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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RICHARD ARMENTA,
12 CDCR #G-39318,

13 Plaintiff,

14 vs.

15 D. PARAMO, Warden, et al.,

16 Defendants.
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Case No.: 3:16-cv-02931-BTM-KSC

ORDER:

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

**2) DENYING MOTION TO
APPOINT COUNSEL
[ECF No. 3]**

AND

**3) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE PURSUANT TO
28 U.S.C. § 1915(d) AND
Fed. R. Civ. P. 4(c)(3)**

24 RICHARD ARMENTA (“Plaintiff”), a prisoner at California State Prison,
25 Sacramento (CSP-SAC) in Represa, California, and proceeding pro se, has filed a civil
26 rights Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1). Together with his
27 Complaint, Plaintiff filed a Motion to Proceed In Forma Pauperis pursuant to 28 U.S.C.
28 § 1915(a) (ECF No. 2), as well as a Motion to Appoint Counsel (ECF No. 3).

1 **Background**

2 Plaintiff claims prison officials at Richard J. Donovan Correctional Facility
3 (“RJD”) in San Diego, California, violated his Eighth and Fourteenth Amendment rights
4 while he was incarcerated there in 2015 by charging him with, finding him guilty of, and
5 punishing him for use of a controlled substance in violation of CAL. CODE REGS., tit. 15
6 § 3016(a). Plaintiff claims Defendants did so with “deliberate indifference” to medical
7 evidence showing he had been prescribed Tylenol with codeine, which he contends
8 explained the positive urinalysis results that initiated his disciplinary proceedings. (ECF
9 No. 1 at 8-15.) Plaintiff seeks declaratory and injunctive relief re-instating his visitation
10 privileges in addition to compensatory and punitive damages. (*Id.* at 16.)

11 **Discussion**

12 **A. IFP Motion**

13 All parties instituting any civil action, suit or proceeding in a district court of the
14 United States, except an application for writ of habeas corpus, must pay a filing fee of
15 \$400.¹ *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
16 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
17 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
18 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to
19 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”
20 *Bruce v. Samuels*, ___ S. Ct. ___, 136 S. Ct. 627, 629 (U.S. 2016); *Williams v. Paramo*,
21 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately
22 dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th
23 Cir. 2002).

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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 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
2 “certified copy of the trust fund account statement (or institutional equivalent) for ... the
3 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
4 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
5 trust account statement, the Court assesses an initial payment of 20% of (a) the average
6 monthly deposits in the account for the past six months, or (b) the average monthly
7 balance in the account for the past six months, whichever is greater, unless the prisoner
8 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
9 custody of the prisoner then collects subsequent payments, assessed at 20% of the
10 preceding month’s income, in any month in which his account exceeds \$10, and forwards
11 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2);
12 *Bruce*, 136 S. Ct. at 629.

13 In support of his IFP motion, Plaintiff has submitted a copy of his CDCR Inmate
14 Statement Report and a certificate issued by a CSP-SAC accounting clerk attesting to his
15 balances and deposits over the 6-month period preceding the filing of his Complaint.
16 (ECF No. 2 at 3-5); 28 U.S.C. § 1915(a)(2); S.D. Cal. CivLR 3.2; *Andrews*, 398 F.3d at
17 1119. These documents show that while Plaintiff has had a monthly average of \$94.17
18 deposited to his account, and has carried an average balance of \$28.12, his available
19 balance at the time of filing was zero (ECF No. 2 at 5). *See* 28 U.S.C. § 1915(b)(4)
20 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action
21 or appealing a civil action or criminal judgment for the reason that the prisoner has no
22 assets and no means by which to pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at
23 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
24 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to
25 the lack of funds available to him when payment is ordered.”).

26 Therefore, the Court grants Plaintiff leave to proceed IFP, declines to exact the
27 \$18.83 initial filing fee assessed pursuant to 28 U.S.C. § 1915(b)(1) because his trust
28 account statement shows he “has no means to pay it,” *Bruce*, 136 S. Ct. at 629; 28 U.S.C.

