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5 UNITED STATES DISTRICT COURT
6 SOUTHERN DISTRICT OF CALIFORNIA
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8 KYLE ROBERT JAMES,
9 CDCR #BB-1457,

10 Plaintiff,

11 vs.

12 DEPUTY EMMENS, Team 1, San Diego
13 Sheriff's Deputy, et al.,

14 Defendants.
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Case No.: 3:16-cv-02823-WQH-NLS

ORDER:

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

**2) DENYING MOTION FOR
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION
[ECF No. 11]**

AND

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

23 KYLE ROBERT JAMES ("Plaintiff") is currently incarcerated at California State
24 Prison – Los Angeles County ("LAC") in Lancaster, California.¹ He is proceeding pro se,
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27 ¹ Plaintiff was incarcerated at the California Institution for Men ("CIM") in Chino, California, at the time
28 of filing (ECF No. 1 at 1, 50), but on December 22, 2016, he filed a Notice of Change of Address noting
his transfer to LAC. *See* ECF No. 7.

1 and has filed a civil Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1). Together with
2 his Complaint, Plaintiff has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant
3 to 28 U.S.C. § 1915(a) (ECF No. 2). He subsequently submitted a “Letter Explaining
4 Documents” (ECF No. 6), and a Sworn Declaration in Support of his Complaint (ECF No.
5 9). On January 19, 2017, he also filed a “Motion for a Temporary Restraining Order
6 (“TRO”) and Preliminary Injunction” seeking the preservation of video evidence he claims
7 exists and is related to his excessive force claims (ECF No. 11).

8 Background

9 Plaintiff claims that on January 23, 2016, and again on February 5, 2016, while he
10 was in the custody of the San Diego Sheriff’s Department and housed at the San Diego
11 County Jail, Defendants used excessive force against him, labeled him a child molester in
12 the presence of other inmates, and refused to respond to his administrative grievances in
13 retaliation for his having filed a filed civil rights action and various internal affairs and
14 “Citizens Law Enforcement Review Board” complaints against them. *See* ECF No. 1 at 5-
15 14.²

16 Discussion

17 **A. IFP Motion**

18 All parties instituting any civil action, suit or proceeding in a district court of the
19 United States, except an application for writ of habeas corpus, must pay a filing fee of
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22 ² Plaintiff identifies his previously filed civil rights action as “15cv0409-AJB-MDD.” ECF No. 1 at 12,
23 15. The Court takes judicial notice that Plaintiff has another previously filed civil rights action currently
24 pending before Judge Anthony J. Battaglia in *James v. Agnew, et al*, S.D. Cal. Civil Case No. 3:15-cv-
25 00409-AJB-MDD. *See Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (courts ““may take notice
26 of proceedings in other courts, both within and without the federal judicial system, if those proceedings
27 have a direct relation to matters at issue.””) (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2
28 (9th Cir. 2002)). In that case, Plaintiff also claims two San Diego Sheriff’s Department Deputies (Tade
and Agnew) used excessive force against him while he was pretrial detainee at the San Diego County Jail
on August 13, 2014. *See id.*, ECF No. 41 at 1-3. Plaintiff’s current case alleges separate constitutional
claims, arising at a later date, and against a different set of Defendants which do not appear duplicative.
Cf. Cato v. United States, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995) (plaintiffs may not “merely repeat[]
pending or previously litigated claims” in separate civil actions).

1 \$400.³ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff's failure to
2 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
3 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
4 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to
5 proceed IFP remains obligated to pay the entire fee in "increments" or "installments,"
6 *Bruce v. Samuels*, ___ S. Ct. ___, 136 S. Ct. 627, 629 (U.S. 2016); *Williams v. Paramo*, 775
7 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately
8 dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th
9 Cir. 2002).

