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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

<p>ANTONIO MORA MENCHACA, Jr., Booking No. 16105447,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>SAN DIEGO SHERIFF'S DEPARTMENT,</p> <p style="text-align: right;">Defendant.</p>	<p>Case No.: 3:17-cv-02059-JAH-JMA</p> <p>ORDER:</p> <p>1) GRANTING RENEWED MOTION TO PROCEED IN FORMA PAUPERIS [ECF No. 4]</p> <p>AND</p> <p>2) DISMISSING COMPLAINT FOR FAILING TO STATE A CLAIM PURSUANT TO 28 U.S.C. § 1915(e)(2) AND § 1915A(b)</p>
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ANTONIO MORA MENCHACA, Jr. ("Plaintiff"), while in the custody of the San Diego Sheriff's Department Vista Detention Facility ("VDF") and proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983 on October 5, 2017. See Compl., ECF No. 1.

Plaintiff seeks to sue the San Diego Sheriff's Department based on claims that he was subject to an unreasonable use of force at the George Bailey Detention Facility sometime "between February [and] April 2016." Id. at 3. He seeks \$1,250,000 in general and punitive damages for his health and "mental problems." Id. at 4.

1 **I. Procedural History**

2 At the time he filed his Complaint, Plaintiff did not prepay the filing fee mandated
3 by 28 U.S.C. § 1914(a); instead, he filed a Motion to Proceed In Forma Pauperis (“IFP”)
4 pursuant to 28 U.S.C. § 1915(a) (ECF No. 2). See *Andrews v. Cervantes*, 493 F.3d 1047,
5 1051 (9th Cir. 2007) (a civil action may proceed despite a party’s failure to pay only if
6 the party is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a)).

7 On October 27, 2017, the Court denied Plaintiff’s initial Motion to Proceed IFP
8 because he failed to attach a certified copy of his VDF trust account statement. See ECF
9 No. 3 at 3 (citing 28 U.S.C. § 1915(a)(2)). Nevertheless, the Court also granted Plaintiff
10 forty-five days leave in which to complete and file a properly supported IFP Motion, and
11 the Clerk of Court provided him with a form for doing so. *Id.* at 4.

12 Plaintiff has since filed a renewed Motion to Proceed IFP, together with the
13 accounting which was missing from his original Motion (ECF No. 4).

14 **II. Renewed Motion to Proceed In Forma Pauperis**

15 As Plaintiff now knows, to institute a civil action, he must pay a filing fee of
16 \$400.¹ See 28 U.S.C. § 1914(a). The action may proceed despite his failure to prepay the
17 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). See
18 *Andrews*, 493 F.3d at 1051; *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
19 However, because he is a prisoner, even if he is granted leave to proceed IFP, Plaintiff
20 remains obligated to pay the entire filing fee in “increments” or “installments,” *Bruce v.*
21 *Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182,
22 1185 (9th Cir. 2015), and regardless of whether his action is dismissed. See 28 U.S.C.
23 § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

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25
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 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
2 “certified copy of the trust fund account statement (or institutional equivalent) for ... the
3 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
4 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005) (hereafter “*King*”).
5 From the certified trust account statement, the Court assesses an initial payment of 20%
6 of (a) the average monthly deposits in the account for the past six months, or (b) the
7 average monthly balance in the account for the past six months, whichever is greater,
8 unless the prisoner has no assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4).
9 The institution having custody of the prisoner then collects subsequent payments,
10 assessed at 20% of the preceding month’s income, in any month in which his account
11 exceeds \$10, and forwards those payments to the Court until the entire filing fee is paid.
12 See 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

13 In support of his renewed IFP Motion, Plaintiff has now submitted a Prison
14 Certificate issued by the VDF Facility Commander attesting to his trust account activity
15 and balances for the 6-month period preceding the filing of his Complaint. See ECF No. 4
16 at 5; 28 U.S.C. § 1915(a)(2); S.D. Cal. CivLR 3.2; *Andrews*, 398 F.3d at 1119. This
17 certificate shows that Plaintiff has carried no average monthly balance, has had no
18 monthly deposits to his account and, consequently, no available balance on the books at
19 the time of filing. See ECF No. 4 at 5. Based on this accounting, no initial partial filing
20 fee is assessed. See 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner
21 be prohibited from bringing a civil action or appealing a civil action or criminal judgment
22 for the reason that the prisoner has no assets and no means by which to pay the initial
23 partial filing fee.”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28
24 U.S.C. § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case
25 based solely on a “failure to pay ... due to the lack of funds available to him when
26 payment is ordered.”).

27 Therefore, the Court GRANTS Plaintiff’s renewed Motion to Proceed IFP (ECF
28 No. 4), declines to exact any initial filing fee because his prison certificate indicates he

1 has “no means to pay it,” Bruce, 136 S. Ct. at 629, and directs the Facility Commander at
2 VDF, or his designee, to instead collect the entire \$350 balance of the filing fees required
3 by 28 U.S.C. § 1914 and forward them to the Clerk of the Court pursuant to the
4 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

5 **III. Initial Screening per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

6 A. Standard of Review

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

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

26 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
27 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
28 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for

1 relief [is] . . . a context-specific task that requires the reviewing court to draw on its
2 judicial experience and common sense.” Id. The “mere possibility of misconduct” or
3 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting
4 this plausibility standard. Id.; see also *Moss v. U.S. Secret Service*, 572 F.3d 962, 969
5 (9th Cir. 2009).

