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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ANTHONY BROWN; LARRY E.  
BELTON, SR.,  
  
Plaintiffs,

vs.

SCOTT KERNAN; CALIFORNIA  
HEALTH CARE SERVICES; J. LEWIS;  
DANIEL A. PARAMO; DR. R.  
WALKER; DR. J. CHAU; OFFICE OF  
RISK MANAGEMENT; DR. A.  
HORAM; J. KELSO; EDMUND GERRY  
BROWN, JR.,  
  
Defendants.

Case No.: 3:17-cv-00693-LAB-WVG

**ORDER:**

- 1) DISMISSING PLAINTIFF BELTON;**
- 2) GRANTING PLAINTIFF BROWN’S MOTION TO PROCEED IN FORMA PAUPERIS [ECF No. 2]**
- 3) DENYING MOTION FOR PRELIMINARY INJUNCTION [ECF No. 10];**
- 4) DISMISSING COMPLAINT FOR FAILING TO STATE A CLAIM; AND**
- 5) DENYING MOTION TO EFFECT SERVICE AS MOOT [ECF No. 6]**

Anthony Brown and Larry Belton are inmates currently incarcerated at Richard J. Donovan Correctional Facility (RJD) in San Diego, California. Both Plaintiffs are proceeding pro se, and have filed a civil rights Complaint pursuant to 42 U.S.C. § 1983.

1           However, only Plaintiff Brown has filed a Motion to Proceed In Forma Pauperis  
2 (IFP) pursuant to 28 U.S.C. § 1915(a). (ECF No. 2.) Plaintiff Belton has not filed a  
3 Motion to Proceed IFP, nor has he prepaid the \$400 civil filing fee required by 28 U.S.C.  
4 § 1914(a) at the time of filing.

5           In addition, Plaintiffs have filed a “Motion to Effect Service” (ECF No. 6), while  
6 Plaintiff Belton has separately filed a “Motion for an Emergency Injunction and  
7 Restraining Order” (ECF No. 10).

#### 8 **I. Motion to Proceed In Forma Pauperis**

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

20           Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
21 “certified copy of the trust fund account statement (or institutional equivalent) for ... the  
22 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
23 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
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25  
26 <sup>1</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 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
2 monthly deposits in the account for the past six months, or (b) the average monthly  
3 balance in the account for the past six months, whichever is greater, unless the prisoner  
4 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having  
5 custody of the prisoner then collects subsequent payments, assessed at 20% of the  
6 preceding month’s income, in any month in which his account exceeds \$10, and forwards  
7 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2);  
8 *Bruce*, 136 S. Ct. at 629.

9 **A. Plaintiff Brown**

10 In support of his IFP Motion, Plaintiff Brown has submitted a copy of his CDCR  
11 Inmate Statement Report attesting to his balances and deposits over the 6-month period  
12 preceding the filing of his Complaint. *See* ECF No. 4 at 1-2; 28 U.S.C. § 1915(a)(2); S.D.  
13 CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. This statement shows that Plaintiff has  
14 nearly a zero balance at the time of filing. *See* ECF No. 5 at 1-2. *See* 28 U.S.C.  
15 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a  
16 civil action or appealing a civil action or criminal judgment for the reason that the  
17 prisoner has no assets and no means by which to pay the initial partial filing fee.”);  
18 *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4)  
19 acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a  
20 “failure to pay ... due to the lack of funds available to him when payment is ordered.”).

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

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1           **B. Plaintiff Belton**

2           Plaintiff Belton has not prepaid the \$400 in filing and administrative fees required  
3 to commence this civil action, nor has he filed a properly supported Motion to Proceed  
4 IFP pursuant to 28 U.S.C. § 1915(a). Therefore, his case cannot yet proceed. *See* 28  
5 U.S.C. § 1914(a); *Andrews*, 493 F.3d at 1051.

6           Even if Plaintiff Belton were to file a properly supported Motion to Proceed IFP,  
7 the Court would deny any such motion as barred pursuant to 28 U.S.C. § 1915(g). The  
8 Prison Litigation Reform Act (“PLRA”) amended section 1915 to preclude the privilege  
9 to proceed IFP:

10                     . . . if [a] prisoner has, on 3 or more prior occasions, while  
11                     incarcerated or detained in any facility, brought an action or  
12                     appeal in a court of the United States that was dismissed on the  
13                     grounds that it is frivolous, malicious, or fails to state a claim  
14                     upon which relief can be granted, unless the prisoner is under  
                      imminent danger of serious physical injury.