10 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
11 "certified copy of the trust fund account statement (or institutional equivalent) for ... the 6-
12 month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2);
13 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account
14 statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits
15 in the account for the past six months, or (b) the average monthly balance in the account
16 for the past six months, whichever is greater, unless the prisoner has no assets. See 28
17 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner
18 then collects subsequent payments, assessed at 20% of the preceding month's income, in
19 any month in which his account exceeds \$10, and forwards those payments to the Court
20 until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

21 In support of his IFP motion, Plaintiff has submitted a Trust Account Withdrawal
22 Authorization and a certified Prison Certificate attesting to his balances and deposits over
23 the 6-month period preceding the filing of his Complaint. See ECF No. 2 at 4, 5; 28 U.S.C.
24 § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. Plaintiff's prison certificate
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27 ³ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. See
28 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff.
June 1, 2016)). The additional \$50 administrative fee does not apply to persons granted leave to proceed
IFP. *Id.*

1 shows that while Plaintiff had a monthly average of \$67.50 deposited to his account, he
2 carried an average balance of only \$0.13, and his available balance was just \$0.74 at the
3 time. *See* ECF No. 2 at 5. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a
4 prisoner be prohibited from bringing a civil action or appealing a civil action or criminal
5 judgment for the reason that the prisoner has no assets and no means by which to pay the
6 initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that
7 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP
8 case based solely on a “failure to pay ... due to the lack of funds available to him when
9 payment is ordered.”).

10 Therefore, the Court grants Plaintiff leave to proceed IFP, declines to “exact” any
11 initial filing fee because his trust account statement shows he “has no means to pay it,”
12 *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California Department of
13 Corrections and Rehabilitation (“CDCR”) to collect the entire \$350 balance of the filing
14 fees required by 28 U.S.C. § 1914 and forward them to the Clerk of the Court pursuant to
15 the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1). *See id.*

16 **C. Screening of Complaint pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

17 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
18 answer screening which the Court conducts *sua sponte* pursuant to 28 U.S.C. § 1915(e)(2)
19 and § 1915A(b). Under these statutes, the Court must dismiss a prisoner’s IFP complaint,
20 or any portion of it, which is frivolous, malicious, fails to state a claim, or seeks damages
21 from defendants who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir.
22 2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002,
23 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to
24 ensure that the targets of frivolous or malicious suits need not bear the expense of
25 responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler*
26 *v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

27 “The standard for determining whether a plaintiff has failed to state a claim upon
28 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of

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

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

15 As currently pleaded, the Court finds that while Plaintiff has not shown, for the
16 reasons discussed below, that he is entitled to preliminary injunctive relief, Plaintiff’s
17 Complaint nevertheless contains factual content sufficient to survive the “low threshold”
18 for proceeding past the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and
19 1915A(b), because it alleges both excessive force⁴ and retaliation claims which are
20 plausible on its face. *See Wilhelm*, 680 F.3d at 1123. *See Iqbal*, 556 U.S. at 678; *Kingsley*
21 *v. Hendrickson*, __ U.S. __, 135 S. Ct. 2466, 2473 (2015) (“[T]he Due Process Clause
22 protects a pretrial detainee from the use of excessive force that amounts to punishment.”)
23 (citing *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)). Under *Kingsley*, a pretrial
24 detainee, unlike a convicted prisoner, need not prove that the defendant subjectively knew
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27 ⁴ While Plaintiff alleges in his TRO to have been “convicted of bank robbery at the beginning months of
28 2016,” (ECF No. 11 at 5), it is not clear whether he was a pretrial detainee or a convicted prisoner at the
time his excessive force claims arose on January 23, 2016, and February 5, 2016. *See* ECF No. 1 at 1.

1 that the force applied was excessive; that state-of-mind inquiry is “solely ... objective.” *Id.*
2 at 2473; *Austin v. Baker*, 616 F. App’x 365, 366 (9th Cir. 2015); *see also Hudson v.*
3 *McMillian*, 503 U.S. 1, 6-7 (1992) (when prison officials stand accused of using excessive
4 force in violation of the Eighth Amendment, the core judicial inquiry is “... whether force
5 was applied in a good-faith effort to maintain or restore discipline, or maliciously and
6 sadistically to cause harm.”); *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)
7 (“Within the prison context, a viable claim of First Amendment retaliation entails five basic
8 elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
9 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the
10 inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably
11 advance a legitimate correctional goal.”).

12 Accordingly, the Court will direct the U.S. Marshal to effect service upon the
13 Defendants on Plaintiff’s behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall
14 issue and serve all process, and perform all duties in [IFP] cases.”); FED. R. CIV. P. 4(c)(3)
15 (“[T]he court may order that service be made by a United States marshal or deputy marshal
16 . . . if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915.”).

17 **D. Motion for TRO and Preliminary Injunction**

18 Plaintiff has also filed a Motion requesting a TRO and preliminary injunction
19 requiring the San Diego Sheriff’s [Department] Legal Affairs Unit, and San Diego County
20 Counsel Thomas Montgomery to preserve “material and relevant video evidence of the two
21 excessive force incidents that [form] the basis of this case.” (ECF No. 11 at 1, 2-4.)

