

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 DAVID WILSON,
12 CDCR #AZ-8092,

13 Plaintiff,

14 vs.

15 CORPORAL GARDINER, San Diego
16 County Sheriff's Deputy; JOE DOE #1,
17 San Diego County Deputy Sheriff;
18 SERGEANT POITER, Deputy Sergeant;
19 JOE DOES #2-4,

20 Defendants.
21

Case No.: 3:17-cv-0469-JLS-MDD

**ORDER (1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
AND (2) DIRECTING U.S. MARSHAL
TO EFFECT SERVICE PURSUANT
TO 28 U.S.C. § 1915(D) AND
FED. R. CIV. P. 4(C)(3)**

(ECF No. 2)

22 David Wilson ("Plaintiff") is currently incarcerated at the California Medical
23 Facility ("CMF") in Vacaville, California. He is proceeding pro se, and has filed a civil
24 Complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1).

25 Plaintiff had not prepaid the \$400 civil filing fee required to commence a civil action
26 pursuant to 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma*
27 *Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

28 ///

BACKGROUND

1
2 Plaintiff claims he suffers from a “psychiatric disability” for which he is currently
3 receiving care “within the [California Department of of Corrections and Rehabilitation]
4 [(‘)CDCR[’)].” (Compl. 5.) Earlier, while he was “an inmate under [the] care and control
5 of the San Diego County Sheriff’s Department,” and housed at the San Diego Central Jail
6 (“SDCJ”) on April 5, 2016, however, Plaintiff alleges Defendants Gardiner and Joe Doe
7 #1, both San Diego County Sheriff’s Department deputies assigned to SDCJ, used
8 excessive force against him with “callous and malicious intent” to both harm and humiliate
9 him. (*Id.* at 3–14.) Specifically, Plaintiff claims Gardiner became “infuriated” after Plaintiff
10 asked for soup, at which point Gardiner grabbed, punched, pushed, kicked, and struck him
11 “in the eye, neck, and upper torso,” and then escorted him “through the Jail with a severely
12 torn shirt and no pants on,” and into a “filthy” medical cell. (*Id.* at 7–9.)

13 After two hours in the cell, “half naked in distress,” Plaintiff claims he asked
14 Defendant Deputy Joe Doe #1 for clothes and supplies, and stated “[I’d] rather be dead
15 than live like this.” (*Id.* at 9–10.) Joe Doe #1 then ordered him to “cuff up”—claiming
16 Plaintiff had threatened suicide—“pointed the jagged edge of the . . . cuffs in [his] right
17 hand,” and “immediately” pepper sprayed him twice, after he asked for a sergeant. (*Id.* at
18 10–11.)

19 Plaintiff further contends Defendant Poiter, a San Diego County Sergeant on
20 “second watch,” arrived a “moment later,” commented on the amount of pepper spray
21 dispensed, but “failed to properly document the incidents.” (*Id.* at 4, 11.) Plaintiff was then
22 “taken straight to suicide watch,” “left in a rubber cell naked and burning,” and released
23 “within 24 hours” after being assessed “by the psych doctor” as non-suicidal. (*Id.* at 12.)

IFP MOTION

24
25 All parties instituting any civil action, suit or proceeding in a district court of the
26 United States, except an application for writ of habeas corpus, must pay a filing fee of
27 \$400. *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
28 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.

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

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

19 In support of his IFP motion, Plaintiff has submitted a CDCR Inmate Statement, and
20 a Prison Certificate authorized by an accounting specialist at CMF attesting to his balances
21 and deposits over the six-month period preceding the filing of his Complaint. *See* ECF No.
22 2 at 4, 6; 28 U.S.C. § 1915(a)(2); S.D. Cal. Civ. L.R. 3.2; *Andrews*, 398 F.3d at 1119. These
23 statements show that Plaintiff has carried no monthly average and has had no money
24 deposited to his account for the six-month period preceding the filing of this action.

25
26
27 ¹ 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 Consequently, his available balance at the time of filing was zero. (*See* ECF No. 2 at 4);
2 *see also* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited
3 from bringing a civil action or appealing a civil action or criminal judgment for the reason
4 that the prisoner has no assets and no means by which to pay the initial partial filing fee”);
5 *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts
6 as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure
7 to pay . . . due to the lack of funds available to him when payment is ordered”).

8 Therefore, the Court grants Plaintiff’s Motion to Proceed IFP (ECF No. 2), declines
9 to “exact” any initial filing fee because his trust account statement shows he “has no means
10 to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of CDCR to collect the entire
11 \$350 balance of the filing fees required by 28 U.S.C. § 1914 and forward them to the Clerk
12 of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
13 § 1915(b)(1). *See id.*

14 **SCREENING PURSUANT TO 28 U.S.C. §§ 1915(E)(2)(B) AND 1915A(B)**

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

25 “The standard for determining whether a plaintiff has failed to state a claim upon
26 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
27 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
28 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.

