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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JOSEPH A. CRISTIANO,  
12 CDCR #AW-6241,

13 Plaintiff,

14 vs.

15 EDMUND G. BROWN, Jr.,  
16 Governor, et al.,

17 Defendants.  
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Case No.: 3:16-cv-03077-BEN-BLM

**ORDER:**

**1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
[ECF No. 2]**

**AND**

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

22  
23 JOSEPH A. CRISTIANO (“Plaintiff”), a prisoner at Pleasant Valley State Prison  
24 (“PVSP”) in Coalinga, California, has filed a civil rights complaint pursuant to 42 U.S.C.  
25 § 1983 (ECF No. 1).

26 Plaintiff claims the Governor of California (Defendant Brown), the current and  
27 former Directors of the California Department of Corrections and Rehabilitation  
28 (“CDCR”) (Defendants Kernan and Beard), the Warden of PVSP (Defendant

1 Frauenheim), and a San Diego Superior Court Judge (Defendant Popkins) have subjected  
2 him to severe and inhabitable conditions of confinement and systemic prison  
3 overcrowding from “2014 to present” in violation of the Eighth Amendment. (ECF No. 1  
4 at 1-3, 13-15.) He seeks cessation of the Eighth Amendment violation “via release as  
5 sanctioned in *Brown v. Plata*,” a reversal of his conviction, the expungement of his  
6 criminal record, and “\$140 for each day of an unauthorized prison sentence,” as well as  
7 punitive damages and other sanctions.<sup>1</sup> (*Id.* at 25.)

8 Plaintiff has not paid the civil filing fees required by 28 U.S.C. § 1914(a), but  
9 instead, has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C.  
10 § 1915(a) (ECF No. 2).

#### 11 **I. IFP Motion**

12 All parties instituting any civil action, suit or proceeding in a district court of the  
13 United States, except an application for writ of habeas corpus, must pay a filing fee of  
14 \$400.<sup>2</sup> *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
15 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
16 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
17 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to  
18 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
19 *Bruce v. Samuels*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d  
20 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.

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24 <sup>1</sup> *See Brown v. Plata*, 563 U.S. 493, 499-503 (2011) (affirming three-judge district court  
25 order requiring California to reduce its prison population).

26 <sup>2</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative  
27 fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court  
28 Misc. Fee Schedule, § 14 (eff. June 1, 2016). The additional \$50 administrative fee does  
not apply to persons granted leave to proceed IFP. *Id.*

1 See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.  
2 2002).

3 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
4 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the  
5 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
6 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
7 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
8 monthly deposits in the account for the past six months, or (b) the average monthly  
9 balance in the account for the past six months, whichever is greater, unless the prisoner  
10 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having  
11 custody of the prisoner then collects subsequent payments, assessed at 20% of the  
12 preceding month’s income, in any month in which his account exceeds \$10, and forwards  
13 those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2);  
14 *Bruce*, 136 S. Ct. at 629.

15 In support of his IFP Motion, Plaintiff has submitted copies of his CDCR Inmate  
16 Statement Report and a prison certificate authorized by a PVSP official attesting to his  
17 trust account activity at the time of filing. See ECF No. 2 at 6-8; 28 U.S.C. § 1915(a)(2);  
18 S.D. Cal. CivLR 3.2; *Andrews*, 398 F.3d at 1119. These statements show Plaintiff has had  
19 no monthly deposits to his account, has carried no balance over the six month period  
20 preceding the filing of his Complaint, and that his current available balance is zero (ECF  
21 No. 2 at 7, 8). See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner  
22 be prohibited from bringing a civil action or appealing a civil action or criminal judgment  
23 for the reason that the prisoner has no assets and no means by which to pay the initial  
24 partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28  
25 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case  
26 based solely on a “failure to pay . . . due to the lack of funds available to him when  
27 payment is ordered.”).

1           Therefore, the Court grants Plaintiff’s Motion to Proceed IFP, declines to exact any  
2 initial filing fee because his trust account statement shows he “has no means to pay it,”  
3 *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California Department of  
4 Corrections and Rehabilitation (“CDCR”) to collect the entire \$350 balance of the filing  
5 fees required by 28 U.S.C. § 1914 and forward them to the Clerk of the Court pursuant to  
6 the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1). *See id.*

## 7 **II. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

### 8 **A. Standard of Review**

9           Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-  
10 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
11 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of  
12 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
13 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
14 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.  
15 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
16 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
17 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
18 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

19           “The standard for determining whether a plaintiff has failed to state a claim upon  
20 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
21 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668  
22 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th  
23 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
24 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
25 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted  
26 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.  
27 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

28           Detailed factual allegations are not required, but “[t]hreadbare recitals of the

1 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
2 *Iqbal*, 556 U.S. at 678. “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” or  
5 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting  
6 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th  
7 Cir. 2009).

