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

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

RONALD LEGARDY,
CDCR #E-98759,

Plaintiff,

vs.

E. ENRIQUEZ,

Defendant.

Civil No. 10cv2285 BEN (WVG)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED IN
FORMA PAUPERIS, IMPOSING
NO PARTIAL FILING FEE AND
GARNISHING \$ 350 BALANCE
FROM PRISONER'S TRUST
ACCOUNT PURSUANT
TO 28 U.S.C. § 1915(a)
[Doc. No. 2];**

AND

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

Ronald Legardy ("Plaintiff"), a state prisoner currently incarcerated in Pleasant Valley State Prison located in Coalinga, 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].

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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 the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
7 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to
8 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their
9 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d
10 844, 847 (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 no available funds from which to pay filing fees at this
24 time. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited
25 from bringing a civil action or appealing a civil action or criminal judgment for the reason that
26 the prisoner has no assets and no means by which to pay the initial partial filing fee."); *Taylor*,
27 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing
28 dismissal of a prisoner's IFP case based solely on a "failure to pay ... due to the lack of funds

1 available to him when payment is ordered.”). Therefore, the Court **GRANTS** Plaintiff’s Motion
2 to Proceed IFP [Doc. No. 2] and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1).
3 However, the entire \$350 balance of the filing fees mandated shall be collected and forwarded
4 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
5 § 1915(b)(1).

6 II.

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

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

19 “[W]hen determining whether a complaint states a claim, a court must accept as true all
20 allegations of material fact and must construe those facts in the light most favorable to the
21 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
22 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
23 duty to liberally construe a pro se’s pleadings, see *Karim-Panahi v. Los Angeles Police Dept.*,
24 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.*
25 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). However, in giving liberal interpretation to a
26 pro se civil rights complaint, the court may not “supply essential elements of claims that were
27 not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th
28 Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations

1 are not sufficient to withstand a motion to dismiss.” *Id.*

2 **A. 42 U.S.C. § 1983 Liability**

3 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
4 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
5 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
6 United States. *See* 42 U.S.C. § 1983; *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 2122
7 (2004); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

8 **B. Rule 8**

9 As a preliminary matter, the Court finds that Plaintiff’s Complaint fails to comply with
10 FED. R. CIV. P. 8(a), which provides that a complaint “shall contain (1) a short and plain
11 statement of the grounds upon which the court’s jurisdiction depends . . . (2) a short and plain
12 statement of the claim showing that the pleader is entitled to relief, and (3) a demand for
13 judgment for the relief the pleader seeks.” FED. R. CIV. P. 8(a). Rule 8 is designed to provide
14 defendants with fair notice of the claims against them and the grounds on which those claims
15 rest. *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991). Plaintiff is also cautioned that he
16 must abide by the Local Rule which provides, in part, that a “complaint must contain a short and
17 plain statement of the claim and each averment must be simple, concise and direct.” S.D.
18 CIVLR 8.2(a).

19 **C. Access to Courts claim**

20 Plaintiff’s Complaint is difficult to decipher, however, it appears that Plaintiff alleges,
21 while he was housed at the Richard J. Donovan Correctional Facility (“RJD”), Defendant
22 Enriquez destroyed his unspecified legal materials. (*See* Compl. at 3-5.) Prisoners do “have a
23 constitutional right to petition the government for redress of their grievances, which includes a
24 reasonable right of access to the courts.” *O’Keefe v. Van Boening*, 82 F.3d 322, 325 (9th Cir.
25 1996); *accord Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995). In *Bounds*, 430 U.S. at 817,
26 the Supreme Court held that “the fundamental constitutional right of access to the courts requires
27 prison authorities to assist inmates in the preparation and filing of meaningful legal papers by
28 providing prisoners with adequate law libraries or adequate assistance from persons who are

1 trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977). To establish a violation of the
2 right to access to the courts, however, a prisoner must allege facts sufficient to show that: (1)
3 a nonfrivolous legal attack on his conviction, sentence, or conditions of confinement has been
4 frustrated or impeded, and (2) he has suffered an actual injury as a result. *Lewis v. Casey*, 518
5 U.S. 343, 353-55 (1996). An “actual injury” is defined as “actual prejudice with respect to
6 contemplated or existing litigation, such as the inability to meet a filing deadline or to present
7 a claim.” *Id.* at 348; *see also Vandelft v. Moses*, 31 F.3d 794, 796 (9th Cir. 1994); *Sands v.*
8 *Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989); *Keenan v. Hall*, 83 F.3d 1083, 1093 (9th Cir. 1996).

9 Here, Plaintiff has failed to alleged any actions with any particularity that have *precluded*
10 his pursuit of a non-frivolous direct or collateral attack upon either his criminal conviction or
11 sentence or the conditions of his current confinement. *See Lewis*, 518 U.S. at 355 (right to
12 access to the courts protects only an inmate’s need and ability to “attack [his] sentence[], directly
13 or collaterally, and ... to challenge the conditions of [his] confinement.”). In addition, Plaintiff
14 must also describe the non-frivolous nature of the “underlying cause of action, whether
15 anticipated or lost.” *Christopher v. Harbury*, 536 U.S. 403, 415 (2002) .

16 In short, Plaintiff has not alleged that “a complaint he prepared was dismissed,” or that
17 he was “so stymied” by any individual defendant’s actions that “he was unable to even file a
18 complaint,” direct appeal or petition for writ of habeas corpus that was not “frivolous.” *Lewis*,
19 518 U.S. at 351; *Christopher*, 536 U.S. at 416 (“like any other element of an access claim[,] ...
20 the predicate claim [must] be described well enough to apply the ‘nonfrivolous’ test and to show
21 that the ‘arguable’ nature of the underlying claim is more than hope.”). Therefore, Plaintiff’s
22 access to courts claims must be dismissed for failing to state a claim upon which section 1983
23 relief can be granted. *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

24 III.

25 CONCLUSION AND ORDER

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

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

28 **GRANTED.**

1 2. The Secretary of California Department of Corrections and Rehabilitation, or his
2 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
3 owed in this case by collecting monthly payments from the account in an amount equal to twenty
4 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
5 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
6 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
7 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, 1515 S Street, Suite 502,
10 Sacramento, California 95814.

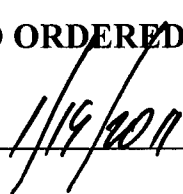
11 **IT IS FURTHER ORDERED** that:

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

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

23 **IT IS SO ORDERED.**

24 DATED: _____

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27 **HON. ROGER T. BENITEZ**
28 United States District Judge