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

DIEGO RIVERA-VAZQUEZ,  
Reg. No. 37781-298,

Plaintiff,

vs.

UNKNOWN UNITED STATES  
CUSTOMS & BORDER PATROL  
AGENTS,

Defendants.

Civil No. 14cv2207 LAB (BGS)

**ORDER:**

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

**AND**

**(2) DISMISSING COMPLAINT  
FOR FAILING TO STATE A  
CLAIM PURSUANT TO  
28 U.S.C. § 1915(e)(2)  
AND § 1915A(b)(1)**

Diego Rivera-Vazquez (“Plaintiff”), currently incarcerated at the Federal Correctional Institution (“FCI”) in Mendota, California, and proceeding with the assistance of counsel, has filed a complaint (“Compl.”) pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S.C. 388 (1971) (Doc. No. 1).

Plaintiff alleges his Fifth and Eighth Amendment rights were violated on March 20, 2104, by unidentified United States Customs and Border Patrol agents who arrested him at the Otay Mesa port of entry, placed him in a security detention cell, and “violently

1 assaulted” him with “kicks and fists to his groin” so severe as to require hospitalization  
2 and the amputation of one of his testicles. *See* Compl. ¶¶ 6-7. He seeks \$250,000 in  
3 damages and costs. *Id.* ¶ 11.

4 Neither Plaintiff nor his counsel have prepaid the \$400 statutory and  
5 administrative civil filing fees required by 28 U.S.C. § 1914(a); instead, Plaintiff has  
6 filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a)  
7 (Doc. No. 2).

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

9 All parties instituting any civil action, suit or proceeding in a district court of the  
10 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*  
11 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite the plaintiff’s failure to prepay the  
12 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
13 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, if the plaintiff is a  
14 prisoner and is granted leave to proceed IFP, he nevertheless remains obligated to pay  
15 the entire fee in installments, regardless of whether his action is ultimately dismissed.  
16 *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.  
17 2002).

18 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act  
19 (“PLRA”), a prisoner seeking leave to proceed IFP must also submit a “certified copy  
20 of the trust fund account statement (or institutional equivalent) for . . . the six-month  
21 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);  
22 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account  
23 statement, the Court must assess an initial payment of 20% of (a) the average monthly  
24 deposits in the account for the past six months, or (b) the average monthly balance in the  
25 account for the past six months, whichever is greater, unless the prisoner has no assets.

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27 <sup>1</sup> In addition to the \$350 statutory fee, all parties filing civil actions *on or after*  
28 *May 1, 2013*, must 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 See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of  
2 the prisoner must collect subsequent payments, assessed at 20% of the preceding  
3 month's income, in any month in which the prisoner's account exceeds \$10, and forward  
4 those payments to the Court until the entire filing fee is paid. See 28 U.S.C.  
5 § 1915(b)(2).

6 In support of his IFP application, Plaintiff has submitted a certified certificate of  
7 his inmate trust account activity pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL.  
8 CIVLR 3.2. *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff's certificate,  
9 issued by a case manager at FCI Mendota where he is currently incarcerated, which  
10 shows an average monthly balance of \$22.35, average monthly deposits of \$98.59, and  
11 an available balance in his account of \$.56 at the time it was submitted to the Court for  
12 filing. Based on this financial information, the Court GRANTS Plaintiff's Motion to  
13 Proceed IFP (Doc. No. 2) and assesses an initial partial filing fee of \$19.72 pursuant to  
14 28 U.S.C. § 1915(b)(1).

15 However, the Warden of FCI Mendota, or his designee, shall collect this initial fee  
16 only if sufficient funds in Plaintiff's account are available at the time this Order is  
17 executed pursuant to the directions set forth below. See 28 U.S.C. § 1915(b)(4)  
18 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action  
19 or appealing a civil action or criminal judgment for the reason that the prisoner has no  
20 assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at  
21 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal  
22 of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack of funds  
23 available to him when payment is ordered."). The remaining balance of the \$350 total  
24 owed in this case must be collected and forwarded to the Clerk of the Court pursuant to  
25 the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

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

27 Notwithstanding IFP status or the payment of any partial filing fees, the PLRA  
28 also obligates the Court to review complaints filed by all persons proceeding IFP and by

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

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

19 “When there are well-pleaded factual allegations, a court should assume their  
20 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”  
21 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
22 (“[W]hen determining whether a complaint states a claim, a court must accept as true all  
23 allegations of material fact and must construe those facts in the light most favorable to  
24 the plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
25 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). On  
26 the other hand, “[a] pleading that offers ‘labels and conclusions’ or ‘a formulaic  
27 recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678  
28 (quoting *Twombly*, 550 U.S. at 555).