### 8 **B. Plaintiff’s Complaint**

9 As noted above, Plaintiff seeks to sue the Governor, Directors of the CDCR, the  
10 Warden of PVSP, where he is currently incarcerated, and the San Diego Superior Court  
11 Judge who “sentenced [him] to a plea agreement that placed [him] in a prison system”  
12 that violates the Eighth Amendment due to overcrowding. (ECF No. 1 at 2.) With the  
13 exception of several paragraphs in which he complains of a non-functioning toilet, and  
14 the lack of showers at the California Institution for Men (“CIM”) in Chino where he was  
15 first incarcerated, and several other reports of gang intimidation, cell flooding, vermin,  
16 and power outages at PVSP where he is now incarcerated, *id.* at 27-29, Plaintiff’s  
17 pleading contains virtually no facts specific to him or involving the persons he seeks to  
18 sue. Instead, it is mostly comprised of a narrative history of the still-pending California  
19 class action, *Brown v. Plata*, of which he may or may not be a member, followed by case  
20 citations and quotations expounding upon broad principles of Eighth Amendment law,  
21 proportionality, and judicial immunity. (*Id.* at 10-24.)

### 22 **C. 42 U.S.C. § 1983**

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

1 deprivation of a right secured by the Constitution and laws of the United States, and (2)  
2 that the deprivation was committed by a person acting under color of state law.” *Tsao v.*  
3 *Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

#### 4 **D. Defendant Popkins**

5 First, to the extent Plaintiff seeks money damages against San Diego Superior  
6 Court Judge Michael J. Popkins for “knowingly sentencing [him],” “abus[ing] his  
7 discretion,” and remanding him to the custody of a “prison system” that was overcrowded  
8 in violation of the Eighth Amendment (ECF No. 1 at 2, 21-23), his claims clearly require  
9 sua sponte dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii). Judge Popkins is  
10 absolutely immune from any suit for money damages based on decisions made during  
11 sentencing. *See Donaghe v. McKay*, 81 F. App’x 925, 926 (9th Cir. 2003) (judge’s  
12 sentencing decisions are “intimately associated with the judicial phase of the criminal  
13 process”).

#### 14 **E. Defendants Brown, Kernan, Beard, and Frauenheim**

15 Second, to the extent Plaintiff seeks to sue the Governor of California, the current  
16 and former Directors of the CDCR, and the Warden of PVSP for failing to adequately  
17 supervise or train subordinate officials who are allegedly subjecting him to conditions  
18 that violate the Eighth Amendment (ECF No. 1 at 2), supervisory personnel may not be  
19 held liable under § 1983 for the actions of subordinate employees based on respondeat  
20 superior, or vicarious liability. *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013);  
21 *accord Lemire v. Cal. Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1074-75 (9th Cir. 2013);  
22 *Moss*, 711 F.3d at 967-68 (9th Cir. 2013); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 915-  
23 16 (9th Cir. 2012) (en banc).

24 “A supervisor may be liable only if (1) he or she is personally involved in the  
25 constitutional deprivation, or (2) there is a sufficient causal connection between the  
26 supervisor’s wrongful conduct and the constitutional violation.” *Crowley*, 734 F.3d at 977  
27 (internal citation and quotation marks omitted); *Lemire*, 726 F.3d at 1074-75; *Lacey*, 693  
28 F.3d at 915-16. “Under the latter theory, supervisory liability exists even without overt

1 personal participation in the offensive act if supervisory officials implement a policy so  
2 deficient that the policy itself is a repudiation of constitutional rights and is the moving  
3 force of a constitutional violation.” *Crowley*, 734 F.3d at 977 (citing *Hansen v. Black*,  
4 885 F.2d 642, 646 (9th Cir.1989)) (internal quotation marks omitted).

