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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JEFFREY ELIAS KANE, CDCR #AX-3761, Booking #17161895, <p style="text-align: right;">Plaintiff,</p>	vs.	R.J. DONOVAN STATE PRISON, <p style="text-align: right;">Defendant.</p>
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Case No.: 3:17-cv-02237-MMA-AGS

ORDER:

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

AND

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

JEFFREY ELIAS KANE (“Plaintiff”), a former state prisoner, now detained at the San Diego Sheriff’s Department’s North County Regional Facility in Vista, California (“VDF”), and proceeding pro se, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983 (Doc. No. 1).

Plaintiff’s Complaint names R.J. Donovan State Prison as the sole Defendant, and it contains no factual allegations or constitutional basis for relief. Instead, Plaintiff simply requests \$12 million in general and punitive damages and refers to *another* civil action he

1 previously filed: *Kane v. RJ Donovan State Prison, et al.*, S.D. Cal. Civil Case No. 3:16-
2 cv-00010-BEN-JLB. *See* Compl., Doc. No. 1 at 1-3.

3 Plaintiff has not prepaid the \$400 civil filing fee required by 28 U.S.C. § 1914(a);
4 instead, he has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28
5 U.S.C. § 1915(a) (Doc. No. 2).

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
7 Sheriff’s Department trust account activity statement, together with a prison certificate
8 completed by the Facility Commander at VDF attesting to his account activity. *See* Doc.
9 No. 2 at 4-5; *see also* 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at
10 1119. These statements show Plaintiff has carried a \$.01 average monthly balance, had an
11 average monthly deposit of only \$5 to his account over the 6-month period immediately
12 preceding the filing of his Complaint, and an available balance of only \$.06 on the books
13 at the time of filing. *See* Doc. No. 2 at 4, 5.

14 Based on this accounting, no initial partial filing fee is assessed. *See* 28 U.S.C.
15 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a
16 civil action or appealing a civil action or criminal judgment for the reason that the
17 prisoner has no assets and no means by which to pay the initial partial filing fee.”);
18 *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4)
19 acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a
20 “failure to pay ... due to the lack of funds available to him when payment is ordered.”).

21 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP (Doc. No. 2),
22 declines to exact an initial filing fee because his trust account statement indicates he has
23 “no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the VDF Facility Commander,
24 or his designee, to instead collect the entire \$350 balance of the filing fees required by 28
25 U.S.C. § 1914 and forward them to the Clerk of the Court pursuant to the installment
26 payment provisions set forth 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 a prisoner’s IFP complaint, or any portion of
6 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
7 who are 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); *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. *Id.*; *Moss v.*
28 *U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

1 B. Discussion

2 As noted above, Plaintiff’s Complaint contains no factual allegations and he cites
3 no constitutional basis for relief whatsoever. While he has invoked federal jurisdiction by
4 using the Court’s form 42 U.S.C. § 1983 Complaint, and names RJ Donovan State Prison
5 as the sole Defendant in its caption, his pleading merely refers to a previously filed case,
6 the facts and allegations from which the Court presumes he wishes to incorporate into
7 this civil action by reference. *See* Compl., Doc. No. 1 at 1; FED. R. CIV. P. 10(c) (“A
8 statement in a pleading may be adopted by reference elsewhere in the same pleading or in
9 any other pleading of motion.”).

