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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
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8 GARY R. CUSHINBERRY,
9 Plaintiff,
10 v.
11 SERGEANT PATRICK VINSON, et al.,
12 Defendants.

Case No.: 17cv1794-MMA (KSC)

ORDER:

(1) **GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
(Doc. No. 2)**

AND

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

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20 On September 5, 2017, Plaintiff Gary R. Cushinberry, a non-prisoner proceeding
21 *pro se*, submitted a complaint against Sergeant Patrick Vinson and the City of San Diego
22 pursuant to 42 U.S.C. § 1983. Compl., Doc. No. 1. Plaintiff has also filed a motion to
23 proceed *in forma pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a).

24 **DISCUSSION**

25 **I. Motion to Proceed IFP**

26 All parties instituting any civil action, suit or proceeding in a district court of the
27 United States, except an application for writ of habeas corpus, must pay a filing fee of
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1 \$400.¹ See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to
2 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. §
3 1915(a). See *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). “To proceed *in*
4 *forma pauperis* is a privilege not a right.” *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir.
5 1965). A party need not be completely destitute to proceed *in forma pauperis*. *Adkins v.*
6 *E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339-40 (1948). But, “the same even-
7 handed care must be employed to assure that federal funds are not squandered to
8 underwrite, at public expense, either frivolous claims or the remonstrances of a suitor
9 who is financially able, in whole or in material part, to pull his own oar.” *Temple v.*
10 *Ellerthorpe*, 586 F. Supp. 848, 850 (D.R.I. 1984).

11 Plaintiff states that he receives \$193.00 in food stamps. Doc. No. 2 at 2. Plaintiff
12 is unemployed and has been unemployed for at least one year. *Id.* at 5; see Compl. at ¶ 9-
13 21. Plaintiff’s total monthly expenses amount to \$193.00, which he uses to purchase
14 food with his food stamps. Plaintiff’s affidavit sufficiently shows he is unable to pay the
15 fees or post securities required to maintain this action. As such, the Court **GRANTS**
16 Plaintiff’s motion to proceed *in forma pauperis*.

17 **II. Screening Pursuant to 28 U.S.C. § 1915**

18 Because Plaintiff is proceeding IFP, his Complaint requires a pre-Answer
19 screening pursuant to 28 U.S.C. § 1915(e)(2)(B). In accordance with that section, the
20 Court must *sua sponte* dismiss a Plaintiff’s IFP complaint, or any portion of it, which is
21 “frivolous or malicious,” “fails to state a claim on which relief may be granted,” or
22 “seeks monetary relief against a defendant who is immune from such relief.” See 28
23 U.S.C. § 1915(e)(2)(B)(i)-(III); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001)
24 (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”). The
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27 ¹ In addition to the \$350.00 statutory fee, civil litigants must pay an additional administrative fee of
28 \$50.00. See 28 U.S.C. § 1914(b) (Judicial Conference Schedule of 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 court is not only allowed to, but is required to screen IFP complaints. *See Lopez v. Smith*,
2 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (noting § 1915(e) “not only permits but
3 requires” the court to *sua sponte* dismiss an IFP complaint that fails to state a claim).

4 “The standard for determining whether a plaintiff has failed to state a claim upon
5 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
6 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
7 F.3d 1108, 1112 (9th Cir. 2012). A pleading must contain “a short and plain statement of
8 the claim showing that the pleader is entitled to relief. . . .” Fed. R. Civ. P. 8(a)(2). Rule
9 8 can serve as an independent basis for dismissal of claims. *McHenry v. Renne*, 84 F.3d
10 1172, 1179 (9th Cir. 1996). Rule 8(d) requires that plaintiffs file “simple, concise, and
11 direct” pleadings. *Id.* Pleadings must “give the defendant fair notice of what the . . .
12 claim is and the grounds upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S.
13 544, 555 (2007) (quotation marks and citation omitted). A pleading lacking “simplicity,
14 conciseness and clarity as to whom plaintiffs are suing for what wrongs, fails to perform
15 the essential functions of a complaint.” *McHenry*, 84 F.3d at 1180. A plaintiff must
16 plead “enough facts to state a claim to relief that is plausible on its face.” Fed. R. Civ. P.
17 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard
18 demands more than a formulaic recitation of the elements of a cause of action, or naked
19 assertions devoid of further factual enhancement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678
20 (2009). Instead, the complaint “must contain sufficient allegations of underlying facts to
21 give fair notice and to enable the opposing party to defend itself effectively.” *Starr v.*
22 *Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

