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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL AARON WITKIN,

Plaintiff,

v.

M. LEE, et al.,

Defendants.

No. 2:17-cv-0232-JAM-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in this action brought under 42 U.S.C. § 1983. Plaintiff’s motion to proceed in forma pauperis (“IFP”) under 28 U.S.C. § 1915 was granted on March 24, 2017. ECF Nos. 6, 7. Defendants now seek dismissal of the action, arguing that plaintiff’s allegation of poverty was false. ECF No. 37. Defendants also contend that plaintiff’s state law negligence claim is deficient. For the reasons that follow, defendants’ motion must be granted.

I. Background

In his motion to proceed IFP, plaintiff declared, under penalty of perjury, that he had received no income in the prior 12 months, had no valuable property, and had no assets. ECF No. 2 at 1-2. Plaintiff signed the motion on December 5, 2016, and it was filed on February 2, 2017. *Id.* An officer from his institution of incarceration (California State Prison, Solano) signed the “certificate” portion of the IFP application, indicating that, during the prior six months, plaintiff’s trust account had an average monthly balance of \$0 and average monthly deposits of \$0. *Id.* at 2.

1 The attached trust account statement showed that, on December 1, 2016, plaintiff had received
2 into his trust account a settlement check for \$4,722.77, but that the same day the entirety of the
3 amount was debited from his account for various restitution fines and other obligations. *Id.* at 3.

4 Defendants present evidence that plaintiff hid assets from the court in his IFP application.
5 First, defendants request judicial notice of the August 12, 2016 settlement of *Witkin v. Swarthout*,
6 No. 2:13-cv-01931-GEB-KJN. That request is granted. Fed. R. Evid. 201. The record in that
7 case shows that plaintiff agreed to settle the case for \$10,625.00. ECF No. 37-2 at 7. Plaintiff
8 agreed to use “approximately \$4,700” of the settlement amount to pay off his restitution fines and
9 asked that the remaining money be forwarded to his mother. *Id.* at 7-8. Defendants’ evidence
10 shows that a check for \$5,666.09 was issued to Elena Witkin on November 9, 2016. *Id.* at 21.

11 The court also grants defendants’ request for judicial notice of the November 1, 2016
12 settlement conference in *Witkin v. Solis*, No. 1:12-cv-01256-AWI-MJS, in which plaintiff agreed
13 to settle the case for \$1,200. ECF No. 37-2 at 17. Defendants’ evidence shows that a check for
14 \$1,200 was issued to Elena Witkin on January 27, 2017. *Id.* at 54.

15 Lastly, the court grants defendants’ request for judicial notice of the January 27, 2017
16 “Notice of Proof of Availability of Funds for Plaintiff’s Deposition of Dr. B. Barnett” in *Witkin v.*
17 *Lotersztain*, Case No. 2:15-cv-00638-MCE-KJN. ECF No. 37-2 at 49-51. That filing shows
18 checking and savings accounts held by “the Witkin Family Trust” at Schools Financial Credit
19 Union holding \$12,205.10 in assets and \$6,200.76 in debts (a car loan and a credit card) for the
20 statement period of December 1, 2016 through December 31, 2016.¹

21 In his verified opposition, plaintiff does not dispute any of the evidence presented by
22 defendants. ECF No. 42. Instead, he claims it shows his honesty in the IFP application.
23 According to plaintiff, the evidence shows that he did not have any settlement funds under his
24 control at the time he executed the application because he had directed the payments be made to

25 ¹ Defendants also seek judicial notice of transcripts of various phone conversations
26 between plaintiff and others that were recorded by plaintiff’s institution of incarceration. The
27 court questions whether these transcripts are appropriate subjects of judicial notice but need not
28 engage with the issue as the transcripts are not necessary to the disposition of the instant motion.
Accordingly, the court has not considered the transcripts in formulating these findings and
recommendations.

