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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JOSE TELLEZ,
12 CDCR #BF-5313,

13 Plaintiff,

14 vs.

15 CALIFORNIA DEP'T OF
16 CORRECTIONS AND
17 REHABILITATION; SCOTT KERNEN;
18 DANIEL PARAMO; KATHLEEN
19 ALLISON; KATHERINE TEBROCK.

20 Defendants.

Case No.: 3:19-cv-1072-LAB-WVG

ORDER:

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

2) **DENYING MOTION TO
APPOINT COUNSEL [ECF No. 3]**

AND

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

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23 Plaintiff, Jose Tellez, an inmate currently incarcerated at the Richard J. Donovan
24 Correctional Facility (“RJD”) located in San Diego, California has filed a civil rights
25 Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1). In addition, Plaintiff has filed a
26 Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a), along
27 with a Motion to Appoint Counsel (ECF Nos. 2, 3).
28

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

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

16 **II. Motion for Appointment of Counsel**

17 Plaintiff also requests that the Court appoint him counsel in this matter. (*See* ECF
18 No. 3.) All documents filed pro se are liberally construed, and “a pro se complaint,
19 however inartfully pleaded, must be held to less stringent standards than formal pleadings
20 drafted by lawyers.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (citing *Estelle v.*
21 *Gamble*, 429 U.S. 97, 106 (1976) (internal quotations omitted)). But there is no
22 constitutional right to counsel in a civil case; and none of Plaintiff’s pleadings to date
23 demand that the Court exercise its limited discretion to request that an attorney represent
24 him pro bono pursuant to 28 U.S.C. § 1915(e)(1) at this stage of the case. *See Lassiter v.*
25 *Dept. of Social Servs.*, 452 U.S. 18, 25 (1981); *Agyeman v. Corr. Corp. of America*, 390
26 F.3d 1101, 1103 (9th Cir. 2004). Only “exceptional circumstances” support such a
27 discretionary appointment. *Terrell v. Brewer*, 935 F.3d 1015, 1017 (9th Cir. 1991);
28 *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). Exceptional circumstances exist

1 where there is cumulative showing of both a likelihood of success on the merits and a
2 demonstrated inability of the pro se litigant to articulate his claims in light of their legal
3 complexity. *Id.*

4 As currently pleaded, Plaintiff's Complaint demonstrates that while he may not be
5 formally trained in law, he nevertheless may be capable of articulating the facts and
6 circumstances relevant to his claims, which are typical and not legally "complex."
7 *Agyeman*, 390 F.3d at 1103. Moreover, for the reasons discussed below, Plaintiff has yet
8 to show he is likely to succeed on the merits of his claims. Therefore, the Court DENIES
9 Plaintiff's Motion for Appointment of Counsel (ECF No. 3).

10 **III. Legal Standards for Screening Complaint Pursuant to 28 U.S.C.**
11 **§§ 1915(e)(2)(B) and 1915A(b)**

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

22 "The standard for determining whether a plaintiff has failed to state a claim upon
23 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
24 Civil Procedure 12(b)(6) standard for failure to state a claim." *Watison v. Carter*, 668
25 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
26 Cir. 2012) (noting that screening pursuant to § 1915A "incorporates the familiar standard
27 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
28 12(b)(6)"). Rule 12(b)(6) requires a complaint to "contain sufficient factual matter,

1 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,
2 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

3 **A. Plaintiff’s allegations**

4 Plaintiff was initially housed at RJD, “following a criminal conviction,” on
5 February 22, 2018. (Compl. at 9.) At that time, Plaintiff was “classified as in need of
6 protective custody or as a sensitive needs yard (“SNY”)” inmate. (*Id.*) Plaintiff was also
7 designated an “enhanced out patient (“EOP”) with a qualified mental health disability.”
8 (*Id.*)

9 On April 14, 2017, the CDCR, “under the direction of Department Secretary Scott
10 Kernan, issued a policy directive called ‘Expanding the Transition away from Designated
11 General Population and SNY EOP.’” (*Id.*) Plaintiff claims that the CDCR has been
12 “historically known” to hold “notorious prison gang populations in the general population
13 (“GP”) and these inmates were a threat to Plaintiff being SNY designated.” (*Id.*)

