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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 PEDRO QUIJAS,
12 CDCR #T-67616,

13 Plaintiff,

14 vs.

15 DANIEL A. PARAMO; T. SOTO; M.
16 LOPEZ; MITCHELL; I. BRAVO; R.
17 OLIVARRIA; B. SELF; G. STRATTON,
18 Defendants.

Case No.: 3:17-cv-02280-AJB-WVG

ORDER:

1) **GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
PURSUANT TO 28 U.S.C. § 1915(a)
[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)**

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23 Pedro Quijas (“Plaintiff”), is a prisoner at the Richard J. Donovan Correctional
24 Facility (“RJD”) located in San Diego, California. He has filed a civil rights Complaint
25 pursuant to 42 U.S.C. § 1983 (ECF No. 1) and a Motion to Proceed In Forma Pauperis
26 (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

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2 Because Plaintiff’s Motion to Proceed IFP complies with 28 U.S.C. § 1915(a)(2),
3 the Court grants him leave to proceed without full prepayment of the civil filing fees
4 required by 28 U.S.C. § 1914(a), but dismisses his Complaint for failing to state a claim
5 pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b).

6 **Discussion**

7 **A. Plaintiff’s IFP Motion**

8 All parties instituting any civil action, suit or proceeding in a district court of the
9 United States, except an application for writ of habeas corpus, must pay a filing fee of
10 \$400.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
11 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
12 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
13 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to
14 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”
15 *Bruce v. Samuels*, ___ S. Ct. ___, 136 S. Ct. 627, 629 (U.S. 2016); *Williams v. Paramo*,
16 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately
17 dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th
18 Cir. 2002).

19 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
20 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
21 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
22 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
23 trust account statement, the Court assesses an initial payment of 20% of (a) the average
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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. Dec. 1, 2014). The additional \$50 administrative fee does
not apply to persons granted leave to proceed IFP. *Id.*

1 monthly deposits in the account for the past six months, or (b) the average monthly
2 balance in the account for the past six months, whichever is greater, unless the prisoner
3 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
4 custody of the prisoner then collects subsequent payments, assessed at 20% of the
5 preceding month’s income, in any month in which his account exceeds \$10, and forwards
6 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2);
7 *Bruce*, 136 S. Ct. at 629.

8 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate
9 Trust Account Statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.
10 *See* ECF No. 4 at 1; *Andrews*, 398 F.3d at 1119. This report shows that Plaintiff has a
11 balance of zero in his inmate trust account. Thus, it appears Plaintiff may be unable to
12 pay any initial fee at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event
13 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
14 criminal judgment for the reason that the prisoner has no assets and no means by which to
15 pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850
16 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a
17 prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available
18 to him when payment is ordered.”).

19 For this reason, the Court grants Plaintiff leave to proceed IFP, declines to “exact”
20 an initial partial filing fee because his prison certificate indicates he “has no means to pay
21 it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California Department of
22 Corrections and Rehabilitation (“CDCR”) to garnish the entire \$350 balance of the filing
23 fees required by 28 U.S.C. § 1914 and forward them to the Clerk of the Court pursuant to
24 the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1). *See id.*

25 **B. Screening of Complaint Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

26 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
27 Answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
28 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of

1 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
2 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
3 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
4 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
5 the targets of frivolous or malicious suits need not bear the expense of responding.’”
6 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
7 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

8 “The standard for determining whether a plaintiff has failed to state a claim upon
9 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
10 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
11 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
12 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
13 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
14 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,
15 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
16 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

17 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
18 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
19 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
20 relief [is] . . . a context-specific task that requires the reviewing court to draw on its
21 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
22 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
23 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
24 (9th Cir. 2009).

25 **C. Plaintiff’s Allegations**

26 Plaintiff alleges that his cell was searched on November 10, 2015. (*See Compl.* at
27 4.) Defendants allegedly found contraband in his cell and issued a Rules Violation
28 Report (“RVR”). (*See id.*) Following his disciplinary hearing, Plaintiff was found guilty

1 of a division “F” offense. (*See id.*) As a result, Plaintiff lost “good time credits and
2 points.” (*Id.*) Plaintiff seeks an investigation by the Federal Bureau of Investigation,
3 compensatory and punitive damages and the restoration of “good time credits & points.”
4 (*Id.* at 6-7, 11.)

