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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DANIEL MOSES COOK,
Inmate Booking #17145418,

Plaintiff,

vs.

JONATHAN LAROCHE; JOSEPH
GOMES; SAN DIEGO COUNTY
SHERIFF'S DEPT'; JACK IN THE BOX,

Defendants.

Case No.: 3:17-cv-01826-JAH-JMA

ORDER:

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

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
(ECF No. 3); and**

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

Daniel Moses Clark (“Plaintiff”), currently incarcerated at the George Bailey Detention Facility (“GBDF”) located in San Diego, California, and proceeding pro se, has filed this civil rights action pursuant to 42 U.S.C. § 1983. (ECF No. 1.)

In addition, Plaintiff has filed a Motion to Proceed In Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a), along with a Motion to Appoint Counsel. (ECF Nos. 2, 4.)

1 **I. Motion to Appoint Counsel**

2 Plaintiff seeks appointment of counsel to assist him in this matter. (ECF No. 4.)
3 However, there is no constitutional right to counsel in a civil case. *Lassiter v. Dept. of*
4 *Social Services*, 452 U.S. 18, 25 (1981). While under 28 U.S.C. § 1915(e)(1), district
5 courts have some limited discretion to “request” that an attorney represent an indigent
6 civil litigant, *Agyeman v. Corr. Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004),
7 this discretion is rarely exercised and only under “exceptional circumstances.” *Id.*; *see*
8 *also Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of exceptional
9 circumstances requires “an evaluation of the likelihood of the plaintiff’s success on the
10 merits and an evaluation of the plaintiff’s ability to articulate his claims ‘in light of the
11 complexity of the legal issues involved.’” *Agyeman*, 390 F.3d at 1103, quoting *Wilborn*
12 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

13 Applying these factors to Plaintiff’s case, the Court **DENIES** his Motion to
14 Appoint Counsel because a liberal construction of his original pleadings shows he is
15 capable of articulating the factual basis for his claims. All documents filed by pro se
16 litigants are construed liberally, and “a *pro se* complaint, however inartfully pleaded,
17 must be held to less stringent standards than formal pleadings drafted by lawyers.”
18 *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Moreover, FED. R. CIV. P. 8(e) requires that
19 “[p]leadings . . . be construed so as to do justice.”

20 The pleadings filed by Plaintiff to date demonstrate that while Plaintiff may not be
21 a trained in law, he is capable of legibly articulating the facts and circumstances relevant
22 to his claims, which are typical, straightforward, and not legally “complex.” *Agyeman*,
23 390 F.3d at 1103. Therefore, neither the interests of justice nor any exceptional
24 circumstances warrant the appointment of counsel in this case at this time. *LaMere v.*
25 *Risley*, 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

26 **II. Motion to Proceed IFP**

27 All parties instituting any civil action, suit or proceeding in a district court of the
28 United States, except an application for writ of habeas corpus, must pay a filing fee of

1 \$400.¹ *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). However,
4 prisoners who are granted leave to proceed IFP remain obligated to pay the entire fee in
5 “increments” or “installments,” *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629
6 (2016); *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of
7 whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v.*
8 *Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

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

21 In support of his IFP Motion, Plaintiff has submitted a prison certificate completed
22 by a GBDF accounting official attesting to his trust account activity and balances for the
23 six-months preceding the filing of his Complaint. *See* ECF No. 2 at 2; 28 U.S.C.

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26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
27 fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court
28 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 § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*, 398 F.3d at 1119. These statements show
2 that Plaintiff had an average monthly balance of \$3.34, and average monthly deposits of
3 \$150.00 to his account over the 6-month period immediately preceding the filing of his
4 Complaint, as well as an available balance of \$6.67 at the time of filing. *See* ECF No. 2 at
5 2. Based on this financial information, the Court GRANTS Plaintiff’s Motion to Proceed
6 IFP (ECF No. 2), and assesses his initial partial filing fee to be \$30.00 pursuant to 28
7 U.S.C. § 1915(b)(1).

