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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 GUSTAVO McKENZIE,
12 CDCR #D-17477,

13 Plaintiff,

14
15 vs.
16

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18
19 R. CASILLAS; J. NUTT; M.D. CARPIO;
20 J. OLIVO; HECTOR LOPEZ; D.
21 RODERICK; E. URIBE; E. CASTILLO;
22 R. LIZARRAGA; B. HATFIELD;
23 J. SALCEDA; P. ALANIS,
24

25 Defendants.

Civil No. 12-1602 BEN (RBB)

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. 2];

(2) GRANTING PLAINTIFF'S
MOTION FOR CORRECTION
[ECF No. 3];

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)

25 Gustavo McKenzie ("Plaintiff"), a state prisoner currently incarcerated at Corcoran State
26 Prison located in Corcoran, California, and proceeding pro se, has filed a civil rights complaint
27 pursuant to 42 U.S.C. § 1983. Plaintiff alleges that his civil rights were violated when he was
28 housed at Calipatria State Prison. (See Compl. at 1.)

1 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead he
2 has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [ECF
3 No. 2]. In addition, Plaintiff has filed a “Motion for Correction” in which he indicates that the
4 Court’s docket reflects a clerical error in the spelling of one of the named Defendants. Plaintiff’s
5 Motion is **GRANTED** and the Clerk of Court is directed to correct the spelling of Defendant
6 “Saleeda” to “Salceda.”

7 **I.**

8 **MOTION TO PROCEED IFP**

9 All parties instituting any civil action, suit, or proceeding in a district court of the United
10 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
11 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee
12 only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
13 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP
14 remains obligated to pay the entire fee in installments, regardless of whether his action is
15 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847
16 (9th Cir. 2002).

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

28 The Court finds that Plaintiff has submitted a certified copy of his trust account statement

1 pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. *Andrews*, 398 F.3d at 1119.
2 Plaintiff's trust account statement shows he has insufficient funds with which to pay any initial
3 partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be
4 prohibited from bringing a civil action or appealing a civil action or criminal judgment for the
5 reason that the prisoner has no assets and no means by which to pay [an] initial partial filing
6 fee"); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"
7 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack
8 of funds available").

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

13 II.

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

15 The PLRA also obligates the Court to review complaints filed by all persons proceeding
16 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
17 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
18 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
19 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) & 1915A(b). Under these provisions
20 of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are
21 frivolous, malicious, fail to state a claim, or which seek damages from defendants who are
22 immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) & 1915A; *Rhodes v. Robinson*, 621 F.3d 1002, 1004
23 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)); *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th
24 Cir. 2000) (en banc) (§ 1915(e)(2)).

25 "[W]hen determining whether a complaint states a claim, a court must accept as true all
26 allegations of material fact and must construe those facts in the light most favorable to the
27 plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*,
28 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2) "parallels the language of Federal

1 Rule of Civil Procedure 12(b)(6)”). In addition, courts “have an obligation where the petitioner
2 is pro se, particularly in civil rights cases, to construe the pleadings liberally and to afford the
3 petitioner the benefit of any doubt.” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010)
4 (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however,
5 “supply essential elements of claims that were not initially pled.” *Ivey v. Bd. of Regents of the*
6 *Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory allegations of
7 official participation in civil rights violations are not sufficient to withstand a motion to dismiss.”
8 *Id.*

9 As currently pleaded, the Court finds Plaintiff’s allegations sufficient to survive the sua
10 sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).¹ See *Lopez*, 203 F.3d at
11 1126-27. Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his behalf.
12 See 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and perform
13 all duties in [IFP] cases.”); FED. R. CIV. P. 4(c)(3) (“[T]he court may order that service be made
14 by a United States marshal or deputy marshal . . . if the plaintiff is authorized to proceed *in forma*
15 *pauperis* under 28 U.S.C. § 1915.”).

16 III.

17 CONCLUSION AND ORDER

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

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

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

27 _____
28 ¹ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of,
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).

1 IDENTIFIED BY THE NAME AND NUMBER 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, P.O. Box 942883,
4 Sacramento, California 94283-0001.

5 **IT IS FURTHER ORDERED** that:

6 4. Plaintiff's Motion for Correction [ECF No. 3] is **GRANTED**. The Clerk of Court
7 is directed to correct the spelling of Defendant "Saleeda" to "Salceda" in the Court's docket.

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

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


26 7. Plaintiff shall serve upon the Defendants or, if appearance has been entered by
27 counsel, upon Defendants' counsel, a copy of every further pleading or other document
28 submitted for consideration of the Court. Plaintiff shall include with the original paper to be

1 filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy
2 of any document was served on Defendants, or counsel for Defendants, and the date of service.
3 Any paper received by the Court which has not been filed with the Clerk or which fails to
4 include a Certificate of Service will be disregarded.

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DATED:

7/12/2012


HON. ROGER T. BENITEZ
United States District Judge