5 Thus, insofar as Plaintiff attempts to hold Defendants Brown, Kernan, Beard and  
6 Frauenheim liable for subjecting him to generally unsafe or unsanitary prison conditions  
7 at either Chino or PVSP,<sup>3</sup> he makes no allegations that any of these officials were  
8 personally involved in any specific deprivation, or knew of any specific deprivation and  
9 failed to remedy it. *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1182  
10 (9th Cir. 2007) (citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)). There is  
11 simply no causal connection between these Defendants and Plaintiff’s alleged  
12 deprivations. *Crowley*, 734 F.3d at 977.

13 Thus, because “vicarious liability is inapplicable to . . . § 1983 suits,” and Plaintiff  
14 has failed to “plead that each Government-official defendant, through the official’s own  
15 individual actions, has violated the Constitution,” *Iqbal*, 556 U.S. at 676, his Complaint  
16 fails to state a claim against Defendants Brown, Kernan, Beard, and Frauenheim and is  
17 subject to sua sponte dismissal on that basis pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and  
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20 <sup>3</sup> The Court further notes that even if Plaintiff had “plead[ed] factual content that [would]  
21 allow[] the court to draw the reasonable inference that [each of these] defendant[s] [could  
22 be held] liable for the misconduct alleged,” *Iqbal*, 556 U.S. at 678, his Complaint was filed  
23 in the wrong district. *See* 28 U.S.C. § 1391(b) (providing that a “civil action may be brought  
24 in – (1) a judicial district in which any defendant resides, if all defendants are residents of  
25 the State in which the district is located; [or] (2) a judicial district in which a substantial  
26 part of the events or omissions giving rise to the claim occurred, or a substantial part of  
27 property that is the subject of the action is situated[.]”). Defendants Brown, Kernan, and  
28 Beard are alleged to reside in Sacramento, and Frauenheim is alleged to reside in Fresno  
County, where PVSP is also located. (ECF No. 1 at 2.) None of these Defendants is alleged  
to reside in either San Diego or Imperial County, and Plaintiff’s Eighth Amendment claims  
are alleged to arise at CIM and PVSP—neither of which is located within the Southern  
District of California. *See* 28 U.S.C. § 84(d).

1 § 1915A(b)(1).

2 **F. Eighth Amendment Overcrowding**

3 To the extent Plaintiff claims Defendants Brown, Kernan, Beard, and Frauenheim  
4 are liable for allegedly failing to sufficiently or quickly remedy overcrowding pursuant to  
5 the remedial orders issued in the ongoing class action litigation in *Plata* (ECF No. 1 at 2),  
6 he also fails to state a claim.

7 It is true that the Eighth Amendment’s prohibition against cruel and unusual  
8 punishment protects prisoners not only from inhumane methods of punishment but also  
9 from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045  
10 (9th Cir. 2006). While conditions of confinement may be, and often are, restrictive and  
11 harsh, they must not involve the wanton and unnecessary infliction of pain. *Id.* at 1045  
12 (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Thus, conditions which are  
13 devoid of legitimate penological purpose or contrary to evolving standards of decency  
14 that mark the progress of a maturing society violate the Eighth Amendment. *Id.*  
15 (quotation marks and citations omitted); *Hope v. Pelzer*, 536 U.S. 730, 737 (2002);  
16 *Rhodes*, 452 U.S. at 346.

17 It is also true that prison officials have a duty to ensure prisoners are provided  
18 adequate shelter, food, clothing, sanitation, medical care, and personal safety, *Johnson v.*  
19 *Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) (quotation marks and citations omitted)—but  
20 not every injury that a prisoner sustains while in prison rises to the level of a  
21 constitutional violation, *Morgan*, 465 F.3d at 1045 (quotation marks omitted). To plead  
22 an Eighth Amendment claim, prisoners must allege facts sufficient to plausibly show that  
23 officials acted with deliberate indifference to a substantial risk of harm to their health or  
24 safety. *E.g.*, *Farmer v. Brennan*, 511 U.S. 825, 847 (1994); *Thomas v. Ponder*, 611 F.3d  
25 1144, 1150–51 (9th Cir. 2010); *Foster v. Runnels*, 554 F.3d 807, 812-14 (9th Cir. 2009);  
26 *Morgan*, 465 F.3d at 1045; *Johnson*, 217 F.3d at 731; *Frost v. Agnos*, 152 F.3d 1124,  
27 1128 (9th Cir. 1998).