8 However, the Court will direct the Watch Commander for GBDF, or his designee,
9 to collect this initial fee only if sufficient funds are available in Plaintiff’s account at the
10 time this Order is executed. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event
11 shall a prisoner be prohibited from bringing a civil action or appealing a civil action or
12 criminal judgment for the reason that the prisoner has no assets and no means by which to
13 pay the initial partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850
14 (finding that 28 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a
15 prisoner’s IFP case based solely on a “failure to pay . . . due to the lack of funds available
16 to him when payment is ordered.”). The remaining balance of the \$350 total fee owed in
17 this case must be collected and forwarded to the Clerk of the Court pursuant to 28 U.S.C.
18 § 1915(b)(1).

19 **III. Initial Screening pursuant to 28 U.S.C. §§ 1915(e)(2) and 1915A(b)**

20 The Court is obligated by the Prison Litigation Reform Act (“PLRA”) to review
21 complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are
22 “incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated
23 delinquent for, violations of criminal law or the terms or conditions of parole, probation,
24 pretrial release, or diversionary program,” at the time of filing “as soon as practicable
25 after docketing.” *See* Doc. No. 8 at 4; 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under the
26 PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are
27 frivolous, malicious, fail to state a claim, or which seek damages from defendants who
28 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122,

1 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002,
2 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

3 **A. Standard of Review**

4 “The purpose of § 1915A is ‘to ensure that the targets of frivolous or malicious
5 suits need not bear the expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920
6 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681
7 (7th Cir. 2012)). “The standard for determining whether a plaintiff has failed to state a
8 claim upon which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the
9 Federal Rule of Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v.*
10 *Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012); *accord Wilhelm v. Rotman*, 680 F.3d 1113,
11 1121 (9th Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the
12 familiar standard applied in the context of failure to state a claim under Federal Rule of
13 Civil Procedure 12(b)(6)”).

14 Every complaint must contain “a short and plain statement of the claim showing
15 that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations
16 are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported
17 by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678 (citing *Bell*
18 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “When there are well-pleaded
19 factual allegations, a court should assume their veracity, and then determine whether they
20 plausibly give rise to an entitlement to relief.” *Id.* at 679. “Determining whether a
21 complaint states a plausible claim for relief [is] . . . a context-specific task that requires
22 the reviewing court to draw on its judicial experience and common sense.” *Id.* The “mere
23 possibility of misconduct” falls short of meeting this plausibility standard. *Id.*; *see also*
24 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

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1 While a plaintiff’s factual allegations are taken as true, courts “are not required to
2 indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th
3 Cir. 2009) (internal quotation marks and citation omitted). Indeed, while courts “have an
4 obligation where the petitioner is pro se, particularly in civil rights cases, to construe the
5 pleadings liberally and to afford the petitioner the benefit of any doubt,” *Hebbe v. Pliler*,
6 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1
7 (9th Cir. 1985)), it may not “supply essential elements of claims that were not initially
8 pled.” *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir.
9 1982). Even before *Iqbal*, “[v]ague and conclusory allegations of official participation in
10 civil rights violations” were not “sufficient to withstand a motion to dismiss.” *Id.*

11 **B. 42 U.S.C. § 1983**

12 Title 42 U.S.C. § 1983 provides a cause of action for the “deprivation of any rights,
13 privileges, or immunities secured by the Constitution and laws” of the United States.
14 *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). To state a claim under § 1983, a plaintiff must
15 allege two essential elements: (1) that a right secured by the Constitution or laws of the
16 United States was violated, and (2) that the alleged violation was committed by a person
17 acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Long v. Cty. of*
18 *Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

19 Here, the Court finds that Defendant Jack in the Box, a purported corporation, is
20 not alleged to be “person[s] acting under color of state law.” *See West*; 487 U.S. at 48;
21 *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999) (The party
22 charged with a constitutional deprivation under § 1983 must be a person who may fairly
23 be said to be a governmental actor) (citation and quotations omitted).

