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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 SEDRIC EUGENE JOHNSON,  
12 CDCR #AZ-2648,

Plaintiff,

13  
14 vs.

15 A. DE LA TRINIDAD; R. FLORES; J.  
16 SOTO; D. LAMONT;

17 Defendants.  
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Case No.: 3:17-cv-0731-WQH-MDD

**ORDER:**

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

**AND**

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

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24 Sedric Eugene Johnson (“Plaintiff”), currently incarcerated at Kern Valley State  
25 Prison, and proceeding pro se, has filed a civil rights complaint pursuant to 42 U.S.C.  
26 § 1983 (ECF No. 1). Plaintiff did not prepay the civil filing fee required by 28 U.S.C.  
27 § 1914(a) when he filed his Complaint; instead, he filed a Motion to Proceed In Forma  
28

1 Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2), and later filed a Motion  
2 for Appointment of Counsel (ECF No. 9).

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.<sup>1</sup> 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). However,  
9 prisoners who are granted leave to proceed IFP remain obligated to pay the entire fee in  
10 “increments” or “installments,” *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016); *Williams v.*  
11 *Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether their action is  
12 ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d  
13 844, 847 (9th Cir. 2002).

14 Section 1915(a)(2) also 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  
20 balance in the account for the past six months, whichever is greater, unless the prisoner  
21 has no assets. See 28 U.S.C. § 1915(b)(1) & (b)(4). The institution having custody of the  
22 prisoner then collects subsequent payments, assessed at 20% of the preceding month’s  
23 income, in any month in which his account exceeds \$10, and forwards those payments to  
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26 <sup>1</sup> 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 the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2); Bruce, 136 S. Ct.  
2 at 629.

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

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

## 19 **II. Motion for Appointment of Counsel**

20 Plaintiff seeks appointed counsel in this matter on the grounds that he is indigent  
21 and “lacks the credentials to advocate myself to the Courts [sic] standards[.]” (ECF No.  
22 9 at 3). However, there is no constitutional right to counsel in a civil case. *Lassiter v.*  
23 *Dep’t of Social Servs.*, 452 U.S. 18, 25 (1981); *Palmer v. Valdez*, 560 F.3d 965, 970 (9th  
24 Cir. 2009). And while 28 U.S.C. § 1915(e)(1) grants the district court limited discretion  
25 to “request” that an attorney represent an indigent civil litigant, *Agyeman v. Corr. Corp.*  
26 *of America*, 390 F.3d 1101, 1103 (9th Cir. 2004), this discretion may be exercised only  
27 under “exceptional circumstances.” *Id.*; see also *Terrell v. Brewer*, 935 F.2d 1015, 1017  
28 (9th Cir. 1991). A finding of exceptional circumstances requires the Court “to consider

1 whether there is a ‘likelihood of success on the merits’ and whether ‘the prisoner is  
2 unable to articulate his claims in light of the complexity of the legal issues involved.’”  
3 *Harrington v. Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015) (quoting *Cano v. Taylor*,  
4 739 F.3d 1214, 1218 (9th Cir. 2014)).

5 The Court denies Plaintiff’s request without prejudice. Nothing in Plaintiff’s  
6 Complaint or in his Motion to Appoint Counsel suggests he is incapable of articulating  
7 the factual basis for his discrimination claims, which appear “relatively straightforward.”  
8 *Id.* In fact, the Court finds, based on its screening of Plaintiff’s Complaint under the  
9 standards of review discussed below, that Plaintiff has pleaded sufficient factual content  
10 to state plausible claims. However, at this initial stage of the pleadings, Plaintiff has not  
11 yet shown a likelihood of success on the merits. *Id.* Therefore, the Court finds no  
12 exceptional circumstances and DENIES his Motion to Appoint Counsel (ECF No. 9) on  
13 that basis. See, e.g., *Cano*, 739 F.3d at 1218 (affirming denial of counsel where prisoner  
14 could articulate his claims in light of the complexity of the issues involved, but did not  
15 show likelihood of succeed on the merits).

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

#### 17 **A. Standard of Review**

18 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint also requires a  
19 pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
20 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of  
21 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
22 who are immune. See *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
23 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.  
24 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
25 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
26 *Nordstrom v. Ryan*, 762 F.3d 903, 907 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
27 *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.* at 679. The “mere possibility of misconduct”  
15 or “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting  
16 this plausibility standard. *Id.* at 678-79; see also *Moss v. U.S. Secret Serv.*, 572 F.3d 962,  
17 969 (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. 1989) (“[M]aterial which is properly submitted as part of the complaint  
23 may be considered” in ruling on a Rule 12(b)(6) motion to dismiss.)).

