

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROY MASON,

Plaintiff,

v.

MARK CALABRESE dba ROCKIE’S
FROZEN YOGURT, GORDON T
FROST TRUST (DECEASED), ALBERT
A FROST JR. TRUST, and DOES 1-10
INCLUSIVE,

Defendants.

Case No.: 18-CV-368 JLS (JMA)

**ORDER: (1) GRANTING MOTION
TO PROCEED IN FORMA
PAUPERIS; AND (2) DIRECTING
U.S. MARSHAL TO EFFECT
SERVICE OF SUMMONS AND
COMPLAINT PURSUANT TO 28
U.S.C. § 1915(d) AND FED. R. CIV. P.
4(c)(3)**

(ECF No. 2)

Plaintiff Roy Mason filed an action pursuant to the Americans with Disabilities Act (“Compl.,” ECF No. 1), and a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a), (IFP Mot., ECF No. 2).

IFP Motion

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of

1 \$400.¹ See 28 U.S.C. § 1914(a). An action may proceed despite the plaintiff’s failure to
2 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
3 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
4 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). A federal court may authorize the
5 commencement of an action without the prepayment of fees if the party submits an
6 affidavit, including a statement of assets, showing that he is unable to pay the required
7 filing fee. 28 U.S.C. § 1915(a).

8 In support of his IFP Motion, Plaintiff has submitted an affidavit of his financial
9 status pursuant to 28 U.S.C. § 1915(a)(1) and Civil Local Rule 3.2. These statements show
10 that Plaintiff receives \$867.00 in monthly disability benefits, is not employed or married,
11 and has no assets. (IFP Mot. 1–3.)² Plaintiff represents that he has \$980.00 in monthly
12 expenses. Thus it appears that Plaintiff does not have the funds to pay the requisite filing
13 fee. Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP.

14 **Initial Screening Pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A**

15 The Court must screen every civil action brought pursuant to 28 U.S.C. § 1915(a)
16 and dismiss any case it finds “frivolous or malicious,” “fails to state a claim on which relief
17 may be granted,” or “seeks monetary relief against a defendant who is immune from relief.”
18 28 U.S.C. § 1915(e)(2)(B); see also *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001)
19 (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez v.*
20 *Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e)
21 “not only permits but requires a district court to dismiss an in forma pauperis complaint
22 that fails to state a claim”).

23 As amended by the Prison Litigation Reform Act (“PLRA”), 28 U.S.C. § 1915(e)(2)
24 mandates that the court reviewing an action filed pursuant to the IFP provisions of § 1915

25
26 ¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1, 2013, must pay an
27 additional administrative fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees,
28 District Court Misc. Fee Schedule) (eff. May 1, 2013). However, the additional \$50 administrative fee is
waived if the plaintiff is granted leave to proceed IFP. *Id.*

² Pin citations refer to the CM/ECF numbers electronically stamped at the top of each page.

1 make and rule on its own motion to dismiss before directing the Marshal to effect service
2 pursuant to Federal Rule of Civil Procedure 4(c)(3). *See* Fed. R. Civ. P. 4(c)(3); *Navarette*
3 *v. Pioneer Med. Ctr.*, No. 12-cv-0629-WQH (DHB), 2013 WL 139925, at *1 (S.D. Cal.
4 Jan. 9, 2013).

5 All complaints must contain a “short and plain statement of the claim showing that
6 the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are
7 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by
8 mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
9 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007)). “[D]etermining whether a
10 complaint states a plausible claim is context-specific, requiring the reviewing court to draw
11 on its experience and common sense.” *Iqbal*, 556 U.S. at 663–64 (citing *Twombly*, 550
12 U.S. at 556).

13 “When there are well-pleaded factual allegations, a court should assume their
14 veracity, and then determine whether they plausibly give rise to an entitlement of relief.”
15 *Iqbal*, 556 U.S. at 679. “[W]hen determining whether a complaint states a claim, a court
16 must accept as true all allegations of material fact and must construe those facts in the light
17 most favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see*
18 *also Andrews v. King*, 393 F.3d 1113, 1121 (9th Cir. 2005); *Barren v. Harrington*, 152
19 F.3d 1193, 1194 (9th Cir. 1998) (“The language of § 1915(e)(2)(B)(ii) parallels the
20 language of Federal Rule of Civil Procedure 12(b)(6).”).