28 Allegations of prison overcrowding alone are insufficient to state a claim under the

1 Eighth Amendment. *See Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 471 (9th Cir.  
2 1989); *see also Rhodes*, 452 U.S. at 348-49 (double-celling of inmates by itself does not  
3 inflict unnecessary or wanton pain or constitute grossly disproportionate punishment in  
4 violation of Eighth Amendment). An overcrowding claim is cognizable only if Plaintiff  
5 alleges the crowding has caused an increase in violence, reduced the provision of other  
6 constitutionally required services, or has reached a level rendering the institution no  
7 longer fit for human habitation. *See Balla*, 869 F.2d at 471; *Hoptowit v. Ray*, 682 F.2d  
8 1237, 1248-49 (9th Cir. 1982) (noting that overcrowding itself not Eighth Amendment  
9 violation but can lead to specific effects that might violate Constitution), *abrogated in*  
10 *part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

11 Here, Plaintiff has failed to state an Eighth Amendment claim because he has  
12 failed to allege facts sufficient to plausibly show that any of the persons he has named as  
13 Defendants in this case acted with deliberate indifference to any known, specific, or  
14 individualized substantial risk to *his* health or safety. *Farmer*, 511 U.S. at 847; *see also*  
15 *Paine v. City of Lompoc*, 265 F.3d 975, 984 (9th Cir. 2001) (whether or not each  
16 defendant “is a participant in the incidents that could give rise to liability” is a necessary  
17 element of the § 1983 claim). In order to establish a claim for damages against an  
18 individual prison official under § 1983, Plaintiff must allege facts to plausibly show that  
19 each official’s deliberate indifference actually and proximately caused a deprivation of  
20 his Eighth Amendment rights. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988);  
21 *Jackson v. Chappell*, No. C 14-3108 CRB (PR), 2017 WL 57304, at \*4 (N.D. Cal. Jan. 5,  
22 2017). He has failed to plead any such “factual content,” and instead, offers only the  
23 “unadorned, the defendant[s]-unlawfully-harmed-me accusation[s]” that *Iqbal* makes  
24 clear “will not do.” *Iqbal*, 556 U.S. at 678.

25 Further, to the extent Plaintiff suggests the ongoing *Plata* litigation entitles him to,  
26 among other things, punitive damages and release from prison, he has also failed to state  
27 a claim upon which § 1983 relief can be granted because the remedial decree in *Plata* to  
28 reduce prison populations does not create any independent cause of action. *See Hooker v.*

1 *Kimura–Yip*, No. 2:11-cv-0899, 2012 WL 4056914, at \*3 (E.D. Cal. Sept. 14, 2012)  
2 (finding that remedial orders in *Plata* did not provide “independent cause of action”  
3 under § 1983 because they did not “have the effect of creating or expanding plaintiff’s  
4 constitutional rights”), *adopted in relevant part* 2013 WL 6334937; *Yocom v. Grounds*,  
5 No. C 11-5741 SBA (PR), 2012 WL 2254221, at \*6 (N.D. Cal. June 14, 2012) (same).  
6 Moreover, even though the Supreme Court affirmed the remedial order setting the State’s  
7 prison population at a benchmark of 137.5 percent of capacity, which Plaintiff claims has  
8 yet to be achieved, *see* ECF No. 1 at 3, the Supreme Court further emphasized State  
9 officials have discretion in the “means” of complying with that order and are free to seek  
10 its modification. *See Plata*, 563 U.S. at 533. Indeed, as of the filing of this Order, *Plata* is  
11 still pending in the district court. *See also Thomas v. Brown*, No. 1:13-CV-00909 AWI,  
12 2014 WL 3969781, at \*2–3 (E.D. Cal. Aug. 13, 2014); *Plata v. Brown, et al.*, C01-1351  
13 TEH (Defendants’ March 2017 Status Report) (March 15, 2017) (ECF No. 2931).

14 For these additional reasons, the Court finds Plaintiff’s Complaint fails to state a  
15 claim upon which § 1983 relief can be granted. *See Lopez*, 203 F.3d at 1126-27; *Rhodes*,  
16 621 F.3d at 1004.

### 17 **G. Equitable Relief**

18 Finally, to the extent Plaintiff seeks his “release as sanctioned in *Plata*” and  
19 injunctive relief in the form of a court-ordered “reversal and vacat[ion] of his conviction”  
20 (ECF No. 1 at 25), such relief is not available in a § 1983 action, regardless of the  
21 constitutional basis for claims. Challenges to the “fact or duration of confinement” must  
22 be brought in a habeas petition, not in a civil rights action. *See Wilkinson v. Dotson*, 544  
23 U.S. 74, 78-79 (2005) (noting that prisoners who seek “immediate release from prison” or  
24 any “shortening of . . . term of confinement” are mounting challenges to the duration of  
25 their confinement); *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *cf. Ramirez v.*  
26 *Galaza*, 334 F.3d 850, 859 (9th Cir. 2003) (“[H]abeas jurisdiction is absent, and a § 1983  
27 action proper, where a successful challenge to a prison condition will not necessarily  
28 shorten the prisoner’s sentence.”).