24 The Constitution protects individual rights only from government action and not
25 from private action; it is only when the government is responsible for the specific conduct
26 of which the plaintiff complains that individual constitutional rights are implicated.
27 *Single Moms, Inc. v. Mont. Power Co.*, 331 F.3d 743, 746-47 (9th Cir. 2003). Generally,
28 private parties do not act under color of state law. *See Price v. Hawai’i*, 939 F.2d 702,

1 707-08 (9th Cir. 1991). Section “1983 excludes from its reach merely private conduct, no
2 matter how discriminatory or wrong.” *Sutton*, 193 F.3d at 835 (citing *Am. Mfrs. Mut. Ins.*
3 *Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (citation and internal quotation marks omitted));
4 *see also Ouzts v. Md. Nat’l Ins. Co.*, 505 F.2d 547, 551 (9th Cir.1974) (a purely private
5 actor may be liable for his misconduct in state court, but his conduct is not actionable
6 under Section 1983, regardless of how egregious).

7 In order for private conduct to constitute governmental action, “something more”
8 must be alleged. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982) (“Action
9 by a private party pursuant to [§ 1983], without something more, [i]s not sufficient to
10 justify a characterization of that party as a ‘state actor.’”). Courts have used four different
11 factors or tests to identify what constitutes “something more”: (1) public function, (2)
12 joint action, (3) governmental compulsion or coercion, and (4) governmental nexus. *See*
13 *id.*; *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997); *Parks Sch. of Bus., Inc. v.*
14 *Symington*, 51 F.3d 1480, 1486 (9th Cir. 1995); *Gorenc v. Salt River Project Agric.*
15 *Improvement and Power Dist.*, 869 F.2d 503, 506 (9th Cir. 1989).

16 Here, Plaintiff has failed to allege facts sufficient to plausibly show that the
17 corporation he has named as Defendant performed any public function traditionally
18 reserved to the state, acted as a willful participant in joint action with government agents,
19 was compelled or coerced, or had any connection whatsoever with the state, when it
20 allegedly injured Plaintiff. *See Iqbal*, 556 U.S. at 678; *Lugar*, 457 U.S. at 939.

21 **C. Heck Bar**

22 In addition, to the extent Plaintiff seeks damages against Defendants and claims
23 they falsely arrested him, he may not pursue those claims in a civil rights action pursuant
24 to 42 U.S.C. § 1983, without first showing his conviction has already been invalidated.
25 *See Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

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1 In *Heck*, the Supreme Court held:

2 in order to recover damages for allegedly unconstitutional
3 conviction or imprisonment, or for other harm caused by actions
4 whose unlawfulness would render a conviction or sentence
5 invalid, a § 1983 plaintiff must prove that the conviction or
6 sentence has been reversed on direct appeal, expunged by
7 executive order, declared invalid by a state tribunal authorized to
8 make such determination, or called into question by a federal
9 court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A
claim for damages bearing that relationship to a conviction or
sentence that has not been so invalidated is not cognizable under
§ 1983.

10 *Id.* at 486-87.

11 “Suits challenging the validity of the prisoner’s continued incarceration lie within
12 ‘the heart of habeas corpus,’ whereas ‘a § 1983 action is a proper remedy for a state
13 prisoner who is making a constitutional challenge to the conditions of his prison life, but
14 not to the fact or length of his custody.’” *Ramirez v. Galaza*, 334 F.3d 850, 856 (9th Cir.
15 2003), *quoting Preiser v. Rodriguez*, 411 U.S. 475, 489-99 (1973) (holding that a writ of
16 habeas corpus is “explicitly and historically designed” to provide a state prisoner with the
17 “exclusive” means to “attack the validity of his confinement” in federal court).