22 Procedurally, a federal district court may issue emergency injunctive relief only if it
23 has personal jurisdiction over the parties and subject matter jurisdiction over the lawsuit.
24 *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (noting
25 that one “becomes a party officially, and is required to take action in that capacity, only
26 upon service of summons or other authority-asserting measure stating the time within
27 which the party served must appear to defend.”). The court may not attempt to determine
28 the rights of persons not before it. *See, e.g., Hitchman Coal & Coke Co. v. Mitchell*, 245

1 U.S. 229, 234-35 (1917); *Zepeda v. INS*, 753 F.2d 719, 727-28 (9th Cir. 1983); *Lathrop v.*
2 *Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953, 961 (M.D. Fl. 1993);
3 *Kandlbinder v. Reagan*, 713 F. Supp. 337, 339 (W.D. Mo. 1989); *Suster v. Marshall*, 952
4 F. Supp. 693, 701 (N.D. Ohio 1996); *see also Califano v. Yamasaki*, 442 U.S. 682, 702
5 (1979) (injunctive relief must be “narrowly tailored to give only the relief to which
6 plaintiffs are entitled”). Under Federal Rule of Civil Procedure 65(d)(2) an injunction binds
7 only “the parties” to the action, their “officers, agents, servants, employees, and attorneys,”
8 and “other persons who are in active concert or participation[.]” FED. R. CIV. P.
9 65(d)(2)(A)-(C).

10 Substantively, “[a] plaintiff seeking a preliminary injunction must establish that he
11 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence
12 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
13 in the public interest.” *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726, 2736-37 (2015)
14 (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).
15 “Under *Winter*, plaintiffs must establish that irreparable harm is likely, not just possible, in
16 order to obtain a preliminary injunction.” *Alliance for the Wild Rockies v. Cottrell*, 632
17 F.3d 1127, 1131 (9th Cir. 2011).

18 Finally, the PLRA further requires prisoners to satisfy additional requirements when
19 seeking preliminary injunctive relief against prison officials:

20 Preliminary injunctive relief must be narrowly drawn, extend no
21 further than necessary to correct the harm the court finds requires
22 preliminary relief, and be the least intrusive means necessary to
23 correct that harm. The court shall give substantial weight to any
24 adverse impact on public safety or the operation of a criminal
25 justice system caused by the preliminary relief and shall respect
the principles of comity set out in paragraph (1)(B) in tailoring
any preliminary relief.

26 18 U.S.C. § 3626(a)(2). Section 3626(a)(2) places significant limits upon a court’s power
27 to grant preliminary injunctive relief to inmates, and “operates simultaneously to restrict
28 the equity jurisdiction of federal courts and to protect the bargaining power of prison

1 administrators—no longer may courts grant or approve relief that binds prison
2 administrators to do more than the constitutional minimum.” *Gilmore v. People of the State*
3 *of California*, 220 F.3d 987, 998-99 (9th Cir. 2000).

4 First, because Plaintiff’s case is still in its preliminary screening stage, the United
5 States Marshal has yet to effect service on his behalf, and Defendants have no actual notice.
6 Therefore, the Court has no personal jurisdiction over any Defendant at this time. *See* FED.
7 R. Civ. P. 65(d)(2); *Murphy Bros., Inc.*, 526 U.S. at 350; *Zepeda*, 753 F.2d at 727-28. Even
8 more critically, Plaintiff seeks injunctive relief against the “San Diego Sheriff’s
9 [Department] Legal Affairs Unit,” (ECF No. 11 at 1-3), and San Diego County Counsel
10 Thomas Montgomery, neither of which/whom are even named as parties to this action. *Cf.*
11 ECF No. 1 at 1-4.

