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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TYRONE WALLACE,
CDCR #P-48941,

Plaintiff,

vs.

SOSA, CCII, Appeals Coordinator, et al.,

Defendants.

Case No.: 16-cv-01501-BAS(BGS)

ORDER:

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

**2) DENYING MOTION TO
APPOINT COUNSEL
[ECF No. 6];**

AND

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

TYRONE WALLACE (“Plaintiff”), currently incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983 (ECF. No. 1). Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when he filed his Complaint; instead,

1 he filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a)
2 (ECF No. 2). Plaintiff has also filed a Motion to Appoint Counsel (ECF No. 6).

3 **I. Motion to Proceed IFP**

4 All parties instituting any civil action, suit or proceeding in a district court of the
5 United States, except an application for writ of habeas corpus, must pay a filing fee of
6 \$400.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
7 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
8 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
9 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to
10 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”
11 *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d
12 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.
13 See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

14 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
15 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
16 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
17 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
18 trust account statement, the Court assesses an initial payment of 20% of (a) the average
19 monthly deposits in the account for the past six months, or (b) the average monthly balance
20 in the account for the past six months, whichever is greater, unless the prisoner has no
21 assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody
22 of the prisoner then collects subsequent payments, assessed at 20% of the preceding
23 month’s income, in any month in which his account exceeds \$10, and forwards those
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26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
27 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court
28 Misc. Fee Schedule, § 14 (eff. June 1, 2016)). The additional \$50 administrative fee does
not apply to persons granted leave to proceed IFP. *Id.*

1 payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2); Bruce,
2 136 S. Ct. at 629.

3 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate
4 Statement Report as well as a prison certificate certified by a Senior Accounting Officer at
5 RJD. See ECF No. 2 at 6-10; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; Andrews, 398
6 F.3d at 1119. These statements show that while Plaintiff had an average monthly balance
7 of \$4.01 and average monthly deposits of \$8.82 to his account over the 6-month period
8 immediately preceding the filing of his Complaint, he had an available balance of zero at
9 the time he filed it. See ECF No. 2 at 10. Thus, the Court assesses Plaintiff's initial partial
10 filing fee to be \$1.76 pursuant to 28 U.S.C. § 1915(b)(1), but acknowledges he may be
11 unable to pay even that small initial fee at this time. See 28 U.S.C. § 1915(b)(4) (providing
12 that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing
13 a civil action or criminal judgment for the reason that the prisoner has no assets and no
14 means by which to pay the initial partial filing fee”); Bruce, 136 S. Ct. at 630; Taylor, 281
15 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing
16 dismissal of a prisoner's IFP case based solely on a “failure to pay . . . due to the lack of
17 funds available to him when payment is ordered”).

18 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP (ECF No. 2),
19 declines to exact the initial \$1.76 initial filing fee because his prison certificate indicates
20 he may have “no means to pay it,” Bruce, 136 S. Ct. at 629, and directs the Secretary of
21 the California Department of Corrections and Rehabilitation (“CDCR”), or his designee,
22 to instead collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914
23 and forward them to the Clerk of the Court pursuant to the installment payment provisions
24 set forth in 28 U.S.C. § 1915(b)(1). See *id.*

25 **II. Motion to Appoint Counsel**

26 Plaintiff has also filed a Motion for Appointment of Counsel (ECF No. 6). Plaintiff
27 claims to have a learning disability that makes it difficult for him to understand the
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1 “complexity of federal court orders” and he contends he has had other “legal pleadings
2 denied” because he has “bad handwriting” that is “hard to decipher.” (ECF No. 6 at 3-4.)

3 First, the Court finds Plaintiff’s Complaint sufficiently legible, assures him that all
4 documents filed pro se are “liberally construed,” and notes that “a pro se complaint,
5 however inartfully pleaded,” is held to less stringent standards than formal pleadings
6 drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (internal citations and
7 quotation marks omitted). Moreover, Federal Rule of Civil Procedure 8(e) requires that
8 “[p]leadings . . . be construed so as to do justice.”

