

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 No. K-96643,  
  
Plaintiff,  
  
v.  
  
C. XIONG,  
  
Defendants.

Case No.: 23-CV-1294 JLS (JLB)  
  
**ORDER (1) GRANTING MOTION  
TO PROCEED *IN FORMA*  
*PAUPERIS* AND (2) DISMISSING  
COMPLAINT FOR FAILING TO  
STATE A CLAIM PURSUANT TO 28  
U.S.C. § 1915(e)(2) AND 28 U.S.C.  
§ 1915A(b)**  
  
(ECF Nos. 1, 2)

Plaintiff Kristopher French, a prisoner proceeding pro se, filed this civil rights action pursuant to 42 U.S.C. § 1983 alleging that he has been subjected to unconstitutional conditions of confinement while housed at the Richard J. Donovan Correctional Facility (“RJD”). See generally Complaint (“Compl.,” ECF No. 1). Plaintiff has also filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a). ECF No. 2.  
///  
///

1 **I. 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. *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). Section  
7 1915(a)(2) also requires prisoners seeking leave to proceed IFP to submit a “certified copy  
8 of the trust fund account statement (or institutional equivalent) for . . . the 6-month period  
9 immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v.*  
10 *King*, 398 F.3d 1113, 1119 (9th Cir. 2005).

11 From the certified trust account statement, the Court assesses an initial payment of  
12 20 percent of (a) the average monthly deposits in the account for the past six months, or  
13 (b) the average monthly balance in the account for the past six months, whichever is  
14 greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C.  
15 § 1915(b)(4). The institution having custody of the prisoner then collects subsequent  
16 payments, assessed at 20 percent of the preceding month’s income, in any month in which  
17 his account exceeds \$10, and forwards those payments to the Court until the entire filing  
18 fee is paid. *See* 28 U.S.C. § 1915(b)(2). Prisoners who are granted leave to proceed IFP  
19 remain obligated to pay the entire fee in monthly installments regardless of whether their  
20 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

21 In support of his IFP Motion, Plaintiff submitted a copy of his prison certificate  
22 attested to by an RJD accounting official. *See* ECF No. 3 at 1. This document shows  
23 Plaintiff had an available balance of \$0.67 at the time of filing. *See id.* The Court therefore  
24 **GRANTS** Plaintiff’s Motion to Proceed IFP, declines to exact any initial filing fee because  
25 his prison certificates indicate he may have “no means to pay it,” *Bruce v. Samuels*, 577  
26 U.S. 82 (2016), and directs the Secretary of the California Department of Corrections and  
27 Rehabilitation (“CDCR”), or their designee, to instead collect the entire \$350 balance of  
28 ///

1 the filing fees required by 28 U.S.C. § 1914 and forward them to the Clerk of the Court  
2 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

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

4 **A. Standard of Review**

5 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires pre-  
6 Answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
7 statutes, the Court must *sua sponte* dismiss a prisoner’s IFP complaint, or any portion of  
8 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
9 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc)  
10 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.  
11 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of § 1915A is to ensure that the  
12 targets of frivolous or malicious suits need not bear the expense of responding.” *Nordstrom*  
13 *v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (internal quote marks omitted).

14 “The standard for determining whether a plaintiff has failed to state a claim upon  
15 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
16 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d  
17 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.  
18 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
19 applied in the context of failure to state a claim under Federal Rule of Civil Procedure  
20 12(b)(6)”). Rule 12(b)(6) requires a complaint to “contain sufficient factual matter,  
21 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,  
22 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570  
23 (2007)).

24 **B. Plaintiff’s Allegations**

25 On October 29, 2022, Plaintiff alleges that the sink in the cell he was housed in  
26 would “back up for no apparent reason.” Compl. at 3. Plaintiff informed

27 ///

28 ///

1 Correctional Officer Carter<sup>1</sup> that his sink was clogged and Carter purportedly told Plaintiff  
2 that he would put a “work order” in. *Id.* Two days later, Plaintiff told Correctional Officer  
3 Fernandez<sup>2</sup> that his sink was clogged and the cell smelled like “urine and feces.” *Id.*  
4 Plaintiff requested that Fernandez move him to a different cell. *See id.*

5 Two days later, Plaintiff asked Defendant Correctional Officer Xiong to call a  
6 plumber claiming that he was unable to breathe and was becoming sick. *See id.* He also  
7 asked Xiong to move him to another cell. *See id.* at 3–4. Plaintiff alleges that he refused  
8 to move him to another cell and refused to provide a plunger but he acknowledges that the  
9 clogged sink “went down by itself” a few days later. *Id.* at 4.

