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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEAN A. SCHWARTZMILLER, et al.,
Booking # 15746082,

Plaintiff,

vs.

K. RODRIGUEZ, et al.

Defendants.

Case No.: 3:17-cv-00538-JAH-PCL

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)**

Plaintiff, Dean Schwartzmiller, an inmate currently incarcerated at the Richard J. Donovan Correctional Facility (“RJD”) located in San Diego, California has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1) and a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2). Because Plaintiff’s Motion to Proceed IFP complies with 28 U.S.C. § 1915(a)(2), the Court grants him leave to proceed without full prepayment of the civil filing fees, but dismisses his Complaint for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b).

1 **A. Plaintiff’s IFP Motion**

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*, ___ S. Ct. ___, 136 S. Ct. 627, 629 (U.S. 2016); *Williams v. Paramo*,
10 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately
11 dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th
12 Cir. 2002).

13 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
14 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
15 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
16 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
17 trust account statement, the Court assesses an initial payment of 20% of (a) the average
18 monthly deposits in the account for the past six months, or (b) the average monthly
19 balance in the account for the past six months, whichever is greater, unless the prisoner
20 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
21 custody of the prisoner then collects subsequent payments, assessed at 20% of the
22 preceding month’s income, in any month in which his account exceeds \$10, and forwards
23 those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2).

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26 ¹ 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. Dec. 1, 2014)). The additional \$50 administrative fee does
not apply to persons granted leave to proceed IFP. *Id.*

1 In support of his IFP Motion, Plaintiff has submitted a certified copy of his inmate
2 trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. His
3 trust account statement indicates he has insufficient funds from which to pay a partial
4 initial filing fee at this time. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event
5 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
6 criminal judgment for the reason that the prisoner has no assets and no means by which to
7 pay the initial partial filing fee.”); Bruce, 136 S. Ct. at 630; Taylor, 281 F.3d at 850
8 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a
9 prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available
10 to him when payment is ordered.”).

11 Therefore, the Court grants Plaintiff leave to proceed IFP and directs the Secretary
12 for the California Department of Corrections and Rehabilitation (“CDCR”) to collect the
13 entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and forward them to
14 the Clerk of the Court pursuant to the installment payment provisions set forth in 28
15 U.S.C. § 1915(b)(1). See *id.*

16 **B. Legal Standards for Screening Complaint Pursuant to 28 U.S.C.**
17 **§§ 1915(e)(2)(B) and 1915A(b)**

18 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
19 Answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
20 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of
21 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants
22 who are immune. See *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
23 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
24 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
25 the targets of frivolous or malicious suits need not bear the expense of responding.’”
26 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
27 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

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

10 **1. Plaintiff’s allegations**

11 Plaintiff has filed a forty eight (48) page Complaint in which he names thirty-seven
12 (37) defendants and attaches nearly twenty (20) pages of exhibits. (ECF No. 1.) Plaintiff
13 alleges constitutional violations by RJD prison officials, as well as several news agencies,
14 dating back to 2006.

15 **2. 42 U.S.C. § 1983**

16 Title 42 U.S.C. § 1983 provides a cause of action for the “deprivation of any rights,
17 privileges, or immunities secured by the Constitution and laws” of the United States.
18 *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). To state a claim under § 1983, a plaintiff must
19 allege two essential elements: (1) that a right secured by the Constitution or laws of the
20 United States was violated, and (2) that the alleged violation was committed by a person
21 acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. Cty. of*
22 *Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

23 **3. Representation of other parties**

24 Plaintiff purports to bring this action on behalf of Plaintiff Harmon whom he
25 describes as his “heir apparent.” See Compl. at 6. However, because Plaintiff is
26 proceeding pro se, he has no authority to represent the legal interest of any other party.
27 See *Cato v. United States*, 70 F.3d 1103, 1105 n.1 (9th Cir. 1995); *C.E. Pope Equity Trust*
28 *v. United States*, 818 F.2d 696, 697 (9th Cir. 1987); see also Fed.R.Civ.P. 11(a) (“Every

1 pleading, written motion, and other paper shall be signed by at least one attorney of
2 record in the attorney's original name, or if the party is not represented by an attorney,
3 shall be signed by the party."). Therefore, Plaintiff Harmon is DISMISSED from this
4 action.

