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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JOHN HENRY YABLONSKY,  
12 CDCR #AL-0373,

13 Plaintiff,

14 vs.

15 CALIFORNIA DEP'T OF  
16 CORRECTIONS AND  
17 REHABILITATION; DANIEL  
18 PARAMO; J. ROBLES; POWELL;  
19 BLAHNIK; MARTINEZ; TISCARNIA;  
McGUIRE; DOES 1-10

20 Defendants.

Case No.: 3:18-cv-01122-CAB-AGS

**ORDER:**

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

2) **SUA SPONTE DISMISSING  
DEFENDANTS PURSUANT TO  
28 U.S.C. § 1915(e)(2)(B)(ii)  
AND § 1915A(b)(1)**

**AND**

3) **DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE UPON  
REMAINING DEFENDANTS  
PURSUANT TO  
28 U.S.C. § 1915(d) AND  
Fed. R. Civ. P. 4(c)(3)**

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27 John Henry Yablonsky (“Plaintiff”), incarcerated at Richard J. Donovan  
28 Correctional Facility (“RJD”), in San Diego, California, is proceeding pro se in this case

1 with a civil rights Complaint filed pursuant to 42 U.S.C. § 1983 (Doc. No. 4). Plaintiff  
2 has not prepaid the \$400 civil filing fee required by 28 U.S.C. § 1914(a); instead, he has  
3 filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a)  
4 (Doc. No. 2).

5 **I. Motion to Proceed IFP**

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 granted leave to proceed  
12 IFP remains obligated to pay the entire fee in “increments” or “installments,” *Bruce v.*  
13 *Samuels*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182,  
14 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. See 28  
15 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

16 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
17 “certified copy of the trust fund account statement (or institutional equivalent) for ... the  
18 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
19 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
20 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
21 monthly deposits in the account for the past six months, or (b) the average monthly  
22 balance in the account for the past six months, whichever is greater, unless the prisoner  
23 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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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 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 In support of his Motion to Proceed IFP, Plaintiff has submitted a copy of his  
6 CDCR Inmate Statement Report, together with a prison certificate completed by an  
7 accounting official at RJD attesting to his trust account activity (Doc. No. 2 at 5-6). *See*  
8 *also* 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. These  
9 statements show that Plaintiff had no available balance at the time of filing (Doc. No. 2 at  
10 5-7.) Based on this accounting, no initial partial filing fee is assessed. *See* 28 U.S.C.  
11 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a  
12 civil action or appealing a civil action or criminal judgment for the reason that the  
13 prisoner has no assets and no means by which to pay the initial partial filing fee.”);  
14 *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4)  
15 acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a  
16 “failure to pay ... due to the lack of funds available to him when payment is ordered.”).

17 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP (Doc. No. 2),  
18 declines to exact any initial filing fee because his prison certificate indicates he has “no  
19 means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California  
20 Department of Corrections and Rehabilitation (“CDCR”), or his designee, to instead  
21 collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and  
22 forward them to the Clerk of the Court pursuant to the installment payment provisions set  
23 forth in 28 U.S.C. § 1915(b)(1). *See id.*

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

### 25 **A. Standard of Review**

26 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-  
27 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
28 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of

1 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
2 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
3 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.  
4 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
5 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
6 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
7 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

8 “The standard for determining whether a plaintiff has failed to state a claim upon  
9 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
10 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668  
11 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th  
12 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
13 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
14 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,  
15 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,  
16 556 U.S. 662, 678 (2009) (internal quotation marks omitted).

17 Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
18 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
19 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for  
20 relief [is] ... a context-specific task that requires the reviewing court to draw on its  
21 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or  
22 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting  
23 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969  
24 (9th Cir. 2009).

25 B. 42 U.S.C. § 1983

26 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
27 elements: (1) that a right secured by the Constitution or laws of the United States was  
28 violated, and (2) that the alleged violation was committed by a person acting under the

1 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*, 789 F.3d 1030,  
2 1035-36 (9th Cir. 2015).