1 his mother. Plaintiff declares that he owed his parents about \$44,000 for various litigation-related
2 loans they had advanced him and was using the settlement funds to repay them. ECF No. 42-1 at
3 2. Plaintiff attests that he does not own or control the assets in the Witkin Family Trust. *Id.* at 3-
4 4. Instead, he states that his parents were willing to loan him money (presumably from that
5 account) to pay for the deposition in *Lotersztain*. *Id.*

6 II. The Motion to Dismiss

7 Defendants seek dismissal of the case with prejudice under 28 U.S.C. § 1915(e)(2)(A),
8 which provides: “Notwithstanding any filing fee, or any portion thereof, that may have been paid,
9 the court shall dismiss the case at any time if the court determines that the allegation of poverty is
10 untrue[.]” The statute was amended in April of 1996; it had previously provided that the court
11 “*may* dismiss the case if the allegation of poverty is untrue[.]” 28 U.S.C. § 1915(e) (1996)
12 (emphasis added).

13 Section 1915(e)(2)(A) regards procedures to be followed after an individual has applied
14 for, and been granted, permission to proceed IFP under 28 U.S.C. § 1915(a). Section 1915(a)
15 allows a person to proceed IFP after he submits to the court an affidavit that includes a statement
16 of all of the person’s assets and a statement that the person cannot pay the filing fee.
17 Additionally, a prisoner seeking to proceed IFP must also submit a certified copy of their prison
18 trust account statement for the six months prior to the filing of the complaint. 28 U.S.C.
19 § 1915(a)(2). An IFP affidavit “is sufficient where it alleges that the affiant cannot pay the court
20 costs and still afford the necessities of life.” *Escobedo v. Applebees*, 787 F.3d 1226, 1234 (9th
21 Cir. 2015) (considering the impact of the filing fee on the budget of the applicant in determining
22 that she should have been granted IFP status). Where the IFP applicant is a prisoner, however,
23 courts recognize that most necessary life expenses are covered by the government. *Kennedy v.*
24 *Huibregtse*, 831 F.3d 441, 443 (7th Cir. 2016) (noting that plaintiff’s entire \$2,000 in assets were
25 available to him to pay for his lawsuit because the prison paid for his food, clothing, shelter, and
26 medical care).

27 In this district, plaintiffs generally seek IFP status by submitting a form application. E.D.
28 Cal. Website, <http://www.caed.uscourts.gov/caednew/index.cfm/forms/civil/> (last checked

1 October 10, 2019). Relevant to this case, the form asks the applicant to list all income from the
2 prior 12 months, any money in a bank account, and any other assets of value. The form
3 concludes with the following declaration, above the applicant's signature: "I declare under
4 penalty of perjury that the above information is true and understand that a false statement may
5 result in a dismissal of my claims."

6 On December 5, 2016 plaintiff completed and signed the 2002 version of this application.
7 ECF No. 2. (The form was revised in 2010). He averred that, in the past 12 months, he had not
8 received any money from any source. *Id.* at 1. That statement was not true. He further averred
9 that he had no money in any bank account and owned no other valuable property or assets. *Id.* at
10 2. Plaintiff included the required certification and trust account statement. *Id.* at 2-4. The trust
11 account statement showed that plaintiff had received income from a settlement on December 1,
12 2016 (four days before plaintiff signed the IFP affidavit) totaling \$4,722.77 but that the entire
13 amount had been applied to satisfy his restitution obligations on the same day. *Id.* at 3. Because
14 the affidavit and trust statement indicated that plaintiff had no money, the court granted his
15 request to proceed IFP. ECF No. 7. Defendants argue that this application was deliberately
16 inaccurate, warranting dismissal under § 1915(e)(2)(A).

