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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 CHRISTOPHER OLIVER,
12 CDCR #BA-2054,

13 Plaintiff,

14 vs.

15 SCRIPPS MESA DEVELOPER OFFICE,
16 Defendant.
17

Case No.: 3:17-cv-00261-AJB-JMA

ORDER:

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

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

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22 CHRISTOPHER OLIVER (“Plaintiff”), proceeding pro se and while he was
23 incarcerated at California Institution for Men (“CIM”), in Chino, California, filed this
24 civil rights action pursuant to 42 U.S.C. § 1983 (ECF No. 1). He did not prepay the \$400
25 civil filing fee required by 28 U.S.C. § 1914(a), but instead, filed a Motion to Proceed In
26 Forma Pauperis (“IFP”) (ECF No. 2). He then filed a Notice of Change of Address
27 indicating that he was no longer incarcerated at CIM, and instead resided on Boston
28 Avenue, in San Diego. (ECF No. 3).

1 Because the Court presumed from Plaintiff's change of address that he was no
2 longer a prisoner in custody of the California Department of Corrections and
3 Rehabilitation ("CDCR"), on June 16, 2017, it denied his Motion to Proceed IFP without
4 prejudice, and directed him to file a supplemental IFP Motion to account for his "current
5 post-release income, assets and expenses" in order to proceed. (ECF No. 4 at 7-8.)

6 In lieu of a supplemental IFP Motion, on June 27, 2017, Plaintiff filed a letter to
7 the Clerk of Court (ECF No. 6), explaining that he is, in fact, "still incarcerated," but has
8 been transferred to a "Male Community Re-Entry Program under CDCR," and that the
9 trust account statement attached to his original IFP Motion (ECF No. 2) still accurately
10 accounts for all the assets he currently possesses. (*Id.* at 1.) Plaintiff also attaches a letter
11 from a counselor at "Correctional Alternatives, LLP," located at 2727 Boston Avenue,
12 San Diego, confirming that Plaintiff is a participant in the "Male Community Reentry
13 Program" and will remain confined there until August 7, 2017. (*Id.* at 2.)¹

14 Based on Plaintiff's letter, the Court will now reconsider his previously filed
15 Motion to Proceed IFP (ECF No. 2).

16 **I. Motion to Proceed IFP**

17 All parties instituting any civil action, suit or proceeding in a district court of the
18 United States, except an application for writ of habeas corpus, must pay a filing fee of
19 \$400.² *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff's failure to
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22 ¹ According to the CDCR's website, its Male Community Reentry Program ("MCRP") is
23 "designed to provide, or arrange linkage to a range of community-based, rehabilitative
24 services that assist with substance use disorders, mental health care, employment,
25 education, housing, family reunification, and social support." *See* [http://www.cdcr.ca.gov](http://www.cdcr.ca.gov/rehabilitation/MCRP.html)
26 [/rehabilitation/MCRP.html](http://www.cdcr.ca.gov/rehabilitation/MCRP.html) (last visited July 7, 2017). "The MCRP is a voluntary program
27 for [m]ale inmates who have approximately 365 days left to serve. The MCRP allow
28 eligible inmates committed to state prison to serve the end of their sentences in the
community in lieu of confinement in state prison." *Id.*

² In addition to the \$350 statutory fee, civil litigants must pay an additional
administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of

1 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
2 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
3 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the Plaintiff is a prisoner³ at the
4 time of filing, even if he is granted leave to proceed IFP, he remains obligated to pay the
5 entire filing fee in “increments” or “installments,” *Bruce v. Samuels*, __ U.S. __, 136 S.
6 Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and
7 regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) &
8 (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

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

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23 Fees, District Court Misc. Fee Schedule, § 14 (eff. June 1, 2016). The additional \$50
24 administrative fee does not apply to persons granted leave to proceed IFP. *Id.*

25 ³ For purposes of the IFP statute, a “prisoner” is “any person incarcerated or detained in
26 any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for,
27 violations of criminal law or the terms and conditions or parole, probation, pretrial
28 release, or diversionary program.” 28 U.S.C. § 1915(h). Thus, while Plaintiff has been
released from CIM, he remains a “prisoner” under 28 U.S.C. § 1915(h), so long as he is
serving out end of his sentence in the MCRP.