15 28 U.S.C. § 1915(g). “This subdivision is commonly known as the ‘three strikes’  
16 provision.” *Andrews v. King*, 398 F.3d 1113, 1116 n.1 (9th Cir. 2005).

17           “Pursuant to § 1915(g), a prisoner with three strikes or more cannot proceed IFP.”  
18 *Id.*; *see also Andrews v. Cervantes*, 493 F.3d 1047, 1052 (9th Cir. 2007) (hereafter  
19 “*Cervantes*”) (under the PLRA, “[p]risoners who have repeatedly brought unsuccessful  
20 suits may entirely be barred from IFP status under the three strikes rule[.]”). The  
21 objective of the PLRA is to further “the congressional goal of reducing frivolous prisoner  
22 litigation in federal court.” *Tierney v. Kupers*, 128 F.3d 1310, 1312 (9th Cir. 1997).  
23 “[S]ection 1915(g)’s cap on prior dismissed claims applies to claims dismissed both  
24 before and after the statute’s effective date.” *Id.* at 1311.

25           “Strikes are prior cases or appeals, brought while the plaintiff was a prisoner,  
26 which were dismissed on the ground that they were frivolous, malicious, or failed to state  
27 a claim,” *Andrews*, 398 F.3d at 1116 n.1 (internal quotations omitted), “even if the  
28 district court styles such dismissal as a denial of the prisoner’s application to file the

1 action without prepayment of the full filing fee.” *O’Neal v. Price*, 531 F.3d 1146, 1153  
2 (9th Cir. 2008); *see also El-Shaddai v. Zamora*, 833 F.3d 1036, 1042 (9th Cir. 2016)  
3 (noting that when court “review[s] a dismissal to determine whether it counts as a strike,  
4 the style of the dismissal or the procedural posture is immaterial. Instead, the central  
5 question is whether the dismissal ‘rang the PLRA bells of frivolous, malicious, or failure  
6 to state a claim.’”) (quoting *Blakely v. Wards*, 738 F.3d 607, 615 (4th Cir. 2013)).

7 Once a prisoner has accumulated three strikes, he is simply prohibited by section  
8 1915(g) from pursuing any other IFP civil action or appeal in federal court unless he  
9 alleges he is facing “imminent danger of serious physical injury.” *See* 28 U.S.C.  
10 § 1915(g); *Cervantes*, 493 F.3d at 1051-52 (noting § 1915(g)’s exception for IFP  
11 complaints which “make[] a plausible allegation that the prisoner faced ‘imminent danger  
12 of serious physical injury’ at the time of filing.”).

### 13 **1. Application to Plaintiff**

14 The Court has carefully reviewed Plaintiff Belton’s Complaint and has ascertained  
15 that it does not contain any “plausible allegations” to suggest he “faced ‘imminent danger  
16 of serious physical injury’ at the time of filing.” *Cervantes*, 493 F.3d at 1055 (quoting 28  
17 U.S.C. § 1915(g)).

18 A court may take judicial notice of its own records and “‘may take notice of  
19 proceedings in other courts, both within and without the federal judicial system, if those  
20 proceedings have a direct relation to matters at issue.’” *Bias v. Moynihan*, 508 F.3d 1212,  
21 1225 (9th Cir. 2007) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir.  
22 2002)); *see also United States ex rel. Robinson Rancheria Citizens Council v. Borneo,*  
23 *Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Plaintiff has been barred from proceeding IFP in  
24 a number of cases included *Belton v. Gacad, et al.*, S.D. Cal. Civil Case No. 3:13-cv-  
25 01375-H-DHB (Order Denying Motion to Proceed IFP as barred by 28 U.S.C. § 1915(g)  
26 and Dismissing Civil Action dated Aug. 16, 2013.)

