

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KRISTOPHER G. FRENCH,  
CDCR #K-96643  
  
Plaintiff,  
  
vs.  
  
N. MORENO,  
  
Defendant.

Case No.: 23cv1023-BTM (DEB)

**ORDER:**  
  
**(1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS,  
and**  
  
**(2) DISMISSING COMPLAINT  
WITH LEAVE TO AMEND FOR  
FAILING TO STATE A CLAIM  
PURSUANT TO 28 U.S.C.  
§ 1915(e)(2) AND § 1915A(b)**

Plaintiff Kristopher G. French, a state prisoner housed at the Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, proceeding pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983, accompanied by a Motion to proceed In Forma Pauperis (“IFP”). (ECF Nos. 1-2.) Plaintiff claims Defendant RJD Correctional Officer Moreno violated his Eighth Amendment right to be free from cruel and unusual punishment when Moreno told Plaintiff he would address a sewage backup in Plaintiff’s cell but failed to do so. (ECF No. 1 at 3-4.)

1 **I. Motion to Proceed IFP**

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 \$402.<sup>1</sup> See 28 U.S.C. § 1914(a). The action may proceed despite a failure to prepay the  
5 entire fee only if leave to proceed IFP is granted pursuant to 28 U.S.C. § 1915(a). See  
6 *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007). Section 1915(a)(2) also  
7 requires prisoners seeking leave to proceed IFP to submit a “certified copy of the trust fund  
8 account statement (or institutional equivalent) for . . . the 6-month period immediately  
9 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d  
10 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court assesses  
11 an initial payment of 20% of (a) the average monthly deposits in the account for the past  
12 six months, or (b) the average monthly balance in the account for the past six months,  
13 whichever is greater, unless the prisoner has no assets. See 28 U.S.C. § 1915(b)(1) & (4).  
14 The institution collects subsequent payments, assessed at 20% of the preceding month’s  
15 income, in any month in which the account exceeds \$10, and forwards those payments to  
16 the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2). Plaintiff remains  
17 obligated to pay the entire fee in monthly installments regardless of whether their action is  
18 ultimately dismissed. *Bruce v. Samuels*, 577 U.S. 82, 84 (2016); 28 U.S.C. § 1915(b)(1)  
19 & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

20 In support of his IFP Motion, Plaintiff has submitted a prison certificate indicating  
21 he had average monthly deposits of \$0 and carried an average monthly balance of \$0 over  
22 the 6-month period preceding the filing of his Complaint, and had \$0.67 on account at the  
23 time of filing. (ECF No. 3 at 1.) Based on this accounting, the Court assesses no initial  
24 partial filing fee pursuant to 28 U.S.C. § 1915(a)(1) & (b)(1) because Plaintiff appears  
25

---

26  
27 <sup>1</sup> In addition to a \$350 fee, civil litigants, other than those granted leave to proceed IFP,  
28 must pay an additional administrative fee of \$52. See 28 U.S.C. § 1914(a) (Judicial  
Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff. Dec. 1, 2020)).

1 currently unable to pay one. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event  
2 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or  
3 criminal judgment for the reason that the prisoner has no assets and no means by which to  
4 pay the initial partial filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.  
5 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based  
6 solely on a “failure to pay . . . due to the lack of funds available to him when payment is  
7 ordered.”)

8 Accordingly, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2),  
9 and declines to exact any initial filing fee because he may have “no means to pay it.” *Bruce*,  
10 577 U.S. at 84. Plaintiff remains obligated to pay the \$350.00 filing fee in monthly  
11 installments even if this action is ultimately dismissed. *Id.*

## 12 **II. Screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

### 13 **A. Standard of Review**

14 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-  
15 Answer screening pursuant to 28 U.S.C. §§ 1915(e)(2) & 1915A(b). Under these statutes,  
16 the Court must *sua sponte* dismiss a prisoner’s IFP complaint, or any portion of it, which  
17 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are  
18 immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing  
19 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)  
20 (discussing 28 U.S.C. § 1915A(b)).

21 The standard for determining whether a prisoner’s complaint fails to state a claim  
22 upon which relief can be granted under 28 U.S.C. § 1915A is the same as the Federal Rule  
23 of Civil Procedure 12(b)(6) standard for failure to state a claim. *Wilhelm v. Rotman*, 680  
24 F.3d 1113, 1121 (9th Cir. 2012) (noting that § 1915A screening “incorporates the familiar  
25 standard applied in the context of failure to state a claim under Federal Rule of Civil  
26 Procedure 12(b)(6).”) Rule 12(b)(6) requires a complaint to “contain sufficient factual  
27 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*  
28 *v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

1 570 (2007). Detailed factual allegations are not required, but “[t]hreadbare recitals of the  
2 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
3 *Iqbal*, 556 U.S. at 678.

