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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Rwayne Johnson,
Petitioner,
v.
Department of Veterans Affairs,
Respondent.

Case No.: 3:17-cv-00071-GPC-KSC

ORDER:

- 1) DENYING PETITIONER’S REQUEST TO PROCEED IN FORMA PAUPERIS;**

- 2) DISMISSING CIVIL ACTION FOR FAILING TO STATE A CLAIM PURSUANT TO 28 U.S.C. § 1915(e)(2)(B)(ii);**

- 3) DENYING AS MOOT PETITIONER’S REQUEST FOR COURT-APPOINTED COUNSEL**

- AND**

- (4) GRANTING PETITIONER LEAVE TO AMEND WITHIN 45 DAYS**

[ECF Nos. 2, 3.]

1 On January 12, 2017, Petitioner Rwayne Johnson (“Petitioner”), a state prisoner
2 proceeding *pro se*,¹ initiated this action against the Department of Veterans Affairs
3 (“Respondent”). (Dkt. No. 1.) Petitioner concurrently filed a motion to proceed *in forma*
4 *pauperis* (“IFP”) and a motion for court-appointed counsel. (Dkt. Nos. 2, 3.) For the
5 reasons set forth below, the Court **DENIES** Petitioner’s motion to proceed *in forma*
6 *pauperis*, **DISMISSES** Petitioner’s Petition for Writ of Mandamus for failure to state a
7 claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), and **DISMISSES AS MOOT**
8 Petitioner’s request for court-appointed counsel.

9 DISCUSSION

10 I. Motion for Leave to Proceed *In Forma Pauperis*

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

21 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
22 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
23

24
25 ¹ On the Civil Cover Sheet submitted with his Complaint, Petitioner indicated that the nature of his suit
26 is a “prisoner petition.” (Dkt. No. 1 at 5.) Petitioner’s return address is the same as the William P.
Clements Prison located in Amarillo, Texas. (Dkt. No. 1 at 7.)

27 ² In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50.
28 See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court 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 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
2 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
3 trust account statement, the Court assesses an initial payment of 20% of (a) the average
4 monthly deposits in the account for the past six months, or (b) the average monthly
5 balance in the account for the past six months, whichever is greater, unless the prisoner
6 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution
7 having custody of the prisoner then collects subsequent payments, assessed at 20% of the
8 preceding month’s income, in any month in which his account exceeds \$10, and forwards
9 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2);
10 *Bruce*, 136 S. Ct. at 629.

11 Here, Petitioner has not provided the Court with sufficient information to
12 determine Petitioner’s financial status. Petitioner has not submitted a certified copy of
13 his prison trust fund account statement. Accordingly, the Court **DENIES** Petitioner’s
14 request to proceed *in forma pauperis*.

15 **II. Sua Sponte Screening**

16 Notwithstanding Petitioner’s IFP status or the payment of any filing fees, the Court
17 must review complaints filed by all persons proceeding IFP and must *sua sponte* dismiss
18 any complaint, or any portion of a complaint, which is frivolous, malicious, fails to state
19 a claim, or seeks damages from defendants who are immune. *See* 28 U.S.C. §
20 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (§
21 1915(e)(2)).

22 All complaints must contain “a short and plain statement of the claim showing that
23 the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations are
24 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
25 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
26 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining
27 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that
28 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

1 The “mere possibility of misconduct” falls short of meeting this plausibility standard.
2 *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

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

10 However, while the court “ha[s] an obligation where the petitioner is pro se,
11 particularly in civil rights cases, to construe the pleadings liberally and to afford the
12 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
13 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
14 “supply essential elements of claims that were not initially pled,” *Ivey v. Bd. of Regents of*
15 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

16 Petitioner seeks a writ of mandamus under 28 U.S.C. § 1361 to compel the
17 Department of Veterans Affairs to pay him 30% of his service-connected benefits since
18 1981. (Dkt. No. 1 at 1–3.) Issuance of a writ of mandamus is considered an
19 “extraordinary remedy, to be reserved for extraordinary situations.” *Gulfstream*
20 *Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). Because the writ of
21 mandamus is “one of the most potent weapons in the judicial arsenal,” Petitioner has the
22 burden to satisfy three conditions before a writ may be issued on his behalf: (1) Petitioner
23 has no other adequate means to attain the desired relief; (2) Petitioner’s right to issuance
24 of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under
25 the circumstances. *Cheney v. United States Dist. Court*, 542 U.S. 367, 380–81 (2004).

