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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICARDO OROZCO,
CDCR #BI-6982,

Plaintiff,

vs.

C. MADDEN, Warden, et al.,

Defendants.

Case No.: 22cv1732-RBM (DDL)

**ORDER GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
AND DISMISSING COMPLAINT
FOR FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) & 1915A(b)**

Plaintiff Ricardo Orozco, a state prisoner proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983, accompanied by a Motion to proceed In Forma Pauperis (“IFP”). (ECF Nos. 1-2.)

I. Motion to Proceed IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$402.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a failure to prepay the

¹ In addition to a \$350 fee, civil litigants, other than those granted leave to proceed IFP, must pay an additional administrative fee of \$52. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2020)).

1 entire fee only if leave to proceed IFP is granted pursuant to 28 U.S.C. § 1915(a). *See*
2 *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007). Section 1915(a)(2) also
3 requires prisoners seeking leave to proceed IFP to submit a “certified copy of the trust fund
4 account statement (or institutional equivalent) for . . . the 6-month period immediately
5 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d
6 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court assesses
7 an initial payment of 20% of (a) the average monthly deposits in the account for the past
8 six months, or (b) the average monthly balance in the account for the past six months,
9 whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1) & (4).
10 The institution collects subsequent payments, assessed at 20% of the preceding month’s
11 income, in any month in which the account exceeds \$10, and forwards those payments to
12 the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2). Plaintiff remains
13 obligated to pay the entire fee in monthly installments regardless of whether their action is
14 ultimately dismissed. *Bruce v. Samuels*, 577 U.S. 82, 84 (2016); 28 U.S.C. § 1915(b)(1)
15 & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

16 In support of his IFP Motion, Plaintiff has submitted a copy of his California
17 Department of Corrections and Rehabilitation (“CDCR”) Inmate Statement Report and
18 Prison Certificate which indicates that during the six months prior to filing suit Plaintiff
19 had an average monthly balance of \$0.00, average monthly deposits of \$0.00, and had an
20 available balance of \$0.00 in his account at the time he filed suit. (ECF No. 2 at 7.)

21 Plaintiff’s Motion to Proceed IFP is **GRANTED** without imposition of an initial
22 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner
23 be prohibited from bringing a civil action or appealing a civil action or criminal judgment
24 for the reason that the prisoner has no assets and no means by which to pay the initial partial
25 filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-
26 valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . .
27 due to the lack of funds available to him when payment is ordered.”) Plaintiff remains
28 obligated to pay the \$350.00 filing fee in monthly installments. *Bruce*, 577 U.S. at 84.

1 **II. Screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

2 **A. Standard of Review**

3 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
4 Answer screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). Under these statutes,
5 the Court must *sua sponte* dismiss a prisoner’s IFP complaint, or any portion of it, which
6 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are
7 immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing
8 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)
9 (discussing 28 U.S.C. § 1915A(b)).

10 “The standard for determining whether a plaintiff has failed to state a claim upon
11 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
12 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
13 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
14 2012) (noting that § 1915A screening “incorporates the familiar standard applied in the
15 context of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).”) Rule
16 12(b)(6) requires a complaint to “contain sufficient factual matter, accepted as true, to ‘state
17 a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009),
18 quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Detailed factual
19 allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action,
20 supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.
21 “Determining whether a complaint states a plausible claim for relief [is] . . . a context-
22 specific task that requires the reviewing court to draw on its judicial experience and
23 common sense.” *Id.*

24 Title 42 U.S.C. § 1983 “creates a private right of action against individuals who,
25 acting under color of state law, violate federal constitutional or statutory rights.”
26 *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a
27 source of substantive rights, but merely provides a method for vindicating federal rights
28 elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation

1 marks omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation
2 of a right secured by the Constitution and laws of the United States, and (2) that the
3 deprivation was committed by a person acting under color of state law.” *Tsao v. Desert*
4 *Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

5 **B. Plaintiff’s Allegations**

6 Plaintiff claims violations of his federal constitutional rights to due process and
7 access to the courts while incarcerated at the Richard J. Donovan Correctional Facility
8 (“RJD”) in San Diego, California. (ECF No. 1 at 3-5.) He alleges that the Superior Court
9 of Hamilton, Indiana sent him a letter on April 12, 2022, which he never received. (*Id.* at
10 4.) He alleges that he was “misled” regarding a scheduled April 21, 2022 court hearing
11 which was supposed to be conducted via Zoom video conference, but which was instead
12 conducted over the telephone. (*Id.* at 3.)