1 § 1915(b)(4), and directs the Secretary of the California Department of Corrections and
2 Rehabilitation (“CDCR”) to collect the entire \$350 balance of the filing fees required by
3 28 U.S.C. § 1914 and forward them to the Clerk of the Court pursuant to the installment
4 payment provisions set forth in 28 U.S.C. § 1915(b). *See id.*

5 **B. Motion to Appoint Counsel**

6 Plaintiff also asks the Court to appoint counsel for him because he is indigent,
7 incarcerated, “unable to read or write,” and because “a trial in this case will likely involve
8 conflicting testimony,” and he believes “counsel would better enable [him] to present
9 evidence and cross examine witnesses.” (ECF No. 3 at 1.)

10 However, there is no constitutional right to counsel in a civil case. *Lassiter v. Dept.*
11 *of Social Servs*, 452 U.S. 18, 25 (1981); *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir.
12 2009). And while 28 U.S.C. § 1915(e)(1) grants the district court limited discretion to
13 “request” that an attorney represent an indigent civil litigant, *Agyeman v. Corr. Corp. of*
14 *America*, 390 F.3d 1101, 1103 (9th Cir. 2004), this discretion is exercised only in
15 “exceptional circumstances.” *Id.*; *see also Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th
16 Cir. 1991). A finding of exceptional circumstances requires the Court “to consider
17 whether there is a ‘likelihood of success on the merits’ and whether ‘the prisoner is
18 unable to articulate his claims in light of the complexity of the legal issues involved.’”
19 *Harrington v. Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015) (*quoting Palmer*, 560 F.3d
20 at 970).

21 The Court denies Plaintiff’s request without prejudice at this time because nothing
22 in either his Complaint or his Motion to Appoint Counsel demonstrates an inability to
23 “read or write” or suggests he is incapable of articulating the factual basis for his claims,
24 which appear “relatively straightforward.” *Id.* In fact, the Court finds, based on its
25 screening of Plaintiff’s Complaint and applying the liberal standards of construction
26 required in pro se cases, *see Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010)
27 (noting court’s “obligation where the petitioner is pro se, particularly in civil rights cases,
28 to construe the pleadings liberally and to afford the petitioner the benefit of any doubt”),

1 that Plaintiff has pleaded sufficient factual content to state a plausible claim for relief.

2 At the same time, and at this initial stage of the case, Plaintiff’s Complaint, by
3 itself, while sufficient to state a claim, does not yet demonstrate a “likelihood” of success
4 on the merits. *Id.* Therefore, the Court finds no “exceptional circumstances” exist to
5 justify the appointment of counsel at this time. *See, e.g., Cano v. Taylor*, 739 F.3d 1214,
6 1218 (9th Cir. 2014) (affirming denial of counsel where prisoner was able to articulate
7 his inadequate medical care claims in light of the complexity of the issues involved, but
8 found unlikely to succeed on the merits).

9 **C. Screening of Complaint pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

10 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint also requires a
11 sua sponte pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b).
12 Under these statutes, the Court must dismiss a prisoner’s IFP complaint, or any portion of
13 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
14 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
15 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
16 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
17 the targets of frivolous or malicious suits need not bear the expense of responding.’”
18 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
19 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

20 “The standard for determining whether a plaintiff has failed to state a claim upon
21 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
22 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
23 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
24 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
25 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
26 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
27 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
28 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

1 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
2 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
3 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
4 relief [is] ... a context-specific task that requires the reviewing court to draw on its
5 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
6 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
7 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
8 (9th Cir. 2009).