4 Title 42 U.S.C. § 1983 “creates a private right of action against individuals who,  
5 acting under color of state law, violate federal constitutional or statutory rights.”  
6 *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a  
7 source of substantive rights, but merely provides a method for vindicating federal rights  
8 elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal quotation  
9 marks omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation  
10 of a right secured by the Constitution and laws of the United States, and (2) that the  
11 deprivation was committed by a person acting under color of state law.” *Tsao v. Desert*  
12 *Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

### 13 **B. Plaintiff’s Allegations**

14 Plaintiff alleges that on March 19, 2023, the sink in his cell “backed up and a foul  
15 smell of feces & fecal matter came from the backed up water, the smell was so bad that my  
16 stomach became very nauseated, I was gagging from the foul smell.” (EFC No. 1 at 3.)  
17 That same day his cellmate informed Defendant Correctional Officer Moreno, the sole  
18 Defendant named in the Complaint, of the backup, and Plaintiff called Defendant Moreno  
19 to the cell door and showed him the sink. (*Id.*) Defendant said: “I’ll get around to it.” (*Id.*)  
20 No plumber or prison official came to fix the sink the next day, so on March 21, 2023,  
21 Plaintiff’s cellmate asked Correctional Officer Marciel to check on the work order and call  
22 a plumber. (*Id.*) Marciel told Plaintiff’s cellmate that Defendant Moreno did not put in a  
23 work order, but Marciel would. (*Id.*) The backup went down on March 28, 2023, after  
24 Plaintiff and his cellmate cut a handball in half and used it to plunge the sink. (*Id.*)

25 Plaintiff claims Defendant Moreno knew of a substantial risk of harm from breathing  
26 odors from a backed-up sewer, but maliciously, sadistically and deliberately lied when he  
27 said he would put in a work order to fix the sink, and thereby showed deliberate  
28 indifference to Plaintiff’s health and safety in violation of his Eighth Amendment right to

1 be free from cruel and unusual punishment. (*Id.* at 3-4.) He also states there are many  
2 plumbing problems in the restrooms at RJD causing foul smells which pose a risk to the  
3 health and safety of all inmates. (*Id.* at 4.) Plaintiff seeks monetary damages, costs and  
4 fees. (*Id.* at 6.)

### 5 C. Analysis

6 An Eighth Amendment violation occurs where a prisoner is denied “the minimal  
7 civilized measure of life’s necessities.” *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).  
8 Such a violation requires an objectively grave deprivation of humane conditions of  
9 confinement. *Hudson v. McMillian*, 503 U.S. 1, 9 (1992); *Whitley v. Albers*, 475 U.S. 312,  
10 319 (1986) (“After incarceration, only the unnecessary and wanton infliction of pain . . .  
11 constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”)

12 “Prison officials have a duty to ensure that prisoners are provided adequate shelter,  
13 food, clothing, sanitation, medical care, and personal safety.” *Johnson v. Lewis*, 217 F.3d  
14 726, 731 (9th Cir. 2000), citing *Farmer*, 511 U.S. at 832; *see also Keenan v. Hall*, 83 F.3d  
15 1083, 1090 (9th Cir. 1996) (“If the air was in fact saturated with the fumes of feces, urine,  
16 and vomit, it could undermine health and sanitation” sufficient to violate the Eighth  
17 Amendment). However, “[t]he circumstances, nature, and duration of a deprivation of  
18 these necessities must be considered in determining whether a constitutional violation has  
19 occurred.” *Johnson*, 217 F.3d at 731. Although “subjection of a prisoner to lack of  
20 sanitation [in a cell that was dirty and smelled bad] that is severe or prolonged can  
21 constitute an infliction of pain within the meaning of the Eighth Amendment,” the  
22 temporary imposition of such conditions does not state a claim absent allegations of a risk  
23 of harm. *Anderson v. County of Kern*, 45 F.3d 1310, 1314-15 (9th Cir. 1995).

