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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 JOHN LELAND COMBS,
11 Reg. No. 63884298,

12 Plaintiff,

13 vs.

14 NORBERTO RIBAC, U.S. Border Patrol
15 Agent; JORGE ARTILES, U.S. Border
16 Patrol Agent; UNITED STATES
17 CUSTOMS AND BORDER
18 PROTECTION AGENCY,

19 Defendants.

Case No.: 3:17-cv-02381-WQH-BGS

ORDER

19 Plaintiff John Leland Combs, a federal detainee currently housed at the Metropolitan
20 Correctional Center (“MCC”) in San Diego, California, and proceeding pro se, has filed a
21 civil rights complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1). Combs claims
22 Defendants Norberto Ribac and Jorge Artiles, both U.S. Customs and Border Patrol
23 Agents, together with the U.S. Department of Homeland Security Customs and Border
24 Protection Agency (“CBP”), violated his Fourth, Fifth and Fourteenth Amendment rights
25 by racially profiling him and using excessive force during the course of his arrest near a
26 checkpoint in Tecate, California, on September 2, 2017. Compl. at 1–9. Combs has not
27 prepaid the \$400 filing fee required by 28 U.S.C. § 1914(a) to commence a civil action;
28 instead, he has filed a Motion to Proceed IFP (ECF No. 2).

1 Combs has also filed a Motion and letter addressed to the Clerk of Court requesting
2 an extension of time in which to prosecute this case until his “criminal trial concerning this
3 same matter is complete.” (ECF No. 4 at 1; ECF No. 6 at 2–3). The Court may “take
4 notice of proceedings in other courts, both within and without the federal judicial system,
5 if those proceedings have a direct relation to matters at issue.” *Bias v. Moynihan*, 508 F.3d
6 1212, 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th
7 Cir. 2002)). The Court takes judicial notice of *United States v. Combs*, S.D. Cal. Criminal
8 Case No. 3:17-cr-03026-CAB-1, currently pending before Judge Bencivengo, in which a
9 criminal complaint filed on September 5, 2017 charges Plaintiff with one count of assault
10 on a federal officer in violation of 18 U.S.C. § 111 and one count of high speed flight from
11 an immigration checkpoint in violation of 18 U.S.C. § 758. A jury trial in *United States v.*
12 *Combs*, S.D. Cal. Criminal Case No. 3:17-cr-03026-CAB-1, is currently set for March
13 19, 2018.

14 **I. Motion to Proceed IFP**

15 All parties instituting any civil action, suit or proceeding in a district court of the
16 United States, except an application for writ of habeas corpus, must pay a filing fee of
17 \$400.¹ *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
18 prepay the entire fee only if he is granted leave to proceed *in forma pauperis* pursuant to
19 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007);
20 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is
21 granted leave to proceed *IFP* remains obligated to pay the entire fee in “increments” or
22 “installments,” *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016), and regardless of whether
23 his action is ultimately dismissed, *see* 28 U.S.C. § 1915(b); *Taylor v. Delatoore*, 281 F.3d
24 844, 847 (9th Cir. 2002).

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27 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50.
28 *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court 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 Section 1915(a)(2) requires prisoners seeking leave to proceed *IFP* to submit a
2 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
3 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
4 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
5 trust account statement, the Court assesses an initial payment of 20% of (a) the average
6 monthly deposits in the account for the past six months, or (b) the average monthly balance
7 in the account for the past six months, whichever is greater, unless the prisoner has no
8 assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody
9 of the prisoner then collects subsequent payments, assessed at 20% of the preceding
10 month’s income, in any month in which his account exceeds \$10, and forwards those
11 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,
12 136 S. Ct. at 629.

13 In support of his *IFP* Motion, Combs has submitted a copy of his Federal Bureau of
14 Prisons “Trulincs” Commissary and Trust Account Activity. *See* ECF No. 2 at 3–4; 28
15 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. These statements
16 show that while Combs has had a total of \$175 deposited to his account since September
17 12, 2017, he had an available balance of only \$.44 at the time of filing. *See* ECF No. 2 at
18 3–4. Thus, the Court assesses Combs initial partial filing fee to be \$5.83 pursuant to 28
19 U.S.C. § 1915(b)(1), but acknowledges he may be unable to pay that fee at this time. *See*
20 28 U.S.C. § 1915(b)(4) (“In no event shall a prisoner be prohibited from bringing a civil
21 action or appealing a civil action or criminal judgment for the reason that the prisoner has
22 no assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at
23 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a
24 prisoner’s *IFP* case based solely on a “failure to pay . . . due to the lack of funds available
25 to him when payment is ordered.”).

