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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 JOSE REYES,

12 Plaintiff,

13 vs.

14 VALLEY STATE PRISON, et al.,

15 Defendants.  
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**1:20-cv-00023-ADA-GSA-PC**

**FINDINGS AND RECOMMENDATIONS  
RECOMMENDING THAT DEFENDANTS'  
MOTION TO REVOKE PLAINTIFF'S IN  
FORMA PAUPERIS STATUS BE DENIED**

**(ECF No. 40.)**

**OBJECTIONS, IF ANY, DUE ON OR BEFORE  
MAY 30, 2023**

20 Plaintiff Jose Reyes is a state prisoner proceeding *pro se* and *in forma pauperis* with this  
21 civil rights action pursuant to 42 U.S.C. § 1983.

22 Currently before the Court is Defendants' motion to revoke Plaintiff's *in forma pauperis*  
23 status, filed on March 8, 2023. (ECF No. 40.)

24 **I. PROCEDURAL BACKGROUND**

25 This case now proceeds with the Fourth Amended Complaint filed by Plaintiff on  
26 November 9, 2022, against Defendant Moosbauer for retaliation; and against Defendants  
27 Moosbauer and Fisher for RLUIPA violations, First Amendment Free Exercise Clause violations,  
28 and an Eighth Amendment Failure to Protect Plaintiff violation. (ECF Nos. 34, 36.)

1 On March 8, 2023, Defendants filed a motion to revoke Plaintiff's *in forma pauperis*  
2 status based on his release from prison. (ECF No. 40.) Plaintiff did not file an opposition and  
3 the time to do has now passed. Local Rule 230(l).

4 **II. IN FORMA PAUPERIS STATUS**

5 All parties instituting any civil action, suit or proceeding in a district court of the United  
6 States, except an application for writ of habeas corpus, must pay a filing fee of \$402. Townsend  
7 v. Rendon, No. 121CV01120DADSABPC, 2022 WL 1462181, at \*1 (E.D. Cal. Apr. 1, 2022)  
8 (citing see 28 U.S.C. § 1914(a).)<sup>1</sup> An action may proceed despite a plaintiff's failure to prepay  
9 the entire fee only if he is granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. §  
10 1915(a). Id. (citing see Rodriguez v. Cook, 169 F.3d 1176, 1177 (9th Cir. 1999)). However, if  
11 the plaintiff is a "prisoner" as defined by 28 U.S.C. § 1915(h), as amended by the Prison  
12 Litigation Reform Act ("PLRA"), at the time of filing, he may be granted leave to proceed *in*  
13 *forma pauperis*, but unlike non-incarcerated civil litigants, he remains obligated to pay the entire  
14 fee in installments, regardless of whether his action is ultimately dismissed. Id. (citing see 28  
15 U.S.C. § 1915(b)(1) & (2); Taylor v. Delatoore, 281 F.3d 844, 847 (9th Cir. 2002)).

16 Thus, under the PLRA, a prisoner seeking leave to proceed *in forma pauperis* must submit  
17 a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner  
18 for the six-month period immediately preceding the filing of the complaint." Id. (citing 28 U.S.C.  
19 § 1915(a)(2); Andrews v. King, 398 F.3d 1113, 1119 (9th Cir. 2005)). From the certified trust  
20 account 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 account  
22 for the past six months, whichever is greater, unless the prisoner has no assets. Id. (citing see 28  
23 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4)). The institution having custody of the prisoner must  
24 collect subsequent payments, assessed at 20% of the preceding month's income, in any month in

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27 <sup>1</sup> In addition to the \$350 statutory fee, civil litigants must pay an additional administrative  
28 fee of \$52. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee  
Schedule, § 14). However, the additional \$52 administrative fee does not apply to persons granted leave  
to proceed *in forma pauperis*. Id.

1 which the prisoner's account exceeds \$10, and forward those payments to the Court until the  
2 entire filing fee is paid. Id. (citing see 28 U.S.C. § 1915(b)(2)).

3 **Another benefit** of *in forma pauperis* status is that the plaintiff is entitled to service of  
4 process of the complaint upon defendants by the U.S. Marshal. Fed. R. Civ. P. 4(c)(3) (in cases  
5 involving a plaintiff proceeding *in forma pauperis*, the Marshal, upon order of the Court, shall  
6 serve the summons and the complaint). Here, this benefit was not mentioned in Defendants'  
7 motion and therefore the Court will not address it in this order.

