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

BRIAN DEVERICK LEWIS,
CDCR #J-49028,

Plaintiff,

vs.

MATTHEW CATES, Director of
Corrections; DANIEL PARAMO,
Warden; ALAN KHAN, Chaplain;
A. OJEDA, Correctional Sergeant,

Defendants.

Civil No. 15cv0791 DMS (MDD)

ORDER:

**1) GRANTING PLAINTIFF'S
MOTION TO PROCEED
IN FORMA PAUPERIS
PURSUANT TO
28 U.S.C. § 1915(a)
[ECF No. 2]**

AND

**2) DIRECTING U.S. MARSHAL
TO EFFECT SERVICE OF
SUMMONS AND COMPLAINT
PURSUANT TO
28 U.S.C. § 1915(d) AND
FED.R.CIV.P. 4(c)(3)**

Brian D. Lewis ("Plaintiff"), currently incarcerated at Richard J. Donovan Correctional Facility ("RJD"), and proceeding pro se, has filed a civil rights complaint ("Compl.") pursuant to 42 U.S.C. § 1983 (ECF No. 1).

Plaintiff claims he is disabled, and that after his transfer from California Men's Colony to RJD on September 14, 2012, Defendants violated his right to due process by placing him in segregation "for no other reason than [his] disability," and deprived him of his right to free exercise as a Muslim by failing to provide him with "religious meals"

1 which caused him to “violate the dietary tenets of his [faith].” *See* Compl. at 3-11.¹ He
2 seeks declaratory and injunctive relief as well as \$50,000 in damages. *Id.* at 13.

3 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when
4 he filed his Complaint; instead, he has filed a Motion to Proceed *In Forma Pauperis*
5 (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

6 **I. Plaintiff’s Motion to Proceed IFP**

7 All parties instituting any civil action, suit or proceeding in a district court of the
8 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*
9 28 U.S.C. § 1914(a).² An action may proceed despite a plaintiff’s failure to prepay the
10 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
11 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a
12 prisoner and he is granted leave to proceed IFP, he remains obligated to pay the entire fee
13 in “increments,” *see Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), regardless
14 of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor*
15 *v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

16 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
17 (“PLRA”), prisoners seeking leave to proceed IFP must submit a “certified copy of the
18 trust fund account statement (or institutional equivalent) for the . . . six-month period
19 immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v.*
20 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the
21 Court assesses an initial payment of 20% of (a) the average monthly deposits in the
22 account for the past six months, or (b) the average monthly balance in the account for the
23 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.

25 ¹ Plaintiff invokes jurisdiction pursuant to § 1983 as well as the “Americans with
26 Disabilit[ies] Act,” and the Religious Freedom of Institutionalized Persons Act
27 (“RLUIPA”). *See* Compl. at 1.

28 ² In addition to the \$350 statutory fee, civil litigants must pay an additional
administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of
Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2014). The additional \$50
administrative fee does not apply to persons granted leave to proceed IFP. *Id.*

1 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner then
2 collects subsequent payments, assessed at 20% of the preceding month’s income, in any
3 month in which the prisoner’s account exceeds \$10, and forwards those payments to the
4 Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

5 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust
6 account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*,
7 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account activity, which shows
8 that while he has maintained an average monthly balance of \$6.18 and has had average
9 monthly deposits of \$13.89 to his account over the six-month period preceding the filing
10 of his Complaint. However, Plaintiff had an available balance of zero in his account at
11 the time of filing. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a
12 prisoner be prohibited from bringing a civil action or appealing a civil action or criminal
13 judgment for the reason that the prisoner has no assets and no means by which to pay [an]
14 initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4)
15 acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a
16 “failure to pay . . . due to the lack of funds available.”).

17 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF No. 2) and
18 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
19 balance of the filing fee owed must be collected and forwarded to the Clerk of the Court
20 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

21 **II. Initial Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A**

22 Notwithstanding Plaintiff’s IFP status or the payment of any filing fees, the PLRA
23 also requires the Court to review complaints filed by all persons proceeding IFP and by
24 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,
25 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
26 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as
27 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
28 statutes, the Court must sua sponte dismiss any complaint, or any portion of a complaint,

1 which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
2 who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203
3 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621
4 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

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

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

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

27 As currently pled, the Court finds Plaintiff’s Complaint contains claims sufficient
28 to survive the “low threshold” for proceeding past the sua sponte screening required by

1 28 U.S.C. §§ 1915(e)(2) and 1915A(b).³ See *Wilhelm v. Rotman*, 680 F.3d 1113, 1123
2 (9th Cir. 2012). Accordingly, the Court will direct the U.S. Marshal to effect service upon
3 the Defendants on Plaintiff’s behalf. See 28 U.S.C. § 1915(d) (“The officers of the court
4 shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P.
5 4(c)(3) (“[T]he court may order that service be made by a United States marshal or
6 deputy marshal . . . if the plaintiff is authorized to proceed *in forma pauperis* under 28
7 U.S.C. § 1915.”).

8 **III. Conclusion and Orders**

9 Good cause appearing, the Court:

10 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
11 (ECF No. 2).

12 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
13 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing
14 monthly payments from his account in an amount equal to twenty percent (20%) of the
15 preceding month’s income and forwarding those payments to the Clerk of the Court each
16 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL
17 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
18 ASSIGNED TO THIS ACTION.

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

21 4. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
22 upon Defendants as directed by Plaintiff on the USM Form 285s provided to him. All
23 costs of that service will be advanced by the United States. See 28 U.S.C. § 1915(d);
24 FED.R.CIV.P. 4(c)(3).

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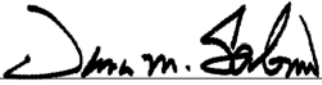
26 _____
27 ³ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is
28 cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a
defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
Cal. 2007).

1 5. **DIRECTS** the Clerk to issue a summons as to Plaintiff’s Complaint (ECF
2 No. 1) upon Defendants and forward it to Plaintiff along with a blank U.S. Marshal Form
3 285 for each Defendant. In addition, the Clerk will provide Plaintiff with a certified copy
4 of this Order, a certified copy of his Complaint (ECF No. 1), and the summons so that he
5 may serve the Defendants. Upon receipt of this “IFP Package,” Plaintiff must complete
6 the Form 285s as completely and accurately as possible, and return them to the United
7 States Marshal according to the instructions the Clerk provides in the letter accompanying
8 his IFP package.

9 6. **ORDERS** Defendants to reply to Plaintiff’s Complaint within the time
10 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42
11 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to “waive the
12 right to reply to any action brought by a prisoner confined in any jail, prison, or other
13 correctional facility under section 1983,” once the Court has conducted its sua sponte
14 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a
15 preliminary determination based on the face on the pleading alone that Plaintiff has a
16 “reasonable opportunity to prevail on the merits,” the defendant is required to respond).

17 7. **ORDERS** Plaintiff to serve upon Defendants or, if an appearance has been
18 entered by counsel, upon Defendants’ counsel, a copy of every further pleading or other
19 document he wishes the Court to consider. Plaintiff must include with the original paper
20 to be filed with the Clerk of the Court, a certificate stating the manner in which a true and
21 correct copy of the document was served on Defendants, or counsel for Defendants, and
22 the date of that service. Any paper received by the Court which has not been properly
23 filed with the Clerk, or which fails to include a Certificate of Service, may be disregarded.

24 DATED: June 8, 2015

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28 HON. DANA M. SABRAW
United States District Judge