18 Because Plaintiff seeks damages based on an arrest he alleges was “false” and
19 based on perjured testimony (ECF No. 1 at 3-4), his claims amount to an attack on the
20 validity of his underlying criminal conviction, and may not proceed pursuant to § 1983,
21 unless his conviction has already been invalidated. *Heck*, 512 U.S. at 486-87; *Ramirez*,
22 334 F.3d at 855-56 (“Absent such a showing, ‘[e]ven a prisoner who has fully exhausted
23 available state remedies has no cause of action under § 1983.’”), *quoting Heck*, 512 U.S.
24 at 489. While Plaintiff identifies no specific acts of misconduct taken by the Defendants
25 prior to or during the course of his criminal proceedings, except to point to the “false
26 narratives, contentious charges and overzealous attacks” (ECF No. 1 at 4), *see Iqbal*, 556
27 U.S. at 677 (noting that “[a]bsent vicarious liability, each Government official, his or her
28 title notwithstanding, is only liable for his or her own misconduct”), the Court will

1 presume he intends to sue these law enforcement officials for acting together to
2 wrongfully convict him in violation of “due process.” (ECF No. 1 at 4).

3 However, such claims “necessarily imply the invalidity” of his conviction and
4 continued incarceration. *Heck*, 512 U.S. at 487. In other words, were Plaintiff to succeed
5 in showing that Defendants conspired to wrongfully convict him based on false evidence
6 or perjured testimony, an award of damages would “necessarily imply the invalidity” of
7 his conviction and/or sentence. *Id.*, 512 U.S. at 487; *see also Guerrero v. Gates*, 442 F.3d
8 697, 701 (9th Cir. 2006) (finding § 1983 action stemming from allegations of wrongful
9 arrest, malicious prosecution, and a general conspiracy of “bad behavior” among officials
10 in connection with the plaintiff’s arrest, prosecution, and incarceration were barred by
11 *Heck*).

12 **D. Defendant San Diego Sheriff’s Department**

13 The Court also finds Plaintiff’s Complaint requires sua sponte dismissal pursuant
14 to 28 U.S.C. § 1915(e)(2)(B)(ii) and § 1915A(b)(1) to the extent it seeks relief under
15 § 1983 against the San Diego Sheriff’s Department. The San Diego Sheriff’s
16 Department, unlike the County of San Diego itself, is not subject to suit under § 1983.
17 *See Vance v. County of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996) (“Naming a
18 municipal department as a defendant is not an appropriate means of pleading a § 1983
19 action against a municipality.”); *Powell v. Cook County Jail*, 814 F. Supp. 757, 758 (N.D.
20 Ill. 1993) (“Section 1983 imposes liability on any ‘person’ who violates someone’s
21 constitutional rights ‘under color of law.’ Cook County Jail is not a ‘person.’”).
22 Therefore, while the County of San Diego may be considered a “person” subject to suit
23 under § 1983, *see Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006)
24 (citing *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690 (1978)), its Sheriff’s Department
25 may not.

26 **E. Medical care claims**

27 Plaintiff alleges that he was treated by an unnamed medical doctor while housed by
28 the San Diego Sheriff’s Department for “blood and discharge” coming from his ear due

1 to the alleged excessive force incident. (Compl. at 6.) Plaintiff claims the Doctor
2 provided him with “ear drops and antibiotics” but only referred to his condition as a
3 “mild ear infection.” (*Id.*)

4 Prison officials are liable only if they are deliberately indifferent to the prisoner’s
5 serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976); *see also Clouthier*
6 *v. Cnty. of Contra Costa*, 591 F.3d 1232, 1241-44 (9th Cir. 2010) (applying *Estelle*’s
7 Eighth Amendment deliberate indifference standard to inadequate medical care claims
8 alleged to violate a pretrial detainees’ due process rights).

