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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 JAMAL EVANS,
12 CDCR #P-51115,

13 Plaintiff,

14 vs.

15 HERNANDEZ; R. MADDEN;
16 RODRIGUEZ; T. BLACHSTOCK,

17 Defendants.
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Case No.: 3:17-cv-02254-GPC-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)**

22 Jamal Evans (“Plaintiff”), a prisoner currently incarcerated at Centinela State
23 Prison (“CEN”) in San Diego, California, and proceeding pro se, has filed a civil rights
24 complaint (“Compl.”) pursuant to 42 U.S.C. § 1983 (ECF No. 1). Plaintiff has not
25 prepaid the civil filing fee; instead he has filed a Motion to Proceed In Forma Pauperis
26 (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).
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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, except an application for writ of habeas corpus, must pay a filing fee. *See*
4 28 U.S.C. § 1914(a). An action may proceed despite the plaintiff’s failure to prepay the
5 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
6 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a
7 prisoner and is granted leave to proceed IFP, he nevertheless remains obligated to pay the
8 entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28
9 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

10 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act
11 (“PLRA”), a prisoner seeking leave to proceed IFP must also submit a “certified copy of
12 the 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, the
15 Court assesses an initial payment of 20% of (a) the average monthly deposits in the
16 account for the past six months, or (b) the average monthly balance in the account for the
17 past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C.
18 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner then
19 collects subsequent payments, assessed at 20% of the preceding month’s income, in any
20 month in which the prisoner’s account exceeds \$10, and forwards them to the Court until
21 the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

22 In support of his IFP Motion, Plaintiff has submitted the certified copy of his trust
23 account statement required by 28 U.S.C. § 1915(a)(2) and S.D. Cal. CivLR 3.2.
24 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff’s trust account statements,
25 which show that he has had no monthly deposits, has carried an average balance of zero
26 in his account during the 6-month period preceding the filing of this action, and had no

1 available funds to his credit at the time of filing. *See* 28 U.S.C. § 1915(b)(4) (providing
2 that “[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing
3 a civil action or criminal judgment for the reason that the prisoner has no assets and no
4 means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding
5 that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s
6 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him
7 when payment is ordered.”).

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

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

14 **A. Standard of Review**

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

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

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

17 However, while the court “ha[s] an obligation where the petitioner is pro se,
18 particularly in civil rights cases, to construe the pleadings liberally and to afford the
19 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
20 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not
21 “supply essential elements of claims that were not initially pled.” *Ivey v. Board of*
22 *Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

23 **B. 42 U.S.C. § 1983**

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

7 **C. Grievance Procedures**

8 Plaintiff has failed to allege a viable claim against any of the individually named
9 Defendants. While not entirely clear, Plaintiff’s complaint appears to allege that
10 Defendants have violated his constitutional rights due to the manner in which they
11 responded to his administrative grievances. (*See* Compl. at 3.) However, a prison
12 official’s alleged improper processing of an inmate’s grievances or appeals, without
13 more, cannot serve as a basis for section 1983 liability. *See generally Ramirez v. Galaza*,
14 334 F.3d 850, 860 (9th Cir. 2003) (prisoners do not have a “separate constitutional
15 entitlement to a specific prison grievance procedure”); *Mann v. Adams*, 855 F.2d 639,
16 640 (9th Cir. 1988) (due process not violated simply because defendant fails properly to
17 process grievances submitted for consideration); see also *Shallowhorn v. Molina*, 572
18 Fed. Appx. 545, 547 (9th Cir. 2014) (district court properly dismissed section 1983
19 claims against defendants who “were only involved in the appeals process” (citing
20 *Ramirez*, 334 F.3d at 860)).

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

23 **D. Transfer**

24 Plaintiff also appears to claim that his constitutional rights have been violated
25 because prison officials refuse to transfer him to a facility that is closer to his family.
26 (*See* Compl. at 3.) Plaintiff does not have a constitutional right to be housed in the

1 institution of his choice. *See Olim v. Wakinekona*, 461 U.S. 238, 249 (1983); *McKune v.*
2 *Lile*, 536 U.S. 24, 39 (2002) (“It is well settled that the decision where to house inmates
3 is at the core of prison administrators’ expertise.”)

4 Because he is proceeding pro se, however, the Court having now provided him
5 with “notice of the deficiencies in his complaint,” will also grant Plaintiff an opportunity
6 to amend. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v.*
7 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

8 **III. Conclusion and Order**

9 Good cause appearing, the Court:

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

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

19 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
20 Kernan, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
21 942883, Sacramento, California, 94283-0001;

22 4. **DISMISSES** Plaintiff’s Complaint (ECF No. 1) for failing to state a claim
23 upon which relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and
24 1915A(b)(1);

25 5. **GRANTS** Plaintiff thirty (30) days leave from the date of this Order in
26 which to file an Amended Complaint that cures the deficiencies of pleading described
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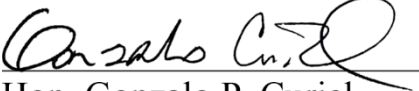
1 above. Plaintiff's Amended Complaint must be complete by itself without reference to
2 his original complaint. *See* S.D. Cal. CivLR 15.1; *Hal Roach Studios, Inc. v. Richard*
3 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading
4 supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012)
5 (noting that claims dismissed with leave to amend which are not re-alleged in an
6 amended pleading may be “considered waived if not repled.”).

7 Should Plaintiff elect not to proceed by filing an Amended Complaint within 30
8 days, the Court will enter a final Order of dismissal of this civil action for failure to state
9 a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1), and for failure to
10 prosecute in compliance with a Court Order requiring amendment. *See Ferdik*, 963 F.2d
11 at 1260-61 (dismissal for failure to prosecute permitted if plaintiff fails to respond to a
12 court's order requiring amendment of complaint); *Lira v. Herrera*, 427 F.3d 1164, 1169
13 (9th Cir. 2005) (“If a plaintiff does not take advantage of the opportunity to fix his
14 complaint, a district court may convert the dismissal of the complaint into dismissal of
15 the entire action.”).

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

18 **IT IS SO ORDERED.**

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20 Dated: November 8, 2017


21 Hon. Gonzalo P. Curiel
22 United States District Judge
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