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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ROBERT HATCHER,
12 Booking No. 17182375,

Plaintiff,

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14 vs.

15 Dr. BLAKE, et al.,

16 Defendants.
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Case No.: 3:18-cv-00561-MMA-MDD

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[Doc. No. 6]**

**2) DISMISSING COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
AND § 1915A(b)**

AND

**3) DENYING EX PARTE MOTION
TO SET PRE-TRIAL HEARING
DATES
[Doc. No. 3]**

25 ROBERT HATCHER (“Plaintiff”), while in custody at the San Diego Central Jail
26 (“SDCJ”), filed this civil action pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown*
27 *Federal Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), on
28 March 16, 2018. *See* Compl., Doc. No. 1.

1 Plaintiff did not pay the \$400 civil and administrative filing fee required by 28
2 U.S.C. § 1914(a) to commence a civil action at the time he filed his Complaint. Instead,
3 he subsequently filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28
4 U.S.C. § 1915(a) (Doc No. 6), followed by an ex-parte Motion seeking to set pre-trial
5 hearing dates (Doc. No. 3), as well as additional exhibits in support of his Complaint
6 (Doc. No. 5).

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

8 In order to commence a civil action, Plaintiff must pay a filing fee of \$400.¹ See 28
9 U.S.C. § 1914(a). The action may proceed despite his failure to prepay the entire fee only
10 if Plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See *Andrews*
11 *v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176,
12 1177 (9th Cir. 1999). However, because Plaintiff is a prisoner, even if he is granted leave
13 to proceed IFP, he will remain obligated to pay the entire filing fee in “increments” or
14 “installments,” *Bruce v. Samuels*, __ U.S. __, 136 S. Ct. 627, 629 (2016); *Williams v.*
15 *Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether his action is
16 dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th
17 Cir. 2002).

18 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
19 “certified copy of the trust fund account statement (or institutional equivalent) for ... the
20 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
21 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
22 trust account statement, the Court assesses an initial payment of 20% of (a) the average
23 monthly deposits in the account for the past six months, or (b) the average monthly
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28 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
fee of \$50. 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 balance in the account for the past six months, whichever is greater, unless the prisoner
2 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
3 custody of the prisoner then collects subsequent payments, assessed at 20% of the
4 preceding month’s income, in any month in which his account exceeds \$10, and forwards
5 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2);
6 *Bruce*, 136 S. Ct. at 629.

7 In support of his IFP Motion, Plaintiff has submitted a prison certificate authorized
8 by a Sheriff’s Detentions Lieutenant at SDCJ attesting to his trust account activity. *See*
9 Doc. No. 6 at 3; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at
10 1119. This certificate shows that while Plaintiff had an average monthly deposit of \$20,
11 and carried an average monthly balance of \$3.33 over the 6-month period preceding the
12 filing of his Complaint, he had no money on the books at the time of filing. *See* Doc. No.
13 6 at 3.

14 Based on this accounting, the Court assesses no initial partial filing fee pursuant to
15 28 U.S.C. § 1915(a)(1) and (b)(1) because Plaintiff appears currently unable to pay one.
16 *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited
17 from bringing a civil action or appealing a civil action or criminal judgment for the
18 reason that the prisoner has no assets and no means by which to pay the initial partial
19 filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
20 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based
21 solely on a “failure to pay ... due to the lack of funds available to him when payment is
22 ordered.”).

23 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (Doc. No. 6),
24 declines to exact any initial filing fee because his SDCJ certificate shows he may have
25 “no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Watch Commander at
26 SDCJ, or his designee, to collect the entire \$350 balance of the filing fee required by 28
27 U.S.C. § 1914 and forward payments to the Clerk of the Court pursuant to the installment
28 provisions set forth in 28 U.S.C. § 1915(b)(1).

1 **II. Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A**

2 A. Standard of Review

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

15 “The standard for determining whether a plaintiff has failed to state a claim upon
16 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
17 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
18 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
19 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
20 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
21 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
22 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
23 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

24 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
25 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
26 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
27 relief [is] ... a context-specific task that requires the reviewing court to draw on its
28 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or

1 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
2 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
3 (9th Cir. 2009).

