

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RONALD C. DIAZ,
CDCR #AD2009

Plaintiff,

V.

N. McGEE; S. RUTHLEDGE; D.
HOLBROOK; J. WILBORN; CALVERT;
RICHARD J. DONOVAN
CORRECTIONAL FACILITY ,

Defendants.

Case No.: 3:17-cv-1772-LAB-BLM

ORDER:

**(1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS;
AND**

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

Ronald C. Diaz (“Plaintiff”), a state inmate currently incarcerated at California State Prison - Los Angeles County located in Lancaster, California and proceeding pro se, has filed a civil rights Complaint (“Compl.”) pursuant to 42 U.S.C. § 1983. (ECF No. 1.) He alleges violation of his First, Eighth and Fourteenth Amendment rights when he was previously housed at the Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California. (Compl. at 1.) In addition, Plaintiff has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). (ECF No. 2.)

1 **I. Plaintiff's Motion to Proceed IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the
3 United States must satisfy a filing fee requirement. See 28 U.S.C. § 1914(a).¹ An action
4 may proceed despite a plaintiff's failure to prepay the entire fee only if he is granted
5 leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). Rodriguez v. Cook, 169 F.3d
6 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a prisoner, even if he is granted
7 leave to proceed IFP he remains obligated to pay the full entire fee in "increments," see
8 Williams v. Paramo, 775 F.3d 1182, 1185 (9th Cir. 2015), regardless of whether his
9 action is ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2).

10 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
11 ("PLRA"), prisoners seeking leave to proceed IFP must submit a "certified copy of the
12 trust fund account statement (or institutional equivalent) for the . . . six-month period
13 immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); Andrews v.
14 King, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement,
15 the Court assesses an initial payment of 20 percent of (a) the average monthly deposits in
16 the account for the past six months, or (b) the average monthly balance in the account for
17 the past six months, whichever is greater, unless the prisoner has no assets. See 28
18 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the
19 prisoner collects subsequent payments, assessed at 20 percent of the preceding month's
20 income, in any month in which the prisoner's account exceeds \$10, and forwards those
21 payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2).
22 In support of his IFP Motion, Plaintiff has submitted a prison certificate attesting to his
23 trust account balance and activity for the six-month period prior to the filing of his
24 Complaint as required by 28 U.S.C. § 1915(a)(2) and S.D. CAL. CivLR 3.2. This
25 certificate shows that Plaintiff has no available funds to his credit at the time of filing.

27 ¹ In addition to the \$350 statutory fee for this action, civil litigants must pay an additional administrative
28 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee
Schedule, § 14 (eff. Dec. 1, 2014)). The additional \$50 administrative fee does not apply to persons
granted leave to proceed IFP. Id.

1 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP (ECF No. 2), and
2 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). See 28 U.S.C.
3 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a
4 civil action or appealing a civil action or criminal judgment for the reason that the
5 prisoner has no assets and no means by which to pay the initial partial filing fee.”);
6 Taylor v. Delatoore, 281 F.3d 844, 850 (9th Cir. 2002) (finding that 28 U.S.C.
7 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based
8 solely on a “failure to pay . . . due to the lack of funds available to him when payment is
9 ordered.”) However, the entire \$350 balance for this case must be forwarded to the Clerk
10 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
11 § 1915(b)(1).

12 **II. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

13 **A. Standard of Review**

14 “The Court shall review, before docketing, if feasible or, in any event, as soon as
15 practicable after docketing,” complaints filed by all persons proceeding IFP, and by those
16 who are “incarcerated or detained in any facility [and] accused of, sentenced for, or
17 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
18 probation, pretrial release, or diversionary program.” See 28 U.S.C. §§ 1915(e)(2) and
19 1915A(b). The Court must sua sponte dismiss complaints, or any portions thereof, which
20 are frivolous, malicious, fail to state a claim, or which seek damages from defendants
21 who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; Lopez v. Smith, 203 F.3d
22 1122, 1126-27 (9th Cir. 2000).

23 All complaints must contain “a short and plain statement of the claim showing that
24 the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations are
25 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
26 mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678
27 (2009), citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). “Determining
28 whether a complaint states a plausible claim for relief [is] . . . a context-specific task that

1 requires the reviewing court to draw on its judicial experience and common sense.” Id. at
2 679. The “mere possibility of misconduct” falls short of meeting the Iqbal plausibility
3 standard. Id.; see also Moss v. U. S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009).

