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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

VICENTE ARRAIGA ALVAREZ,  
CDCR #V-99688,  
  
Plaintiff,  
  
v.  
  
DR. S. KO, DR. CONNALL McCABE,  
DR. A. SANGHA, J. LEWIS,  
  
Defendants.

Case No.: 16-cv-1302-H-NLS

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS**

[Doc. No. 2]

**(2) DENYING MOTION FOR  
APPOINTMENT OF COUNSEL**

[Doc. No. 3]

**(3) DENYING MOTION FOR  
PRELIMINARY INJUNCTION**

[Doc. No. 4]

**(4) DIRECTING U.S. MARSHAL  
TO EFFECT SERVICE**

On May 31, 2016, Plaintiff Vicente Arraiga Alvarez, currently incarcerated at Corcoran State Prison and proceeding pro se, filed a civil rights complaint under 42 U.S.C. § 1983. (Doc. No. 1.)

1 Plaintiff claims that Richard J. Donovan Correctional Facility and Corcoran State  
2 Prison officials violated and continue to violate his Eighth Amendment rights by denying  
3 him adequate medical care. (*Id.*) Plaintiff did not prepay the civil filing fee required by  
4 28 U.S.C. § 1914(a) when he filed his complaint. Instead, he filed a motion to proceed in  
5 forma pauperis (“IFP”) under 28 U.S.C. § 1915(a), along with motions to appoint counsel  
6 and for a preliminary injunction. (Doc. Nos. 2–4.)

7 **A. Motion to Proceed IFP**

8 Plaintiff moves for leave to proceed IFP. (Doc. No. 2.) All parties instituting any  
9 civil action, suit or proceeding in a district court of the United States, except an application  
10 for writ of habeas corpus, must pay a filing fee of \$400. See 28 U.S.C. § 1914(a).<sup>1</sup> The  
11 action may proceed despite a plaintiff’s failure to prepay the entire fee only if he is granted  
12 leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See *Andrews v. Cervantes*, 493 F.3d  
13 1047, 1051 (9th Cir. 2007). However, a prisoner who is granted leave to proceed IFP  
14 remains obligated to pay the entire fee in increments and regardless of whether his action  
15 is ultimately dismissed. See 28 U.S.C. §§ 1915(b)(1), (2); *Bruce v. Samuels*, 136 S. Ct.  
16 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015); *Taylor v.*  
17 *Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

18 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
19 “certified copy of the trust fund account statement (or institutional equivalent) for . . .  
20 the 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
21 § 1915(a)(2); see *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). The Court will  
22 assess an initial payment of 20% of the average monthly deposits in the account for the  
23 past six months, or of the average monthly balance in the account for the past six months,  
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26 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an administrative fee of \$50.  
27 See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee  
28 Schedule, § 14 (eff. Dec. 1, 2014)). The additional \$50 administrative fee does not apply  
to persons granted leave to proceed IFP. See *id.*

1 whichever is greater, unless the prisoner has no assets. See 28 U.S.C. § 1915(b)(1), (b)(4).  
2 The institution with custody of the prisoner will collect payments of 20% of the preceding  
3 month’s income in any month where his account exceeds \$10, and forward those payments  
4 to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2); Bruce, 136 S. Ct.  
5 at 629.

6 Plaintiff submitted a certified prison certificate and a certified copy of his inmate  
7 trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. (Doc.  
8 No. 7.) This certificate shows that Plaintiff had no monthly deposits and carried no balance  
9 in his trust account during the 6-month period preceding the filing of this action, and had  
10 an available balance of zero at the time of filing. (Id.) The Court assesses no initial partial  
11 filing fee because Plaintiff is unable to pay any initial fee at this time. See 28 U.S.C.  
12 § 1915(b)(4) (“In no event shall a prisoner be prohibited from bringing a civil action or  
13 appealing a civil action or criminal judgment for the reason that the prisoner has no assets  
14 and no means by which to pay the initial partial filing fee.”); Bruce, 136 S. Ct. at 630;  
15 Taylor, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”  
16 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due to  
17 the lack of funds available to him when payment is ordered.”).

18 The Court grants Plaintiff’s motion to proceed IFP and declines to exact any initial  
19 filing fee because his prison certificate shows he has no means to pay it. See Bruce, 136  
20 S. Ct. at 629. The Court directs the Secretary of the California Department of Corrections  
21 and Rehabilitation (“CDCR”), or his designee, to collect the entire \$350 balance of the  
22 filing fees and forward the fees to the Clerk of the Court. See id.

### 23 **B. Motion for Appointment of Counsel**

24 Plaintiff asks the Court to appoint counsel. (Doc. No. 3.) “There is no constitutional  
25 right to appointed counsel in a § 1983 action.” Rand v. Rowland, 113 F.3d 1520, 1525  
26 (9th Cir. 1997). While 28 U.S.C. § 1915(e)(1) grants the district court limited discretion  
27 to request that an attorney represent an indigent civil litigant, this discretion may be  
28 exercised only under “exceptional circumstances.” Agyeman v. Corr. Corp. of Am., 390

1 F.3d 1101, 1103 (9th Cir. 2004). A finding of exceptional circumstances requires “an  
2 evaluation of the likelihood of the plaintiff’s success on the merits and an evaluation of the  
3 plaintiff’s ability to articulate his claims in light of the complexity of the legal issues  
4 involved.” Id. at 1103 (internal citations omitted).

5 The Court denies Plaintiff’s request for appointed counsel without prejudice.  
6 Nothing in the record at this stage of the proceedings suggests he is incapable of articulating  
7 the factual basis for his claims, and any evaluation of his likelihood of success on the merits  
8 is premature.

