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8	UNITED STATES D	ISTRICT COURT
9	SOUTHERN DISTRICT OF CALIFORNIA	
10	CONDALEE MORRIS, CDCR #V-96203,	Civil No. 10-2642 AJB (BGS)
11 12	Plaintiff,	ORDER:
13		(1) GRANTING MOTION TO PROCEED <i>IN FORMA PAUPERIS</i> [ECF No. 2];
14	vs.	(2) DENYING MOTIONS TO
15 16		APPOINT COUNSEL PURSUANT TO 28 U.S.C. § 1915(e)(1) [ECF Nos. 3, 9];
17	M. BARRA; L. MILLS; D. WHITE; G.J. JANDA; MACE; JANE DOE,	AND
18		(3) DIRECTING U.S. MARSHAL TO EFFECT SERVICE OF
19	Defendants.	SUMMONS AND FIRST AMENDED COMPLAINT UPON DEFENDANTS
20		PURSUANT TO FED.R.CIV.P. 4(c)(3) AND 28 U.S.C. § 1915(d)
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22	Plaintiff Condalas Morris a prisoner our	ntly incarcerated at the California Correctional
23 24	Plaintiff, Condalee Morris, a prisoner currently incarcerated at the California Correctional Institution located in Tehachapi, California, and proceeding pro se, has submitted a civil rights	
24 25	Complaint pursuant to 28 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated	
26	by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed <i>In Forma Pauperis</i> ("IFP")	
27	pursuant to 28 U.S.C. § 1915(a) [ECF No. 2], as well as two Motions for Appointment of	
28	Counsel pursuant to 28 U.S.C. § 1915(e)(1) [ECF Nos. 3, 9].	

10cv2642 AJB (BGS)

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Before the Court could conduct the required sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) & § 1915A, Plaintiff filed a First Amended Complaint ("FAC") [ECF No. 7].

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Motion to Proceed IFP [ECF No. 2]

I.

5 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 6 7 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee 8 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See 9 Rodriguez v. Cook, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to 10 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2); Taylor v. Delatoore, 281 F.3d 11 12 844, 847 (9th Cir. 2002).

13 Section 1915, as amended by the Prison Litigation Reform Act ("PLRA"), further requires that each prisoner seeking leave to proceed IFP submit a "certified copy of [his] trust 14 15 fund account statement (or institutional equivalent) ... for the six-month period immediately 16 preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2). Using these certified trust 17 account statements, the Court must assess an initial payment of 20% of (a) the average monthly 18 deposit, or (b) the average monthly balance in the account for the past six months, whichever 19 is greater, and collect that amount as the prisoner's initial partial filing fee, unless he has no 20 current assets with which to pay. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4); Taylor, 21 281 F.3d at 850. Thereafter, the institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which 22 23 his account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2); Taylor, 281 F.3d at 847. 24

25 The Court finds that Plaintiff has submitted an affidavit that complies with 28 U.S.C. § 1915(a)(1) [ECF No. 2] as well as a certified copy of his prison trust account statement 26 pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff's trust account currently 27 28 indicates that he has insufficient funds from which to pay an initial partial filing fee.

Accordingly, the Court hereby **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 2], 1 2 and assesses no initial partial filing fee at this time. See 28 U.S.C. § 1915(b)(1) (court shall 3 assess initial partial filing fee only "when funds exist"); 28 U.S.C. § 1915(b)(4) ("In no event shall a prisoner be prohibited from bringing a civil action . . . for the reason that the prisoner has 4 5 no assets and no means by which to pay the initial partial filing fee."); Taylor, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's 6 7 IFP case based solely on a "failure to pay . . . due to the lack of funds available to him when 8 payment is ordered."). However, Plaintiff is required to pay the full \$350 filing fee mandated by 28 U.S.C. §§ 1914(a) and 1915(b)(1), by subjecting any future funds credited to his prison 9 10 trust account to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(2).

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

II.

