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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY RASHAD JOHNSON,
Booking #13708274,

Plaintiff,

vs.

NATURAL ROOTS MARIJUANA
DISPENSARY; ROBERT ESPINOSA;
ISAAC RODRÍGUEZ; and
JOSH FELDMAN,

Defendants.

Civil No. 13cv0642 WQH (DHB)

**1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
[ECF Doc No. 2];**

**2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[ECF Doc. No. 3];**

AND

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

Anthony Rashad Johnson, ("Plaintiff"), currently detained by the San Diego County Sheriff's Department at the South Bay Detention Facility in Chula Vista, California, and proceeding pro se, has submitted a civil rights Complaint pursuant to 28 U.S.C. § 1983.

Plaintiff claims Defendants, who are alleged to be the owner and "employee/volunteers" of the Natural Roots Medical Marijuana Dispensary, violated his constitutional rights by "operating a storefront marijuana dispensary illegally." (Compl. at 3.) Specifically, Plaintiff alleges that on January 24, 2013, Defendants "g[ot] high off marijuana," drank "meth taps (juice with methamphetamine)", and "caused [his] client & several other customers to be victims in

1 a heist type armed robbery.” (*Id.*) Plaintiff claims he was subject to cruel and unusual
2 punishment, denied due process, equal protection, and was falsely imprisoned due to
3 Defendants’ failures to employ “armed security guards,” post the proper “signs and symbols,”
4 or otherwise comply with the “Prop. 215 laws.” (*Id.* at 3, 4.) Plaintiff seeks a restraining order
5 keeping Defendants 100 yards away from him and his family, as well as general and punitive
6 damages. (*Id.* at 7.)

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

10 **I.**

11 **MOTION TO PROCEED IFP**

12 All parties instituting any civil action, suit or proceeding in a district court of the United
13 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
14 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff’s failure to prepay the entire fee
15 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
16 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
17 remains obligated to pay the entire fee in installments, regardless of whether his action is
18 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
19 (9th Cir. 2002).

20 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
21 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
22 statement (or institutional equivalent) for the prisoner for the six-month period immediately
23 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
24 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
25 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
26

27 ¹ All parties filing civil actions *on or after May 1, 2013*, must pay an additional administrative
28 fee of \$50. However, the \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP.
Plaintiff’s complaint in this case was filed before May 1, 2013; therefore, no additional administrative
fee would have been required even if he were denied IFP status.

1 (b) the average monthly balance in the account for the past six months, whichever is greater,
2 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
3 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
4 of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and
5 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
6 § 1915(b)(2).

7 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust account
8 statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. Cal. CivLR 3.2. *Andrews*, 398 F.3d at
9 1119. Plaintiff's trust account statement shows an average monthly balance of \$100.00, average
10 monthly deposits of \$207.00, and a balance of \$250.38 in his account at the time of filing. Based
11 on this financial information, the Court GRANTS Plaintiff's Motion to Proceed IFP [ECF Doc.
12 No. 2] and assesses an initial partial filing fee of \$41.40 pursuant to 28 U.S.C. § 1915(b)(1).

13 However, the Watch Commander of the South Bay Detention Facility, or his designee,
14 shall collect this initial fee *only if sufficient funds in Plaintiff's account are available at the time*
15 *this Order is executed* pursuant to the directions set forth below. *See* 28 U.S.C. § 1915(b)(4)
16 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or
17 appealing a civil action or criminal judgment for the reason that the prisoner has no assets and
18 no means by which to pay the initial partial filing fee."); *Taylor v. Delatoore*, 281 F.3d 844, 850
19 (9th Cir. 2002) (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal
20 of a prisoner's IFP case based solely on a "failure to pay ... due to the lack of funds available to
21 him when payment is ordered."). The remaining balance shall be collected and forwarded to the
22 Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
23 § 1915(b)(1).

24 II.

25 MOTION FOR APPOINTMENT OF COUNSEL

26 Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil
27 action. The Constitution provides no right to appointment of counsel in a civil case, however,
28 unless an indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept.*

1 of *Social Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district
2 courts are granted discretion to appoint counsel for indigent persons. This discretion may be
3 exercised only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th
4 Cir. 1991). “A finding of exceptional circumstances requires an evaluation of both the
5 ‘likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se
6 in light of the complexity of the legal issues involved.’ Neither of these issues is dispositive and
7 both must be viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*,
8 789 F.2d 1328, 1331 (9th Cir. 1986)).