5 **4. Rule 8**

6 In addition, the Court finds that Plaintiff's Complaint fails to comply with Rule 8.
7 Rule 8 of the Federal Rules of Civil Procedure provides that in order to state a claim for
8 relief in a pleading it must contain "a short and plain statement of the grounds for the
9 court's jurisdiction" and "a short and plain statement of the claim showing that the
10 pleader is entitled to relief." Fed.R.Civ.P. 8(a)(1) & (2). In addition, "the pleading
11 standard Rule 8 announces does not require 'detailed factual allegations,' but it demands
12 more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556
13 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

14 Plaintiff is also admonished that he must comply with Local Rule 8.2 which
15 requires, in part, that "[c]omplaints by prisoners under the Civil Rights Act, 42 U.S.C.
16 § 1983, must be legibly written or typewritten on forms supplied by the court" and
17 "[a]dditional pages not to exceed fifteen (15) in number may be included with the court
18 approved form complaint, provided the form is completely filled ion to the extent
19 applicable." S.D. CivLr 8.2(a). Here, Plaintiff has failed to use the Court's form
20 complaint and has filed a forty eight (48) page Complaint, which well exceeds the
21 number of pages permitted by the local rule.

22 **5. Private parties**

23 Plaintiff claims that Defendant John Larson, whom he identifies as an "NBC News
24 Correspondent," is responsible for producing a television program entitled "The Worst
25 Predator" and identifies Plaintiff as the "worst predator of our time" in 2006. (Compl. at
26 9-10.) As a result of this program, Plaintiff claims that Larson "exposed Plaintiff to
27 hatred, contempt, and ridicule, causing him to be assaulted, shunned and/or avoided."
28 (Id. at 10.) Plaintiff seeks \$250,000,000 in damages from these Defendants. (Id. at 36.)

1 However, neither Larson nor his purported employers, Defendants NBC News and
2 MSNBC, are alleged to be “person[s] acting under color of state law.” See West, 487 U.S.
3 at 48; Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835 (9th Cir. 1999) (The
4 party charged with a constitutional deprivation under § 1983 must be a person who may
5 fairly be said to be a governmental actor) (citation and quotations omitted).

6 The Constitution protects individual rights only from government action and not
7 from private action; it is only when the government is responsible for the specific conduct
8 of which the plaintiff complains that individual constitutional rights are implicated.
9 *Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 746-47 (9th Cir. 2003). Generally,
10 private parties do not act under color of state law. See *Price v. Hawai‘i*, 939 F.2d 702,
11 707-08 (9th Cir. 1991). Section “1983 excludes from its reach merely private conduct, no
12 matter how discriminatory or wrong.” Sutton, 193 F.3d at 835 (citing *Am. Mfrs. Mut. Ins.*
13 *Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citation and internal quotation marks omitted));
14 see also *Ouzts v. Md. Nat’l Ins. Co.*, 505 F.2d 547, 551 (9th Cir.1974) (a purely private
15 actor may be liable for his misconduct in state court, but his conduct is not actionable
16 under Section 1983, regardless of how egregious).

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

26 Here, Plaintiff has failed to allege facts sufficient to plausibly show that any of the
27 private parties or organizations he has named as Defendants performed any public
28 function traditionally reserved to the state, acted as willful participants in joint action

1 with government agents, was compelled or coerced, or had any connection whatsoever
2 with the state, when they allegedly injured Plaintiff. See *Iqbal*, 556 U.S. at 678; *Lugar*,
3 457 U.S. at 939.

4 **6. Statute of Limitations**

5 Moreover, Plaintiff claims that this program on NBC, which he alleges has caused
6 him harm, was produced and aired on television in 2006. (See Compl. at 9.) “A claim
7 may be dismissed [for failing to state a claim] on the ground that it is barred by the
8 applicable statute of limitations only when ‘the running of the statute is apparent on the
9 face of the complaint.’” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592
10 F.3d 954, 969 (9th Cir. 2010) (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992,
11 997 (9th Cir. 2006)). “A complaint cannot be dismissed unless it appears beyond doubt
12 that the plaintiff can prove no set of facts that would establish the timeliness of the
13 claim.” *Id.* (quoting *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir. 1995));
14 see also *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276-77 (9th Cir. 1993) (where the
15 running of the statute of limitations is apparent on the face of a complaint, dismissal for
16 failure to state a claim is proper, so long as Plaintiff is provided an opportunity to amend
17 in order to allege facts which, if proved, might support tolling); see also *Tahoe-Sierra*
18 *Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 216 F.3d 764, 788 (9th Cir. 2000)
19 (court may raise the defense of statute of limitations sua sponte), overruled on other
20 grounds by *Gonzalez v. Arizona*, 677 F.3d 383, 389 (9th Cir. 2011) (en banc); *Hughes v.*
21 *Lott*, 350 F.3d 1157, 1163 (11th Cir. 2003) (upholding sua sponte dismissal under 28
22 U.S.C. § 1915(e)(2)(B) of prisoner’s time-barred complaint).

