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7 UNITED STATES DISTRICT COURT
8 EASTERN DISTRICT OF CALIFORNIA

9
10 KAREEM J. HOWELL,

11 Plaintiff,

12 v.

13 S. VILLARREAL,

14 Defendant.

Case No. 1:19-cv-01178-NONE-EPG (PC)

FINDINGS AND RECOMMENDATIONS
RECOMMENDING THAT DEFENDANT’S
MOTION TO DISMISS UNDER 28 U.S.C. §
1915(e)(2)(A) BE GRANTED IN PART

(ECF No. 54)

15 OBJECTIONS, IF ANY, DUE WITHIN
16 FOURTEEN DAYS

17 **I. INTRODUCTION**

18 Kareem J. Howell (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma*
19 *pauperis* with this civil rights action filed pursuant to 42 U.S.C. § 1983. This case is
20 proceeding on Plaintiff’s claims against defendant Villarreal for retaliation in violation of the
21 First Amendment and for violation of his First Amendment right to freedom of
22 speech/expression. (ECF Nos. 13, 18, & 35). Plaintiff alleges that defendant Villareal refused
23 to return Plaintiff’s hand-written manuscript in retaliation for Plaintiff filing lawsuits against
24 correctional staff.

25 On September 17, 2021, Defendant filed a motion to dismiss under 28 U.S.C. §
26 1915(e)(2)(A) or, alternatively, to revoke Plaintiff’s *in forma pauperis* status. (ECF No. 54).
27 “This motion is based on Plaintiff’s untrue allegation of poverty in his application to proceed *in*
28 *forma pauperis* (IFP). Because Plaintiff lied on his application and intentionally hid hundreds

1 of thousands of dollars in income from the California Department of Corrections and
2 Rehabilitation and the Court, this case should be dismissed. Alternatively, Defendant requests
3 that Plaintiff's IFP status be revoked and he be required to pay the filing fee before this matter
4 proceeds." (Id. at 1).¹ On September 30, 2021, Plaintiff filed his opposition. (ECF No. 60).
5 On October 6, 2021, Defendant filed her reply. (ECF No. 61). On October 14, 2021, Plaintiff
6 filed an unauthorized surrepley. (ECF No. 62). On October 20, 2021, Defendant filed an
7 objection to Plaintiff's surrepley. (ECF No. 63).²

8 Defendant's motion to dismiss under 28 U.S.C. § 1915(e)(2)(A) or, alternatively, to
9 revoke Plaintiff's *in forma pauperis* status is now before the Court.

10 As the Court finds that Plaintiff intentionally withheld information from the Court in his
11 application to proceed *in forma pauperis*, and that the information that was withheld shows that
12 Plaintiff's allegation of poverty was untrue, the Court will recommend that Defendant's motion
13 be granted in part and that this case be dismissed, without prejudice.

14 **II. PLAINTIFF'S APPLICATION TO PROCEED IN FORMA PAUPERIS**

15 In Plaintiff's application to proceed *in forma pauperis*, which was filed on August 28,
16 2019, Plaintiff stated that he is not employed. (ECF No. 2, p. 1). He also stated that, in the last
17 twelve months, he did not receive any money from a business, a profession, or other self-
18 employment; rent payments, interest or dividends; pensions, annuities or life insurance
19 programs; disability or workers compensation payments; gifts or inheritances; or any other
20 sources. (Id.). Finally, when asked about his assets, Plaintiff stated that he does not have cash;
21 real estate, stocks, bonds, securities, other financial instruments, automobiles, or other valuable
22 property; or any other assets. (Id. at 2). Plaintiff's statements were made under penalty of
23 perjury. (Id. at 1-2).

24 Based on these representations, as well as a review of Plaintiff's Trust Fund Account
25 Statement, the Court granted Plaintiff's application. (ECF No. 7).

27 ¹ Page numbers refer to the ECF page numbers stamped at the top of the page.

28 ² As consideration of Plaintiff's unauthorized surrepley does not change the result, the Court will overrule
Defendant's objection as moot.