3 C. Defendants CDCR and Paramo

4 First, the Court notes Plaintiff includes the California Department of Corrections  
5 and Rehabilitation (“CDCR”) and the RJD Warden, Daniel Paramo as Defendants. *See*  
6 Doc. No. 4 at 1-2. However, the CDCR is not a “person” subject to suit under § 1983. *See*  
7 *Hale v. State of Arizona*, 993 F.2d 1387, 1398-99 (9th Cir. 1993) (holding that a state  
8 department of corrections is an arm of the state, and thus, not a “person” within the  
9 meaning of § 1983); *see also Anderson v. California*, No. 3:16-CV-01172-LAB-JLB,  
10 2016 WL 4127785, at \*2 (S.D. Cal. Aug. 3, 2016) (sua sponte dismissing both CDCR  
11 and RJD pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A because neither are “persons”  
12 subject to § 1983 liability).

13 In addition, while RJD’s Warden Daniel Paramo may be subject to suit under  
14 § 1983, Plaintiff fails to include “further factual enhancement” to describes when, how,  
15 or to what extent, Defendant Paramo personally caused him any injury. *Iqbal*, 556 U.S. at  
16 678 (citing *Twombly*, 550 U.S. at 557). Instead, Plaintiff simply identifies Paramo as  
17 RJD’s Warden, and alleges he is “responsible for the training and insurance that the  
18 training is being implemented.” *See* Doc. No. 4 at 24. However, there is no respondeat  
19 superior liability under 42 U.S.C. § 1983. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38  
20 (9th Cir. 1993). “Because vicarious liability is inapplicable to ... § 1983 suits, [Plaintiff]  
21 must plead that each government-official defendant, through the official’s own individual  
22 actions, has violated the Constitution.” *Iqbal*, 556 at 676; *see also Jones v. Community*  
23 *Redevelopment Agency of City of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (even  
24 pro se plaintiff must “allege with at least some degree of particularity overt acts which  
25 defendants engaged in” in order to state a claim).

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1 Therefore, because Plaintiff fails to state a claim upon which § 1983 relief can be  
2 granted as to the CDCR and Warden Paramo, they must be dismissed pursuant to 28  
3 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1). *See Lopez*, 203 F.3d at 1126-27; *Rhodes*,  
4 621 F.3d at 1004.

5 D. Remaining Claims and Defendants

6 As to Plaintiff's remaining claims, however, the Court finds Plaintiff's Complaint  
7 contains First Amended allegations sufficient to survive the "low threshold" for  
8 proceeding past the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and  
9 1915A(b). *See Wilhelm*, 680 F.3d at 1123; *Rhodes v. Robinson*, 408 F.3d 559, 567-68  
10 (9th Cir. 2005) ("Within the prison context, a viable claim of First Amendment retaliation  
11 entails five basic elements: (1) An assertion that a state actor took some adverse action  
12 against an inmate (2) because of (3) that prisoner's protected conduct, and that such  
13 action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action  
14 did not reasonably advance a legitimate correctional goal.")

15 Accordingly, the Court will direct U.S. Marshal service upon the remaining  
16 Defendants on Plaintiff's behalf. *See* 28 U.S.C. § 1915(d) ("The officers of the court shall  
17 issue and serve all process, and perform all duties in [IFP] cases."); FED. R. CIV. P.  
18 4(c)(3) ("[T]he court may order that service be made by a United States marshal or  
19 deputy marshal ... if the plaintiff is authorized to proceed in forma pauperis under 28  
20 U.S.C. § 1915.").

21 **III. Conclusion and Orders**

22 For the reasons discussed, the Court:

- 23 1) **GRANTS** Plaintiff's Motion to Proceed In Forma Pauperis (Doc. No. 2).
- 24 2) **ORDERS** the Secretary of the CDCR, or his designee, to collect from  
25 Plaintiff's trust account the full \$350 owed in monthly payments in an amount equal to  
26 twenty percent (20%) of the preceding month's income to the Clerk of the Court each  
27 time the amount in Plaintiff's account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2).  
28 **ALL PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND**

1 NUMBER ASSIGNED TO THIS ACTION.

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

4 4) **DISMISSES** all claims as to Defendants California Department of  
5 Corrections and Rehabilitation (CDCR) and Warden Daniel Paramo sua sponte pursuant  
6 to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1) for failing to state a claim upon  
7 which § 1983 may be granted, and **DIRECTS** the Clerk of the Court to terminate CDCR  
8 and Paramo as parties to this action.

