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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ALLEN HAMMLER,
CDCR #F-73072,

Plaintiff,

vs.

J. ALVAREZ, Correctional Officer;
SOTO, Correctional Officer;
J. NEVAREZ, Correctional Officer;
HOUGH, Correctional Officer,

Defendants.

Case No.: 3:17-cv-01533-JAH-WVG

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[ECF No. 7]**

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)**

ALLEN HAMMLER (“Plaintiff”), currently incarcerated at Kern Valley State Prison (“KVSP”) in Delano, California, and proceeding pro se, has filed this civil rights action pursuant to 42 U.S.C. § 1983 (ECF No. 1).

Plaintiff claims Defendants Alvarez, Soto, Nevarez, and Hough, all Correctional Officers at Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, used excessive force against him while he was incarcerated there on October 20, 2016, in violation of the Eighth Amendment. See Compl., ECF No. 1 at 1-15, ¶¶ 1-28. Plaintiff

1 alleges to have exhausted available administrative remedies “up and through the Third
2 Level of Review” via CDC 602 Log No. RJD-B-16-04421, his Complaint is verified
3 under penalty of perjury, and he seeks \$300,000 in general and punitive damages. *Id.* at
4 15-16, 18.¹

5 Plaintiff has not paid the civil filing fee required by 28 U.S.C. § 1914(a); instead
6 he has filed a Motion to Proceed In Forma Pauperis pursuant to 28 U.S.C. § 1915(a)
7 (ECF No. 7).

8 **I. Motion to Proceed In Forma Pauperis**

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 of
11 \$400.² See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
12 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
13 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*
14 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed
15 IFP remains obligated to pay the entire fee in “increments” or “installments,” *Bruce v.*
16 *Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182,
17 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. See 28
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20 ¹ The Court takes judicial notice that Plaintiff has another civil rights action currently
21 pending before Judge Battaglia in *Hammler v. Aviles*, S.D. Cal. Civil Case No. 3:17-cv-
22 01185-AJB-WVG (“Aviles”). See *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007)
23 (court ““may take notice of proceedings in other courts, both within and without the federal
24 judicial system, if those proceedings have a direct relation to matters at issue.””) (quoting
25 *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002)). While Aviles also
26 involves an alleged incident of excessive force at RJD, the two cases appear unrelated
27 insofar as they involve different correctional officer defendants and allege separate causes
28 of action arising more than several weeks apart. See Aviles, ECF No. 1 at 1, 3-9.

² In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
fee of \$50. See 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 U.S.C. § 1915(b)(1) & (2); Taylor v. Delatoore, 281 F.3d 844, 847 (9th Cir. 2002).

2 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
3 “certified copy of the trust fund account statement (or institutional equivalent) for ... the
4 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
5 § 1915(a)(2); Andrews v. King, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
6 trust account statement, the Court assesses an initial payment of 20% of (a) the average
7 monthly deposits in the account for the past six months, or (b) the average monthly
8 balance in the account for the past six months, whichever is greater, unless the prisoner
9 has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having
10 custody of the prisoner then collects subsequent payments, assessed at 20% of the
11 preceding month’s income, in any month in which his account exceeds \$10, and forwards
12 those payments to the Court until the entire filing fee is paid. See 28 U.S.C. § 1915(b)(2);
13 Bruce, 136 S. Ct. at 629.

14 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate
15 Statement Report as well as a Prison Certificate completed by an accounting officer at
16 KVSP. See ECF No. 7 at 4-8; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; Andrews,
17 398 F.3d at 1119. These statements show that Plaintiff has carried no average monthly
18 balance, has had no monthly deposits to his account over the 6-month period immediately
19 preceding the filing of his Complaint, and, consequently, had no available balance on the
20 books at the time of filing. See ECF No. 7 at 4, 7. Based on this accounting, no initial
21 partial filing fee is assessed. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event
22 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
23 criminal judgment for the reason that the prisoner has no assets and no means by which to
24 pay the initial partial filing fee.”); Bruce, 136 S. Ct. at 630; Taylor, 281 F.3d at 850
25 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a
26 prisoner’s IFP case based solely on a “failure to pay ... due to the lack of funds available
27 to him when payment is ordered.”).