17 Courts have not been totally uniform in their application of § 1915(e)(2)(A), but a close
18 reading of the cases applying the statute reveals consistent considerations guiding the courts'
19 analyses. The U.S. Court of Appeals for the Ninth Circuit provided a starting point in *Escobedo*,
20 787 F.3d at 1234 n.8, stating that, to dismiss a complaint under § 1915(e)(2)(A), the court must
21 find that the allegation of poverty was not just inaccurate, but made in bad faith. Consistent with
22 that approach, other courts have concluded that, where the allegation of poverty is untrue but
23 there is no showing of bad faith, the court should impose a lesser sanction than outright dismissal
24 with prejudice, for example, revoking IFP and provide a window for the plaintiff to pay the filing
25 fee, or dismissing without prejudice. *Camp v. Oliver*, 798 F.2d 434, 438 (11th Cir. 1986);
26 *Mahone v. Pierce Cnty.*, No. C14-5665 BHS-KLS, 2014 U.S. Dist. LEXIS 170997, at *7-8 (W.D.
27 Wash. Oct. 21, 2014); *Jacobsen v. Am. Honda Motor Co.*, No. CV 10-134-PK, 2010 U.S. Dist.
28 LEXIS 80060, at *4-9 (recommending dismissal without prejudice where plaintiff failed to

1 disclose income on IFP application but the evidence did not conclusively show intentional
2 misrepresentation).

3 Courts that have declined to dismiss an action under § 1915(e)(2)(A) have generally based
4 their decisions on the actual poverty of the plaintiff, despite a technical inaccuracy in the IFP
5 application, and the absence of a showing of bad faith. *Escobedo*, 787 F.3d at 1234 n.8 (dismissal
6 not warranted where plaintiff claimed to be paying a certain amount in “rent” despite actually
7 owning her home, because her mortgage payment was equivalent to a payment of rent and
8 plaintiff owned no equity in the home); *Camp*, 798 F.2d at 438-49 (reversing district court’s
9 dismissal where there was no finding that plaintiff’s inaccuracy foreclosed IFP eligibility);
10 *Hammler v. Alvarez*, No. 18-CV-326-AJB(WVG), 2019 U.S. Dist. LEXIS 22837, at *2-5 (S.D.
11 Cal. Feb. 13, 2019) (dismissal not warranted where plaintiff failed to reveal over \$1,000 in
12 settlement funds because such funds were immediately and entirely used to pay plaintiff’s
13 restitution fines); *Ruffin v. Baldwin*, No. 18-cv-1774-NJR, 2018 U.S. Dist. LEXIS 203411, at *7-
14 10 (S.D. Ill. Nov. 30, 2018) (dismissal not warranted where plaintiff did not list over \$4,000 in
15 settlement funds received in the six months preceding the application because the funds were
16 revealed on the accompanying trust account statement (indicating no intent to conceal them) and
17 because, by the date of the application, plaintiff had spent the money and was thus eligible for
18 IFP); *Griffin v. Moon*, No. 1:12-cv-02034-LJO-BAM (PC), 2016 U.S. Dist. LEXIS 130812, at *7
19 (E.D. Cal. Sept. 23, 2016) (dismissal not warranted where plaintiff had received funds between 8
20 and 20 years prior to his IFP application and there was no evidence that he currently had such
21 funds).

22 On the flip side, courts routinely dismiss with prejudice cases upon finding that the
23 plaintiff has intentionally withheld information that may have disqualified plaintiff from
24 obtaining IFP status or has otherwise manipulated his finances to make it appear that a plaintiff is
25 poorer than he actually is; i.e., where the facts show that the inaccuracy on the IFP application
26 resulted from the plaintiff’s bad faith. Thus, in *Kennedy v. Huibregtse*, 831 F.3d 441, 442-44 (7th
27 Cir. 2016), the Seventh Circuit affirmed the district court’s dismissal with prejudice of a
28 complaint pursuant to § 1915(e)(2)(A) where the plaintiff failed to reveal that he had a trust