23 To state a claim under § 1983, a plaintiff must allege that a right secured by the
24 Constitution has been violated, and the deprivation was committed by a person acting
25 under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). States and state officers
26 sued in their official capacity are not “persons” for the purposes of a § 1983 action, and
27 generally, they may not be sued under the statute. *Will v. Michigan Dep’t of State Police*,
28 491 U.S. 58, 71 (1989). Section 1983 does allow suits against state officers in their

1 individual capacities. *Hafer v. Melo*, 502 U.S. 21, 31 (1991).

2 In reviewing complaints, courts must assume the truth of all factual allegations and
3 must construe them in the light most favorable to the plaintiff. *Cahill v. Liberty Mut. Ins.*
4 *Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). The court need not take legal conclusions as
5 true merely because they are cast in the form of factual allegations. *Roberts v.*
6 *Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Where dismissal is appropriate, a court
7 should grant leave to amend unless the plaintiff could not possibly cure the defects in the
8 pleading. *Knappenberger v. City of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009); *Lopez v.*
9 *Smith*, 203 F.3d 1122, 1127–29 (9th Cir. 2000).

10 As currently pleaded, the Court finds allegations in Plaintiff’s complaint which are
11 sufficient to survive the *sua sponte* screening required by 28 U.S.C. § 1915(e)(2).
12 Accordingly, the Court will direct the U.S. Marshal to effect service on Plaintiff’s behalf.
13 See 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and
14 perform all duties in [IFP] cases.”); Fed.R.Civ.P. 4(c)(3) (“[T]he court may order that
15 service be made by a United States marshal or deputy marshal . . . if the plaintiff is
16 authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

17 **III. Conclusion and Order**

18 Good cause appearing, **IT IS HEREBY ORDERED** that:

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

21 **IT IS FURTHER ORDERED** that:

22 2. The Clerk is **DIRECTED** to issue a summons as to Plaintiff’s Complaint
23 (Doc. No. 1) upon Defendants and forward it to Plaintiff along with blank U.S. Marshal
24 Form 285s for each named Defendant. In addition, the Clerk is directed to provide
25 Plaintiff with a certified copy of this Order and a certified copy of his Complaint (Doc.
26 No. 1) and the summons so that he may serve each named Defendant. Upon receipt of
27 this “IFP Package,” Plaintiff is directed to complete the Form 285s as completely and
28 accurately as possible, and to return them to the United States Marshal according to the

1 instructions provided by the Clerk in the letter accompanying his IFP package.

2 3. Upon receipt, the U.S. Marshal is **ORDERED** to serve a copy of the
3 Complaint and summons upon the named Defendants as directed by Plaintiff on the USM
4 Form 285s. All costs of service will be advanced by the United States. *See* 28 U.S.C.
5 § 1915(d); Fed.R.Civ.P. 4(c)(3).

6 4. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint
7 within the time provided by the applicable provisions of Federal Rule of Civil Procedure
8 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to
9 "waive the right to reply to any action brought by a prisoner confined in any jail, prison,
10 or other correctional facility under section 1983," once the Court has conducted its sua
11 sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made
12 a preliminary determination based on the face on the pleading alone that Plaintiff has a
13 "reasonable opportunity to prevail on the merits," the defendant is required to respond).

14 5. Plaintiff must serve upon the Defendants or, if appearance has been entered
15 by counsel, upon Defendants' counsel, a copy of every further pleading or other
16 document submitted for consideration by the Court. Plaintiff must include with the
17 original paper to be filed with the Clerk of the Court, a certificate stating the manner in
18 which a true and correct copy of the document was served on the Defendants, or counsel
19 for Defendants, and the date of that service. Any paper received by the Court which has
20 not been properly filed with the Clerk, or which fails to include a Certificate of Service,
21 may be disregarded.

22 **IT IS SO ORDERED.**

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24 Dated: September 7, 2017



Hon. Michael M. Anello
United States District Judge