

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TRISTIN KING,
CDCR #AW-9524,

Plaintiff,

C/O FIERO;
C/O WOLLESEN.

Defendants.

Case No.: 3:20-CV-1254 JLS (AHG)

**ORDER: (1) GRANTING MOTION
TO PROCEED IN FORMA
PAUPERIS; AND (2) DIRECTING
U.S. MARSHAL TO EFFECT
SERVICE OF SUMMONS AND
COMPLAINT**

Plaintiff Tristin D. King, currently housed at the Richard J. Donovan Correctional Facility (“RJD”) located in San Diego, California, and proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. (*See* Compl., ECF No. 1.) Plaintiff claims that California Department of Corrections and Rehabilitation (“CDCR”) correctional officers failed to protect him from an attack by another inmate in violation of his Eighth Amendment rights. (*See id.*)

Plaintiff did not pay the fee required by 28 U.S.C. § 1914(a) when he filed his Complaint; instead he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

///

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

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); *Rodriguez v.*
 7 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to
 8 proceed IFP remains obligated to pay the entire fee in "increments" or "installments,"
 9 *Bruce v. Samuels*, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185
 10 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. *See* 28 U.S.C.
 11 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

12 Section 1915(a)(2) 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 balance
 18 in the account for the past six months, whichever is greater, unless the prisoner has no
 19 assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody
 20 of the prisoner then collects subsequent payments, assessed at 20% of the preceding
 21 month's income, in any month in which his account exceeds \$10, and forwards those
 22 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,
 23 136 S. Ct. at 629.

24 ///

25
 26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. *See*
 27 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
 28 IFP. *Id.*

1 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate
 2 Statement Report recording his balances and deposits over the 6-month period preceding
 3 the filing of his Complaint. *See* ECF No. 4; 28 U.S.C. § 1915(a)(2); S.D. Cal. CivLR 3.2;
 4 *Andrews*, 398 F.3d at 1119. This Report shows that Plaintiff had a balance of only \$0.12
 5 at the time of filing. *See* ECF No. 4 at 1.

6 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP (ECF No. 2). *See*
 7 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from
 8 bringing a civil action or appealing a civil action or criminal judgment for the reason that
 9 the prisoner has no assets and no means by which to pay the initial partial filing fee”);
 10 *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts
 11 as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure
 12 to pay . . . due to the lack of funds available to him when payment is ordered”). The Court
 13 declines to “exact” any initial filing fee because his trust account statement shows he “has
 14 no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California
 15 Department of Corrections and Rehabilitation (“CDCR”) to collect the entire \$350 balance
 16 of the filing fees required by 28 U.S.C. § 1914 and forward them to the Clerk of the Court
 17 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

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

19 **A. Legal Standard**

20 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
 21 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these statutes,
 22 the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it, which
 23 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are
 24 immune. *See Williams v. King*, 875 F.3d 500, 502 (9th Cir. 2017) (discussing 28 U.S.C.
 25 § 1915(e)(2)) (citing *Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc));
 26 *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C.
 27 § 1915A(b)). “The purpose of [screening] is ‘to ensure that the targets of frivolous or
 28 malicious suits need not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d

1 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d
 2 680, 681 (7th Cir. 2012)). A complaint is “frivolous” if it “lacks an arguable basis either
 3 in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 324 (1989).

4 “The standard for determining whether a plaintiff has failed to state a claim upon
 5 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
 6 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
 7 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
 8 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
 9 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
 10 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,
 11 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
 12 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

13 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
 14 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
 15 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief
 16 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
 17 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
 18 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
 19 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

20 **B. 42 U.S.C. § 1983**

21 “Section 1983 creates a private right of action against individuals who, acting under
 22 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*,
 23 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive
 24 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”
 25 *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation marks and citations
 26 omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a
 27 right secured by the Constitution and laws of the United States, and (2) that the deprivation
 28 ///

1 was committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*,
2 698 F.3d 1128, 1138 (9th Cir. 2012).

