

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

OMAR YASIN,

Plaintiff,

v.

CAPTAIN D. FLYNN, *et al.*,

Defendants.

Case No. 17-cv-01057-BAS-JLB

ORDER:

**(1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
(ECF No. 4)**

AND

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

Omar Yasin (“Plaintiff”), while he was detained at the San Diego Sheriff’s Department George Bailey Detention Facility (“GBDF”), and proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1.)

Plaintiff claims two San Diego County Sheriff’s Department Captains, one at GBDF, and another at the San Diego Central Jail (“SDCJ”), violated his Eighth Amendment rights

1 by confining him in a five-foot by seven-foot cell with two other inmates on May 15, 2016.¹
2 (ECF No. 1 at 1-2.)

3 On August 1, 2017, the Court dismissed the action because Plaintiff failed to pay the
4 filing fees required to commence a civil action by 28 U.S.C. § 1914(a) (ECF No. 3), but
5 granted him forty-five days leave in which to pay those fees or file a Motion to Proceed In
6 Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). (*Id.* at 4.)

7 He has since filed a Motion to Proceed In Forma Pauperis (“IFP”) (ECF No. 4),
8 together with a supplemental affidavit attesting as to his trust account activity and balances
9 as required by 28 U.S.C. § 1915(a)(2) (ECF No. 8).

11 **I. Motion to Proceed IFP**

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

21 ¹ Plaintiff has since been transferred from County custody to the Otay Mesa Detention
22 Center (“OMDC”), which is operated by CoreCivic, formerly known as the Corrections
23 Corporation of America or CCA. CoreCivic is a private company that operates prison and
24 detention facilities, under contract with state and federal government agencies. *See*
25 <http://www.cca.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic>
(last visited Oct. 24, 2017).

26 ² In addition to the \$350.00 statutory fee, civil litigants must pay an additional
27 administrative fee of \$50.00. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of
28 Fees, District Court Misc. Fee Schedule, § 14 (eff. June 1, 2016). The additional \$50.00
administrative fee does not apply to persons granted leave to proceed IFP. *Id.*

1 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.
2 *See* 28 U.S.C. § 1915(b)(1), (b)(2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

3 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
4 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
5 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
6 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
7 trust account statement, the Court assesses an initial payment of twenty percent of (a) the
8 average monthly deposits in the account for the past six months, or (b) the average monthly
9 balance in the account for the past six months, whichever is greater, unless the prisoner has
10 no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
11 custody of the prisoner then collects subsequent payments, assessed at twenty percent of
12 the preceding month’s income, in any month in which his account exceeds ten dollars, and
13 forwards those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. §
14 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

15 In support of his IFP Motion, Plaintiff has submitted two prison certificates certified
16 authorized OMDC officials. (ECF No. 4 at 5; ECF No. 8 at 4); *see also* 28 U.S.C.
17 § 1915(a)(2); S.D. Cal. Civ. R. 3.2; *Andrews*, 398 F.3d at 1119. These certificates attest
18 that Plaintiff carried an average monthly balance of \$29.67, had average monthly deposits
19 of \$30.00 to his account over the six-month period immediately preceding the filing of his
20 Motion, and had an available balance of \$56.34 on the books at the time of filing. (ECF
21 No. 4 at 5; ECF No. 8 at 4.) Thus, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP
22 (ECF No. 4) and assesses his initial partial filing fee to be \$6.00 pursuant to 28 U.S.C.
23 § 1915(b)(1).

24 However, the Court will direct the Warden of OMDC, or his designee, to collect this
25 initial fee only if sufficient funds are available in Plaintiff’s account at the time this Order
26 is executed. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be
27 prohibited from bringing a civil action or appealing a civil action or criminal judgment for
28 the reason that the prisoner has no assets and no means by which to pay the initial partial

1 filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
2 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based
3 solely on a “failure to pay . . . due to the lack of funds available to him when payment is
4 ordered.”). The remaining balance of the \$350.00 total fee owed in this case must be
5 collected and forwarded to the Clerk of the Court pursuant to 28 U.S.C. § 1915(b)(1).