### 8 **III. DEFENDANTS' MOTION TO REVOKE PLAINTIFF'S IFP STATUS**

9 Defendants assert that Plaintiff was incarcerated at Valley State Prison in Chowchilla,  
10 California, when he filed this action. As a prisoner, therefore, he is "required to pay the full  
11 amount of a filing fee" in order to commence a civil action. Id. (quoting 28 U.S.C. § 1915(b)(1)).  
12 When a prisoner, like Plaintiff, files a motion to proceed *in forma pauperis* which shows he is  
13 financially unable to prepay the full amount of the civil filing fee required by 28 U.S.C. § 1914(a),  
14 the Court typically assesses an initial partial filing fee based on Plaintiff's average inmate trust  
15 account deposits and balances over the six-month period preceding the filing of his complaint,  
16 see 28 U.S.C. § 1915(b)(1), and thereafter directs the "agency having custody" to forward both  
17 the initial and subsequent monthly payments required "until the filing fees are paid." Id. (quoting  
18 see 28 U.S.C. § 1915(b)(2)).

19 Defense counsel, Zachary Glantz, indicates that Plaintiff has been released from custody,  
20 declaring as follows:

21 On November 10, 2022, I received a letter dated November 7 from  
22 Plaintiff Jose Reyes enclosing a copy of his Fourth Amended Complaint. The  
23 letter informed me that Plaintiff was going to be released from prison on  
24 November 24, and it provided an address where correspondence relating to this  
25 case should be sent following his release. The Fourth Amended Complaint, but  
26 not this letter, were docketed by the Court on November 9. (ECF No. 36.) A true  
27 and correct copy of Plaintiff's November 7 letter to me is attached hereto as  
28 Exhibit A. (Declaration of Zachary Glantz, ECF No. 40 at 7 ¶ 2.)

1           On November 18, I wrote a letter to Plaintiff in response to his November  
2           7 letter, although my letter was not placed in the mail to Plaintiff until November  
3           20. In my letter, I warned Plaintiff that his correspondence to me did not satisfy  
4           his obligations to keep the Court apprised of his current address. A true and correct  
5           copy of my response letter to Plaintiff is attached hereto as Exhibit B. (Id. at 7 ¶  
6           3.)

7           Plaintiff was assigned the CDCR number AC9213 during his  
8           incarceration. A search of CDCR’s online Inmate Locator (located at  
9           <https://inmatelocator.cdcr.ca.gov/>) for that number yields no results, indicating  
10          that Plaintiff has been released from CDCR’s custody. (Id. at 7 ¶ 4.)

#### 11 **IV. DISCUSSION**

12          Plaintiff has not notified the Court of his release from Valley State Prison, nor of an  
13          address change. In fact, on January 23, 2023, the Court served an Order of Understanding on  
14          Plaintiff at his Valley State Prison address, identified by his CDCR number A9213, and the mail  
15          was not returned to the Court as undeliverable. (ECF No. 39.) Since the January 23, 2023  
16          service, the Court has not served any other orders on Plaintiff or filed any documents submitted  
17          by Plaintiff. (Court Record.)

18          Plaintiff’s release from custody would render 28 U.S.C. § 1915(b)’s fee collection  
19          provisions unenforceable in this case. If Plaintiff is no longer incarcerated at Valley State Prison  
20          or another correctional facility, no inmate trust account exists from which his filing fees may be  
21          garnished and forwarded to the court. Townsend, 2022 WL 1462181, at \*1 (E.D. Cal. Apr. 1,  
22          2022) (citing see DeBlasio v. Gilmore, 315 F.3d 396, 399 (4th Cir. 2010) (noting that after a  
23          prisoner is released, there is “no ‘prisoner’s account’ from which to deduct . . . payments.”)).