#### 24           B. Plaintiff’s Allegations

25           Plaintiff claims that on August 30, 2016, Centinela State Prison (“CEN”)  
26 Correctional Officer De La Trinidad used unnecessary and unreasonable force against  
27 him. (ECF No. 1 at 5.) Plaintiff also claims Correctional Officer Soto observed the  
28 incident but failed to intervene. *Id.* Finally, Plaintiff claims Correctional Officer Flores

1 applied handcuffs “in a cruel and unusual manner” and Defendant Lamont failed to  
2 properly “document” and “treat” his injuries. *Id.*

3 Plaintiff seeks injunctive relief, as well as compensatory and punitive damages. *Id.*  
4 at 7.

5 Based on these allegations, the Court finds Plaintiff’s Complaint sufficient to  
6 survive the “low threshold” for proceeding past the sua sponte screening required by 28  
7 U.S.C. §§ 1915(e)(2) and 1915A(b). See *Wilhelm*, 680 F.3d at 1123; *Iqbal*, 556 U.S. at  
8 678; *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (When prison officials stand accused  
9 of using excessive force in violation of the Eighth Amendment, the core judicial inquiry  
10 is “whether force was applied in a good-faith effort to maintain or restore discipline, or  
11 maliciously and sadistically to cause harm.”); *Robins v. Meecham*, 60 F.3d 1436, 1442  
12 (9th Cir.1995) (holding that “a prison official can violate a prisoner’s Eighth Amendment  
13 rights by failing to intervene”); *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976) (prison  
14 officials are liable if they act with deliberate indifference to a prisoner’s serious medical  
15 needs); *id.* at 104 (deliberate indifference “is manifested by prison [officials] intentionally  
16 denying or delaying access to medical care.”).

17 Therefore, the Court will direct the U.S. Marshal to effect service of summons  
18 Plaintiff’s Complaint on his behalf. See 28 U.S.C. § 1915(d) (“The officers of the court  
19 shall issue and serve all process, and perform all duties in [IFP] cases.”); *FED. R. CIV. P.*  
20 4(c)(3) (“[T]he court may order that service be made by a United States marshal or  
21 deputy marshal . . . if the plaintiff is authorized to proceed in forma pauperis under 28  
22 U.S.C. § 1915[.]”).

### 23 **III. Conclusion and Order**

24 For the reasons explained, the Court:

25 1. **DENIES** Plaintiff’s Motion to Appoint Counsel (ECF No. 9) without  
26 prejudice.

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

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

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

10          5.       **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF  
11 No. 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each  
12 Defendant. In addition, the Clerk will provide Plaintiff with a certified copy of this Order,  
13 certified copies of his Complaint, and the summons so that he may serve Defendants.  
14 Upon receipt of this "IFP Package," Plaintiff must complete the USM Form 285s as  
15 completely and accurately as possible, include an address where each named Defendant  
16 may be found and/or subject to service, and return them to the United States Marshal  
17 according to the instructions the Clerk provides in the letter accompanying his IFP  
18 package.

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

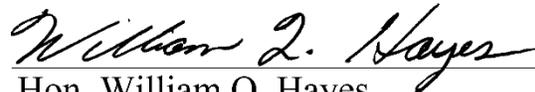
23          7.       **ORDERS** Defendants, once they have been served, to reply to Plaintiff's  
24 Complaint within the time provided by the applicable provisions of Federal Rule of Civil  
25 Procedure 12(a). See 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be  
26 permitted to "waive the right to reply to any action brought by a prisoner confined in any  
27 jail, prison, or other correctional facility under section 1983," once the Court has  
28 conducted its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b),

1 and thus, has made a preliminary determination based on the face on the pleading alone  
2 that Plaintiff has a “reasonable opportunity to prevail on the merits,” defendant is  
3 required to respond).

4 8. **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to  
5 serve upon Defendants, or if appearance has been entered by counsel, upon Defendants’  
6 counsel, a copy of every further pleading, motion, or other document submitted for the  
7 Court’s consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must include with every  
8 original document he seeks to file with the Clerk of the Court, a certificate stating the  
9 manner in which a true and correct copy of that document has been was served on  
10 Defendants or their counsel, and the date of that service. See S.D. CAL. CIVLR 5.2. Any  
11 document received by the Court which has not been properly filed with the Clerk or  
12 which fails to include a Certificate of Service upon the Defendants, or their counsel, may  
13 be disregarded.

14 **IT IS SO ORDERED.**

15 Dated: August 29, 2017

16   
17 Hon. William Q. Hayes  
18 United States District Court  
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