6 7 **II. Screening of Plaintiff’s Complaint**

8 **A. Standard of Review**

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

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

28 //

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 relief
4 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
5 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
6 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
7 standard. *Id.*; see also *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

8 9 **B. Plaintiff’s Factual Allegations**

10 Plaintiff claims that upon his arrival at the SDCJ on or about May 15, 2016, he was
11 housed in a five-foot by nine-foot cell with two other inmates. (*See* ECF No. 1 at 1.) He
12 filed a grievance, but was told: “That’s how these cells are.” (*Id.* at 2.) Plaintiff claims he
13 remained confined to his bed because there was “no[t] enough space to move around,” and
14 because his cellmates were either playing cards or working out. (*Id.*) Plaintiff complained
15 to “numerous officials,” and asked Captain Flynn to “develop and implement a plan
16 designed to properly house [them].” (*Id.*) Flynn allegedly replied: “Don’t come to jail.”
17 (*Id.*)

18 On an unspecified date, Plaintiff was transferred to GBDF where he was assigned to
19 a five-foot by seven-foot cell, again with two cellmates. (ECF No. 1 at 2.) Plaintiff
20 continued to complain to Captain Duke, who rejected his grievances. (*Id.* at 2, 7.)

21 Plaintiff seeks \$33 million in damages against Defendants for exposing him and a
22 list of his fellow inmates³ to “inhumane living conditions” in violation of the Eighth
23 Amendment. (*Id.* at 2-4.)

24
25
26 ³ Because Plaintiff is proceeding pro se he may not represent anyone other than himself.
27 *See Simon v. Hartford Life & Accident Ins. Co.*, 546 F.3d 661, 664 (9th Cir. 2008) (“[T]he
28 general rule prohibiting pro se plaintiffs from pursuing claims on behalf of others in a
representative capacity.”).

1 **C. Overcrowding**

2 First, while Plaintiff invokes the Eighth Amendment’s prohibition on cruel and
3 unusual punishments (*see* ECF No. 1 at 2), it is unclear whether he was convicted at the
4 time he was held at the SCDJ and GBDF.

5 “Inmates who sue prison officials for injuries suffered while in custody may do so
6 under the Eighth Amendment’s Cruel and Unusual Punishment Clause or, if not yet
7 convicted, under the Fourteenth Amendment’s Due Process Clause.” *Castro v. Cty. of Los*
8 *Angeles*, 833 F.3d 1060, 1067-68 (9th Cir. 2016), *cert. denied sub nom. Los Angeles Cty.,*
9 *Cal. v. Castro*, 137 S. Ct. 831 (2017) (citing *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)
10 (holding that, under the Due Process Clause, a detainee may not be punished prior to
11 conviction)). But under either Amendment, Plaintiff must allege facts sufficient to show
12 that Defendants acted with “deliberate indifference” in order to state a plausible claim for
13 relief. *Id.* at 1068; *Iqbal*, 556 U.S. at 678; *Hatter v. Dyer*, 154 F. Supp. 3d 940, 944-54
14 (E.D. Cal. 2015) (applying *Castro*’s deliberate indifference standard to pretrial detainee’s
15 over-crowding and general conditions of confinement claims).

16 Here, Plaintiff alleges Defendants Flynn and Duke violated his Eighth Amendment
17 rights by exposing him to “inhumane living conditions,” specifically by requiring him to
18 share his cells with two other detainees, and failing to respond to his complaints. (ECF No.
19 1 at 2-3.) It is well settled that “a prison official cannot be found liable under the Eighth
20 Amendment for denying an inmate humane conditions of confinement unless the official
21 knows of and disregards an excessive risk to inmate health or safety; the official must both
22 be aware of facts from which the inference could be drawn that a substantial risk of serious
23 harm exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837
24 (1994); *see Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014). This “deliberate
25 indifference” standard requires more than “gross negligence” or even “recklessness.”
26 *Farmer*, 511 U.S. at 836, 836 n.4; *Hatter*, 154 F. Supp. 3d at 944.

27 First, Plaintiff has failed to allege facts sufficient to plausibly suggest that either the
28 SDCJ or GBDF’s three-man cells posed any “excessive risk to [his] health or safety.”