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

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

13 As currently pled, the Court finds that Plaintiff’s Complaint contains factual
14 allegations sufficient to survive the “low threshold” for proceeding past the *sua sponte*
15 screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b), because it alleges excessive
16 force claims which are plausible on their face.² *See Wilhelm*, 680 F.3d at 1123. *See Iqbal*,
17 556 U.S. at 678; *Kingsley v. Hendrickson*, ___ U.S. ___, 135 S. Ct. 2466, 2473 (2015) (“[T]he
18 Due Process Clause protects a pretrial detainee from the use of excessive force that
19 amounts to punishment.”) (citing *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)).
20 Under *Kingsley*, a pretrial detainee, unlike a convicted prisoner, need not prove that the
21 defendant subjectively knew that the force applied was excessive; the state-of-mind inquiry
22 is “solely . . . objective.” *Id.* at 2473; *Austin v. Baker*, 616 F. App’x 365, 366 (9th Cir.
23 2015); *cf. Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992) (when prison officials stand
24 accused of using excessive force in violation of the Eighth Amendment, the core judicial
25

26
27 ² Plaintiff is cautioned, however, that “the sua sponte screening and dismissal procedure is cumulative of,
28 and not a 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 inquiry is “whether force was applied in a good-faith effort to maintain or restore discipline,
2 or maliciously and sadistically to cause harm”).

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

9 CONCLUSION AND ORDER

10 Given the foregoing, the Court:

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

13 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
14 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing monthly
15 payments from his account in an amount equal to twenty percent (20%) of the preceding
16 month’s income and forwarding those payments to the Clerk of the Court each time the
17

18
19 ³ Plaintiff must, of course, identify the Defendants he references only as “Joe Doe #1, San Diego County
20 Sheriff Deputy” and “Joe Does #2–4,” whose names are presently unknown but whom Plaintiff claims
21 “refused to stop the excessive force, or failed to properly document” it. (ECF No. 1 at 5). Plaintiff must
22 identify these Defendants by their true names and substitute those individual persons in place of each
23 unnamed Doe by amending his Complaint to identify each of those parties before the United States
24 Marshal will be able to execute service upon any of them. See *Aviles v. Village of Bedford Park*, 160
25 F.R.D. 565, 567 (1995) (Doe defendants must be identified and served within [90] days of the
26 commencement of the action against them); Fed. R. Civ. P. 15(c)(1)(C) & 4(m). Generally, Doe pleading
27 is disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). It is in most instances impossible
28 for the United States Marshal to serve 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 permits Plaintiff the opportunity to
pursue appropriate discovery to identify the unknown Does, unless it is clear that discovery would not
uncover their identity, or the 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 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL PAYMENTS
2 SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO
3 THIS ACTION;

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

6 4. **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF No.
7 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for Defendants
8 GARDINER and POITER. In addition, the Clerk will provide Plaintiff with a certified
9 copy of this Order, a certified copy of his Complaint and the summons so that he may serve
10 these Defendants. Upon receipt of this "IFP Package," Plaintiff must complete the Form
11 285s as completely and accurately as possible, *include an address where each named*
12 *Defendant may be found and/or subject to service*, and return them to the United States
13 Marshal according to the instructions the Clerk provides in the letter accompanying the IFP
14 package;

15 5. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
16 upon the Defendants Gardiner and Poiter as directed by Plaintiff on the USM Form 285s
17 provided to him. All costs of that service will be advanced by the United States. *See* 28
18 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3);

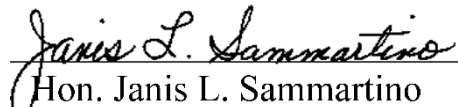
19 6. **ORDERS** Defendants Gardiner and Poiter, once they have been served, to
20 reply to Plaintiff's Complaint within the time provided by the applicable provisions of
21 Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may
22 occasionally be permitted to "waive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

28 ///

1 7. **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
2 serve upon Defendants Gardiner and Poiter, or, if appearance has been entered by counsel,
3 upon Defendants' counsel, a copy of every further pleading, motion, or other document
4 submitted for the Court's consideration pursuant to Fed. R. Civ. P. 5(b). Plaintiff must
5 include with every original document he seeks to file with the Clerk of the Court, a
6 certificate stating the manner in which a true and correct copy of that document has been
7 was served on Defendants or their counsel, and the date of that service. *See* S.D. Cal. Civ.
8 L.R. 5.2. Any document received by the Court which has not been properly filed with the
9 Clerk or which fails to include a Certificate of Service upon Defendants may be
10 disregarded.

11 **IT IS SO ORDERED.**

12 Dated: June 28, 2017


Hon. Janis L. Sammartino
United States District Judge