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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PETER J. HELFRICH,
Plaintiff,
v.
STATE OF NEVADA ex rel ATTORNEY
GENERAL OF NEVADA et al.,
Defendants.

2:16-cv-00574-GMN-GWF

SCREENING ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis* and a motion for telephonic hearing.¹ (ECF No. 1, 1-1, 2). The Court now addresses Plaintiff’s application to proceed *in forma pauperis* and screens his civil rights complaint pursuant to 28 U.S.C. § 1915A.

I. IN FORMA PAUPERIS APPLICATION

Before the Court is Plaintiff’s application to proceed *in forma pauperis*. (ECF No. 1). Based on the information regarding Plaintiff’s financial status, the Court finds that Plaintiff is not able to pay an initial installment payment toward the full filing fee pursuant to 28 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments toward the full \$350.00 filing fee when he has funds available.

II. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See

¹ The Court denies Plaintiff’s motion for telephonic hearing (ECF No. 2).

1 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss
2 any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted
3 or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C.
4 § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v.*
5 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. §
6 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the
7 Constitution or laws of the United States, and (2) that the alleged violation was committed by
8 a person acting under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

9 In addition to the screening requirements under § 1915A, pursuant to the Prison
10 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the allegation
11 of poverty is untrue," or if the action "is frivolous or malicious, fails to state a claim on which
12 relief may be granted, or seeks monetary relief against a defendant who is immune from such
13 relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which
14 relief can be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the court
15 applies the same standard under § 1915 when reviewing the adequacy of a complaint or an
16 amended complaint. When a court dismisses a complaint under § 1915(e), the plaintiff should
17 be given leave to amend the complaint with directions as to curing its deficiencies, unless it
18 is clear from the face of the complaint that the deficiencies could not be cured by amendment.
19 See *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

20 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See *Chappel*
21 *v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
22 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the
23 claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.
24 1999). In making this determination, the court takes as true all allegations of material fact
25 stated in the complaint, and the court construes them in the light most favorable to the plaintiff.
26 See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations of a *pro se*
27 complainant are held to less stringent standards than formal pleadings drafted by lawyers.
28 See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While the standard under Rule 12(b)(6) does not

1 require detailed factual allegations, a plaintiff must provide more than mere labels and
2 conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation
3 of the elements of a cause of action is insufficient. *Id.*

4 Additionally, a reviewing court should “begin by identifying pleadings [allegations] that,
5 because they are no more than mere conclusions, are not entitled to the assumption of truth.”
6 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide the
7 framework of a complaint, they must be supported with factual allegations.” *Id.* “When there
8 are well-pleaded factual allegations, a court should assume their veracity and then determine
9 whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a
10 complaint states a plausible claim for relief . . . [is] a context-specific task that requires the
11 reviewing court to draw on its judicial experience and common sense.” *Id.*

12 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua*
13 *sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This includes
14 claims based on legal conclusions that are untenable (e.g., claims against defendants who are
15 immune from suit or claims of infringement of a legal interest which clearly does not exist), as
16 well as claims based on fanciful factual allegations (e.g., fantastic or delusional scenarios).
17 See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); see also *McKeever v. Block*, 932 F.2d
18 795, 798 (9th Cir. 1991).

19 **III. SCREENING OF COMPLAINT**

20 In the complaint, Plaintiff sues multiple defendants for events that took place while
21 Plaintiff was incarcerated at High Desert State Prison (“HDSP”). (ECF No. 1-1 at 1). Plaintiff
22 sues Defendants Lieutenant Ronald Oliver, Sergeant Dario Sanchez, Law Library Supervisor
23 Mike “Don” Anderson, Assistant Warden Nash, Assistant Warden Howell, Former NDOC
24 Director James Greg Cox, State of Nevada ex rel the Attorney General of Nevada, and
25 John/Jane Does. (*Id.* at 1-3, 5). Plaintiff alleges one count and seeks injunctive relief,
26 monetary damages, expungement of OIC #388839, and reinstatement of any “good time” lost
27 or taken. (*Id.* at 7, 22-23).

28 In the complaint, Plaintiff alleges the following: On March 18, 2015, Sanchez had

1 refused to provide Plaintiff with a copy of his amended notice of charges. (*Id.* at 8). The
2 amended charges had changed the MJ51 charge to an MJ48 charge and had changed the
3 MJ31 charge to an MJ9 charge. (*Id.*). However, Plaintiff did not receive the new notice of
4 charges until March 25, 2015. (*Id.*). This delay deprived Plaintiff of his due process right to
5 prepare for his hearing. (*Id.*). At the disciplinary hearing, Oliver refused to allow Plaintiff to
6 read an affidavit from Plaintiff's eye witness. (*Id.* at 9). Anderson had illegally taken an
7 affidavit from Plaintiff's witness, Richard Simons. (*Id.* at 10). Oliver and Sanchez were not
8 impartial decision makers. (*Id.* at 13). Plaintiff had written an informal grievance against
9 Oliver for "tossing" Plaintiff's cell. (*Id.* at 18).

