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7 UNITED STATES DISTRICT COURT  
8 SOUTHERN DISTRICT OF CALIFORNIA  
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10 KJONNA OGGS,  
11 CDCR #AG-6164,

12 Plaintiff,

13 vs.

14 O. NAVARRO, Correction Officer;  
15 E. ESTRADA, Correction Officer;  
16 M. RODRIGUEZ, Correction Officer;  
17 RUELAS, Correction Officer;  
18 BYRDHUNT, Correction Officer;  
19 MEJIA, Correction Officer,

20 Defendants.

Case No.: 3:18-cv-01361-CAB-JMA

**ORDER:**

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

**AND**

**2) DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE OF COMPLAINT  
AND SUMMONS PURSUANT TO  
28 U.S.C. § 1915(d) AND  
Fed. R. Civ. P. 4(c)(3)**

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22 KJONNA OGGS (“Plaintiff”), currently incarcerated at Richard J. Donovan  
23 Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, has filed a  
24 civil rights complaint pursuant to 42 U.S.C. § 1983 (ECF Nos. 1, 2).<sup>1</sup>  
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27 <sup>1</sup> Plaintiff e-filed only the cover sheet of his Complaint pursuant to S.D. Cal. Gen. Order 653 on June 20,  
28 2018 (ECF No. 1), but he mailed the completed pleading to the Clerk via U.S. Mail soon after. *See* ECF  
No. 2. The Court considers both ECF No. 1 (“Complaint”) and ECF No. 2, filed as a “Supplemental  
Document” to comprise the operative pleading in this case. Plaintiff also filed a Notice of Change of

1 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when  
2 he filed his Complaint; instead, he has filed a Motion to Proceed In Forma Pauperis  
3 (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 3).

4 **I. Motion to Proceed IFP**

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

15 Section 1915(a)(2) also requires prisoners seeking leave to proceed IFP to submit a  
16 “certified copy of the trust fund account statement (or institutional equivalent) for ... the  
17 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
18 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
19 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
20 monthly deposits in the account for the past six months, or (b) the average monthly  
21 balance in the account for the past six months, whichever is greater, unless the prisoner  
22 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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24  
25 Address on August 28, 2018, in which he requests all filings in this case be mailed to a private address in  
Hawthorne, California, but he admits he remains incarcerated at RJD. See ECF No. 8 at 1-2.

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27 <sup>2</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. See  
28 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff.  
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 IFP Motion, Plaintiff has submitted CDCR Inmate Statement  
6 Reports demonstrating his trust account activity and balances for the six-months  
7 preceding the filing of his Complaint. *See* ECF Nos. 4, 7; 28 U.S.C. § 1915(a)(2); S.D.  
8 CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. The Court has reviewed these reports, but  
9 both show Plaintiff has a current available balance of zero in his account. *See* 28 U.S.C.  
10 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a  
11 civil action or appealing a civil action or criminal judgment for the reason that the  
12 prisoner has no assets and no means by which to pay the initial partial filing fee.”);  
13 *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”  
14 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to  
15 the lack of funds available to him when payment is ordered.”).

16 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 3) and  
17 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350  
18 balance of the filing fees mandated will be collected by the California Department of  
19 Corrections and Rehabilitation (“CDCR”) and forwarded to the Clerk of the Court  
20 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

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

### 22 A. Standard of Review

23 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint also requires a  
24 pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
25 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of  
26 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
27 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
28 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.

1 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
2 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
3 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
4 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

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

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

22 Finally, in deciding whether Plaintiff has stated a plausible claim for relief, the  
23 Court may consider exhibits attached to his Complaint. *See Fed. R. Civ. P. 10(c)* (“A  
24 copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all  
25 purposes.”); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555  
26 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d  
27 426 (9th Cir. 1978) (“[M]aterial which is properly submitted as part of the complaint may  
28 be considered” in ruling on a Rule 12(b)(6) motion to dismiss.)).

