

1 In an Order dated January 12, 2007, the Court ordered
2 Plaintiff to file proof that he had served the remaining named
3 defendants. The Court informed Plaintiff that the failure to do so
4 would result in the dismissal of all claims against these named
5 defendants without prejudice. In that same Order, the Court noted
6 that Plaintiff did not sign and date his complaint. Therefore, the
7 Court directed Plaintiff to sign a copy of page eight of his
8 complaint, which includes the signature line, within ninety days of
9 the January 12, 2007 Order.

10 Plaintiff has since responded to the Court's January 12, 2007
11 Order by signing a copy of page eight of his complaint and filing a
12 "Response to Court's Order to Show Cause Against Unserved Named
13 Defendants." Attached to his response, Plaintiff has filed proofs
14 of service for the remaining named defendants, including Defendants
15 Ideta, Staehely, Neu, Jackson and Aragon.³ Pursuant to Rule 4(e),
16 service of process upon individuals must be effected:

17
18 (1) pursuant to the law of the state in which the
19 district court is located, or in which the service is
20 effected, for the service of a summons upon the defendant
in an action brought in the courts of general
jurisdiction of the State; or

21 (2) by delivering a copy of the summons and of the
22 complaint to the individual personally or by leaving
23 copies thereof at the individual's dwelling house or
24 usual place of abode with some person of suitable age and
25 discretion then residing therein or by delivering a copy
of the summons and of the complaint to an agent
authorized by appointment or by law to receive service of
process.

26 Fed. R. Civ. P. 4(e). Plaintiff's response indicates that he hired
27 a process server named Arthur Arenas to attempt to serve Defendants

28 _____
³ Plaintiff attaches the same proofs of service to his motion
for entry of default judgment.

1 Ideta, Staehely, Neu, Jackson and Aragon in person. The attached
2 proofs of service state that Mr. Arenas served Defendants Ideta,
3 Staehely, Neu, Jackson and Aragon by "substitute service." (Pl.'s
4 Response to OSC, Ex. A at A5-A19.) Mr. Arenas states that he left
5 a copy of the summons and of the complaint on June 26, 2006 at
6 3:40 PM with "Bill Fein," who is "authorized to receive service"
7 for those Defendants. (Id.) His attempt to serve Defendants by
8 "substitute service" falls under Rule 4(e)(1), and as such is
9 governed by California law. Under California law, in order to
10 effectuate service of process by "substitute service," a plaintiff
11 must leave the defendant a copy of the summons and complaint

12 during usual office hours in his or her office or, if no
13 physical address is known, at his or her usual mailing
14 address, other than a United States Postal Service post
15 office box, with the person who is apparently in charge
16 thereof, and, and by thereafter mailing a copy of the
summons and complaint by first-class mail, postage
prepaid to the person to be served at the place where a
copy of the summons and complaint were left.

17 See Cal. Code Civ. Proc. § 415.20(a). "When service is effected by
18 leaving a copy of the summons and complaint at a mailing address,
19 it shall be left with a person at least 18 years of age, who shall
20 be informed of the contents thereof. Service of a summons in this
21 manner is deemed complete on the 10th day after the mailing." Id.

22 According to the attached proofs of service, Mr. Arenas
23 "mailed (by first-class, postage prepaid) copies of the documents
24 to the person to be served at the place where the copies were
25 left." (Pl.'s Response to OSC, Ex. A at A5-A19.) Mr. Arenas
26 states that he mailed the documents for Defendants Ideta, Staehely,
27 Neu, Jackson and Aragon on June 26, 2006, and thus, under
28 § 415.20(a) of the California Code of Civil Procedure, service on

1 these Defendants was deemed complete ten days later, on July 6,
2 2006. See Cal. Code Civ. Proc. § 415.20(a).

3 Plaintiff's "substitute service" appears to be in accord with
4 § 415.20(a) of the California Code of Civil Procedure. However,
5 these Defendants have not yet appeared in this action.

6 Plaintiff has now filed a motion for the entry of default
7 judgment against Defendants Ideta, Staehely, Neu, Jackson and
8 Aragon.