4 “When there are well-pleaded factual allegations, a court should assume their
5 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
6 Iqbal, 556 U.S. at 679; see also Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000)
7 (“Under § 1983, when determining whether a complaint states a claim, a court must
8 accept as true all allegations of material fact and must construe those facts in the light
9 most favorable to the plaintiff.”); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir.
10 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil
11 Procedure 12(b)(6)”). However, while the court has an “obligation . . . where the
12 petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally
13 and to afford the petitioner the benefit of any doubt,” Hebbe v. Pliler, 627 F.3d 338, 342
14 (9th Cir. 2010), citing Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en
15 banc), it may not, in so doing, “supply essential elements of the claim that were not
16 initially pled.” Ivey v. Board of Regents of the University of Alaska, 673 F.2d 266, 268
17 (9th Cir. 1982).

18 “Section 1983 creates a private right of action against individuals who, acting
19 under color of state law, violate federal constitutional or statutory rights.” Devereaux v.
20 Abbey, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
21 substantive rights, but merely provides a method for vindicating federal rights elsewhere
22 conferred.” Graham v. Connor, 490 U.S. 386, 393-94 (1989) (internal quotation marks
23 and citations omitted). “To establish § 1983 liability, a plaintiff must show both
24 (1) deprivation of a right secured by the Constitution and laws of the United States, and
25 (2) that the deprivation was committed by a person acting under color of state law.” Tsao
26 v. Desert Palace, Inc., 698 F.3d 1128, 1138 (9th Cir. 2012).

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1 **B. Plaintiff's Allegations**

2 On August 28, 2015, Plaintiff was transported from RJD to Salinas Valley State
3 Prison and placed on suicide watch. (See Compl. at 3.) When he was transported,
4 Plaintiff claims RJD prison officials had the responsibility to “secure and pack up
5 Plaintiff’s personal property.” (Id.) However, because RJD officials believed Plaintiff
6 would return that evening to RJD, they did not secure his property which resulted in all of
7 Plaintiff’s property being stolen by other inmates. (Id.)

8 **C. Loss of Property Claims**

9 The Due Process Clause protects prisoners from being deprived of property
10 without due process of law, Wolff v. McDonald, 418 U.S. 539, 556 (1974), and prisoners
11 have a protected interest in their personal property. Hansen v. May, 502 F.2d 728, 730
12 (9th Cir. 1974). However, “[a]n unauthorized intentional deprivation of property by a
13 [state actor] does not constitute a violation of the procedural requirements of the Due
14 Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy
15 for the loss is available.” Hudson v. Palmer, 468 U.S. 517, 533 (1984); Parratt v. Taylor,
16 451 U.S. 527, 541-44 (1981), overruled on other grounds by Daniels v. Williams, 474
17 U.S. 327 (1986) (a deprivation of property allegedly caused by a state employee does not
18 constitute a valid § 1983 constitutional claim if the state provides other adequate post-
19 deprivation remedies); Zinermon v. Burch, 494 U.S. 113, 128 (1990) (a state post-
20 deprivation remedy, *e.g.*, a state tort action, precludes relief under § 1983 because it
21 provides sufficient procedural due process).

22 The Ninth Circuit has held that the California Tort Claims Act provides an
23 additional adequate post-deprivation remedy for property deprivations caused by any
24 public official. See Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir.1994); *see* CAL. GOV’T.
25 CODE §§ 810-997.6. It does not matter whether or not Plaintiff succeeds in redressing his
26 loss through these available state remedies; it is the existence of these alternate remedies
27 that bars him from pursuing a procedural due process claim in a § 1983 action.
28 Willoughby v. Luster, 717 F. Supp. 1439, 1443 (D. Nev.1989).

1 **D. Grievances**

2 Plaintiff's also fails to state a viable Section 1983 claim against Defendants for the
3 manner in which they responded to his administrative grievances. The claims against
4 these Defendants arise from Plaintiff's allegations that they refused to grant his entire
5 request for reimbursement when they responded to his administrative grievances.