5 **D. Due Process**

6 To the extent Plaintiff challenges the validity of the disciplinary proceedings which
7 resulted from Defendants issuing an RVR on grounds that they violated his right to
8 procedural due process, he also fails to state a claim upon which § 1983 relief can be
9 granted. *See* 28 U.S.C. §§ 1915(e)(2), 1915A(b).

10 The Due Process Clause protects prisoners against deprivation or restraint of “a
11 protected liberty interest” and “atypical and significant hardship on the inmate in relation
12 to the ordinary incidents of prison life.” *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir.
13 2003) (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)) (internal quotation marks
14 omitted). Although the level of the hardship must be determined in a case-by-case
15 determination, courts look to:

16 1) whether the challenged condition ‘mirrored those conditions imposed upon
17 inmates in administrative segregation and protective custody,’ and thus
18 comported with the prison’s discretionary authority; 2) the duration of the
19 condition, and the degree of restraint imposed; and 3) whether the state’s
action will invariably affect the duration of the prisoner’s sentence.

20 *Ramirez*, 334 F.3d at 861 (quoting *Sandin*, 515 U.S. at 486-87). Only if an inmate has
21 alleged facts sufficient to show a protected liberty interest does the court next consider
22 “whether the procedures used to deprive that liberty satisfied Due Process.” *Ramirez*, 334
23 F.3d at 860.

24 As currently pleaded, Plaintiff’s Complaint fails to allege facts which show that the
25 disciplinary punishment he faced as a result of the RVR subjected him to any “atypical
26 and significant hardship in relation to the ordinary incidents of prison life.” *Id.*; *Sandin*,
27 515 U.S. at 584. Plaintiff does not compare the conditions of his confinement before or
28 after his disciplinary conviction. Nor does he allege the duration of his term of discipline,

1 or the degree of restraint it imposed. *Ramirez*, 334 F.3d at 861 (quoting *Sandin*, 515 U.S.
2 at 486-87).

3 And while Plaintiff does claim generally that his disciplinary conviction caused
4 him “mental and emotional stress,” his pleading contains no “factual content that allows
5 the court to draw the reasonable inference,” *Iqbal*, 556 U.S. at 678, that Defendants’
6 actions “presented a dramatic departure from the basic conditions of [Plaintiff’s]
7 indeterminate sentence,” or caused him to suffer an “atypical” or “significant hardship.”
8 *Sandin*, 515 U.S. at 584-85; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir.
9 1996), *amended by* 135 F.3d 1318 (9th Cir. 1998).

10 Finally, to the extent Plaintiff requests damages based on allegedly invalid
11 disciplinary conviction, and he seeks to “dismiss [the] RVR,” and “restore” the lost
12 custody credits that were imposed as a result of his disciplinary conviction (ECF No. 1 at
13 11), he faces an additional hurdle. *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

14 State prisoners may not challenge the fact or duration of their confinement in a
15 section 1983 action; their remedy lies in habeas corpus instead. *See Wilkinson v. Dotson*,
16 544 U.S. 74, 78 (2005). Often referred to as the “favorable termination rule” or the “*Heck*
17 bar,” this limitation applies whenever state prisoners “seek to invalidate the duration of
18 their confinement--either *directly* through an injunction compelling speedier release or
19 *indirectly* through a judicial determination that necessarily implies the unlawfulness of
20 the State’s custody.” *Id.* at 81 (emphasis in original). Accordingly, “a state prisoner’s
21 § 1983 action is barred (absent prior invalidation)--no matter the relief sought (damages
22 or equitable relief), no matter the target of the prisoner’s suit (state conduct leading to
23 conviction or internal prison proceedings)--if success in that action would necessarily
24 demonstrate the invalidity of confinement or its duration.” *Id.* at 81-82. The favorable
25 termination rule applies to prison disciplinary proceedings if those proceedings resulted
26 in the loss of good-time or behavior credits. *Edwards v. Balisok*, 520 U.S. 641, 646-48
27 (1997).

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1 Where “success in a ... [section] 1983 damages action would implicitly question
2 the validity of conviction or duration of sentence, the litigant must first achieve favorable
3 termination of his available state, or federal habeas, opportunities to challenge the
4 underlying conviction or sentence.” *Muhammad v. Close*, 540 U.S. 749, 751 (2004)
5 (citing *Heck*, 512 U.S. 477; *Edwards*, 520 U.S. at 648). Because Plaintiff contends the
6 punishment imposed as a result of his RVR affects the duration of his sentence (ECF No.
7 1 at 11), even a well-pleaded due process claim would be barred unless Plaintiff can also
8 show his disciplinary conviction has been reversed, expunged, or otherwise invalidated.
9 *Heck*, 512 U.S. at 486-87.