10 The Court dismisses the complaint in its entirety because it is duplicative. Plaintiff
11 raised these same allegations in Count 6 of the amended complaint in *Helfrich v. Cox*,
12 2:15-cv-00384-JCM-PAL. (ECF No. 4-1 at 34-54). The screening order on the amended
13 complaint in that case had permitted the retaliation claim to proceed against Defendant
14 Anderson and the due process claims to proceed against Defendants Oliver and Sanchez.
15 (ECF No. 19 at 12-13). The Court notes that the parties in that case held an Inmate Early
16 Mediation Conference on July 29, 2016 and are currently in the process of finalizing a
17 settlement agreement. (ECF No. 39, 43).

18 The Court notes that duplicative litigation by a plaintiff proceeding *in forma pauperis*
19 may be dismissed as malicious under 28 U.S.C. § 1915(e). See *Cato v. United States*, 70
20 F.3d 1103, 1105 n.2 (9th Cir. 1995) (citing *Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th
21 Cir.1988) (holding that repetitious litigation of virtually identical causes of action is subject to
22 dismissal as malicious)); *Pittman v. Moore*, 980 F.2d 994, 994-95 (5th Cir.1993) (holding that
23 it is malicious for a "pauper" to file a lawsuit that duplicates allegations of another pending
24 federal lawsuit by the same plaintiff). As such, the Court dismisses the complaint, with
25 prejudice, as malicious.

1 The Court further notes that this current dismissal is Plaintiff's third strike.² Pursuant
2 to 28 U.S.C. § 1915(g), "if [a] prisoner has, on 3 or more prior occasions, while incarcerated
3 or detained in any facility, brought an action or appeal in a court of the United States that was
4 dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which
5 relief may be granted," he may not proceed *in forma pauperis* and, instead, must pay the full
6 \$350.00 filing fee in advance unless he is "under imminent danger of serious physical injury."
7 28 U.S.C. § 1915(g).

8 **IV. CONCLUSION**

9 For the foregoing reasons, **IT IS ORDERED** that Plaintiff's application to proceed *in*
10 *forma pauperis* (ECF No. 1) without having to prepay the full filing fee is **GRANTED**. Plaintiff
11 shall **not** be required to pay an initial installment fee. Nevertheless, the full filing fee shall still
12 be due, pursuant to 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform Act. The
13 movant herein is permitted to maintain this action to conclusion without the necessity of
14 prepayment of fees or costs or the giving of security therefor. This order granting *in forma*
15 *pauperis* status shall not extend to the issuance and/or service of subpoenas at government
16 expense.

17 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the
18 Prisoner Litigation Reform Act, the Nevada Department of Corrections shall pay to the Clerk
19 of the United States District Court, District of Nevada, 20% of the preceding month's deposits
20 to the account of Peter J. Helfrich, #1111875 (in months that the account exceeds \$10.00)
21 until the full \$350 filing fee has been paid for this action. The Clerk shall send a copy of this
22 order to the attention of **Albert G. Peralta, Chief of Inmate Services for the Nevada**
23 **Department of Prisons**, P.O. Box 7011, Carson City, NV 89702.

24 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise
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26 ² In *Helfrich v. Cox*, 2:15-cv-00384-JCM-PAL, the Ninth Circuit Court of Appeals
27 dismissed Plaintiff's appeal as frivolous. (ECF No. 15, 16). In *Helfrich v. Marshall*,
28 2:15-cv-00393-KJD-GWF, the Ninth Circuit Court of Appeals dismissed Plaintiff's appeal as
frivolous. (ECF No. 59, 60). These dismissals constitute two strikes under 28 U.S.C.
§ 1915(g). *Richey v. Dahne*, 807 F.3d 1202, 1208 (9th Cir. 2015).

1 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by
2 the Prisoner Litigation Reform Act.

3 **IT IS FURTHER ORDERED** that the motion for telephonic hearing (ECF No. 2) is
4 denied.

5 **IT IS FURTHER ORDERED** that the Clerk of the Court shall file the complaint (ECF No.
6 1-1).

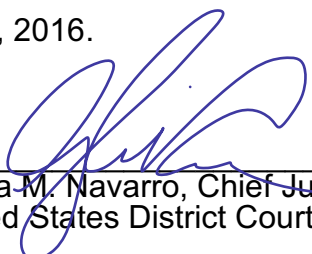
7 **IT IS FURTHER ORDERED** that the complaint is dismissed, with prejudice, in its
8 entirety as malicious.

9 **IT IS FURTHER ORDERED** that this dismissal constitutes Plaintiff's third strike under
10 28 U.S.C. § 1915(g).

11 **IT IS FURTHER ORDERED** that this Court certifies that any *in forma pauperis* appeal
12 from this order would **not** be taken "in good faith" pursuant to 28 U.S.C. § 1915(a)(3).

13 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment
14 accordingly.

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16 DATED: This 13 day of September, 2016.

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20 Gloria M. Navarro, Chief Judge
21 United States District Court
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