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1 **II. Representation of other parties**

2 To the extent that Plaintiff Brown is proceeding pro se and he intends to also  
3 represent Plaintiff Belton, he has no authority to represent the legal interest of any other  
4 party. *See Cato v. United States*, 70 F.3d 1103, 1105 n.1 (9th Cir. 1995); *C.E. Pope*  
5 *Equity Trust v. United States*, 818 F.2d 696, 697 (9th Cir. 1987); see also Fed.R.Civ.P.  
6 11(a) (“Every pleading, written motion, and other paper shall be signed by at least one  
7 attorney of record in the attorney’s original name, or if the party is not represented by an  
8 attorney, shall be signed by the party.”). In this matter, neither Plaintiff signed the  
9 Complaint. Because Plaintiff Belton has not filed a Motion to Proceed IFP, paid the  
10 initial civil filing fee, or signed the Complaint, he is DISMISSED from this action. The  
11 Court will not accept further filings from Plaintiff Belton in this matter.

12 **III. Plaintiff Belton’s Motion for an Emergency Injunction**

13 Plaintiff Belton has also filed a “Motion for an Emergency Injunction and  
14 Restraining Order.” (ECF No. 10.) In this Motion, Plaintiff Belton alleges misconduct  
15 on the part of RJD correctional officers who are not named Defendants in this action.  
16 The facts alleged in this Motion appear to relate only to Plaintiff Belton who has been  
17 dismissed from this action and there is no indication or factual allegations in this Motion  
18 that Plaintiff Brown is seeking injunctive relief.

19 Procedurally, a federal district court may issue emergency injunctive relief only if  
20 it has personal jurisdiction over the parties and subject matter jurisdiction over the  
21 lawsuit. *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999)  
22 (noting that one “becomes a party officially, and is required to take action in that  
23 capacity, only upon service of summons or other authority-asserting measure stating the  
24 time within which the party served must appear to defend.”). The court may not attempt  
25 to determine the rights of persons not before it. *See, e.g., Hitchman Coal & Coke Co. v.*  
26 *Mitchell*, 245 U.S. 229, 234-35 (1916); *Zepeda v. INS*, 753 F.2d 719, 727-28 (9th Cir.  
27 1983); *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 961  
28 (M.D. Fl. 1993); *Kandlbinder v. Reagan*, 713 F. Supp. 337, 339 (W.D. Mo. 1989); *Suster*

1 *v. Marshall*, 952 F. Supp. 693, 701 (N.D. Ohio 1996); *see also Califano v. Yamasaki*, 442  
2 U.S. 682, 702 (1979) (injunctive relief must be “narrowly tailored to give only the relief  
3 to which plaintiffs are entitled”). Under Federal Rule of Civil Procedure 65(d)(2) an  
4 injunction binds only “the parties to the action,” their “officers, agents, servants,  
5 employees, and attorneys,” and “other persons who are in active concert or participation.”  
6 FED. R. CIV. P. 65(d)(2)(A)-(C).

7 As stated above, Plaintiff Belton has been dismissed from this action, the  
8 individuals Plaintiff Belton seeks to restrain are not currently named Defendants, Plaintiff  
9 Brown’s case is still in its preliminary screening stage, and the United States Marshal has  
10 yet to effect service on Plaintiff Brown’s behalf. Therefore, Defendants have no actual  
11 notice and the Court has no personal jurisdiction over any Defendant at this time. *See*  
12 FED. R. CIV. P. 65(d)(2); *Murphy Bros., Inc.*, 526 U.S. at 350; *Zepeda*, 753 F.2d at 727-  
13 28. Accordingly, the Court DENIES Plaintiff Belton’s Motion for injunctive relief.

14 **IV. Screening of Complaint pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

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

26 “The standard for determining whether a plaintiff has failed to state a claim upon  
27 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
28 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668

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

7 Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
8 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
9 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for  
10 relief [is] ... a context-specific task that requires the reviewing court to draw on its  
11 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or  
12 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting  
13 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969  
14 (9th Cir. 2009).

#### 15 **A. Plaintiff Brown’s allegations**

16 Plaintiff claims that he was notified by Defendant California Correctional Health  
17 Care Service (“CCHCS”) through correspondence dated May 16, 2016 that there was a  
18 “possible information security incident involving your personal information.” (ECF No.  
19 1 at 6; 1-2 at 26.) In this notification it stated that an “unencrypted laptop was stolen  
20 from a CCHCS workforce member’s personal vehicle.” (ECF No. 1-2 at 26.) It further  
21 states that CCHCS does “not know if any sensitive information was contained in the  
22 laptop” or whether the laptop “included any of your information.” (*Id.*) While Plaintiff  
23 claims Defendants have “maliciously, intentionally violated the Plaintiff’s U.S.  
24 Constitutional Eighth Amendment right to be free from cruel and unusual punishment,”  
25 his injury is merely speculative. (ECF No. 1 at 8.)