24          The Ninth Circuit has yet to decide how a released prisoner who is obligated to “pay the  
25          full amount of a filing fee” under 28 U.S.C. § 1915(b)(1) may proceed IFP after he has been  
26          released, *i.e.*, whether he must prepay the entire civil filing fee at once, whether he may proceed  
27          pursuant to some other partial fee and/or court-ordered installment payment plan, or whether his  
28          obligation to pay the fee is waived altogether or in part by virtue of his release. Makoni v. Downs,

1 No. 16CV2335-AJB (WVG), 2016 WL 7210403, at \*2 (S.D. Cal. Dec. 13, 2016) (citing see  
2 Putzer v. Attal, 2013 WL 4519351 at \*1 (D. Nev. Aug. 23, 2013) (unpub.) (noting the  
3 “unresolved issue within the Ninth Circuit regarding the application of the Prison Litigation  
4 Reform Act (PLRA) pauper application requirements in cases where the prisoner is released  
5 *pendente lite*, i.e., during the litigation.”); see also Turner v. San Diego County, 2014 WL  
6 5800595 at \*2-3 (S.D. Cal. Nov. 7, 2014) (unpub.) (noting absence of 9th Circuit authority);  
7 Patten v. Walker, 2015 WL 3623687 at \*5 (E.D. Cal. June 9, 2015) (unpub.) (same)). However,  
8 some district courts and some other circuit courts have held that if a prisoner proceeding *in forma*  
9 *pauperis* is released from prison while their action is pending, they must submit an updated *in*  
10 *forma pauperis* affidavit under 28 U.S.C. § 1915(a)(1) or pay the filing fee. Id. (citing see  
11 DeBlasio, 315 F.3d at 399; In re Prison Litig. Reform Act, 105 F.3d 1131, 1138-39 (6th Cir.  
12 1997); McGann v. Comm’r Soc. Sec. Admin., 96 F.3d 28, 30 (2d Cir. 1996) (holding “a released  
13 prisoner may litigate without further prepayment of fees upon satisfying the poverty affidavit  
14 requirement applicable to all non-prisoners”); Flores v. Cal. Corr. Women’s Facility, Case No.  
15 1:19- cv-1509-NONE-JLT (PC), 2020 WL 8821643 at \*2 (E.D. Cal. June 24, 2020) (released  
16 prisoner plaintiff must notify the Court of intent to pay filing fee or file a non-prisoner application  
17 to proceed *in forma pauperis*); Adler v. Gonzalez, No. 1:11-cv-1915-LJO-MJS (PC), 2015 WL  
18 4041772, at \*2 (E.D. Cal. July 1, 2015) (applying McGann and DeBlasio to require released  
19 prisoner plaintiff to submit a new *in forma pauperis* application to continue to proceed *in forma*  
20 *pauperis*); but see Gay v. Texas Dep’t of Corr. State Jail Div., 117 F.3d 240, 242 (5th Cir. 1997)  
21 (applicability of PLRA is determined at the time of filing, and subsequent release “is irrelevant”  
22 to continuing obligation to pay fee)).

23 Defendants provide evidence that Plaintiff expected to be released from Valley State  
24 Prison on November 24, 2022. (Declaration of Zachary Glantz, ECF No. 40 at 8 ¶ 2 & Exh. A.)  
25 Defense counsel declares that he searched CDCR’s online Inmate Locator for Plaintiff’s CDCR  
26 number AC9213 and the search yielded no results, indicating that Plaintiff has been released  
27 from CDCR’s custody. (Id. at ¶ 4.)

1           **Importantly** however, this Court’s financial records show that Plaintiff finished paying  
2 the \$350 filing fee in full for this case in October 2021. (Financial Department.) Because  
3 Plaintiff’s filing fee for this action is paid in full, Defendants’ motion to revoke Plaintiff’s *in*  
4 *forma pauperis* status is moot, whether or not Plaintiff has been released from custody.  
5 Therefore, the Court shall recommend that Defendants’ motion to revoke Plaintiff’s *in forma*  
6 *pauperis* status be denied.

7 **V. CONCLUSION AND RECOMMENDATIONS**

8 Based on the foregoing, it is **HEREBY RECOMMENDED** that:

- 9 1. Defendants’ motion to revoke Plaintiff’s *in forma pauperis* status as a prisoner,  
10 filed on March 8, 2023, be DENIED; and  
11 2. This case be referred back to the Magistrate Judge.

12 These Findings and Recommendations will be submitted to the United States District  
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). **On or before**  
14 **May 30, 2023**, the parties may file written objections with the Court. The document should be  
15 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The parties are  
16 advised that failure to file objections within the specified time may result in the waiver of rights  
17 on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan,  
18 923 F.2d 1391, 1394 (9th Cir. 1991)).

19 IT IS SO ORDERED.  
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21 Dated: May 3, 2023

21 /s/ Gary S. Austin  
22 UNITED STATES MAGISTRATE JUDGE  
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