

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**

LANCE R. MARTIN,
CDCR # E-17299,

Plaintiff,

vs.

T. HARRINSTON; L. MILLER;
C. OROZCO,

Defendants.

Civil No. 14cv2914 BEN (PCL)

ORDER:

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

AND

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. § 1915(e)(2)(B)(ii)
AND 28 U.S.C. § 1915A(b)(1)**

Lance R. Martin (“Plaintiff”), a state prisoner currently incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, and proceeding pro se, has filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983.

Plaintiff has not prepaid the \$400 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2).

///

///

1 I.

2 MOTION TO PROCEED IFP

3 All parties instituting any civil action, suit or proceeding in a district court of the
4 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*
5 28 U.S.C. § 1914(a).¹ An action may proceed despite the plaintiff’s failure to prepay the
6 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
7 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a
8 prisoner and he is granted leave to proceed IFP, he nevertheless remains obligated to pay
9 the entire fee in installments, regardless of whether his action is ultimately dismissed.
10 *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.
11 2002).

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

24 In support of his IFP application, Plaintiff has submitted the certified copies of his
25 trust account statements required by 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.

26
27 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after
28 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a),
(b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May
1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is
granted leave to proceed IFP. *Id.*

1 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,
2 which are frivolous, malicious, fail to state a claim, or which seek damages from
3 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v.*
4 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*
5 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

6 All complaints must contain “a short and plain statement of the claim showing that
7 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are
8 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
9 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
10 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
11 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
12 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*
13 The “mere possibility of misconduct” falls short of meeting this plausibility standard.
14 *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

15 “When there are well-pleaded factual allegations, a court should assume their
16 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
17 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
18 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
19 allegations of material fact and must construe those facts in the light most favorable to
20 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
21 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

22 However, while the court “ha[s] an obligation where the petitioner is pro se,
23 particularly in civil rights cases, to construe the pleadings liberally and to afford the
24 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
25 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
26 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
27 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

28 ///

1 **B. Access to Courts Claims**

2 Plaintiff claims that Defendants have delayed in mailing confidential legal mail
3 that he has submitted to them. Prisoners have a constitutional right to access to the
4 courts. *Lewis v. Casey*, 518 U.S. 343, 346 (1996). The right is limited to the filing of
5 direct criminal appeals, habeas petitions, and civil rights actions. *Id.* at 354. Claims for
6 denial of access to the courts may arise from the frustration or hindrance of “a litigating
7 opportunity yet to be gained” (forward-looking access claim) or from the loss of a suit
8 that cannot now be tried (backward-looking claim). *Christopher v. Harbury*, 536 U.S.
9 403, 412-15 (2002); *see also Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011)
10 (differentiating “between two types of access to court claims: those involving prisoners’
11 right to affirmative assistance and those involving prisoners’ rights to litigate without
12 active interference.”).

13 However, the plaintiff must allege “actual injury” as the threshold requirement to
14 any access to courts claim. *See Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. An
15 “actual injury” is “actual prejudice with respect to contemplated or existing litigation,
16 such as the inability to meet a filing deadline or to present a claim.” *Lewis*, 518 U.S. at
17 348; *see also Jones v. Blanas*, 393 F.3d 918, 936 (9th Cir. 2004) (defining actual injury
18 as the “inability to file a complaint or defend against a charge”). The failure to allege an
19 actual injury is “fatal.” *Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) (“Failure
20 to show that a ‘non-frivolous legal claim had been frustrated’ is fatal.”) (quoting *Lewis*,
21 518 U.S. at 353 & n.4).

22 In addition, the prisoner must allege the loss of a “non-frivolous” or “arguable”
23 underlying claim. *See Harbury*, 536 U.S. at 413-14. The nature and description of the
24 underlying claim must be set forth in the pleading “as if it were being independently
25 pursued.” *Id.* at 417. Finally, the plaintiff must specifically allege the “remedy that may
26 be awarded as recompense but not otherwise available in some suit that may yet be
27 brought.” *Id.* at 415.

28

1 Plaintiff's Complaint fails to allege the actual injury required to state an access to
2 courts claim. *See Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. Specifically, he
3 has failed to allege how the delay in the mailing of legal documents resulted in an "actual
4 prejudice with respect to contemplated or existing litigation, such as the inability to meet
5 a filing deadline or to present a claim." *Lewis*, 518 U.S. at 348; *Jones*, 393 F.3d at 936;
6 *Iqbal*, 556 U.S. at 678.