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1 Plaintiff does not allege that he has any knowledge that any injury has resulted  
2 from the theft or that he suffered any harm.<sup>2</sup> In order to determine whether Plaintiff even  
3 has standing to bring such a claim, Plaintiff must allege facts to show that he faces “a  
4 credible threat of harm” that is “both real and immediate” and not merely “conjectural or  
5 hypothetical.” *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010)  
6 (citations omitted.)

7 Here, Plaintiff was notified about the laptop theft but also informed that Defendant  
8 CCHCS did not “know if any sensitive information was contained in the laptop” and or if  
9 it contained any of Plaintiff’s personal information. (ECF No. 1-2 at 26.) Thus, whether  
10 Plaintiff suffered an actual injury is merely speculative on his part and thus, his  
11 constitutional claims are DISMISSED without prejudice for lack of standing. *See Fleck*  
12 *& Assoc, Inc. v. City of Phoenix*, 471 F.3d 1100, 1106-07 (9th Cir. 2006).

13 Even if Plaintiff had standing to pursue this claim, he has failed to allege facts  
14 sufficient to state a claim. Where a prisoner alleges he was deprived of a property  
15 interest caused by the unauthorized acts of state officials, either negligent or intentional,  
16 he cannot state a constitutional claim where the state provides an adequate post-  
17 deprivation remedy. *See Zinermon v. Burch*, 494 U.S. 113, 129-32 (1990); *Hudson v.*  
18 *Palmer*, 468 U.S. 517, 533 (1984) (holding that the unauthorized negligent or intentional  
19 deprivation of property does not violate due process if a meaningful post-deprivation  
20 remedy is available). The California Tort Claims Act (“CTCA”) provides an adequate  
21 post-deprivation state remedy for the random and unauthorized taking of property.  
22 *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994) (“California law provides an  
23 adequate post-deprivation remedy for any property deprivations.”) Thus, to the extent  
24 Plaintiff challenges the unauthorized or negligent taking of identity information, the  
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27 <sup>2</sup> Plaintiff Belton claims that his information was stolen and used to create debt in his name but he is  
28 not a party to this action. Plaintiff Brown offers no factual allegations or provide any documentation to  
support such a claim.

1 CTCA provides him with an adequate state post-deprivation remedy, and his substantive  
2 and procedural due process claims are not cognizable in a § 1983 action.

3 **V. Conclusion and Order**

4 Accordingly, the Court:

5 (1) **DISMISSES** Plaintiff Beltran from this action sua sponte without prejudice  
6 for failure to pay the \$400 civil filing and administrative fee or to submit a Motion to  
7 Proceed IFP pursuant to 28 U.S.C. §§ 1914(a) and 1915(a);

8 (2) **DENIES** Plaintiff Beltran’s Motion for Emergency Injunction and  
9 Restraining Order (ECF No. 10). No further filings from Plaintiff Beltran will be  
10 accepted in this action.

11 (3) **GRANTS** Plaintiff **Brown’s** Motion to Proceed IFP pursuant to 28 U.S.C.  
12 § 1915(a) (ECF No. 2);

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

20 (5) **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott  
21 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

22 (6) **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which  
23 § 1983 relief can granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A and for  
24 lack of subject matter jurisdiction;

25 (7) **DENIES** Plaintiff **Brown’s** Motion to Effect Service (ECF No. 6) as moot;

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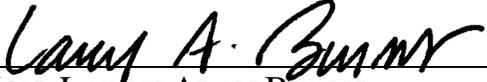
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1 (8) **GRANTS** Plaintiff **Brown** forty-five (45) days leave to file an Amended  
2 Complaint which cures all the deficiencies of pleading described in this Order. Plaintiff is  
3 cautioned, however, that should he choose to file an Amended Complaint,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

10 (9) The Clerk of Court is directed to mail Plaintiff **Brown** a court approved  
11 form civil rights complaint.

12 **IT IS SO ORDERED.**

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14 Dated: July 24 2017

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16 HON. LARRY ALAN BURNS  
17 United States District Judge  
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