9 It appears that Defendants Ideta, Staehely, Neu, Jackson and
10 Aragon are in default because they have been properly served but
11 have not filed an answer to Plaintiff's complaint. However,
12 default judgments are generally disfavored and "[c]ases should be
13 decided upon their merits whenever reasonably possible." Eitel v.
14 McCool, 782 F.2d 1470, 1472 (9th Cir. 1986); see also TCI Group
15 Life Ins. Plan v. Knoebber, 244 F.3d 691, 693 (9th Cir. 2001)
16 (recognizing "the long-standing principle that default judgments
17 are disfavored"). Therefore, the Court DENIES Plaintiff's motion
18 for entry of default judgment at this time. Instead, the Court
19 orders Defendants Ideta, Staehely, Neu, Jackson and Aragon to file
20 an answer in this action or to show cause why default judgment
21 should not be entered against them within thirty (30) days of this
22 Order. Failure to respond to the Court's order to show cause will
23 result in default judgment being entered against Defendants Ideta,
24 Staehely, Neu, Jackson and Aragon.

26 II. Review of Plaintiff's Complaint

27 A. Factual Background

28 The following facts are derived from the allegations in

1 Plaintiff's complaint.

2 On February 28, 2004, Plaintiff returned from a jail visit and
3 was informed that there had been a physical altercation between two
4 inmates while he was at his visit. Jail officials began to conduct
5 interviews. When it was time for Plaintiff's interview, Defendant
6 Jackson informed Plaintiff that he was being transferred to
7 administrative segregation at D-Block. Plaintiff was not given a
8 reason for the transfer, but was told he had to go to D-Block
9 immediately. Defendant Jackson handcuffed Plaintiff, and Plaintiff
10 complied while his hands were "cuffed in the front." (Compl. at
11 4.) Plaintiff then asked Defendant Jackson if he could search his
12 legal paperwork in his presence, so that he could take it to his
13 new housing assignment. Defendant Jackson "became angry" and
14 ordered Defendants Neu and Castro to "take Plaintiff to D-Block and
15 house him in D-16 stating that he didn't 'give a fuck' if they had
16 to drag Plaintiff there." (Id.)

17 During the escort, Plaintiff fell while Defendants Neu and
18 Castro were "still holding on to Plaintiff's arms." (Id.) While
19 on the ground, Plaintiff "felt several officers fall on his back."
20 (Id.) Defendant Neu "applied a two (2) finger choke hold around
21 Plaintiff's Adams [sic] apple that prevented Plaintiff from
22 breathing." (Id.) Plaintiff "used his size and strength to remove
23 Defendant Neu's hands from his throat" and "then lowered his head
24 to the ground to prevent any other assaults to his throat area."
25 (Id.) Defendant Jackson placed his foot on the left side of
26 Plaintiff's face. Defendant Castro placed his foot on the left
27 side of Plaintiff's wrists, "causing the cuff to cut into his
28

1 wrist." (Id.)

2 Plaintiff began complaining of breathing problems. Plaintiff
3 then observed Defendant Aragon asking Defendant Jackson questions.
4 Deputy Sheriff Kilgariff brought a video camera to the scene and
5 gave it to Defendant Staehely.

6 Defendant Jackson "advised officers who was [sic] on
7 Plaintiff's back to get off." (Id. at 5.) Plaintiff continued
8 complaining about his breathing problems. After several minutes,
9 Plaintiff was moved to the safety cell. His clothes were cut off
10 his body. He continued to complain that he could not breathe and
11 that he needed oxygen. A nurse arrived to administer the oxygen,
12 and Plaintiff informed her that he also had chest pains. Plaintiff
13 was then given a nitroglycerin tablet. Paramedics arrived and
14 transported Plaintiff to San Francisco General Hospital, where he
15 was "given more nitroglycerin pills, morphine, and had his
16 breathing monitored." (Id.) After Plaintiff was medically
17 cleared, he was returned to the jail.