23 Because section 1983 contains no specific statute of limitation, federal courts apply
24 the forum state’s statute of limitations for personal injury actions. *Jones v. Blanas*, 393
25 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004);
26 *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California’s statute of
27 limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the
28 limitations period was extended to two. *Id.* (citing CAL. CIV. PROC. CODE § 335.1). The

1 law of the forum state also governs tolling. *Wallace v. Kato*, 549 U.S. 384, 394 (2007)
2 (citing *Hardin v. Straub*, 490 U.S. 536, 538-39 (1989)); *Jones*, 393 F.3d at 927 (noting
3 that in actions where the federal court borrows the state statute of limitation, the federal
4 court also borrows all applicable provisions for tolling the limitations period found in
5 state law).

6 Under California law, the statute of limitations for prisoners serving less than a life
7 sentence is tolled for two years. CAL. CIV. PROC. CODE § 352.1(a); *Johnson v. California*,
8 207 F.3d 650, 654 (9th Cir. 2000), overruled on other grounds, 543 U.S. 499 (2005).
9 Accordingly, the effective statute of limitations for most California prisoners is three
10 years for claims accruing before January 1, 2003 (one year limitations period plus two
11 year statutory tolling), and four years for claims accruing thereafter (two year limitations
12 period plus two years statutory tolling). In addition, the limitations period for prisoners is
13 tolled while the “prisoner completes the mandatory exhaustion process.” *Brown v. Valoff*,
14 422 F.3d 926, 943 (9th Cir. 2005).

15 Unlike the length of the limitations period, however, “the accrual date of a § 1983
16 cause of action is a question of federal law that is not resolved by reference to state law.”
17 *Wallace*, 549 U.S. at 388; *Hardin*, 490 U.S. at 543-44 (federal law governs when a
18 § 1983 cause of action accrues). “Under the traditional rule of accrual ... the tort cause of
19 action accrues, and the statute of limitation begins to run, when the wrongful act or
20 omission results in damages.” *Wallace*, 549 U.S. at 391. Put another way, “[u]nder
21 federal law, a claim accrues when the plaintiff knows or has reason to know of the injury
22 which is the basis of the action.” *Maldonado*, 370 F.3d at 955; *TwoRivers v. Lewis*, 174
23 F.3d 987, 991 (9th Cir. 1999).

24 Here, Plaintiff’s claims first accrued in 2006 when the program first aired on
25 August 11, 2006. (See Compl. at 9.) Thus, assuming Plaintiff is not serving a life
26 sentence, he is entitled to 2 years of statutory tolling pursuant to CAL. CIV. PROC. CODE
27 § 352.1(a). *Johnson*, 207 F.3d at 654; see also *Jones*, 393 F.3d at 928 n.5 (noting that
28 “California courts have read out if the statute the qualification that the period of

1 incarceration must be ‘for a term less than for life’ in order for a prisoner to qualify for
2 tolling.’). Consequently, based on the face of Plaintiff’s own pleading, it is clear
3 Plaintiff’s claims fall far outside California’s two-year statute of limitations, even
4 including all presumed periods of tolling provided by statute. See Wallace, 591 U.S. at
5 391; Maldonado, 370 F.3d at 955; CAL. CODE CIV. PROC. § 335.1 (tolling statute of
6 limitations “for a maximum of 2 years” during a prisoner’s incarceration).

