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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN HAGAN,  
CDCR #AX-5810,  
  
Plaintiff,  
  
vs.  
  
SCOTT MICHAEL BLUMAN;  
CHARLES CHILDERS; SCOTTY  
ELECTRIC CO.; KATHY BURGESS,  
  
Defendants.

Case No.: 3:16-cv-02976-LAB-JLB

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
PURSUANT TO 28 U.S.C. § 1915(a)  
[Doc. No. 2]; AND**

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

Kevin Hagan (“Plaintiff”), a prisoner incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, has filed a civil rights complaint (“Compl.”) pursuant to 42 U.S.C. § 1983. See Doc. No. 1 at 1.

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1 Plaintiff did not prepay the civil filing fees required by 28 U.S.C. § 1914(a) at the  
2 time of filing; instead he has filed a certified copy of his inmate trust account statement  
3 which the Court has liberally construed as a Motion to Proceed In Forma Pauperis  
4 (“IFP”) pursuant to 28 U.S.C. § 1915(a) (Doc. No. 2).

5 **I. Plaintiff’s IFP Motion**

6 All parties instituting any civil action, suit or proceeding in a district court of the  
7 United States, except an application for writ of habeas corpus, must pay a filing fee of  
8 \$400.<sup>1</sup> See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
9 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
10 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
11 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to  
12 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
13 *Bruce v. Samuels*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d  
14 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.  
15 See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.  
16 2002).

17 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
18 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the  
19 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
20 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
21 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
22 monthly deposits in the account for the past six months, or (b) the average monthly  
23 balance in the account for the past six months, whichever is greater, unless the prisoner  
24 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having  
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27 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. See  
28 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff.  
Dec. 1, 2014)). The additional \$50 administrative fee does not apply to persons granted leave to proceed  
IFP. *Id.*

1 custody of the prisoner then collects subsequent payments, assessed at 20% of the  
2 preceding month's income, in any month in which his account exceeds \$10, and forwards  
3 those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2);  
4 Bruce, 136 S. Ct. at 629.

5 Plaintiff has submitted a certified copy of his prison trust account statement  
6 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. See Doc. No. 2 at 4-7;  
7 Andrews, 398 F.3d at 1119. This statement shows that Plaintiff had an available amount  
8 of \$0.01 at the time of filing. Therefore, the Court assesses no initial partial filing fee  
9 pursuant to 28 U.S.C. § 1915(b)(1). See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no  
10 event shall a prisoner be prohibited from bringing a civil action or appealing a civil action  
11 or criminal judgment for the reason that the prisoner has no assets and no means by  
12 which to pay the initial partial filing fee.”); Bruce, 136 S. Ct. at 630; Taylor, 281 F.3d at  
13 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of  
14 a prisoner's IFP case based solely on a “failure to pay . . . due to the lack of funds  
15 available to him when payment is ordered.”).

16 Thus, the Court GRANTS Plaintiff's Motion to Proceed IFP and directs the  
17 Secretary of the California Department of Corrections and Rehabilitation (“CDCR”), or  
18 his designee, to collect the entire \$350 balance of the filing fees required by 28 U.S.C.  
19 § 1914 and forward them to the Clerk of the Court pursuant to the installment payment  
20 provisions set forth in 28 U.S.C. § 1915(b)(1). See *id.*

## 21 **II. Screening Pursuant to 28 U.S.C. § 1915(e)(2)(B)**

### 22 **A. Standard of Review**

23 If a prisoner's complaint “seeks redress from a governmental entity or officer or  
24 employee of a governmental entity,” the Court “shall review” the pleading “as soon as  
25 practicable after docketing,” and “dismiss the complaint, or any portion of the complaint,  
26 if [it] . . . is frivolous, malicious, or fails to state a claim upon which relief may be  
27 granted.” 28 U.S.C. § 1915A(a), (b)(1); *Nordstrom v. Ryan*, 762 F.3d 903, 907 n.1 (9th  
28 Cir. 2014). As noted below, Plaintiff alleges violations of his constitutional right to be

1 free from “cruel and unusual punishment,” see Compl. at 3, but he seeks redress from  
2 private citizens, attorneys and his former employer, none of whom are alleged to be  
3 governmental actors. *Id.* at 2. Therefore, § 1915A(a)’s screening provisions do not apply.  
4 See *Chavez v. Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016) (“Section 1915A mandates  
5 early review ... for all complaints ‘in which a prisoner seeks relief from a governmental  
6 entity...’”) (quoting § 1915A(a)); see also *Thompson v. Hicks*, 213 Fed. Appx. 939, 2007  
7 WL 106785 at \*3 (11th Cir. 2007) (noting that because a private defendant was not a  
8 “governmental entity” as described in § 1915A, prisoner’s complaint as to that defendant  
9 was not subject to dismissal under § 1915A).

