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

STANFORD P. BRYANT,
CDC #E-46727,

Plaintiff,

vs.

TIM OCHOA, et al.,

Defendants.

Civil No. 07-0200 JM (PCL)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350
FROM PRISONER'S TRUST
ACCOUNT [Doc. No. 2-1];**

**(2) DENYING PLAINTIFF'S MOTION
FOR TEMPORARY RESTRAINING
ORDER
WITHOUT PREJUDICE
[Doc. No. 4-1]; AND**

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

Plaintiff, Stanford Bryant, a state prisoner currently incarcerated at Calipatria State Prison in Calipatria, California, and proceeding pro se, has submitted 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); instead,

¹ The proceedings were assigned to this Court, but all post-service matters have been referred to Magistrate Judge Peter C. Lewis by Local Rule 72.3(e), "Assignment of § 1983 Prisoner Civil Cases to United States Magistrate Judges," pursuant to 28 U.S.C. § 636. See *Gomez v. Vernon*, 255 F.3d 1118, 1126 (9th Cir. 2001).

1 he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No.
2 2], as well as a Motion for Temporary Restraining Order [Doc. No. 4].

3 **I. Motion to Proceed IFP [Doc. No. 2]**

4 All parties instituting any civil action, suit or proceeding in a district court of the United States,
5 except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a).
6 An action may proceed despite a party’s failure to prepay the entire fee only if the party is granted leave
7 to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir.
8 1999). Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in
9 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28 U.S.C. §
10 1915(b)(1) & (2).

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

22 The Court finds that Plaintiff has submitted an affidavit sufficient to show that he has no funds
23 from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall
24 a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for
25 the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.”);
26 *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal
27 of a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available to him
28 when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [Doc.

1 No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
2 balance of the filing fees mandated shall be collected and forwarded to the Clerk of the Court pursuant
3 to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

4 **II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) and § 1915A**

5 The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and
6 by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for,
7 or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation,
8 pretrial release, or diversionary program,” “as soon as practicable after docketing.” See 28 U.S.C. §§
9 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any prisoner and
10 all other IFP complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or
11 which seek damages from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A;
12 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213
13 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

14 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte dismissal
15 of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However 28 U.S.C.
16 §§ 1915(e)(2) and 1915A now mandate that the court reviewing an IFP or prisoner’s suit make and rule
17 on its own motion to dismiss before directing that the Complaint be served by the U.S. Marshal pursuant
18 to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection 1915(e) not only permits, but requires a district court
19 to dismiss an in forma pauperis complaint that fails to state a claim.”); see also *Barren v. Harrington*,
20 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing § 1915A). “[W]hen determining whether a complaint
21 states a claim, a court must accept as true all allegations of material fact and must construe those facts
22 in the light most favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting
23 that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

24 Here, the Court finds that Plaintiff’s Complaint survives the sua sponte screening required by 28
25 U.S.C. §§ 1915(e)(2) and 1915A(b), and that Plaintiff is therefore automatically entitled to U.S. Marshal
26 service on his behalf. See *Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) (“The officers of the court
27 shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(2) (providing
28 that “service be effected by a United States marshal, deputy United States marshal, or other officer

1 specially appointed by the court ... when the plaintiff is authorized to proceed *in forma pauperis* pursuant
2 to 28 U.S.C. § 1915.”).

3 **III. Plaintiff’s Motion for Temporary Restraining Order (“TRO”) [Doc. No. 4]**

4 Plaintiff also filed a Motion for TRO [Doc. No. 4], as well Memorandum of Points & Authorities
5 in Support of the TRO [Doc. No. 4].

6 Rule 65 of the Federal Rules of Civil Procedure provides that:

7 A temporary restraining order may be granted without written or oral notice to the
8 adverse party or that party’s attorney only if (1) it clearly appears from specific facts
9 shown by affidavit or by the verified complaint that immediate and irreparable injury,
10 loss, or damage will result to the applicant before the adverse party or that party’s
11 attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court
12 in writing the efforts, if any, which have been made to give the notice and the reasons
13 supporting the claim that notice should not be required.

