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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 WILLARD RICHARD STROUD, JR.,
11 Plaintiff,
12 v.
13 SHERIFF WILLIAM D. GORE, et al.,
14 Defendants.

Case No.: 18-CV-515 JLS (MDD)

**ORDER GRANTING MOTION TO
DISMISS**

(ECF No. 17)

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16 Presently before the Court is Defendants Sheriff William D. Gore and Sergeant Paul
17 Michalke's (the "Responding Defendants") Motion to Dismiss First Amended Complaint
18 ("FAC") ("Mot.," ECF No. 17). Also before the Court are the Responding Defendants'
19 Notice of Lack of Opposition to (ECF No. 23), Plaintiff's Response in Opposition to
20 ("Opp'n," ECF No. 25), the Responding Defendants' Reply to Plaintiff's Opposition to
21 ("Reply," ECF No. 26), and Plaintiff's second Opposition to ("Sur-Reply," ECF No. 29)
22 the Motion. The Court vacated the hearing on the Motion and took the matter under
23 submission without oral argument. ECF No. 22. After considering the Parties' arguments
24 and the law, the Court **GRANTS** the Responding Defendants' Motion.

25 **BACKGROUND**

26 On March 13, 2016 at approximately 8:30 p.m., Plaintiff was walking in the parking
27 lot of the George Bailey Detention Facility to visit a family member. FAC, ECF No. 15,
28 at 2. Defendants stopped Plaintiff and requested that he provide them with identification,

1 which he did. *Id.* They also asked Plaintiff what he had previously been arrested for, which
2 Plaintiff told them. *Id.* Defendants then informed Plaintiff that he would need to submit
3 to a search of his person and vehicle before he would be allowed to continue with his visit.
4 *Id.* Plaintiff declined. *Id.*

5 At that point, eight to ten San Diego County Sheriff's Deputies grabbed Plaintiff and
6 slammed him against a vehicle in the parking lot. *Id.* at 3. Although Plaintiff begged the
7 officers to stop, they continued to smash his face against the vehicle and to twist his wrists
8 behind his back. *Id.* Because Plaintiff had been holding his phone when the attack began,
9 the phone fell to the ground. *Id.* The officers then threw Plaintiff to the ground, where
10 they "jumped on his back with their knees" and handcuffed him. *Id.* One officer jumped
11 on the handcuffs, injuring Plaintiff's wrists. *Id.*

12 Plaintiff could not feel his hands and told the officers that he was in a great deal of
13 pain. *Id.* The officers asked Plaintiff whether he required medical attention. *Id.* Plaintiff
14 told them that he did. *Id.* The officers called the paramedics, who briefly examined
15 Plaintiff and informed him that he had no broken bones. *Id.* Nonetheless, Plaintiff
16 continues to suffer nerve damage to his wrists and lower back. *Id.* at 8.

17 Plaintiff was then arrested for being drunk and disorderly and was placed in the back
18 of a patrol car for over an hour before being transported to jail, during which time the
19 numbness in his hands worsened. *Id.* at 3. Although he repeatedly asked the defendants
20 to loosen his handcuffs, they did not do so. *Id.* Plaintiff also asked repeatedly for his cell
21 phone, but the officers told them that they had no idea what had happened to it. *Id.* at 4.
22 Plaintiff was not given a toxicology or sobriety test, despite requesting one from the
23 officers. *Id.* After Plaintiff's arrest, the officers then searched his vehicle without his
24 consent. *Id.*

25 After Plaintiff was released from custody the following day, March 13, 2016, at
26 which time he returned to the George Bailey Detention Facility to retrieve his vehicle. *Id.*
27 Plaintiff asked a patrol officer in the parking lot whether his cell phone, which was not
28 logged as his property during the booking process, had been turned in to the lost and found.

1 *Id.* The officer gave Plaintiff’s contact information to Sergeant Paul Michalke, who called
2 Plaintiff a couple days later to tell Plaintiff that the officers had no idea what had happened
3 to Plaintiff’s phone. *Id.* Sergeant Michalke told Plaintiff that a phone was found on the
4 ground but that it belonged to one of the officers, and suggested that Plaintiff file a claim
5 with the Sheriff’s Department for the loss of his phone. *Id.* at 5. Plaintiff’s phone had cost
6 \$900 dollars and contained personal information and photographs that Plaintiff cannot
7 replace. *Id.* at 4. Ultimately, the Sheriff’s Department refused Plaintiff’s claim because
8 the cell phone bill was in Plaintiff’s sister’s name, not his own. *Id.* at 6, 8.

9 Sergeant Michalke also told Plaintiff that Sergeant Michalke did not believe that
10 Plaintiff had been under the influence of drugs or alcohol on the night of Plaintiff’s arrest,
11 but that Sergeant Michalke agreed to “go along with” the other two officers in charging
12 Plaintiff with public intoxication. *Id.* at 5. Although Plaintiff was originally arrested for
13 public intoxication, he was later charged with resisting arrest. *Id.* Plaintiff was found not
14 guilty at trial. *Id.* at 7. Sergeant Michalke did not testify at the trial. *Id.*

15 On March 9, 2018, Plaintiff filed this action pursuant to 42 U.S.C. § 1983 against
16 Sheriff William D. Gore, Detective Lizarraga, Sergeant Michalke, Detective Oshea, and
17 the City of San Diego Paramedics Services. *See* ECF No. 1. Plaintiff was granted leave
18 to proceed *in forma pauperis*, *see* ECF No. 4, and the United States Marshals Service
19 served Sheriff Gore and Sergeant Michalke on April 27, 2018. *See* ECF Nos. 6, 10. The
20 Sheriff’s Office refused to accept service on Detectives Lizarraga and Oshea and the City
21 of San Diego Paramedics Services. *See* ECF Nos. 7–9.