1 **III. MOTION TO DISMISS UNDER 28 U.S.C. § 1915(e)(2)(A)**

2 a. Defendant’s Motion

3 On September 17, 2021, Defendant filed a motion to dismiss under 28 U.S.C. §
4 1915(e)(2)(A) or, alternatively, revoke Plaintiff’s IFP status. (ECF No. 54). “This motion is
5 based on Plaintiff’s untrue allegation of poverty in his application to proceed *in forma pauperis*
6 (IFP). Because Plaintiff lied on his application and intentionally hid hundreds of thousands of
7 dollars in income from the California Department of Corrections and Rehabilitation and the
8 Court, this case should be dismissed. Alternatively, Defendant requests that Plaintiff’s IFP
9 status be revoked and he be required to pay the filing fee before this matter proceeds.” (Id. at
10 1).

11 “In his IFP application, Plaintiff declared that he had not received any money from any
12 source in the past twelve months, has no cash in any accounts, and no other assets. However,
13 in his recent deposition, Plaintiff testified under oath that he has \$200,000-\$300,000 in outside
14 bank accounts, which he has had since at least 2013, due to the sale of his books written while
15 in prison.” (ECF No. 54-1, p. 1). “Furthermore, Plaintiff specifically testified that he
16 purposely hides this money from CDCR because of ‘rules and regulations.’” (Id. at 3)
17 (citations omitted).

18 The following exchange occurred during Plaintiff’s deposition:

19 Q. So in the books that you’ve been writing, how much have you made, because
20 if you are the one that’s requesting compensatory damages, I’m trying to figure
21 out how much you’re making on your books.

22 A. I’m gonna estimate the cost about of my net worth to about 200, 300,000.

23 Q. So your net worth is 200 to 300,000?

24 A. Yeah, just by writing books alone.

25 Q. And where do you keep that money?

26 A. Like I say, I’m a third party.

27 Q. But you said this is your money, right?

28 A. It is my money, but CDCR have rules and regulations that you cannot profit
from writing books for creation and stuff, and you have to get a third party. So
me having somebody work for me is legal.

 Q. Okay. Okay. I’m just trying to understand. You have 2 to \$300,000 held in

1 an account for you, correct?

2 A. Probably more.

3 Q. Okay. And where is that account held?

4 A. I want to plead the Fifth.

5 Transcript of Plaintiff's Deposition Dated August 26, 2021 ("Transcript"), 69:13-70:9).

6 "Plaintiff is a highly experienced litigant who concealed substantial income when
7 applying to proceed IFP in this matter. His failure to disclose such a significant sum of income
8 and specific testimony that he purposely hides these funds, coupled with his extensive litigation
9 experience, demonstrates purposeful bad faith. Therefore, the Court should dismiss this action
10 pursuant to 28 U.S.C. § 1915(e)(2)." (ECF No. 54-1, p. 4). The dismissal should be with
11 prejudice because it is the only sanction that will deter Plaintiff. (Id. at 7).

12 In the alternative, Defendant argues that the Court should revoke Plaintiff's IFP status
13 and require that he pay the filing fee before proceeding because he "has hundreds of thousands
14 of dollars at his disposal." (Id. at 8).

15 As evidence, Defendant attaches excerpts from the transcript of Plaintiff's deposition,
16 as well as a copy of the PACER print out from defense counsel's search under the name
17 "Kareem Howell."

18 b. Plaintiff's Opposition

19 Plaintiff filed his opposition on September 30, 2021. (ECF No. 60).

20 Plaintiff argues that Defendant has not brought forth sufficient evidence to show that
21 Plaintiff has an outside bank account that maintains a balance of \$200,000 to \$300,000. (Id. at
22 1). Plaintiff states that, when he filed this case, he was in fact an indigent inmate. (Id. at 2). At
23 his deposition, Plaintiff made clear that "the people working for him are the ones who receive
24 checks. They do what they want to do. As long as they look out for Plaintiff." (Id. at 3).

25 Plaintiff also stated at his deposition that, while he writes the books, he is a "Third Party to get
26 royalty checks." (Id. at 4).