13 Plaintiff contends Defendants Warden Madden, Assistant Warden Payne, Assistant
14 Warden Secretary Garcia, and an unnamed Litigation Coordinator are responsible in a
15 supervisory capacity for their employees’ alleged misconduct. (*Id.* at 2-4.) Plaintiff alleges
16 that although Defendant Garcia told him the letter from the Superior Court was returned
17 by the United States Postal Service and not the RJD mailroom, Plaintiff’s efforts to confirm
18 that fact or otherwise obtain relief through the prison grievance system failed. (*Id.* at 4.)

19 Although there are no further details alleged in the body of the Complaint, Plaintiff
20 incorporates by reference attachments to the Complaint consisting of inmate grievances
21 and responses thereto. (ECF No. 1-2.) These documents indicate that as a result of the
22 court hearing being held by telephone rather than video conference: “I don’t think I will be
23 able to overturn the decision the court order[ed],” and: “By missing this court hearing it
24 has leaving [sic] me with a harmful severe effect in my life.” (*Id.* at 2, 9.) Plaintiff contends
25 he has been incarcerated at RJD since November 14, 2021, and has received 3 letters from
26 the Hamilton, Indiana Superior Court without any delivery problems. (*Id.* at 6.) Plaintiff
27 requests monetary damages as well as an injunction preventing Defendants from retaliating
28 against him or transferring him to another prison. (ECF No. 1 at 7.)

1 **C. Analysis**

2 Plaintiff claims he was denied his rights to due process rights and access to the courts
3 by: (1) being required to attend a court hearing via telephone rather than via video
4 conference as scheduled by the court, (2) the failure of RJD to ensure that a letter addressed
5 to him from the court was delivered, and (3) the unacceptable responses to his inmate
6 grievances regarding those issues. Rather than name as Defendants the individuals directly
7 responsible for those actions, Plaintiff claims the four named Defendants, the Warden, an
8 Assistant Warden, an Assistant Warden Secretary, and an unnamed Litigation Coordinator
9 at RJD, are liable as supervisors of the persons responsible.

10 **1. Access to Courts**

11 Prisoners have a federal constitutional right of access to the courts. *Lewis v. Casey*,
12 518 U.S. 343, 346, 354 (1996). To state a claim for denial of access to the courts, Plaintiff
13 must allege “‘actual injury’ - that is, ‘actual prejudice with respect to contemplated or
14 existing litigation, such as the inability to meet a filing deadline or to present a claim.’” *Id.*
15 at 348; *see also Jones v. Blanas*, 393 F.3d 918, 936 (9th Cir. 2004) (defining actual injury
16 as an “inability to file a complaint or defend against a charge.”) The nature and description
17 of the underlying claim must be set forth in a complaint “just as if it were being
18 independently pursued.” *Christopher v. Harbury*, 536 U.S. 403, 417 (2002).

19 Plaintiff fails to plausibly allege he suffered an “actual injury.” Rather, he alleges
20 that the failure to deliver his superior court letter and the holding of a court hearing via
21 telephone rather than video conference had the following results: “I don’t think I will be
22 able to overturn the decision the court order[ed],” and: “By missing this court hearing it
23 has leaving [sic] me with a harmful severe effect in my life.” (ECF No. 1-2 at 2, 9.) These
24 allegations of actual injury are entirely conclusory and do not plausibly allege “inability to
25 file a complaint or defend against a charge.” *Jones*, 393 F.3d at 936; *see also Alvarez v.*
26 *Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) (“Failure to show that a ‘nonfrivolous legal
27 claim had been frustrated’ is fatal” to an access to courts claim), quoting *Lewis*, 518 U.S.
28 at 353 & n.4; *see also Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a

1 cause of action, supported by mere conclusory statements, do not suffice” to state a 42
2 U.S.C. § 1983 claim.) If Plaintiff wishes to proceed with an access to courts claim, he must
3 set forth facts which plausibly allege in a non-conclusory manner that he has suffered an
4 “actual injury” as a result of his court hearing being held via telephone rather than video
5 conference or his legal mail being returned as undeliverable. *See Harbury*, 536 U.S. at 417
6 (the nature and description of the underlying non-frivolous claim which was lost or
7 frustrated must be set forth in the complaint “as if it were being independently pursued.”)