9 Here, Plaintiff claims suffered from “blood and discharge” from his ear for up to
10 twelve days, but he fails to include any further “factual matter” sufficient to show or
11 describe how or to what extent his medical needs were objectively serious. *See*
12 *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991) (defining a “serious medical
13 need” as one which the “failure to treat ... could result in further significant injury or the
14 ‘unnecessary and wanton infliction of pain.’”), *overruled on other grounds by WMX*
15 *Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc) (citing *Estelle*, 429 U.S. at
16 104); *Iqbal*, 556 U.S. at 678 (“[A] complaint must contain sufficient factual matter,
17 accepted as true, to ‘state a claim to relief that is plausible on its face.’”) (quoting
18 *Twombly*, 550 U.S. at 570). The “existence of an injury that a reasonable doctor or patient
19 would find important and worthy of comment or treatment; the presence of a medical
20 condition that significantly affects an individual’s daily activities; or the existence of
21 chronic and substantial pain are examples of indications that a prisoner has a ‘serious’
22 need for medical treatment.” *McGuckin*, 974 F.3d at 1059-60.

23 Moreover, even if the Court assumes Plaintiff’s ear condition was an “objectively
24 serious” medical condition, nothing in his Complaint supports a “reasonable inference
25 that [any individual] defendant” acted with deliberate indifference to his plight. *Iqbal*,
26 556 U.S. at 678. “In order to show deliberate indifference, an inmate must allege
27 sufficient facts to indicate that prison officials acted with a culpable state of mind.”
28 *Wilson v. Seiter*, 501 U.S. 294, 302 (1991). The indifference to medical needs also must

1 be substantial; inadequate treatment due to malpractice, or even gross negligence, does
2 not amount to a constitutional violation. *Estelle*, 429 U.S. at 106; *Toguchi v. Chung*, 391
3 F.3d 1051, 1060 (9th Cir. 2004) (“Deliberate indifference is a high legal standard.”)
4 (citing *Hallett v. Morgan*, 296 F.3d 732, 1204 (9th Cir. 2002); *Wood v. Housewright*, 900
5 F.2d 1332, 1334 (9th Cir. 1990)). A difference of opinion between a pretrial detainee and
6 the doctors or other trained medical personnel at the Jail as to the appropriate course or
7 type of medical attention he requires does not amount to deliberate indifference, *see Snow*
8 *v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (citing *Sanchez v. Vild*, 891 F.2d 240,
9 242 (9th Cir. 1989)), and any delay in providing an appropriate course of treatment does
10 not by itself show deliberate indifference, unless the delay is alleged have caused harm.
11 *See McGuckin*, 974 F.2d at 1060; *Shapley v. Nevada Bd. of State Prison Comm’rs*, 766
12 F.2d 404, 407 (9th Cir. 1985); *Hunt v. Dental Dep’t*, 865 F.2d 198, 200 (9th Cir. 1989)
13 (“[D]elay in providing a prisoner with dental treatment, standing alone, does not
14 constitute an Eighth Amendment violation.”).

15 Plaintiff’s Complaint, as currently pleaded, does not include facts to show that any
16 individual San Diego Sheriff’s Department official actually knew of, yet disregarded any
17 serious medical need. *See Gibson v. Cnty. of Washoe, Nev.*, 290 F.3d 1175, 1193 (9th Cir.
18 2002) (“[D]eliberate indifference requires the defendant to be subjectively aware that
19 serious harm is likely to result from a failure to provide medical care.”). Nor does it
20 allege that any decision to refuse or delay a particular course of medical treatment caused
21 him actual harm. *See McGuckin*, 974 F.2d at 1060. Without more, Plaintiff’s Complaint
22 currently amounts only to “unadorned, the defendant[s]-unlawfully-harmed-me
23 accusation[s],” which “stop[] short of the line, between possibility and plausibility of
24 ‘entitlement to relief’” as to any constitutionally inadequate medical care claim. *Iqbal*,
25 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557).

