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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DENO E. WOODIS,
12 Booking No. 17137550,

13 Plaintiff,

14 vs.

15 LAW OFFICE OF GARY MARKS;
16 STATE OF CALIFORNIA,

17 Defendants.
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Case No.: 3:17-cv-01527-LAB-RBB

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[ECF No. 8]**

AND

**2) DISMISSING CIVIL ACTION
FOR FAILING TO STATE A CLAIM
AND AS FRIVOLOUS PURSUANT
TO 28 U.S.C. § 1915(e)(2)(B)
AND § 1915A(b)(1)**

22 DENO E. WOODIS (“Plaintiff”), while detained at the San Diego County Sheriff’s
23 Department Vista Detention Facility (“VDF”) in Vista, California, first filed this civil
24 action by submitting a Complaint on Sheriff’s Department inmate stationary, invoking
25 the Civil Rights Act, 42 U.S.C. § 1983, and naming the “Law Office of Gary Marks” and
26 the State of California as Defendants, on July 24, 2017. *See* ECF No. 1.

27 He has since filed an Amended Complaint naming the same Defendants, but this
28 time alleging federal jurisdiction pursuant to 28 U.S.C. § 1331 and *Bivens v. Six*

1 *Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See*
2 ECF No. 7.

3 Plaintiff has failed to prepay the civil filing fees required by 28 U.S.C. § 1914(a),
4 and has instead filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28
5 U.S.C. § 1915(a) (ECF No. 8).

6 **I. Motion to Proceed IFP**

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

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

6 In support of his Motion to Proceed IFP, Plaintiff has submitted a copy of his San
7 Diego Sheriff’s Department Account Activity. *See* ECF No. 8 at 7; *see also* 28 U.S.C.
8 § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. This statement shows
9 Plaintiff had a total of \$100 “posted directly to [his] books,” during the months of July
10 and August, and that a \$50.96 balance remained in his account as of August 21, 2017. *See*
11 ECF No. 8 at 7. Based on this accounting, the Court GRANTS Plaintiff’s Motion to
12 Proceed IFP (ECF No. 8), and assesses an initial partial filing fee of \$10 pursuant to 28
13 U.S.C. § 1915(b)(1)(A).

14 However, the Court will direct the Facility Commander at VDF, or his designee, to
15 collect this initial fee only if sufficient funds are available in Plaintiff’s account at the
16 time this Order is executed. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event
17 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
18 criminal judgment for the reason that the prisoner has no assets and no means by which to
19 pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
20 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based
21 solely on a “failure to pay ... due to the lack of funds available to him when payment is
22 ordered.”). The remaining balance of the \$350 total fee owed in this case must be
23 collected and forwarded to the Clerk of the Court pursuant to the installment payment
24 provisions set out in 28 U.S.C. § 1915(b)(1).

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1 **II. Screening Pursuant to 28 U.S.C. § 1915(e)(2)(B) & 1915A**

2 A. Standard of Review

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

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

22 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
23 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
24 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
25 relief [is] . . . a context-specific task that requires the reviewing court to draw on its
26 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
27 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting

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1 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
2 (9th Cir. 2009).

3 B. Plaintiff's Allegations

4 Plaintiff's Complaint, Amended Complaint, and several miscellaneous filings
5 submitted in support, while difficult to decipher, all seek money damages against a
6 private attorney and the State of California for erroneously having released a personal
7 injury "settlement check" in the amount of \$18,750 to his wife, Karen Woodis, while he
8 was incarcerated at Soledad State Prison sometime in 1996 or early 1997. *See* ECF No. 1
9 at 2-4; ECF No. 7 at 3, 5; ECF No. 10 at 3-4. Plaintiff claims Defendants "defrauded"
10 him in violation of his "constitutional right" to due process. ECF No. 1 at 4; ECF No. 7 at
11 3; ECF No. 10 at 3.

12 C. 42 U.S.C. § 1983

13 To state a claim under 42 U.S.C. § 1983,² a plaintiff must allege two essential
14 elements: (1) that a right secured by the Constitution or laws of the United States was
15 violated, and (2) that the alleged violation was committed by a person acting under the
16 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*, 789 F.3d 1030,
17 1035-36 (9th Cir. 2015).

18 D. State of California

19 First, Plaintiff's pleadings fail to state a claim upon which relief can be granted
20 because states are not "persons" subject to suit under § 1983. *See Arizonans for Official*
21 *English v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Michigan Dep't of State Police*, 491
22 U.S. 58, 65-66 (1989). Therefore, Plaintiff's § 1983 claims against the State of California
23 are legally frivolous, *see Jackson v. Arizona*, 885 F.2d 639, 641 (9th Cir.1989),
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26 ² The Court notes that Plaintiff also invokes federal question jurisdiction pursuant to *Bivens*.
27 *See* ECF No. 7 at 1. But neither the Law Offices of Gary Marks or the State of California
28 are *federal* officers alleged to have violated Plaintiff's constitutional rights. *See Iqbal*, 556
U.S. at 675 (citing *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001)).

1 *superseded by statute on other grounds as stated in Lopez v. Smith*, 203 F.3d 1122, 1130
2 (9th Cir. 2000) (en banc), and leave to amend them is denied. *Lopez*, 203 F.3d at 1127 n.8
3 (“When a case may be classified as frivolous or malicious, there is, by definition, no
4 merit to the underlying action and so no reason to grant leave to amend.”); *see also*
5 *Turner v. San Diego Cty.*, No. 14CV1965 LAB WVG, 2015 WL 5254610, at *3 (S.D.
6 Cal. Sept. 9, 2015), *appeal dismissed* (Apr. 5, 2016).