1 Plaintiff alleges Defendants, “[u]nknown United States Customs Agents,”  
2 violated his rights to due process and equal protection under the Fifth Amendment, and  
3 the Eighth Amendment’s proscription of cruel and unusual punishment, when they  
4 assaulted him “violent[ly]” and without provocation “after his detention” by “kicking  
5 and striking [him] in the groin area.” *See* Compl. at 3 ¶¶ 9, 10.

6 A *Bivens* claim is the “federal analog to suits brought against state officials under  
7 . . . 42 U.S.C. § 1983.” *Iqbal*, 556 U.S. at 675-76 (2009) (quoting *Hartman v. Moore*,  
8 547 U.S. 250, 254 n.2 (2006)). In *Bivens*, the Supreme Court recognized an implied  
9 private right of action for damages existed against federal officials alleged to have  
10 conducted an unreasonable search and seizure in violation of the Fourth Amendment.  
11 403 U.S. 388, 397. The Court has further recognized a *Bivens* action may serve to  
12 redress a violation of the equal protection component of the Fifth Amendment’s Due  
13 Process Clause. *See Iqbal*, 556 U.S. at 675 (citing *Davis v. Passman*, 442 U.S. 228  
14 (1979)).

15 Here, while Plaintiff grounds his claims of unreasonable force in both the Fifth  
16 and the Eighth Amendments, *see* Compl. at 3 ¶¶ 9, 10, it is the Fourth Amendment that  
17 governs the reasonableness of government searches and seizures. *See* U.S. Const.,  
18 amend. IV (“The right of the people to be secure in their persons, houses, papers, and  
19 effects, against unreasonable searches and seizures, shall not be violated . . . but upon  
20 probable cause . . .”). “Where a particular Amendment ‘provides an explicit textual source  
21 of constitutional protection’ against a particular sort of government behavior, ‘that  
22 Amendment, [and] not the more generalized notion of ‘substantive due process,’ must  
23 be the guide for analyzing these claims.” *Albright v. Oliver*, 510 U.S. 266, 273 (1994),  
24 quoting *Graham v. Connor*, 490 U.S. 386, 394 (1989); *see also United States v. Lanier*,  
25 520 U.S. 259, 272 n.7 (1997). The Fourth Amendment “provides an explicit textual  
26 source of constitutional protection against . . . physically intrusive government conduct,”  
27 including allegations excessive force during a search or seizure. *Graham*, 490 U.S. at  
28 395.

1           Therefore, because Plaintiff alleges Defendants violated his rights during his  
2 detention at the U.S. port of entry in Otay-Mesa, and not *after* he was convicted or  
3 sentenced, his unreasonable force claims do not sound in either the Eighth Amendment  
4 or in any “generalized notion of ‘substantive due process’” under the Fifth Amendment.  
5 *Albright*, 510 U.S. at 273; *see also Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)  
6 (Eighth Amendment’s Cruel and Unusual Punishments Clause “was designed to protect  
7 those convicted of crimes,” and consequently the Clause applies “only after the State has  
8 complied with the constitutional guarantees traditionally associated with criminal  
9 prosecutions.”).