1           Moreover, if Plaintiff is a class member in *Plata*, which is unclear from the face of  
2 his Complaint, he likely cannot separately file an individual suit based on the same  
3 subject matter as either of those cases. *See Crawford v. Bell*, 599 F.2d 890, 892-93 (9th  
4 Cir. 1979) (as amended) (noting that dismissal of claim was proper where “previously  
5 certified class action was still pending which raised the same issue and included all of the  
6 members of [plaintiff’s] class”); *McNeil v. Guthrie*, 945 F.2d 1163, 1165 (10th Cir. 1991)  
7 (“Individual suits for injunctive and equitable relief from alleged unconstitutional prison  
8 conditions cannot be brought where there is an existing class action.”); *see also Reece v.*  
9 *Basi*, No. 2:11-cv-2712 GEB AC, 2013 WL 1339048, at \*4–5 (E.D. Cal. Apr. 3, 2013)  
10 (denying prisoner’s request for “system-wide injunctive relief over matters within the  
11 scope of the *Plata* litigation” where he was a member of *Plata* class); *Thomas*, 1:13-CV-  
12 00909 AWI, 2014 WL 3969781, at \*5-6 (E.D. Cal. Aug. 13, 2014).

13           Thus, for these additional reasons, Plaintiff’s Complaint is subject to sua sponte  
14 dismissal pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A because he has failed to state a  
15 plausible claim that he is entitled to the injunctive relief he seeks. *See Lopez*, 203 F.3d at  
16 1126-27; *Rhodes*, 621 F.3d at 1004.

17           Because Plaintiff is proceeding without counsel, however, the Court having now  
18 provided him with “notice of the deficiencies in his complaint,” will also grant him an  
19 opportunity to amend it.<sup>4</sup> *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing  
20 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

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24 <sup>4</sup> Should Plaintiff’s Amended Complaint fail to name Defendants who are alleged to reside  
25 in either San Diego or Imperial County, or fail to allege any plausible claim for relief  
26 arising in the Southern District of California, it may also be subject to sua sponte dismissal  
27 for lack of proper venue pursuant to 28 U.S.C. § 1391(a) and § 1406(a). *See Costlow v.*  
28 *Weeks*, 790 F.2d 1486, 1488 (9th Cir. 1986) (venue may be raised by a court sua sponte  
where the defendant has not yet filed a responsive pleading and the time for doing so has  
not run).

1 **III. Conclusion and Order**

2 Good cause appearing, the Court:

3 1. **GRANTS** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)  
4 (ECF No. 2).

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

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

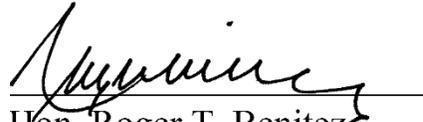
14 4. **DISMISSES** Plaintiff's Complaint for failing to state a claim upon which  
15 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b), and  
16 **GRANTS** him forty-five (45) days leave from the date of this Order in which to file an  
17 Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff's  
18 Amended Complaint must be complete by itself without reference to his original  
19 pleading. Defendants not named and any claim not re-alleged in his Amended Complaint  
20 will be considered waived. *See* S.D. Cal. CivLR 15.1; *Hal Roach Studios, Inc. v. Richard*  
21 *Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading  
22 supersedes the original.”); *Lacey*, 693 F.3d at 928 (noting that claims dismissed with  
23 leave to amend which are not re-alleged in an amended pleading may be “considered  
24 waived if not repled”).

25 If Plaintiff fails to file an Amended Complaint within the time provided, the Court  
26 will enter a final Order dismissing this civil action based both on Plaintiff's failure to  
27 state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)  
28 and 1915A(b), and his failure to prosecute in compliance with a court order requiring

1 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does  
2 not take advantage of the opportunity to fix his complaint, a district court may convert the  
3 dismissal of the complaint into dismissal of the entire action.”).

4 **IT IS SO ORDERED.**

5 Dated: April 5, 2017

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7 Hon. Roger T. Benitez  
8 United States District Judge  
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