7 E. Law Offices of Gary Marks

8 Second, a “person” acts under color of state law when he or she “exercises power
9 possessed by virtue of state law and made possible only because the wrongdoer is clothed
10 with the authority of state law.” *West*, 487 U.S. at 49. “The purpose of § 1983 is to deter
11 *state actors* from using the badge of their authority to deprive individuals of their
12 federally guaranteed rights.” *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)
13 (emphasis added) (citing *Wyatt v. Cole*, 504 U.S. 158, 161 (1992)). Section 1983 does not
14 allow such a claim to be brought against *private* parties who are not alleged to have not
15 acted under color of state law. *West*, 487 U.S. at 49; *Single Moms, Inc. v. Montana Power*
16 *Co.*, 331 F.3d 743, 746 (9th Cir. 2003) (“The United States Constitution protects
17 individual rights only from *government* action, not from private action.”) (emphasis in
18 original). “Only when the *government* is responsible for a plaintiff’s complaints are
19 individual constitutional rights implicated.” *Single Moms, Inc.*, 331 F.3d at 746-47 (citing
20 *Brentwood Academy v. Tennessee Secondary School Athletic Assoc.*, 531 U.S. 288, 295
21 (2001)) (emphasis in original).

22 Therefore, because Plaintiff has failed to allege any plausible facts to suggest that
23 his attorney acted in any way attributable to the state, he has not and cannot state a
24 § 1983 claim for relief against Gary Marks or his Law Offices based on his
25 representation, or any fraud or misconduct allegedly committed with respect to a personal

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1 injury settlement check disbursed more than twenty years ago.³ *Id.*; *see also Polk v.*
2 *Dodson*, 454 U.S. 312, 319 n.9 (1981) (attorneys appointed to represent indigent criminal
3 defendants do not act “under color of state law”); *Miranda v. Clark County of Nevada*,
4 319 F.3d 465, 468 (9th Cir. 2003) (upholding dismissal of complaint on basis that public
5 defender was not acting on behalf of county for purposes of section 1983 in representing
6 plaintiff’s interests); *Harkins v. Eldredge*, 505 F.2d 802, 805 (8th Cir. 1974) (“The
7 conduct of counsel, either retained or appointed, in representing clients does not
8 constitute action under color of state law for purposes of a § 1983 violation.”); *accord*
9 *Palmer v. Woodford*, No. 1:06-CV-00512-LJO, 2011 WL 3666712, at *11 (E.D. Cal.
10 Aug. 22, 2011).

11 **III. Conclusion and Orders**

12 Based on the foregoing, the Court:

13 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
14 (ECF No. 8).

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17 ³ Even if Plaintiff *had* alleged facts sufficient to show state action, he admits, on the face
18 of his pleadings, that the incident giving rise to his claim occurred in 1996 or 1997. *See*
19 ECF No. 1 at 2; ECF No. 10 at 1. Thus, his claims far exceed California’s statute of
20 limitations for personal injury actions, even including the two additional years of statutory
21 tolling provided for persons incarcerated at the time a cause of action accrues. *See Von*
22 *Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (“A
23 claim may be dismissed [for failing to state a claim] on the ground that it is barred by the
24 applicable statute of limitations only when ‘the running of the statute is apparent on the
25 face of the complaint.’” (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th
26 Cir. 2006)); *Wallace v. Kato*, 549 U.S. 384, 391 (2007) (“Under the traditional rule of
27 accrual ... the tort cause of action accrues, and the statute of limitation begins to run, when
28 the wrongful act or omission results in damages.”); *Douglas v. Noelle*, 567 F.3d 1103, 1109
(9th Cir. 2009) (§ 1983 claims are governed by forum state’s statute of limitations for
personal injury actions); *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004) (noting that
before 2003, CAL. CIV. PROC. CODE § 340(3) provided a one year statute of limitations
applicable to personal injury actions; CAL. CIV. PROC. CODE § 352.1 entitles prisoners to
two years of statutory tolling); *Mimms v. Lewis, et al.*, __ Fed. App’x __, No. 16-56868,
2017 WL 4461123, at *1 (9th Cir. Oct. 5, 2017).

1 2. **DIRECTS** the Facility Commander of the VDF, or his designee, to collect
2 from Plaintiff's prison trust account the initial partial filing fee assessed by this Order, if
3 those funds are available, and to forward the balance of the \$350 filing fee owed in this
4 case by garnishing monthly payments from his account in an amount equal to twenty
5 percent (20%) of the preceding month's income and forwarding those payments to the
6 Clerk of the Court each time the amount in the account exceeds \$10 pursuant to 28
7 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE
8 NAME AND NUMBER ASSIGNED TO THIS ACTION.

9 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on the
10 Facility Commander, San Diego Sheriff's Department, Vista Detention Facility, 325
11 South Melrose Drive, Vista, California, 92081.

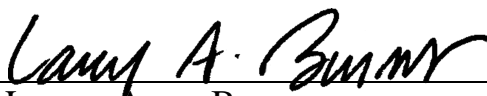
12 4. **DISMISSES** this civil action both as frivolous and for failing to state a
13 claim pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)(1) and denies leave to
14 amend as futile. *Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) (leave to amend
15 is not required if it is "absolutely clear that the deficiencies of the complaint could not be
16 cured by amendment.") (internal citations omitted).

17 5. **CERTIFIES** that an IFP appeal from this Order would be frivolous and
18 therefore, would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See*
19 *Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548,
20 550 (9th Cir. 1977) (indigent appellant is permitted to proceed IFP on appeal only if
21 appeal would not be frivolous); and

22 7. **DIRECTS** the Clerk of Court to close the file.

23 **IT IS SO ORDERED.**

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25 Dated: October 13, 2017

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28 HON. LARRY ALAN BURNS
United States District Judge