10 Plaintiff seeks \$20,000 in damages, in addition to court costs and attorney fees. *Id.*  
11 at 6.

### 12 **C. 42 U.S.C. § 1983**

13 “Section 1983 creates a private right of action against individuals who, acting under  
14 color of state law, violate federal constitutional or statutory rights.” *Devereaux v. Abbey*,  
15 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of substantive  
16 rights, but merely provides a method for vindicating federal rights elsewhere conferred.”  
17 *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation marks and citations  
18 omitted). “To establish § 1983 liability, a plaintiff must show both (1) deprivation of a  
19 right secured by the Constitution and laws of the United States, and (2) that the deprivation  
20 was committed by a person acting under color of state law.” *Tsao v. Desert Palace, Inc.*,  
21 698 F.3d 1128, 1138 (9th Cir. 2012).

### 22 **D. Discussion**

23 “[T]he Constitution does not mandate comfortable prisons.” *Rhodes v. Chapman*,  
24 452 U.S. 337, 346 (1981); *Watson v. Walkley*, 120 F.3d 269 (9th Cir. 1997). “After  
25 incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and  
26

---

27 <sup>1</sup> Carter is not a named Defendant.

28 <sup>2</sup> Fernandez is not a named Defendant.

1 unusual punishment forbidden by the Eight Amendment. To be cruel and unusual  
2 punishment, conduct that does not purport to be punishment at all must involve more than  
3 ordinary lack of due care for the prisoners' interest or safety." *Whitely v. Albers*, 475 U.S.  
4 312, 319 (1986). "[C]onditions that cannot be said to be cruel and unusual under  
5 contemporary standards are not unconstitutional." *Rhodes*, 452 U.S. at 347. Thus, to assert  
6 an Eighth Amendment claim for deprivation of humane conditions of confinement, a  
7 prisoner must allege facts sufficient to fulfill two requirements: one objective and one  
8 subjective. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

9 Under the objective requirement, the prisoner must allege facts sufficient to show  
10 that the prison official's acts or omissions deprived him of the "minimal civilized measure  
11 of life's necessities." *Rhodes*, 452 U.S. at 347; *Farmer*, 511 U.S. at 834. However, to the  
12 extent conditions are merely "restrictive and even harsh, they are part of the penalty that  
13 criminal offenders pay for their offenses against society." *Rhodes*, 452 U.S. at 347. Thus,  
14 to violate the Eighth Amendment, the deprivation at issue must first be "sufficiently  
15 serious." *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000) (citing *Wilson v. Seiter*, 501  
16 U.S. 294, 298 (1991)). Under the subjective requirement, the prisoner must further allege  
17 facts to plausibly show each defendant he seeks to hold liable acted with "deliberate  
18 indifference" to his health or safety. *Wilson*, 501 U.S. at 303; *Farmer*, 511 U.S. at 834.

19 Here, Plaintiff alleges that for a period of approximately ten days,<sup>3</sup> he was housed  
20 in a cell with a clogged sink that smelled like a "sewer." Compl. at 3. "The circumstances,  
21 nature, and duration of a deprivation of [minimal] necessities must be considered in  
22 determining whether a constitutional violation has occurred." *Johnson*, 217 F.3d at 731.  
23 "[S]ubjection of a prisoner to lack of sanitation that is severe or prolonged can constitute  
24 an infliction of pain within the meaning of the Eighth Amendment," *Anderson v. Cty. of*  
25 *Kern*, 45 F.3d 1310, 1314 (9th Cir.), *as amended*, 75 F.3d 448 (9th Cir. 1995), and "[t]he  
26

---

27  
28 <sup>3</sup> Plaintiff's allegations indicate that he informed Defendant Xiong on the fifth day that the sink in his  
cell had become clogged.

1 more basic the need, the shorter the time it can be withheld.” *Hoptowit v. Ray*, 682 F.2d  
2 1237, 1259 (9th Cir. 1982).

