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

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MARK WILLIAM STANLEY,
CDCR #V-92538,

Civil No. 07-1226 H (BLM)

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Plaintiff,

ORDER:

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**(1) DENYING MOTION TO
APPOINT COUNSEL [Doc. No. 3]**

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vs.

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

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SUPERIOR COURT OF CALIFORNIA;
UNION BANK OF CALIFORNIA,

**(3) DISMISSING ACTION FOR
FAILING TO STATE A CLAIM
AND FOR SEEKING MONETARY
DAMAGES AGAINST IMMUNE
DEFENDANTS PURSUANT TO 28
U.S.C. §§ 1915(e)(2)(b)(ii) &
1915A(b)(1)**

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Defendants.

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Plaintiff, Mark William Stanley, a state inmate currently incarcerated at Kern Valley State Prison in Delano, California and proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion to Appoint Counsel [Doc. No. 3].

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1 **I. Motion to Appoint Counsel**

2 Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action.
3 The Constitution provides no right to appointment of counsel in a civil case, however, unless an
4 indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social*
5 *Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are
6 granted discretion to appoint counsel for indigent persons. This discretion may be exercised
7 only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).
8 “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success
9 on the merits and the ability of the plaintiff to articulate his claims pro se in light of the
10 complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be
11 viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d
12 1328, 1331 (9th Cir. 1986)).

13 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice
14 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
15 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

16 **II. Motion to Proceed IFP [Doc. No. 2]**

17 Effective April 9, 2006, all parties instituting any civil action, suit or proceeding in a
18 district court of the United States, except an application for writ of habeas corpus, must pay a
19 filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure
20 to prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C.
21 § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners
22 granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless
23 of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v.*
24 *Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

25 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
26 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
27 statement (or institutional equivalent) for the prisoner for the six-month period immediately
28 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,

1 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
2 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
3 (b) the average monthly balance in the account for the past six months, whichever is greater,
4 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
5 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
6 of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and
7 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
8 § 1915(b)(2).

9 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
10 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
11 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. Plaintiff's trust
12 account statement shows that he has no available funds from which to pay filing fees at this time.
13 *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from
14 bringing a civil action or appealing a civil action or criminal judgment for the reason that the
15 prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281
16 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal
17 of a prisoner's IFP case based solely on a "failure to pay ... due to the lack of funds available to
18 him when payment is ordered."). Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed
19 IFP [Doc. No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However,
20 the entire \$350 balance of the filing fees mandated shall be collected and forwarded to the Clerk
21 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

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

23 **A. Standard**

24 The PLRA also obligates the Court to review complaints filed by all persons proceeding
25 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
26 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
27 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
28 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these

1 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion
2 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
3 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203
4 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
5 446 (9th Cir. 2000) (§ 1915A).

6 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
7 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
8 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,
9 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
10 an IFP or prisoner's suit make and rule on its own motion to dismiss before effecting service of
11 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection
12 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
13 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
14 (discussing 28 U.S.C. § 1915A).

15 “[W]hen determining whether a complaint states a claim, a court must accept as true all
16 allegations of material fact and must construe those facts in the light most favorable to the
17 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
18 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court's
19 duty to liberally construe a pro se's pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
20 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
21 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

22 **A. Constitutional Claims**

23 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
24 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
25 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
26 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
27 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d
28 1350, 1354 (9th Cir. 1985) (en banc).

1 **B. Eleventh Amendment**

2 In his Complaint, Plaintiff names the Superior Court of California as a Defendant because
3 he had difficulty obtaining court forms and filing documents. (*See* Compl. at 2-3.) The Superior
4 Court for the State of California, as an agency of the State of California, is not a “person”
5 subject to suit and is instead, entitled to absolute immunity from monetary damages actions
6 under the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53-54
7 (1996); *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir.
8 1987). In order to state a claim under § 1983, Plaintiff must identify a “person” who, acting
9 under color of state law, deprived him of a right guaranteed under the Constitution or a federal
10 statute. *See* 42 U.S.C. § 1983.

11 Therefore, Plaintiff’s claims against the Superior Court for the State of California are
12 dismissed with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii).

13 **C. Claims against private entity**

14 In addition, Plaintiff fails to allege any act on the part of Union Bank of California which
15 was taken “under color of state law.” *See* 42 U.S.C. § 1983, 28 U.S.C. § 1915(e)(2)(B)(ii).
16 Private parties do not generally act under color of state law; thus, “purely private conduct, no
17 matter how wrongful, is not within the protective orbit of section 1983.” *Ouzts v. Maryland*
18 *Nat’l Ins. Co.*, 505 F.2d 547, 550 (9th Cir. 1974); *see also Price v. Hawaii*, 939 F.2d 702, 707-08
19 (9th Cir. 1991).

20 While a plaintiff may seek to hold a private actor liable under section 1983, he must
21 allege facts that show some “state involvement which directly or indirectly promoted the
22 challenged conduct.” *Ouzts*, 505 F.2d at 553; *West v. Atkins*, 457 U.S. 42, 49, 54 (1988);
23 *Johnson v. Knowles*, 113 F.3d 1114, 1118-1120 (9th Cir. 1997). In other words, Plaintiff must
24 show that the private actor’s conduct is “fairly attributable” to the state. *Rendell-Baker v. Kohn*,
25 457 U.S. 830, 838 (1982); *see also Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 567
26 (9th Cir. 1987).

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1 Here, Plaintiff's Complaint fails to allege facts sufficient to show that the Union Bank of
2 California acted on behalf of, or in any way attributable to, the state. Thus, Plaintiff's allegations
3 against the Union Bank of California fail to satisfy the first prong of a § 1983 claim. *See*
4 *Haygood*, 769 F.2d at 1354.

5 Accordingly, the Court finds that Plaintiff's Complaint fails to state a section 1983 claim
6 upon which relief may be granted and seeks damages against immune defendants, and is
7 therefore subject to dismissal pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). Because it
8 is not altogether certain that Plaintiff would be unable to allege any additional facts, however,
9 the Court will provide Plaintiff with an opportunity to amend his pleading in light of the
10 standards set forth above. *See Lopez*, 203 F.3d at 1130-31.

11 **IV. Conclusion and Order**

12 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

13 1. Plaintiff's Motion to Appoint Counsel is **DENIED** without prejudice [Doc. No.
14 3];

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

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

24 4. The Clerk of the Court is directed to serve a copy of this Order on James Tilton,
25 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
26 Sacramento, California 95814.

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1 **IT IS FURTHER ORDERED** that:

2 5. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
3 §§ 1915(e)(2)(b)(ii) and (iii) and 1915A(b)(1) and (2). However, Plaintiff is **GRANTED** forty
4 five (45) days leave from the date this Order is "Filed" in which to file a First Amended
5 Complaint which cures all the deficiencies of pleading noted above. Plaintiff's Amended
6 Complaint must be complete in itself without reference to the superseded pleading. *See* S.D.
7 Cal. Civ. L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended
8 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.
9 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon which relief may
10 be granted, it may be dismissed without further leave to amend and may hereafter be counted
11 as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir.
12 1996).

13 6. The Clerk of the Court is directed to mail a Court approved form § 1983 complaint
14 to Plaintiff.

15 **IT IS SO ORDERED.**

16 DATED: August 24, 2007

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18 **MARILYN L. HUFF**, District Judge
19 UNITED STATES DISTRICT COURT
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