7 Finally, Plaintiff’s claims could be considered timely if, in his Complaint, he
8 alleges facts sufficient to show the limitations period may be equitably tolled. See
9 Cervantes, 5 F.3d at 1276-77. Generally, federal courts also apply the forum state’s law
10 regarding equitable tolling. Fink, 192 F.3d at 914; Bacon v. City of Los Angeles, 843 F.2d
11 372, 374 (9th Cir.1988). Under California law, however, Plaintiff must meet three
12 conditions to equitably toll the statute of limitations: (1) he must have diligently pursued
13 his claim; (2) his situation must be the product of forces beyond his control; and (3)
14 Defendants must not be prejudiced by the application of equitable tolling. See Hull v.
15 Central Pathology Serv. Med. Clinic, 28 Cal. App. 4th 1328, 1335 (Cal. Ct. App. 1994);
16 Addison v. State of California, 21 Cal.3d 313, 316-17 (Cal. 1978); Fink, 192 F.3d at 916.
17 As currently pleaded, however, the Court finds Plaintiff has failed to plead any facts
18 which, if proved, would support any plausible claim for equitable tolling. See Cervantes,
19 5 F.3d at 1277; Iqbal, 556 U.S. at 679; Hinton v. Pac. Enters., 5 F.3d 391, 395 (9th Cir.
20 1993) (plaintiff carries the burden to plead facts which would give rise to equitable
21 tolling); see also Kleinhammer v. City of Paso Robles, 385 Fed. Appx. 642, 643 (9th Cir.
22 2010).

23 Accordingly, the Court finds the running of the statute of limitations is apparent on
24 the face of Plaintiff’s Complaint, and therefore he has failed to state a claim upon which
25 section 1983 relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii); § 1915A(b)(1).

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1 **7. Eighth Amendment claims**

2 Plaintiff alleges that he is a disabled prisoner and Defendants have violated his
3 right to be free from cruel and unusual punishment because he has been “forced to remain
4 in a non-ADA equipped cell.” (Compl. at 37-38.) Plaintiff further claims that
5 Defendants have “unilaterally” rejected the “Armstrong Remedial Plan” which provides
6 for assistance for prisoners who are deemed “disabled.” (Id. at 38.) Plaintiff also claims
7 that Defendant Walker “discontinued” his pain medication. (Id. at 40.)

8 These are claims that Plaintiff previously raised in *Schwartzmiller, et al. v. Brown,*
9 *et al.*, S.D. Civil Case No. 3:13-cv-01253-WQH-NLS. A court ““may take notice of
10 proceedings in other courts, both within and without the federal judicial system, if those
11 proceedings have a direct relation to matters at issue.”” *Bias v. Moynihan*, 508 F.3d 1212,
12 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir.
13 2002)). A prisoner’s complaint is considered frivolous if it “merely repeats pending or
14 previously litigated claims.” *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir.
15 1995) (construing former 28 U.S.C. § 1915(d)) (citations and internal quotations
16 omitted). Therefore, because Plaintiff already filed an action with the identical claims
17 presented in the instant action against the same Defendants in *Schwartzmiller, et al. v.*
18 *Brown, et al.*, S.D. Civil Case No. 3:13-cv-01253-WQH-NLS, the Court must dismiss the
19 duplicative claims brought in this action pursuant to 28 U.S.C. § 1915(e) (2) &
20 1915A(b). See *Cato*, 70 F.3d at 1105 n.2; *Resnick*, 213 F.3d at 446 n.1; see also *Adams v.*
21 *Cal. Dep’t of Health Servs.*, 487 F.3d 684, 688–89 (9th Cir. 2007) (“[I]n assessing
22 whether the second action is duplicative of the first, we examine whether the causes of
23 action and relief sought, as well as the parties or privies to the action, are the same.”),
24 overruled on other grounds by *Taylor v. Sturgell*, 553 U.S. 880, 904 (2008).²

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27 ² To the extent that Plaintiff is seeking relief pursuant to the Armstrong Remedial Plan, he must pursue
28 those claims through the consent decree or through class counsel. See *Crayton v. Terhune*, No. C 98-
4386, 2002 WL 31093590 (Sept. 17, 2002).

1 **8. Fourteenth Amendment claim**

2 Plaintiff claims that he was “falsely accused and punished by Defendant K.
3 Rodriquez’ allegation of sexual disorderly conduct on May 24, 2013.” (Compl. at 41.)
4 Plaintiff claims he was placed in administrative segregation (“ad-seg”) for a period of
5 forty-six (46) days as a result of this charge. (Id.) Plaintiff claims that Defendants
6 “provided an alleged due process hearing” to find Plaintiff guilty of the disciplinary
7 charge and as a result he lost sixty (60) days of “goodtime credits.” (Id. at 42.) Plaintiff
8 seeks \$5,000,000 in damages for “such unconstitutional conduct.”