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1 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 7),
2 declines to exact any initial filing fee because his prison certificate indicates he has “no
3 means to pay it,” Bruce, 136 S. Ct. at 629, and directs the Secretary of the California
4 Department of Corrections and Rehabilitation (“CDCR”), or his designee, to instead
5 collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and
6 forward them to the Clerk of the Court pursuant to the installment payment provisions set
7 forth in 28 U.S.C. § 1915(b)(1). See *id.*

8 **II. Sua Sponte Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b)**

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

19 “The standard for determining whether a plaintiff has failed to state a claim upon
20 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
21 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668
22 F.3d 1108, 1112 (9th Cir. 2012); see also *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th
23 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
24 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
25 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
26 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
27 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

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

9 As currently pleaded, the Court finds Plaintiff’s Complaint contains “sufficient
10 factual matter, accepted as true,” to state excessive force claims for relief that are
11 “plausible on its face,” *Iqbal*, 556 U.S. at 678, and therefore, sufficient to survive the
12 “low threshold” for proceeding past the sua sponte screening required by 28 U.S.C.
13 §§ 1915(e)(2) and 1915A(b).³ See *Wilhelm*, 680 F.3d at 1123; *Hudson v. McMillian*, 503
14 U.S. 1, 6-7 (1992) (When prison officials stand accused of using excessive force in
15 violation of the Eighth Amendment, the core judicial inquiry is “... whether force was
16 applied in a good-faith effort to maintain or restore discipline, or maliciously and
17 sadistically to cause harm.”).

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

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27 ³ Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative
28 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 **III. Conclusion and Orders**

2 For the reasons discussed, the Court:

3 1) **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 7);

4 2) **DIRECTS** the Secretary of the CDCR, or his designee, to collect from
5 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing
6 monthly payments from his account in an amount equal to twenty percent (20%) of the
7 preceding month’s income and forwarding those payments to the Clerk of the Court each
8 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). ALL
9 PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
10 ASSIGNED TO THIS ACTION;

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

13 4) **DIRECTS** the Clerk to issue a summons as to Plaintiff’s Complaint (ECF
14 No. 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each
15 Defendant. In addition, the Clerk will provide Plaintiff with a certified copy of this Order,
16 a certified copy of his Complaint, and the summons so that he may serve the Defendants.
17 Upon receipt of this “IFP Package,” Plaintiff must complete the Form 285s as completely
18 and accurately as possible, include an address where each named Defendant may be
19 served, see S.D. CAL. CIVLR 4.1.c, and return them to the United States Marshal
20 according to the instructions the Clerk provides in the letter accompanying his IFP
21 package;

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

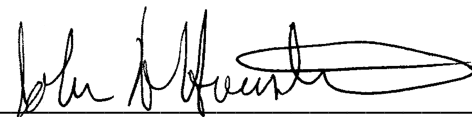
26 6) **ORDERS** Defendants, once served, to reply to Plaintiff’s Complaint within
27 the time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a).
28 See 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted to “waive

1 the right to reply to any action brought by a prisoner confined in any jail, prison, or other
2 correctional facility under section 1983,” once the Court has conducted its sua sponte
3 screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a
4 preliminary determination based on the face on the pleading alone that Plaintiff has a
5 “reasonable opportunity to prevail on the merits,” defendant is required to respond); and

6 7) **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to
7 serve upon Defendants or, if appearance has been entered by counsel, upon Defendants’
8 counsel, a copy of every further pleading, motion, or other document submitted for the
9 Court’s consideration pursuant to FED. R. CIV. P. 5(b). Plaintiff must include with every
10 original document he seeks to file with the Clerk of the Court, a certificate stating the
11 manner in which a true and correct copy of that document has been was served on
12 Defendants or Defendants’ counsel, and the date of that service. See S.D. CAL. CIVLR
13 5.2. Any document received by the Court which has not been properly filed with the
14 Clerk, or which fails to include a Certificate of Service upon the Defendants, may be
15 disregarded.

16 **IT IS SO ORDERED.**

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18 Dated: February 13, 2018

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21 HON. JOHN A. HOUSTON
22 United States District Judge