1 In support of his IFP original Motion, Plaintiff submitted a copy of his CDCR
2 Inmate Statement Report showing his available balance and trust account activity at CIM.
3 See ECF No. 2 at 3-4; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d
4 at 1119. This statement shows that while Plaintiff carried monthly balances ranging from
5 \$474.34 to \$67.02 from September through November 2016, he had an *available* balance
6 of zero at the time of filing. See ECF No. 2 at 3. Based on this accounting, the Court
7 GRANTS Plaintiff leave to proceed IFP, and will assess no initial partial filing fee
8 pursuant to 28 U.S.C. § 1915(b)(1). See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no
9 event shall a prisoner be prohibited from bringing a civil action or appealing a civil action
10 or criminal judgment for the reason that the prisoner has no assets and no means by
11 which to pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at
12 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of
13 a prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds
14 available to him when payment is ordered.”). The Court will further direct the Secretary
15 of the CDCR, or his designee, to instead collect the entire \$350 balance of the filing fees
16 required by 28 U.S.C. § 1914 and forward them to the Clerk of the Court pursuant to the
17 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1). See *id.*

18 **II. Sua Sponte Screening pursuant to 28 U.S.C. § 1915(e)(2)**

19 **A. Standard of Review**

20 If a prisoner’s complaint “seeks redress from a governmental entity or officer or
21 employee of a governmental entity,” the Court “shall review” the pleading “as soon as
22 practicable after docketing,” and “dismiss the complaint, or any portion of the complaint,
23 if [it] . . . is frivolous, malicious, or fails to state a claim upon which relief may be
24 granted.” 28 U.S.C. § 1915A(a), (b)(1); *Nordstrom v. Ryan*, 762 F.3d 903, 907 n.1 (9th
25 Cir. 2014). Here, Plaintiff alleges violations of his “due process rights” under the Fourth
26 and Fourteenth Amendments, see ECF No. 1 at 2, 8, but he seeks redress from “Scripps
27 Mesa Developer Office,” which is alleged to be the property management company that
28 “[gave] up the keys to [a] residence” he shared with his mother on March 25, 2016, to an

1 unidentified probation officer “without probable cause.” *Id.* Plaintiff does not seek
2 redress from or name governmental actors as Defendants. *Id.* at 1-2. Therefore,
3 § 1915A(a)’s screening provisions do not apply. *See Chavez v. Robinson*, 817 F.3d 1162,
4 1168 (9th Cir. 2016) (“Section 1915A mandates early review ... for all complaints ‘in
5 which a prisoner seeks relief from a governmental entity...”) (quoting § 1915A(a)); *see*
6 *also Thompson v. Hicks*, 213 Fed. Appx. 939, 2007 WL 106785 at *3 (11th Cir. 2007)
7 (noting that because a private defendant was not a “governmental entity” as described in
8 § 1915A, prisoner’s complaint as to that defendant was not subject to dismissal under
9 § 1915A).

10 Because Plaintiff is proceeding IFP, however, his Complaint *is* still subject to a
11 sua sponte review, and mandatory dismissal, if it is “frivolous, malicious, fail[s] to state a
12 claim upon which relief may be granted, or seek[s] monetary relief from a defendant
13 immune from such relief,” regardless of whether he seeks redress from a “governmental
14 entity.” *See* 28 U.S.C. § 1915(e)(2)(B); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763
15 (2015) (pursuant to 28 U.S.C. § 1915(e)(2) “the court shall dismiss the case at any time if
16 the court determines that—(A) the allegation of poverty is untrue; or (B) the action or
17 appeal—(i) is frivolous or malicious; [or] (ii) fails to state a claim on which relief may be
18 granted.”); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection
19 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis
20 complaint that fails to state a claim.”).

21 “The standard for determining whether a plaintiff has failed to state a claim upon
22 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
23 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
24 F.3d 1108, 1112 (9th Cir. 2012).

25 To survive a motion to dismiss, the complaint must contain “a short and plain
26 statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P.
27 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare recitals of the
28 elements of a cause of action, supported by mere conclusory statements, do not suffice.”

1 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550
2 U.S. 544, 555 (2007)). “Determining whether a complaint states a plausible claim for
3 relief [is] . . . a context-specific task that requires the reviewing court to draw on its
4 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” falls
5 short of meeting this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572
6 F.3d 962, 969 (9th Cir. 2009).

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

13 However, while the court “ha[s] an obligation where the petitioner is pro se,
14 particularly in civil rights cases, to construe the pleadings liberally and to afford the
15 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
16 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
17 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
18 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

19 B. Plaintiff’s Allegations

20 As noted above, Plaintiff seeks \$4.5 million in general and punitive damages from
21 “Scrip[p]s Mesa De[ve]loper Office,” for violating his Fourth and Fourteenth
22 Amendment rights on March 25, 2016. (ECF No. 1 at 1-2.) He claims this Defendant is
23 liable for providing a key to a residence he shared with his mother to an unidentified
24 probation officer who lied and used it to search his residence “without probable cause.”
25 (*Id.* at 8.)

26 C. 42 U.S.C. § 1983

27 Section 1983 is a “vehicle by which plaintiffs can bring federal constitutional and
28 statutory challenges to actions by state and local officials.” *Anderson v. Warner*, 451 F.3d

1 1063, 1067 (9th Cir. 2006). To state a claim under 42 U.S.C. § 1983, a plaintiff must
2 allege two essential elements: (1) that a right secured by the Constitution or laws of the
3 United States was violated, and (2) that the alleged violation was committed by a person
4 acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*,
5 789 F.3d 1030, 1035-36 (9th Cir. 2015).

