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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

| | | |
|---------------------|---|--|
| ANTHONY J. SMITH, |) | Case No. 1:21-cv-01329-SAB (PC) |
| |) | |
| Plaintiff, |) | |
| |) | ORDER DIRECTING CLERK OF COURT TO |
| v. |) | RANDOMLY ASSIGN A DISTRICT JUDGE TO |
| |) | THIS ACTION |
| K. SANTORO, et al., |) | |
| |) | FINDINGS AND RECOMMENDATION |
| Defendants. |) | RECOMMENDING DENIAL OF MOTION TO |
| |) | PROCEED IN FORMA PAUPERIS |
| |) | |
| |) | (ECF No. 2) |
| |) | |

Plaintiff Anthony J. Smith is proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff filed the instant complaint on September 3, 2021, along with a motion to proceed in forma pauperis. On September 7, 2021, the Court directed Plaintiff to either pay the filing fee or submit a complete application to proceed in forma pauperis. (ECF No. 4.) After receiving an extension of time, Plaintiff submitted his prison trust account statement. (ECF No. 8.)

**I.
LEGAL STANDARD**

28 U.S.C. § 1915(a)(1) permits a plaintiff to bring a civil action “without prepayment of fees or security thereof” if the plaintiff submits a financial affidavit that demonstrates the plaintiff’s “is unable to pay such fees or give security therefor.” A prisoner seeking to bring a civil action must, in addition

1 to filing an affidavit, “submit a certified copy of the trust fund account statement ... for the 6-month
2 period immediately preceding the filing of the complaint ... obtained from the appropriate official of
3 each prison at which the prisoner is or was confined.” 28 U.S.C. § 1915(a)(2).

4 **II.**

5 **DISCUSSION**

6 Plaintiff has filed an application declaring that, due to his poverty, he is unable to pre-pay the
7 full amount of fees and costs for these proceedings or give security therefor, and that he believes that
8 he is entitled to the relief sought in his complaint. On November 24, 2021, Plaintiff submitted his
9 prisoner trust account statement. (ECF No. 8.) The statement provides the activity in Plaintiff’s
10 inmate trust account for approximately six months preceding the filing of the complaint. Plaintiff’s
11 certified inmate statement report indicates that he currently has an available sum of \$1,089.55 on
12 account to his credit at Kern Valley State Prison. Further, the statement report indicates that, on June
13 9, 2021, the sum of \$1,400.00 was deposited to Plaintiff’s account. Although the certified trust
14 account statement report indicates that Plaintiff has an outstanding restitution fine of \$6,966.61.00, the
15 available balance in Plaintiff’s account reflects that he can pay the \$402.00 filing fee for this action.

16 Based on the foregoing, the information that Plaintiff has provided to the Court reflects that he
17 is financially able to pre-pay the entire filing fee to commence this action. Although the Ninth Circuit
18 Court of Appeals has held that “the filing fee ... should not take the prisoner's last dollar,” Olivares v.
19 Marshall, 59 F.3d 109, 112 (9th Cir. 1995), in these circumstances, it appears Plaintiff has sufficient
20 funds to pre-pay the \$402.00 filing fee with money left over. Should Plaintiff have additional
21 information to provide the Court, or should his available balance change by the time he receives this
22 order, he may notify the Court. However, the Court has the authority to consider any reasons and
23 circumstances for any change in Plaintiff’s available assets and funds. See also Collier v. Tatum, 722
24 F.2d 653, 656 (11th Cir. 1983) (district court may consider an unexplained decrease in an inmate's
25 trust account, or whether an inmate's account has been depleted intentionally to avoid court costs).
26 Therefore, Plaintiff’s motion to proceed in forma pauperis must be denied. If Plaintiff wishes to
27 proceed with this action, Plaintiff must pre-pay the \$402.00 filing fee in full.

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III.

ORDER AND RECOMMENDATIONS

Accordingly, it is HEREBY ORDERED that the Clerk of the Court to randomly assign a Fresno District Judge to this action.

Further, IT IS HEREBY RECOMMENDED that:

1. Plaintiff's motion to proceed in forma pauperis, (ECF No. 2), be DENIED; and
2. Plaintiff be ordered to pay the \$402.00 filing fee in full in order to proceed with this action.

These Findings and Recommendations will be submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **fourteen (14)** days after being served with these Findings and Recommendations, Plaintiff may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that the failure to file objections within the specified time may result in the waiver of the "right to challenge the magistrate's factual findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: November 29, 2021



UNITED STATES MAGISTRATE JUDGE