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

FRANK MARANO,  
CDCR #B-97636,

Plaintiff,

vs.

GEORGE NEOTTI, Warden; M. STOUT,  
Facility Captain; M. DOMINGUEZ,  
Culinary Officer; D. HODGE, Facility  
Patrol Officer; CALIFORNIA  
DEPARTMENT OF CORRECTIONS;  
DAVID M. WAGNER, Inmate;  
JOHN DOES 1-10,

Defendants.

Civil No. 13cv3117 LAB (BLM)

**ORDER:**

**(1) GRANTING PLAINTIFF’S  
MOTION TO PROCEED  
IN FORMA PAUPERIS  
(ECF Doc. No. 2)**

**(2) DISMISSING COMPLAINT  
AS TO DEFENDANT WAGNER  
FOR FAILING TO STATE A  
CLAIM PURSUANT  
TO 28 U.S.C. §§ 1915(e)(2)  
AND 1915A(b)**

**AND**

**(3) DIRECTING U.S. MARSHAL  
TO EFFECT SERVICE UPON  
REMAINING DEFENDANTS  
PURSUANT TO  
28 U.S.C. § 1915(d) AND  
FED.R.CIV.P. 4(c)(3)**

Frank Marano (“Plaintiff”), currently incarcerated at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983.

1 Plaintiff claims the California Department of Corrections and Rehabilitation  
2 (“CDCR”) and several RJD officials subjected him to “unsafe prison condition[s]” by  
3 failing to properly supervise inmate plumbers’ access to “industrial sized tools.” *See*  
4 Compl. ¶¶ 6-8, 23, 33-37, 47, 57. As a result, Plaintiff alleges his throat was “slashed”  
5 with a box cutter by a fellow inmate while he was working to repair a drinking fountain  
6 in RJD’s Facility 3 culinary area on December 10, 2009. *See* Compl. ¶¶ 3, 9. Plaintiff  
7 further alleges that Defendants failed to provide him “competent medical care during a  
8 . . . life-threatening emergency,” by transporting him to Alvarado Hospital instead of a  
9 trauma center equipped to address his injury. *Id.* ¶¶ 17-18, 24. Plaintiff seeks injunctive  
10 relief as well as general, “specific,” and “exemplar[y]” damages. *Id.* at 32-33.

11 Plaintiff did not prepay the filing fee required by 28 U.S.C. § 1914(a); instead, he  
12 filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)  
13 (ECF Doc. No. 2), followed by a prison trust account certificate and certified copies of  
14 his account activity as required by 28 U.S.C. § 1915(a)(2) (ECF Doc. No. 4).

#### 15 **I. PLAINTIFF’S MOTION TO PROCEED IFP**

16 All parties instituting any civil action, suit or proceeding in a district court of the  
17 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*  
18 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite the plaintiff’s failure to prepay the  
19 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
20 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a  
21 prisoner and is granted leave to proceed IFP, he nevertheless remains obligated to pay  
22 the entire fee in installments, regardless of whether his action is ultimately dismissed.  
23 *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.  
24 2002).

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27 <sup>1</sup> For civil actions filed on or before May 1, 2013, the filing fee was \$350. Civil litigants  
28 filing actions on or after May 1, 2013, however, must now pay an additional administrative fee  
of \$50. *See* 28 U.S.C. § 1914(a), (b); Judicial Conference Schedule of Fees, District Court Misc.  
Fee Schedule (eff. May 1, 2013). However, the additional \$50 administrative fee is waived if  
the plaintiff is granted leave to proceed IFP. *Id.*

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

14 In support of his IFP Motion (ECF Doc. No. 2), Plaintiff has submitted certified  
15 copies of his trust account statements pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL.  
16 CIVLR 3.2 (ECF Doc. No. 4). *Andrews*, 398 F.3d at 1119. The Court has reviewed  
17 Plaintiff’s trust account statements, as well as the attached prison certificate issued by  
18 a trust account official at RJD where he remains incarcerated which verifies his account  
19 history and available balances. Plaintiff’s statements show an average monthly balance  
20 of \$302.94, average monthly deposits of \$101.38, and an available balance in his account  
21 of \$230.94 at the time it was submitted to the Court for filing. Based on this financial  
22 information, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF Doc. No. 2)  
23 and assesses an initial partial filing fee of \$60.58 pursuant to 28 U.S.C. § 1915(b)(1).

24 However, the Secretary of the CDCR, or his designee, shall collect this initial fee  
25 only if sufficient funds in Plaintiff’s account are available at the time this Order is  
26 executed pursuant to the directions set forth below. *See* 28 U.S.C. § 1915(b)(4)  
27 (providing that “[i]n no event shall a prisoner be prohibited from bringing a civil action  
28 or appealing a civil action or criminal judgment for the reason that the prisoner has no

1 assets and no means by which to pay the initial partial filing fee.”); *Taylor*, 281 F.3d at  
2 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal  
3 of a prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds  
4 available to him when payment is ordered.”). The remaining balance of the \$350 total  
5 owed in this case shall be collected and forwarded to the Clerk of the Court pursuant to  
6 the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

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

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

19 All complaints must contain “a short and plain statement of the claim showing  
20 that the pleader is entitled to relief.” FED.R.CIV.P. 8(a)(2). Detailed factual allegations  
21 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported  
22 by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
23 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining  
24 whether a complaint states a plausible claim for relief [is] ... a context-specific task that  
25 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*  
26 The “mere possibility of misconduct” falls short of meeting this plausibility standard.  
27 *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

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1 “When there are well-pleaded factual allegations, a court should assume their  
2 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
3 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
4 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
5 allegations of material fact and must construe those facts in the light most favorable to  
6 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
7 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