8 **2. Due Process**

9 With respect to Plaintiff’s claim that his court appearance via telephone violated his
10 procedural due process rights because he should have appeared via video conference, the
11 Supreme Court “has assumed that, even in situations where the defendant is not actually
12 confronting witnesses or evidence against him, he has a due process right to be present in
13 his own person whenever his presence has a relation, reasonably substantial, to the fulness
14 of his opportunity to defend against the charge.” *Kentucky v. Stincer*, 482 U.S. 730, 745
15 (1987) (internal quote marks omitted); *see also Warner v. Cate*, 12cv1146-LJO-MJS (PC),
16 2015 WL 4645019, at *1 (E.D. Cal. Aug. 4, 2015) (“Because a witness testifying by video
17 is observed directly with little, in any, delay in transmission, . . . courts have found that
18 video testimony can sufficiently enable cross-examination and credibility determinations,
19 as well as preserve the overall integrity of the proceedings.”), citing *Beltran-Tirado v.*
20 *I.N.S.*, 213 F.3d 1179, 1186 (9th Cir. 2000) (telephonic appearance appropriate where
21 witness was in Missouri and hearing held in San Diego and appropriate safeguards were in
22 place to adequately assess witness’s credibility and prevent impairment of cross-
23 examination.) Assuming Plaintiff has plausibly alleged a right to appear via video rather
24 than telephone, his allegations that his inability to appear at his court hearing via video
25 resulted in a lack of confidence in being “able to overturn the decision the court” and as
26 having left him “with a harmful severe effect in my life” are entirely conclusory. Coupled
27 with a failure to identify the nature of the court hearing, Plaintiff fails to plausibly allege
28 he suffered a reasonably substantial effect on his ability to defend against a charge against

1 him as necessary to state a procedural due process claim. *Stincer*, 482 U.S. at 745; *Iqbal*,
2 556 U.S. at 678 (noting that a complaint is subject to dismissal for failure to state a claim
3 if it does not “contain sufficient factual matter, accepted as true, to ‘state a claim to relief
4 that is plausible on its face.’”), quoting *Twombly*, 550 U.S. at 570.

5 To the extent Plaintiff claims the telephonic conference or lack of receipt of the court
6 letter violated his substantive due process rights, he has failed to state a claim. In order to
7 state a substantive due process claim, Plaintiff must “show both a deprivation of [his]
8 liberty and conscience shocking behavior by the government.” *Brittain v. Hansen*, 451
9 F.3d 982, 991 (9th Cir. 2006). Behavior which shocks the conscience can be shown by
10 “conduct intended to injure in some way unjustifiable by any government interest.” *County*
11 *of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). Even assuming Plaintiff could allege
12 Defendants’ actions satisfied this standard, he has not plausibly alleged a deprivation of his
13 liberty arising from Defendants’ actions. As with his access to courts and procedural due
14 process claims, the allegations of adverse effect on Plaintiff’s ability to defend himself at
15 the court hearing, either because he was not permitted to attend via video conference or
16 because he was not able to adequately prepare without receipt of the court letter, are too
17 conclusory to plausibly allege that a deprivation of his liberty arose from either event. In
18 other words, Plaintiff has not identified the alleged adverse effect he claims arose from
19 those events and has therefore failed to plausibly allege a due process claim.

20 To the extent Plaintiff alleges a due process violation arising from the manner in
21 which his inmate grievances were handled, he has failed to state a claim because there is
22 no independent constitutional right to a prison administrative appeal or grievance system.
23 *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (“[I]nmates lack a separate
24 constitutional entitlement to a specific prison grievance procedure.”), citing *Mann v.*
25 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (“There is no legitimate claim of entitlement to
26 a [state prison] grievance procedure.”); *see also Flick v. Alba*, 932 F.2d 728, 729 (8th Cir.
27 1991) (noting that although prisoners have a federal constitutional right to petition the
28 government for redress of grievances and access to the courts, those rights are “not

1 compromised by the prison’s refusal to entertain his grievance.”) Thus, with respect to the
2 allegations of inadequate processing of Plaintiff’s grievance, the Complaint fails to state a
3 claim because there is no constitutional requirement regarding how a grievance system is
4 operated. *Ramirez*, 334 F.3d at 860; *Mann*, 855 F.2d at 640.