The PLRA also obligates the Court to review complaints filed by all persons proceeding 13 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused 14 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or 15 conditions of parole, probation, pretrial release, or diversionary program," "as soon as 16 17 practicable after docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any prisoner and all other IFP complaints, or any 18 19 portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages 20 from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; Lopez v. Smith, 21 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); Resnick v. Hayes, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A); see also Barren v. Harrington, 152 F.3d 1193, 1194 (9th 22 Cir. 1998) (discussing § 1915A). "[W]hen determining whether a complaint states a claim, a 23 court must accept as true all allegations of material fact and must construe those facts in the light 24 25 most favorable to the plaintiff." Resnick, 213 F.3d at 447; Barren, 152 F.3d at 1194 (noting that § 1915(e)(2) "parallels the language of Federal Rule of Civil Procedure 12(b)(6)"). 26

Here, the Court finds that Plaintiff's claims in his First Amended Complaint survive the
sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b), and that Plaintiff is

therefore automatically entitled to U.S. Marshal service on his behalf as to those individuals. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) ("The officers of the court shall issue and
serve all process, and perform all duties in [IFP] cases."); FED.R.CIV.P. 4(c)(3) (providing that
"service be effected by a United States marshal, deputy Untied States marshal, or other officer
specially appointed by the court ... when the plaintiff is authorized to proceed *in forma pauperis*pursuant to 28 U.S.C. § 1915.").

III.

Motion for Appointment of Counsel [ECF Nos. 3, 9]

Plaintiff also requests the appointment of counsel to assist him in prosecuting this civil 9 10 action. The Constitution provides no right to appointment of counsel in a civil case, however, unless an indigent litigant may lose his physical liberty if he loses the litigation. Lassiter v. 11 12 Dept. of Social Services, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), 13 district courts are granted discretion to appoint counsel for indigent persons. This discretion may be exercised only under "exceptional circumstances." Terrell v. Brewer, 935 F.2d 1015, 1017 14 (9th Cir. 1991). "A finding of exceptional circumstances requires an evaluation of both the 15 16 'likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se 17 in light of the complexity of the legal issues involved.' Neither of these issues is dispositive and both must be viewed together before reaching a decision." Id. (quoting Wilborn v. Escalderon, 18 19 789 F.2d 1328, 1331 (9th Cir. 1986)).

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

IV.

Conclusion and Order

Good cause appearing, IT IS HEREBY ORDERED that:

Plaintiff's Motions for Appointment of Counsel pursuant to 28 U.S.C. § 1915(e)(1)
 [ECF Nos. 3, 9] are **DENIED**.

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

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

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

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IT IS FURTHER ORDERED that:

5. The Clerk shall issue the summons upon Defendants, provide Plaintiff with a
certified copy of both this Order and his First Amended Complaint, and forward them to Plaintiff
along with a blank U.S. Marshal Form 285 for each of these Defendants. Plaintiff shall complete
the Form 285s and forward them to the United States Marshal. The U.S. Marshal serve a copy
of the First Amended Complaint and summons upon each individual Defendant as directed by
Plaintiff on each U.S. Marshal Form 285. All costs 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. Once served, these Defendants are thereafter **ORDERED** to reply to the First Amended Complaint within the time provided by the applicable provisions of Federal Rule of 22 Civil Procedure 12(a). See 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be 23 24 permitted to "waive the right to reply to any action brought by a prisoner confined in any jail, 25 prison, or other correctional facility under section 1983," once the Court has conducted its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a 26 preliminary determination based on the face on the pleading alone that Plaintiff has a 27 28 "reasonable opportunity to prevail on the merits," Defendants are required to respond).

1	7. Plaintiff shall serve upon Defendants or, if appearance has been entered by	
2	counsel, upon Defendants' counsel, a copy of every further pleading or other document	
3	submitted for consideration of the Court. Plaintiff shall include with the original paper to be	
4	filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy	
5	of any document was served on Defendants, or counsel for Defendants, and the date of service.	
6	Any paper received by the Court which has not been filed with the Clerk or which fails to	
7	include a Certificate of Service will be disregarded.	
8	IT IS SO ORDERED.	
9	DATED: April 13, 2011	
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11	Hon. Anthony J. Battaglia U.S. District Judge	
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