9 Second, there is no constitutional right to counsel in a civil case. *Lassiter v. Dept. of*
10 *Social Services*, 452 U.S. 18, 25 (1981). While under 28 U.S.C. § 1915(e)(1), district courts
11 have some limited discretion to “request” that an attorney represent an indigent civil
12 litigant, *Agyeman v. Corr. Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004), this
13 discretion is rarely exercised and only under “exceptional circumstances.” *Id.*; see also
14 *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of exceptional
15 circumstances requires “an evaluation of the likelihood of the plaintiff’s success on the
16 merits and an evaluation of the plaintiff’s ability to articulate his claims ‘in light of the
17 complexity of the legal issues involved.’” *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn v.*
18 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

19 Under these circumstances, the Court must **DENY** Plaintiff’s Motion to Appoint
20 Counsel (ECF No. 6) without prejudice because, as discussed below, a liberal construction
21 of his Complaint suggests Plaintiff is capable of articulating the factual basis for his claims
22 in this case, and that the likelihood of his success on the merits is not at all yet clear at this
23 preliminary stage of the proceedings. *Id.* Therefore, neither the interests of justice nor any
24 exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
25 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

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1 **III. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

2 **A. Standard of Review**

3 Because Plaintiff is a prisoner and is proceeding IFP, his complaint requires a pre-
4 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these statutes,
5 the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it, which
6 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are
7 immune. See *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing
8 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)
9 (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that the
10 targets of frivolous or malicious suits need not bear the expense of responding.’”
11 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
12 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

13 “The standard for determining whether a plaintiff has failed to state a claim upon
14 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
15 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
16 1108, 1112 (9th Cir. 2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
17 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
18 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
19 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
20 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
21 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

22 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
23 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
24 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief
25 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
26 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
27 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
28 standard. *Id.*; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

1 Finally, in deciding whether Plaintiff has stated a plausible claim for relief, the Court
2 may consider exhibits attached to his Complaint. See Fed. R. Civ. P. 10(c) (“A copy of a
3 written instrument that is an exhibit to a pleading is a part of the pleading for all
4 purposes.”); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555
5 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d 426
6 (9th Cir. 1978)) (“[M]aterial which is properly submitted as part of the complaint may be
7 considered” in ruling on a Rule 12(b)(6) motion to dismiss.).

8 **B. Plaintiff’s Allegations**

9 Plaintiff claims that RJD Appeals Coordinators Sosa and Self and “I.G.” Robert
10 Barton in Sacramento denied his First Amendment right to access the courts by “screening
11 out” several CDC 602 inmate appeals related to his requests for single-cell status. (ECF
12 No. 1 at 3-6.)

13 Prisoners have a constitutional right to access to the courts. *Lewis v. Casey*, 518 U.S.
14 343, 346 (1996). The right is limited to the filing of direct criminal appeals, habeas
15 petitions, and civil rights actions. *Id.* at 354. Claims for denial of access to the courts may
16 arise from the frustration or hindrance of “a litigating opportunity yet to be gained”
17 (forward-looking access claim) or from the loss of a suit that cannot now be tried
18 (backward-looking claim). *Christopher v. Harbury*, 536 U.S. 403, 412-15 (2002); see also
19 *Silva v. Di Vittorio*, 658 F.3d 1090, 1102 (9th Cir. 2011) (differentiating “between two
20 types of access to court claims: those involving prisoners’ right to affirmative assistance
21 and those involving prisoners’ rights to litigate without active interference”).

22 However, Plaintiff must allege “actual injury” as the threshold requirement to any
23 access to courts claim. *Lewis*, 518 U.S. at 351-53; *Silva*, 658 F.3d at 1104. An “actual
24 injury” is “actual prejudice with respect to contemplated or existing litigation, such as the
25 inability to meet a filing deadline or to present a claim.” *Lewis*, 518 U.S. at 348; see also
26 *Jones v. Blanas*, 393 F.3d 918, 936 (9th Cir. 2004) (defining actual injury as the “inability
27 to file a complaint or defend against a charge”). The failure to allege an actual injury is
28 “fatal.” *Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008) (“Failure to show that a

1 ‘non-frivolous legal claim had been frustrated’ is fatal.”) (quoting Lewis, 518 U.S. at 353
2 & n.4).

3 In addition, Plaintiff must allege the loss of a “non-frivolous” or “arguable”
4 underlying claim. Harbury, 536 U.S. at 413-14. The nature and description of the
5 underlying claim must be set forth in the pleading “as if it were being independently
6 pursued.” Id. at 417. Finally, Plaintiff must specifically allege the “remedy that may be
7 awarded as recompense but not otherwise available in some suit that may yet be brought.”
8 Id. at 415.

