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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MIGUEL SANCHEZ,
12 CDCR #AC-8280,

13 Plaintiff,

14 vs.

15 PATRICK COVELLO; TORRES;
16 BRIONES; SANCHEZ; TREJO,

17 Defendants.
18

Case No.: 3:19-cv-1428-JLS-BGS

**ORDER: (1) GRANTING MOTION
TO PROCEED IN FORMA
PAUPERIS, AND (2) DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT TO 28
U.S.C. § 1915(e)(2) AND 28 U.S.C.
§ 1915A(b)(1)**

19 Plaintiff Miguel Sanchez, proceeding pro se, is currently incarcerated at the Richard
20 J. Donovan Correctional Facility (“RJD”) located in San Diego, California and has filed a
21 civil rights Complaint pursuant to 42 U.S.C. § 1983. *See* Complaint (“Compl.”), ECF No.
22 1. Plaintiff claims that RJD prison officials are “destroying, cutting, [and] stealing [his]
23 confidential mail and personal property.” *Id.* at 2. Plaintiff seeks a “restraining order”
24 requiring Defendants to “stay away” from his cell and “pay for [his] personal property.”
25 *Id.* at 7. In addition, Plaintiff seeks \$5000 in compensatory damages, \$5000 in punitive
26 damages, and \$10,000 in “pain and suffering.” *Id.*

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1 Plaintiff did not prepay the \$400 civil filing fee required by 28 U.S.C. § 1914(a) at
2 the time of filing; instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”)
3 pursuant to 28 U.S.C. § 1915(a) (ECF No. 7).

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 \$400.¹ 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). A prisoner
10 who is granted IFP status remains obligated to pay the entire fee in “increments” or
11 “installments,” *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775
12 F.3d 1182, 1185 (9th Cir. 2015), regardless of whether the action is ultimately dismissed.
13 See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

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

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27 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. See
28 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 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,
2 136 S. Ct. at 629.

3 In support of his IFP Motion, Plaintiff has submitted a copy of his California
4 Department of Corrections and Rehabilitation (“CDCR”) Inmate Statement Report
5 recording his balances and deposits over the six-month period preceding the filing of his
6 Complaint. *See* ECF No. 3; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398
7 F.3d at 1119. This Report shows Plaintiff has had no money in his trust account for the
8 six-months preceding the filing of this action and that he had a zero balance at the time of
9 filing. *See* ECF No. 3 at 1; *see also* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event
10 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
11 criminal judgment for the reason that the prisoner has no assets and no means by which to
12 pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding
13 that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s
14 IFP case based solely on a “failure to pay . . . due to the lack of funds available to him when
15 payment is ordered.”).

16 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 7), but
17 declines to “exact” any initial filing fee because his trust account statement shows he “has
18 no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the CDCR to
19 collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and forward
20 them to the Clerk of the Court pursuant to the installment payment provisions set forth in
21 28 U.S.C. § 1915(b)(1).

22 **II. Screening of Complaint pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

23 **A. Legal Standard**

24 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a
25 pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
26 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it,
27 which is frivolous, malicious, fails to state a claim, or seeks damages from defendants who
28 are immune. *See Williams v. King*, 875 F.3d 500, 502 (9th Cir. 2017) (discussing 28 U.S.C.

1 § 1915(e)(2)) (citing *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc));
2 *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C.
3 § 1915A(b)). “The purpose of [screening] is ‘to ensure that the targets of frivolous or
4 malicious suits need not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d
5 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d
6 680, 681 (7th Cir. 2012)). A complaint is “frivolous” if it “lacks an arguable basis either
7 in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 324 (1989).

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 F.3d
11 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
12 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 to “contain sufficient factual matter,
15 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
16 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

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 relief
20 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
21 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
22 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
23 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

24 **B. Analysis**

25 Plaintiff brings his claims under 42 U.S.C. § 1983. “Section 1983 creates a private
26 right of action against individuals who, acting under color of state law, violate federal
27 constitutional or statutory rights.” *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir.
28 2001). Section 1983 “is not itself a source of substantive rights, but merely provides a

1 method for vindicating federal rights elsewhere conferred.” *Graham v. Connor*, 490 U.S.
2 386, 393-94 (1989) (internal quotation marks and citations omitted). “To establish § 1983
3 liability, a plaintiff must show both (1) deprivation of a right secured by the Constitution
4 and laws of the United States, and (2) that the deprivation was committed by a person
5 acting under color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir.
6 2012).

