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

MICHAEL ANTHONY LOPEZ,  
CDCR #H-30604,

Plaintiff,

vs.

URIBE DOMINGO, JR.; N. GRANNIS;  
M. HODGES; DENNIS BROWN; ALICIA  
GARCIA; L. KASTNER;

Defendants.

Civil No. 11cv1079 BTM (PCL)

**ORDER:**

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

**(2) DENYING MOTION FOR  
APPOINTMENT OF COUNSEL  
[ECF No. 3];**

**(3) DISMISSING DEFENDANTS**

**AND**

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

**I. Procedural History**

Initially, this action was filed by two Plaintiffs, Tyrone Rogers and Michael Anthony Lopez, who are state inmates currently incarcerated at Centinela State Prison. On May 17, 2011, the Court severed the claims and the parties. Plaintiff Rogers was permitted to proceed in *Rogers v. Giurbino, et al.*, S.D. Cal. Civil Case No. 11cv0666 BTM (PCL), while the Clerk of

1 Court was directed to open a new action for Plaintiff Lopez. That new action is the action that  
2 is currently before this Court.

3 Plaintiff has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C.  
4 § 1915(a) [ECF No. 2], along with a Motion for Appointment of Counsel [ECF No. 3].

5 **I. MOTION TO PROCEED IFP [ECF NO. 2]**

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 the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
10 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to  
11 proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their  
12 action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

13 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.  
14 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to  
15 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff’s trust account statement shows that  
16 he has no available funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4).  
17 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP [ECF No. 2] and assesses no  
18 initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the  
19 filing fee mandated shall be collected and forwarded to the Clerk of the Court pursuant to the  
20 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

21 **II. INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) and 1915A(b)(1)**

22 Notwithstanding IFP status or the payment of any partial filing fee, the Court must subject  
23 each civil action commenced pursuant to 28 U.S.C. § 1915(a) to mandatory screening and order  
24 the sua sponte dismissal of any case it finds “frivolous, malicious, failing to state a claim upon  
25 which relief may be granted, or seeking monetary relief from a defendant immune from such  
26 relief.” 28 U.S.C. § 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en  
27 banc) (noting that 28 U.S.C. § 1915(e) “not only permits but requires” the court to sua sponte  
28 dismiss an *in forma pauperis* complaint that fails to state a claim).

1            “[W]hen determining whether a complaint states a claim, a court must accept as true all  
2 allegations of material fact and must construe those facts in the light most favorable to the  
3 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). In addition, the Court has a duty  
4 to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dep’t*, 839  
5 F.2d 621, 623 (9th Cir. 1988), which is “particularly important in civil rights cases.” *Ferdik v.*  
6 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

7            Due to the Court’s severing of the claims, the only current claims that are properly before  
8 this Court are those found in Counts 2 and 3 of the Complaint. Count 1 pertains to claims made  
9 by Plaintiff Rogers and is not part of this action. Additionally, Defendants G.J. Giurbino,  
10 Unnamed Defendant 2, M. Ayala, B. Narvis, D. Foston and Unnamed Defendant 1 are not  
11 named in the claims raised by Plaintiff Lopez. Thus, those Defendants are **DISMISSED** from  
12 this action.

13            The Court finds that Counts 2 and 3, Plaintiff’s access to courts and substantive due  
14 process claims, found in Plaintiff’s Complaint survive the sua sponte screening required by 28  
15 U.S.C. §§ 1915(e)(2) and 1915A(b). *See Lopez*, 203 F.3d at 1126-27. Accordingly, the Court  
16 finds Plaintiff is entitled to U.S. Marshal service on his behalf. *See* 28 U.S.C. § 1915(d);  
17 FED.R.CIV.P. 4(c)(3).

### 18 **III. MOTION FOR APPOINTMENT OF COUNSEL [ECF NO. 3]**

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

1 789 F.2d 1328, 1331 (9th Cir. 1986)).

2 Here, while the Court has found that Plaintiff's Complaint has survived the sua sponte  
3 screening process such that it requires a response from Defendants, the record is not sufficiently  
4 developed so that the Court can make a determination on the likelihood of success on the merits  
5 at this stage of the proceedings. In addition, at this stage, Plaintiff appears to be able to  
6 articulate his claims as set forth above so that he is entitled to service by the U.S. Marshal of his  
7 Complaint. Accordingly, the Court denies Plaintiff's request without prejudice, as neither the  
8 interests of justice nor exceptional circumstances warrant appointment of counsel at this time.  
9 *LaMere v. Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

10 **IV. CONCLUSION AND ORDER**

11 Good cause appearing, **IT IS HEREBY ORDERED** that:

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

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

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

24 **IT IS FURTHER ORDERED** that:

25 4. Defendants G.J. Giurbino, Unnamed Defendant 2, M. Ayala, B. Narvis, D. Foston  
26 and Unnamed Defendant 1 are **DISMISSED** from this action.

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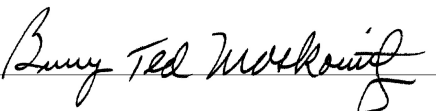
1           5       Plaintiff's Motion for Appointment of Counsel [ECF No. 3] is **DENIED** without  
2 prejudice.

3           6.       The Clerk shall issue a summons as to Plaintiff's Complaint [ECF No. 1] upon the  
4 Defendants and shall forward it to Plaintiff along with a blank U.S. Marshal Form 285 for  
5 each Defendant. In addition, the Clerk shall provide Plaintiff with a certified copy of this Order  
6 and a certified copy of his Complaint and the summons for purposes of serving the Defendants.  
7 Upon receipt of this "IFP Package," Plaintiff is directed to complete the Form 285 as completely  
8 and accurately as possible, and to return it to the United States Marshal according to the  
9 instructions provided by the Clerk in the letter accompanying his IFP package. Thereafter, the  
10 U.S. Marshal shall serve a copy of the Complaint and summons upon the Defendants as directed  
11 by Plaintiff on the USM Form 285. All costs of service shall be advanced by the United States.  
12 *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

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

20           **IT IS SO ORDERED.**

21  
22 DATED: September 6, 2011

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24 Honorable Barry Ted Moskowitz  
25 United States District Judge  
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