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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROGELIO RUIZ, CDCR #F-59761, vs. R. OLIVEIRA; B. SELF; M. VOONG; CDCR OFFICERS, 	Plaintiff, Defendants.
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Case No.: 3:17-cv-01914-BEN-NLS

ORDER:

(1) GRANTING PLAINTIFF'S MOTION TO PROCEED IFP; AND

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

I. Procedural History

On September 19, 2017, Rogelio May Ruiz ("Plaintiff"), a prisoner currently incarcerated at Corcoran State Prison located in Corcoran, California, and proceeding pro se, filed a civil rights complaint ("Compl.") pursuant to 42 U.S.C. § 1983 (ECF No. 1). Plaintiff did not prepay the civil filing fee; instead he filed a Motion to Proceed In Forma Pauperis ("IFP") pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

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1 On October 4, 2017, the Court dismissed his Complaint for failing to comply with
2 Rule 8 and S.D. Local Rule 5.1.a. (ECF No. 3.) Plaintiff's Motion to Proceed IFP was
3 denied as moot and without prejudice to re-file with an amended pleading. (*Id.*) On
4 October 30, 2017, Plaintiff filed his First Amended Complaint ("FAC"). (ECF No. 4.)

5 **II. Plaintiff's Motion to Proceed IFP**

6 All parties instituting any civil action, suit or proceeding in a district court of the
7 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*
8 28 U.S.C. § 1914(a). An action may proceed despite the plaintiff's failure to prepay the
9 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
10 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a
11 prisoner and is granted leave to proceed IFP, he nevertheless remains obligated to pay the
12 entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28
13 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

14 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
15 ("PLRA"), a prisoner seeking leave to proceed IFP must also submit a "certified copy of
16 the trust fund account statement (or institutional equivalent) for . . . the six-month period
17 immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v.*
18 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement,
19 the Court assesses an initial payment of 20% of: (a) the average monthly deposits in the
20 account for the past six months, or (b) the average monthly balance in the account for the
21 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
22 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner then
23 collects subsequent payments, assessed at 20% of the preceding month's income, in any
24 month in which the prisoner's account exceeds \$10, and forwards them to the Court until
25 the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

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1 In support of his IFP Motion, Plaintiff has submitted the certified copy of his trust
2 account statement required by 28 U.S.C. § 1915(a)(2) and S.D. Cal. CivLR 3.2.
3 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff's trust account statements
4 which show that he has had no monthly deposits, and has carried an average balance of
5 zero in his account during the 6-month period preceding the filing of this action, and had
6 no available funds to his credit at the time of filing. *See* 28 U.S.C. § 1915(b)(4)
7 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action
8 or appealing a civil action or criminal judgment for the reason that the prisoner has no
9 assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at
10 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of
11 a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds
12 available to him when payment is ordered.”).

13 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF No. 2), and
14 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
15 balance of the filing fees due for this case must be collected by the California Department
16 of Corrections and Rehabilitation (“CDCR”) and forwarded to the Clerk of the Court
17 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

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

19 **A. Standard of Review**

20 Notwithstanding Plaintiff’s IFP status or the payment of any partial filing fees, the
21 PLRA also obligates the Court to review complaints filed by all persons proceeding IFP
22 and by those, like Plaintiff, who are “incarcerated or detained in any facility [and]
23 accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the
24 terms or conditions of parole, probation, pretrial release, or diversionary program,” “as
25 soon as practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b). Under
26 these statutes, the Court must sua sponte dismiss complaints, or any portions thereof,
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1 which are frivolous, malicious, fail to state a claim, or which seek damages from
2 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B), 1915A(b); *Lopez v. Smith*,
3 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*,
4 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

5 All complaints must contain “a short and plain statement of the claim showing that
6 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
7 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
8 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
9 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining whether a
10 complaint states a plausible claim for relief [is] . . . a context-specific task that requires
11 the reviewing court to draw on its judicial experience and common sense.” *Id.* The “mere
12 possibility of misconduct” falls short of meeting this plausibility standard. *Id.*; *see also*
13 *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

14 “When there are well-pleaded factual allegations, a court should assume their
15 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
16 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
17 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
18 allegations of material fact and must construe those facts in the light most favorable to
19 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
20 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

21 However, while the court “ha[s] an obligation where the petitioner is pro se,
22 particularly in civil rights cases, to construe the pleadings liberally and to afford the
23 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
24 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
25 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents*
26 *of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

1 now provided him with “notice of the deficiencies in his complaint,” will also grant
2 Plaintiff an opportunity to amend. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir.
3 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

4 **III. Conclusion and Order**

5 Good cause appearing, the Court:

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

8 2. **ORDERS** the Secretary of the CDCR, or his designee, to collect from
9 Plaintiff’s prison trust account the \$350 filing fee owed in this case by collecting monthly
10 payments from the account in an amount equal to twenty percent (20%) of the preceding
11 month’s income and forwarding them to the Clerk of the Court each time the amount in
12 his account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS**
13 **MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO**
14 **THIS ACTION.**

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

18 4. **DISMISSES** Plaintiff’s FAC (ECF No. 4) for failing to state a claim upon
19 which § 1983 relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and
20 1915A(b)(1).

21 5. **GRANTS** Plaintiff thirty (30) days leave from the date of this Order in
22 which to file a Second Amended Complaint that cures the deficiencies of pleading
23 described above. Plaintiff’s Second Amended Complaint must be complete by itself
24 without reference to his original complaint. *See* S.D. Cal. CivLR 15.1; *Hal Roach*
25 *Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n
26 amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928

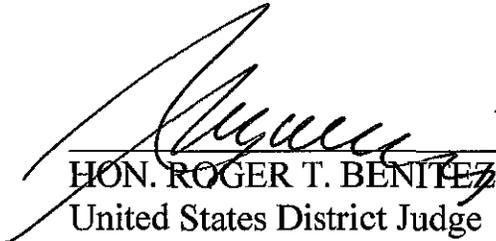
1 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not re-
2 alleged in an amended pleading may be “considered waived if not repled.”).

3 Should Plaintiff elect not to proceed by filing a Second Amended Complaint
4 within 30 days, the Court will enter a final Order of dismissal of this civil action for
5 failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1), and
6 for failure to prosecute in compliance with a Court Order requiring amendment. *See*
7 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir. 1992) (dismissal for failure to
8 prosecute permitted if plaintiff fails to respond to a court’s order requiring amendment of
9 complaint); *Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not
10 take advantage of the opportunity to fix his complaint, a district court may convert the
11 dismissal of the complaint into dismissal of the entire action.”).

12 6. The Clerk of Court is directed to mail Plaintiff a civil rights form complaint
13 for his use in amending.

14 **IT IS SO ORDERED.**

15
16 DATED: December  2017


HON. ROGER T. BENITEZ
United States District Judge