10 Except where separate cases have been “consolidated ... for pretrial purposes,” and
11 thus “share the same docket sheet and file under the same case number,” *see e.g., Glob.*
12 *Oil Tools, Inc. v. Barnhill*, No. CIV.A. 12-3041, 2013 WL 3070838, at *9 (E.D. La. June
13 17, 2013)), or where an indigent pro se litigant requests original exhibits submitted in
14 support of one civil action be incorporated by reference to another related case due to his
15 lack of access to a photocopier, *see Weatherspoon v. Dinsa*, No. 14-CV-12756, 2015 WL
16 5634448, at *7 (E.D. Mich. Sept. 25, 2015), courts typically hold that Rule 10(c) does not
17 allow a party to adopt by reference pleadings from a wholly separate action, even if that
18 action is between the same parties. *See Amini Innovation Corp. v. McFerran Home*
19 *Furnishings, Inc.*, 301 F.R.D. 487, 492 (C.D. Cal. 2014) (citing *Tex. Water Supply Corp.*
20 *v. R.F.C.*, 204 F.2d 190, 196-97 (5th Cir. 1953) (“Rule 10(c) ... permits references to
21 pleadings and exhibits in the same case, but there is no rule permitting the adoption of a
22 cross-claim in a separate action in a different court by mere reference.”); *Aronson v.*
23 *Advanced Cell Tech., Inc.*, 972 F. Supp. 2d 123, 136 (D. Mass. 2013) (quoting
24 *Constellation Energy Commodities Grp. Inc. v. Transfield ER Cape Ltd.*, 801 F. Supp. 2d
25 211, 223 (S.D.N.Y. 2011)); *Davis v. Bifani*, Civil Action No. 07-cv-00122-MEH-BNB,
26 2007 WL 1216518, at *1 (D. Colo. Apr. 24, 2007) (“[T]he Court does not believe that it
27 is proper to incorporate by reference wholesale the allegations in a complaint in a
28 completely separate action, even if that action is between the same parties.”)).

1 This Court agrees and finds that FED. R. CIV. P. 10(c) does not permit the adoption
2 by reference of factual allegations and legal claims Plaintiff previously raised in *Kane v.*
3 *RJ Donovan State Prison, et al.*, S.D. Cal. Civil Case No. 3:16-cv-00010-BEN-JLB, as a
4 valid means of supplanting FED. R. CIV. P. 8(a)(3) and its requirement that Plaintiff’s
5 current Complaint, by itself and without reference to any other civil action he filed in the
6 past, contain a “short and plain statement of the claim showing that [he] is entitled to
7 relief.” See FED. R. CIV. P. 8(a)(3). Because it does not, Plaintiff has failed to state a
8 claim upon which § 1983 relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii) and
9 § 1915A(b)(1). See also *Iqbal*, 556 U.S. at 678; *Wilhelm*, 680 F.3d at 1121.

10 Moreover, even if Plaintiff had included some factual allegations in his current
11 pleading, section 1983 “by itself does not protect anyone against anything.” *Chapman v.*
12 *Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979); *Sprint Telephony PCS v. County*
13 *of San Diego*, 490 F.3d 700, 717 (9th Cir. 2007). In other words, section 1983 “is not
14 itself a source of substantive rights, but merely provides a method for vindicating federal
15 rights elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal
16 citations omitted); *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). “In § 1983
17 cases, it is the constitutional right itself that forms the basis of the claim.” *Crater v.*
18 *Galaza*, 508 F.3d 1261, 1269 (9th Cir. 2007).

19 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
20 elements: (1) that a right secured by the Constitution or laws of the United States was
21 violated, *and* (2) that the alleged violation was committed by a person acting under the
22 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*, 789 F.3d 1030,
23 1035-36 (9th Cir. 2015).

24 Plaintiff’s Complaint fails to do either: he pleads no “factual content that allows
25 the court to draw [a] reasonable inference that the defendant is liable” for depriving him
26 of any constitutional or federal statutory right, *Iqbal*, 556 U.S. at 676, 678, and the only
27 party he has named as a Defendant—RJ Donovan State Prison—is not a “person” subject
28 to suit under § 1983. See *Hale v. State of Arizona*, 993 F.2d 1387, 1398-99 (9th Cir.

