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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ALEXANDER JACOME,
12 068227-8,

13 Plaintiff,

14 vs.

15 DIMITRIS VLAHAKIS, et al.

16 Defendants.
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Case No.: 3:18-cv-0010-GPC-MDD

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[ECF No. 5]**

**2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[ECF No. 2]; AND**

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)**

24 Alexander Jacome (“Plaintiff”), proceeding pro se, and civilly detained at
25 Atascadero State Hospital (“ASH”) in Atascadero, California, has filed this civil action
26 pursuant to 42 U.S.C. § 1983 (ECF No. 1). Plaintiff has filed a Motion to Proceed In
27 Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 4), along with a
28 Motion to Appoint Counsel (ECF No. 2).

1 Before the Court could conduct the required sua sponte screening, Plaintiff filed a
2 First Amended Complaint (“FAC”) (ECF No. 6) which is the operative pleading.

3 **I. Motion to Proceed IFP**

4 All parties instituting any civil action, suit or proceeding in a district court of the
5 United States, except an application for writ of habeas corpus, must pay a filing fee of
6 \$400.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
7 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
8 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007).

9 However, “[u]nlike other indigent litigants, prisoners proceeding IFP must pay the
10 full amount of filing fees in civil actions and appeals pursuant to the PLRA [Prison
11 Litigation Reform Act].” *Agyeman v. INS*, 296 F.3d 871, 886 (9th Cir. 2002). As defined
12 by the PLRA, a “prisoner” is “any person incarcerated or detained in any facility who is
13 accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of
14 criminal law or the terms and conditions of parole, probation, pretrial release, or
15 diversionary program.” 28 U.S.C. § 1915(h).

16 A “civil detainee” on the other hand, like Plaintiff, is not a “prisoner” within the
17 meaning of the PLRA. *Andrews v. King*, 398 F.3d 1113, 1122 (9th Cir 2005); *Agyeman*,
18 296 F.3d at 886 (holding that INS detainee not also facing criminal charges is not a
19 “prisoner” under § 1915); see also *Page v. Torrey*, 201 F.3d 1136, 1140 (9th Cir. 2000)
20 (person confined under California’s Sexually Violent Predator Law, while a “a ‘prisoner’
21 within the meaning of the PLRA when he served time for his conviction, . . . ceased
22 being a ‘prisoner’ when he was released from the custody of the Department of
23 Corrections.”); *Mullen v. Surtshin*, 590 F. Supp. 2d 1233, 1240 (N.D. Cal. 2008) (holding
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26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative fee of \$50. See
27 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule, § 14 (eff.
28 June 1, 2016). The additional \$50 administrative fee does not apply to persons granted leave to proceed
IFP. *Id.*

1 plaintiff “adjudicated NGI [not guilty by reason of insanity] and committed to [Napa
2 State Hospital] as a result of that adjudication” was “not a prisoner as defined by the
3 PLRA.”).

4 Thus, because Plaintiff is a civilly committed patient at ASH, and not a “prisoner”
5 as defined by 28 U.S.C. § 1915(h) when he filed this action, the filing fee provisions of
6 28 U.S.C. § 1915(b) do not apply. *Andrews*, 398 F.3d at 1122. Therefore, the Court has
7 reviewed Plaintiff’s affidavit of assets, just as it would for any other non-prisoner litigant
8 seeking IFP status, and finds it is sufficient to show that he is unable to pay the fees or
9 post securities required to maintain this action. *See* S.D. CAL. CIVLR 3.2(d). Accordingly,
10 the Court GRANTS Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)
11 (ECF No. 4).

12 **II. Motion for Appointment of Counsel**

13 Plaintiff seeks appointed counsel in this matter on the grounds that he is indigent
14 and is “not experienced as a person who is professionally trained” in legal matters. (Pl.’s
15 Mot., ECF No. 2, at 1-2.) However, there is no constitutional right to counsel in a civil
16 case. *Lassiter v. Dept. of Social Servs*, 452 U.S. 18, 25 (1981); *Palmer v. Valdez*, 560
17 F.3d 965, 970 (9th Cir. 2009). And while 28 U.S.C. § 1915(e)(1) grants the district court
18 limited discretion to “request” that an attorney represent an indigent civil litigant,
19 *Agyeman v. Corr. Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004), this discretion
20 may be exercised only under “exceptional circumstances.” *Id.*; *see also Terrell v. Brewer*,
21 935 F.2d 1015, 1017 (9th Cir. 1991). A finding of exceptional circumstances requires the
22 Court “to consider whether there is a ‘likelihood of success on the merits’ and whether
23 ‘the prisoner is unable to articulate his claims in light of the complexity of the legal issues
24 involved.’” *Harrington v. Scribner*, 785 F.3d 1299, 1309 (9th Cir. 2015) (*quoting*
25 *Palmer*, 560 F.3d at 970).