21 “While factual allegations are accepted as true, legal conclusions are not.” *Hoagland*
22 *v. Astrue*, No. 1:12-cv-00973-SMS, 2012 WL 2521753, at *3 (E.D. Cal. June 28, 2012)
23 (citing *Iqbal*, 556 U.S. at 678). Courts cannot accept legal conclusions set forth in a
24 complaint if the plaintiff has not supported her contentions with facts. *Id.* (citing *Iqbal*,
25 556 U.S. at 679).

26 A prima facie claim under 42 U.S.C. § 12182(a) requires a plaintiff to show: (1) he
27 is disabled; (2) the defendant’s business is a place of public accommodation; and (3)
28 plaintiff was denied access because of his disability. *Hernandez v. Polanco Enter., Inc.*,

1 19 F. Supp. 3d 918, 930 (N.D. Cal. 2013) (citing *Molski v. M.J. Cable, Inc.*, 481 F.3d 724,
2 730 (9th Cir. 2007)). Here, Plaintiff alleges that he is mobility impaired and uses a
3 wheelchair. (Compl. ¶ 10.) He alleges that Defendants’ business is open to the public and
4 does not have a table that would fit his wheelchair. (*Id.* ¶ 11.) He further alleges that
5 Defendants’ business has not cured its failure to provide full and equal access. (*Id.* ¶ 12.)
6 The Court finds Plaintiff’s complaint sufficient to survive the “low threshold” for
7 proceeding past the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and
8 1915A(b). *See Wilhelm*, 680 F.3d at 1123; *Iqbal*, 556 U.S. at 678.

9 CONCLUSION

10 Good cause appearing, the Court:

11 1. **GRANTS** Plaintiff’s IFP Motion, (ECF No. 2), pursuant to 28 U.S.C.
12 § 1915(a).

13 2. **DIRECTS** the Clerk of Court to issue a summons as to Plaintiff’s Complaint,
14 (ECF No. 1), upon Defendants and forward it to Plaintiff along with a blank U.S. Marshal
15 Form 285 for the named Defendants. In addition, the Clerk is **DIRECTED** to provide
16 Plaintiff with a certified copy of this Order and a certified copy of his Complaint, (ECF
17 No. 1), and the summons so that he may serve the named Defendants. Upon receipt of this
18 “IFP Package,” Plaintiff is **DIRECTED** to complete the Form 285 as completely and
19 accurately as possible, and to return it to the United States Marshal according to the
20 instructions provided by the Clerk in the letter accompanying the IFP package.

21 3. Upon receipt, the Court **ORDERS** the U.S. Marshal to serve a copy of the
22 Complaint and summons upon the named Defendant as directed by Plaintiff on the USM
23 Form 285. All costs of service will be advanced by the United States. *See* 28 U.S.C.
24 § 1915(d); Fed. R. Civ. P. 4(c)(3).

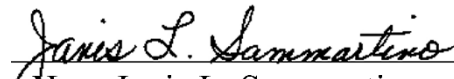
25 4. Defendants are thereafter **ORDERED** to reply to Plaintiff’s Complaint within
26 the time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a).
27 *See* 42 U.S.C. § 1997e(g) (noting that once the Court has conducted its *sua sponte* screening
28 pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus has made a preliminary

1 determination based on the face on the pleading alone that Plaintiff has a “reasonable
2 opportunity to prevail on the merits,” the defendant is required to respond).

3 5. Plaintiff **SHALL SERVE** upon the Defendants or, if appearance has been entered
4 by counsel, upon Defendants’ counsel, a copy of every further pleading or other document
5 submitted for consideration by the Court. Plaintiff must include with the original paper to
6 be filed with the Clerk, a certificate stating the manner in which a true and correct copy of
7 the document was served on the Defendants, or counsel for Defendants, and the date of
8 that service. Any paper received by the Court which has not been properly filed with the
9 Clerk, or which fails to include a Certificate of Service, may be disregarded.

10 **IT IS SO ORDERED.**

11 Dated: March 7, 2018


12 Janis L. Sammartino
13 Hon. Janis L. Sammartino
14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28