26 Therefore, the Court GRANTS Combs’ Motion to Proceed *IFP* (ECF No. 2),
27 declines to exact the initial filing fee because his trust account statements indicate he may
28 have no means to pay it, and directs the Warden of the MCC or his designee to instead

1 collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and forward
2 them to the Clerk of the Court pursuant to the installment payment provisions set forth in
3 28 U.S.C. § 1915(b)(1).

4 **II. Initial Screening**

5 **A. Standard of Review**

6 Because Combs is a prisoner and is proceeding *IFP*, his complaint requires a
7 pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
8 statutes, the Court must sua sponte dismiss a prisoner’s *IFP* complaint, or any portion of
9 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
10 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc)
11 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
12 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
13 the targets of frivolous or malicious suits need not bear the expense of responding.’”
14 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
15 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

16 “The standard for determining whether a plaintiff has failed to state a claim upon
17 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
18 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
19 1108, 1112 (9th Cir. 2012). Federal Rule of Civil Procedure 12(b)(6) requires a complaint
20 to “contain sufficient factual matter, accepted as true, to state a claim to relief that is
21 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations
22 omitted). 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 relief
25 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
26 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
27 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
28 standard. *Id.*

1 **B. 42 U.S.C. § 1983**

2 “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a right
3 secured by the Constitution and laws of the United States, and (2) that the deprivation was
4 committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698
5 F.3d 1128, 1138 (9th Cir. 2012) (emphasis added). Combs is a federal pretrial detainee
6 seeking to sue the CBP and two of its agents for allegedly violating his constitutional rights
7 during the course of his arrest. Compl. at 2–12. Combs fails to allege that any Defendant
8 acted under color of state law. Therefore, he may not proceed under § 1983. *Tsao*, 698
9 F.3d at 1138.

10 **C. Bivens**

11 Because Combs is proceeding without counsel, however, the Court will liberally
12 construe the constitutional claims alleged to have arisen at the time of his arrest under
13 *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388
14 (1971). *Bivens* is the “federal analogue” to § 1983. *Hartman v. Moore*, 547 U.S. 250, 254,
15 255 n.2 (2006). In *Bivens*, the Supreme Court recognized an implied cause of action for
16 damages against federal officers for alleged violation of a citizen’s rights under the Fourth
17 Amendment. 403 U.S. at 397; *Iqbal*, 556 U.S. at 675. After *Bivens*, the Supreme Court
18 has recognized a similar cause of action implied against federal actors for alleged violations
19 of the Due Process Clause of the Fifth Amendment and the Cruel and Unusual Punishment
20 clause of the Eighth Amendment. *See Correctional Services Corp. v. Malesko*, 534 U.S.
21 61, 67–68 (2001).

22 In *Ziglar v. Abbasi*, the Supreme Court explained that

23 the Court has made clear that expanding the *Bivens* remedy is now a
24 “disfavored” judicial activity. This is in accord with the Court’s observation
25 that it has “consistently refused to extend *Bivens* to any new context or new
26 category of defendants.” Indeed, the Court has refused to do so for the past
27 30 years.

28 137 S. Ct. 1843, 1857 (2017) (internal citations omitted). The Supreme Court stated, “The
Court’s precedents now make clear that a *Bivens* remedy will not be available if there are

1 ‘special factors counseling hesitation in the absence of affirmative action by Congress.’”
2 *Id.* (quoting *Carlson v. Green*, 446 U.S. 1, 18 (1980)). The Supreme Court further
3 instructed that the district court must determine whether a particular case presents a new
4 *Bivens* context in addition to determining whether to proceed with a special factor analysis.
5 *Id.* at 1864.

6 **1. Defendant CBP**

7 As noted above, Combs seeks to sue two CBP agents as well as the CBP agency
8 itself. Compl. at 1–2. However, a *Bivens* claim may only be maintained against officials
9 acting under color of federal law in their individual capacities—neither the United States,
10 nor any of its agencies, is a proper defendant. *FDIC v. Meyer*, 510 U.S. 471, 486 (1994)
11 (federal agencies are not proper defendants in a *Bivens* action). Because CBP is a federal
12 agency and not an official, it may not be sued under *Bivens*. Accordingly, CBP must be
13 dismissed as a Defendant in this matter pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b).
14 *See Bucio v. U.S. Customs & Border Prot.*, No. CIV. 06-0917 BEN(JMA), 2007 WL
15 173838, at *2 (S.D. Cal. Jan. 9, 2007) (sua sponte dismissing *Bivens* action against CPB
16 for failing to state a claim per 28 U.S.C. § 1915(e)(2) and § 1915A(b)).

