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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DARIUS SIMS,
12 CDCR #T-51521,

13 Plaintiff,

14 vs.

15 R. WALKER; J.K. CHAU; D.J.
16 CLAYTON; R. BARECHI; D.
17 STRAYHORN;

18 Defendants.
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Case No.: 3:17-cv-0722-CAB-JLB

ORDER:

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

AND

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

23 Darius Sims (“Plaintiff”), currently incarcerated at Richard J. Donovan
24 Correctional Facility (“RJD”), and proceeding pro se, has filed a civil rights complaint
25 pursuant to 42 U.S.C. § 1983 (ECF No. 1). Plaintiff did not prepay the civil filing fee
26 required by 28 U.S.C. § 1914(a) when he filed his Complaint; instead, he filed a Motion
27 to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2),
28 followed by exhibits in support of his Complaint (ECF No. 5).

1 **I. Motion to Proceed IFP**

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

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

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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 In support of his IFP Motion, Plaintiff has submitted a CDCR Inmate Statement
2 Report demonstrating his trust account activity and balances for the six-months preceding
3 the filing of his Complaint. *See* ECF No. 3 at 1-2; 28 U.S.C. § 1915(a)(2); S.D. CAL.
4 CivLR 3.2; *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s prison
5 certificate, but it shows that he has a current available balance of zero. *See* 28 U.S.C.
6 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a
7 civil action or appealing a civil action or criminal judgment for the reason that the
8 prisoner has no assets and no means by which to pay the initial partial filing fee.”);
9 *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
10 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due to
11 the lack of funds available to him when payment is ordered.”).

12 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2) and
13 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
14 balance of the filing fees mandated will be collected by the California Department of
15 Corrections and Rehabilitation (“CDCR”) and forwarded to the Clerk of the Court
16 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

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

18 **A. Standard of Review**

19 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint also requires a
20 pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
21 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of
22 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
23 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
24 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
25 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
26 the targets of frivolous or malicious suits need not bear the expense of responding.’”
27 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
28 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

1 “The standard for determining whether a plaintiff has failed to state a claim upon
2 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
3 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
4 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
5 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
6 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
7 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
8 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
9 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

10 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
11 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
12 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
13 relief [is] ... a context-specific task that requires the reviewing court to draw on its
14 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
15 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
16 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
17 (9th Cir. 2009).

18 Finally, in deciding whether Plaintiff has stated a plausible claim for relief, the
19 Court may consider exhibits attached to his Complaint. *See* FED. R. CIV. P. 10(c) (“A
20 copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all
21 purposes.”); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555
22 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d
23 426 (9th Cir. 1978) (“[M]aterial which is properly submitted as part of the complaint may
24 be considered” in ruling on a Rule 12(b)(6) motion to dismiss.)).

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1 Here, the Court finds Plaintiff’s Complaint sufficient to survive the “low
2 threshold” for proceeding past the sua sponte screening required by 28 U.S.C.
3 §§ 1915(e)(2) and 1915A(b). *See Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th Cir.
4 2012; *Iqbal*, 556 U.S. at 678; *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976) (prison
5 officials are liable if they act with deliberate indifference to a prisoner’s serious medical
6 needs); *id.* at 104 (deliberate indifference “is manifested by prison [officials] intentionally
7 denying or delaying access to medical care.”).

8 Therefore, the Court will direct the U.S. Marshal to effect service of summons
9 Plaintiff’s Complaint on his behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court
10 shall issue and serve all process, and perform all duties in [IFP] cases.”); FED. R. CIV. P.
11 4(c)(3) (“[T]he court may order that service be made by a United States marshal or
12 deputy marshal . . . if the plaintiff is authorized to proceed in forma pauperis under 28
13 U.S.C. § 1915.”).

14 **III. Conclusion and Order**

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

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

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1 4. **DIRECTS** the Clerk to issue a summons as to Plaintiff’s Complaint (ECF
2 No. 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each
3 Defendant. In addition, the Clerk will provide Plaintiff with a certified copy of this Order,
4 certified copies of his Complaint and Exhibits (ECF No. 1, 5), and the summons so that
5 he may serve Defendants. Upon receipt of this “IFP Package,” Plaintiff must complete
6 the USM Form 285s as completely and accurately as possible, *include an address where*
7 *each named Defendant may be found and/or subject to service*, and return them to the
8 United States Marshal according to the instructions the Clerk provides in the letter
9 accompanying his IFP package.

10 5. **ORDERS** the U.S. Marshal to serve a copy of the Complaint, **Exhibits**
11 **(ECF No. 5)** and summons upon the Defendants as directed by Plaintiff on the USM
12 Form 285s provided to him. All costs of that service will be advanced by the United
13 States. *See* 28 U.S.C. § 1915(d); FED. R. CIV. P. 4(c)(3).

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

23 7. **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
24 serve upon Defendants, or if appearance has been entered by counsel, upon Defendants’
25 counsel, a copy of every further pleading, motion, or other document submitted for the
26 Court’s consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must include with every
27 original document he seeks to file with the Clerk of the Court, a certificate stating the
28 manner in which a true and correct copy of that document has been was served on

1 Defendants or their counsel, and the date of that service. *See* S.D. CAL. CIVLR 5.2. Any
2 document received by the Court which has not been properly filed with the Clerk or
3 which fails to include a Certificate of Service upon the Defendants, or their counsel, may
4 be disregarded.

5 **IT IS SO ORDERED.**

6 Dated: June 29, 2017



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8 Hon. Cathy Ann Bencivengo
9 United States District Judge
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