



1 Cir. 1991) (reversed on other grounds).

2 “The trial court must be careful to avoid construing the statute so narrowly that a litigant is  
3 presented with a Hobson’s choice between eschewing a potentially meritorious claim or foregoing  
4 life’s plain necessities.” *Temple v. Ellerthorpe*, 586 F. Supp. 848, 850 (D.R.I. 1984), citing  
5 *Potnick v. Eastern State Hospital*, 701 F.2d 243, 244 (2d Cir. 1983) (per curiam); *Carson v.*  
6 *Polley*, 689 F.2d 562, 586 (5th Cir. 1982). “But, the same even-handed care must be employed to  
7 assure that federal funds are not squandered to underwrite, at public expense, either frivolous  
8 claims or the remonstrances of a suitor who is financially able, in whole or in material part, to pull  
9 his own oar.” *Temple*, 586 F. Supp. at 850, citing *Brewster v. North American Van Lines, Inc.*,  
10 461 F.2d 649, 651 (7th Cir. 1972).

11 The statement report of Plaintiff’s inmate account provided by the CDCR indicates that  
12 less than a month prior to filing this action, Plaintiff had over \$500 that could have been used to  
13 pay the filing fee. Instead, Plaintiff spent nearly \$400 the same day he signed the Complaint and  
14 his application to proceed *in forma pauperis*, which was the day before he filed this action.

15 Proceeding “*in forma pauperis* is a privilege not a right.” *Smart v. Heinze*, 347 F.2d 114,  
16 116 (9th Cir. 1965). While a party need not be completely destitute to proceed *IFP*, *Adkins v. E.I.*  
17 *DuPont de Nemours & Co.*, 335 U.S. 331, 339-40 (1948), “the same even-handed care must be  
18 employed to assure that federal funds are not squandered to underwrite, at public expense, either  
19 frivolous claims or the remonstrances of a suitor who is financially able, in whole or in material  
20 part, to pull his own oar.” *Doe v. Educ. Enrichment Sys.*, No. 15cv2628-MMA (MDD), 2015 U.S.  
21 Dist. LEXIS 173063, \*2 (S.D. Cal. Dec. 30, 2015) (citing *Temple v. Ellerthorpe*, 586 F. Supp. 848,  
22 850 (D.R.I. 1984)).

23 “If an applicant has the wherewithal to pay court costs, or some part thereof, without  
24 depriving himself and his dependents (if any there be) of the necessities of life, then he should be  
25 required, in the First Circuit’s phrase, to ‘put his money where his mouth is.’” *Williams v. Latins*,  
26 877 F.2d 65 (9th Cir. 1989) (affirming district court denial of *in forma pauperis* where in past 12  
27 months, plaintiff received a sum of \$5,000 settling a civil action and no indication it was  
28 unavailable to plaintiff) (citing, *Temple*, 586 F.Supp. at 851(quoting *In re Stump*, 449 F.2d 1297,

1 1298 (1st Cir. 1971) (*per curiam*)).

2 To proceed *in forma pauperis*, a plaintiff need not demonstrate that he is completely  
3 destitute, but his poverty must prevent him from paying the filing fee and providing his dependents  
4 with the necessities of life. See *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339-40  
5 (1948). A “showing of something more than mere hardship must be made.” *Nastrom v. New*  
6 *Century Mortg. Corp.*, No. 11-cv-1998, 2011 WL 7031499, at \*1 (E.D. Cal. Dec. 7, 2011)  
7 (quoting *Martin v. Gulf States Utilities Co.*, 221 F.Supp. 757, 759 (W.D. La.1963)), report and  
8 recommendation adopted by, 2012 WL 116563 (E.D. Cal. Jan.12, 2012). Plaintiff has not shown  
9 that he has any dependents who would have been deprived of the necessities of life if he paid the  
10 filing fee and, since Plaintiff is currently incarcerated, the State of California is paying for his  
11 necessities of daily life. *Williams*, 877 F.2d 65.

12 The Court may consider the economic priority Plaintiff placed on the use of money in his  
13 trust account. See *Olivares v. Marshall*, 59 F.3d 109, 112 (9th Cir. 1995) (citing *Alexander v.*  
14 *Carson Adult High School*, 9 F.3d 1448, 1449 (9th Cir. 1993). A district court is entitled to honor  
15 an inmate’s decision of other use of available funds which the inmate considered more worthwhile  
16 than payment of a federal court’s filing fee. See *Olivares*, at 112, (quoting *Lumbert v. Illinois*  
17 *Department of Corrections*, 827 F.2d 257, 260 (7th Cir. 1987) (Noting peanut and candy  
18 “comforts” the plaintiff purchased in the prison commissary; “If the inmate thinks a more  
19 worthwhile use of his funds would be to buy peanuts and candy ... than to file a civil rights suit, he  
20 has demonstrated an implied evaluation of the suit that the district court is entitled to honor.”).)  
21 Plaintiff clearly prioritized various purchases over his obligation to pay the filing fee in this action.

22 The determination whether a party can proceed *in forma pauperis* is a “matter within the  
23 discretion of the trial court and in civil actions for damages should be allowed only in exceptional  
24 circumstances.” *Weller v. Dickinson*, 314 F.2d 598, 600 (9th Cir. 1963); see also *Franklin v.*  
25 *Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“court permission to proceed in forma pauperis is  
26 itself a matter of privilege and not right; denial of in forma pauperis status does not violate the  
27 applicant’s right to due process”). The day Plaintiff signed the Complaint and the application to  
28 proceed *in forma pauperis*, which was the day before he filed this action, Plaintiff spent nearly

1 \$400 elsewhere. Thus, Plaintiff's application to proceed *in forma pauperis* should be denied and  
2 this action should be dismissed without prejudice to refiling on prepayment of the filing fee.

3 **RECOMMENDATION**

4 Accordingly, the Court **RECOMMENDS** that Plaintiff's application to proceed *in forma*  
5 *pauperis*, filed on July 11, 2018 (Doc. 2), be **DENIED** and that the action be dismissed without  
6 prejudice to refiling on prepayment of the filing fee. The Clerk of the Court is directed to  
7 randomly assign a district judge to this action.

8 These Findings and Recommendations will be submitted to the United States District Judge  
9 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within 21 days**  
10 after being served with these Findings and Recommendations, Plaintiff may file written objections  
11 with the Court. The document should be captioned "Objections to Magistrate Judge's Findings  
12 and Recommendations." Plaintiff is informed that failure to file objections within the specified  
13 time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th  
14 Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

15 IT IS SO ORDERED.

16 Dated: **December 17, 2018**

17 **/s/ Jennifer L. Thurston**  
18 UNITED STATES MAGISTRATE JUDGE