9 As noted above, Plaintiff claims Defendants charged, tried, and found him guilty of
10 a serious rules violation in March and April 2015 after his urine tested positive for
11 morphine and despite having knowledge that he possessed a valid prescription for
12 Tylenol with codeine, which he claims caused a “false positive.” As a result, Plaintiff
13 forfeited 90 days of behavioral credits,² 90 days loss of quarterly packages, special
14 purchases, canteen, and dayroom privileges, was placed on “C” status, lost 180 days of
15 contact visits, was restricted to only non-contact visitation for the next 180 days, and was
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18 ² Plaintiff admits his credits have been restored in response to a petition for habeas corpus
19 he filed in San Diego Superior Court in Case No. HSC 11448—which appears to challenge
20 the same disciplinary conviction at issue in this case. *See* ECF No. 1 at 9-10, 48-55. Thus,
21 the Court finds Plaintiff’s § 1983 suit does not appear precluded by *Heck v. Humphrey*,
22 512 U.S. 477, 483, 486-87 (1994) and *Edwards v. Balisok*, 520 U.S. 641, 644 (1997)).
23 “[W]here ... a successful § 1983 action would not necessarily result in an earlier release
24 from incarceration ... the favorable termination rule of *Heck* and *Edwards* does not apply.”
25 *Ramirez v. Galaza*, 334 F.3d 850, 858 (9th Cir. 2003); *Coleman v. Peery*, No. 2:16-CV-
26 0652 AC P, 2016 WL 6094422, at *3 n.2 (E.D. Cal. Oct. 18, 2016). Plaintiff’s § 1983 suit
27 may, however, be subject to dismissal on grounds of claim preclusion if Defendants can
28 demonstrate this “second suit involves: the (1) same cause of action (2) between the same
parties [or parties in privity with them] (3) after a final judgment on the merits in the first
suit.” *Furnace v. Giurbino*, 838 F.3d 1019, 1023, 1028 (9th Cir. 2016) (citing *DKN
Holdings LLC v. Faerber*, 61 Cal. 4th 813, 189 Cal. Rptr. 3d 432, 51 P.3d 378, 386 (2015));
see also Clements v. Airport Auth. Of Washoe Cnty, 69 F.3d 321, 328 (9th Cir. 1995)
 (“Claim preclusion is an affirmative defense.”).

1 required to submit to one year of mandatory random drug testing four times per month.
2 (ECF No. 8-16, 20-25.) Plaintiff further claims he was “confined for 24 hours a day for
3 10 days in [his] cell,” deprived of “entertainment appliances,” denied the ability to work,
4 attend yard, participate in education or vocation programs, and to attend religious
5 services. (*Id.* at 16-17.)

6 Based on these allegations, the Court finds Plaintiff’s Complaint contains factual
7 content sufficient to survive the “low threshold” for proceeding past the sua sponte
8 screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Wilhelm*, 680 F.3d at
9 1123; *Iqbal*, 556 U.S. at 678; *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (Due
10 Process Clause of the Fourteenth Amendment protects prisoners against deprivation or
11 restraint of “a protected liberty interest” that may be demonstrated by a showing of
12 “‘atypical and significant hardship’ on the inmate in relation to the ordinary incidents of
13 prison life.”) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

14 Accordingly, the Court will direct the U.S. Marshal to effect service upon the
15 Defendants on Plaintiff’s behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall
16 issue and serve all process, and perform all duties in [IFP] cases.”); FED. R. CIV. P.
17 4(c)(3) (“[T]he court may order that service be made by a United States marshal or
18 deputy marshal . . . if the plaintiff is authorized to proceed in forma pauperis under 28
19 U.S.C. § 1915.”).

20 Conclusion

21 Good cause appearing, the Court:

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

24 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
25 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing
26 monthly payments from his account in an amount equal to twenty percent (20%) of the
27 preceding month’s income and forwarding those payments to the Clerk of the Court each
28 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL

1 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
2 ASSIGNED TO THIS ACTION.

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

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

14 6. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
15 upon the named Defendants as directed by Plaintiff on the USM Form 285s provided to
16 him. All costs of that service will be advanced by the United States. See 28 U.S.C.
17 § 1915(d); FED. R. CIV. P. 4(c)(3).

18 7. **ORDERS** the served Defendants to reply to Plaintiff's Complaint within the
19 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See*
20 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the
21 right to reply to any action brought by a prisoner confined in any jail, prison, or other
22 correctional facility under section 1983," once the Court has conducted its sua sponte
23 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a
24 preliminary determination based on the face on the pleading alone that Plaintiff has a
25 "reasonable opportunity to prevail on the merits," the defendant is required to respond);
26 and

27 8. **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
28 serve upon the named Defendants, or, if appearance has been entered by counsel, upon

1 Defendants' counsel, a copy of every further pleading, motion, or other document
2 submitted for the Court's consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must
3 include with every original document he seeks to file with the Clerk of the Court, a
4 certificate stating the manner in which a true and correct copy of that document has been
5 was served on Defendants or their counsel, and the date of that service. *See* S.D. CAL.
6 CivLR 5.2. Any document received by the Court which has not been properly filed with
7 the Clerk or which fails to include a Certificate of Service upon Defendants may be
8 disregarded.

9 **IT IS SO ORDERED.**

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11 Dated: April 5, 2017

12 
13 HON. BARRY TED MOSKOWITZ
14 United States District Judge