### 9 **C. Motion for Preliminary Injunction**

10 Plaintiff also filed a motion for preliminary injunction pursuant to Federal Rule of  
11 Civil Procedure 65(a). (Doc. No. 4.) Rule 65(a) provides that “the court may issue a  
12 preliminary injunction only on notice to the adverse party.” As a preliminary matter,  
13 Plaintiff’s motion for an injunction does not comply with the Rule 65(a) procedural notice  
14 requirement. Plaintiff has not demonstrated that his complaint or his motion have been  
15 served on the named Defendants. Thus, the Court denies without prejudice Plaintiff’s  
16 motion for preliminary injunction.

### 17 **D. Screening Under 28 U.S.C. §§ 1915(e)(2) and 1915A**

18 Regardless of a plaintiff’s IFP status or the payment of any filing fees, the Prison  
19 Litigation Reform Act (“PLRA”) requires the Court to review “as soon as practicable after  
20 docketing, a complaint in a civil action in which a prisoner seeks redress from a  
21 governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A.  
22 The Court must dismiss any complaint, or any portion of a complaint, that is frivolous,  
23 malicious, fails to state a claim, or seeks damages from defendants who are immune. See  
24 id.; Rhodes v. Robinson, 621 F.3d 1002, 1004 (9th Cir. 2010); Lopez v. Smith, 203 F.3d  
25 1122, 1126-27 (9th Cir. 2000).

26 All complaints must contain “a short and plain statement of the claim showing that  
27 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
28 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by

1 mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).  
2 “Determining whether a complaint states a plausible claim for relief [is] . . . a context-  
3 specific task that requires the reviewing court to draw on its judicial experience and  
4 common sense.” Id. The “mere possibility of misconduct” falls short of meeting this  
5 plausibility standard. Id.

6 “When there are well-pleaded factual allegations, a court should assume their  
7 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
8 Iqbal, 556 U.S. at 679; see Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000) (“[W]hen  
9 determining whether a complaint states a claim, a court must accept as true all allegations  
10 of material fact and must construe those facts in the light most favorable to the plaintiff.”).

11 The Court “ha[s] an obligation where the petitioner is pro se, particularly in civil  
12 rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of  
13 any doubt.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010). However, it may not  
14 “supply essential elements of claims that were not initially pled.” Ivey v. Bd. of Regents  
15 of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

16 Plaintiff alleges deliberate indifference to his serious medical needs. (Doc. No. 1.)  
17 Plaintiff’s complaint contains claims sufficient to survive the “low threshold” for  
18 proceeding past the screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A. See  
19 Wilhelm v. Rotman, 680 F.3d 1113, 1123 (9th Cir. 2012). Accordingly, the Court directs  
20 the U.S. Marshal to effect service upon the Defendants on Plaintiff’s behalf. See 28 U.S.C.  
21 § 1915(d); Fed. R. Civ. P. 4(c)(3).

## 22 CONCLUSION

23 The Court grants Plaintiff’s motion to proceed IFP under 28 U.S.C. § 1915(a). (Doc.  
24 No. 2.) However, the Court denies without prejudice Plaintiff’s motion for appointment  
25 of counsel and his motion for a preliminary injunction. (Doc. Nos. 3, 4.) The Court directs  
26 the Secretary of the CDCR, or his designee, to collect from Plaintiff’s prison trust account  
27 the \$350 filing fee owed in this case by garnishing monthly payments from Plaintiff’s  
28 account in an amount equal to twenty percent (20%) of the preceding month’s income, and

1 to forward those payments to the Clerk of the Court each time the amount in the account  
2 exceeds \$10. All payments must be clearly identified by the name and number assigned to  
3 this action. The Court directs the Clerk of the Court to serve a copy of this order on Scott  
4 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

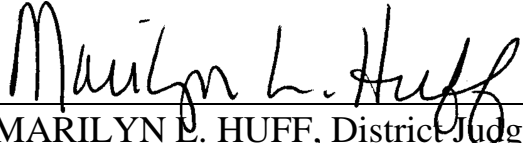
5 The Court also directs the Clerk of Court to issue a summons as to Plaintiff's  
6 complaint and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each  
7 Defendant. In addition, the Clerk will provide Plaintiff with a certified copy of this order,  
8 a certified copy of his complaint, and the summons so that he may serve Defendants. On  
9 receipt of this IFP package, Plaintiff must fill out the Form 285s as completely and  
10 accurately as possible and return the forms to the U.S. Marshal according to the instructions  
11 the Clerk provides in the letter accompanying the IFP package.

12 The Court directs the United States Marshals Service to serve a copy of the  
13 complaint and summons on Defendants as directed by Plaintiff on the USM Form 285s  
14 provided to him. All costs of that service will be advanced by the United States. See 28  
15 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3).

16 After the U.S. Marshal has effected service, Plaintiff must serve on Defendants or,  
17 if appearance has been entered by counsel, on Defendants' counsel a copy of every further  
18 pleading, motion, or other document submitted for the Court's consideration. See Fed.  
19 Rule Civ. P. 5(b). Plaintiff must include with every original document he seeks to file with  
20 the Clerk of the Court a certificate stating how a true and correct copy of that document  
21 was served on Defendants or their counsel, and the date of that service. See Civ. L.R. 5.2.  
22 The Court will disregard any document it receives that has not been properly filed with the  
23 Clerk or that fails to include a certificate of service.

24 **IT IS SO ORDERED.**

25 DATED: June 28, 2016

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28 MARILYN E. HUFF, District Judge  
UNITED STATES DISTRICT COURT