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**FILED**  
OCT 03 2017  
CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY *[Signature]* DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DIANGELO K. JOHNSON,  
BOP No. 96690-198,  
  
Plaintiff,  
  
vs.  
  
DE LA FUENTE CADILLAC OF EL  
CAJON  
  
Defendants.

Case No.: 3:17-cv-01732-WQH-WVG

**ORDER:**

- 1) GRANTING MOTION TO PROCEED IN FORMA PAUPERIS [ECF No. 2]**
- AND**
- 2) DISMISSING COMPLAINT FOR FAILING TO STATE A CLAIM PURSUANT TO 28 U.S.C. § 1915(e)(2) AND § 1915A(b)**

Plaintiff, Diangelo K. Johnson, an inmate currently incarcerated at the Metropolitan Correctional Center (“MCC”) located in San Diego, California has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1) and a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2). Because Plaintiff’s Motion to Proceed IFP complies with 28 U.S.C. § 1915(a)(2), the Court grants him leave to proceed without full prepayment of the civil filing fees, but dismisses his Complaint for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b).

1 **A. Plaintiff's IFP Motion**

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.<sup>1</sup> 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.

24  
25  
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 In support of his IFP Motion, Plaintiff has submitted a BOP Inmate Statement  
2 Report, together with a prison certificate completed by an MCC accounting official  
3 attesting to his trust account activity and balances for the six-months preceding the filing  
4 of his Complaint. *See* ECF No. 2 at 4-5; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2;  
5 *Andrews*, 398 F.3d at 1119. These statements show that Plaintiff had an average monthly  
6 balance of \$70.44, and average monthly deposits of \$140.00 to his account over the 6-  
7 month period immediately preceding the filing of his Complaint, as well as an available  
8 balance of \$12.60 at the time of filing. *See* ECF No. 2 at 4. Based on this financial  
9 information, the Court GRANTS Plaintiff's Motion to Proceed IFP (ECF No. 2), and  
10 assesses his initial partial filing fee to be \$28.00 pursuant to 28 U.S.C. § 1915(b)(1).

11 However, the Court will direct the Warden for MCC, or their designee, to collect  
12 this initial fee only if sufficient funds are available in Plaintiff's account at the time this  
13 Order is executed. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a  
14 prisoner be prohibited from bringing a civil action or appealing a civil action or criminal  
15 judgment for the reason that the prisoner has no assets and no means by which to pay the  
16 initial partial filing fee."); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that  
17 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP  
18 case based solely on a "failure to pay . . . due to the lack of funds available to him when  
19 payment is ordered."). The remaining balance of the \$350 total fee owed in this case must  
20 be collected and forwarded to the Clerk of the Court pursuant to 28 U.S.C. § 1915(b)(1).

21 **B. Legal Standards for Screening Complaint Pursuant to 28 U.S.C.**  
22 **§§ 1915(e)(2)(B) and 1915A(b)**

23 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-  
24 Answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
25 statutes, the Court must sua sponte dismiss a prisoner's IFP complaint, or any portion of  
26 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
27 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
28 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.

1 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
2 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
3 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
4 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

5 “The standard for determining whether a plaintiff has failed to state a claim upon  
6 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
7 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668  
8 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th  
9 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
10 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
11 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,  
12 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,  
13 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

#### 14 **1. Plaintiff’s allegations**

15 Plaintiff’s Complaint is not entirely clear but it appears that he purchased a vehicle  
16 from Defendant, De La Fuente Cadillac of El Cajon. (*See* Compl. at 2.) On January 5,  
17 2016, Plaintiff claims that the “2017 registration” for the vehicle had been “suspended”  
18 due to fees not having been paid. (*Id.*) Plaintiff “received a telephone call from Mr.  
19 Gallardo (Steve Gallardo service manager assistant)” informing Plaintiff that he should  
20 bring his “vehicle [to the dealership] for service.” (*Id.*) Plaintiff alleges that he was  
21 stopped by officers with the San Diego Police Department because of the “unpaid fees.”  
22 (*Id.* at 3.) Plaintiff claims this gave the officers “probable cause to investigate what  
23 officers believed was a stolen vehicle.” (*Id.*) As a result, Plaintiff alleges Defendants  
24 violated his Fourth Amendment rights because they were responsible for the unpaid fees  
25 which allowed SDPD officers to stop and presumably arrest Plaintiff. (*Id.*)

26 Plaintiff seeks \$100,000 in damages due to “loss of income that Mr. Johnson now  
27 suffers due to being incarcerated.” (*Id.*)  
28

1           **2.     42 U.S.C. § 1983**

2           Title 42 U.S.C. § 1983 provides a cause of action for the “deprivation of any rights,  
3 privileges, or immunities secured by the Constitution and laws” of the United States.

