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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ALLEN HAMMLER,
12 CDCR #F-73072,

13 Plaintiff,

14 vs.

15 J. HERNANDEZ, Correctional Officer;
16 A. MAGALLANES, Correctional Officer,

17 Defendants.
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Case No.: 3:18-cv-00259-CAB-MDD

ORDER

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[ECF No. 3]**

AND

**2) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE PURSUANT TO
28 U.S.C. § 1915(d) AND
Fed. R. Civ. P. 4(c)(3)**

22 ALLEN HAMMLER (“Plaintiff”), proceeding pro se and while incarcerated at
23 Kern Valley State Prison (“KVSP”) in Delano, California, filed a civil rights Complaint
24 pursuant to 42 U.S.C. § 1983 on February 2, 2018.¹ *See* Compl., ECF No. 1.
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¹ Plaintiff has since been transferred to California Men’s Colony (“CMC”), in San Luis Obispo, California. *See* ECF No. 4.

1 Plaintiff claims two correctional officers at Richard J. Donovan Correctional
2 Facility (“RJD”), in San Diego, California, retaliated against him and subjected him to
3 cruel and unusual punishment in violation of the First and Eighth Amendments while he
4 was incarcerated there in November and December 2016. *Id.* at 1-25.² Plaintiff alleges to
5 have exhausted available administrative remedies “up and through [the] Third Level” of
6 review via CDC 602 Log Nos. RJD-B-16-04715 and RJD-B-17-00182, his Complaint is
7 verified under penalty of perjury, and he seeks \$300,000 in general and punitive
8 damages. *Id.* at 26, 28-29.

9 Because he did not pay the civil filing fee at the time of filing, the Court dismissed
10 the case on February 13, 2018 pursuant to 28 U.S.C. § 1914(a), but granted Plaintiff leave
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13 ² The Court takes judicial notice that Plaintiff has two other civil rights action currently
14 pending in this Court, one before Judge Battaglia in *Hammler v. Aviles*, S.D. Cal. Civil
15 Case No. 3:17-cv-01185-AJB-WVG (“*Aviles*”), and another before Judge Houston in
16 *Hammler v. Alvarez, et al.*, S.D. Cal. Civil Case No. 3:17-cv-01533-JAH-WVG
17 (“*Alvarez*”). *See Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (court “‘may take
18 notice of proceedings in other courts, both within and without the federal judicial system,
19 if those proceedings have a direct relation to matters at issue.’”) (quoting *Bennett v.*
20 *Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)). Both *Aviles* and *Alvarez* involve
21 alleged incidents of excessive force at RJD, but those cases appear unrelated to each other
22 insofar as they involve different correctional officer defendants and allege separate causes
23 of action arising more than several weeks apart. *See Aviles*, ECF No. 1 at 1, 3-9; *Alvarez*,
24 ECF No. 1 at 1-15. Plaintiff’s retaliation claims in this case appear to arise *after* Plaintiff
25 filed administrative grievances related to the excessive force incidents at issue in *Aviles*.
26 *See* ECF No. 1 at 3. Plaintiff is hereby cautioned that he may not raise duplicative claims
27 in separate actions, *see Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995)
28 (prisoner’s complaint is considered frivolous under 28 U.S.C. § 1915 if it “merely repeats
pending or previously litigated claims.”), *and* that he is “required to pay the full amount of
a filing fee,” for *each* civil action he has filed. *See* 28 U.S.C. § 1915(a)(b)(1); *Bruce v.*
Samuels, ___ U.S. ___, 136 S. Ct. 627, 632 (2016) (“Just as § 1915(b)(1) calls for assessment
of ‘an initial partial filing fee’ each time a prisoner ‘brings a civil action or files an appeal’
(emphasis added), so its allied provision, § 1915(b)(2), triggered immediately after, calls
for ‘monthly payments of 20 percent of the preceding month’s income’ simultaneously for
each action pursued.”).

1 to either pay the \$400 fee required by statute, or to file a Motion to Proceed In Forma
2 Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

3 On February 20, 2018, Plaintiff filed a Motion to Proceed IFP (ECF No. 3).

4 **I. Motion to Proceed In Forma Pauperis**

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

15 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
16 “certified copy of the trust fund account statement (or institutional equivalent) for ... the
17 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
18 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
19 trust account statement, the Court assesses an initial payment of 20% of (a) the average
20 monthly deposits in the account for the past six months, or (b) the average monthly
21 balance in the account for the past six months, whichever is greater, unless the prisoner
22 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
23 custody of the prisoner then collects subsequent payments, assessed at 20% of the
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26 ³ 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 preceding month's income, in any month in which his account exceeds \$10, and forwards
2 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2);
3 *Bruce*, 136 S. Ct. at 629.

4 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate
5 Statement Report as well as a Prison Certificate completed by an accounting officer at
6 KVSP. *See* ECF No. 3 at 4-6; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*,
7 398 F.3d at 1119. These statements show that Plaintiff has carried no average monthly
8 balance, has had no monthly deposits to his account over the 6-month period immediately
9 preceding the filing of his Complaint, and, consequently, had no available balance on the
10 books at the time of filing. *See* ECF No. 3 at 4, 6. Based on this accounting, no initial
11 partial filing fee is assessed. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event
12 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
13 criminal judgment for the reason that the prisoner has no assets and no means by which to
14 pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850
15 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a
16 prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds available
17 to him when payment is ordered.”).