12 Second, even if the Court had personal jurisdiction over the entity or person Plaintiff
13 seeks to enjoin, he has failed to establish the imminent irreparable harm required to support
14 a preliminary injunction. *See Winter*, 555 U.S. at 20; *Alliance for the Wild Rockies*, 632
15 F.3d at 1131. “The fact that plaintiff has met the pleading requirements allowing him to
16 proceed with the complaint does not, ipso facto, entitle him to a preliminary injunction.”
17 *Claiborne v. Blausler*, No. CIV S-10-2427 LKK, 2011 WL 3875892, at *8 (E.D. Cal. Aug.
18 31, 2011), *report and recommendation adopted*, No. CIV S-10-2427 LKK, 2011 WL
19 4765000 (E.D. Cal. Sept. 29, 2011). Instead, to meet the “irreparable harm” requirement,
20 Plaintiff must do more than simply *allege* imminent harm; he must demonstrate it.
21 *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). This
22 requires Plaintiff to demonstrate by specific facts that there is a credible threat of immediate
23 and irreparable harm. FED. R. CIV. P. 65(b). Mere “[s]peculative injury does not constitute
24 irreparable injury sufficient to warrant granting a preliminary injunction.” *Caribbean*
25 *Marine*, 844 F.2d at 674-75.

26 Plaintiff claims that “relevant video evidence of the two excessive force incidents
27 that are the basis of this case,” exist, yet the San Diego Sheriff’s [Department] Legal Affairs
28 Unit “will not respond to numerous letters from [him] giving the Sheriff’s Department

1 “notice of [his] intention to bring suit.” ECF No. 11 at 1. He further claims that without
2 this evidence he “will not be able to pursue his claim,” because there is a “lack of police
3 accountability ... in police brutality cases such as this one.” *Id.* at 6.

4 But these allegations are merely speculative at this stage of the proceedings, and the
5 Court therefore finds Plaintiff has failed to establish either the immediate or irreparable
6 harm required to justify extraordinary injunctive relief. *Lyons*, 461 U.S. at 102; *see also*
7 *Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964) (“The grant of a
8 preliminary injunction is the exercise of a very far reaching power never to be indulged in
9 except in a case clearly warranting it.”). Nor has Plaintiff demonstrated he is entitled to
10 compel the expedited discovery he essentially seeks.⁵ While “[t]he failure to preserve
11 electronic or other records, *once the duty to do so has been triggered*, raises the issue of
12 spoliation of evidence and its consequences,” *Thompson v. U.S. Dep’t of Hous. & Urban*
13 *Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003) (emphasis added); *Pettit v. Smith*, 45 F. Supp. 3d
14 1099, 1104 (D. Ariz. 2014), “[a]bsent some special relationship or duty arising by reason
15 of an agreement, contract, statute, or other special circumstance, ... there is no duty to
16 preserve possible evidence for another party to aid that other party in some future legal
17 action against a third party.” *Wilson v. Beloit Corp.*, 921 F.2d 765, 767 (8th Cir. 1990)
18 (internal citation omitted); *Pettit*, 45 F. Supp. 3d at 1106.

19 For all these reasons, the Court denies Plaintiff’s Motion for TRO and Preliminary
20 Injunction (ECF No. 11) pursuant to FED. R. CIV. P. 65 at this time.

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24 ⁵ Federal Rule of Civil Procedure 26(d) provides, in part, that “[a] party may not seek discovery from any
25 source before the parties have conferred as required by Rule 26(f), except ... when authorized by these
26 rules, by stipulation, or by court order.” FED. R. CIV. P. 26(d)(1). A court may order expedited discovery
27 under FED. R. CIV. P. 26(d) only for good cause, which may be found “where the need for expedited
28 discovery, in consideration of the administration of justice, outweighs the prejudice to the responding
party.” *Semitool, Inc. v. Tokyo Elec. Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *see also Assef v.*
Does 1–10, No. 15-CV-01960-MEJ, 2015 WL 3430241, at *2 (N.D. Cal. May 28, 2015). Even liberally
construed, the Court finds Plaintiff’s TRO fails to demonstrate the good cause required to justify discovery
at this preliminary and pre-service stage of the case. *Id.*

1 Conclusion

2 Good cause appearing, the Court:

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

5 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
6 Plaintiff's prison trust account the \$350 filing fee owed in this case by garnishing monthly
7 payments from his account in an amount equal to twenty percent (20%) of the preceding
8 month's income and forwarding those payments to the Clerk of the Court each time the
9 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL

10 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
11 ASSIGNED TO THIS ACTION;

12 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
13 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001;

14 4. **DENIES** Plaintiff's Motion for Temporary Restraining Order and
15 Preliminary Injunction (ECF No. 11);

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

24 6. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
25 upon the named Defendants as directed by Plaintiff on the USM Form 285s provided to
26 him. All costs of that service will be advanced by the United States. *See* 28 U.S.C.
27 § 1915(d); FED. R. CIV. P. 4(c)(3);

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