10 Here, Plaintiff contends he was convicted based upon claims that he was “set up”;
11 therefore, his claims necessarily imply the invalidity of his disciplinary conviction. *Id.* at
12 487. Because he has not further alleged his conviction has already been reversed,
13 expunged, or otherwise invalidated, Plaintiff does not state a plausible claim for relief,
14 and his Fourteenth Amendment claims must be dismissed. *Id.*; *see also Coley v. Duffy*,
15 No. 1:13-CV-00912-BAM-PC, 2016 WL 1359799, at *6 (E.D. Cal. Apr. 5, 2016)
16 (dismissing prisoner’s § 1983 complaint alleging loss of custody credits and of being
17 falsely charged with a disciplinary violation pursuant to 28 U.S.C. § 1915(e)(2) and §
18 1915A as barred by *Heck*).

19 **E. Eighth Amendment claims**

20 Plaintiff claims that the false disciplinary hearing and loss of good time credits
21 violated his Eighth Amendment rights because he suffered “mental and emotional
22 distress.” (Compl. at 5.)

23 Prison officials have a duty under the Eighth Amendment to avoid excessive risks
24 to inmate safety. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To state a claim
25 under the Eighth Amendment, Plaintiff must allege Defendants were “deliberate[ly]
26 indifferen[t]” to “conditions posing a substantial risk of serious harm.” *Id.* Deliberate
27 indifference is more than mere negligence, but less than purpose or knowledge. *See id.* at
28 836.

1 A prison official acts with deliberate indifference only if he “knows of and
2 disregards an excessive risk to inmate health and safety; the official must both be aware
3 of facts from which the inference could be drawn that a substantial risk of serious harm
4 exists, and he must also draw the inference.” *Id.* at 837. Plaintiff offers no facts from
5 which the Court could find that any of the named Defendants acted with “deliberate
6 indifference” to his health and safety. In addition, Plaintiff cannot recover monetary
7 damages for a “mental or emotional injury” without a “prior showing of physical injury.”
8 42 U.S.C. § 1997e(e).

9 Therefore, the Court dismisses Plaintiff’s Eighth Amendment cruel and unusual
10 punishment claims for failing to state a claim upon which relief could be granted.

11 **F. Leave to Amend**

12 A pro se litigant must be given leave to amend his pleading to state a claim unless
13 it is absolutely clear the deficiencies cannot be cured by amendment. *See Lopez*, 203 F.3d
14 at 1130 (noting leave to amend should be granted when a complaint is dismissed under
15 28 U.S.C. § 1915(e) “if it appears at all possible that the plaintiff can correct the defect”).
16 Therefore, while the Court finds Plaintiff’s Complaint fails to state a claim upon which
17 relief can be granted, it will provide him a chance to fix the pleading deficiencies
18 discussed in this Order. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing
19 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

20 **Conclusion and Order**

21 For all the reasons discussed, the Court:

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

24 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
25 Plaintiff’s trust account the \$350 filing fee owed in this case by garnishing monthly
26 payments from his account in an amount equal to twenty percent (20%) of the preceding
27 month’s income and forwarding those payments to the Clerk of the Court each time the
28 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL**

1 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
2 ASSIGNED TO THIS ACTION.

3 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
4 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.


5 4. **DISMISSES** Plaintiff's Complaint for failing to state a claim upon which
6 § 1983 relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

7 5. **GRANTS** Plaintiff forty-five (45) days leave to file an Amended Complaint
8 which cures all the deficiencies of pleading described in this Order. Plaintiff is cautioned,
9 however, that should he choose to file an Amended Complaint, it must be complete by
10 itself, comply with Federal Rule of Civil Procedure 8(a), and that any claim not re-
11 alleged will be considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v.*
12 *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended
13 pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.
14 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an
15 amended pleading may be “considered waived if not repled.”).

16 If Plaintiff fails to follow these instructions and/or files an Amended Complaint
17 that still fails to state a claim, his case may be dismissed without further leave to amend.
18 *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take
19 advantage of the opportunity to fix his complaint, a district court may convert the
20 dismissal of the complaint into dismissal of the entire action.”).

21 **IT IS SO ORDERED.**

22
23 Dated: December 7, 2017

24 
25 Hon. Anthony J. Battaglia
26 United States District Judge
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28