10 Because Plaintiff is proceeding IFP, however, his Complaint is still subject to a  
11 sua sponte review, and mandatory dismissal, if it is “frivolous, malicious, fail[s] to state a  
12 claim upon which relief may be granted, or seek[s] monetary relief from a defendant  
13 immune from such relief,” regardless of whether he seeks redress from a “governmental  
14 entity.” See 28 U.S.C. § 1915(e)(2)(B); *Coleman v. Tollefson*, 135 S. Ct. 1759, 1763  
15 (2015) (pursuant to 28 U.S.C. § 1915(e)(2) “the court shall dismiss the case at any time if  
16 the court determines that—(A) the allegation of poverty is untrue; or (B) the action or  
17 appeal—(i) is frivolous or malicious; [or] (ii) fails to state a claim on which relief may be  
18 granted.”); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection  
19 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis  
20 complaint that fails to state a claim.”).

21 “The standard for determining whether a plaintiff has failed to state a claim upon  
22 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
23 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668  
24 F.3d 1108, 1112 (9th Cir. 2012).

25 To survive a motion to dismiss, the complaint must contain “a short and plain  
26 statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P.  
27 8(a)(2). Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
28 elements of a cause of action, supported by mere conclusory statements, do not suffice.”

1 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550  
2 U.S. 544, 555 (2007)). “Determining whether a complaint states a plausible claim for  
3 relief [is] . . . a context-specific task that requires the reviewing court to draw on its  
4 judicial experience and common sense.” Id. The “mere possibility of misconduct” falls  
5 short of meeting this plausibility standard. Id.; see also Moss v. U.S. Secret Service, 572  
6 F.3d 962, 969 (9th Cir. 2009).

7 “When there are well-pleaded factual allegations, a court should assume their  
8 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
9 Iqbal, 556 U.S. at 679; see also Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000)  
10 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
11 allegations of material fact and must construe those facts in the light most favorable to  
12 the plaintiff.”).

13 However, while the court “ha[s] an obligation where the petitioner is pro se,  
14 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
15 petitioner the benefit of any doubt,” Hebbe v. Pliler, 627 F.3d 338, 342 & n.7 (9th Cir.  
16 2010) (citing Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not  
17 “supply essential elements of claims that were not initially pled.” Ivey v. Board of  
18 Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

### 19 **B. Plaintiff’s Allegations**

20 Plaintiff claims to have been injured with a “life-time permanent injury” when he  
21 was working as an electrician for “Scotty Electric” in 2002. Compl. at 3. Plaintiff  
22 brought a worker’s compensation civil lawsuit against his former employer claiming, in  
23 part, “debilitating mental & physical injuries” which have “placed him in a wheelchair  
24 for the remainder of his life.” Id. Plaintiff alleges that the litigation remained pending  
25 for more than ten (10) years during which time he was “mentally & physically  
26 incompetent” and unable to understand any of the settlement negotiations. (Id.) As a  
27 result, Plaintiff claims his attorneys, the attorneys representing his former employer, and  
28 the attorneys representing the State Compensation Insurance Fund all took advantage of

1 him. (Id.) Specifically, Plaintiff claims that they “coerced” him into taking a settlement  
2 that fell far below the amount needed to take care of his medical needs for the remainder  
3 of his life. (Id.) Plaintiff seeks compensatory damages in the amount of \$2,000,000 and  
4 punitive damages in the amount of \$500,000 from each Defendant. (Id. at 7.)

5 **C. 42 U.S.C. § 1983**

6 Section 1983 is a “vehicle by which plaintiffs can bring federal constitutional and  
7 statutory challenges to actions by state and local officials.” *Anderson v. Warner*, 451 F.3d  
8 1063, 1067 (9th Cir. 2006). To state a claim under 42 U.S.C. § 1983, a plaintiff must  
9 allege two essential elements: (1) that a right secured by the Constitution or laws of the  
10 United States was violated, and (2) that the alleged violation was committed by a person  
11 acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*,  
12 789 F.3d 1030, 1035-36 (9th Cir. 2015).

