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

JAMES EARL SMITH,
CDCR #AB-5463,

Plaintiff,

vs.

CALIFORNIA DEP'T OF CORRECTIONS
AND REHABILITATION; RICHARD J.
DONOVAN CORRECTIONAL
FACILITY; A. ALLAMBY; ALAN
HERNANDEZ; MS. YORK; MR. FORTE;
R. COBB,

Defendants.

Civil No. 11-0586 JAH (CAB)

ORDER:

- (1) GRANTING PLAINTIFF'S MOTION TO PROCEED *IN FORMA PAUPERIS*, IMPOSING NO INITIAL PARTIAL FILING FEE AND GARNISHING BALANCE FROM PRISONER'S TRUST ACCOUNT PURSUANT TO 28 U.S.C. § 1915(a) [ECF No. 5];**
- (2) DENYING MOTION FOR COURT ORDER WITHOUT PREJUDICE [ECF No. 10]; 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)**

James Earl Smith ("Plaintiff"), a state prisoner currently incarcerated at the Richard J. Donovan Correctional Facility located in San Diego, California, and proceeding in pro se, initially filed this civil rights Complaint pursuant to 42 U.S.C. § 1983 in the Northern District of California. United States District Judge Lucy Koh determined that the acts complained of in the Complaint occurred in San Diego and all the named Defendants were alleged to reside in San Diego. Thus, the matter was transferred to the Southern District of California. See Koh Order, dated Mar. 21, 2011, at 1.

Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he

1 has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF
2 No. 5]. In addition, Plaintiff has filed a “Motion for Court Order” which the Court construes as
3 a Motion for Preliminary Injunction [ECF No. 10].

4 **I.**

5 **MOTION TO PROCEED IFP**

6 All parties instituting any civil action, suit or proceeding in a district court of the United
7 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
8 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
9 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
11 remains obligated to pay the entire fee in installments, regardless of whether his action is
12 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
13 (9th Cir. 2002).

14 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act (“PLRA”), a
15 prisoner seeking leave to proceed IFP must submit a “certified copy of the trust fund account
16 statement (or institutional equivalent) for the prisoner for the six-month period immediately
17 preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113,
18 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial
19 payment of 20% of (a) the average monthly deposits in the account for the past six months, or
20 (b) the average monthly balance in the account for the past six months, whichever is greater,
21 unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The
22 institution having custody of the prisoner must collect subsequent payments, assessed at 20%
23 of the preceding month’s income, in any month in which the prisoner’s account exceeds \$10, and
24 forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C.
25 § 1915(b)(2).

26 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
27 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119.
28 Plaintiff’s trust account statement shows he has insufficient funds with which to pay any initial

1 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be
2 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
3 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing
4 fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve”
5 preventing dismissal of a prisoner’s IFP case based solely on a “failure to pay ... due to the lack
6 of funds available.”).

7 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP [ECF No. 5], and
8 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
9 balance of the filing fees mandated 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 EX PARTE APPLICATION FOR INJUNCTIVE RELIEF

13 Plaintiff also filed a “Motion for Court Order” in which he seeks injunctive relief. Thus
14 the Court has construed this Motion brought pursuant to FED.R.CIV.P. 65(a). Rule 65 of the
15 Federal Rules of Civil Procedure provides that “the court may issue a preliminary injunction
16 only on notice to the adverse party.” FED.R.CIV.P. 65(a). As a preliminary matter, Plaintiff’s
17 Motion for Injunction does not comply with Rule 65(a)’s important procedural notice
18 requirement. Here, Plaintiff has not demonstrated that his Complaint, or his Motion have been
19 served on any named Defendant. Plaintiff does request that the Court copy his Motion and serve
20 it upon the Defendants. However, the Court is not responsible for serving any of the parties in
21 this action with anything other than Orders issued directly by the Court. And while Defendants,
22 as employees of the CDCR, may ultimately be represented by counsel in this matter, there has
23 been no appearance on any Defendant’s behalf by counsel at this preliminary stage of the
24 proceedings.

25
26 Plaintiff’s Motion does not comply with this elemental procedural requirement of Federal
27 Rule of Civil Procedure 65(a). Thus, the Court must **DENY**, without prejudice, Plaintiff’s
28 Motion for Preliminary Injunction [Doc. No. 10] pursuant to FED.R.CIV.P. 65(a).

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III.

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

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an obligation where the petitioner is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt.” *Hebbe v. Pliler*, ___ F.3d ___, 2010 WL 4673711 at *3 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however, “supply essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.” *Id.*

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As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b). See *Lopez*, 203 F.3d at 1126-27. Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf.

1 See 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and perform
2 all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may order that service be made
3 by a United States marshal or deputy marshal ... if the plaintiff is authorized to proceed *in forma*
4 *pauperis* under 28 U.S.C. § 1915.”). Plaintiff is cautioned that “the sua sponte screening and
5 dismissal procedure is cumulative of, and not a substitute for, any subsequent Rule 12[] motion
6 that [a defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
7 Cal. 2007).

8 **IV.**

9 **CONCLUSION AND ORDER**

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

11 1. Plaintiff’s Ex Parte Motion for Injunctive Relief is **DENIED** without prejudice
12 pursuant to FED.R.CIV.P. 65(a) [Doc. No. 10].

13 2. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 5] is
14 **GRANTED**.

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

22 4. The Clerk of the Court is directed to serve a copy of this order on Matthew Cate,
23 Secretary, California Department of Corrections and Rehabilitation, P.O. Box 942883,
24 Sacramento, California 94283-0001.

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26 **IT IS FURTHER ORDERED** that:

27 5. The Clerk shall issue a summons as to Plaintiff’s Complaint [ECF No. 1] upon
28 Defendants and shall and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for

1 each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order
2 and a certified copy of his Complaint and the summons so that he may serve Defendants. Upon
3 receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and
4 accurately as possible, and to return them to the United States Marshal according to the
5 instructions provided by the Clerk in the letter accompanying his IFP package. Upon receipt,
6 the U.S. Marshal shall serve a copy of the Complaint and summons upon Defendants as directed
7 by Plaintiff on the USM Form 285s. All costs of service shall be advanced by the United States.
8 *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

9 6. Defendants are thereafter **ORDERED** to reply to Plaintiff's Complaint within the
10 time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42
11 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to "waive the right to
12 reply to any action brought by a prisoner confined in any jail, prison, or other correctional
13 facility under section 1983," once the Court has conducted its sua sponte screening pursuant to
14 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based
15 on
16 the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the
17 merits," the defendant is required to respond).

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

25
26 DATED: July 25, 2011



HON. JOHN A. HOUSTON
United States District Judge