27 Plaintiff states that he never testified that he has \$200,000 to \$300,000 "in outside
28 (bank) accounts...." (Id. at 5). Instead, "Plaintiff speaks about being a third party to getting a

1 royalty check that he believes that his people made a lot of money.” (Id.)

2 When asked if he had \$200,000 to \$300,00 held in account for him, Plaintiff responded
3 “probably more.” (Id. at 6). However, he never confirmed that “the account is a ‘bank’
4 account that he has access to funds, or even knows how much currency is held in an account.”
5 (Id.).

6 Plaintiff denies that he committed fraud on the Court. (Id.).

7 Plaintiff also argues that Defendant’s motion should be denied because Defendant
8 incorrectly captioned her motion as being brought before the Sacramento Division. (Id. at 1).

9 Plaintiff includes a declaration. In his declaration, he states that he is indigent, and was
10 indigent in the twelve to fourteen months prior to filing this action. (Id. at 42). Plaintiff wrote
11 7 to 8 books between 2006 to 2013, and he sent them back home to his family members. (Id.).
12 Plaintiff’s family sells the books for money. (Id. at 42-43). Plaintiff has not received any
13 direct payments or any direct checks. (Id. at 43). Plaintiff has a verbal agreement with his
14 family members that he will write books and send them to his family. (Id.). His family can sell
15 the books and use the money. (Id.). So long as they continue to order Plaintiff food, stationary,
16 and hygiene packages, he will continue to write the books for them. (Id.). Plaintiff was told by
17 a family member that he has a savings account for Plaintiff and will present an undisclosed
18 amount of money to Plaintiff upon Plaintiff’s release from prison. (Id.). Plaintiff has not
19 confirmed the legitimacy of his family member’s statement. (Id.). Plaintiff has not been sent
20 or shown any savings account receipts or legal documents. (Id.).

21 In addition to his declaration, Plaintiff includes a complete copy of the deposition
22 transcript.

23 **IV. LEGAL STANDARDS**

24 “Notwithstanding any filing fee, or any portion thereof, that may have been paid, the
25 court shall dismiss the case at any time if the court determines that ... the allegation of poverty
26 is untrue.” 28 U.S.C § 1915(e)(2)(A). However, “[t]o dismiss [a] complaint pursuant to §
27 1915(e)(2), a showing of bad faith is required, not merely inaccuracy.” Escobedo v.
28 Applebees, 787 F.3d 1226, 1235 n. 8 (9th Cir. 2015).

1 “Courts have not been totally uniform in their application of § 1915(e)(2)(A), but a
2 close reading of the cases applying the statute reveals consistent considerations guiding the
3 courts’ analyses.... Consistent with [Escobedo], other courts have concluded that, where the
4 allegation of poverty is untrue but there is no showing of bad faith, the court should impose a
5 lesser sanction than outright dismissal with prejudice, for example, revoking IFP and
6 provid[ing] a window for the plaintiff to pay the filing fee....” Witkin v. Lee, 2020 WL
7 2512383, at *3 (E.D. Cal. May 15, 2020), report and recommendation adopted, 2020 WL
8 4350094 (E.D. Cal. July 29, 2020), appeal dismissed, 2020 WL 8212954 (9th Cir. Dec. 9,
9 2020).

10 “Courts that have declined to dismiss an action under § 1915(e)(2)(A) have generally
11 based their decisions on the actual poverty of the plaintiff, despite a technical inaccuracy in the
12 IFP application, and the absence of a showing of bad faith.” Id. (collecting cases). “On the flip
13 side, courts routinely dismiss with prejudice cases upon finding that the plaintiff has
14 intentionally withheld information that may have disqualified plaintiff from obtaining IFP
15 status or has otherwise manipulated his finances to make it appear that a plaintiff is poorer than
16 he actually is; i.e., where the facts show that the inaccuracy on the IFP application resulted
17 from the plaintiff’s bad faith.” Id. See also Steshenko v. Gayrard, 2015 WL 1503651, at *5
18 (N.D. Cal. Apr. 1, 2015) (“Where the applicant has knowingly provided inaccurate information
19 on his or her IFP application, the dismissal may be with prejudice.”) (citing Thomas v. Gen.
20 Motors Acceptance Corp., 288 F.3d 305, 306 (7th Cir. 2002); Attwood v. Singletary, 105 F.3d
21 610, 612-13 (11th Cir. 1997); Romesburg v. Trickey, 908 F.2d 258, 260 (8th Cir. 1990);
22 Thompson v. Carlson, 705 F.2d 868, 869 (6th Cir. 1983)), aff’d sub nom. Steshenko v. Albee,
23 691 F. App’x 869 (9th Cir. 2017).