1 account outside of prison, managed by a friend, containing about \$1400 at the time of the
2 plaintiff's IFP application. The court rejected plaintiff's claim that he did not know the balance
3 of the account at that time and thought it had only about \$10, because he spent over \$600 from it
4 just before and after the application. *Id.* at 444. Importantly, the court found that, even if the
5 district court would have granted the plaintiff IFP status if it had known about the trust account,

6 hiding assets is not a permissible alternative to seeking the judge's assistance. An
7 applicant has to tell the truth, then argue to the judge why seemingly adverse facts
8 (such as the trust fund in this case) are not dispositive. A litigant can't say, "I
know how the judge *should* rule, so I'm entitled to conceal material information
from him."

9 *Id.* at 443 (emphasis in original).

10 Similarly, the Seventh Circuit affirmed a dismissal with prejudice under § 1915(e)(2)(A)
11 where the plaintiff had not disclosed a savings account he controlled with a balance of over
12 \$32,000 at the time of his IFP application. *David v. Wal-Mart Stores, Inc.*, 669 F. App'x 793 (7th
13 Cir. 2016). The court rejected the plaintiff's explanation that he regarded the account as off-
14 limits because he kept that money for his family in case of financial hardship. *Id.* at 794. The
15 plaintiff had used funds from the account to pay \$600 for a seminar and thus his claim that he
16 could not have used the money for the filing fee was disingenuous. *Id.* And, as in *Kennedy*, the
17 court emphasized that the plaintiff must disclose assets to the court and allow the court to assess
18 their availability to him. *Id.* at 794.

19 The Second Circuit reached the same conclusion in *Vann v. Comm'r of the N.Y.C. Dep't*
20 *of Corr.*, 496 F. App'x 113 (2d Cir. 2012), affirming dismissal with prejudice where the plaintiff
21 made false statements and intentionally concealed income on his IFP application. *Id.* at 114.
22 Plaintiff had omitted about \$2,000 of income from the application. *Id.* at 115-16. The court
23 found irrelevant whether the plaintiff had spent the money before submitting his IFP application,
24 because the statute required him "to accurately and truthfully state his financial history and
25 assets," and he had not done so. *Id.* at 116. Moreover, the plaintiff was "an experienced litigator
26 with extensive knowledge and familiarity with the in forma pauperis system." *Id.* This fact
27 supported a finding of bad faith. *Id.* at 115 ("To determine whether a plaintiff has acted in bad

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1 faith a court may consider a plaintiff's familiarity with the in forma pauperis system and history
2 of litigation.")

3 In a good number of cases finding bad faith, prisoner-plaintiffs have diverted funds in the
4 period leading up to their IFP application to others, usually family members. In *Roberts v. Beard*,
5 No. 15cv1044-WQH-RBM, 2019 U.S. Dist. LEXIS 120744 (S.D. Cal. Aug. 2, 2019), the plaintiff
6 had received a \$3,000 settlement on October 21, 2014, transferred \$2,000 to his sister on the same
7 day, and used the remainder to pay outstanding court filing fees. *Id.* at *3-12. On April 14, 2015,
8 the plaintiff submitted an IFP application indicating that he had not received any money from any
9 other sources in the prior twelve months. *Id.* When the defendants sought dismissal under
10 § 1915(e)(A)(2), the plaintiff claimed he had forgotten about the \$3,000 settlement, had not
11 benefitted from it, and no longer had the money at the time of his application. *Id.* at *10. The
12 court rejected these claims as not credible based on the plaintiff's extensive litigation history and
13 familiarity with the IFP process. *Id.* at *7-11 (quoting *Vann*).

