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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ALEJANDRO VILLASENOR,
12 Inmate Booking No. 20922124,

13 Plaintiff,

14 vs.

15 IAN T. McNETT; WILLIAM GORE;
16 COUNTY OF SAN DIEGO,

17 Defendants.
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Case No.: 3:21-cv-00848-GPC-DEB

ORDER:

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

**2) DISMISSING WILLIAM GORE
AND COUNTY OF SAN DIEGO FOR
FAILING TO STATE A CLAIM;**

AND

**3) DIRECTING U.S. MARSHAL TO
EFFECT SERVICE ON
DEFENDANT McNETT PURSUANT
TO 28 U.S.C. § 1915(d) AND
Fed. R. Civ. P. 4(c)(3)**

25 Alejandro Villasenor (“Plaintiff”) is currently housed at the San Diego Central Jail
26 (“SDCJ”) located in San Diego, California. He is proceeding pro se and has filed a civil
27 Complaint (“Compl.”) pursuant to 42 U.S.C. § 1983 (ECF No. 1).
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1 Plaintiff had not prepaid the \$402 civil filing fee required to commence a civil
2 action pursuant to 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed In
3 Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

4 **I. Motion to Proceed IFP**

5 All parties instituting any civil action, suit or proceeding in a district court of the
6 United States, except an application for writ of habeas corpus, must pay a filing fee of
7 \$402.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
8 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
9 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to
11 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”
12 *Bruce v. Samuels*, 577 U.S. 82, 84 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th
13 Cir. 2015), and regardless of whether his action is ultimately dismissed. See 28 U.S.C.
14 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

15 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
16 “certified copy of the trust fund account statement (or institutional equivalent) for ... the
17 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
18 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
19 trust account statement, the Court assesses an initial payment of 20% of (a) the average
20 monthly deposits in the account for the past six months, or (b) the average monthly
21 balance in the account for the past six months, whichever is greater, unless the prisoner
22 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
23 custody of the prisoner then collects subsequent payments, assessed at 20% of the
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26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
27 fee of \$52. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court
28 Misc. Fee Schedule, § 14 (eff. December 1, 2020). The additional \$52 administrative fee
does not apply to persons granted leave to proceed IFP. *Id.*

1 preceding month's income, in any month in which his account exceeds \$10, and forwards
2 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2);
3 *Bruce*, 136 S. Ct. at 629.

4 In support of his IFP motion, Plaintiff has submitted a Prison Certificate authorized
5 by a SDCJ official attesting to his balances and deposits over the 6-month period
6 preceding the filing of his Complaint. *See* ECF No. 2 at 4, 6; 28 U.S.C. § 1915(a)(2);
7 S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. This statement indicates that he has
8 insufficient funds to pay an initial partial filing fee. *See* ECF No. 2 at 4. *See* 28 U.S.C.
9 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a
10 civil action or appealing a civil action or criminal judgment for the reason that the
11 prisoner has no assets and no means by which to pay the initial partial filing fee.”);
12 *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4)
13 acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a
14 “failure to pay ... due to the lack of funds available to him when payment is ordered.”).

15 Therefore, the Court grants Plaintiff’s Motion to Proceed IFP (ECF No. 2),
16 declines to “exact” any initial filing fee because his trust account statement shows he “has
17 no means to pay it,” *Bruce*, 577 U.S. at 84, and directs the Watch Commander for the
18 SDCJ to collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914
19 and forward them to the Clerk of the Court pursuant to the installment payment
20 provisions set forth in 28 U.S.C. § 1915(b)(1). *See id.*

21 **II. Screening pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

22 Because Plaintiff is a pre-trial detainee and is proceeding IFP, his Complaint
23 requires a pre-answer screening which the Court conducts *sua sponte* pursuant to 28
24 U.S.C. § 1915(e)(2) and § 1915A(b). Under these statutes, the Court must dismiss a
25 prisoner’s IFP complaint, or any portion of it, which is frivolous, malicious, fails to state
26 a claim, or seeks damages from defendants who are immune. *See Lopez v. Smith*, 203
27 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2));
28 *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C.

1 § 1915A(b)). “The purpose of [screening] is ‘to ensure that the targets of frivolous or
2 malicious suits need not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d
3 903, 920 n.1 (9th Cir.2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d
4 680, 681 (7th Cir. 2012)).