13 While Plaintiff claims Defendants violated his Eighth Amendment right to be free  
14 from “cruel and unusual punishment,” Defendants Bluman, Childers, Scott Electric Co.,  
15 and Burgess are not alleged to be “person[s] acting under color of state law.” See *West*;  
16 487 U.S. at 48; *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir.  
17 1999) (The party charged with a constitutional deprivation under § 1983 must be a person  
18 who may fairly be said to be a governmental actor) (citation and quotations omitted).

19 The Constitution protects individual rights only from government action and not  
20 from private action; it is only when the government is responsible for the specific conduct  
21 of which the plaintiff complains that individual constitutional rights are implicated.  
22 *Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 746-47 (9th Cir. 2003). Generally,  
23 private parties do not act under color of state law. See *Price v. Hawai‘i*, 939 F.2d 702,  
24 707-08 (9th Cir. 1991). Section “1983 excludes from its reach merely private conduct, no  
25 matter how discriminatory or wrong.” *Sutton*, 193 F.3d at 835 (citing *Am. Mfrs. Mut. Ins.*  
26 *Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citation and internal quotation marks omitted));  
27 *see also Ouzts v. Md. Nat’l Ins. Co.*, 505 F.2d 547, 551 (9th Cir.1974) (a purely private  
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1 actor may be liable for his misconduct in state court, but his conduct is not actionable  
2 under Section 1983, regardless of how egregious).

3 In order for private conduct to constitute governmental action, “something more”  
4 must be alleged. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982) (“Action  
5 by a private party pursuant to [§ 1983], without something more, [i]s not sufficient to  
6 justify a characterization of that party as a ‘state actor.’”). Courts have used four different  
7 factors or tests to identify what constitutes “something more”: (1) public function, (2)  
8 joint action, (3) governmental compulsion or coercion, and (4) governmental nexus. See  
9 *id.*; *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997); *Parks Sch. of Bus., Inc. v.*  
10 *Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995); *Gorenc v. Salt River Project Agric.*  
11 *Improvement and Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989).

12 Here, Plaintiff has failed to allege facts sufficient to plausibly show that any of the  
13 private parties or organizations he has named as Defendants performed any public  
14 function traditionally reserved to the state, acted as willful participants in joint action  
15 with government agents, was compelled or coerced, or had any connection whatsoever  
16 with the state, when they allegedly deprived Plaintiff of a larger monetary settlement. See  
17 *Iqbal*, 556 U.S. at 678; *Lugar*, 457 U.S. at 939.

18 For all these reasons, the Court finds Plaintiff’s Complaint fails to state a claim  
19 upon which relief can be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii); *Lopez*, 203 F.3d at  
20 1130.

#### 21 **D. Leave to Amend**

22 A pro se litigant must be given leave to amend his pleading to state a claim unless  
23 it is absolutely clear the deficiencies cannot be cured by amendment. See *Lopez*, 203 F.3d  
24 at 1130 (noting leave to amend should be granted when a complaint is dismissed under  
25 28 U.S.C. § 1915(e) “if it appears at all possible that the plaintiff can correct the defect”).  
26 Therefore, while the Court finds Plaintiff’s Complaint fails to state a claim upon which  
27 relief can be granted, it will provide him a chance to fix the pleading deficiencies  
28

1 discussed in this Order, if he can. See *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir.  
2 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

3 **III. Conclusion and Order**

4 For all the reasons discussed, the Court:

5 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)  
6 (Doc. No. 2).

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

14 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott  
15 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

16 4. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which  
17 § 1983 relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii).

18 5. **GRANTS** Plaintiff forty-five (45) days leave to file an Amended Complaint  
19 which cures all the deficiencies of pleading described in this Order. Plaintiff is cautioned,  
20 however, that should he choose to file an Amended Complaint, it must be complete by  
21 itself, comply with Federal Rule of Civil Procedure 8(a), and that any claim not re-  
22 alleged will be considered waived. See S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v.*  
23 *Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended  
24 pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir.  
25 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an  
26 amended pleading may be “considered waived if not repled.”).

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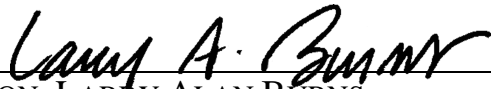
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1           **6. DIRECTS** the Clerk of Court to mail to Plaintiff, together with this Order, a  
2 blank copy of the Court’s form “Complaint under the Civil Rights Act, 42 U.S.C.  
3 § 1983” for his use in amending.

4           **IT IS SO ORDERED.**

5  
6 Dated: February 27, 2017

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8 \_\_\_\_\_  
9 HON. LARRY ALAN BURNS  
10 United States District Judge

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