was a risk to Delatorre’s health and safety because he alleges only
28 that Dr. Clayton did not see him in response to his requests for medical attention on

1 December 28, 29, and 30. *Toguchi*, 391 F.3d at 1057; *Iqbal*, 556 U.S. at 678. Moreover,
2 Delatorre admits he was prescribed antibiotics on December 27 or 28. Compl at 3, 10.

3 For the foregoing reasons, Delatorre’s Eighth Amendment claims against Drs.
4 Shakiba and Clayton must be dismissed for failing to state a claim upon which relief
5 under section 1983 may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii); *Watison*, 668
6 F.3d 1108, 1112 (9th Cir. 2012).

7 3. Retaliation

8 Delatorre alleges Drs. Shakiba and Clayton’s delay in treating his hand was in
9 retaliation for a grievance (602) he filed against them. Compl. at 4–5. To state a valid
10 First Amendment retaliation claim, a Plaintiff must assert: (1) a state actor took some
11 adverse action against him, (2) the adverse action was taken because he engaged in some
12 protected conduct, (3) the state actor’s acts “would chill or silence a person of ordinary
13 firmness from future First Amendment activities,” and (4) the adverse action “did not
14 reasonably advance a legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559,
15 567-68 (9th Cir. 2005) (internal quotation marks and emphasis omitted). “[A] plaintiff
16 who fails to allege a chilling effect may still state a claim if he alleges he suffered some
17 other harm,” *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009), that is “more than
18 minimal.” *Rhodes*, 408 F.3d at 568 n.11.

19 As discussed above, according to Delatorre, he was prescribed antibiotics for his
20 hand on December 27 or 28, 2019. Compl. at 3–5, 10. When he went to the medical
21 clinic two days later on December 30, 2019, he was told that he needed to wait for the
22 antibiotics to begin to work. *Id.* at 10. He was taken to Alvarado Hospital for treatment
23 three days later on January 2, 2020. *Id.* These facts do not plausibly allege that Drs.
24 Shakiba and Clayton took an adverse action against him, i.e., delayed his medical care.
25 *Rhodes*, 408 F.3d at 567–68. Only six days passed between when Delatorre first sought
26 medical attention and when he was treated at Alvarado hospital, and during that time he
27 was prescribed antibiotics. Compl. at 3-5.

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1 Even assuming Delatorre has shown that Drs. Shakiba and Clayton delayed his
2 care, he does not plausibly allege they did so because he engaged in the protected conduct
3 of filing a grievance against them. *Id.*; *Iqbal*, 556 U.S. at 678. “A plaintiff must allege
4 facts, not simply conclusions, t[o] show that [each defendant] was personally involved in
5 the deprivation of his civil rights.” *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.
6 1998); *see also Estate of ex rel. Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir.
7 1999) (stating that “[c]ausation is, of course, a required element of a § 1983 claim”).
8 Here, Delatorre simply makes a conclusory allegation that Drs. Shakiba and Clayton
9 retaliated against him, which is insufficient. *Iqbal*, 556 U.S. at 678.

10 Accordingly, Delatorre’s First Amendment retaliation claims against Drs. Shakiba
11 and Clayton must be dismissed for failing to state a claim upon which relief under section
12 1983 may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii); *Watison*, 668 F.3d 1108, 1112
13 (9th Cir. 2012).

14 **IV. Conclusion and Order**

15 For the reasons explained, the Court:

- 16 1) **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a).
- 17 2) **ORDERS** the Secretary of the CDCR, or her designee, to collect from
18 Plaintiff’s trust account the full \$350 owed in monthly payments in an amount equal to
19 twenty percent (20%) of the preceding month’s income to the Clerk of the Court each
20 time the amount in Plaintiff’s account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2).
21 ALL PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND
22 NUMBER ASSIGNED TO THIS ACTION.
- 23 3) **DIRECTS** the Clerk of the Court to serve a copy of this Order by U.S. Mail
24 on Kathleen Allison, Secretary, CDCR, P.O. Box 942883, Sacramento, California,
25 94283-0001, or in the alternative by forwarding an electronic copy to
26 trusthelpdesk@cdcr.ca.gov;
- 27 4) **DISMISSES** Plaintiff’s claims against Defendant R.J. Donovan State Prison
28 without leave to amend for failing to state a claim upon which relief may be granted

1 pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b) and because amendment would be
2 futile. The Clerk of Court is **DIRECTED** to terminate Defendant R.J. Donovan from the
3 docket.

4 5) **DISMISSES** Plaintiff’s claims against Defendants Shakiba and Clayton for
5 failing to state a claim upon which relief may be granted and for seeking monetary
6 damages against Defendants pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b), and
7 **GRANTS** him sixty (60) days leave from the date of this Order in which to file an
8 Amended Complaint against Drs. Shakiba and Clayton only which cures all the
9 deficiencies of pleading noted. Plaintiff’s Amended Complaint must be complete by
10 itself without reference to his original pleading. Defendants not named and any claim not
11 re-alleged in his Amended Complaint will be considered waived. *See* CIVLR 15.1; *Hal*
12 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989)
13 (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d
14 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not
15 re-alleged in an amended pleading may be “considered waived if not repled.”).

16 If Plaintiff fails to file an Amended Complaint within the time provided, the Court
17 will enter a final Order dismissing this civil action based both on Plaintiff’s failure to
18 state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)
19 and 1915A(b), and his failure to prosecute in compliance with a court order requiring
20 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff
21 does not take advantage of the opportunity to fix his complaint, a district court may
22 convert the dismissal of the complaint into dismissal of the entire action.”).

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

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

4 **IT IS SO ORDERED.**

5 DATE: May 4, 2021



6 HON. MICHAEL M. ANELLO
7 United States District Judge

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