7 Moreover, Plaintiff's Complaint also fails to identify or even nominally describe
8 the non-frivolous or arguable nature of the underlying cause of action he either
9 anticipated or lost as a result of Defendants' actions. *Harbury*, 536 U.S. at 416 ("[L]ike
10 any other element of an access claim[,] . . . the predicate claim [must] be described well
11 enough to apply the 'nonfrivolous' test and to show that the 'arguable' nature of the
12 underlying claim is more than hope.").

13 For these reasons, the Court finds Plaintiff's access to courts claims must be
14 dismissed for failing to state a plausible claim upon which § 1983 relief can be granted.
15 *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1); *Iqbal*, 556 U.S. at 678.

16 **C. Grievance claims**

17 Plaintiff further alleges that prison officials have not adequately responded to his
18 administrative grievances in violation of his Fourteenth Amendment due process rights.
19 The Fourteenth Amendment provides that: "[n]o state shall ... deprive any person of life,
20 liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "The
21 requirements of procedural due process apply only to the deprivation of interests
22 encompassed by the Fourteenth Amendment's protection of liberty and property." *Board*
23 *of Regents v. Roth*, 408 U.S. 564, 569 (1972). State statutes and prison regulations may
24 grant prisoners liberty or property interests sufficient to invoke due process protection.
25 *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). To state a procedural due process
26 claim, Plaintiff must allege: "(1) a liberty or property interest protected by the
27 Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of
28 process." *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000).

1 However, the Ninth Circuit has held that prisoners have no protected *property*
2 interest in an inmate grievance procedure arising directly from the Due Process Clause.
3 *See Ramirez v. Galaza*, 334 F.3d 850, 869 (9th Cir. 2003) (“[I]nmates lack a separate
4 constitutional entitlement to a specific prison grievance procedure”) (citing *Mann v.*
5 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (finding that the due process clause of the
6 Fourteenth Amendment creates “no legitimate claim of entitlement to a [prison]
7 grievance procedure”)); *accord Adams v. Rice*, 40 F.3d 72, 75 (4th Cir. 1994) (1995);
8 *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993).

9 In addition, Plaintiff has failed to plead facts sufficient to show that prison official
10 deprived him of a protected *liberty* interest by allegedly failing to respond to his prison
11 grievances in a satisfactory manner. While a liberty interest can arise from state law or
12 prison regulations, *Meachum*, 427 U.S. at 223-27, due process protections are implicated
13 only if Plaintiff alleges facts to show that Defendants: (1) restrained his freedom in a
14 manner not expected from his sentence, and (2) “impose[d] atypical and significant
15 hardship on [him] in relation to the ordinary incidents of prison life.” *Sandin v. Conner*,
16 515 U.S. 472, 484 (1995); *Neal v. Shimoda*, 131 F.3d 818, 827-28 (9th Cir. 1997).
17 Plaintiff pleads nothing to suggest how the allegedly inadequate review and
18 consideration of his inmate grievances resulted in an “atypical” and “significant
19 hardship.” *Sandin*, 515 U.S. at 483-84. Thus, to the extent Plaintiff challenges the
20 procedural adequacy of inmate grievance procedures, these claims must be dismissed for
21 failing to state a plausible claim upon which § 1983 relief can be granted. *See* 28 U.S.C.
22 §§ 1915(e)(2)(B)(ii), 1915A(b)(1); *Iqbal*, 556 U.S. at 678.

23 Because Plaintiff is proceeding without counsel, and it is not “absolutely clear that
24 no amendment can cure” the defects of pleading set forth above, the Court will grant him
25 an opportunity to amend. *See Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995);
26 *Lopez*, 203 F.3d at 1131; *Cervantes*, 5 F.3d at 1276-77.

27 ///

28 ///

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

III.

CONCLUSION AND ORDER

Based on the foregoing, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 2) is **GRANTED**.

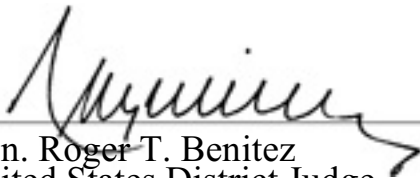
2. The Secretary of the CDCR, or his designee, shall collect the \$5.51 initial filing fee assessed by this Order from Plaintiff's prison trust account, and forward the remaining \$344.49 balance of the full fee owed by collecting monthly payments from Plaintiff's account in an amount equal to twenty percent (20%) of the preceding month's income to the Clerk of the Court each time the amount in Plaintiff's account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey A. Beard, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

IT IS FURTHER ORDERED that:

4. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). However, Plaintiff is **GRANTED** forty-five (45) days leave from the date of this Order in which to file an Amended Complaint which cures all 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. Defendants not named and all claims not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

DATED: December 18, 2014


Hon. Roger T. Benitez
United States District Judge