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

DOUGLAS P. ELLIOTT,
CDCR #V-42022,

Plaintiff,

vs.

A. SANCHEZ; B. JONES,

Defendants.

Civil No. 11cv0951 MMA (JMA)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350.00
BALANCE FROM PRISONER'S
TRUST ACCOUNT [ECF No. 2]; and**

**(2) DISMISSING COMPLAINT
FOR FAILING TO STATE A
CLAIM PURSUANT TO 28 U.S.C.
§§ 1915(e)(2) AND 1915A(b)**

Douglas P. Elliott (“Plaintiff”), a state prisoner currently incarcerated at the Richard J. Donovan Correctional Facility located in San Diego, California, and proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff has filed a certified copy of his inmate trust account statement which the Court construes as Plaintiff’s Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 2].

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I.

MOTION TO PROCEED IFP [ECF No. 2]

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 \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds

1 available to him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion
2 to Proceed IFP [ECF No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
3 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded
4 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
5 § 1915(b)(1).

6 II.

7 INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)

8 Notwithstanding IFP status or the payment of any partial filing fees, the Court must
9 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening
10 and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a
11 claim upon which relief may be granted, or seeking monetary relief from a defendant immune
12 from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir.
13 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v.*
14 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e) “not
15 only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint that
16 fails to state a claim).

17 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte
18 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as
19 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant to
20 the IFP provisions of section 1915 make and rule on its own motion to dismiss before directing
21 the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(3). *See Calhoun*, 254 F.3d at
22 845; *Lopez*, 203 F.3d at 1127; *see also McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir.
23 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of
24 process is made on the opposing parties”).

25 “[W]hen determining whether a complaint states a claim, a court must accept as true all
26 allegations of material fact and must construe those facts in the light most favorable to the
27 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194
28 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”);

1 *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe a pro se’s
2 pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988),
3 which is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
4 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights complaint, however, the
5 court may not “supply essential elements of claims that were not initially pled.” *Ivey v. Board*
6 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

7 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
8 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
9 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
10 United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122
11 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

12 **A. Property Damage claims**

13 In his Complaint, Plaintiff alleges that correctional officers searched a number of cells
14 and left the water on in the cells for several hours which caused damage to his personal property
15 in violation of his Eighth Amendment rights. (*See* Compl. at 3-4.) Where an inmate alleges the
16 deprivation of a liberty or property interest caused by the unauthorized negligent or intentional
17 action of a prison official, the prisoner cannot state a constitutional claim where the state
18 provides an adequate post-deprivation remedy. *See Zinermon v. Burch*, 494 U.S. 113, 129-32
19 (1990); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). The California Tort Claims Act (“CTCA”)
20 provides an adequate post-deprivation state remedy for the random and unauthorized taking of
21 property. *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994). Thus, Plaintiff has an
22 adequate state post-deprivation remedy and his claims relating to the destruction of his property
23 are not cognizable in this § 1983 action, and must be dismissed pursuant to 28 U.S.C.
24 §§ 1915(e)(2) and 1915A(b)(1).

25 **B. Access to Courts**

26 Plaintiff alleges that the property that was damaged includes his legal papers which the
27 Court liberally construes as an access to courts claim. (*See* Compl. at 3-4.) Prisoners do “have
28 a constitutional right to petition the government for redress of their grievances, which includes

1 a reasonable right of access to the courts.” *O’Keefe v. Van Boening*, 82 F.3d 322, 325 (9th Cir.
2 1996); accord *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). In *Bounds*, 430 U.S. at 817,
3 the Supreme Court held that “the fundamental constitutional right of access to the courts requires
4 prison authorities to assist inmates in the preparation and filing of meaningful legal papers by
5 providing prisoners with adequate law libraries or adequate assistance from persons who are
6 trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977). To establish a violation of the
7 right to access to the courts, however, a prisoner must allege facts sufficient to show that: (1)
8 a nonfrivolous legal attack on his conviction, sentence, or conditions of confinement has been
9 frustrated or impeded, and (2) he has suffered an actual injury as a result. *Lewis v. Casey*, 518
10 U.S. 343, 353-55 (1996). An “actual injury” is defined as “actual prejudice with respect to
11 contemplated or existing litigation, such as the inability to meet a filing deadline or to present
12 a claim.” *Id.* at 348; see also *Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v.*
13 *Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996).

14 Here, Plaintiff has failed to alleged any actions with any particularity that have *precluded*
15 his pursuit of a non-frivolous direct or collateral attack upon either his criminal conviction or
16 sentence or the conditions of his current confinement. See *Lewis*, 518 U.S. at 355 (right to
17 access to the courts protects only an inmate’s need and ability to “attack [his] sentence[], directly
18 or collaterally, and ... to challenge the conditions of [his] confinement.”); see also *Christopher*
19 *v. Harbury*, 536 U.S. 403, 415 (2002) (the non-frivolous nature of the “underlying cause of
20 action, whether anticipated or lost, is an element that must be described in the complaint, just as
21 much as allegations must describe the official acts frustrating the litigation.”). Moreover,
22 Plaintiff has not alleged facts sufficient to show that he has been actually injured by any specific
23 defendant’s actions. *Lewis*, 518 U.S. at 351.

24 In short, Plaintiff has not alleged that “a complaint he prepared was dismissed,” or that
25 he was “so stymied” by any individual defendant’s actions that “he was unable to even file a
26 complaint,” direct appeal or petition for writ of habeas corpus that was not “frivolous.” *Lewis*,
27 518 U.S. at 351; *Christopher*, 536 U.S. at 416 (“like any other element of an access claim[,] ...
28 the predicate claim [must] be described well enough to apply the ‘nonfrivolous’ test and to show

1 that the ‘arguable’ nature of the underlying claim is more than hope.”). Therefore, Plaintiff’s
2 access to courts claims must be dismissed for failing to state a claim upon which section 1983
3 relief can be granted. *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

4 Accordingly, the Court finds that Plaintiff’s Complaint fails to state a section 1983 claim
5 upon which relief may be granted, and is therefore subject to dismissal pursuant to 28 U.S.C.
6 §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an opportunity to amend
7 his pleading to cure the defects set forth above. Plaintiff is warned that if his amended complaint
8 fails to address the deficiencies of pleading noted above, it may be dismissed with prejudice and
9 without leave to amend.

10 III.

11 CONCLUSION AND ORDER

12 Good cause appearing, **IT IS HEREBY ORDERED** that:

13 1. Plaintiff’s Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 2] is
14 **GRANTED**.

15 2. The Secretary of California Department of Corrections and Rehabilitation, or his
16 designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee
17 owed in this case by collecting monthly payments from the account in an amount equal to twenty
18 percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court
19 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
20 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
21 ASSIGNED TO THIS ACTION.

22 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
23 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
24 Sacramento, California 95814.

25 **IT IS FURTHER ORDERED** that:

26 4. Plaintiff’s Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
27 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
28 from the date this Order is “Filed” in which to file a First Amended Complaint which cures all

1 the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in
2 itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1. Defendants
3 not named and all claims not re-alleged in the Amended Complaint will be deemed to have been
4 waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended
5 Complaint fails to state a claim upon which relief may be granted, it may be dismissed without
6 further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g).
7 *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

8 5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

9 **IT IS SO ORDERED.**

10 DATED: May 11, 2011

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12 Hon. Michael M. Anello
13 United States District Judge

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