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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

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11 KORY T. O'BRIEN,  
12 CDCR #AM-1378,

13 Plaintiff,

14 v.

15 C. MURPHY; T. RAMOS;  
16 LANCE ESHELMAN; R.E.J. MARTIN;  
17 J. STEWART; PATRICK COVELLO,

18 Defendants.

Case No.: 19-cv-01496-BAS-BGS

**ORDER:**

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

**AND**

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

20 Kory T. O'Brien ("Plaintiff"), proceeding pro se and incarcerated at Richard J.  
21 Donovan Correctional Facility ("RJD") in San Diego, California, filed a civil rights  
22 Complaint pursuant to 42 U.S.C. § 1983 on August 9, 2019. (ECF No. 1, Compl.).

23 Plaintiff claims that RJD officials have violated his right to equal protection of the  
24 laws under the Fourteenth Amendment by promulgating and enforcing provisions of Title  
25 15 of the California Code of Regulations with "discriminatory intent," affecting Plaintiff's  
26 right to a possible sentence reduction pursuant to California's Public Safety and  
27 Rehabilitation Act of 2016 ("Proposition 57"). (*Id.* at 4–8.)

28 Plaintiff did not prepay the \$400 civil filing fee required by 28 U.S.C. § 1914(a) at

1 the time of filing; instead, he has filed a Motion to Proceed In Forma Pauperis (“IFP”)  
2 pursuant to 28 U.S.C. § 1915(a). (ECF No. 2.)

3 **I. Motion to Proceed In Forma Pauperis**

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

13 Section 1915(a)(2) also 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 the average  
18 monthly deposits in the account for the past six months, or the average monthly balance in  
19 the account for the past six months, whichever is greater, unless the prisoner has no assets.  
20 See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the  
21 prisoner then collects subsequent payments, assessed at 20% of the preceding month’s  
22 income, in any month in which his account exceeds \$10, and forwards those payments to  
23 the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2); *Bruce v. Samuels*,  
24 \_\_ U.S. \_\_, 136 S. Ct. 627, 629 (2016).

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27 <sup>1</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 In support of his IFP Motion, Plaintiff has submitted a copy of his Inmate Statement  
2 Report from the California Department of Corrections (“CDCR”) as well as a Prison  
3 Certificate completed by an accounting officer at RJD. (ECF No. 3 at 1–5.) These  
4 statements show that Plaintiff: (1) maintained an average monthly balance of \$117.16 for  
5 the past six months; (2) made average monthly deposits of \$151.10 to his account over the  
6 six-month period immediately preceding the filing of his Complaint; and (3) had a \$10.92  
7 available balance on the books at the time of filing. (See ECF No. 3 at 1, 3.) Based on this  
8 accounting, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF No. 2) and  
9 assesses his initial partial filing fee to be \$30.22 pursuant to 28 U.S.C. § 1915(b)(1).

10 However, because Plaintiff’s available balance was insufficient to satisfy this initial  
11 fee at the time of filing, the Court will direct the Secretary of the CDCR, or his designee,  
12 to collect the initial \$30.22 fee assessed only if sufficient funds are available in Plaintiff’s  
13 account at the time this Order is executed. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n  
14 no event shall a prisoner be prohibited from bringing a civil action or appealing a civil  
15 action or criminal judgment for the reason that the prisoner has no assets and no means by  
16 which to pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at  
17 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a  
18 prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available  
19 to him when payment is ordered.”). The remaining balance of the \$350 total fee owed in  
20 this case must be collected by the agency having custody of the prisoner and forwarded to  
21 the Clerk of the Court pursuant to 28 U.S.C. § 1915(b)(2).

## 22 **II. Sua Sponte Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b)**

23 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-  
24 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these statutes,  
25 the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it, which  
26 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are  
27 immune from suit. 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 F.3d  
8 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.  
9 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 to “contain sufficient factual matter,  
12 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*,  
13 556 U.S. 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 relief  
17 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial  
18 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,  
19 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility  
20 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

21 As currently pleaded, the Court finds Plaintiff’s Complaint contains “sufficient  
22 factual matter, accepted as true,” to allege equal protection claims for relief that are  
23 “plausible on its face.” *Iqbal*, 556 U.S. at 678. Therefore, Plaintiff’s Complaint is  
24 sufficient to survive the “low threshold” for proceeding past the sua sponte screening  
25 required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).<sup>2</sup> *See Wilhelm*, 680 F.3d at 1123.

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27 <sup>2</sup> Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a  
28 substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to bring.” *Teahan v.*  
*Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

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

### 6 **III. Conclusion and Orders**

7 For the reasons discussed, the Court:

8 1) **GRANTS** Plaintiff's Motion to Proceed IFP (ECF No. 2);  
9 2) **DIRECTS** the Secretary of the CDCR, or his designee, to collect from  
10 Plaintiff's prison trust account the \$350 filing fee owed in this case by garnishing monthly  
11 payments from his account in an amount equal to twenty percent (20%) of the preceding  
12 month's income and forwarding those payments to the Clerk of the Court each time the  
13 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS**  
14 **SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO**  
15 **THIS ACTION;**

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

18 4) **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF No.  
19 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each Defendant.  
20 In addition, the Clerk will provide Plaintiff with a certified copy of this Order, a certified  
21 copy of his Complaint, and the summons so that he may serve the Defendants. Upon  
22 receipt of this "IFP Package," Plaintiff must complete the Form 285 as completely and  
23 accurately as possible, *include an address where the Defendants may be served, see* S.D.  
24 Cal. CivLR 4.1.c, and return it to the United States Marshal according to the instructions  
25 the Clerk provides in the letter accompanying his IFP package;

26 5) **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons  
27 upon the Defendants as directed by Plaintiff on the USM Form 285 provided to him. All  
28 costs of that service will be advanced by the United States. *See* 28 U.S.C. § 1915(d);

1 Fed. R. Civ. P. 4(c)(3);

2 6) **ORDERS** the Defendants, once served, to reply to Plaintiff's Complaint  
3 within the time provided by the applicable provisions of Federal Rule of Civil Procedure  
4 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to  
5 "waive the right to reply to any action brought by a prisoner confined in any jail, prison, or  
6 other correctional facility under section 1983," once the Court has conducted its sua sponte  
7 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a  
8 preliminary determination based on the face on the pleading alone that Plaintiff has a  
9 "reasonable opportunity to prevail on the merits," defendant is required to respond); and

10 7) **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to  
11 serve upon the Defendants, or, if appearance has been entered by counsel, upon  
12 Defendants' counsel, a copy of every further pleading, motion, or other document  
13 submitted for the Court's consideration pursuant to Fed. R. Civ. P. 5(b). Plaintiff must  
14 include, with every original document he seeks to file with the Clerk of the Court, a  
15 certificate stating the manner in which a true and correct copy of that document was served  
16 on the Defendants or their counsel, and the date of that service. *See* S.D. Cal. CivLR 5.2.  
17 Any document received by the Court which has not been properly filed with the Clerk, or  
18 which fails to include a Certificate of Service upon the Defendants, may be disregarded by  
19 the Court.

20 **IT IS SO ORDERED.**

21  
22 **Dated: October 7, 2019**

23   
24 **Hon. Cynthia Bashant**  
25 **United States District Judge**