24 In determining whether a plaintiff acted in bad faith, a court may consider whether the
25 plaintiff is an experienced litigator. See, e.g., Vann v. Comm’r of N.Y. City Dep’t of
26 Correction, 496 F. App’x 113, 115 (2d Cir. 2012) (“To determine whether a plaintiff has acted
27 in bad faith a court may consider a plaintiff’s familiarity with the *in forma pauperis* system and
28 history of litigation.”); Roberts v. Beard, 2019 WL 3532183, at *4 (S.D. Cal. Aug. 2, 2019)

1 (relying, in part, on the fact that the plaintiff was an experienced litigant to dismiss the case
2 pursuant to § 1915(e)(2)).

3 V. ANALYSIS

4 The Court finds that Plaintiff, an experienced litigant, intentionally withheld
5 information from the Court in his application to proceed *in forma pauperis*, and that the
6 information that was withheld shows that Plaintiff's allegation of poverty was untrue.

7 According to Plaintiff, he transferred valuable assets to his family (books) (ECF No. 60,
8 p. 42), his family sold the assets (*id.* at 42-43), and his family is holding approximately
9 \$200,000 to \$300,000 of the sales for Plaintiff (Transcript, 69:17-24 (“Q. So your net worth is
10 200 to 300,000? A. Yeah, just by writing books alone. Q. And where do you keep that
11 money? A. Like I say, I’m a third party. Q. But you said this is your money, right? A. It is
12 my money....”); Transcript, 84:13-16 (“Q. Well I’m -- you said earlier that you have an account
13 with 2 to \$300,000 in it that’s being held for you from your books. A. Yes.”); Transcript,
14 70:5-7 (“Q. You have 2 to \$300,000 held in an account for you, correct?” A. “Probably
15 more.”)).³

16 The fact that Plaintiff's family sold the books Plaintiff wrote and is holding proceeds for
17 Plaintiff instead of Plaintiff holding the proceeds directly is of no consequence here. Plaintiff
18 admits that, even though he considers himself a “third party,” it is his money. Transcript,
19 69:21-24 (“Q. But you said this is your money, right? A. It is my money....”); Transcript,
20 84:13-16 (“Q. Well I’m -- you said earlier that you have an account with 2 to \$300,000 in it
21 that’s being held for you from your books. A. Yes.”). Additionally, at his deposition and in
22 his surreply Plaintiff states that his net worth is between \$200,000 to \$300,000. Transcript,
23 69:13-20 (“A. I’m gonna estimate the cost about of my net worth to about 200, 300,000.”);
24 ECF No. 62, p. 4 (stating that Plaintiff believes his net worth is between “\$200,000 to
25 \$300,000” from “sales of his books.”).

26
27 ³ Plaintiff alleges that he wrote the books from 2006 to 2013. (ECF No. 60, p. 42). The book he made
28 the most money off of, “No Mercy,” was written in 2013. Transcript, 85:6-18. Thus, it appears that Plaintiff had
most, if not all, of the money prior to filing this action.

1 Despite believing that his net worth was between \$200,000 to \$300,000, when asked
2 about his assets, Plaintiff stated that he does not have cash; real estate, stocks, bonds, securities,
3 other financial instruments, automobiles, or other valuable property; or any other assets. (ECF
4 No. 2, p. 2).