18
19 A few days later, Senior Deputy Robinson conducted a video
20 interview of Plaintiff. Thereafter, Plaintiff was informed that he
21 was being charged with "two counts of using force and violence and
22 inflicting injury upon Defendants Staehley [sic] and Castro" and
23 "two counts of resisting arrest." (Id. at 5-6.) These charges
24 were subsequently dropped "for lack of sufficient evidence." (Id.
25 at 6 (citing Pl.'s Ex. A).)⁴

26
27 ⁴ The Court notes that attached as Exhibit A to Plaintiff's
28 complaint are the following: (1) March 11, 2004 letter from the
Law Offices of Arthur K. Wachtel requesting copy of videotape;
(2) Chronological Report of Investigation of February 28, 2004

1 Plaintiff continues to have "ongoing chest pain, complication
2 of breathing, and has to carry nitroglycerin where ever [sic] he
3 goes." (Id. at 5.) He seeks compensatory and punitive damages.
4 (Id. at 7.)

5 B. Standard of Review

6 A federal court must conduct a preliminary screening in any
7 case in which a prisoner seeks redress from a governmental entity
8 or officer or employee of a governmental entity. See 28 U.S.C.
9 § 1915A(a). In its review, the court must identify cognizable
10 claims and dismiss any claims that are frivolous, malicious, fail
11 to state a claim upon which relief may be granted or seek monetary
12 relief from a defendant who is immune from such relief. See id.
13 § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally
14 construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
15 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a
16 plaintiff must allege two essential elements: (1) that a right
17 secured by the Constitution or laws of the United States was
18 violated, and (2) that the alleged violation was committed by a
19 person acting under the color of state law. See West v. Atkins,
20 487 U.S. 42, 48 (1988).

21
22 A supervisor may be liable under § 1983 upon a showing of
23 personal involvement in the constitutional deprivation or a
24 sufficient causal connection between the supervisor's wrongful
25 conduct and the constitutional violation. Redman v. County of San
26 Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc) (citation
27 _____
28 incident by Deputy A. Ung; (3) complaint charging Plaintiff with
four charges mentioned above; and (4) print-out showing two battery
charges and only one resisting charge. (Pl.'s Ex. A.)

1 omitted). A supervisor therefore generally "is only liable for
2 constitutional violations of his subordinates if the supervisor
3 participated in or directed the violations, or knew of the
4 violations and failed to act to prevent them." Taylor v. List, 880
5 F.2d 1040, 1045 (9th Cir. 1989). This includes evidence that a
6 supervisor implemented "a policy so deficient that the policy
7 itself is a repudiation of constitutional rights and is the moving
8 force of the constitutional violation." Redman, 942 F.2d at 1446;
9 see Jeffers v. Gomez, 267 F.3d 895, 917 (9th Cir. 2001).

10 C. Excessive Force Claim

11 A pretrial detainee, who has not yet been convicted of the
12 crime for which he or she has been charged, is entitled to at least
13 the protections afforded convicted prisoners. See Bell v. Wolfish,
14 441 U.S. 520, 545 (1979). When prison officials stand accused of
15 using excessive force in violation of the Eighth Amendment, the
16 core judicial inquiry is whether force was applied in a good-faith
17 effort to maintain or restore discipline, or maliciously and
18 sadistically to cause harm. See Hudson v. McMillian, 503 U.S. 1, 6
19 (1992); Whitley v. Albers, 475 U.S. 312, 320-21 (1986).

21 Plaintiff alleges that on February 28, 2004, Defendants
22 Castro, Staehely, Neu, Jackson and Aragon used excessive force
23 against him while he was being escorted to D-Block. While
24 Plaintiff does not specify Defendants Staehely's and Aragon's
25 involvement in the use of force, Plaintiff alleges that he "felt
26 several officers fall on his back" during the encounter. Because
27 Plaintiff alleges that Defendants Staehely and Aragon were present
28 at the incident, the Court construes Plaintiff's claim to imply

1 that Defendants Staehely and Aragon participated in the use of
2 excessive force against Plaintiff while he was handcuffed as one of
3 the officers who fell on his back. Plaintiff claims that he
4 continues to suffer ongoing chest pains and breathing problems as a
5 result of the incident. Based on the allegations raised, the Court
6 is unable to say that Plaintiff can prove no set of facts which
7 would entitle him to relief on his claim of the malicious and
8 sadistic use of force. Accordingly, the Court finds Plaintiff
9 states a cognizable claim against Defendants Castro, Staehely, Neu,
10 Jackson and Aragon for the excessive use of force in violation of
11 Plaintiff's due process rights.