4 B. Plaintiff’s Complaint

5 Plaintiff invokes federal question jurisdiction under *Bivens*, names a SDCJ doctor,
6 “medical staff,” and “about 5” unidentified nurses as Defendants in the caption of his
7 Complaint, and mentions his “right to medical care,” but his pleading contains no factual
8 allegations whatsoever. *See Compl., Doc. No. at 1, 4, 5.*

9 In lieu of any factual content, Plaintiff instead attaches dozens of SDCJ Sick Call
10 Request and Inmate/Grievance Appeal Forms, copies of San Diego Superior Court
11 Misdemeanor–Judgment Minutes in Criminal Case No. CN381450, and what appears to
12 be an undated pleading submitted to the Superior Court Judge presiding over that case,
13 requesting that the Judge hold the “medical staff” at SDCJ “in contempt” for bias and
14 prejudice against him as a Blackfoot Indian. *Id. at 8-49.*

15 He seeks \$30,000 in general and punitive damages. *Id. at 7.*

16 C. *Bivens*

17 As a preliminary matter, the Court notes Plaintiff’s Complaint was filed pursuant
18 to *Bivens*; however, Defendants are alleged to be medical officials employed at and
19 SDCJ, and are not alleged to have violated Plaintiff’s constitutional rights under color or
20 *federal law*. *See Doc. No. 1 at 1-2.*

21 “In *Bivens*, the Supreme Court ‘recognized for the first time an implied right of
22 action for damages against federal officers alleged to have violated a citizen’s
23 constitutional rights.’” *Vega v. United States*, 881 F.3d 1146, 1152 (9th Cir. 2018)
24 (quoting *Hernandez v. Mesa*, __ U.S. __, 137 S. Ct. 2003, 2006 (2017) (citation
25 omitted)). “In the limited settings where *Bivens* does apply, the implied cause of action is
26 the ‘federal analog to suits brought against state officials under Rev. Stat. § 1979, 42
27 U.S.C. § 1983.’” *Iqbal*, 556 U.S. at 675-76 (quoting *Hartman v. Moore*, 547 U.S. 250,
28 254 n.2 (2006)).

1 Thus, because “[a]ctions under § 1983 and those under *Bivens* are identical save
2 for the replacement of a state actor under § 1983 by a federal actor under *Bivens*,” *Van*
3 *Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991), and pro se pleadings are subject to
4 liberal construction, the Court will construe Plaintiff’s Complaint as if it were filed
5 pursuant to 42 U.S.C. § 1983. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
6 (noting court’s duty to construe pro se prisoner’s pleadings liberally when screening
7 complaints pursuant to 28 U.S.C. § 1915A) (citation omitted); *cf. Navarette v. Pioneer*
8 *Med. Ctr.*, No. 12CV0629 WQH DHB, 2012 WL 4178682, at *3 (S.D. Cal. Sept. 17,
9 2012) (liberally construing prisoner’s § 1983 Complaint to instead arise under *Bivens*
10 because Plaintiff claimed violations of his civil rights by a federal actors).

11 D. 42 U.S.C. § 1983

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

21 E. Discussion

22 First, Plaintiff’s Complaint, even if construed under § 1983, fails to comply with
23 Federal Rule of Civil Procedure 8, and fails to state a claim upon which relief may be
24 granted. *See Iqbal*, 556 U.S. at 677-78; 28 U.S.C. § 1915(e)(2)(B)(ii), § 1915A(b)(1).

25 “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short
26 and plain statement of the claim showing that the pleader is entitled to relief.” *Iqbal*, 556
27 U.S. at 677-78. “[T]he pleading standard Rule 8 announces does not require ‘detailed
28 factual allegations,’ but it demands more than [the type of] unadorned, the defendant-

1 unlawfully-harmed-me accusation[s],” Plaintiff offers here. *Id.* (quoting *Bell Atlantic v.*
2 *Twombly*, 550 U.S. 544, 555 (2007)).

3 For example, Plaintiff contends Defendants violated his right to be free of “cruel
4 and unusual punishment” and his “right to medical care,” *see* Compl., Doc. No. 1 at 4, 5,
5 but he leaves completely blank the remaining portions of the Complaint form wherein he
6 is asked to provide the facts supporting those claims, *id.*, and instead merely attaches
7 dozens of sick call request forms and administrative grievances he presumably submitted
8 to SDCJ officials between January and March 2018. *See id.* at 13-49. However, “[w]hile
9 legal conclusions” like “cruel and unusual punishment” “can provide the framework of a
10 complaint, they must be supported by factual allegations,” lest the Plaintiff face
11 dismissal. *Iqbal*, 556 U.S. at 679. Mere “labels” and “naked assertions devoid of further
12 factual enhancement” simply “will not do.” *Id.* at 678 (citing *Twombly*, 550 U.S. at 555,
13 557).