8 However, while the court “ha[s] an obligation where the petitioner is pro se,  
9 particularly in civil rights cases, to construe the pleadings liberally and to afford the  
10 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.  
11 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not, in  
12 so doing, “supply essential elements of claims that were not initially pled.” *Ivey v. Board*  
13 *of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

#### 14 **A. 42 U.S.C. § 1983**

15 “Section 1983 creates a private right of action against individuals who, acting  
16 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*  
17 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of  
18 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
19 conferred.” *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation marks  
20 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)  
21 deprivation of a right secured by the Constitution and laws of the United States, and (2)  
22 that the deprivation was committed by a person acting under color of state law.” *Tsao*  
23 *v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

#### 24 **B. Plaintiff’s Claims**

25 As to his claims against Defendant Wagner, the inmate Plaintiff alleges attacked  
26 him, Plaintiff may not proceed. Unlike the prison officials Plaintiff alleges acted in both  
27 their individual and official capacities, *see Compl.* at 2-3; *Leer v. Murphy*, 844 F.2d 628,  
28 633 (9th Cir. 1988) (finding prison officials “administer[ing] the prison” acted under

1 color of state law for purposes of 42 U.S.C. § 1983), Wagner is alleged only to have  
2 acted in his “personal capacity as an inmate,” Compl. at 3, and not “under color of state  
3 law” when he attacked Plaintiff. *See Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (a  
4 private individual generally does not act under color of state law). Purely private  
5 conduct, no matter how wrongful, is not covered under § 1983. *Ouzts v. Maryland Nat’l*  
6 *Ins. Co.*, 505 F.2d 547, 550 (9th Cir. 1974). Simply put—there is no right to be free from  
7 the infliction of constitutional deprivations by private individuals. *See Van Ort v. Estate*  
8 *of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996).

9 As to the remaining Defendants, however, the Court finds that while Plaintiff  
10 styles his “causes of action” in terms of state torts, workplace safety laws, and as a  
11 “breach of contract” governing Defendants’ duty to respond to “reasonable and  
12 heightened expectation[s] of dangerous risk to the life of inmates and staff,” *see* Compl.  
13 at 20, 21, 24, 25, 26, the “factual content” in his Complaint, when liberally construed,  
14 is sufficient to “state a claim to relief [under 42 U.S.C. § 1983] that is plausible on its  
15 face.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570).<sup>2</sup>

16 “[P]rison officials have a duty to protect prisoners from violence at the hands of  
17 other prisoners.” *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (internal quotation  
18 marks, ellipsis, and citation omitted). If an inmate has been assaulted by a fellow inmate,  
19 a prison official can be held liable under the Eighth Amendment so long as Plaintiff  
20 demonstrates that the deprivation is sufficiently serious, *id.* at 834 (citing *Wilson v.*  
21 *Seiter*, 501 U.S. 294, 298 (1991)), and that the prison official was deliberately indifferent  
22 to the risk. *Id.* at 837. In addition, “deliberate indifference to a prisoner’s serious illness  
23 or injury states a cause of action under § 1983.” *Estelle v. Gamble*, 429 U.S. 97, 105  
24 (1976).

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

1 Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service upon  
2 Defendants Neotti, Stout, Dominguez, Savala, Hodge, and the CDCR on his behalf.<sup>3</sup> See  
3 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process, and  
4 perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may order that  
5 service be made by a United States marshal or deputy marshal . . . if the plaintiff is  
6 authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

7 **III. CONCLUSION AND ORDER**

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

9 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF  
10 Doc. No. 2) is **GRANTED**.

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

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21 <sup>3</sup> Plaintiff must, of course, identify the persons he currently lists only as “John Does,” by  
22 their true names and substitute those individual persons by amending his Complaint to identify  
23 each individual party before the United States Marshal will be ordered and able to execute  
24 service upon any of them. See *Aviles v. Village of Bedford Park*, 160 F.R.D. 565, 567 (1995)  
25 (Doe defendants must be identified and served within 120 days of the commencement of the  
26 action against them); FED.R.CIV.P. 15(c)(1)(C) & 4(m). Generally, Doe pleading is disfavored.  
27 *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). And when the plaintiff proceeds IFP,  
28 it is in most instances impossible for the United States Marshal to serve a summons and  
complaint upon a party identified only as a Doe. See *Walker v. Sumner*, 14 F.3d 1415, 1422 (9th  
Cir. 1994) (in order to properly effect service under Rule 4 in an IFP case, the plaintiff is  
required to “furnish the information necessary to identify the defendant.”). However, the Court  
will not dismiss Plaintiff’s claims against the Doe Defendants at this time because where the  
identity of an alleged party is not known prior to filing of an action, Ninth Circuit authority  
provides that the plaintiff be given an opportunity to pursue appropriate discovery to identify the  
unknown Does, unless it is clear that discovery would not uncover their identities, or that his  
Complaint should be dismissed for other reasons. See *Wakefield v. Thompson*, 177 F.3d 1160,  
1163 (9th Cir. 1999) (citing *Gillespie*, 629 F.2d at 642).

1           3.       The Clerk of the Court is directed to serve a copy of this Order on Jeffrey  
2 A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O. Box  
3 942883, Sacramento, California, 94283-0001.

4           **IT IS FURTHER ORDERED** that:

5           4.       Plaintiff’s Complaint is **DISMISSED** without prejudice for failing to state  
6 a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b) as to Defendant Wagner.


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

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



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

8  
9 DATED: May 7, 2014

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12 **HONORABLE LARRY ALAN BURNS**  
United States District Judge