7 1. *Property Deprivation Claims*

8 Plaintiff claims that Defendants violated his right to due process when they allegedly
9 destroyed his personal property. *See* Compl. at 3–5.

10 “The Fourteenth Amendment’s Due Process Clause protects persons against
11 deprivations of life, liberty, or property; and those who seek to invoke its procedural
12 protection must establish that one of these interests is at stake.” *Wilkinson v. Austin*, 545
13 U.S. 209, 221 (2005); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). Prisoners have a
14 protected interest in their personal property, *Hansen v. May*, 502 F.2d 728, 730 (9th Cir.
15 1974), but the procedural component of the Due Process Clause is not violated by a
16 random, unauthorized deprivation of property if the state provides an adequate
17 post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Barnett v. Centoni*,
18 31 F.3d 813, 816–17 (9th Cir. 1994) (per curiam) (citing Cal. Gov’t Code §§ 810–895).

19 Here, Plaintiff has no due process claim based on Defendants’ unauthorized
20 deprivation of his personal property—whether intentional or negligent—since a
21 meaningful state post-deprivation remedy for his loss is available. *See Hudson*, 468 U.S.
22 at 533. California’s tort claim process provides an adequate post-deprivation remedy. *See*
23 *Barnett*, 31 F.3d at 816–17 (“[A] negligent or intentional deprivation of a prisoner’s
24 property fails to state a claim under section 1983 if the state has an adequate post
25 deprivation remedy.”); *see also Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1120 (S.D. Cal.
26 2007); *Kemp v. Skolnik*, No. 2:09-CV-02002-PMP, 2012 WL 366946, at *6 (D. Nev. Feb.
27 3, 2012) (finding prisoner’s alleged loss or destruction of newspaper, magazines, and books
28 failed to state a Fourteenth Amendment claim pursuant to *Hudson* and noting that “[i]f

1 Plaintiff wishes to recoup the value of the alleged lost materials, he will have to file a claim
2 in small claims court in state court”).

3 2. *Access to Courts*

4 Next, Plaintiff claims that Defendants have refused to provide him with “indigent
5 envelopes” and have “thrown” his legal mail in the trash resulting in a denial of access to
6 the courts. Compl. at 4–5.

7 Prisoners have a constitutional right of access to the courts. *Lewis v. Casey*, 518
8 U.S. 343, 346 (1996). In order to state a claim of a denial of the right to access the courts,
9 a prisoner must establish that he has suffered “actual injury,” a jurisdictional requirement
10 derived from the standing doctrine. *Id.* at 349. An “actual injury” is “actual prejudice with
11 respect to contemplated or existing litigation, such as the inability to meet a filing deadline
12 or to present a claim.” *Id.* at 348 (citation and internal quotations omitted).

13 The right of access does *not* require the State to “enable the prisoner to discover
14 grievances,” or even to “litigate effectively once in court.” *Id.* at 354; *see also Jones v.*
15 *Blanas*, 393 F.3d 918, 936 (9th Cir. 2004) (defining actual injury as the “inability to file a
16 complaint or defend against a charge”). Instead, *Lewis* limits the right of access to the
17 courts, as follows:

18 [T]he injury requirement is [limited to those tools] that the inmates need in
19 order to attack their sentences, directly or collaterally, and in order to
20 challenge the conditions of their confinement. Impairment of any other
21 litigating capacity is simply one of the incidental (and perfectly constitutional)
consequences of conviction and incarceration.

22 *Lewis*, 518 U.S. at 346. Plaintiff’s failure to set forth any allegations regarding an “actual
23 injury” here is “fatal” to his claim. *Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9th Cir. 2008)
24 (“Failure to show that a ‘non-frivolous legal claim had been frustrated’ is fatal.”) (quoting
25 *Lewis*, 518 U.S. at 353 & n.4).

26 In addition to failing to allege an “actual injury,” Plaintiff has also failed to allege
27 facts sufficient to describe the “non-frivolous” or “arguable” nature of an underlying claim
28 he contends was lost as a result of Defendants’ actions. *Christopher v. Harbury*, 536 U.S.