1 1993) (holding that a state department of corrections is an arm of the state, and thus, not a
2 “person” within the meaning of § 1983); *Rojo v. R.J. Donovan State Prison*, No.
3 13CV2237 LAB BGS, 2014 WL 1653102, at *2 (S.D. Cal. Apr. 23, 2014) (sua sponte
4 dismissing prisoner’s § 1983 complaint against R.J. Donovan State Prison pursuant to 28
5 U.S.C. § 1915(e)(2)(B)(ii), (iii) and 28 U.S.C. § 1915A(b)(1) & (2)).

6 C. Leave to Amend

7 Finally, while the Court would typically grant leave to amend in light of Plaintiff’s
8 pro se status, it concludes that doing so under the circumstances would be futile. *See*
9 *Lopez*, 203 F.3d at 1127; *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d
10 817, 824 (9th Cir. 2002) (recognizing “[f]utility of amendment” as a proper basis for
11 dismissal without leave to amend).

12 This is because Plaintiff’s attempt to adopt by reference his previously filed civil
13 action in *Kane v. RJ Donovan State Prison, et al.*, S.D. Cal. Civil Case No. 3:16-cv-
14 00010-BEN-JLB as the basis for *this* subsequently-filed case shows he means to “merely
15 repeat[] pending or previously litigated claims.” *Cato v. United States*, 70 F.3d 1103,
16 1105 n.2 (9th Cir. 1995).² An IFP complaint is considered frivolous under 28 U.S.C.
17 § 1915(e)(2)(B)(ii) [formerly § 1915(d)] if it “merely repeats pending or previously
18 litigated claims.” *Id.* (construing former 28 U.S.C. § 1915(d)) (citations and internal
19 quotations omitted); *see also Adams v. Cal. Dep’t of Health Servs.*, 487 F.3d 684, 688-89
20 (9th Cir. 2007) (“[I]n assessing whether the second action is duplicative of the first, [the
21 court] examine[s] whether the causes of action and relief sought, as well as the parties or
22 privies to the action, are the same.”), *overruled on other grounds by Taylor v. Sturgell*,
23 553 U.S. 880, 904 (2008). And “[w]hen a case may be classified as frivolous or
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26 ² A court “may take notice of proceedings in other courts, both within and without the
27 federal judicial system, if those proceedings have a direct relation to matters at issue.”
28 *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*,
285 F.3d 801, 803 n.2 (9th Cir. 2002)).

1 malicious, there is, by definition, no merit to the underlying action and so no reason to
2 grant leave to amend.” *Lopez*, 203 F.3d at 1127 n.8.

3 **IV. Conclusion and Orders**

4 Accordingly, the Court:

5 1) **GRANTS** Plaintiff’s Motion to Proceed In Forma Pauperis (Doc. No. 2).

6 2) **ORDERS** the Facility Commander of VDF, or his designee, to collect from
7 Plaintiff’s trust account the full \$350 owed in monthly payments in an amount equal to
8 twenty percent (20%) of the preceding month’s income to the Clerk of the Court each
9 time the amount in Plaintiff’s account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2).

10 **ALL PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND**
11 **NUMBER ASSIGNED TO THIS ACTION.**

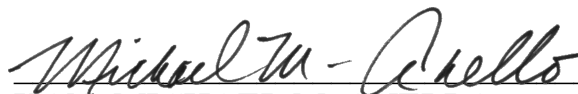
12 3) **DISMISSES** Plaintiff’s Complaint without leave to amend both for failing
13 to state a claim and as frivolous pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b).

14 4) **CERTIFIES** that an IFP appeal of this dismissal would not be taken in good
15 faith pursuant to 28 U.S.C. § 1915(a)(3); and

16 5) **DIRECTS** the Clerk of Court to serve a copy of this Order on the Facility
17 Commander, San Diego Sheriff’s Department North County Regional Facility, 325 S.
18 Melrose Ave., Vista, California, 92083, terminate this action, and close the file.

19 **IT IS SO ORDERED.**

20 DATE: December 21, 2017

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22 HON. MICHAEL M. ANELLO
23 United States District Judge
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