14 On November 30, 2017, Kathleen Allison, “acting as Director of CDCR’s Division
15 of Adult Institutions,” along with Katherine Tebrock, “Deputy Director of CDCR’s
16 statewide Mental Health Program, issued a memorandum setting into action a policy to
17 refuse SNY to EOP inmates.” (*Id.* at 10.) In “response to the policy directive,” Plaintiff
18 claims that Daniel Paramo, RJD’s Warden, “began to refuse EOP inmates SNY custody.”
19 (*Id.*)

20 Plaintiff had previously been housed at Wasco State Prison and when he was
21 transferred to RJD, he claims he was “clearly separated in the bus from inmates
22 designated” general population. (*Id.*) When Plaintiff arrived at RJD he was housed in a
23 general population yard “occupied by numerous prison gangs.” (*Id.* at 11.) The other
24 inmates on the bus that transferred with Plaintiff were housed with him and “were aware”
25 that Plaintiff was designated as an “SNY inmate.” (*Id.*)

26 On August 16, 2018, Plaintiff was “instructed by a correctional officer” to “report
27 to receiving and release (“R&R”) to collect his property.” (*Id.*) At the time he was told
28 to report, other inmates “were freely engaged in yard recreation.” (*Id.*) While Plaintiff

1 was walking to the R&R, an “Hispanic inmate with long black hair attempted to murder
2 Plaintiff for his SNY status by sneaking behind him and painfully and shockingly
3 slashing his throat.” (*Id.*) Correctional officers “sounded a [siren] by calling an
4 emergency code and intervened.” (*Id.*) They also “summoned medical treatment to tend
5 to Plaintiff’s injury and he was eventually given numerous stitches to mend his slashed
6 throat.” (*Id.* at 12.)

7 Plaintiff alleges the “culprit was apprehended, placed in administrative segregation
8 and eventually referred to the San Diego District Attorney’s Office for allegations of
9 attempted murder.” (*Id.*) Plaintiff was “hospitalized in acute suicide prevention.” (*Id.* at
10 13.) Plaintiff was later “released to RJD Facility E.” (*Id.*) Plaintiff alleges Facility E
11 frequently housed inmates who “refused to house with inmates who are SNY or PC.”
12 (*Id.*)

13 In February of 2019, the inmate who had “attempted to murder Plaintiff, despite
14 having been apprehended, approached Plaintiff on the Facility E yard.” (*Id.*) Plaintiff
15 alleges this inmate “confrontationally told Plaintiff that he slit his throat.” (*Id.*) This
16 inmate further told Plaintiff that he had “paper work” which Plaintiff claims is a “prison
17 gang tactic that is commonly used to validate a ‘snitch.’” (*Id.*) Plaintiff “managed to exit
18 the conversation.” (*Id.*)

19 Plaintiff “again encountered the inmate” who asked Plaintiff “if he could influence
20 his pending litigation by refuting he was a victim” and “offered to compensate Plaintiff
21 with meth.” (*Id.*) Ultimately, Plaintiff “believes the case was rejected by the San Diego
22 District Attorney.” (*Id.*)

23 **B. 42 U.S.C. § 1983**

24 Title 42 U.S.C. § 1983 provides a cause of action for the “deprivation of any rights,
25 privileges, or immunities secured by the Constitution and laws” of the United States.
26 *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). To state a claim under § 1983, a plaintiff must
27 allege two essential elements: (1) that a right secured by the Constitution or laws of the
28 United States was violated, and (2) that the alleged violation was committed by a person

1 acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. Cty. of*
2 *Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

3 **C. Individual liability**

4 Plaintiff argues that Defendants Kernan, Paramo, Allison and Tebrock
5 “implemented a deficient policy, with deliberate indifference or reckless disregard of
6 Plaintiff’s safety” in violation of his Eighth Amendment rights. (Compl. at 15.)
7 However, Plaintiff fails to state a plausible claim for relief under § 1983 because he fails
8 to include “further factual enhancement” which describes how or when Defendants were
9 actually aware of a serious risk of harm to Plaintiff. *Iqbal*, 556 U.S. at 678 (citing
10 *Twombly*, 550 U.S. at 557).

