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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

BENJAMIN A. WALSH,  
CDCR #K-35564,

Plaintiff,

vs.

J. CELAYA; P. ALANIZ;  
KAREN CRIBBS; N. PANA,

Defendants.

Civil No. 12cv1603 JLS (MDD)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE, GARNISHING \$350.00  
BALANCE FROM PRISONER'S  
TRUST ACCOUNT [ECF No. 3]; and**

**(2) DISMISSING COMPLAINT  
FOR FAILING TO STATE A  
CLAIM PURSUANT TO 28 U.S.C.  
§§ 1915(e)(2) AND 1915A(b)**

Benjamin A. Walsh (“Plaintiff”), a state prisoner currently incarcerated at the Richard J. Donovan Correctional Facility located in San Diego, California, and proceeding pro se, has submitted a civil action pursuant to 42 U.S.C. § 1983. Additionally, Plaintiff has filed a certified copy of his inmate trust account statement which the Court construes as Plaintiff’s Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF No. 3].

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1 I.

2 MOTION TO PROCEED IFP [ECF No. 3]

3 All parties instituting any civil action, suit or proceeding in a district court of the  
4 United States, except an application for writ of habeas corpus, must pay a filing fee of \$350.  
5 See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the  
6 entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C.  
7 § 1915(a). See *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners  
8 granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless  
9 of whether their action is ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v.*  
10 *Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

11 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”),  
12 a prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund  
13 account statement (or institutional equivalent) for the prisoner for the six-month period  
14 immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v.*  
15 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the  
16 Court must assess an initial payment of 20% of (a) the average monthly deposits in the  
17 account for the past six months, or (b) the average monthly balance in the account for the  
18 past six months, whichever is greater, unless the prisoner has no assets. See 28 U.S.C.  
19 § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must  
20 collect subsequent payments, assessed at 20% of the preceding month’s income, in any  
21 month in which the prisoner’s account exceeds \$10, and forward those payments to the Court  
22 until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2).

23 The Court finds that Plaintiff has no available funds from which to pay filing fees at  
24 this time. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be  
25 prohibited from bringing a civil action or appealing a civil action or criminal judgment for  
26 the reason that the prisoner has no assets and no means by which to pay the initial partial  
27 filing fee”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-  
28 valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay . . . due

1 to the lack of funds available to him when payment is ordered.”). Therefore, the Court  
2 **GRANTS** Plaintiff’s Motion to Proceed IFP [ECF No. 3] and assesses no initial partial filing  
3 fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated  
4 shall be collected and forwarded to the Clerk of the Court pursuant to the installment  
5 payment provisions set forth in 28 U.S.C. § 1915(b)(1).

6 **II.**

7 **INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

8 Notwithstanding IFP status or the payment of any partial filing fees, the Court must  
9 subject each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening  
10 and order the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a  
11 claim upon which relief may be granted, or seeking monetary relief from a defendant  
12 immune from such relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845  
13 (9th Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to  
14 prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that  
15 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte dismiss an *in*  
16 *forma pauperis* complaint that fails to state a claim).

17 Before its amendment by the PLRA, former 28 U.S.C. § 1915(d) permitted sua sponte  
18 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1130. However, as  
19 amended, 28 U.S.C. § 1915(e)(2) mandates that the court reviewing an action filed pursuant  
20 to the IFP provisions of § 1915 make and rule on its own motion to dismiss before directing  
21 the U.S. Marshal to effect service pursuant to FED.R.CIV.P. 4(c)(3). See *Calhoun*, 254 F.3d  
22 at 845; *Lopez*, 203 F.3d at 1127; *McGore v. Wrigglesworth*, 114 F.3d 601, 604-05 (6th Cir.  
23 1997) (stating that sua sponte screening pursuant to § 1915 should occur “before service of  
24 process is made on the opposing parties”).

25 “[W]hen determining whether a complaint states a claim, a court must accept as true  
26 all allegations of material fact and must construe those facts in the light most favorable to the  
27 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Barren*, 152 F.3d at 1194  
28 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure

1 12(b)(6)"); *Andrews*, 398 F.3d at 1121. In addition, the Court has a duty to liberally construe  
2 a pro se's pleadings, see *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th  
3 Cir. 1988), which is "particularly important in civil rights cases," *Ferdik v. Bonzelet*, 963  
4 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation to a pro se civil rights  
5 complaint, however, the court may not "supply essential elements of claims that were not  
6 initially pled." *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th  
7 Cir. 1982).

8 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a  
9 person acting under color of state law committed the conduct at issue, and (2) that the  
10 conduct deprived the claimant of some right, privilege, or immunity protected by the  
11 Constitution or laws of the United States. See 42 U.S.C. § 1983; *Nelson v. Campbell*, 124  
12 S.Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en  
13 banc).