17 **2. Defendants Ribac and Artiles**

18 In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court concluded that a §
19 1983 claim which “necessarily implies the invalidity” of an underlying criminal judgment
20 is not cognizable until the criminal judgment has been reversed, set aside, expunged,
21 invalidated, or called into question on federal habeas review. *Id.* at 486–87; *see also Martin*
22 *v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996) (applying *Heck*’s favorable termination rule to
23 *Bivens* actions). Combs contends that Ribac and Artiles violated his Fourth, Fifth and
24 Fourteenth Amendment rights on September 2, 2017, by “racially profiling,” and
25 prolonging his detention after he consented to a search of his vehicle, and then
26 “aggressively” “div[ing] through the driver[’]s window” of his car while “striking” and
27 “punching” him in the head. Compl. at 3–6, 8–9. Combs’ Fourth Amendment claims
28 against Defendants Ribac and Artiles could be barred by *Heck* to the extent they may

1 “necessarily imply the invalidity” of his criminal judgment should he ultimately be
2 convicted for the crimes for which he is currently awaiting trial before in *U.S. v. Combs*,
3 S. D. Cal. Criminal Case No. 3:17-cr-03026-CAB-1.

4 However, *Heck* is only implicated when there exists “‘a conviction or sentence that
5 has not been . . . invalidated,’ that is to say, an ‘outstanding criminal judgment.’” *Wallace*
6 *v. Kato*, 549 U.S. 384, 393 (2007) (quoting *Heck*, 512 U.S. at 486–87). In *Wallace*, the
7 Supreme Court specifically rejected the contention that “an action which would impugn an
8 *anticipated future conviction* cannot be brought until that conviction occurs and is set
9 aside.” *Id.* at 393 (italics in original). Thus, if a plaintiff raises Fourth Amendment claims
10 in a § 1983 or *Bivens* action while he remains subject to criminal prosecution, but before
11 he is convicted or exonerated, as Combs has here, or if he “files any other claim related to
12 rulings that will likely be made in a pending or anticipated criminal trial, it is within the
13 power of the district court, and in accord with common practice, to stay the civil action
14 until the criminal case or the likelihood of a criminal case is ended.”² *Wallace*, 549 U.S.
15 at 393–94 (citing *Heck*, 512 U.S. at 487–88, n.8). “If the plaintiff is then convicted, and if
16 the stayed civil suit would impugn that conviction, *Heck* requires dismissal; otherwise, the
17 case may proceed.” *Id.*

18 **III. Conclusion and Order**

19 Based on the foregoing, the Court:

- 20 1. GRANTS Combs’ Motion to Proceed IFP (ECF No. 2).
- 21 2. DIRECTS the Warden of the MCC, or his designee, to collect from Combs’
22 trust account the \$350 filing fee owed in this case by garnishing monthly payments from
23 his account in an amount equal to twenty percent (20%) of the preceding month’s income
24 and forwarding those payments to the Clerk of the Court each time the amount in Combs’
25 account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE
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28 ² *Wallace* holds that a stay of the civil action is proper, because under common law, a prisoner’s false
arrest claim accrues “when legal process was initiated against him.” 549 U.S. at 390.

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

3 3. DIRECTS the Clerk of the Court to serve a copy of this Order on Wayne
4 Smith, Warden, Metropolitan Correctional Center, 880 Union Street, San Diego,
5 CA 92101.

6 4. DISMISSES Defendant United States Customs and Border Protection Agency
7 and DIRECTS the Clerk of the Court to terminate the United States Customs and Border
8 Protection Agency as a party to this action based on Combs' failure to state a claim upon
9 which relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

10 5. GRANTS Combs' Motion for Extension of Time (ECF No. 6) and DIRECTS
11 the Clerk of the Court to STAY the remainder of the proceedings in this civil action pending
12 resolution of Combs' criminal proceedings in *United States v. Combs*, S.D. Cal. Civil
13 Criminal Case No. 3:17-cr-03026-CAB-1.

14 6. ORDERS Combs to file a Motion requesting the stay in these proceedings be
15 lifted, together with a Motion requesting U.S. Marshal service upon Defendants Ribac and
16 Artiles pursuant to Fed. R. Civ. P. 4(c)(3) and 28 U.S.C. § 1915(d), within 30 days of the
17 conclusion of his criminal case.

18 Dated: March 7, 2018

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20 Hon. William Q. Hayes
21 United States District Court
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