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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CLYDE JOHNSON,
Inmate Booking #1717643,

Plaintiff,

vs.

SAN DIEGO SHERIFF'S
DEPARTMENT,

Defendants.

Case No.: 3:18-cv-01846-LAB-RBB

ORDER:

**(1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[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)**

Clyde Johnson (“Plaintiff”), currently incarcerated at the George Bailey Detention Facility (“GBDF”) located in San Diego, California, and proceeding pro se, has filed this civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.) In addition, Plaintiff has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a). (ECF No. 2.)

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1 **II. Motion to Proceed IFP**

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

12 Section 1915(a)(2) also requires prisoners seeking leave to proceed IFP to submit a
13 “certified copy of the trust fund account statement (or institutional equivalent) for ... the
14 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
15 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
16 trust account statement, the Court assesses an initial payment of 20% of (a) the average
17 monthly deposits in the account for the past six months, or (b) the average monthly
18 balance in the account for the past six months, whichever is greater, unless the prisoner
19 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
20 custody of the prisoner then collects subsequent payments, assessed at 20% of the
21 preceding month’s income, in any month in which his account exceeds \$10, and forwards
22 those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2);
23 *Bruce*, 136 S. Ct. at 629.

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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. June 1, 2016). The additional \$50 administrative fee does
not apply to persons granted leave to proceed IFP. *Id.*

1 In support of his IFP Motion, Plaintiff has submitted a prison certificate authorized
2 by a GBDF administrative lieutenant attesting to his trust account activity. *See* ECF No. 2
3 at 5; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. These
4 statements show Plaintiff has had no monthly deposits to his account, has carried no
5 balance over the six month period preceding the filing of his Complaint, and that his
6 current available balance is \$0.26. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no
7 event shall a prisoner be prohibited from bringing a civil action or appealing a civil action
8 or criminal judgment for the reason that the prisoner has no assets and no means by
9 which to pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at
10 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of
11 a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds
12 available to him when payment is ordered.”).

13 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF No. 2),
14 declines to “exact” any initial filing fee because his trust account statement shows he “has
15 no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Watch Commander at
16 GBDF to instead collect the entire \$350 balance of the filing fees required by 28 U.S.C.
17 § 1914 and forward them to the Clerk of the Court pursuant to the installment payment
18 provisions set forth in 28 U.S.C. § 1915(b)(1).

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

20 The Court is obligated by the Prison Litigation Reform Act (“PLRA”) to review
21 complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are
22 “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated
23 delinquent for, violations of criminal law or the terms or conditions of parole, probation,
24 pretrial release, or diversionary program,” at the time of filing “as soon as practicable
25 after docketing.” *See* Doc. No. 8 at 4; 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under the
26 PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are
27 frivolous, malicious, fail to state a claim, or which seek damages from defendants who
28 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122,

1 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002,
2 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

3 **A. Standard of Review**

4 “The purpose of § 1915A is ‘to ensure that the targets of frivolous or malicious
5 suits need not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920
6 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681
7 (7th Cir. 2012)). “The standard for determining whether a plaintiff has failed to state a
8 claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the
9 Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v.*
10 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012); *accord Wilhelm v. Rotman*, 680 F.3d 1113,
11 1121 (9th Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the
12 familiar standard applied in the context of failure to state a claim under Federal Rule of
13 Civil Procedure 12(b)(6)”).

14 Every complaint must contain “a short and plain statement of the claim showing
15 that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations
16 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported
17 by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Bell*
18 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “When there are well-pleaded
19 factual allegations, a court should assume their veracity, and then determine whether they
20 plausibly give rise to an entitlement to relief.” *Id.* at 679. “Determining whether a
21 complaint states a plausible claim for relief [is] . . . a context-specific task that requires
22 the reviewing court to draw on its judicial experience and common sense.” *Id.* The “mere
23 possibility of misconduct” falls short of meeting this plausibility standard. *Id.*; *see also*
24 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

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1 While a plaintiff’s factual allegations are taken as true, courts “are not required to
2 indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th
3 Cir. 2009) (internal quotation marks and citation omitted). Indeed, while courts “have an
4 obligation where the petitioner is pro se, particularly in civil rights cases, to construe the
5 pleadings liberally and to afford the petitioner the benefit of any doubt,” *Hebbe v. Pliler*,
6 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1
7 (9th Cir. 1985)), it may not “supply essential elements of claims that were not initially
8 pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir.
9 1982). Even before *Iqbal*, “[v]ague and conclusory allegations of official participation in
10 civil rights violations” were not “sufficient to withstand a motion to dismiss.” *Id.*