5 **3. Supervisory Liability**

6 Finally, Plaintiff seeks to hold all Defendants liable in their supervisory capacities
7 over the RJD employees who were responsible for ensuring Plaintiff received his legal mail
8 and made his court appearance via video conference rather than over the telephone.
9 Plaintiff has not plausibly alleged a 42 U.S.C. § 1983 claim against any Defendant in their
10 supervisory capacity.

11 “[A] plaintiff must plead that each Government official defendant, through the
12 official’s own individual actions, has violated the constitution.” *Iqbal*, 556 U.S. at 676-77
13 (rejecting argument that “a supervisor’s mere knowledge of his subordinate’s
14 [unconstitutional actions] amounts to the supervisor’s violating the Constitution.”) Rather,
15 “[a] supervisory official may be held liable under § 1983 only if ‘there exists either (1) his
16 or her personal involvement in the constitutional violation, or (2) a sufficient causal
17 connection between the supervisor’s wrongful conduct and the constitutional violation.’”
18 *Keates v. Koile*, 883 F.3d 1228, 1242-43 (9th Cir. 2018), quoting *Starr v. Baca*, 652 F.3d
19 1202, 1207 (9th Cir. 2011). “In a section 1983 claim, a supervisor is liable for the acts of
20 his subordinates if the supervisor participated in or directed the violations, or knew of the
21 violations of subordinates and failed to act to prevent them.” *Corales v. Bennett*, 567 F.3d
22 554, 570 (9th Cir. 2009) (internal quote marks omitted). Plaintiff must identify individual
23 acts or omissions by each Defendant he contends resulted in a constitutional violation. *See*
24 *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (“The inquiry into causation must be
25 individualized and focus on the duties and responsibilities of each individual defendant
26 whose acts or omissions are alleged to have caused a constitutional deprivation.”)

27 Based on the foregoing, Plaintiff’s Complaint is dismissed for failure to state a claim
28 upon which relief may be granted. *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1).

1 **D. Leave to Amend**

2 In light of his pro se status, the Court grants Plaintiff leave to amend his Complaint
3 in order to attempt to address the pleading deficiencies identified in this Order. *See Rosati*
4 *v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not dismiss a pro
5 se complaint without leave to amend [pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)] unless ‘it
6 is absolutely clear that the deficiencies of the complaint could not be cured by
7 amendment.’”), quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

8 **IV. Conclusion and Orders**

9 Good cause appearing, the Court:

10 1. **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2).

11 2. **ORDERS** the Secretary of the CDCR, or her designee, to collect from
12 Plaintiff’s prison trust account the \$350 filing fee owed by collecting monthly payments
13 from Plaintiff’s account in an amount equal to twenty percent (20%) of the preceding
14 month’s income and forwarding those payments to the Clerk of the Court each time the
15 amount in the account exceeds \$10 pursuant to 28 U.S.C. Section 1915(b)(2).


16 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Kathleen
17 Allison, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
18 942883, Sacramento, California 94283-0001.

19 4. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which
20 relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1) and
21 **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in which to file
22 an Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff’s
23 Amended Complaint must be complete by itself without reference to his original pleading.
24 Defendants not named and any claim not re-alleged in his Amended Complaint will be
25 considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc.*, 896 F.2d at 1546
26 (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d
27 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not
28 re-alleged in an amended pleading may be “considered waived if not repled.”)

1 If Plaintiff fails to file an Amended Complaint within the time provided, the Court
2 will enter a final Order dismissing this civil action based both on Plaintiff's failure to state
3 a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) &
4 1915A(b)(1), and his failure to prosecute in compliance with a court order requiring
5 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) ("If a plaintiff does
6 not take advantage of the opportunity to fix his complaint, a district court may convert the
7 dismissal of the complaint into dismissal of the entire action.")

8 **IT IS SO ORDERED.**

9 DATE: December 12, 2022


HON. RUTH BERMUDEZ MONTENEGRO
UNITED STATES DISTRICT JUDGE

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