5 “The standard for determining whether a plaintiff has failed to state a claim upon
6 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
7 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
8 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
9 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
10 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
11 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
12 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
13 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

14 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
15 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
16 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for
17 relief [is] ... a context-specific task that requires the reviewing court to draw on its
18 judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or
19 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
20 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969
21 (9th Cir. 2009).

22 **A. Factual Allegations**

23 On May 18, 2020, Plaintiff was “in a holding cell” and he “slipped [his] handcuffs
24 in front of [him].” (Compl. at 3.) Defendant McNett asked Plaintiff to “lay on the
25 ground” and put his arms in front of him. (*Id.*) McNett uncuffed the handcuffs and re-
26 cuffed Plaintiff’s hands behind his back. (*See id.*) As Plaintiff was laying on his stomach
27 on the ground with his hands cuffed behind his back, he alleges McNett “used
28 mace/pepper spray” by spraying into his eyes twice. (*Id.*) Plaintiff claims he was

1 “completely restrained with handcuffs” and McNett’s knee was on his back when he used
2 the pepper spray. (*Id.*) As a result of the pepper spray, Plaintiff alleges he “started to
3 suffocate” and told McNett he “could not breathe” and subsequently, he “passed out.”
4 (*Id.*)

5 **B. County of San Diego**

6 To the extent Plaintiff attempts to assert a claim against the County of San Diego,
7 his allegations are insufficient. A municipal entity may be held liable under § 1983 only
8 if he alleges facts sufficient to plausibly show that he was deprived of a constitutional
9 right by individually identified employees who acted pursuant to the municipality’s
10 policy or custom. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280
11 (1977); *Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978); *Villegas v. Gilroy*
12 *Garlic Festival Ass’n*, 541 F.3d 950, 964 (9th Cir. 2008). The County of San Diego may
13 not be held vicariously liable under § 1983 simply because one of its employees is
14 alleged to have acted wrongfully. *See Board of Cty. Comm’rs. v. Brown*, 520 U.S. 397,
15 403 (1997); *Monell*, 436 U.S. at 691 (“[A] municipality cannot be held liable solely
16 because it employs a tortfeasor.”); *Jackson v. Barnes*, 749 F.3d 755, 762 (9th Cir. 2014).
17 Instead, the municipality may be held liable “when execution of a government’s policy or
18 custom ... inflicts [a constitutional] injury.” *Monell*, 436 U.S. at 694; *Los Angeles Cty.,*
19 *Cal. v. Humphries*, 562 U.S. 29, 36 (2010). Plaintiff has not alleged that McNett acted
20 pursuant to any policy or custom of the County of San Diego.

21 **C. Sheriff Gore -- Individual Liability**

22 While William Gore, the San Diego County Sheriff is a “person” subject to suit
23 under § 1983, there are no specific factual allegations as to this Defendant.

24 These types of broad and conclusory allegations fail to plausibly show how, or to
25 what extent, Gore may be held individually liable for any constitutional injury. *See Iqbal*,
26 556 U.S. at 676-77; *Jones v. Comm’ty Redev. Agency of City of Los Angeles*, 733 F.2d
27 646, 649 (9th Cir. 1984) (even pro se plaintiff must “allege with at least some degree of
28 particularity overt acts which defendants engaged in” in order to state a claim). As

1 pleaded, Plaintiff plainly seeks to hold Gore liable for the acts of unidentified
2 subordinates. But “vicarious liability is inapplicable to ... § 1983 suits.” *Iqbal*, 556 U.S.
3 at 676. Instead, “Plaintiff must plead that each Government-official defendant, through
4 [his] own individual actions, has violated the Constitution” in order to plead a plausible
5 claim for relief. *Id.*; see also *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013)
6 (supervisor may be held liable under §1983 only if there is “a sufficient causal connection
7 between the supervisor’s wrongful conduct and the constitutional violation”) (citations
8 and internal quotation marks omitted); *Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir.
9 1979) (when a named defendant holds a supervisory position, the causal link between
10 the defendant and the claimed constitutional violation must be specifically alleged).

11 For all these reasons, the Court dismisses Defendants County of San Diego and
12 Sheriff William Gore from this action for failing to state a claim upon which § 1983 relief
13 may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and 28 U.S.C. § 1915A(b)(1);
14 *Lopez*, 203 F.3d at 1126-27; *Wilhelm*, 680 F.3d at 1121.

