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

JUSTIN THOMAS MILLER,  
CDCR #K-78694,

Plaintiff,

vs.

JOHN LAMONTAGNE; RICHARD  
BUTCHER; JOSE E. OTERO;  
DAVID G. SMITH,

Defendants.

Civil No. 10-0702 WQH (POR)

**ORDER:**

**(1) GRANTING MOTION TO  
PROCEED *IN FORMA PAUPERIS*,  
IMPOSING NO INITIAL PARTIAL  
FILING FEE, GARNISHING \$350.00  
BALANCE FROM PRISONER’S  
TRUST ACCOUNT [Doc. No. 2];**

**(2) DENYING MOTION FOR  
APPOINTMENT OF COUNSEL  
PURSUANT TO 28 U.S.C. § 1915(e)(1)  
[Doc. No. 3]; and**

**AND**

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

Justin Thomas Miller (“Plaintiff”), a state prisoner currently incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, and proceeding in pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], as well as a Motion for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1) [Doc. No. 3].

1 **I.**

2 **MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 3]**

3 Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action.  
4 The Constitution provides no right to appointment of counsel in a civil case, however, unless an  
5 indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social*  
6 *Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are  
7 granted discretion to appoint counsel for indigent persons. This discretion may be exercised only  
8 under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A  
9 finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success  
10 on the merits and the ability of the plaintiff to articulate his claims pro se in light of the  
11 complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be  
12 viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328,  
13 1331 (9th Cir. 1986)).

14 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice  
15 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,  
16 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

17 **II.**

18 **MOTION TO PROCEED IFP [Doc. No. 2]**

19 All parties instituting any civil action, suit or proceeding in a district court of the United  
20 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
21 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee  
22 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
23 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to  
24 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their  
25 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d  
26 844, 847 (9th Cir. 2002).

27 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a  
28 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account

1 statement (or institutional equivalent) for the prisoner for the six-month period immediately  
2 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,  
3 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial  
4 payment of 20% of (a) the average monthly deposits in the account for the past six months, or  
5 (b) the average monthly balance in the account for the past six months, whichever is greater,  
6 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The  
7 institution having custody of the prisoner must collect subsequent payments, assessed at 20%  
8 of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and  
9 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.  
10 § 1915(b)(2).

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

### 22 III.

#### 23 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

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 of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,  
2 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
3 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-  
4 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)  
5 (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing  
6 § 1915A).

7 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
8 allegations of material fact and must construe those facts in the light most favorable to the  
9 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
10 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s  
11 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,  
12 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*  
13 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a  
14 pro se civil rights complaint, the court may not “supply essential elements of claims that were  
15 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th  
16 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations  
17 are not sufficient to withstand a motion to dismiss.” *Id.*

18 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua  
19 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).<sup>1</sup> *See Lopez*, 203 F.3d at  
20 1126-27. Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf.  
21 *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and perform  
22 all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made  
23 by a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma*  
24 *pauperis* under 28 U.S.C. § 1915.”).

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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 **IV.**

2 **CONCLUSION AND ORDER**

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

4 1. Plaintiff's Motion for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1)  
5 [Doc. No. 3] is **DENIED**.

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

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

15 4. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,  
16 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,  
17 Sacramento, California 95814.


18 **IT IS FURTHER ORDERED** that:

19 5. The Clerk shall issue a summons as to Plaintiff's Complaint [Doc. No. 1] upon  
20 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each  
21 Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order and  
22 a certified copy of his Complaint and the summons so that he may serve Defendants. Upon  
23 receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and  
24 accurately as possible, and to return them to the United States Marshal according to the  
25 instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,  
26 the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed  
27 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.  
28 *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

1           6. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the  
2 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42  
3 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to  
4 reply to any action brought by a prisoner confined in any jail, prison, or other correctional  
5 facility under section 1983," once the Court has conducted its sua sponte screening pursuant to  
6 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based  
7 on  
8 the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the  
9 merits," the defendant is required to respond).

10           7. Plaintiff shall serve upon the Defendants or, if appearance has been entered by  
11 counsel, upon Defendants' counsel, a copy of every further pleading or other document  
12 submitted for consideration of the Court. Plaintiff shall include with the original paper to be  
13 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy  
14 of any document was served on Defendants, or counsel for Defendants, and the date of service.  
15 Any paper received by the Court which has not been filed with the Clerk or which fails to  
16 include a Certificate of Service will be disregarded.

17 DATED: May 10, 2010

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19 **WILLIAM Q. HAYES**  
20 United States District Judge

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