1           B.     Plaintiff's Allegations

2           Plaintiff claims that in late March 2018, he was moved into a cell with an inmate  
3 named Darden who “began asking to see [his] paperwork.” *See* Supp. Doc., ECF No. 2 at  
4 3. “For weeks” after, Plaintiff claims Darden threatened him and said “he was a  
5 pedophile and he must die.” Plaintiff contends he “repeatedly” told Officers Estrada,  
6 Mejia, Byrdhunt, Rueles, and Rodriguez “about Darden[']s threats to kill, stab, and  
7 assault him.” *Id.* But “they all told Plaintiff to deal with him,” and “made comments like,  
8 “[Y]ou[']r[e] a big guy,” and “refused to make any bed moves.” *Id.*

9           On May 1, 2018, Plaintiff claims Darden punched and kicked him, but when he  
10 told Officers Rueles and Byrdhunt “they did nothing.” *Id.*

11           On May 29, 2018, Plaintiff claims Darden again attacked him “with a makeshift  
12 weapon.” *Id.* Plaintiff “ran to the door and scream[ed] for help,” but Officer O. Navarro,  
13 the control booth officer, refused to open it and said, “[H]andle your business[,] punk,”  
14 “loud[ly] on the microphone,” while Officer Estrada “stood there and did nothing.” *Id.*  
15 Plaintiff contends Darden continued to kick and beat him, cut his eye, broke his T.V., and  
16 beat him with it for “over 30 minutes” before the officers intervened.<sup>3</sup> *Id.* at 3-4.

17           On June 4, 2018, Plaintiff claims Navarro “pointed [a] state[-]issued mini 14 rifle”  
18 at him while he was in the dayroom and told him “he[']d better withdraw any 602's he  
19 has on him or next time he pointed his rifle he will do worse than what Darden did to  
20 him.” *Id.* at 5. On June 13, 2018, Plaintiff further alleges Navarro “called him into [a]  
21 hallway,” closed the door, accused him of having a “jailhouse lawyer doing a lawsuit and  
22 602 on him,” grabbed him by the neck, punched him in the stomach, and told him the  
23 “beatings and harassment will continue until he withdr[ew] any 602s or lawsuits he has  
24 on him.” *Id.* at 5.

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27 <sup>3</sup> Plaintiff further claims “Sgt. John Doe” refused to summon medical care for his “badly damaged eye”  
28 after the May 29, 2018 incident, saying it wasn't “necessary[,] it's not that bad,” and to “save him the  
headache of having to do paperwork.” *See* ECF No. 2 at 4. But Plaintiff does not include the unidentified  
sergeant as a party-defendant. *Id.* at 1-2.

1 Finally, Plaintiff claims Officer E. Estrada issued a CDCR Serious Rules Violation  
2 Report against him charging him with fighting on May 29, 2018 as “a form of  
3 retaliation,” since she “was aware of Plaintiff’s multiple request[s] to be removed from  
4 the situation.” *Id.* at 6 & Ex. A at 10.

5 As currently pleaded, the Court finds Plaintiff’s Complaint (ECF Nos. 1 & 2)  
6 contain “sufficient factual matter, accepted as true,” to state First and Eighth Amendment  
7 claims for relief that are “plausible on its face,” *Iqbal*, 556 U.S. at 678, and therefore,  
8 sufficient to survive the “low threshold” set for sua sponte screening pursuant to 28  
9 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Wilhelm*, 680 F.3d at 1123; *Iqbal*, 556 U.S. at  
10 678; *United States v. Williams*, 842 F.3d 1143, 1153 (9th Cir. 2016) (the Eighth  
11 Amendment “requires that prison officials ‘must take reasonable measures to guarantee  
12 the safety of the inmates.’”) (quoting *Farmer v. Brennan*, 511 U.S. 825, 833, 847 (1994)  
13 (“[P]rison officials have a duty [under the Eighth Amendment] ... to protect prisoners  
14 from violence at the hands of other prisoners[,]” and therefore, “may be held liable ... if  
15 [they] know[] that inmates face a substantial risk of serious harm and disregard[] that risk  
16 by failing to take reasonable measures to abate it.”); *Robins v. Meecham*, 60 F.3d 1436,  
17 1442 (9th Cir. 1995) (“[A] prison official can violate a prisoner’s Eighth Amendment  
18 rights by failing to intervene.”); *Hudson v. McMillian*, 503 U.S. 1, 5, (1992) (unnecessary  
19 and wanton infliction of pain violates the Cruel and Unusual Punishments Clause of the  
20 Eighth Amendment); *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (per curiam) (for claims  
21 arising out of the use of excessive physical force, the issue is “whether force was applied  
22 in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to  
23 cause harm.”) (citing *Hudson*, 503 U.S. at 7); *Rhodes v. Robinson*, 408 F.3d 559, 567-68  
24 (9th Cir. 2005) (“Within the prison context, a viable claim of First Amendment retaliation  
25 entails five basic elements: (1) An assertion that a state actor took some adverse action  
26 against an inmate (2) because of (3) that prisoner’s protected conduct, and that such  
27 action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action  
28 did not reasonably advance a legitimate correctional goal.”).