3 First, the Court finds that Plaintiff has not plausibly alleged his exposure to a clogged  
4 sink for the five to six days between the time he informed Defendant Xiong to the time the  
5 issue allegedly resolved itself, is the type of “lack of sanitation which is severe or prolonged  
6 [which] can constitute an infliction of pain within the meaning of the Eighth Amendment.”  
7 *Anderson*, 45 F.3d at 1314. Moreover, he has not alleged a causal connection between the  
8 purported harm and Defendant’s purported refusal to help him with the clogged sink that  
9 resolved itself four to five days later. *See Rizzo v. Goode*, 423 U.S. 362, 371–72 (1976)  
10 (holding that a plaintiff must allege he suffered a specific injury from a defendant’s action  
11 and an affirmative link between the injury and the defendant’s conduct).

12 The Complaint does not plausibly allege that his continued exposure to the clogged  
13 sink was caused by Defendant Xiong’s actions. In other words, Plaintiff has not plausibly  
14 alleged that the only Defendant named in the Complaint is responsible for the alleged  
15 constitutional violation. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (“A person  
16 deprives another ‘of a constitutional right, within the meaning of section 1983, if he does  
17 an affirmative act, participates in another’s affirmative acts, or omits to perform an act  
18 which he is legally required to do that *causes* the deprivation of which [the plaintiff  
19 complains].” (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

20 Plaintiff’s attempt to hold an individual defendant liable for money damages for  
21 exposure to the clogged sink requires the Court to apply “a very individualized approach  
22 which accounts for the duties, discretion, and means of each defendant.” *Id.* at 633–34.  
23 “[I]n order to prevail and recover damages against” a prison official for cruel and unusual  
24 punishment, Plaintiff “must prove (1) that the specific prison official, in acting or failing  
25 to act, was deliberately indifferent to the mandates of the eighth amendment and (2) that  
26 this indifference was the actual and proximate cause of the deprivation of [his] eighth  
27 amendment right to be free from cruel and unusual punishment.” *Id.* at 634. Plaintiff has

28 ///

1 not plausibly alleged Defendant's actions were the actual and proximate cause of the  
2 alleged Eighth Amendment violation.

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

### 11 **III. Conclusion and Orders**

12 For the reasons discussed, the Court:

13 1. **GRANTS** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)  
14 (ECF No. 2).

15 2. **ORDERS** the Secretary of the CDCR, or their designee, to collect from  
16 Plaintiff's trust account the \$350 filing fee owed in this case by garnishing monthly  
17 payments from his account in an amount equal to twenty percent (20%) of the preceding  
18 month's income and forwarding those payments to the Clerk of the Court each time the  
19 amount in Plaintiff's account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL  
20 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
21 ASSIGNED TO THIS ACTION.

22 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Jeff  
23 Macomber, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001, by  
24 U.S. Mail, or by forwarding an electronic copy to [trusthelpdesk@cdcr.ca.gov](mailto:trusthelpdesk@cdcr.ca.gov).

25 4. **DISMISSES** this civil action *sua sponte* based on Plaintiff's failure to state a  
26 claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and  
27 § 1915A(b)(1).

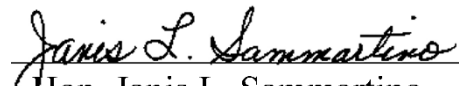
28 ///

1           5.       **GRANTS** Plaintiff forty-five (45) days leave from the date of this Order in  
2 which to file an Amended Complaint which cures all the deficiencies of pleading noted.  
3 Plaintiff’s Amended Complaint must be complete by itself without reference to his original  
4 pleading. Defendants not named and any claim not re-alleged in his Amended Complaint  
5 will be considered waived. *See* S.D. Cal. CivLR 15.1; *Hal Roach Studios, Inc.*, 896 F.2d  
6 at 1546 (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693  
7 F.3d 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are  
8 not re-alleged in an amended pleading may be “considered waived if not repled.”).

9           If Plaintiff fails to file an Amended Complaint within the time provided, the Court  
10 will enter a final Order dismissing this civil action based both on Plaintiff’s failure to state  
11 a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii) &  
12 1915A(b)(1), and his failure to prosecute in compliance with a court order requiring  
13 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does  
14 not take advantage of the opportunity to fix his complaint, a district court may convert the  
15 dismissal of the complaint into dismissal of the entire action.”).

16           **IT IS SO ORDERED.**

17 Dated: July 19, 2023

  
Hon. Janis L. Sammartino  
United States District Judge