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

TIMOTHY PETER LAMBESIS,
CDCR #AU-0886,

Plaintiff,

vs.

MARY ABIARO, Nurse;
PACE, Doctor,
JOHN DOE, Psychiatrist,

Defendants.

Civil No. 15cv1359 MMA (NLS)

**ORDER GRANTING PLAINTIFF'S
MOTION TO PROCEED
IN FORMA PAUPERIS
PURSUANT TO
28 U.S.C. § 1915(a);**

[Doc. No. 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)**

Timothy Peter Lambesis ("Plaintiff"), currently incarcerated at the California Rehabilitation Center ("CRC") in Norco, California, and proceeding *pro se*, has filed a civil rights complaint ("Compl.") pursuant to 42 U.S.C. § 1983 (Doc. No. 1).

Plaintiff claims a nurse, doctor, and psychiatrist at the San Diego County Sheriff Department's Vista Detention Facility ("VDF") and George F. Bailey Detention Facility ("GBDF") acted with deliberate indifference to his serious medical needs in May and June 2014 by denying him medication which had been prescribed for him prior to his incarceration. *See* Compl. at 1-2, 4-7 & Attachment A ¶¶ 1-22.

Plaintiff also alleges a pendent claim for "(medical) gross negligence" in violation of

1 California law. *Id.* at 3. Plaintiff seeks \$35,500,000 in general and punitive damages.
2 *Id.* at 9.

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

6 **I. Motion to Proceed IFP**

7 All parties instituting any civil action, suit or proceeding in a district court of
8 the United States, except an application for writ of habeas corpus, must pay a filing
9 fee. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff’s failure to
10 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
11 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if
12 the plaintiff is a prisoner and he is granted leave to proceed IFP, he remains obligated
13 to pay the full entire fee in “increments,” *see Williams v. Paramo*, 775 F.3d 1182,
14 1185 (9th Cir. 2015), regardless of whether his action is ultimately dismissed. *See* 28
15 U.S.C. § 1915(b)(1) & (2); *Taylor 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
18 the trust fund account statement (or institutional equivalent) for the . . . six-month
19 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);
20 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust
21 account statement, the Court assesses an initial payment of 20% of (a) the average
22 monthly deposits in the account for the past six months, or (b) the average monthly
23 balance in the account for the past six months, whichever is greater, unless the
24 prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
25 institution having custody of the prisoner then collects subsequent payments, assessed

26

27 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional
28 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 at 20% of the preceding month's income, in any month in which the prisoner's
2 account exceeds \$10, and forwards those payments to the Court until the entire filing
3 fee is paid. *See* 28 U.S.C. § 1915(b)(2).

4 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust
5 account statements at CRC pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR
6 3.2. *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff's trust account
7 activity, which show he has had an average monthly balance of \$213.23, and average
8 monthly deposits of \$314.82 to his account over the 6-month period immediately
9 preceding the filing of his Complaint, but an available balance of only \$7.74 in his
10 account at the time of filing. Based on this financial information, the Court **GRANTS**
11 Plaintiff's Motion to Proceed IFP (Doc. No. 2) and assesses an initial partial filing fee
12 of \$62.96 pursuant to 28 U.S.C. § 1915(b)(1).

13 However, the Court will direct the Secretary of the California Department of
14 Corrections and Rehabilitation ("CDCR"), or his designee, to collect this initial fee
15 only if sufficient funds in Plaintiff's account are available at the time this Order is
16 executed. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner
17 be prohibited from bringing a civil action or appealing a civil action or criminal
18 judgment for the reason that the prisoner has no assets and no means by which to pay
19 the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
20 § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case
21 based solely on a "failure to pay . . . due to the lack of funds available to him when
22 payment is ordered."). The remaining balance of the \$350 total fee owed in this case
23 must be collected and forwarded to the Clerk of the Court pursuant to the installment
24 payment provisions set out in 28 U.S.C. § 1915(b)(1).

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

26 Notwithstanding Plaintiff's IFP status or the payment of any partial filing fees,
27 the PLRA also requires the Court to review complaints filed by all persons proceeding
28 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and]

1 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or
2 the terms or conditions of parole, probation, pretrial release, or diversionary program,”
3 “as soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b).
4 Under these statutes, the Court must sua sponte dismiss any complaint, or any portion
5 of a complaint, which is frivolous, malicious, fails to state a claim, or seeks damages
6 from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b);
7 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2));
8 *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. §
9 1915A(b)).