1 *Farmer*, 511 U.S. at 837; *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 471 (1989)
2 (finding overcrowding allegations, “standing alone,” “ha[d] no constitutional
3 significance.”); *Rhodes v. Chapman*, 452 U.S. 337, 348-49 (1981) (finding double-celling
4 of inmates by itself does not inflict unnecessary or wanton pain or constitute grossly
5 disproportionate punishment in violation of Eighth Amendment). An overcrowding claim
6 is cognizable only if the plaintiff alleges that crowding has caused an increase in violence,
7 has reduced the provision of other constitutionally required services, or has reached a level
8 rendering the institution no longer fit for human habitation. *See Balla*, 869 F.2d at 471;
9 *Hoptowit v. Ray*, 682 F.2d 1237, 1248–49 (9th Cir.1982) (noting that overcrowding itself
10 is not an Eighth Amendment violation, but that it can lead to specific effects that might
11 violate the Constitution).

12 Second, Plaintiff fails to allege facts sufficient to show that either Defendants Flynn
13 or Duke acted with “deliberate indifference” to any substantial risk of serious harm. *Castro*,
14 833 F.3d at 1068 (citing *Farmer*, 511 U.S. at 837). Plaintiff alleges only that he “spoke to”
15 Flynn and Duke and that he filed grievances related to his cell conditions. (ECF No. 1).
16 The mere fact that neither responded to Plaintiff’s complaints to his satisfaction, does not,
17 without more, rise to the level of deliberate indifference. Critically, Plaintiff does not
18 further allege that either Defendant was “aware of facts from which the inference could be
19 drawn that a substantial risk of serious harm exist[ed],” nor does he allege that either
20 actually “dr[e]w th[at] inference.” *Hatter*, 154 F. Supp. 3d at 944 (finding “inadvertent
21 failure[s]” and “mere inaction” insufficient to show deliberate indifference to
22 overcrowding).

23 Therefore, the Court finds Plaintiff’s Complaint must be dismissed *sua sponte* for
24 failing to state a claim upon which § 1983 relief may be granted. *See* 28 U.S.C.
25 1915(e)(2)(B)(ii); § 1915A(b)(1); *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

26 //

27 //

28 //

1 **III. Conclusion**

2 Accordingly, the Court:


- 3 (1) **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. §
4 1915(a) (ECF No. 4);
- 5 (2) **ORDERS** the Warden of the OMDC, or his designee, to collect from
6 Plaintiff’s trust account the \$6.00 initial filing fee assessed, if those
7 funds are available at the time this Order is executed, and forward
8 whatever balance remains of the full \$350.00 owed in monthly
9 payments in an amount equal to twenty percent (20%) of the preceding
10 month’s income to the Clerk of the Court each time the amount in
11 Plaintiff’s account exceeds \$10.00 pursuant to 28 U.S.C. § 1915(b)(2)
12 (*all payments must be clearly identified by the name and number*
13 *assigned to this action*);
- 14 (3) **DIRECTS** the Clerk of the Court to serve a copy of this Order on Fred
15 Figueroa, Warden, Otay Mesa Detention Center, P.O. Box 438150, San
16 Diego, California 92143-8150;
- 17 (4) **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon
18 which relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and
19 1915A(b)(1); and
- 20 (5) **GRANTS** Plaintiff forty-five (45) days leave from the date of this
21 Order in which to file an Amended Complaint which cures the
22 deficiencies of pleading described in this Order. Plaintiff’s Amended
23 Complaint must be complete by itself without reference to his original
24 pleading. Defendants not named and any claim not re-alleged in his
25 Amended Complaint will be considered waived. *See* S.D. Cal. Civ. R.
26 15.1; *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d
27 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the
28 original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012)

1 (noting that claims dismissed with leave to amend which are not re-
2 alleged in an amended pleading may be “considered waived if not
3 repld.”).

4 If Plaintiff fails to amend within 45 days, the Court will enter a final Order
5 dismissing this civil action based both on Plaintiff’s failure to state a claim upon which
6 relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), and his failure
7 to prosecute in compliance with a court order requiring amendment. *See Lira v. Herrera*,
8 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take advantage of the
9 opportunity to fix his complaint, a district court may convert the dismissal of the complaint
10 into dismissal of the entire action.”).

11 **IT IS SO ORDERED.**

12
13 **DATED: November 16, 2017**

14 
15 **Hon. Cynthia Bashant**
16 **United States District Judge**
17
18
19
20
21
22
23
24
25
26
27
28