10           And while Plaintiff also invokes his Fifth Amendment right to “equal protection”  
11 in relation to Defendants’ “violent and unprovoked assault,” *see* Compl. at 3 ¶ 9, he  
12 offers no further “factual content that [might] allow[] the court to draw the reasonable  
13 inference” to support a plausible claim that Defendants deprived him equal protection  
14 under the law. *See Iqbal*, 556 U.S. at 678. “The Equal Protection Clause ensures that  
15 ‘all persons similarly situated should be treated alike.’” *Squaw Valley Dev. Co. v.*  
16 *Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (quoting *City of Cleburne v. Cleburne*  
17 *Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)); *Abboud v. INS*, 140 F.3d 843, 848 (9th Cir.  
18 1998) (“[T]he Fifth Amendment . . . requires the government to treat similarly situated  
19 individuals similarly.”). To state a claim, Plaintiff must allege facts plausibly showing  
20 that “the defendants acted with an intent or purpose to discriminate against him based  
21 upon membership in a protected class.” *See Thornton v. City of St. Helens*, 425 F.3d  
22 1158, 1166 (9th Cir. 2005) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th  
23 Cir. 2001)). Because his pleading includes no further “factual enhancement” which  
24 might support a plausible claim of differential treatment or any intent to discriminate,  
25 Plaintiff’s mere reference to equal protection amounts only to an “unadorned, the-  
26 defendant-unlawfully-harmed-me accusation,” and he fails to state any Fifth Amendment  
27 claim upon which relief may be granted. *Iqbal*, 556 U.S. at 678.

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1 Accordingly, the Court finds that Plaintiff's Complaint, as it is currently pleaded,  
2 must be dismissed in its entirety pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See*  
3 *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

4 **III. LEAVE TO AMEND**

5 While Plaintiff's Complaint currently fails to state a due process, equal protection,  
6 or cruel and unusual punishments claim, it includes serious factual allegations that could  
7 potentially be re-alleged to support a Fourth Amendment violation. Therefore, the Court  
8 will provide Plaintiff an opportunity to amend in order to address these pleading  
9 deficiencies. *See Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999) (pursuant to  
10 FED.R.CIV.P. 15, leave to amend "shall be freely given when justice so requires.")<sup>2</sup>

11 **IV. CONCLUSION AND ORDER**

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

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

15 2. The Warden of FCI Mendota, or his designee, shall collect from Plaintiff's  
16 prison trust account the initial filing fee assessed in this Order, and shall forward the  
17 remainder of the \$350 filing fee owed by collecting monthly payments from Plaintiff's  
18 account in an amount equal to twenty percent (20%) of the preceding month's income  
19 and forward those payments to the Clerk of the Court each time the amount in Plaintiff's  
20 account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS

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21  
22 <sup>2</sup> Plaintiff is cautioned that in the event he chooses to amend, his Amended  
23 Complaint must identify the unknown U.S. Customs and Border Patrol Agents he seeks  
24 to sue before U.S. Marshal service may be ordered. *See Aviles v. Village of Bedford*  
25 *Park*, 160 F.R.D. 565, 567 (1995) (Doe defendants must be identified and served within  
26 120 days of the commencement of the action against them); FED.R.CIV.P. 15(c)(1)(C)  
27 & 4(m). Generally, Doe pleading is disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642  
28 (9th Cir. 1980). When a plaintiff proceeds IFP, he may request that the U.S. Marshal be  
ordered to "issue and serve all process" on his behalf pursuant to 28 U.S.C. § 1915(d)  
and FED.R.CIV.P. 4(c)(3); however, it is in most instances impossible for the Marshal to  
perform those duties when the only parties named as defendants are unidentified. *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 U.S. Marshal with]  
the information necessary to identify the defendant.").

1 SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED  
2 TO THIS ACTION.


3 3. The Clerk of the Court is directed to serve a copy of this Order on Warden,  
4 FCI Mendota, Federal Correctional Institution, P.O. Box 39, Mendota, California, 93640.

5 **IT IS FURTHER ORDERED** that:

6 4. Plaintiff's Complaint is **DISMISSED** without prejudice for failing to state  
7 a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is  
8 **GRANTED** forty-five (45) days leave from the date this Order in which to file a  
9 Amended Complaint which cures the deficiencies of pleading identified by this Order.  
10 Plaintiff's Amended Complaint must be complete in itself without reference to his  
11 original pleading. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner*  
12 *& Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes  
13 the original.”); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (citation omitted) (“All  
14 causes of action alleged in an original complaint which are not alleged in an amended  
15 complaint are waived.”).

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DATED: December 9, 2014

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