11 There is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v.*
12 *Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). “Because vicarious liability is
13 inapplicable to ... § 1983 suits, [Plaintiff] must plead that each government-official
14 defendant, through the official’s own individual actions, has violated the Constitution.”
15 *Iqbal*, 556 at 676; *see also Jones v. Community Redevelopment Agency of City of Los*
16 *Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (even pro se plaintiff must “allege with at
17 least me degree of particularity overt acts which defendants engaged in” in order to state
18 a claim).

19 As currently pleaded, Plaintiff’s Complaint offers no factual detail from which the
20 Court might reasonably infer a plausible claim for relief based on a violation of any
21 constitutional right on the part of Kernan, Paramo, Allison or Tebrock. Instead, Plaintiff
22 simply identifies these Defendants as violating his constitutional rights “by exercising
23 power possessed by virtue of state law and was possible only because [these]
24 wrongdoer[s] [were] clothed with authority of state law.” (Compl. at 2.) But Fed. R. Civ.
25 P. 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-me
26 accusation,” and in order “[t]o survive a motion to dismiss, a complaint must contain
27 sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on
28 its face.’” *Iqbal*, 662 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 570). And a

1 supervisory official may only be held liable under § 1983 if Plaintiff alleges his “personal
2 involvement in the constitutional deprivation, or ... a sufficient causal connection
3 between the supervisor’s wrongful conduct and the constitutional violation.” *Keates v.*
4 *Koile*, 883 F.3d 1228, 1242-43 (9th Cir. 2018); *Starr v. Baca*, 652 F.3d 1202, 1207 (9th
5 Cir. 2011).

6 Plaintiff makes no such allegations in his Complaint. Therefore, the Court sua
7 sponte dismisses Defendants Kernan, Paramo, Allison and Tebrock based on Plaintiff’s
8 failure to state a plausible individual liability claim against any of them. *See* 28 U.S.C.
9 § 1915(e)(2)(B)(ii) and § 1915A(b)(1); *Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at
10 1004.

11 **D. Eighth Amendment claims**

12 Plaintiff does raise serious allegations in which he claims he was physically
13 assaulted while housed at RJD. (*See* Compl. at 11.) Specifically, he alleges that while he
14 was walking in the yard, an “Hispanic inmate” attempted to “murder Plaintiff for his
15 SNY status by sneaking behind him and painfully and shockingly slashing his throat.”
16 (*Id.*) Plaintiff also alleges, despite the grave nature of the attack, he was housed with this
17 inmate at a later date. (*See id.* at 13.)

18 Specifically, while the Eighth Amendment requires officials take reasonable
19 measures to guarantee the safety and well-being of prisoners, *Farmer v. Brennan*, 511
20 U.S. 825, 832–33 (1994); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000), to state an
21 Eighth Amendment failure to protect claim Plaintiff must allege facts sufficient to
22 plausibly show that (1) he faced conditions posing a “substantial risk of serious harm” to
23 his health or safety, and (2) the individual prison official he seeks to hold liable was
24 “deliberately indifferent” to those risks. *Farmer*, 511 U.S. at 837; *Thomas v. Ponder*, 611
25 F.3d 1144, 1150 (9th Cir. 2010). To demonstrate deliberate indifference, Plaintiff must
26 allege facts sufficiently to plausibly show that each defendant both knew of and
27 disregarded a substantial risk of serious harm to his health and safety. *Farmer*, 511 U.S.
28 at 837. Thus, Plaintiff must allege that each person he seeks to sue was “both ... aware of

1 facts from which the inference could be drawn that a substantial risk of serious harm
2 exist[ed], and [that] he ... also dr[e]w that inference.” *Id.*

3 Here, Plaintiff does not identify any individual RJD prison officials who were
4 aware, or should have been aware, that Plaintiff faced a “substantial risk of serious
5 harm.” *Id.* Moreover, Plaintiff does not identify any RJD prison officials who were
6 aware that Plaintiff was housed on the same yard as his alleged attacker. Therefore,
7 Plaintiff has failed to state an Eighth Amendment claim upon which relief may be
8 granted.