6 B. Plaintiff’s Allegations

7 Plaintiff claims the San Diego Sheriff’s Department violated his right to be free
8 from “cruel and unusual punishment” sometime “between February [and] April 2016,”
9 and while he was held in custody at the George Bailey Detention Facility. See ECF No. 1
10 at 2-3. Plaintiff claims he was assaulted by six unidentified Sheriff’s Department officers
11 who were responding to a fight between other inmates inside the “2B module” where he
12 was also housed. Id. at 3. Plaintiff contends he was asleep at the time, did not understand
13 what the officers were “screaming” because he does not “completely understand
14 English,” and just “stood by [his] bunk.” The officers grabbed him, slammed him to the
15 floor, and hit him with closed fists. Id. Plaintiff claims he “unconsciously tr[ie]d to
16 defend [him]self” by holding on to his bunk, but the officers “knock[ed] him out of
17 consciousness,” broke his wrist, head, and ankle and bruised his arm, back, and face. Id.

18 C. 42 U.S.C. § 1983

19 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
20 elements: (1) that a right secured by the Constitution or laws of the United States was
21 violated, and (2) that the alleged violation was committed by a person acting under the
22 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*, 789 F.3d 1030,
23 1035-36 (9th Cir. 2015).

24 D. Analysis

25 First, while it is not clear whether Plaintiff remained a pretrial detainee or had been
26 convicted and was awaiting sentence “between February [and] April 2016,” at the time of
27 the incident, his Complaint contains factual allegations sufficient to show the violation of
28 a right “secured by the Constitution.” 42 U.S.C. § 1983; *West*, 487 U.S. at 48; *Kingsley v.*

1 Hendrickson, ___ U.S. ___, 135 S. Ct. 2466, 2473 (2015) (“[T]he Due Process Clause
2 protects a pretrial detainee from the use of excessive force that amounts to punishment.”)
3 (citing *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)). Under *Kingsley*, a pretrial
4 detainee, unlike a convicted prisoner, need not prove that the defendant subjectively
5 knew that the force applied was excessive; that state-of-mind inquiry is “solely ...
6 objective.” *Id.* at 2473; *Austin v. Baker*, 616 F. App’x 365, 366 (9th Cir. 2015); see also
7 *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (When prison officials stand accused of
8 using excessive force in violation of the Eighth Amendment, the core judicial inquiry is
9 “... whether force was applied in a good-faith effort to maintain or restore discipline, or
10 maliciously and sadistically to cause harm.”).

11 Critically, however, Plaintiff has named only the “San Diego Sheriff’s
12 Department” as a Defendant, and not the individual Sheriff’s Department officers who
13 are alleged to have beaten him. See ECF No. 1 at 1-2. Departments of municipal entities
14 are not “persons” subject to suit under § 1983; therefore, a local law enforcement
15 department (like the San Diego County Sheriff’s Department) is not a proper party. See
16 *Vance v. County of Santa Clara*, 928 F. Supp. 993, 996 (N.D. Cal. 1996) (“Naming a
17 municipal department as a defendant is not an appropriate means of pleading a § 1983
18 action against a municipality.”) (citation omitted); *Powell v. Cook County Jail*, 814 F.
19 Supp. 757, 758 (N.D. Ill. 1993) (“Section 1983 imposes liability on any ‘person’ who
20 violates someone’s constitutional rights ‘under color of law.’ Cook County Jail is not a
21 ‘person.’”).

22 “Persons” under § 1983 are state and local officials sued in their individual
23 capacities, private individuals and entities which act under color of state law, and/or the
24 local governmental entity itself. *Vance*, 928 F. Supp. at 995-96. The Sheriff’s Department
25 is managed by and/or a department of the County of San Diego, but it is not a “person”
26 subject to suit under § 1983. See e.g., *United States v. Kama*, 394 F.3d 1236, 1239 (9th
27 Cir. 2005) (“[M]unicipal police departments and bureaus are generally not considered
28 ‘persons’ within the meaning of section 1983.”); *Rodriguez v. Cnty. of Contra Costa*,