9 The Due Process Clause protects prisoners against deprivation or restraint of “a
10 protected liberty interest” and “atypical and significant hardship on the inmate in relation
11 to the ordinary incidents of prison life.” Ramirez v. Galaza, 334 F.3d 850, 860 (9th Cir.
12 2003) (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)) (internal quotation marks
13 omitted). Although the level of the hardship must be determined in a case-by-case
14 determination, courts look to:

15 1) whether the challenged condition ‘mirrored those conditions imposed upon
16 inmates in administrative segregation and protective custody,’ and thus
17 comported with the prison’s discretionary authority; 2) the duration of the
18 condition, and the degree of restraint imposed; and 3) whether the state’s
 action will invariably affect the duration of the prisoner’s sentence.

19 Ramirez, 334 F.3d at 861 (quoting Sandin, 515 U.S. at 486-87). Only if an inmate has
20 alleged facts sufficient to show a protected liberty interest does the court next consider
21 “whether the procedures used to deprive that liberty satisfied Due Process.” Ramirez, 334
22 F.3d at 860.

23 As currently pleaded, Plaintiff’s Complaint fails to allege facts which show that the
24 disciplinary punishment he faced subjected him to any “atypical and significant hardship
25 in relation to the ordinary incidents of prison life.” Id.; Sandin, 515 U.S. at 584.

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1 Moreover, Plaintiff’s Complaint contains no “factual content that allows the court
2 to draw the reasonable inference,” *Iqbal*, 556 U.S. at 678, that Defendant’s actions
3 “presented a dramatic departure from the basic conditions of [Plaintiff’s] indeterminate
4 sentence,” or caused him to suffer an “atypical” or “significant hardship.” *Sandin*, 515
5 U.S. at 584-85; see also *Keenan*, 83 F.3d at 1088-89.

6 Accordingly, the Court finds that Plaintiff has failed to state a Fourteenth
7 Amendment due process claim upon which relief may be granted.

8 **9. Leave to Amend**

9 A pro se litigant must be given leave to amend his or her complaint to state a claim
10 unless it is absolutely clear the deficiencies of the complaint cannot be cured by
11 amendment. See *Lopez*, 203 F.3d at 1130 (noting leave to amend should be granted when
12 a complaint is dismissed under 28 U.S.C. § 1915(e) “if it appears at all possible that the
13 plaintiff can correct the defect”). Therefore, while the Court finds Plaintiff’s Complaint
14 fails to state any claim upon which relief can be granted, it will provide him a chance to
15 fix the pleading deficiencies discussed in this Order. See *Akhtar v. Mesa*, 698 F.3d 1202,
16 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

17 **C. Conclusion and Order**

18 Good cause appearing, the Court:

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

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

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

3 4. **DISMISSES** Plaintiff Harmon from this action and directs the Clerk of
4 Court to terminate this party from the Court’s docket.

5 5. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which
6 relief may be granted and as frivolous pursuant to 28 U.S.C. § 1915(e)(2) and
7 § 1915A(b), and **GRANTS** him forty-five (45) days leave from the date of this Order in
8 which to file an Amended Complaint which cures all the deficiencies of pleading noted.
9 Plaintiff’s Amended Complaint must be complete in itself without reference to his
10 original pleading. Defendants not named and any claims not re-alleged in the Amended
11 Complaint will be considered waived. See S.D. Cal. CivLR 15.1; Hal Roach Studios, Inc.
12 v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended
13 pleading supersedes the original.”); Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir.
14 2012) (noting that claims dismissed with leave to amend which are not re-alleged in an
15 amended pleading may be “considered waived if not repled.”).

16 6. **DIRECTS** the Clerk of Court to mail to Plaintiff, together with this Order, a
17 blank copy of the Court’s form “Complaint under the Civil Rights Act, 42 U.S.C.
18 § 1983” for his use in amending.

19 **IT IS SO ORDERED.**

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21 Dated: May 22, 2017



HON. JOHN A. HOUSTON
United States District Judge