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

RICARDO RIVERA,  
CDCR #K-40871,  
  
Plaintiff,  
  
vs.  
  
D. URIBE, Warden;  
JAMES NAPOLITANO, Lieutenant;  
ABLE ZAMORA, Sergeant,  
  
Defendants.

Civil No. 10-2245 LAB (BGS)

**ORDER:**

**(1) GRANTING PLAINTIFF’S  
MOTION TO PROCEED *IN  
FORMA PAUPERIS*, IMPOSING  
INITIAL PARTIAL FILING FEE  
AND GARNISHING BALANCE  
FROM PRISONER’S TRUST  
ACCOUNT PURSUANT  
TO 28 U.S.C. § 1915(a)  
[Doc. No. 2];**

**AND**

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

Ricardo Rivera (“Plaintiff”), a state prisoner currently incarcerated at Pelican Bay State Prison located in Crescent City, California, and proceeding in pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff alleges that his constitutional rights were violated when he was housed at Centinela State Prison in 2009.

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].

1 I.

2 MOTION TO PROCEED IFP

3 All parties instituting any civil action, suit or proceeding in a district court of the United  
4 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28  
5 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee  
6 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*  
7 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP  
8 remains obligated to pay the entire fee in installments, regardless of whether his action is  
9 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847  
10 (9th Cir. 2002).

11 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a  
12 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account  
13 statement (or institutional equivalent) for the prisoner for the six-month period immediately  
14 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,  
15 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial  
16 payment of 20% of (a) the average monthly deposits in the account for the past six months, or  
17 (b) the average monthly balance in the account for the past six months, whichever is greater,  
18 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The  
19 institution having custody of the prisoner must collect subsequent payments, assessed at 20% of  
20 the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and  
21 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.  
22 § 1915(b)(2).

23 The Court finds that Plaintiff has submitted a certified copy of his trust account statement  
24 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.  
25 Plaintiff’s statement shows a current available balance of \$697.18, an average monthly balance  
26 of \$635.34, and average monthly deposits totaling \$203.34. Based on this financial information,  
27 the Court GRANTS Plaintiff’s Motion to Proceed IFP [Doc. No. 2] and assesses an initial partial  
28 filing fee of \$127.07 pursuant to 28 U.S.C. § 1915(b)(1).

1 However, the Secretary of the CDCR, or his designee, shall collect this initial fee *only if*  
2 *sufficient funds in Plaintiff's account are available at the time this Order is executed* pursuant  
3 to the directions set forth below. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall  
4 a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal  
5 judgment for the reason that the prisoner has no assets and no means by which to pay the initial  
6 partial filing fee.”); *Taylor v. Delatoore*, 281 F.3d 844, 850 (9th Cir. 2002) (finding that 28  
7 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based  
8 solely on a “failure to pay ... due to the lack of funds available to him when payment is  
9 ordered.”). The remaining balance shall be collected and forwarded to the Clerk of the Court  
10 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## 11 II.

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

13 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
14 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
15 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
16 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
17 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
18 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,  
19 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
20 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-  
21 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000)  
22 (§ 1915A); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing  
23 § 1915A).

24 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
25 allegations of material fact and must construe those facts in the light most favorable to the  
26 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
27 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s  
28 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,

1 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*  
2 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a  
3 pro se civil rights complaint, the court may not “supply essential elements of claims that were  
4 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th  
5 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations  
6 are not sufficient to withstand a motion to dismiss.” *Id.*

7 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua  
8 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Lopez*, 203 F.3d at  
9 1126-27; *Farmer v. Brennan*, 511 U.S. 825 833-34 (1994) (“Prison officials have a duty ... to  
10 protect prisoners from violence.”). Accordingly, the Court finds Plaintiff is entitled to U.S.  
11 Marshal service on his behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue  
12 and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court  
13 may order that service be made by a United States marshal or deputy marshal ... if the plaintiff  
14 is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”). Plaintiff is cautioned that  
15 “the sua sponte screening and dismissal procedure is cumulative of, and not a substitute for, any  
16 subsequent Rule 12[] motion that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481  
17 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

### 18 III.

#### 19 CONCLUSION AND ORDER

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

21 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4]  
22 is **GRANTED**.

23 2. The Secretary of the CDCR, or his designee, is ordered to collect the \$127.07  
24 initial partial filing fee assessed by this Order and forward that amount to the Clerk of Court,  
25 *if those funds are available at the time this Order is executed*. THE INITIAL PARTIAL  
26 FILING FEE SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER  
27 ASSIGNED TO THIS ACTION.

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

8           4.       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, Sacramento,  
10 California 94283-0001.

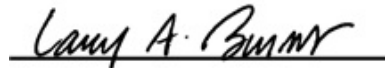
11           **IT IS FURTHER ORDERED** that:

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

21           6.       Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the time  
22 provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C. §  
23 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to reply to any action  
24 brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983," once  
25 the Court has conducted its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b),  
26 and thus, has made a preliminary determination based on  
27 the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the merits," the  
28 defendant is required to respond).

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

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10 DATED: December 6, 2010

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12 **HONORABLE LARRY ALAN BURNS**  
13 United States District Judge  
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