9 Plaintiff’s Complaint fails to allege the actual injury required to state an access to
10 courts claim. See Lewis, 518 U.S. at 351-53; Silva, 658 F.3d at 1104. While Plaintiff does
11 claim Defendants’ refusals to process CDC 602 inmate appeal Log No. RJD-C-15-00752,
12 in which he requested single-cell status, presented an “obstacle” and “hindrance” to his
13 pursuit of those conditions of confinement claims (ECF No. 1 at 4; ECF No. 1-2 at 2-14),
14 his exhibits further show that he did successfully file no fewer than five state habeas
15 petitions related to his cell status, that San Diego Superior Court Judge Stephanie Sontag
16 ordered an evidentiary hearing related to Plaintiff’s cell-status in San Diego Superior Court
17 Case No. HSC 11061 on January 21, 2015, despite his difficulties “exhausting his
18 administrative remedies,” and that as of August 1, 2015, Plaintiff was, in fact, authorized
19 for “single-cell housing.” (ECF No. 1-2 at 2-5, 16-22.) Thus, the Court finds that Plaintiff’s
20 Complaint fails to include any further “factual matter” to show how or why any of the
21 individual Defendants in this case caused him to suffer any “actual prejudice . . . , such as
22 the inability to meet a filing deadline or to present a claim,” with respect to that case. Lewis,
23 518 U.S. at 348;¹ Jones, 393 F.3d at 936; Iqbal, 556 U.S. at 678.

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26 ¹ Although Bounds suggested “that the State must enable the prisoner to discover
27 grievances, and to litigate effectively once in court,” Lewis expressly disavowed such a far-
28 reaching right. 518 U.S. at 354 (emphasis added). Only materials that would ensure
meaningful access—the ability to present a claim—are required: “To demand the conferral
of sophisticated legal capabilities upon a mostly uneducated and indeed largely illiterate

1 Thus, because Plaintiff has failed to allege facts sufficient to show that Defendants
2 caused him to suffer any “actual injury” with respect to his state habeas case, or any other
3 non-frivolous direct criminal appeal, habeas petition, or civil rights action he may have
4 filed, see *Lewis*, 518 U.S. at 354, the Court finds Plaintiff’s access to courts claims must
5 be dismissed for failing to state a plausible claim upon which § 1983 relief can be granted.
6 See 28 U.S.C. § 1915(e)(2)(B)(ii), § 1915A(b)(1); *Iqbal*, 556 U.S. at 678.

7 **C. Leave to Amend**

8 Because Plaintiff is proceeding without counsel, and he has now been provided with
9 notice of his Complaint’s deficiencies, the Court will grant him leave to amend. See *Rosati*
10 *v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not dismiss a pro
11 se complaint without leave to amend [pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)] unless ‘it
12 is absolutely clear that the deficiencies of the complaint could not be cured by
13 amendment.’”) (quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012)).

14 **IV. Conclusion and Order**

15 Good cause appearing, the Court:

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

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

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27 prison population is effectively to demand permanent provision of counsel, which we do
28 not believe the Constitution requires.” *Id.*

1 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
2 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

3 4. **DENIES** Plaintiff's Motion to Appoint Counsel (ECF No. 6).

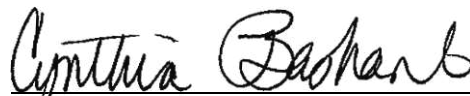
4 5. **DISMISSES** this civil action for failing to state a claim upon which § 1983
5 relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

6 6. **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in
7 which to re-open his case by filing an Amended Complaint which cures all the deficiencies
8 of pleading described in this Order. If Plaintiff elects to file an Amended Complaint, it
9 must be complete by itself without reference to his original pleading. See S.D. CAL. CIVLR
10 15.1; Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1546 (9th Cir.
11 1989) (“[A]n amended pleading supersedes the original.”); Lacey v. Maricopa Cnty., 693
12 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are
13 not re-alleged in an amended pleading may be “considered waived if not repled”).

14 If Plaintiff fails to file an Amended Complaint within the time provided, this civil
15 action will remain dismissed without prejudice based on his failure to state a claim upon
16 which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

17 **IT IS SO ORDERED.**

18
19 **Dated: September 12, 2016**



Hon. Cynthia Bashant
United States District Judge