24 Assuming Plaintiff has plausibly alleged his exposure to the foul overflow in his sink  
25 amounts to the type of “lack of sanitation which is severe or prolonged [which] can  
26 constitute an infliction of pain within the meaning of the Eighth Amendment,” *Anderson*,  
27 45 F.3d at 1314, he has not alleged a causal connection between that harm and the short  
28 delay in placing a work order caused by Defendant Moreno’s actions. *See Rizzo v. Goode*,

1 423 U.S. 362, 371-72 (1976) (holding that a plaintiff must allege he suffered a specific  
2 injury from a defendant’s action and an affirmative link between the injury and the  
3 defendant’s conduct). Rather, Plaintiff states that after a day passed without the problem  
4 with the sink being addressed and he found out that Moreno had not put in a work order, a  
5 work order was placed by a different correctional officer, yet the sink overflow was never  
6 addressed by the prison, and Plaintiff and his cellmate ended it by plunging the sink himself  
7 ten days later. The Complaint does not plausibly allege that his continued exposure to the  
8 sewage in his sink was caused by Defendant Moreno’s failure to put in a work order after  
9 stating: “I’ll get around to it,” because Plaintiff alleges a work order was put in one or two  
10 days later by a different correctional officer but never acted on. In other words, Plaintiff  
11 has not plausibly alleged that the only Defendant named in the Complaint is responsible  
12 for the alleged constitutional violation. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir.  
13 1988) (“A person deprives another ‘of a constitutional right, within the meaning of section  
14 1983, if he does an affirmative act, participates in another’s affirmative acts, or omits to  
15 perform an act which he is legally required to do that *causes* the deprivation of which [the  
16 plaintiff complains].”), quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).

17 Plaintiff’s attempt to hold an individual defendant liable for money damages for  
18 exposure to the sewage backup in his sink, or for his general allegations of unsanitary  
19 conditions in RJD bathrooms, requires the Court to apply “a very individualized approach  
20 which accounts for the duties, discretion, and means of each defendant.” *Id.* at 633-34.  
21 “[I]n order to prevail and recover damages against” a prison official for cruel and unusual  
22 punishment, Plaintiff “must prove (1) that the specific prison official, in acting or failing  
23 to act, was deliberately indifferent to the mandates of the eighth amendment and (2) that  
24 this indifference was the actual and proximate cause of the deprivation of [his] eighth  
25 amendment right to be free from cruel and unusual punishment.” *Id.* at 634. Plaintiff has  
26 not plausibly alleged Defendant Moreno’s delay in placing a work order or otherwise  
27 following up on his assurance he would “get around to it,” was the actual and proximate  
28 cause of the alleged Eighth Amendment violation.

1           Accordingly, Plaintiff’s Complaint is dismissed for failure to state a claim upon  
2 which relief may be granted. *See* 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1); *Wilhelm*,  
3 680 F.3d at 1121; *Watison*, 668 F.3d at 1112. In light of his pro se status, the Court grants  
4 Plaintiff leave to amend his Complaint in order to attempt to address the pleading  
5 deficiencies identified in this Order. *See Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir.  
6 2015) (“A district court should not dismiss a pro se complaint without leave to amend  
7 unless ‘it is absolutely clear that the deficiencies of the complaint could not be cured by  
8 amendment.’”), quoting *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

#### 9 **IV. Conclusion and Orders**

10           Good cause appearing, the Court:

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

13           2.       **ORDERS** the Secretary of the CDCR, or his designee, to collect from  
14 Plaintiff’s prison trust account the \$350 filing fee owed by collecting monthly payments  
15 from Plaintiff’s account in an amount equal to twenty percent (20%) of the preceding  
16 month’s income and forwarding those payments to the Clerk of the Court each time the  
17 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2).

18           3.       **DIRECTS** the Clerk of the Court to serve a copy of this Order on Jeff  
19 Macomber, Secretary, California Department of Corrections and Rehabilitation, P.O. Box  
20 942883, Sacramento, California 94283-0001.


21           4.       **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which  
22 relief may be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) & 1915A(b)(1) and  
23 **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in which to file  
24 an Amended Complaint which cures all the deficiencies of pleading noted. Plaintiff’s  
25 Amended Complaint must be complete by itself without reference to his original pleading.  
26 Defendants not named and any claim not re-alleged in his Amended Complaint will be  
27 considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc.*, 896 F.2d at 1546  
28 (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d

1 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not  
2 re-alleged in an amended pleading may be “considered waived if not repled.”)

3 If Plaintiff fails to file an Amended Complaint within the time provided, the Court  
4 will enter a final Order dismissing this civil action based both on Plaintiff’s failure to state  
5 a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) &  
6 1915A(b)(1), and his failure to prosecute in compliance with a court order requiring  
7 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does  
8 not take advantage of the opportunity to fix his complaint, a district court may convert the  
9 dismissal of the complaint into dismissal of the entire action.”)

10 **IT IS SO ORDERED.**

11 Dated: July 6, 2023

12   
13 Hon. Barry Ted Moskowitz  
14 United States District Judge