4 *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). To state a claim under § 1983, a plaintiff must  
5 allege two essential elements: (1) that a right secured by the Constitution or laws of the  
6 United States was violated, and (2) that the alleged violation was committed by a person  
7 acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. Cty. of*  
8 *Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

9           Here, the Court finds that Defendant, a purported corporation, is not alleged to be  
10 “person[s] acting under color of state law.” *See West*; 487 U.S. at 48; *Sutton v.*  
11 *Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (stating that the party  
12 charged with a constitutional deprivation under § 1983 must be a person who may fairly  
13 be said to be a governmental actor) (citation and quotations omitted).

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

25           In order for private conduct to constitute governmental action, “something more”  
26 must be alleged. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982) (“Action  
27 by a private party pursuant to [§ 1983], without something more, [i]s not sufficient to  
28 justify a characterization of that party as a ‘state actor.’”). Courts have used four different

1 factors or tests to identify what constitutes “something more”: (1) public function, (2)  
2 joint action, (3) governmental compulsion or coercion, and (4) governmental nexus. *See*  
3 *id.*; *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997); *Parks Sch. of Bus., Inc. v.*  
4 *Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995); *Gorenc v. Salt River Project Agric.*  
5 *Improvement and Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989).

6 Here, Plaintiff has failed to allege facts sufficient to plausibly show that the  
7 corporation he has named as Defendant performed any public function traditionally  
8 reserved to the state, acted as a willful participant in joint action with government agents,  
9 was compelled or coerced, or had any connection whatsoever with the state, when it  
10 allegedly injured Plaintiff. *See Iqbal*, 556 U.S. at 678; *Lugar*, 457 U.S. at 939.

### 11 **C. Conclusion and Order**

12 Good cause appearing, the Court:

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

15 2. **ORDERS** the Warden of the Metropolitan Correctional Center to collect  
16 from Plaintiff’s trust account the \$28.00 initial filing fee assessed, if those funds are  
17 available at the time this Order is executed, and to forward whatever balance remains of  
18 the full \$350 owed in monthly payments in an amount equal to twenty percent (20%) of  
19 the preceding month’s income to the Clerk of the Court each time the amount in  
20 Plaintiff’s account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS**  
21 **MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO**  
22 **THIS ACTION.**

23 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Warden,  
24 Metropolitan Correctional Center, 808 Union Street, San Diego, California 92101.

25 4. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which  
26 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and **GRANTS**  
27 him forty-five (45) days leave from the date of this Order in which to file an Amended  
28 Complaint which cures all the deficiencies of pleading noted. Plaintiff’s Amended

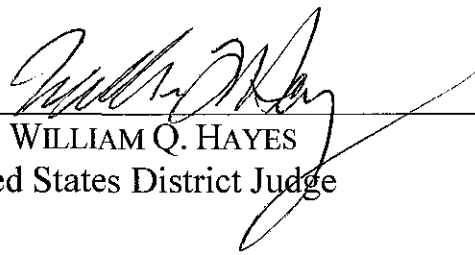
1 Complaint must be complete in itself without reference to his original pleading.  
2 Defendants not named and any claims not re-alleged in the Amended Complaint will be  
3 considered waived. *See* S.D. Cal. CivLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner*  
4 *& Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes  
5 the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that  
6 claims dismissed with leave to amend which are not re-alleged in an amended pleading  
7 may be “considered waived if not repled.”).

8       5.       **DIRECTS** the Clerk of Court to mail to Plaintiff, together with this Order, a  
9 blank copy of the Court’s form “Complaint under the Civil Rights Act, 42 U.S.C.  
10 § 1983” for his use in amending.

11               **IT IS SO ORDERED.**

12  
13 Dated:

14 10/3/17

15   
16 \_\_\_\_\_  
17 HON. WILLIAM Q. HAYES  
18 United States District Judge  
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