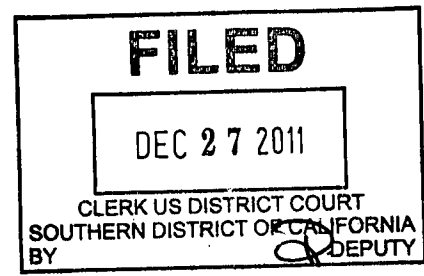


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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARCO T. ORDONEZ,
CDCR #D-79816,

Plaintiff,

vs.

U.S. DEPARTMENT OF THE TREASURY;
INTERNAL REVENUE SERVICE,

Defendants.

Case No. 11-CV-2340 BEN (NLS)

ORDER:

(1) GRANTING PLAINTIFF'S MOTION TO PROCEED *IN FORMA PAUPERIS*, IMPOSING NO INITIAL PARTIAL FILING FEE AND GARNISHING BALANCE FROM INMATE TRUST ACCOUNT PURSUANT TO 28 U.S.C. § 1915(a) (ECF 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)

Plaintiff Marco T. Ordonez, currently incarcerated at Calipatria State Prison ("CAL") in Calipatria, California, and proceeding pro se, has filed a civil action seeking a tax refund pursuant to 26 U.S.C. § 7422 on income he alleges to have earned while incarcerated at CAL.¹ Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he has filed a Motion to Proceed

¹ "A taxpayer seeking a refund of taxes erroneously or unlawfully assessed or collected [pursuant to 26 U.S.C. § 7422] may bring an action against the Government either in United States district court or in the United States Court of Federal Claims." *United States v. Clintwood Elkhorn Min. Co.*, 553 U.S. 1, 3 (2008) (citing 28 U.S.C. § 1346(a)(1)).

1 *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

2 **I. MOTION TO PROCEED IFP**

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

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

21 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
22 pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. *Andrews*, 398 F.3d at 1119. This trust
23 account statement shows Plaintiff has no funds with which to pay any initial partial filing fee. *See* 28
24 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil
25 action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and
26 no means by which to pay [an] initial partial filing fee”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
27 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a
28 “failure to pay . . . due to the lack of funds available”).

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

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

6 The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and
7 by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for,
8 or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation,
9 pretrial release, or diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C.
10 §§ 1915(e)(2) & 1915A(b). Under these provisions of the PLRA, the Court must sua sponte dismiss
11 complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which seek
12 damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A; *Lopez v. Smith*,
13 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002,
14 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

15 "[W]hen determining whether a complaint states a claim, a court must accept as true all
16 allegations of material fact and must construe those facts in the light most favorable to the plaintiff."
17 *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*, 152 F.3d 1193,
18 1194 (9th Cir. 1998) (noting that § 1915(e)(2) "parallels the language of Federal Rule of Civil Procedure
19 12(b)(6)"). In addition, courts "have an obligation where the petitioner is pro se, particularly in civil
20 rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt."
21 *Hebbe v. Pliler*, 627 F.3d 338, 341 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027
22 n.1 (9th Cir. 1985)). The court may not, however, "supply essential elements of claims that were not
23 initially pled." *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). "Vague
24 and conclusory allegations of official participation in civil rights violations are not sufficient to withstand
25 a motion to dismiss." *Id.*

26 As currently pleaded, the Court finds Plaintiff's allegations sufficient to survive the sua sponte
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28

1 screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).² See *Lopez*, 203 F.3d at 1126-27;
2 *Shallowhorn v. United States*, No. 07-CV-1856, 2008 WL 115106, at *2-3 (E.D. Cal. Jan. 11, 2008)
3 (finding prisoner's IFP complaint survived sua sponte screening required by 28 U.S.C. § 1915A and
4 U.S. Marshal service was justified where prisoner's complaint sought a tax refund for income alleged
5 to have been earned while incarcerated pursuant to 26 U.S.C. § 7422 and jurisdiction could be "fairly
6 inferred" under 28 U.S.C. § 1346(a)).³

7 Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf. See 28
8 U.S.C. § 1915(d) ("The officers of the court shall issue and serve all process, and perform all duties in
9 [IFP] cases."); FED. R. CIV. P. 4(c)(3) ("[T]he court may order that service be made by a United States
10 marshal or deputy marshal . . . if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C.
11 § 1915.").

12 **III. CONCLUSION AND ORDER**

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

14 1. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No. 2) is
15 **GRANTED**.

16 2. The Secretary of the California Department of Corrections and Rehabilitation, or his
17 designee, is ordered to collect from Plaintiff's prison trust account the \$350 balance of the filing fee
18 owed in this case by collecting monthly payments from the trust account in an amount equal to twenty
19 percent (20%) of the preceding month's income credited to the account and forward payments to the
20 Clerk of the Court each time the amount in the account exceeds \$10 in accordance with 28 U.S.C.
21 § 1915(b)(2).

22 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**

23 _____
24 ² Plaintiff is cautioned that "the sua sponte screening and dismissal procedure is cumulative of,
25 and not a substitute for, any subsequent Rule 12[] motion that [a defendant] may choose to bring."
Teahan v. Wilhelm, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

26 ³ 28 U.S.C. § 1346(a) provides that "district courts shall have original jurisdiction, concurrent
27 with the United States Court of Federal Claims of: (1) Any civil action against the United States for the
28 recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected
without authority or any sum alleged to have been excessive or in any manner wrongfully collected
under the internal-revenue laws[.]" 28 U.S.C. § 1346(a)(1). Refund suits involving individual
taxpayers, however, may be brought only in the federal district in which the taxpayer resides. 28 U.S.C.
§ 1402(a); *Noonis v. United States*, 539 F. Supp. 404, 405 (S.D. Cal. 1982).

1 ASSIGNED TO THIS ACTION.

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

5 **IT IS FURTHER ORDERED** that:

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

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


22 6. Plaintiff shall serve upon the Defendants or, if appearance has been entered by counsel,
23 upon Defendants' counsel, a copy of every further pleading or other document submitted for
24 consideration of the Court. Plaintiff shall include with the original paper to be filed with the Clerk of
25 the Court a certificate stating the manner in which a true and correct copy of any document was served
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28 ⁴ Because Plaintiff seeks to sue the United States and its agencies, he must comply with Federal Rule of Civil Procedure 4(i).

1 on Defendants, or counsel for Defendants, and the date of service. Any paper received by the Court
2 which has not been filed with the Clerk or which fails to include a Certificate of Service will be
3 disregarded.

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5 DATED: December 12, 2011


HON. ROGER T. BENITEZ
United States District Court Judge

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