1 403, 413–14 (2002). The nature and description of the underlying claim must be set forth
2 in the pleading “as if it were being independently pursued.” *Id.* at 417. Plaintiff’s
3 Complaint contains no allegations whatsoever regarding his inability to access the courts,
4 or any “actual injury” with respect to a “non-frivolous” criminal appeal, habeas action, or
5 conditions of confinement claim. *Id.*

6 3. *Respondeat Superior*

7 In his Complaint caption, Plaintiff names Warden Covello as a Defendant. Compl.
8 at 1. But nowhere in the body of his Complaint does Plaintiff include “further factual
9 enhancement” which describes how or when Warden Covello was the cause of any injury.
10 *See Iqbal*, 556 U.S. at 678 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).
11 There is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9
12 F.3d 1433, 1437–38 (9th Cir. 1993). “Because vicarious liability is inapplicable to . . .
13 § 1983 suits, [Plaintiff] must plead that each government-official defendant, through the
14 official’s own individual actions, has violated the Constitution.” *Iqbal*, 556 at 676; *see*
15 *also Jones v. Cmty. Redevelopment Agency of City of L.A.*, 733 F.2d 646, 649 (9th Cir.
16 1984) (holding pro se plaintiffs must “allege with at least some degree of particularity overt
17 acts which defendants engaged in” in order to state a claim).

18 As currently pled, Plaintiff’s Complaint offers no factual detail from which the Court
19 might reasonably infer a plausible claim for relief based on a violation of any constitutional
20 right on the part of Warden Covello. *Iqbal*, 662 U.S. at 678 (noting that Federal Rule of
21 Civil Procedure 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-
22 me accusation,” and that “[t]o survive a motion to dismiss, a complaint must contain
23 sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its
24 face.’”) (quoting *Twombly*, 550 U.S. at 555, 570). Therefore, the Court dismisses Warden
25 Covello as a party to this action based on Plaintiff’s failure to state a plausible claim against
26 him. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1); *Lopez*, 203 F.3d at 1126–27;
27 *Rhodes*, 621 F.3d at 1004.

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1 For all these reasons, the Court finds Plaintiff's Complaint fails to state any
2 section 1983 claim upon which relief can be granted, and that it must be dismissed sua
3 sponte and in its entirety pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See*
4 *Watison*, 668 F.3d at 1112; *Wilhelm*, 680 F.3d at 1121.

5 **B. Leave to Amend**

6 Because Plaintiff is proceeding pro se, the Court, having now provided him with
7 "notice of the deficiencies in his complaint," will also grant him an opportunity to fix them.
8 *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963
9 F.2d 1258, 1261 (9th Cir. 1992)).

10 **III. Conclusion and Orders**

11 For the reasons discussed, the Court:

12 1. **GRANTS** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
13 (ECF No. 2).

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

21 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Ralph Diaz,
22 Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

23 4. **DISMISSES** this civil action for failing to state a claim pursuant to 28 U.S.C.
24 § 1915(e)(2)(B)(ii) and § 1915A(b)(1).

25 5. **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in
26 which to file an Amended Complaint which cures the deficiencies of pleading noted.
27 Plaintiff's Amended Complaint must be complete by itself without reference to his original
28 pleading. Defendants not named and any claim not re-alleged in his Amended Complaint

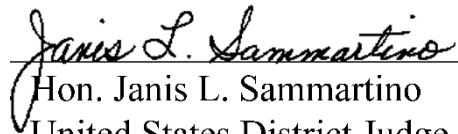
1 will be considered waived. *See* S.D. Cal. CivLR 15.1; *Hal Roach Studios, Inc. v. Richard*
2 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading
3 supersedes the original.”); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 928 (9th Cir. 2012)
4 (noting that claims dismissed with leave to amend which are not re-alleged in an amended
5 pleading may be “considered waived if not repled.”).

6 If Plaintiff fails to file an Amended Complaint within 45 days, the Court will enter
7 a final Order dismissing this civil action based both on his failure to state a claim upon
8 which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b), and his
9 failure to prosecute in compliance with a court order requiring amendment. *See Lira v.*
10 *Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does not take advantage of
11 the opportunity to fix his complaint, a district court may convert the dismissal of the
12 complaint into dismissal of the entire action.”).

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

15 **IT IS SO ORDERED.**

16 Dated: October 7, 2019

17 
18 Hon. Janis L. Sammartino
19 United States District Judge
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