26 The Court denies Plaintiff’s request without prejudice because nothing in his FAC,
27 or in his Motion to Appoint Counsel, suggests he is incapable of articulating the factual
28 basis for his discrimination claims, which appear “relatively straightforward.” *Id.* In fact,

1 the Court finds, based on its screening of Plaintiff’s FAC under the standards of review
2 discussed below, that Plaintiff has pleaded sufficient factual content to state plausible
3 claims. However, at this initial stage of the pleadings, Plaintiff has not yet shown a
4 likelihood of success on the merits. *Id.* Therefore, the Court finds no “exceptional
5 circumstances” and DENIES his Motion to Appoint Counsel (ECF No. 2) on that basis.

6 **III. Screening Pursuant to 28 U.S.C. § 1915(e)(2)**

7 A complaint filed by *any* person proceeding in forma pauperis is subject to sua
8 sponte dismissal, however, if it is “frivolous, malicious, fail[s] to state a claim upon which
9 relief may be granted, or seek[s] monetary relief from a defendant immune from such
10 relief.” 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001)
11 (per curiam) (holding that “the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to
12 prisoners.”); *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection
13 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis
14 complaint that fails to state a claim.”).

15 All complaints must contain “a short and plain statement of the claim showing that
16 the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Detailed factual allegations are not
17 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
18 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
19 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Determining whether a
20 complaint states a plausible claim for relief [is] . . . a context-specific task that requires the
21 reviewing court to draw on its judicial experience and common sense.” *Id.* The “mere
22 possibility of misconduct” falls short of meeting this plausibility standard. *Id.*; *see also*
23 *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

24 “When there are well-pleaded factual allegations, a court should assume their
25 veracity, and then determine whether they plausibly give rise to an entitlement to relief.”
26 *Iqbal*, 556 U.S. at 679; *see also Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)
27 (“[W]hen determining whether a complaint states a claim, a court must accept as true all
28 allegations of material fact and must construe those facts in the light most favorable to the

1 plaintiff.”); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
2 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).

3 However, while the court “ha[s] an obligation where the petitioner is pro se,
4 particularly in civil rights cases, to construe the pleadings liberally and to afford the
5 petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir.
6 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may not “supply
7 essential elements of claims that were not initially pled.” *Ivey v. Board of Regents of the*
8 *University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

9 As currently pleaded, the Court finds that Plaintiff’s FAC contains factual
10 allegations sufficient to survive the “low threshold” for proceeding past the sua sponte
11 screening required by 28 U.S.C. §§ 1915(e)(2), because it alleges claims which are
12 plausible on its face.² *See Wilhelm*, 680 F.3d at 1123. *See Iqbal*, 556 U.S. at 678.

13 Accordingly, the Court will direct the U.S. Marshal to effect service upon the
14 named Defendants on Plaintiff’s behalf.³ *See* 28 U.S.C. § 1915(d) (“The officers of the
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17 ² Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative
18 of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [any individual
19 defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
20 Cal. 2007).

21 ³ Plaintiff must, of course, identify the Defendants he references only as “SDCJ
22 Intake/Booking Deputies, 3-4 Deputies at ARCO in IB and Officers who trained
23 Defendants,” whose names are presently unknown (ECF No. 6), by their true names and
24 substitute those individual persons in place of each unnamed Doe by amending his
25 Complaint to identify each of those parties before the United States Marshal will directed
26 to execute service upon any of them. *See Aviles v. Village of Bedford Park*, 160 F.R.D.
27 565, 567 (1995) (Doe defendants must be identified and served within [90] days of the
28 commencement of the action against them); Fed. R. Civ. P. 15(c)(1)(C) & 4(m). Generally,
Doe pleading is disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). It is in
most instances impossible 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

1 court shall issue and serve all process, and perform all duties in [IFP] cases.”); FED. R.
2 CIV. P. 4(c)(3) (“[T]he court may order that service be made by a United States marshal
3 or deputy marshal . . . if the plaintiff is authorized to proceed in forma pauperis under 28
4 U.S.C. § 1915.”).

5 **IV. Conclusion and Order**

6 For the reasons explained, the Court:

7 1. **DENIES** Plaintiff’s Motion to Appoint Counsel (ECF No. 2);

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

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

18 4. **ORDERS** the U.S. Marshal to serve a copy of the FAC and summons upon
19 the named Defendants as directed by Plaintiff on the USM Form 285s provided to him.

20 All costs of that service will be advanced by the United States. *See* 28 U.S.C. § 1915(d);
21 FED. R. CIV. P. 4(c)(3);

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25 Plaintiff’s claims against the Doe Defendants at this time because where the identity of an
26 alleged party is not known prior to filing of an action, Ninth Circuit authority permits
27 Plaintiff the opportunity to pursue appropriate discovery to identify the unknown Does,
28 unless it is clear that discovery would not uncover their identity, or his 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).

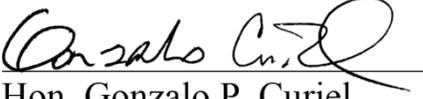
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2 5. **ORDERS** Defendants, once they have been served, to reply to Plaintiff's
3 FAC within the time provided by the applicable provisions of Federal Rule of Civil
4 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally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

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

20 **IT IS SO ORDERED.**

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22 Dated: February 14, 2018

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24 Hon. Gonzalo P. Curiel
25 United States District Judge
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