1 2013 WL 5946112 at *3 (N.D. Cal. Nov. 5, 2013) (citing *Hervey v. Estes*, 65 F.3d 784,
2 791 (9th Cir. 1995)) (“Although municipalities, such as cities and counties, are amenable
3 to suit under *Monell [v. Dep’t of Social Servs]*, 436 U.S. 658 (1978)], sub-departments or
4 bureaus of municipalities, such as the police departments, are not generally considered
5 “persons” within the meaning of § 1983.”); *Nelson v. Cty. of Sacramento*, 926 F. Supp.
6 2d 1159, 1170 (E.D. Cal. 2013) (dismissing Sacramento Sheriff’s Department from
7 section 1983 action “with prejudice” because it “is a subdivision of a local government
8 entity,” i.e., Sacramento County); *Gonzales v. City of Clovis*, 2013 WL 394522 (E.D. Cal.
9 Jan. 30, 2013) (holding that the Clovis Police Department is not a “person” for purposes
10 of section 1983); *Wade v. Fresno Police Dep’t*, 2010 WL 2353525 at *4 (E.D. Cal. June
11 9, 2010) (finding the Fresno Police Department to not be a “person” under section 1983).
12 Therefore, Plaintiff cannot pursue his excessive force claims against the Sheriff’s
13 Department. See *Boone v. Deutsche Bank Nat’l Tr. Co.*, No. 2:16-CV-1293-GEB-KJN-
14 PS, 2017 WL 117966, at *3 (E.D. Cal. Jan. 12, 2017) (“Because the Solano County
15 Sheriff’s Department is not a ‘person’ within the meaning of Section 1983, plaintiffs
16 cannot maintain their claims against it under that statute as a matter of law.”).

17 To the extent Plaintiff intends to assert a claim against the County of San Diego
18 itself, his allegations are also insufficient. A municipal entity is liable under section 1983
19 only if Plaintiff alleges his constitutional injury was caused by employees acting pursuant
20 to the municipality’s policy or custom. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*,
21 429 U.S. 274, 280 (1977); *Monell*, 436 U.S. at 691; *Villegas v. Gilroy Garlic Festival*
22 *Ass’n*, 541 F.3d 950, 964 (9th Cir. 2008).

23 While Plaintiff claims to have been subject to excessive force at the hands on
24 several unidentified “Sheriff’s officers,” see ECF No. 1 at 3, he alleges no facts to
25 suggest the force was employed pursuant to any municipal custom, policy, or practice,
26 and a local governmental entity, like the County of San Diego, may not be held
27 vicariously liable under section 1983 simply based on the allegedly unconstitutional acts
28 of its employees. See *Board of Cty. Comm’rs. v. Brown*, 520 U.S. 397, 403 (1997);

1 Monell, 436 U.S. at 691 (“[A] a municipality cannot be held liable solely because it
2 employs a tortfeasor.”); Jackson v. Barnes, 749 F.3d 755, 762 (9th Cir. 2014). Instead,
3 the municipality may be held liable “when execution of a government’s policy or custom
4 ... inflicts the injury.” Monell, 436 U.S. at 694; Los Angeles Cty., Cal. v. Humphries, 562
5 U.S. 29, 36 (2010).

6 For these reasons, Plaintiff’s Complaint must be dismissed sua sponte for failing to
7 state a claim upon which § 1983 relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii);
8 § 1915A(b)(1); Lopez, 203 F.3d at 1126-27; Wilhelm, 680 F.3d at 1121.

9 **IV. Conclusion and Orders**

10 For the reasons explained, the Court:

11 1. **GRANTS** Plaintiff’s Renewed Motion to Proceed IFP pursuant to 28 U.S.C.
12 § 1915(a) (ECF No. 4).

13 2. **DIRECTS** the Watch Commander of VDF, or his designee, to collect from
14 Plaintiff’s 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 amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL**
18 **PAYMENTS MUST BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
19 **ASSIGNED TO THIS ACTION.**

20 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on the Watch
21 Commander, San Diego Sheriff’s Department Vista Detention Facility, 325 South
22 Melrose Drive, Vista, California, 92083.

23 4. **DISMISSES** Plaintiff’s Complaint for failing to state a claim upon which
24 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b), and
25 **GRANTS** him forty-five (45) days leave from the date of this Order in which to file an
26 Amended Complaint which cures the deficiencies of pleading noted, if he can. Plaintiff’s
27 Amended Complaint must be complete by itself without reference to his original
28 pleading. Defendants not named and any claim not re-alleged in his Amended Complaint

1 will be considered waived. See S.D. Cal. CivLR 15.1; Hal Roach Studios, Inc. v. Richard
2 Feiner & Co., Inc., 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading
3 supersedes the original.”); Lacey v. Maricopa Cnty., 693 F.3d 896, 928 (9th Cir. 2012)
4 (noting that claims dismissed with leave to amend which are not re-alleged in an
5 amended pleading may be “considered waived if not repled.”).

6 If Plaintiff fails to file an Amended Complaint within the time provided, the Court
7 will enter a final Order dismissing this civil action based both on Plaintiff’s failure to
8 state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2)(B)
9 and 1915A(b), and his failure to prosecute in compliance with a court order requiring
10 amendment. See Lira v. Herrera, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does
11 not take advantage of the opportunity to fix his complaint, a district court may convert the
12 dismissal of the complaint into dismissal of the entire action.”).

13 **IT IS SO ORDERED.**

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15 Dated: February 13, 2018



16 HON. JOHN A. HOUSTON
17 United States District Judge
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