26 Here, Petitioner provides no factual allegations explaining why he is entitled to any
27 form of relief, much less the issuance of a writ of mandamus. Petitioner does not address
28 whether he has other adequate means to attain the desired relief, fails to provide

1 allegations plausibly showing that his right to issuance of the writ is clear and
2 indisputable, and offers no information showing that issuance of the writ would be
3 appropriate under the circumstances.³

4 Because Petitioner does not supply any factual allegations explaining why he is
5 entitled to relief, his complaint fails to adequately state a claim under 28 U.S.C. §
6 1915(e)(2)(B). *See* FED. R. CIV. P. 8(a)(2); *Cheney*, 542 U.S. at 380-81; *Iqbal*, 556 U.S.
7 at 678. Accordingly, the Court **DISMISSES** Petitioner’s Petition for Writ of Mandamus
8 for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

9 **III. Motion for Court-Appointed Counsel**

10 Petitioner concurrently filed a motion seeking court-appointed counsel. (Dkt. No.
11 3.) In light of the Court’s dismissal of this civil action pursuant to 28 U.S.C.
12 §1915(e)(2)(B)(ii), the Court **DENIES AS MOOT** Petitioner’s motion for court-
13 appointed counsel.

14 **CONCLUSION**

15 For the foregoing reasons, the Court **DENIES** Petitioner’s motion to proceed *in*
16 *forma pauperis, sua sponte* **DISMISSES** Petitioner’s Petition for Writ of Mandamus for
17 failure to state a claim upon which relief can be granted pursuant to 28 U.S.C. §
18 1915(e)(2)(B)(ii), and **DENIES AS MOOT** Petitioner’s request for court-appointed
19 counsel.

20 The Court **GRANTS** Petitioner **forty-five (45)** days leave from the date of this
21 Order in which to re-open the case. To re-open the case, Petitioner shall, within forty-
22 five days of this Order:

- 23 1. File an Amended Petition for Writ of Mandamus which cures all of the deficiencies
24 of pleading described in this Order. If Petitioner elects to file an Amended Petition
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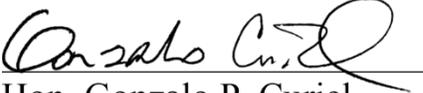
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27 ³ To the extent Petitioner wishes to appeal a Board of Veterans’ Appeals decision regarding his service-
28 connected benefits, the United States Court of Appeals for Veterans Claims has exclusive jurisdiction to
review such decisions. *See* 38 U.S.C. § 7252(a).

1 for Writ of Mandamus, it must be complete by itself without reference to the
2 original pleading. See S.D. CAL. CIV. LR 15.1; *Hal Roach Studios, Inc. v. Richard*
3 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading
4 supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.
5 2012) (noting that claims dismissed with leave to amend which are not re-alleged
6 in an amended pleading may be “considered waived if not repled.”).

- 7 2. Petitioner must file the appropriate filing fee in conjunction with an Amended
8 Petition for Writ of Mandamus. If Petitioner elects to file a motion to proceed *in*
9 *forma pauperis* instead of paying the filing fee, Petitioner must comply with the
10 requirements of 28 U.S.C. § 1915(a)(2) and submit a certified copy of his trust
11 fund account statement for the 6-month period preceding the filing of his Amended
12 Petition for Writ of Mandamus. The Clerk of Court is directed to mail Petitioner a
13 blank motion to proceed *in forma pauperis* form together with a copy of this Order.
- 14 3. If Petitioner fails to file an Amended Petition for Writ of Mandamus within the
15 time provided, the Court will enter a final Order dismissing this civil action based
16 both on Petitioner’s failure to state a claim upon which relief can be granted
17 pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1), and his failure to
18 prosecute in compliance with a Court order requiring amendment. See *Lira v.*
19 *Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take
20 advantage of the opportunity to fix his complaint, a district court may convert the
21 dismissal of the complaint into dismissal of the entire action.”).

22 **IT IS SO ORDERED.**

23 Dated: April 19, 2017

24 
25 Hon. Gonzalo P. Curiel
26 United States District Judge
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