12 D. Supervisory Liability Claims

13 Plaintiff claims that Defendants Hennessey and Ideta are
14 liable as supervisors. Plaintiff must allege that each defendant,
15 as a supervisor, "participated in or directed the violations, or
16 knew of the violations and failed to act to prevent them." Taylor,
17 880 F.2d at 1045. He has not made such a claim. Accordingly,
18 Plaintiff's supervisory liability claims against Defendants
19 Hennessey and Ideta are DISMISSED with leave to amend.

21 E. Doe Defendants

22 Plaintiff identifies "Does 1-50" as Defendants whose names he
23 intends to learn through discovery. The use of Doe Defendants is
24 not favored in the Ninth Circuit. See Gillespie v. Civiletti, 629
25 F.2d 637, 642 (9th Cir. 1980). However, where the identity of
26 alleged defendants cannot be known prior to the filing of a
27 complaint the plaintiff should be given an opportunity through
28 discovery to identify them. Id. Failure to afford the plaintiff

1 such an opportunity is error. See Wakefield v. Thompson, 177 F.3d
2 1160, 1163 (9th Cir. 1999). Accordingly, the claims against the
3 Doe Defendants are DISMISSED from this action without prejudice.
4 Should Plaintiff learn their identities, he may move to file an
5 amendment to the complaint to add them as named defendants. See
6 Brass v. County of Los Angeles, 328 F.3d 1192, 1195-98 (9th Cir.
7 2003).

8 CONCLUSION

9 1. Plaintiff's motion for entry of default judgment (docket
10 no. 16) is DENIED.

11 2. Defendants Ideta, Staehely, Neu, Jackson and Aragon shall
12 file an answer in this action pursuant to the briefing schedule
13 below or show cause why default judgment should not be entered
14 against them within thirty (30) days of this Order. Failure to do
15 so will result in default judgment being entered against them.

16 3. The Clerk shall serve a copy of this Order on Bill Fein
17 and Sheriff M. Hennessey at the San Francisco Sheriff's Department
18 and Attorney Bonta, Defendants Hennessey's and Castro's attorney at
19 the San Francisco City Attorney's Office. They are directed to
20 notify Defendants Ideta, Staehely, Neu, Jackson and Aragon, if they
21 are able to do so, that an order to show cause regarding default
22 judgment has been issued. Additionally, the Clerk shall mail a
23 copy of this Order to Plaintiff.

24 4. Plaintiff has adequately alleged a cognizable excessive
25 force claim against Defendants Castro, Staehely, Neu, Jackson and
26 Aragon.

27 5. Plaintiff's supervisory liability claims against
28

1 Defendants Hennessey and Ideta are DISMISSED WITH LEAVE TO AMEND as
2 indicated above. Within thirty (30) days of the date of this Order
3 Plaintiff may file amended supervisory liability claims against
4 these Defendants (Plaintiff shall resubmit only those claims and
5 not the entire complaint) as set forth above in Section II(D) of
6 this Order. The failure to do so will result in the dismissal
7 without prejudice of the supervisory liability claims against
8 Defendants Hennessey and Ideta.

9 6. Plaintiff's claims against the Doe Defendants are
10 DISMISSED from this action without prejudice.

11 7. Defendants Hennesey and Castro have already filed an
12 answer to the complaint. As mentioned above, Defendants Ideta,
13 Staehely, Neu, Jackson and Aragon shall file an answer within
14 thirty (30) days of the date of this Order. The following briefing
15 schedule shall govern dispositive motions in this action:

16 a. No later than sixty (60) days of the date of this
17 Order, Defendants shall file a motion for summary judgment or other
18 dispositive motion. The motion shall be supported by adequate
19 factual documentation and shall conform in all respects to Federal
20 Rule of Civil Procedure 56. If Defendants are of the opinion that
21 this case cannot be resolved by summary judgment, they shall so
22 inform the Court prior to the date the summary judgment motion is
23 due. All papers filed with the Court shall be promptly served on
24 Plaintiff.

25 b. Plaintiff's opposition to the dispositive motion
26 shall be filed with the Court and served on Defendants no later
27 than thirty (30) days after the date on which Defendants' motion is
28

1 filed. The Ninth Circuit has held that the following notice should
2 be given to pro se plaintiffs facing a summary judgment motion:

3 The defendants have made a motion for summary
4 judgment by which they seek to have your case dismissed.
5 A motion for summary judgment under Rule 56 of the
6 Federal Rules of Civil Procedure will, if granted, end
7 your case.

