

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HON LAU,
CDCR #V-15557,

Plaintiff,

vs.

PRISON LITIGATION REFORM
ACT OF 1996,

Defendant.

Civil No. 09-2827 WQH (WMc)

**ORDER DENYING MOTION TO
PROCEED *IN FORMA PAUPERIS*
AND DISMISSING CASE
WITHOUT PREJUDICE
PURSUANT TO
28 U.S.C. § 1915(a)**

[Doc. No. 2]

Hon Lau (“Plaintiff”), currently incarcerated at Richard J. Donovan Correctional Facility in San Diego, California, and proceeding pro se, has submitted a civil rights Complaint pursuant to 28 U.S.C. § 1983.

While difficult to decipher, Plaintiff’s Complaint claims the “maker” of the Prison Litigation Reform Act of 1996 (“PLRA”) violated his rights to access to the court, petition for redress, and to be free from unreasonable seizures and cruel and unusual punishments because he is “totally innocen[t] of the crime which he did not commit[,]” but has had numerous habeas corpus petitions and civil rights claims denied and/or dismissed “because [he] [is] an indigent.” (Compl. at 3.)

///

1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead,
2 he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)
3 [Doc. No. 2].

4 **I.**

5 **MOTION TO PROCEED IFP**

6 All parties instituting any civil action, suit or proceeding in a district court of the United
7 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
8 U.S.C. § 1914(a). An action may proceed despite a party’s failure to pay only if the party is
9 granted leave to proceed in forma pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). *See*
10 *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176,
11 1177 (9th Cir. 1999). “Under the PLRA, all prisoners who file IFP civil actions must pay the
12 full amount of the filing fee,” regardless of whether the action is ultimately dismissed for any
13 reason. *See Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002) (citing 28 U.S.C.
14 § 1915(b)(1) & (2)). “[T]he PLRA fee filing requirements pass constitutional muster.” *Id.* at
15 848.

16 In order to comply with the PLRA, prisoners seeking leave to proceed IFP must also
17 submit a “certified copy of the trust fund account statement (or institutional equivalent) for the
18 prisoner for the 6-month period immediately preceding the filing of the complaint...” 28 U.S.C.
19 § 1915(a)(2). From the certified trust account statement, the Court assesses an initial payment
20 of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the
21 average monthly balance in the account for the past six months, whichever is greater, unless the
22 prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1), (4); *see Taylor*, 281 F.3d at 850. Thereafter,
23 the institution having custody of the prisoner must collect subsequent payments, assessed at 20%
24 of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and
25 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
26 § 1915(b)(2).

27 While Plaintiff has filed a Motion to Proceed IFP in this matter pursuant to 28 U.S.C.
28 § 1915(a), he has not attached a certified copy of his prison trust account statement for the 6-

1 month period immediately preceding the filing of his Complaint. *See* 28 U.S.C. § 1915(a)(2);
2 S.D. CAL. CIVLR 3.2. Section 1915(a)(2) clearly mandates that prisoners “seeking to bring a
3 civil action ...without prepayment of fees ... *shall* submit a certified copy of the trust fund
4 account statement (or institutional equivalent) ... for the 6-month period immediately preceding
5 the filing of the complaint.” 28 U.S.C. § 1915(a)(2) (emphasis added).

6 Without Plaintiff’s trust account statement, the Court is simply unable to assess the
7 appropriate amount of the filing fee required to initiate this action. *See* 28 U.S.C. § 1915(b)(1).
8 Therefore, Plaintiff’s Motion to Proceed IFP must be DENIED.

9 **II.**

10 **CONCLUSION AND ORDER**

11 For the reasons set forth abotve, **IT IS ORDERED** that:

12 (1) Plaintiff’s Motion to Proceed IFP [Doc. No. 2] is **DENIED**.

13 (2) This action is **DISMISSED** without prejudice for failure to prepay the \$350 filing
14 fee mandated by 28 U.S.C. § 1914(a), and for failure to successfully move to proceed IFP
15 pursuant to 28 U.S.C. § 1915(a).

16 (3) Plaintiff is **GRANTED** forty five (45) days from the date this Order is Filed to
17 either: (1) pay the entire \$350 filing fee, **or** (2) file a new Motion to Proceed IFP, *which*
18 *includes a certified copy of his trust account statement for the 6-month period preceding the*
19 *filing of his Complaint* pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2(b).¹

20 ///

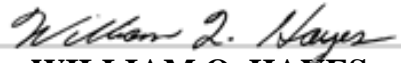
21 ///

22 ///

23
24 ¹ Plaintiff is cautioned that if he chooses to proceed further with this action either by paying the
25 full civil filing fee required by 28 U.S.C. § 1914(a), or sufficiently moving to proceed IFP, his
26 Complaint will be screened and is likely to be dismissed as legally frivolous pursuant to 28 U.S.C. §
27 1915A(b) and 28 U.S.C. § 1915(e)(2)(b). *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)
28 (en banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte
dismiss an *in forma pauperis* complaint that fails to state a claim); *see also Resnick v. Hayes*, 213 F.3d
443, 446 (9th Cir. 2000) (discussing sua sponte screening required by 28 U.S.C. § 1915A(b)). Moreover,
such a dismissal may be counted as a “strike” against Plaintiff if he requests IFP status in any future
civil action filed while he is incarcerated. *See Andrews*, 493 F.3d at 1052 (under the Prison Litigation
Reform Act, “[p]risoners who have repeatedly brought unsuccessful suits may entirely be barred from
IFP status under the three strikes rule[.]”).

1 **IT IS FURTHER ORDERED** that the Clerk of the Court shall provide Plaintiff with a
2 Court-approved form “Motion and Declaration in Support of Motion to Proceed IFP” in this
3 matter. If Plaintiff neither pays the \$350 filing fee in full nor sufficiently completes and files the
4 attached Motion to Proceed IFP, together with a certified copy of his prison trust account
5 statement within 45 days, this action shall remained closed without further Order of the Court.

6 DATED: January 26, 2010

7 
8 **WILLIAM Q. HAYES**
9 United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28