5 Plaintiff would not be entitled to *in forma pauperis* status with a net worth of \$200,000
6 to \$300,000 because he could afford to pay the filing fee or could give security. 28 U.S.C. §
7 1915(a)(1) (“[A]ny court of the United States may authorize the commencement, prosecution
8 or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without
9 prepayment of fees or security therefor, by a person who submits an affidavit that includes a
10 statement of all assets such prisoner possesses that the person is unable to pay such fees or give
11 security therefor.”).

12 Plaintiff’s arguments are unavailing. Plaintiff argues that Defendant has not brought
13 forth sufficient evidence to show that Plaintiff has an outside bank account that maintains a
14 balance of \$200,000 to \$300,000. However, where the money is held is not relevant. It is also
15 irrelevant that Defendant mislabeled the caption of their motion. What matters is that Plaintiff
16 has access to very substantial assets contrary to what he represented in his application.

17 Plaintiff also argues that events dating back to 2006 and 2013 are not relevant. This
18 may be true. However, Plaintiff’s net worth at the time he filed his application is relevant, even
19 if the money was made, or the assets were procured, years earlier. As cited above, Plaintiff has
20 stated that he has a right to these funds today, and it appears that he had a right to the funds at
21 the time he filed his application to proceed *in forma pauperis* as well.

22 Finally, Plaintiff argues that he was not required to disclose what he believed his net
23 worth to be, and that he cannot be required to disclose the amount of money in an account he
24 “only heard about.” But Plaintiff’s statements at deposition show that this is not just an
25 account he heard about—Plaintiff has funds being held by a third party that he considers his
26 own assets and net worth. However, on his application to proceed *in forma pauperis*, despite
27 being asked to disclose all of his assets, he listed assets totaling zero.

1 And, at the time of filing his application, Plaintiff was an experienced litigant. Before
2 filing this case, he filed numerous other cases in which he proceeded *in forma pauperis*. See,
3 e.g., Howell v. Burns, E.D. Cal., Case No. 1:18-cv-00311 (Plaintiff granted in *forma pauperis*
4 status; case settled); Howell v. Selliers, E.D. Cal., Case No. 1:18-cv-00420 (Plaintiff granted in
5 *forma pauperis* status; case settled); Howell v. Babb, E.D. Cal., Case No. 1:18-cv-00467
6 (Plaintiff granted in *forma pauperis* status; case settled); Howell v. Alejo, E.D. Cal., 1:18-cv-
7 00825 (Plaintiff granted in *forma pauperis* status; case settled); Howell v. Flores, E.D. Cal.,
8 1:18-cv-00879 (Plaintiff granted in *forma pauperis* status; case settled); Howell v. Randolph,
9 E.D. Cal., 1:18-cv-01685 (Plaintiff granted in *forma pauperis* status; case settled); Howell v.
10 McConnell, E.D. Cal., 1:18-cv-01686 (Plaintiff granted in *forma pauperis* status; case settled).

11 As discussed above, “courts routinely dismiss with prejudice cases upon finding that the
12 plaintiff has intentionally withheld information that may have disqualified plaintiff from
13 obtaining IFP status....” Witkin, 2020 WL 2512383, at *3. Given that Plaintiff, an
14 experienced litigant, intentionally withheld information from the Court in his application to
15 proceed *in forma pauperis*, and that the information that was withheld shows that Plaintiff’s
16 allegation of poverty was untrue, the Court could recommend dismissal with prejudice. 28
17 U.S.C § 1915(e)(2)(A) (“Notwithstanding any filing fee, or any portion thereof, that may have
18 been paid, the court *shall dismiss the case* at any time if the court determines that ... the
19 allegation of poverty is untrue.”) (emphasis added).

20 However, while Plaintiff intentionally withheld his net worth from the Court, given that
21 it was Plaintiff who admitted that his net worth was between \$200,000 to \$300,000, and that he
22 does not currently appear to be hiding his net worth from the Court (Plaintiff repeatedly
23 admitted to having this net worth), the Court will exercise its discretion to recommend
24 dismissal without prejudice. The Court believes this is a satisfactory sanction here because
25 Plaintiff will have to bring a new action and file a new application to proceed *in forma pauperis*
26 (or pay the filing fee) based on his true assets at the time of that filing.

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