14 In *Cuoco v. U.S. Bureau of Prisons*, 328 F. Supp. 2d 463 (S.D.N.Y. 2004), the plaintiff
15 sought IFP status on October 27, 1998, despite accepting settlement offers in two other cases
16 totaling \$13,500 in the prior three weeks. *Id.* at 464-65. She stated on her IFP application that
17 she had enough money in an account in the community to pay the fee, but could not access the
18 money because prison officials were not allowing her to receive checks. *Id.* at 464. She did not
19 disclose the settlements. While her IFP application was pending, she asked that the settlement
20 checks be sent to her mother, and they were. *Id.* at 465. At the same time, the plaintiff prohibited
21 prison officials from receiving checks on her behalf. *Id.* She did not disclose to the court that she
22 had herself created the barrier keeping checks out of her prison account. *Id.* at 466. The court
23 found that plaintiff, who had obtained IFP status in 15 other suits, had diverted the funds to her
24 mother's address to perpetuate a negative balance in her prison account while misrepresenting to
25 the court that circumstances beyond her control made it unfeasible to have money deposited there.
26 *Id.* at 468-69. This manipulation of the IFP system, especially in combination with similar
27 conduct by the plaintiff in other cases, justified dismissal of her case with prejudice. *Id.* at 468-
28 69.

1 In *Richmond v. Housewright*, 101 F.R.D. 758 (D. Nev. 1984), the plaintiff did not reveal
2 \$2,100 in income he had received during the 12 months preceding his IFP application for work
3 performed as an inmate law clerk and paid directly to the plaintiff's fiancée. Finding that the
4 plaintiff had "deliberately lied," the court dismissed the case. *Id.* at 759.

5 These cases reveal that the essential questions before the court are: (1) was plaintiff's
6 allegation of poverty untrue and, if so, (2) did plaintiff submit the untrue IFP application in bad
7 faith? The evidence submitted by defendants, and not disputed by plaintiff, shows that plaintiff
8 was not honest in his IFP application and, in fact, that plaintiff has attempted to exploit the IFP
9 process in this case in a manner that the court must not allow.

10 A. Plaintiff's allegation of poverty was untrue

11 Even disregarding the Witkin Family Trust, which plaintiff claims he only has access to
12 when permitted by his parents, plaintiff received \$5,666.09 in November 2016, less than a month
13 before he averred that he had received no income from any source in the prior 12 months. That
14 plaintiff diverted this money to his mother, for whatever reason, is irrelevant to whether he
15 received it in the first place. The settlement was made with *him*, to compensate *him*, and it was at
16 *his* direction that the money was sent to his mother. While plaintiff attests that he was paying his
17 parents back,² plaintiff was obligated to disclose the income and to allow the court to assess
18 whether, including consideration of that money, he qualified for IFP status. In addition, when
19 plaintiff claimed to have no income, he knew he would be receiving an additional \$1,200
20 settlement. Plaintiff could easily have taken that money into his trust account and paid the filing
21 fee therefrom. Instead, he again chose to divert the money to his mother.

22 Plaintiff relies heavily on *Ruffin*, where the court excused the plaintiff's failure to report
23 income received prior to his IFP application but which the plaintiff claimed to have used to repay
24 loans from his mother. 2018 U.S. Dist. LEXIS 203411, at *8-9. To the extent that *Ruffin* stands
25 for the proposition that a court should excuse material omissions of income from IFP applications
26 where the plaintiff asserts that such income was used to repay a loan, the court rejects such a

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28 ² The court notes that, aside from his self-serving assertions, plaintiff has submitted
nothing to the court to show the existence of loans from his parents.

1 proposition. Such a rule would eviscerate § 1915(e)(2)(A) by allowing plaintiffs to manipulate
2 their financial history by diverting income to friends and family members and then claiming to
3 have had no income at all. Instead, the court agrees with the Seventh and Second Circuits (and
4 other cases discussed above) – the plaintiff must honestly disclose all income, including income
5 the plaintiff has chosen to spend on loan repayment or whatever else, and allow the court to make
6 the IFP determination based on all the facts.