3 **C. Eighth Amendment claims**

4 The Court finds Plaintiff’s Eighth Amendment allegations are sufficient to survive
5 the “low threshold” set for sua sponte screening pursuant to 28 U.S.C. §§ 1915(e)(2) and
6 1915A(b). *See Wilhelm*, 680 F.3d at 1123; *Iqbal*, 556 U.S. at 678; *United States v.*
7 *Williams*, 842 F.3d 1143, 1153 (9th Cir. 2016) (the Eighth Amendment “requires that
8 prison officials ‘must take reasonable measures to guarantee the safety of the inmates’”)
9 (quoting *Farmer v. Brennan*, 511 U.S. 825, 833, 847 (1994) (“[P]rison officials have a duty
10 [under the Eighth Amendment] . . . to protect prisoners [and therefore] may be held liable
11 . . . if [they] know[] that inmates face a substantial risk of serious harm and disregard[] that
12 risk by failing to take reasonable measures to abate it.”). “[I]t does not matter whether the
13 risk comes from a single source or multiple sources, any more than it matters whether a
14 prisoner faces an excessive risk . . . for reasons personal to him or because all prisoners in
15 his situation face such a risk.” *Farmer*, 511 U.S. at 843; *Lemire v. Cal. Dep’t of Corr. &*
16 *Rehab.*, 726 F.3d 1062, 1076 (9th Cir. 2013); *Robins v. Meecham*, 60 F.3d 1436, 1442 (9th
17 Cir. 1995) (“[A] prison official can violate a prisoner’s Eighth Amendment rights by failing
18 to intervene.”).

19 Therefore, the Court will direct the U.S. Marshal to effect service of summons
20 Plaintiff’s Complaint on Defendants Fiero and Wollesen on his behalf. *See* 28 U.S.C.
21 § 1915(d) (“The officers of the court shall issue and serve all process, and perform all duties
22 in [IFP] cases.”); Fed. R. Civ. P. 4(c)(3) (“[T]he court may order that service be made by
23 a United States marshal or deputy marshal . . . if the plaintiff is authorized to proceed in
24 forma pauperis under 28 U.S.C. § 1915.”).

25 **III. Conclusion and Order**

26 For the reasons explained, the Court:

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

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

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

10 4. **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF
11 No. 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for Defendants.
12 In addition, the Clerk will provide Plaintiff with a certified copy of this Order, a certified
13 copy of his Complaint and the summons so that he may serve these Defendants. Upon
14 receipt of this "IFP Package," Plaintiff must complete the Form 285s as completely and
15 accurately as possible, *include an address where each named Defendant may be found*
16 *and/or subject to service*, and return them to the United States Marshal according to the
17 instructions the Clerk provides in the letter accompanying his IFP package;

18 5. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
19 upon the Defendants as directed by Plaintiff on the USM Form 285s provided to him. All
20 costs of that service will be advanced by the United States. *See* 28 U.S.C. § 1915(d); Fed.
21 R. Civ. P. 4(c)(3);

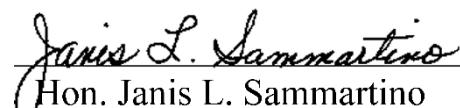
22 6. **ORDERS** Defendants, once he has been served, to reply to Plaintiff's
23 Complaint within the time provided by the applicable provisions of Federal Rule of Civil
24 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be
25 permitted to "waive the right to reply to any action brought by a prisoner confined in any
26 jail, prison, or other correctional facility under section 1983," once the Court has conducted
27 its *sua sponte* screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has
28 made a preliminary determination based on the face on the pleading alone that Plaintiff has

1 a “reasonable opportunity to prevail on the merits,” the defendant is required to respond);
2 and

3 7. **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
4 serve upon Defendants, or, if appearance has been entered by counsel, upon Defendants’
5 counsel, a copy of every further pleading, motion, or other document submitted for the
6 Court’s consideration pursuant to Federal Rule of Civil Procedure 5(b). Plaintiff must
7 include with every original document he seeks to file with the Clerk of the Court, a
8 certificate stating the manner in which a true and correct copy of that document has been
9 was served on Defendants or their counsel, and the date of that service. *See* S.D. Cal.
10 CivLR 5.2. Any document received by the Court which has not been properly filed with
11 the Clerk or which fails to include a Certificate of Service upon Defendants may be
12 disregarded.

13 **IT IS SO ORDERED.**

14 Dated: August 18, 2020


15 Hon. Janis L. Sammartino
16 United States District Judge

17
18
19
20
21
22
23
24
25
26
27
28