

temporary restraining order. With the complaint, Diaz filed an Application to Proceed in District Court Without Prepaying Fees or Costs and an Emergency Motion for Screening of Complaint and Emergency Temporary Restraining Order.

I. Plaintiff's Motion to Proceed In Forma Pauperis

After review of Diaz' financial disclosures in his Application to Proceed in District Court Without Prepaying Fees or Costs, the court will ALLOW the motion notwithstanding that Diaz failed to submit a certified prison account statement as required under 28 U.S.C. § 1915(a)(2). Where, as here, the plaintiff is a prisoner, a request to proceed without prepayment of the filing fee must be accompanied by "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint . . . obtained from the appropriate official of each prison at which the prisoner is or was confined." 28 U.S.C. § 1915(a)(2).

Unlike other civil litigants, prisoner plaintiffs are not entitled to a complete waiver of the filing fee, notwithstanding the grant of in forma pauperis status. Because Diaz is a prisoner, he is obligated to make payments toward the \$350.00 filing fee pursuant to 28 U.S.C. § 1915(b), but this court cannot assess the fee without the certified prison account statement.

Accordingly, it is ordered that Diaz shall, within 42 days of the date of this Memorandum and Order, submit a certified prison account statement for the six-month period preceding the

filing of the complaint. A copy of this Memorandum and Order shall be sent to the Treasurer's Office at MCI Norfolk with the request that it provide Diaz with a certified prison account statement reflecting the average monthly balance and average monthly deposits for the six-month period preceding January 23, 2017.

Upon receipt of the certified prison account statement, the court will direct the appropriate prison official to withdraw an initial partial payment from the plaintiff's account, followed by payments on a monthly basis until the \$350.00 filing fee is paid in full. See 28 U.S.C. § 1915(b)(1)-(2). Even if the action is dismissed, the plaintiff remains obligated to pay the fee, see McGore v. Wrigglesworth, 114 F.3d 601, 607 (6th Cir. 1997) (§ 1915(b)(1) compels the payment of the fee at the moment the complaint is filed). Failure by Diaz to comply with this directive to submit a certified prison account statement may result in a dismissal of this action.

II. Plaintiff's Motion for Temporary Restraining Order

Plaintiff's request for a temporary restraining order ("TRO") shall be denied without prejudice at this time. A TRO is an order issued without notice to the party to be enjoined that may last no more than 14 days. Fed R. Civ. P. 65(b)(2). A TRO may issue without notice only if "specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R.

Civ. P. 65(b)(1)(A). Even where a plaintiff makes a showing of "immediate and irreparable" injury, the Court cannot issue a TRO without notice to the adverse parties unless the plaintiff "certifies in writing any efforts made to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1)(B). Such injunctive relief is warranted "to prevent a substantial risk of serious injury from ripening into actual harm." Farmer v. Brennan, 511 U.S. 825, 845 (1994).

In ruling on a motion for a preliminary injunction or temporary restraining order, the Court must consider: "(1) the movant's likelihood of success on the merits; (2) whether and to what extent the movant would suffer irreparable harm if the request were rejected; (3) the balance of hardships between the parties; and (4) any effects that the injunction or its denial would have on the public interest." Diaz-Carrasquillo v. Garcia-Padilla, 750 F.3d 7, 10 (1st Cir. 2014).

Based on the allegations in the complaint and emergency motion, it would not be appropriate to enter an order for this drastic form of relief at this time. Although Diaz describes a recent series of allergic reactions that the court takes very seriously, he received medical treatment each time he had an allergic reaction to food he consumed. Even so, Diaz seeks a special diet in order to avoid continued allergic reactions. The court does not deem it appropriate to order such a diet without first considering the response of the defendants (several of whom are medical providers). Accordingly, the TRO is denied without

prejudice to plaintiff renewing this request, should it become necessary to do so.

III. Order for Defendants to File a Status Report

Notwithstanding the denial of Diaz' motion for TRO, the court is concerned by the seriousness of the allegations with respect to the alleged denial of a medically prescribed therapeutic diet. Accordingly, it is hereby Ordered that the Clerk shall send a copy of this Memorandum and Order to legal counsel for the Massachusetts Department of Correction, as well as MCI Norfolk Superintendent Sean Medeiros, with a request that counsel provide this court with a Status Report regarding Diaz' dietary/health situation as soon as reasonably practicable and, in any event, within twenty-one (21) days of this Memorandum and Order.¹

ORDER

For the foregoing reasons, it is hereby Ordered that:

1. Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, (Docket No. 3) is ALLOWED and the assessment of the filing fee pursuant to § 1915(b)(1)-(2) is DEFERRED;

2. Within 42 days of the date of this Memorandum and Order, plaintiff shall submit his certified prison account statement under 28 U.S.C. § 1915, failing which this action may

¹Defendants are not required to disclose confidential medical information about Diaz absent his permission to do so, and any disclosures which are made shall be made under seal.

be dismissed. The Clerk shall send a copy of this Memorandum and Order to the Treasurer's Office at MCI Norfolk in order to facilitate any request by the plaintiff for his certified prison account statement. The Court requests that the Treasurer's Office include in any prison account statement the plaintiff's average monthly deposits for the six-month period preceding January 23, 2017, as well as the average monthly balance for that same period;

3. Plaintiff's Emergency Motion for Screening of Complaint and Emergency Temporary Restraining Order (Docket No. 2) is DENIED without prejudice;

4. The Clerk shall issue summonses as to defendants MPCH, Lawrence Churchville, Nurse Practitioner Meagan, Thomas Turco, III; Christopher Mitchell, Religious Services Review Committee, William Bates, Christopher Gendreau, Correctional Officer Casey and the Massachusetts Department of Correction. Service must be within 90 days of the date the summonses issue and must be made in accordance with Rule 4 of the Federal Rules of Civil Procedure and Local Rule 4.1;

5. Because the plaintiff is proceeding in forma pauperis, he may elect to have the United States Marshals Service ("USMS") complete service with all costs of service to be advanced by the United States. If so asked by the plaintiff, the USMS shall serve a copy of the summonses, complaint and this Memorandum and Order upon the defendants as directed by plaintiff. The plaintiff is responsible for providing the USMS all copies for service and

for completing a USM-285 form for each party to be served. The Clerk shall provide the plaintiff with forms and instructions for service by the USMS;

6. Pursuant to 42 U.S.C. § 1997e(g)(2), the defendants shall respond to the complaint as provided for in the Federal Rules of Civil Procedure;

7. The Clerk shall send a copy of this Memorandum and Order to legal counsel for the Massachusetts Department of Correction and Superintendent Medeiros with the directive that a Status Report is to be filed; and

8. Plaintiff's failure to comply with the directives of this Order may result in dismissal of this action.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: January 25, 2017