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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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

RICARDO J. BUSTAMANTE,
CDCR #AC-7291,

Plaintiff,

vs.

ARMY AND NAVY ACADEMY, et.al.,

Defendants.

Civil No. 10cv1140 W (WMc)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
[Doc. No. 2]; AND**

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING
TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A**

Ricardo Bustamante ("Plaintiff"), a state inmate currently incarcerated at the Richard J. Donovan Correctional Facility located in San Diego, California and proceeding pro se, has filed a civil rights action filed 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].

I.

MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. See 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee

1 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
2 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
3 remains obligated to pay the entire fee in installments, regardless of whether his action is
4 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
5 (9th Cir. 2002).

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

18 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
19 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.
20 Plaintiff’s trust account statement shows he has insufficient funds with which to pay any initial
21 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be
22 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
23 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing
24 fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
25 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack
26 of funds available.”).

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1 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
2 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
3 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
4 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
5 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d
6 1350, 1354 (9th Cir. 1985) (en banc).

7 Here, Plaintiff fails to allege any act on the part of Defendants which were taken “under
8 color of state law.” *See* 42 U.S.C. § 1983, 28 U.S.C. § 1915(e)(2)(B)(ii). Private parties do not
9 generally act under color of state law; thus, “purely private conduct, no matter how wrongful,
10 is not within the protective orbit of section 1983.” *Ouzts v. Maryland Nat’l Ins. Co.*, 505 F.2d
11 547, 550 (9th Cir. 1974); *see also Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). While
12 a plaintiff may seek to hold a private actor liable under section 1983, he must allege facts that
13 show some “state involvement which directly or indirectly promoted the challenged conduct.”
14 *Ouzts*, 505 F.2d at 553; *West v. Atkins*, 457 U.S. 42, 49, 54 (1988); *Johnson v. Knowles*, 113
15 F.3d 1114, 1118-1120 (9th Cir. 1997). In other words, Plaintiff must show that the private
16 actor’s conduct is “fairly attributable” to the government. *Rendell-Baker v. Kohn*, 457 U.S. 830,
17 838 (1982); *see also Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 567 (9th Cir.
18 1987).

19 Here, Plaintiff’s Complaint fails to allege facts sufficient to show that any of the named
20 Defendants acted on behalf of, or in any way attributable to, the state. Thus, without more,
21 Plaintiff’s allegations against these Defendants fail to satisfy the first prong of a § 1983 claim.
22 *See Haygood*, 769 F.2d at 1354.

23 III.

24 CONCLUSION AND ORDER

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

26 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
27 is **GRANTED**.

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

8 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
9 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,
10 Sacramento, California, 94283-0001.

11 **IT IS FURTHER ORDERED** that:

12 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
13 §§ 1915(e)(2)(b) & 1915A. However, Plaintiff is **GRANTED** forty five (45) days leave from
14 the date this Order is filed in which to file a First Amended Complaint which cures all the
15 deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself
16 without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not
17 named and all claims not re-alleged in the Amended Complaint will be considered waived. *See*
18 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint
19 fails to state a claim upon which relief may be granted, it may be dismissed without further
20 leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See*
21 *McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

22 5. The Clerk of Court is directed to mail a court approved § 1983 form complaint to
23 Plaintiff.

24 DATED: _____

7/2/10



HON. THOMAS J. WHELAN
United States District Court