18 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 3),
19 declines to exact any initial filing fee because his prison certificate indicates he has “no
20 means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California
21 Department of Corrections and Rehabilitation (“CDCR”), or his designee, to instead
22 collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and
23 forward them to the Clerk of the Court pursuant to the installment payment provisions set
24 forth in 28 U.S.C. § 1915(b)(1). *See id.*

25 **II. Sua Sponte Screening pursuant to 28 U.S.C. § 1915(e)(2) 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 “contain sufficient factual matter, accepted
15 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
16 662, 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 As currently pleaded, the Court finds Plaintiff’s Complaint contains “sufficient
26 factual matter, accepted as true,” to state retaliation and Eighth Amendment failure to
27 protect claims for relief that are “plausible on its face,” *Iqbal*, 556 U.S. at 678, and
28 therefore, sufficient to survive the “low threshold” for proceeding past the sua sponte

1 screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).⁴ *See Wilhelm*, 680 F.3d at
2 1123; *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (“Within the prison
3 context, a viable claim of First Amendment retaliation entails five basic elements: (1) An
4 assertion that a state actor took some adverse action against an inmate (2) because of (3)
5 that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of
6 his First Amendment rights, and (5) the action did not reasonably advance a legitimate
7 correctional goal.”); *United States v. Williams*, 842 F.3d 1143, 1153 (9th Cir. 2016) (the
8 Eighth Amendment “requires that prison officials ‘must take reasonable measures to
9 guarantee the safety of the inmates.’”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 833
10 (1994) (“[P]rison officials have a duty [under the Eighth Amendment] ... to protect
11 prisoners from violence at the hands of other prisoners.”)).

12 Therefore, the Court will order the U.S. Marshal to effect service upon Defendants
13 J. Hernandez and A. Magallanes on Plaintiff’s behalf. *See* 28 U.S.C. § 1915(d) (“The
14 officers of the court shall issue and serve all process, and perform all duties in [IFP]
15 cases.”); FED. R. CIV. P. 4(c)(3) (“[T]he court may order that service be made by a United
16 States marshal or deputy marshal ... if the plaintiff is authorized to proceed in forma
17 pauperis under 28 U.S.C. § 1915.”).

18 **III. Conclusion and Orders**

19 For the reasons discussed, the Court:

- 20 1) **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 3);
- 21 2) **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
22 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing
23 monthly payments from his account in an amount equal to twenty percent (20%) of the
24 preceding month’s income and forwarding those payments to the Clerk of the Court each
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27 ⁴ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative
28 of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may
choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

1 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL
2 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
3 ASSIGNED TO THIS ACTION;

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

6 4) **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF
7 No. 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for
8 Defendants J. HERNANDEZ and A. MAGALLANES. In addition, the Clerk will
9 provide Plaintiff with a certified copy of this Order, a certified copy of his Complaint,
10 and the summons so that he may serve these Defendants. Upon receipt of this "IFP
11 Package," Plaintiff must complete the Form 285s as completely and accurately as
12 possible, *include an address where Defendants Hernandez and Magallanes may be*
13 *served, see S.D. CAL. CIVLR 4.1.c*, and return them to the United States Marshal
14 according to the instructions the Clerk provides in the letter accompanying his IFP
15 package;

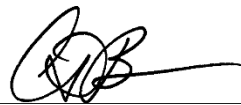
16 5) **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
17 upon Defendants HERNANDEZ and MAGALLANES as directed by Plaintiff on the
18 USM Form 285s provided to him. All costs of that service will be advanced by the
19 United States. *See* 28 U.S.C. § 1915(d); FED. R. CIV. P. 4(c)(3);

20 6) **ORDERS** Defendants HERNANDEZ and MAGALLANES, once served, to
21 reply to Plaintiff's Complaint within the time provided by the applicable provisions of
22 Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant
23 may occasionally be permitted to "waive the right to reply to any action brought by a
24 prisoner confined in any jail, prison, or other correctional facility under section 1983,"
25 once the Court has conducted its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2)
26 and § 1915A(b), and thus, has made a preliminary determination based on the face on the
27 pleading alone that Plaintiff has a "reasonable opportunity to prevail on the merits,"
28 defendant is required to respond); and

1 7) **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
2 serve upon Defendants HERNANDEZ and MAGALLANES, or, if appearance has been
3 entered by counsel, upon Defendants' counsel, a copy of every further pleading, motion,
4 or other document submitted for the Court's consideration pursuant to FED. R. CIV. P.
5 5(b). Plaintiff must include with every original document he seeks to file with the Clerk
6 of the Court, a certificate stating the manner in which a true and correct copy of that
7 document has been served on Defendant or his counsel, and the date of that service.
8 *See S.D. CAL. CIVLR 5.2.* Any document received by the Court which has not been
9 properly filed with the Clerk, or which fails to include a Certificate of Service upon the
10 Defendants, may be disregarded.

11 **IT IS SO ORDERED.**

12 Dated: April 6, 2018



Hon. Cathy Ann Bencivengo
United States District Judge