8 Rule 56 tells you what you must do in order to
9 oppose a motion for summary judgment. Generally, summary
10 judgment must be granted when there is no genuine issue
11 of material fact -- that is, if there is no real dispute
12 about any fact that would affect the result of your case,
13 the party who asked for summary judgment is entitled to
14 judgment as a matter of law, which will end your case.
15 When a party you are suing makes a motion for summary
16 judgment that is properly supported by declarations (or
17 other sworn testimony), you cannot simply rely on what
18 your complaint says. Instead, you must set out specific
19 facts in declarations, depositions, answers to
20 interrogatories, or authenticated documents, as provided
21 in Rule 56(e), that contradict the facts shown in the
22 defendant's declarations and documents and show that
23 there is a genuine issue of material fact for trial. If
24 you do not submit your own evidence in opposition,
25 summary judgment, if appropriate, may be entered against
26 you. If summary judgment is granted [in favor of the
27 defendants], your case will be dismissed and there will
28 be no trial.

See Rand v. Rowland, 154 F.3d 952, 962-63 (9th Cir. 1998) (en
banc).

Plaintiff is advised to read Rule 56 of the Federal Rules of
Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
(party opposing summary judgment must come forward with evidence
showing triable issues of material fact on every essential element
of his claim). Plaintiff is cautioned that because he bears the
burden of proving his allegations in this case, he must be prepared
to produce evidence in support of those allegations when he files
his opposition to Defendants' dispositive motion. Such evidence
may include sworn declarations from himself and other witnesses to

1 the incident, and copies of documents authenticated by sworn
2 declaration. Plaintiff will not be able to avoid summary judgment
3 simply by repeating the allegations of his complaint.

4 c. If Defendants wish to file a reply brief, they shall
5 do so no later than fifteen (15) days after the date Plaintiff's
6 opposition is filed.

7 d. The motion shall be deemed submitted as of the date
8 the reply brief is due. No hearing will be held on the motion
9 unless the Court so orders at a later date.

10 8. Discovery may be taken in this action in accordance with
11 the Federal Rules of Civil Procedure. Leave of the Court pursuant
12 to Rule 30(a)(2) is hereby granted to Defendants to depose
13 Plaintiff and any other necessary witnesses confined in prison.

14 9. All communications by Plaintiff with the Court must be
15 served on Defendants, or Defendants' counsel, by mailing a true
16 copy of the document to Defendants or Defendants' counsel.

17 10. It is Plaintiff's responsibility to prosecute this case.
18 Plaintiff must keep the Court informed of any change of address and
19 must comply with the Court's orders in a timely fashion
20

21 11. Extensions of time are not favored, though reasonable
22 extensions will be granted. Any motion for an extension of time
23 must be filed no later than fifteen (15) days prior to the deadline
24 sought to be extended.

25 12. This Order terminates Docket no. 16.

26 IT IS SO ORDERED.

27 DATED: 9/23/08



28 CLAUDIA WILKEN
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 TREMAYNE COLLIER,

5 Plaintiff,

6 v.

7 M HENNESSY, SHERIFF et al,

8 Defendant.

Case Number: CV06-01143 CW

CERTIFICATE OF SERVICE

9
10 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on September 23, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
located in the Clerk's office.

14 Robert A. Bonta M
15 City Attorney's Office
16 City & County of San Francisco
17 Fox Plaza
1390 Market Street, Sixth Floor
San Francisco, CA 94102-5408

18 Tremayne Collier
19 V-60930
Kern Valley State Prison
20 P.O. Box 5102 B3-130
Delano, CA 93216

21 Bill Fein
22 San Francisco Sheriff's Department
1 Dr. Carlton B. Goodlett Pl., #456
San Francisco, CA 94102

23 Sheriff Michael Hennessey
24 San Francisco Sheriff's Department
1 Dr. Carlton B. Goodlett Pl., #456
25 San Francisco, CA 94102

26 Dated: September 23, 2008

27 Richard W. Wieking, Clerk
28 By: Sheilah Cahill, Deputy Clerk