9 The Court denies Plaintiff’s request without prejudice because, for the reasons set out
10 below, neither the interests of justice nor exceptional circumstances warrant appointment of
11 counsel at this time. *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at
12 1017.

13 III.

14 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

15 The PLRA also obligates the Court to review complaints filed by all persons proceeding
16 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused
17 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
18 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
19 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
20 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,
21 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
22 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
23 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)
24 (§ 1915A); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
25 § 1915A).

26 “[W]hen determining whether a complaint states a claim, a court must accept as true all
27 allegations of material fact and must construe those facts in the light most favorable to the
28 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)

1 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”. In addition, the Court’s
2 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
3 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
4 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
5 pro se civil rights complaint, the court may not “supply essential elements of claims that were
6 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
7 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations
8 are not sufficient to withstand a motion to dismiss.” *Id.*

9 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
10 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
11 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
12 United States. See 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
13 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d
14 1350, 1354 (9th Cir. 1985) (en banc).

15 Here, Plaintiff fails to allege any act on the part of Defendants Natural Roots Marijuana
16 Dispensary, its owner Josh Feldman, or its employee/volunteers Espinosa or Rodriguez, which
17 were taken “under color of state law.” See 42 U.S.C. § 1983, 28 U.S.C. § 1915(e)(2)(B)(ii).
18 Private parties or entities do not generally act under color of state law; thus, “purely private
19 conduct, no matter how wrongful, is not within the protective orbit of section 1983.” *Ouzts v.*
20 *Maryland Nat’l Ins. Co.*, 505 F.2d 547, 550 (9th Cir. 1974); see also *Price v. Hawaii*, 939 F.2d
21 702, 707-08 (9th Cir. 1991). While a plaintiff may seek to hold a private actor liable under
22 section 1983, he must allege facts that show some “state involvement which directly or indirectly
23 promoted the challenged conduct.” *Ouzts*, 505 F.2d at 553; *West v. Atkins*, 457 U.S. 42, 49, 54
24 (1988); *Johnson v. Knowles*, 113 F.3d 1114, 1118-1120 (9th Cir. 1997). In other words, Plaintiff
25 must allege facts to show that the private actor’s conduct is “fairly attributable” to the
26 government. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); see also *Kirtley v. Rainey*, 326
27 F.3d 1088, 1092 (9th Cir. 2003) (“While generally not applicable to private parties, a § 1983

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1 action can lie against a private party” only if he is alleged to be “a willful participant in joint
2 action with the State or its agents.”) (citation and quotation marks omitted).

3 Here, Plaintiff’s Complaint fails to allege facts sufficient to show that any Defendant
4 acted on behalf of, or in any way which is attributable to, the State. In fact, Plaintiff’s Complaint
5 alleges Defendants acted *contrary* to both California and federal law. Thus, without more,
6 Plaintiff’s allegations fail to satisfy the first essential prong of a § 1983 claim. *See Haygood*,
7 769 F.2d at 1354.

8 **IV.**

9 **CONCLUSION AND ORDER**

10 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

11 1. Plaintiff’s Motion for Appointment of Counsel [ECF Doc. No. 3] is **DENIED**.

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

14 3. The Watch Commander at the San Diego County Sheriff’s Department South Bay
15 Detention Facility, or his designee, is ordered to collect the \$41.40 initial partial filing fee
16 assessed by this Order and forward that amount to the Clerk of Court, *if those funds are*
17 *available at the time this Order is executed*. **THE INITIAL PARTIAL FILING FEE SHALL**
18 **BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS**
19 **ACTION.**

20 4. Thereafter, the Watch Commander, or his designee, shall collect from Plaintiff’s
21 trust account the balance of the total \$350 filing fee owed in this case and forward payments
22 from his trust account in an amount equal to twenty percent (20%) of the preceding month’s
23 income to the Clerk of the Court each time the amount in Plaintiff’s account exceeds \$10 in
24 accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY**
25 **IDENTIFIED BY THE CASE NAME AND NUMBER ASSIGNED TO THIS ACTION.**


26 5. The Clerk of the Court is directed to serve a copy of this Order on Watch
27 Commander, San Diego County Sheriff’s Department South Bay Detention Facility, 300 Third
28 Ave., Chula Vista, California, 91910.

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IT IS FURTHER ORDERED that:

6. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). However, Plaintiff is further **GRANTED** forty five (45) days leave from the date this Order is filed in which to file a Amended Complaint if he can cure the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without reference to his original pleading. *See* S.D. CAL. CIVLR 15.1. Any Defendant not named and any claim not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

DATED: 6/12/13



HON. WILLIAM O. HAYES
United States District Judge