9 5) **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (Doc.  
10 No. 4) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each  
11 remaining Defendants.<sup>2</sup> In addition, the Clerk will provide Plaintiff with a filed copy of  
12 this Order, a certified copy of his Complaint and the summons so that he may serve these  
13 Defendants. Upon receipt of this "IFP Package," Plaintiff must complete the Form 285s  
14 as completely and accurately as possible, *include an address where each Defendant may*  
15 *be found and/or subject to service* pursuant to S.D. CAL. CIVLR 4.1c, and return them to  
16 \_\_\_\_\_

17  
18 <sup>2</sup> Plaintiff must, of course, identify the Defendants he references only as "Does 1-10" by  
19 their true names and substitute those individual persons in place of each unnamed Doe by  
20 amending his Complaint to identify each of them before the United States Marshal will be  
21 able to execute service upon them. *See Aviles v. Village of Bedford Park*, 160 F.R.D. 565,  
22 567 (1995) (Doe defendants must be identified and served within [90] days of the  
23 commencement of the action against them); FED. R. CIV. P. 15(c)(1)(C) & 4(m). Generally,  
24 Doe pleading is disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). And  
25 it is in most instances impossible for the United States Marshal to serve a party identified  
26 only as a Doe. *See Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) (in order to  
27 properly effect service under Rule 4 in an IFP case, the plaintiff is required to "furnish the  
28 information necessary to identify the defendant."). However, the Court will not dismiss  
Plaintiff's claims against the Doe Defendants at this time because where the identity of an  
alleged party is not known prior to filing of an action, Ninth Circuit authority permits  
Plaintiff the opportunity to pursue appropriate discovery to identify the unknown Does,  
unless it is clear that discovery would not uncover their identity, or his Complaint should  
be dismissed for other reasons. *See Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir.  
1999) (citing *Gillespie*, 629 F.2d at 642).

1 the United States Marshal according to the instructions the Clerk provides in the letter  
2 accompanying his IFP package.

3           6)     **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons  
4 upon the remaining Defendants as directed by Plaintiff on the USM Form 285s provided  
5 to him. All costs of that service will be advanced by the United States. *See* 28 U.S.C.  
6 § 1915(d); FED. R. CIV. P. 4(c)(3).

7           7)     **ORDERS** Defendants once they have been served, to reply to Plaintiff's  
8 Complaint within the time provided by the applicable provisions of Federal Rule of Civil  
9 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be  
10 permitted to "waive the right to reply to any action brought by a prisoner confined in any  
11 jail, prison, or other correctional facility under section 1983," once the Court has  
12 conducted its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b),  
13 and thus, has made a preliminary determination based on the face on the pleading alone  
14 that Plaintiff has a "reasonable opportunity to prevail on the merits," the defendant is  
15 required to respond).

16           8)     **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to  
17 serve upon Defendants or, if appearance has been entered by counsel, upon Defendants'  
18 counsel, a copy of every further pleading, motion, or other document submitted for the  
19 Court's consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must include with every  
20 original document he seeks to file with the Clerk of the Court, a certificate stating the  
21 manner in which a true and correct copy of that document has been was served on  
22 Defendants or their counsel, and the date of that service. *See* S.D. Cal. CivLR 5.2. Any

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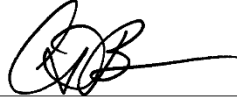
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1 document received by the Court which has not been properly filed with the Clerk or  
2 which fails to include a Certificate of Service upon the Defendant may be disregarded.

3 **IT IS SO ORDERED.**

4 Dated: August 15, 2018



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6 Hon. Cathy Ann Bencivengo  
7 United States District Judge  
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