10 All complaints must contain “a short and plain statement of the claim showing
11 that the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual
12 allegations are not required, but “[t]hreadbare recitals of the elements of a cause of
13 action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*,
14 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555
15 (2007)). “Determining whether a complaint states a plausible claim for relief [is] . . . a
16 context-specific task that requires the reviewing court to draw on its judicial
17 experience and common sense.” *Id.* The “mere possibility of misconduct” falls short
18 of meeting this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572
19 F.3d 962, 969 (9th Cir. 2009).

20 “When there are well-pleaded factual allegations, a court should assume their
21 veracity, and then determine whether they plausibly give rise to an entitlement to
22 relief.” *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir.
23 2000) (“[W]hen determining whether a complaint states a claim, a court must accept
24 as true all allegations of material fact and must construe those facts in the light most
25 favorable to the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir.
26 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil
27 Procedure 12(b)(6)”).

28

1 However, while the court “ha[s] an obligation where the petitioner is pro se,
2 particularly in civil rights cases, to construe the pleadings liberally and to afford the
3 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
4 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
5 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
6 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

7 As currently pled, the Court finds Plaintiff’s Complaint contains inadequate
8 medical care claims sufficient to survive the “low threshold” for proceeding past the
9 sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).² See
10 *Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir. 2012); *Estelle v. Gamble*, 429 U.S.
11 97, 103 (1976) (prison officials may be held liable under the Eighth Amendment if
12 they act with deliberate indifference to serious medical needs); *id.* at 104-05
13 (deliberate indifference may be shown if prison officials “intentionally deny[] or
14 delay[] access to medical care or intentionally interfer[e] with the treatment once
15 prescribed.”); *Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1241-44 (9th Cir.
16 2010) (applying *Estelle*’s Eighth Amendment deliberate indifference standard to
17 inadequate medical care claims alleged to violate a pretrial detainees’ due process
18 rights).

19 Accordingly, the Court will direct the U.S. Marshal to effect service upon
20 Defendants³ on Plaintiff’s behalf. See 28 U.S.C. § 1915(d) (“The officers of the court

21
22 ² Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is
23 cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a
24 defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
25 Cal. 2007).

26 ³ Plaintiff must, of course, identify the Defendant he lists only as John Doe, and
27 whom he currently describes as a “Psychiatrist MD at S.D. County Jail,” see Compl. at
28 2, by his true name and substitute that individual person in place of John Doe by
amending his Complaint to identify that party before the United States Marshal will be
ordered to execute service upon him. See *Aviles v. Village of Bedford Park*, 160 F.R.D.
565, 567 (1995) (Doe defendants must be identified and served within 120 days of the
commencement of the action against them); FED. R. CIV. P. 15(c)(1)(C) & 4(m).
Generally, Doe pleading is disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir.
1980). And when the plaintiff proceeds IFP, it is in most instances impossible for the

1 shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P.
2 4(c)(3) (“[T]he court may order that service be made by a United States marshal or
3 deputy marshal . . . if the plaintiff is authorized to proceed *in forma pauperis* under 28
4 U.S.C. § 1915.”).

5 **III. Conclusion and Orders**

6 Good cause appearing, the Court:

7 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C.
8 § 1915(a) (Doc. No. 2).

9 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect the
10 \$62.96 initial filing fee assessed by this Order from Plaintiff’s prison trust account,
11 and forward the remaining balance of the full \$350.00 owed by collecting monthly
12 payments from Plaintiff’s account in an amount equal to twenty percent (20%) of the
13 preceding month’s income to the Clerk of the Court each time the amount in
14 Plaintiff’s account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL**
15 **PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
16 **ASSIGNED TO THIS ACTION.**

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

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

23 _____
24 United States Marshal to serve a summons and complaint upon a party identified only as
25 a Doe. *See Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) (in order to properly
26 effect service under Rule 4 in an IFP case, the plaintiff is required to “furnish the
27 information necessary to identify the defendant.”). However, the Court will not dismiss
28 Plaintiff’s claims against John Doe at this time because where the identity of an alleged
party is not known prior to filing of an action, Ninth Circuit authority permits plaintiff
the opportunity to pursue appropriate discovery to identify the unknown Doe, unless it
is clear that discovery would not uncover his identity, or that his Complaint should be
dismissed for other reasons. *See Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir.
1999) (citing *Gillespie*, 629 F.2d at 642).