14 FED.R.CIV.P. 65(b).

15 As a preliminary matter, Plaintiff’s Motion for TRO does not comply with Rule 65(b)’s
16 important procedural notice requirement. While the Court has found Plaintiff’s Complaint sufficient to
17 survive the initial screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A, he has yet to effect service
18 of his Complaint and summons upon any named Defendant. And while Defendants, as employees of the
19 CDCR, may ultimately be represented by the Attorney General in this matter, there has been no
20 appearance on any Defendant’s behalf by the Attorney General at this preliminary stage of the
21 proceedings. Moreover, Plaintiff has not submitted a sworn affidavit or declaration certifying that any
22 efforts have been made to give notice of his Motion or Complaint to any named Defendant, which is
23 required by Federal Rule of Civil Procedure 65(b).

24 As noted above, under Federal Rule of Civil Procedure 65(b), a TRO may be granted without
25 notice to the adverse party or that party’s attorney *only* if “it clearly appears from specific facts shown
26 by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result
27 to the applicant before the adverse party or that party’s attorney can be heard in opposition.”
28 FED.R.CIV.P. 65(b). Federal Rule of Civil Procedure 65(b) also requires the Plaintiff to certify to the
Court “the efforts, if any, which have been made to give the notice and the reasons supporting the claim
that notice should not be required.” *Id.* Plaintiff’s Motion for TRO does not comply with these elemental
procedural requirements of Federal Rule of Civil Procedure 65(b).

1 Thus, for all these reasons, the Court must **DENY** without prejudice Plaintiffs' Motion for
2 Temporary Restraining Order [Doc. No. 4] pursuant to FED.R.CIV.P. 65(b) at this time.

3 **IV. Conclusion and Order**

4 Good cause appearing, **IT IS HEREBY ORDERED** that:

5 1. Plaintiff's Motion for TRO [Doc. No. 4] is **DENIED** without prejudice for failing to
6 comply with FED.R.CIV.P. 65(b).

7 2. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
8 **GRANTED**.

9 3. The Secretary of the California Department of Corrections and Rehabilitation, or his
10 designee, is ordered to collect from Plaintiff's prison trust account the \$350 balance of the filing fee owed
11 in this case by collecting monthly payments from the trust account in an amount equal to twenty percent
12 (20%) of the preceding month's income credited to the account and forward payments to the Clerk of the
13 Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). **ALL**
14 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO**
15 **THIS ACTION.**

16 4. The Clerk of the Court is directed to serve a copy of this order on James Tilton, Secretary,
17 California Department of Corrections and Rehabilitation, P.O. Box 942883, Sacramento, California
18 94283-0001.

19 **IT IS FURTHER ORDERED** that:

20 5. The Clerk shall issue the summons, provide Plaintiff with a certified copy of both this
21 Order and his Complaint, and forward them to Plaintiff along with a blank U.S. Marshal Form 285 for
22 each Defendant named in his Complaint. Plaintiff shall complete the Form 285s and forward them to the
23 United States Marshal. The U.S. Marshal shall serve a copy of the Complaint and summons upon
24 Defendants as directed by Plaintiff on each U.S. Marshal Form 285. All costs of service shall be
25 advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(2).

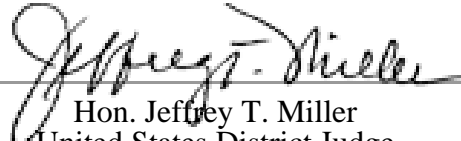
26 6. Plaintiff shall serve upon Defendants or, if appearance has been entered by counsel, upon
27 Defendants' counsel, a copy of every further pleading or other document submitted for consideration of
28 the Court. Plaintiff shall include with the original paper to be filed with the Clerk of the Court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

1 certificate stating the manner in which a true and correct copy of any document was served on
2 Defendants, or counsel for Defendants, and the date of service.

3 Any paper received by the Court which has not been filed with the Clerk or which fails to include
4 a Certificate of Service will be disregarded.

5 **IT IS SO ORDERED.**

6 DATED: April 17, 2007

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8 
9 Hon. Jeffrey T. Miller
United States District Judge

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11 cc: All Parties

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