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

DAVID VEGA,  
CDCR #v-25287,

Plaintiff,

vs.

CALIFORNIA DEP'T OF CORRECTIONS  
AND REHABILITATION; S. KO; VON  
LINTIG; MICHAEL FRAZE; TOVARES;  
GOMES, R.N.; JOHN AND JANE DOES,

Defendants.

Civil 13cv0556 MMA (RBB)  
No.

**ORDER:**

**(1) GRANTING PLAINTIFF'S  
MOTION TO PROCEED IN  
FORMA PAUPERIS,  
IMPOSING  
NO INITIAL PARTIAL  
FILING FEE AND  
GARNISHING BALANCE  
FROM PRISONER'S TRUST  
ACCOUNT PURSUANT  
TO 28 U.S.C. § 1915(a)**

**[Doc. No. 8]**

**AND**

**(2) DIRECTING U.S.  
MARSHAL TO EFFECT  
SERVICE OF SECOND  
AMENDED COMPLAINT  
PURSUANT TO  
FED.R.CIV.P. 4(c)(3) &  
28 U.S.C. § 1915(d)**

David Edward Vega ("Plaintiff"), a prisoner currently incarcerated at California Men's Colony located in San Luis Obispo, California, proceeding *pro se*, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983.

1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a);  
2 instead he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C.  
3 § 1915(a) (Doc. No. 5). Before the Court could conduct the required *sua sponte*  
4 screening, the Court permitted Plaintiff to file a First Amended Complaint, as well as a  
5 Second Amended Complaint which is the operative pleading.

6 **I. MOTION TO PROCEED IFP**

7 All parties instituting any civil action, suit or proceeding in a district court of the  
8 United States, except an application for writ of habeas corpus, must pay a filing fee of  
9 \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to  
10 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
11 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a  
12 prisoner granted leave to proceed IFP remains obligated to pay the entire fee in  
13 installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. §  
14 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

15 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act  
16 (“PLRA”), a prisoner seeking leave to proceed IFP must submit a “certified copy of the  
17 trust fund account statement (or institutional equivalent) for the prisoner for the six-month  
18 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);  
19 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account  
20 statement, the Court must assess an initial payment of 20% of (a) the average monthly  
21 deposits in the account for the past six months, or (b) the average monthly balance in the  
22 account for the past six months, whichever is greater, unless the prisoner has no assets.  
23 *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the  
24 prisoner must collect subsequent payments, assessed at 20% of the preceding month’s  
25 income, in any month in which the prisoner’s account exceeds \$10, and forward those  
26 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

27 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust  
28 account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*,

1 398 F.3d at 1119. Plaintiff’s trust account statement shows a current available balance of  
2 zero. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be  
3 prohibited from bringing a civil action or appealing a civil action or criminal judgment for  
4 the reason that the prisoner has no assets and no means by which to pay [an] initial partial  
5 filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-  
6 valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay  
7 ... due to the lack of funds available.”).

8 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (Doc. No. 5), and  
9 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350  
10 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the  
11 Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

12 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

13 The PLRA also obligates the Court to review complaints filed by all persons  
14 proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any  
15 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of  
16 criminal law or the terms or conditions of parole, probation, pretrial release, or  
17 diversionary program,” “as soon as practicable after docketing.” *See* 28 U.S.C. §§  
18 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must sua sponte  
19 dismiss complaints, or any portions thereof, which are frivolous, malicious, fail to state  
20 a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C. §§  
21 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en  
22 banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)  
23 (discussing 28 U.S.C. § 1915A(b)).

24 “[W]hen determining whether a complaint states a claim, a court must accept as true  
25 all allegations of material fact and must construe those facts in the light most favorable to  
26 the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v.*  
27 *Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the  
28 language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an

1 obligation where the petitioner is pro se, particularly in civil rights cases, to construe the  
2 pleadings liberally and to afford the petitioner the benefit of any doubt.” *Hebbe v. Pliler*,  
3 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1  
4 (9th Cir. 1985)). The court may not, however, “supply essential elements of claims that  
5 were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d  
6 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in  
7 civil rights violations are not sufficient to withstand a motion to dismiss.”

8 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the  
9 sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).<sup>1</sup> *See Lopez*, 203  
10 F.3d at 1126-27. Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service  
11 on his behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve  
12 all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court  
13 may order that service be made by a United States marshal or deputy marshal ... if the  
14 plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

### 15 **III. CONCLUSION AND ORDER**

16 Good cause appearing,

17 1. The Court **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C.  
18 § 1915(a).

19 2. The Secretary of the California Department of Corrections and Rehabilitation,  
20 or his designee, shall collect from Plaintiff’s prison trust account the \$350 filing fee owed  
21 in this case by collecting monthly payments from the account in an amount equal to  
22 twenty percent (20%) of the preceding month’s income and forward payments to the Clerk  
23 of the Court each time the amount in the account exceeds \$10 in accordance with 28  
24 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE**  
25 **NAME AND NUMBER ASSIGNED TO THIS ACTION.**

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28 <sup>1</sup> Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of,  
and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring.”  
*Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

1           3.       The Court **DIRECTS** the Clerk of the Court to serve a copy of this Order on  
2 Jeffrey A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O.  
3 Box 942883, Sacramento, California, 94283-0001.

4           **IT IS FURTHER ORDERED** that:

5           4.       The Clerk shall issue a summons as to Plaintiff’s Second Amended  
6 Complaint (Doc. No. 10) upon Defendants and shall forward it to Plaintiff along with  
7 a blank U.S. Marshal Form 285 for each Defendant. In addition, the Clerk shall provide  
8 Plaintiff with a certified copy of this Order, a certified copy of his Second Amended  
9 Complaint (Doc. No. 10), and the summons so that he may serve each named Defendant.  
10 Upon receipt of this “IFP Package,” Plaintiff is directed to complete the Form 285s as  
11 completely and accurately as possible, and to return them to the United States Marshal  
12 according to the instructions provided by the Clerk in the letter accompanying his IFP  
13 package. Upon receipt, the U.S. Marshal shall serve a copy of the Second Amended  
14 Complaint and summons upon each Defendant as directed by Plaintiff on the USM Form  
15 285s. All costs of service shall be advanced by the United States. *See* 28 U.S.C.  
16 § 1915(d); FED.R.CIV.P. 4(c)(3).

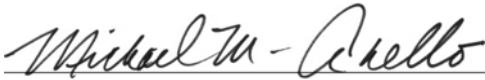
17           5.       Defendants are thereafter **ORDERED** to reply to Plaintiff’s Second  
18 Amended Complaint within the time provided by the applicable provisions of Federal  
19 Rule of Civil Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may  
20 occasionally be permitted to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

26           6.       Plaintiff shall serve upon the Defendants or, if appearance has been entered  
27 by counsel, upon Defendants’ counsel, a copy of every further pleading or other document  
28 submitted for consideration of the Court. Plaintiff shall include with the original paper to

1 be filed with the Clerk of the Court a certificate stating the manner in which a true and  
2 correct copy of any document was served on Defendants, or counsel for Defendants, and  
3 the date of service. Any paper received by the Court which has not been filed with the  
4 Clerk or which fails to include a Certificate of Service will be disregarded.

5 **IT IS SO ORDERED.**

6 DATED: September 9, 2013

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8 Hon. Michael M. Anello  
9 United States District Judge

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