6 Here, the only named Defendant, Scripps Mesa Developer Officer, is not alleged to
7 be a “person acting under color of state law.” *See West*; 487 U.S. at 48; *Sutton v.*
8 *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (The party charged
9 with a constitutional deprivation under § 1983 must be a person who may fairly be said to
10 be a governmental actor) (citation and quotations omitted).

11 The Constitution protects individual rights only from government action and not
12 from private action; it is only when the government is responsible for the specific conduct
13 alleged that individual constitutional rights are implicated. *Single Moms, Inc. v. Mont.*
14 *Power Co.*, 331 F.3d 743, 746-47 (9th Cir. 2003). Generally, private parties do not act
15 under color of state law. *See Price v. Hawai’i*, 939 F.2d 702, 707-08 (9th Cir. 1991).
16 Section “1983 excludes from its reach merely private conduct, no matter how
17 discriminatory or wrong.” *Sutton*, 193 F.3d at 835 (citing *Am. Mfrs. Mut. Ins. Co. v.*
18 *Sullivan*, 526 U.S. 40, 50 (1999) (citation and internal quotation marks omitted)); *see also*
19 *Ouzts v. Md. Nat’l Ins. Co.*, 505 F.2d 547, 551 (9th Cir. 1974) (a purely private actor may
20 be liable for his misconduct in state court, but his conduct is not actionable under Section
21 1983, regardless of how egregious).

22 In order for private conduct to constitute governmental action, “something more”
23 must be alleged. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982) (“Action
24 by a private party pursuant to [§ 1983], without something more, [i]s not sufficient to
25 justify a characterization of that party as a ‘state actor.’”). Courts have used four different
26 factors or tests to identify what constitutes “something more”: (1) public function, (2)
27 joint action, (3) governmental compulsion or coercion, and (4) governmental nexus. *See*
28 *id.*; *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997); *Parks Sch. of Bus., Inc. v.*

1 *Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995); *Gorenc v. Salt River Project Agric.*
2 *Improvement and Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989).

3 As currently pleaded, Plaintiff’s Complaint fails to allege facts sufficient to
4 plausibly show that Scripps Mesa Developer Office performed any public function
5 traditionally reserved to the state, acted as willful participants in joint action with
6 government agents, was compelled or coerced, or had any connection whatsoever with
7 the state, when it allegedly relinquished a key to Plaintiff’s property. *See Iqbal*, 556 U.S.
8 at 678; *Lugar*, 457 U.S. at 939. Moreover, to the extent Plaintiff invokes the Fourth
9 Amendment as the basis of his unlawful search claims, *see* ECF No. 1 at 2, 8, he may not
10 seek the Fourth Amendment’s protections against the actions of private citizens. *See* U.S.
11 Const. Amend. IV; *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (“This Court ...
12 consistently construed this protection as proscribing only governmental action; it is
13 wholly inapplicable ‘to a search or seizure, even an unreasonable one, effected by a
14 private individual not acting as an agent of the Government or with the participation or
15 knowledge of any governmental official.’”) (internal citation omitted).

16 For these reasons, the Court finds Plaintiff’s Complaint fails to state a claim upon
17 which relief can be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii); *Lopez*, 203 F.3d at 1130.

18 D. Leave to Amend

19 A pro se litigant must be given leave to amend his pleading to state a claim unless
20 it is absolutely clear the deficiencies cannot be cured by amendment. *See Lopez*, 203 F.3d
21 at 1130 (noting leave to amend should be granted when a complaint is dismissed under
22 28 U.S.C. § 1915(e) “if it appears at all possible that the plaintiff can correct the defect”).
23 Therefore, while the Court finds Plaintiff’s Complaint fails to state a claim upon which
24 relief can be granted, it will provide him a chance to fix the pleading deficiencies
25 discussed in this Order, if he can. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir.
26 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

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1 **III. Conclusion and Order**

2 For all the reasons discussed, the Court:

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

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

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

14 4. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which
15 § 1983 relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii).

16 5. **GRANTS** Plaintiff forty-five (45) days leave to file an Amended Complaint
17 which cures the deficiencies of pleading described in this Order. Plaintiff is cautioned,
18 however, that should he choose to file an Amended Complaint, it must be complete by
19 itself, comply with Federal Rule of Civil Procedure 8(a), and that any claim not re-
20 alleged will be considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v.*
21 *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended
22 pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.
23 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an
24 amended pleading may be “considered waived if not repled.”).

25 If Plaintiff fails to follow these instructions within 45 days, and/or files an
26 Amended Complaint that still fails to state a claim, the Court will enter a final judgment
27 of dismissal for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) without
28 further leave to amend. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a

1 plaintiff does not take advantage of the opportunity to fix his complaint, a district court
2 may convert the dismissal of the complaint into dismissal of the entire action.”).

3 **IT IS SO ORDERED.**

4 Dated: July 7, 2017

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6 Hon. Anthony J. Battaglia
7 United States District Judge
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