14 Moreover, while “much liberality is allowed in construing *pro se* complaints, a *pro*
15 *se* litigant cannot simply dump a stack of exhibits on the court and expect the court to sift
16 through them to determine if some nugget is buried somewhere in that mountain of
17 papers, waiting to be unearthed and refined into a cognizable claim.” *Samtani v. City of*
18 *Laredo*, 274 F. Supp. 3d 695, at *2 (S.D. Texas 2017). “The Court will not comb through
19 attached exhibits seeking to determine whether a claim possibly could have been stated
20 where the pleading itself does not state a claim. In short, [Plaintiff] must state a claim, not
21 merely attach exhibits.” *Stewart v. Nevada*, No. 2:09-CV-01063, 2011 WL 588485, at *2
22 (D. Nev. Feb. 9, 2011).

23 Finally, the Court notes that to the extent Plaintiff apparently seeks to challenge the
24 sufficiency of the medical treatment he has been provided while a pretrial detainee in
25 custody at the SDCJ, his pleading must allege facts sufficient to show that:

- 26 (i) [each] defendant made an intentional decision with respect to the
27 conditions under which [he] was confined; (ii) those conditions put [him] at
28 substantial risk of suffering serious harm; (iii) [each] defendant did not take
reasonable available measures to abate that risk, even though a reasonable

1 official in the circumstances would have appreciated the high degree of risk
2 involved—making the consequences of the defendant’s conduct obvious; and
3 (iv) by not taking such measures, [each] defendant caused [his] injuries.

4 *Gordon v. Cty. of Orange*, 888 F.3d 1118, 2018 WL 1998296, at *5 (9th Cir. 2018).

5 Because Plaintiff’s Complaint currently fails to meet, or even attempt to address
6 any of these pleading requirements, it must be dismissed sua sponte and in its entirety
7 pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See Lopez*, 203 F.3d at
8 1126-27; *Wilhelm*, 680 F.3d at 1121.

9 **III. Ex Parte Motion to Set Pre-Trial Hearing Dates**

10 Plaintiff has also filed a Motion requesting that the Court set various pre-trial
11 hearing dates for early neutral evaluation, case management, status, and mandatory
12 settlement conferences. Because the Court dismisses his Complaint for failing to state a
13 claim however, it **DENIES** this Motion (Doc. No. 3) without prejudice as premature.

14 **IV. Conclusion and Orders**

15 Good cause appearing, the Court:

16 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
17 (Doc. No. 6).

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

23 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
24 **ASSIGNED TO THIS ACTION.**

25 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on the Watch
26 Commander, San Diego Central Jail, 1173 Front St., San Diego, California, 92101.

27 4. **DENIES** Plaintiff’s ex parte Motion to Set Pre-Trial Dates (Doc. No. 3); and

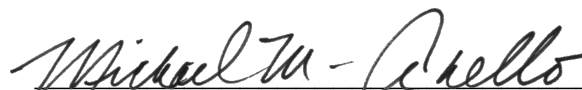
28 5. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which

1 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1), and
2 **GRANTS** him forty-five (45) days leave from the date of this Order in which to file an
3 Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff's
4 Amended Complaint must be complete by itself without reference to his original
5 pleading. Defendants not named and any claim not re-alleged in his Amended Complaint
6 will be considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v. Richard*
7 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading
8 supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012)
9 (noting that claims dismissed with leave to amend which are not re-alleged in an
10 amended pleading may be “considered waived if not repled.”).

11 If Plaintiff fails to file an Amended Complaint within the time provided, the Court
12 will enter a final Order dismissing this civil action based both on Plaintiff's failure to
13 state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii)
14 and 1915A(b)(1), and his failure to prosecute in compliance with a court order requiring
15 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does
16 not take advantage of the opportunity to fix his complaint, a district court may convert the
17 dismissal of the complaint into dismissal of the entire action.”).

18 **IT IS SO ORDERED.**

19 DATE: May 17, 2018



20 HON. MICHAEL M. ANELLO
21 United States District Judge
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