7 Additionally, the court notes that, in *Ruffin*, the plaintiff’s trust account statement,
8 attached to his IFP application, revealed the funds that he had not disclosed in the application. *Id.*
9 at 10. The court found this fact indicated that the plaintiff had not deliberately tried to conceal the
10 funds. *Id.* Here, plaintiff’s diversion of his settlement proceeds to his mother meant that these
11 funds were not reflected on his trust account statement, a situation much more akin to *Cuoco* than
12 *Ruffin*.

13 B. Plaintiff acted in bad faith

14 Plaintiff is an experienced litigant. He has sought, and obtained, IFP status in four civil
15 rights cases and two habeas cases preceding this one (and applied for IFP status in three cases
16 filed after). *Witkin v. Solis*, No. 1:12-cv-01256-AWI-MJS; *Witkin v. Swarthout*, No. 2:13-cv-
17 01931-GEB-KJN; *Witkin v. Lotersztain*, No. 2:15-cv-00638-MCE-KJN; *Witkin v. M.*, No. 2:15-
18 cv-02493-KJM-CKD; *Witkin v. Lee*, No. 2:17-cv-00232-JAM-CKD; *Witkin v. Blackwell*, No.
19 2:17-cv-02692-JAM-AC; *Witkin v. Lotersztain*, No. 2:19-cv-00406-TLN-KJN; *Witkin v.*
20 *Brazelton*, No. 2:12-cv-00391-CMK; *Witkin v. Arnold*, 2:14-cv-1709-GEB-KJN. That
21 experience, plus the timeline of relevant events in this action, shows plaintiff’s deceptive conduct.

22 Plaintiff’s original complaint was based on disputes he had with prison officials over meal
23 portions that occurred over the course of 2015 and 2016. ECF No. 1. Plaintiff settled the
24 *Swarthout* matter in August of 2016. ECF No. 37-2 at 5-13. It is reasonable to assume that
25 plaintiff, an experienced litigant who had four months to mull it over, had an idea in August 2016
26 that he may file suit based on his ongoing dispute with prison authorities over meal portions.

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1 Nevertheless, he directed that all of the settlement proceeds beyond the amount required to satisfy
2 his restitution obligations (an amount exceeding \$5,500), be made over to his mother. In
3 November of 2016, just one month prior to executing his IFP application for this action, plaintiff
4 settled another action for \$1,200. Yet plaintiff mentioned neither settlement agreement in his IFP
5 application. These facts show that plaintiff, rather than apprise the court of his true financial
6 situation, intentionally kept funds out of his prison account (and off the court’s radar) to improve
7 his chances of obtaining IFP status. It is such conduct that § 1915(e)(2)(A) was enacted to
8 prevent. *Vann*, 496 F. App’x at 115 (“Section 1915(e)(2)(A) serves the purpose of preventing
9 abuse of the judicial system by weeding out the litigants who falsely understate their net worth in
10 order to obtain in forma pauperis status when they are not entitled to that status based on their
11 true net worth.”) (internal quotation marks omitted). Plaintiff did not commit a minor
12 misstatement or omission; he manipulated how he received substantial income in order to conceal
13 it from the court. Accordingly, the case must be dismissed with prejudice. *David*, 669 F. App’x
14 at 795 (dishonesty and abuse of the IFP privilege warrant dismissal with prejudice).

15 Because the court finds that this action must be dismissed pursuant to 28 U.S.C.
16 § 1915(e)(2)(A), the court need not address defendants’ additional arguments concerning
17 plaintiff’s negligence claims.

18 III. Conclusion and Recommendation

19 For the reasons stated above, it is hereby RECOMMENDED that defendants’ March 13,
20 2019 motion to dismiss (ECF No. 37) be granted and that the case be dismissed with prejudice
21 pursuant to 28 U.S.C. § 1915(e)(2)(A).


22 These findings and recommendations are submitted to the United States District Judge
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
24 after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections

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1 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
2 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: May 15, 2020.

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5 EDMUND F. BRENNAN
6 UNITED STATES MAGISTRATE JUDGE
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