1 Therefore, the Court will direct the U.S. Marshal to effect service of summons  
2 Plaintiff's Complaint on his behalf.<sup>4</sup> See 28 U.S.C. § 1915(d) ("The officers of the court  
3 shall issue and serve all process, and perform all duties in [IFP] cases."); Fed. R. Civ. P.  
4 4(c)(3) ("[T]he court may order that service be made by a United States marshal or  
5 deputy marshal ... if the plaintiff is authorized to proceed in forma pauperis under 28  
6 U.S.C. § 1915.").

### 7 **III. Conclusion and Order**

8 For the reasons explained, the Court:

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

11 2. **ORDERS** the Secretary of the CDCR, or his designee, to collect from  
12 Plaintiff's trust account the \$350 filing fee owed in this case by collecting monthly  
13 payments from the account in an amount equal to twenty percent (20%) of the preceding  
14 month's income and forward payments to the Clerk of the Court each time the amount in  
15 the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS  
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18 <sup>4</sup> Plaintiff is cautioned that "the sua sponte screening and dismissal procedure is cumulative of, and not a  
19 substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring." *Teahan v.*  
20 *Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007). However, the Court finds it is not "clear from the  
21 face of the complaint," whether Plaintiff has exhausted all "available" administrative remedies pursuant  
22 to 42 U.S.C. § 1997e(a). See *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc); *Williams v.*  
23 *Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015). On the one hand, Plaintiff claims "administrative remedies  
24 have not been exhausted," but he also swears under penalty of perjury that this was due to Officer  
25 Navarro's threats, his fear of further acts of retaliation, "and possible death at the hands of Navarro if [he]  
26 complained." See ECF No. 2 at 7, 13. "[A]n inmate is required to exhaust those, but only those, grievance  
27 procedures that are 'capable of use' to obtain 'some relief for the action complained of.'" *Ross v. Blake*,  
28 136 S. Ct. 1850, 1859 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)); *id.* at 1859-60 (noting  
unavailability where "prison administrators thwart inmates from taking advantage of a grievance process  
through machination, misrepresentation, or intimidation."); *McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir.  
2015) (setting out requirements for prisoners claiming fear of retaliation prevented exhaustion); see also  
*Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 792 (9th Cir. 2018). Therefore, because exhaustion is an  
affirmative defense, Defendants "will have to present probative evidence ... 'to plead and prove' ... that  
[Plaintiff] has failed to exhaust" all available administrative remedies pursuant to Fed. R. Civ. P. 56,  
should they elect to defend on this basis. *Albino*, 747 F.3d at 1169 (quoting *Jones v. Bock*, 549 U.S. 199,  
204 (2007)).

1 SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED  
2 TO THIS ACTION.

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

5       4.     **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (*ECF*  
6 *Nos. 1 and 2*) and forward them to Plaintiff along with a blank U.S. Marshal Form 285  
7 for each Defendant. In addition, the Clerk will provide Plaintiff with a certified copy of  
8 this Order, certified copies of his Complaint, and the summons so that he may serve  
9 Defendants. Upon receipt of this "IFP Package," Plaintiff must complete the USM Form  
10 285s as completely and accurately as possible, *include an address where each named*  
11 *Defendant may be found and/or subject to service* pursuant to S.D. Cal. CivLR 4.1c., and  
12 return them to the United States Marshal according to the instructions the Clerk provides  
13 in the letter accompanying his IFP package.

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

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


27       7.     **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to  
28 serve upon Defendants, or if appearance has been entered by counsel, upon Defendants'



1 counsel, a copy of every further pleading, motion, or other document submitted for the  
2 Court's consideration pursuant to Fed. R. Civ. P. 5(b). Plaintiff must include with every  
3 original document he seeks to file with the Clerk of the Court, a certificate stating the  
4 manner in which a true and correct copy of that document has been served on  
5 Defendants or their counsel, and the date of that service. *See* S.D. Cal. CivLR 5.2. Any  
6 document received by the Court which has not been properly filed with the Clerk or  
7 which fails to include a Certificate of Service upon the Defendants, or their counsel, may  
8 be disregarded.

9 **IT IS SO ORDERED.**

10 Dated: September 17, 2018



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12 Hon. Cathy Ann Bencivengo  
13 United States District Judge  
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