15 **D. Defendant McNett**

16 However, the Court finds that Plaintiff’s Complaint contains factual allegations
17 against Defendant McNett sufficient to survive the “low threshold” for proceeding past
18 the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b), because it
19 alleges excessive force claims which are plausible on their face.² See *Wilhelm*, 680 F.3d
20 at 1123; see also *Iqbal*, 556 U.S. at 678; *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)
21 (“[T]he Due Process Clause protects a pretrial detainee from the use of excessive force
22 that amounts to punishment.”) (citing *Graham v. Connor*, 490 U.S. 386, 395 n.10
23 (1989)). Under *Kingsley*, a pretrial detainee, unlike a convicted prisoner, need not prove
24 that the defendant subjectively knew that the force applied was excessive; that state-of-

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27 ² Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative of, and not a
28 substitute for, any subsequent Rule 12(b)(6) motion that [any individual defendant] may choose to bring.”
Teahan v. Wilhelm, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

1 mind inquiry is “solely ... objective.” *Id.* at 2473; *Austin v. Baker*, 616 F. App’x 365, 366
2 (9th Cir. 2015); *cf. Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (when prison officials
3 stand accused of using excessive force in violation of the Eighth Amendment, the core
4 judicial inquiry is “... whether force was applied in a good-faith effort to maintain or
5 restore discipline, or maliciously and sadistically to cause harm.”).

6 Accordingly, the Court will direct the U.S. Marshal to effect service upon the
7 named Defendant McNett on Plaintiff’s behalf. *See* 28 U.S.C. § 1915(d) (“The officers of
8 the court shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.
9 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
11 under 28 U.S.C. § 1915.”).

12 **III. Conclusion and Order**

13 For the reasons explained, the Court:

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

16 2. **DIRECTS** the SDCJ Watch Commander, or their designee, to collect from
17 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing
18 monthly payments from his account in an amount equal to twenty percent (20%) of the
19 preceding month’s income and forwarding those payments to the Clerk of the Court each
20 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL**
21 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
22 **ASSIGNED TO THIS ACTION;**

23 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Watch
24 Commander, San Diego Central Jail, 1173 Front Street, San Diego, California 92101;

25 4. **DISMISSES** Defendants County of San Diego and Sheriff Gore for failing
26 to state a claim pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b);

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1 5. **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF
2 No. 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for
3 Defendant McNett. In addition, the Clerk will provide Plaintiff with a certified copy of
4 this Order, a certified copy of his Complaint and the summons so that he may serve this
5 Defendant. Upon receipt of this "IFP Package," Plaintiff must complete the Form 285s as
6 completely and accurately as possible, *include an address where each named Defendant*
7 *may be found and/or subject to service*, and return them to the United States Marshal
8 according to the instructions the Clerk provides in the letter accompanying his IFP
9 package;

10 6. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
11 upon the Defendant McNett as directed by Plaintiff on the USM Form 285s provided to
12 him. All costs of that service will be advanced by the United States. *See* 28 U.S.C.
13 § 1915(d); FED. R. CIV. P. 4(c)(3);

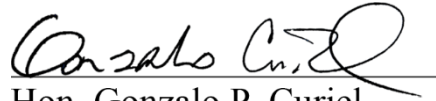
14 7. **ORDERS** Defendant McNett, once he has been served, to reply to
15 Plaintiff's Complaint within the time provided by the applicable provisions of Federal
16 Rule of Civil Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may
17 occasionally be permitted to "waive the right to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

23 8. **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
24 serve upon Defendant McNett, or, if appearance has been entered by counsel, upon
25 Defendant's counsel, a copy of every further pleading, motion, or other document
26 submitted for the Court's consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must
27 include with every original document he seeks to file with the Clerk of the Court, a
28 certificate stating the manner in which a true and correct copy of that document has been

1 served on Defendant or his counsel, and the date of that service. *See* S.D. CAL. CIVLR
2 5.2. Any document received by the Court which has not been properly filed with the
3 Clerk or which fails to include a Certificate of Service upon Defendants may be
4 disregarded.

5 **IT IS SO ORDERED.**

6 Dated: May 10, 2021

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8 Hon. Gonzalo P. Curiel
9 United States District Judge
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