6 (Compl. at 19-23.) However, a prison official's alleged improper processing of an
7 inmate's grievances or appeals, without more, cannot serve as a basis for section 1983
8 liability. See generally Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir. 2003) (prisoners
9 do not have a "separate constitutional entitlement to a specific prison grievance
10 procedure.") (citation omitted); Mann v. Adams, 855 F.2d 639, 640 (9th Cir. 1988) (due
11 process not violated simply because defendant fails properly to process grievances
12 submitted for consideration); see also Shallowhorn v. Molina, 572 Fed. Appx. 545, 547
13 (9th Cir. 2014) (district court properly dismissed section 1983 claims against defendants
14 who "were only involved in the appeals process") (citing Ramirez, 334 F.3d at 860).

15 Here, the Court finds that Plaintiff's allegations against Defendants are insufficient
16 to state a plausible due process claim. See Iqbal, 556 U.S. at 680-84 (citations omitted).

17 **E. Retaliation**

18 Plaintiff claims that all the Defendants retaliated against him for filing grievances.
19 (See Compl. at 29.) Retaliation against a prisoner for exercising his rights to speech or to
20 petition the government may violate the First Amendment. See Rizzo v. Dawson, 778
21 F.2d 527, 532 (9th Cir. 1985); see also Valandingham v. Bojorquez, 866 F.2d 1135 (9th
22 Cir. 1989); Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995). "Within the prison
23 context, a viable claim of First Amendment retaliation entails five basic elements: (1) An
24 assertion that a state actor took some adverse action against an inmate (2) because of (3)
25 that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of
26 his First Amendment rights, and (5) the action did not reasonably advance a legitimate
27 correctional goal." Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005).

1 Here, Plaintiff does not allege that any Defendants took “adverse action” against
2 him because he was engaging in “protected conduct.” Id. Plaintiff acknowledges that
3 Defendants attempted to reimburse him for some of his lost property and they also
4 attempted to replace some of Plaintiff’s property which he ultimately refused.

5 As set forth above, the “mere possibility of misconduct” or “unadorned, the
6 defendant-unlawfully-harmed me accusation[s]” fall short of meeting Iqbal’s plausibility
7 standard. Iqbal, 556 U.S. at 678. Therefore, Plaintiff’s claims of retaliation are dismissed
8 for failing to state a claim.

9 **III. Leave to Amend**

10 Because Plaintiff is proceeding without counsel, and he has now been provided
11 with notice of his Complaint’s deficiencies, the Court will grant him leave to amend. See
12 Rosati v. Igbinoso, 791 F.3d 1037, 1039 (9th Cir. 2015) (“A district court should not
13 dismiss a pro se complaint without leave to amend [pursuant to 28 U.S.C.
14 § 1915(e)(2)(B)(ii)] unless ‘it is absolutely clear that the deficiencies of the complaint
15 could not be cured by amendment.’”) (quoting Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th
16 Cir. 2012)).

17 **IV. Conclusion and Orders**

18 Good cause appearing, the Court:

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

21 2. **ORDERS** the Secretary of the CDCR, or his designee, to collect from
22 Plaintiff’s trust account the \$350 owed in monthly payments in an amount equal to
23 twenty percent (20%) of the preceding month’s income to the Clerk of the Court each
24 time the amount in Plaintiff’s account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2).
25 **ALL PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND**
26 **NUMBER ASSIGNED TO THIS ACTION.**

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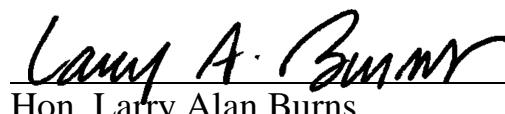
1 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
2 Kernan, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
3 942883, Sacramento, California, 94283-0001.

4 4. **DISMISSES** Plaintiff's Complaint in its entirety for failing to state a claim
5 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b),
6 and **GRANTS** him forty-five (45) days leave from the date of this Order in which to file
7 an Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff's
8 Amended Complaint must be complete by itself without reference to his original
9 pleading, and must comply with S.D. CAL. CIVLR 8.2(a). Defendants not named and any
10 claim not re-alleged in his Amended Complaint will be considered waived. See S.D. CAL.
11 CIVLR 15.1; Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1546
12 (9th Cir. 1989) ("[A]n amended pleading supersedes the original."); Lacey v. Maricopa
13 Cnty., 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to
14 amend which are not re-alleged in an amended pleading may be "considered waived if
15 not replied.").

16 5. The Clerk of Court is directed to mail Plaintiff a copy of a court approved
17 form § 1983 complaint.

18 **IT IS SO ORDERED.**

19 Dated: September 25, 2017


Hon. Larry Alan Burns
United States District Judge