11 **B. 42 U.S.C. § 1983**

12 Title 42 U.S.C. § 1983 provides a cause of action for the “deprivation of any rights,
13 privileges, or immunities secured by the Constitution and laws” of the United States.
14 *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). To state a claim under § 1983, a plaintiff must
15 allege two essential elements: (1) that a right secured by the Constitution or laws of the
16 United States was violated, and (2) that the alleged violation was committed by a person
17 acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. Cty. of*
18 *Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

19 Here, the Court finds that, as currently pleaded, Plaintiff’s Complaint alleges facts
20 sufficient to state plausible First Amendment claims. *See Witherow v. Paff*, 52 F.3d 264,
21 265 (9th Cir. 1995); *Hayes v. Idaho Correctional Center*, 849 F.3d 1204, 1211-1212 (9th
22 Cir. 2017) (finding prisoner who alleged to have had his “properly marked legal mail”
23 “arbitrarily and capriciously opened outside his presence on two separate occasions”
24 stated a plausible First Amendment claim); *cf. Mangiaracina v. Penzone*, 849 F.3d 1191,
25 1196 (9th Cir. 2017) (“[P]risoners have a Sixth Amendment right to be present when
26 legal mail related to a criminal matter is inspected.”); *see also Silva v. Di Vittorio*, 658
27 F.3d 1090, 1102-03 (9th Cir. 2011) (discussing requirements for an access-to-court claim
28 premised on prison officials’ alleged interference, as opposed to failure to affirmatively

1 assist, with any prisoner lawsuit), *overruled on other grounds as stated by Richey v.*
2 *Dahne*, 807 F.3d 1202, 1209 n.6 (9th Cir. 2015).

3 However, the Court further finds that the entire action requires sua sponte
4 dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1) to the extent it
5 only seeks relief under § 1983 against the San Diego Sheriff’s Department. The San
6 Diego Sheriff’s Department, unlike the County of San Diego itself, is not subject to suit
7 under § 1983. *See Vance v. County of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal.
8 1996) (“Naming a municipal department as a defendant is not an appropriate means of
9 pleading a § 1983 action against a municipality.”); *Powell v. Cook County Jail*, 814 F.
10 Supp. 757, 758 (N.D. Ill. 1993) (“Section 1983 imposes liability on any ‘person’ who
11 violates someone’s constitutional rights ‘under color of law.’ Cook County Jail is not a
12 ‘person.’”). Therefore, while the County of San Diego may be considered a “person”
13 subject to suit under § 1983, *see Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185 (9th
14 Cir. 2006) (citing *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690 (1978)), its Sheriff’s
15 Department may not.

16 **C. Leave to Amend**

17 A pro se litigant must be given leave to amend his pleading to state a claim unless
18 it is absolutely clear the deficiencies cannot be cured by amendment. *See Lopez*, 203 F.3d
19 at 1130 (noting leave to amend should be granted when a complaint is dismissed under
20 28 U.S.C. § 1915(e) “if it appears at all possible that the plaintiff can correct the defect”).
21 Therefore, the Court will grant him a chance to fix the pleading deficiencies discussed in
22 this Order. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v.*
23 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

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1 **III. Conclusion and Order**

2 For all the reasons discussed, the Court:

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

5 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
6 Plaintiff’s trust account the \$350 filing fee owed in this case by garnishing monthly
7 payments from his account in an amount equal to twenty percent (20%) of the preceding
8 month’s income and forwarding those payments to the Clerk of the Court each time the
9 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL**
10 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
11 **ASSIGNED TO THIS ACTION.**

12 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Watch
13 Commander, George F. Bailey Detention Facility, 446 Alta Road, #5300, San Diego,
14 California 92158.

15 4. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which
16 § 1983 relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

17 5. **GRANTS** Plaintiff forty-five (45) days leave to file a First Amended
18 Complaint which cures all the deficiencies of pleading described in this Order. Plaintiff is
19 cautioned, however, that should he choose to file a First Amended Complaint, it must be
20 complete by itself, comply with Federal Rule of Civil Procedure 8(a), and that any claim
21 not re-alleged will be considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios,*
22 *Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended
23 pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.
24 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an
25 amended pleading may be “considered waived if not repled.”).

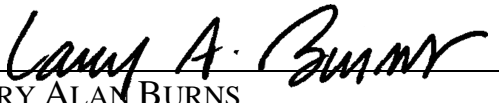
26 If Plaintiff fails to follow these instructions and/or files a First Amended
27 Complaint that still fails to state a claim, his case may be dismissed without further leave
28 to amend. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does

1 not take advantage of the opportunity to fix his complaint, a district court may convert the
2 dismissal of the complaint into dismissal of the entire action.”).

3 6. The Clerk of Court is directed to mail Plaintiff a court approved form civil
4 rights complaint for his use in amending.

5 **IT IS SO ORDERED.**

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8 Dated: August 27, 2018

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10 HON. LARRY ALAN BURNS
11 United States District Judge
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