9 **E. Americans with Disabilities claims**

10 Plaintiff also alleges that the CDCR has “discriminated against Plaintiff by
11 knowingly refusing to provide safe housing because of his mental illness in violation of
12 the Americans with Disabilities Act (“ADA”).” (Compl. at 15.) The Americans with
13 Disabilities Act, 42 U.S.C. § 12132, applies in the prison context. *See* 42 U.S.C.
14 § 12131(1)(B); *U.S. v. Georgia* 546 U.S. 151, 154 (2006). In order to state a claim under
15 Title II of the ADA, however, a plaintiff must allege:

16 (1) ‘is an individual with a disability;’ (2) he ‘is otherwise qualified to
17 participate in or receive the benefit of some public entity’s services,
18 programs, or activities;’ (3) he ‘was either excluded from participation in or
19 denied the benefits of the public entity’s services, programs, or activities, or
20 was otherwise discriminated against by the public entity;’ and (4) ‘such
21 exclusion, denial of benefits, or discrimination was by reason of [his]
22 disability.’

22 *O’Guinn v. Lovelock Correctional Center*, 502 F.3d 1056, 1060 (9th Cir. 2007) (citing
23 *McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004) (quoting *Thompson v.*
24 *Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (per curiam)).

25 In order to recover damages under Title II of the ADA, Plaintiff “must prove
26 intentional discrimination on the part of the defendant.” *Duvall v. County of Kitsap*, 260
27 F.3d 1124, 1138 (9th Cir. 2001) (citing *Ferguson v. City of Phoenix*, 157 F.3d 668, 674
28 (9th Cir. 1998) (footnote omitted)). The Ninth Circuit further held that deliberate

1 indifference is the applicable standard to determine whether there was intentional
2 discrimination by a defendant. *Id.* As stated above with regard to his Eighth Amendment
3 claim, Plaintiff has failed to allege facts sufficient to show any of the named Defendants
4 were deliberately indifferent because there are no allegations that any of the named
5 Defendants were actually aware that there was a substantial risk of serious harm to his
6 health and safety. Moreover, there are no allegations that the named Defendants were
7 actually aware that Plaintiff is alleged to suffer from a mental disability. Therefore,
8 Plaintiff has not alleged facts sufficient to show that he was intentionally discriminated
9 against on the basis of his disability and thus, the Court finds Plaintiff has failed to state a
10 claim under Title II of the ADA.

11 **F. Leave to Amend**

12 A pro se litigant must be given leave to amend his or her complaint to state a claim
13 unless it is absolutely clear the deficiencies of the complaint cannot be cured by
14 amendment. *See Lopez*, 203 F.3d at 1130 (noting leave to amend should be granted when
15 a complaint is dismissed under 28 U.S.C. § 1915(e) “if it appears at all possible that the
16 plaintiff can correct the defect”). Therefore, while the Court finds Plaintiff’s Complaint
17 fails to state any claim upon which relief can be granted, it will provide him a chance to
18 fix the pleading deficiencies discussed in this Order. *See Akhtar v. Mesa*, 698 F.3d 1202,
19 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

20 **IV. Conclusion and Order**

21 Good cause appearing, the Court:

- 22 1. **DENIES** Plaintiff’s Motion for Appointment of Counsel (ECF No. 3)
23 without prejudice.
- 24 2. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
25 (ECF No. 2).
- 26 3. **DIRECTS** the Acting Secretary of the CDCR, or his designee, to collect
27 from Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing
28 monthly payments from his account in an amount equal to twenty percent (20%) of the

1 preceding month's income and forwarding those payments to the Clerk of the Court each
2 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL
3 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
4 ASSIGNED TO THIS ACTION.

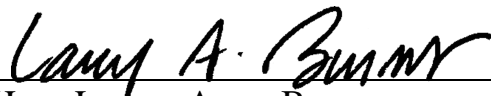
5 4. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Ralph
6 Diaz, Acting Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001.

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

18 6. **DIRECTS** the Clerk of Court to mail to Plaintiff, together with this Order, a
19 blank copy of the Court's form “Complaint under the Civil Rights Act, 42 U.S.C.
20 § 1983” for his use in amending.

21 **IT IS SO ORDERED.**

22
23 Dated: August 5, 2019

24 
25 _____
26 HON. LARRY ALAN BURNS
27 Chief United States District Judge
28