26 **F. Excessive force claims**

27 The Court does find that Plaintiff’s excessive force allegations are sufficient to
28 survive the “low threshold” for proceeding past the sua sponte screening required by 28

1 U.S.C. §§ 1915(e)(2) and 1915A(b), because it alleges excessive force claims as to
2 Defendants LaRoche and Gomes which are plausible on its face.² *See Wilhelm*, 680 F.3d
3 at 1123. *See Iqbal*, 556 U.S. at 678; *Kingsley v. Hendrickson*, __ U.S. __, 135 S. Ct.
4 2466, 2473 (2015) (“[T]he Due Process Clause protects a pretrial detainee from the use
5 of excessive force that amounts to punishment.”) (citing *Graham v. Connor*, 490 U.S.
6 386, 395 n.10 (1989)). Under *Kingsley*, a pretrial detainee, unlike a convicted prisoner,
7 need not prove that the defendant subjectively knew that the force applied was excessive;
8 that state-of-mind inquiry is “solely ... objective.” *Id.* at 2473; *Austin v. Baker*, 616 F.
9 App’x 365, 366 (9th Cir. 2015); *cf. Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (when
10 prison officials stand accused of using excessive force in violation of the Eighth
11 Amendment, the core judicial inquiry is “... whether force was applied in a good-faith
12 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”).

13 **G. Leave to Amend**

14 A pro se litigant must be given leave to amend his pleading to state a claim unless
15 it is absolutely clear the deficiencies cannot be cured by amendment. *See Lopez*, 203 F.3d
16 at 1130 (noting leave to amend should be granted when a complaint is dismissed under
17 28 U.S.C. § 1915(e) “if it appears at all possible that the plaintiff can correct the defect”).
18 Therefore, the Court will grant him a chance to fix the pleading deficiencies discussed in
19 this Order or he may notify the Court of the intent to proceed as to the excessive force
20 claims only. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v.*
21 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).

22 If Plaintiff notifies the Court of his intention to proceed as to the excessive force
23 claims only, the Court will enter an order dismissing all the remaining claims and
24 _____

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

1 Defendants, as well as directing the United States Marshals Service to effect service of
2 the Complaint on Defendants LaRoche and Gomes.

3 **IV. Conclusion and Order**

4 For all the reasons discussed, the Court:

5 1. **DENIES** Plaintiff's Motion to Appoint Counsel (ECF No. 4) without
6 prejudice.

7 2. **GRANTS** Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
8 (ECF No. 2).

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

16 4. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Watch
17 Commander, George F. Bailey Detention Facility, 446 Alta Road, #5300, San Diego,
18 California 92158.

19 5. **DISMISSES** Plaintiff's claims, with the exception of Plaintiff's excessive
20 force claims, for failing to state a claim upon which § 1983 relief can be granted pursuant to
21 28 U.S.C. §§ 1915(e)(2)(B)(ii) and 1915A(b)(1).

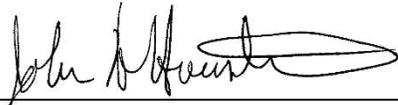
22 6. **GRANTS** Plaintiff forty-five (45) days leave to either: (1) file a First
23 Amended Complaint which cures all the deficiencies of pleading described in this Order;
24 or (2) notify the Court of the intention to proceed as to the excessive force claims only.
25 Plaintiff is cautioned, however, that should he choose to file a First Amended Complaint,
26 it must be complete by itself, comply with Federal Rule of Civil Procedure 8(a), and that
27 any claim not re-alleged will be considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal*
28 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989)

1 (“[A]n amended pleading supersedes the original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d
2 896, 928 (9th Cir. 2012) (noting that claims dismissed with leave to amend which are not
3 re-alleged in an amended pleading may be “considered waived if not repled.”).

4 If Plaintiff fails to follow these instructions and/or files a First Amended
5 Complaint that still fails to state a claim, his case may be dismissed without further leave
6 to amend. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does
7 not take advantage of the opportunity to fix his complaint, a district court may convert the
8 dismissal of the complaint into dismissal of the entire action.”).

9 **IT IS SO ORDERED.**

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12 Dated: October 23, 2017

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14 _____
15 HON. JOHN A. HOUSTON
16 United States District Judge
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