#### 14 **A. Property claims**

15 In his Complaint, Plaintiff alleges that when he was transferred to various prisons,  
16 prison officials lost a box of his property. (See Compl. at 3-5.) Where an inmate alleges the  
17 deprivation of a liberty or property interest caused by the unauthorized negligent or  
18 intentional action of a prison official, the prisoner cannot state a constitutional claim where  
19 the state provides an adequate post-deprivation remedy. See *Zinermon v. Burch*, 494 U.S.  
20 113, 129-32 (1990); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). The California Tort  
21 Claims Act provides an adequate post-deprivation state remedy for the random and  
22 unauthorized taking of property. *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994).  
23 Thus, Plaintiff has an adequate state post-deprivation remedy and his claims relating to the  
24 loss of his property are not cognizable in this § 1983 action, and must be dismissed pursuant  
25 to 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

#### 26 **B. Fourteenth Amendment claims**

27 Throughout Plaintiff's Complaint, he alleges prison officials have failed to process or  
28 respond to his administrative grievances adequately. The Fourteenth Amendment provides

1 that “[n]o state shall . . . deprive any person of life, liberty, or property, without due process  
2 of law.” U.S. CONST. amend. XIV, § 1. “The requirements of procedural due process apply  
3 only to the deprivation of interests encompassed by the Fourteenth Amendment’s protection  
4 of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). State statutes  
5 and prison regulations may grant prisoners liberty or property interests sufficient to invoke  
6 due process protection. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). To state a  
7 procedural due process claim, Plaintiff must allege: “(1) a liberty or property interest  
8 protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3)  
9 lack of process.” *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000).

10         However, the Ninth Circuit has held that prisoners have no protected *property* interest  
11 in an inmate grievance procedure arising directly from the Due Process Clause. *See Ramirez*  
12 *v. Galaza*, 334 F.3d 850, 869 (9th Cir. 2003) (“[I]nmates lack a separate constitutional  
13 entitlement to a specific prison grievance procedure.”) (citing *Mann v. Adams*, 855 F.2d 639,  
14 640 (9th Cir. 1988) (finding that the due process clause of the Fourteenth Amendment creates  
15 “no legitimate claim of entitlement to a [prison] grievance procedure”)); *accord Adams v.*  
16 *Rice*, 40 F.3d 72, 75 (4th Cir. 1994) (1995); *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir.  
17 1993).

18         In addition, Plaintiff has failed to plead facts sufficient to show that prison official  
19 deprived him of a protected *liberty* interest by allegedly failing to respond to his prison  
20 grievances in a satisfactory manner. While a liberty interest can arise from state law or  
21 prison regulations, *Meachum*, 427 U.S. at 223–27, due process protections are implicated  
22 only if Plaintiff alleges facts to show that Defendants: (1) restrained his freedom in a manner  
23 not expected from his sentence, and (2) “impose[d] atypical and significant hardship on [him]  
24 in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484  
25 (1995); *Neal v. Shimoda*, 131 F.3d 818, 827–28 (9th Cir. 1997). Plaintiff pleads nothing to  
26 suggest how the allegedly inadequate review and consideration of his inmate grievances  
27 resulted in an “atypical” and “significant hardship.” *Sandin*, 515 U.S. at 483–84.

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1 Thus, to the extent Plaintiff challenges the procedural adequacy of inmate grievance  
2 procedures, his Complaint fails to state a due process claim. Consequently, the Court finds  
3 that Plaintiff's Complaint must be dismissed sua sponte for failing to state a claim upon  
4 which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b).

5 **III.**

6 **CONCLUSION AND ORDER**

7 Good cause appearing, **IT IS HEREBY ORDERED** that:

8 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 3]  
9 is **GRANTED**.

10 2. The Secretary of California Department of Corrections and Rehabilitation, or  
11 his designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing  
12 fee owed in this case by collecting monthly payments from the account in an amount equal to  
13 twenty percent (20%) of the preceding month's income and forward payments to the Clerk of  
14 the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C.  
15 § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME  
16 AND NUMBER ASSIGNED TO THIS ACTION.

17 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew  
18 Cate, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street,  
19 Suite 502, Sacramento, California 95814.

20 **IT IS FURTHER ORDERED** that:

21 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.  
22 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave  
23 from the date this Order is "Filed" in which to file a First Amended Complaint which cures  
24 all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must be  
25 complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R.  
26 15.1. Defendants not named and all claims not re-alleged in the Amended Complaint will be  
27 deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).


28 Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may be

1 granted, it may be dismissed without further leave to amend and may hereafter be counted  
2 as a “strike” under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th  
3 Cir. 1996).

4 5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

5 **IT IS SO ORDERED.**

6 DATED: July 30, 2012

7   
8 Honorable Janis L. Sammartino  
9 United States District Judge  
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