22 The Responding Defendants filed a motion to dismiss Plaintiff’s original complaint
23 on May 18, 2018. *See* ECF No. 11. After the Court granted Plaintiff leave to file the
24 operative First Amended Complaint, *see* ECF Nos. 14, 15, the Court denied as moot the
25 prior motion to dismiss. *See* ECF No. 16. The instant Motion followed on June 4, 2018.
26 *See* ECF No. 17.

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1 Plaintiff's First Amended Complaint adds as defendants Detective M. Snelling,
2 Deputy K. Racine, and Paramedic E. Lancaster. *See generally* ECF No. 15. No attempt
3 has been made to serve these defendants or to re-serve Detectives Lizarraga or Shea.¹

4 LEGAL STANDARD

5 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
6 defense that the complaint "fail[s] to state a claim upon which relief can be granted,"
7 generally referred to as a motion to dismiss. The Court evaluates whether a complaint
8 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil
9 Procedure 8(a), which requires a "short and plain statement of the claim showing that the
10 pleader is entitled to relief." Although Rule 8 "does not require 'detailed factual
11 allegations,' . . . it [does] demand more than an unadorned, the-defendant-unlawfully-
12 harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
13 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a plaintiff's obligation to
14 provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and
15 conclusions, and a formulaic recitation of the elements of a cause of action will not do."
16 *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A
17 complaint will not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual
18 enhancement.'" *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

19 To survive a motion to dismiss, "a complaint must contain sufficient factual matter,
20 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting
21 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
22 when the facts pled "allow the court to draw the reasonable inference that the defendant is
23 liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at
24 556). That is not to say that the claim must be probable, but there must be "more than a
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27 ¹ Plaintiff's First Amended Complaint lists "Detective B. Shea" rather than "Detective Oshea" as a
28 defendant. Because the U.S. Marshals Service reported that the Sheriff's Office had no detectives with
the last name Oshea, *see* ECF No. 7, the Court assumes that this is a correction and that these defendants
are the same individual.

1 sheer possibility that a defendant has acted unlawfully.” *Id.* Facts “‘merely consistent
2 with’ a defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting
3 *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions”
4 contained in the complaint. *Id.* This review requires context-specific analysis involving
5 the Court’s “judicial experience and common sense.” *Id.* at 678 (citation omitted).
6 “[W]here the well-pleaded facts do not permit the court to infer more than the mere
7 possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the
8 pleader is entitled to relief.’” *Id.*

9 ANALYSIS

10 Plaintiff alleges four causes of action: (1) excessive force, (2) unlawful seizure,
11 (3) unlawful arrest and unlawful detention, and (4) malicious prosecution. *See* FAC at 11–
12 12; Sur-Reply at 9–15. Because Plaintiff does not specify in his FAC which causes of
13 action are alleged against which Defendants, the Court assumes that all causes of action
14 are alleged against every Defendant.

15 The Responding Defendants move to dismiss Plaintiff’s First Amended Complaint
16 pursuant to Rule 12(b)(6) on the grounds that Plaintiff’s complaint does not comply with
17 Federal Rule of Civil Procedure 8, Sheriff Gore was not personally involved in the incident,
18 and it is unclear what actions Sergeant Michalke took that violated Plaintiff’s constitutional
19 rights.² *See generally* Mot. at 5–10.

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24 ² The Responding Defendants also request, *see* Reply at 2, that the Court disregard Plaintiff’s late-filed
25 Opposition, which was accepted *nunc pro tunc* on discrepancy. *See* ECF No. 24. Plaintiff responds that
26 he “filed the opposition to [the Responding] Defendants’ motion to dismiss only by research of the
27 procedure and by sheer luck” because “Plaintiff had no idea that each pleading must be responded to in a
28 timely manner.” Sur-Reply at 5. In light of Plaintiff’s pro se status and the circumstances, the Court
believes that disregarding Plaintiff’s Opposition would be inappropriate. *See, e.g., Haynes v. R.W. Selby
& Co.*, 338 F. App’x 694, 695 (9th Cir. 2009) (finding that district court erred in dismissing action for
failure timely to file an opposition where party was unrepresented and “there was no argument or evidence
of prejudice to defendants”).

1 **I. Compliance with Federal Rule of Civil Procedure 8**

2 Pursuant to Rule 8(a)(2), “[a] pleading that states a claim for relief must contain . . . a
3 short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.
4 R. Civ. P. 8(a)(2). Rule 8(d)(1) requires that “[e]ach allegation must be simple, concise,
5 and direct.” Fed. R. Civ. P. 8(d)(1). The Responding Defendants argue that “Plaintiff’s
6 First Amended Complaint is confusing and conclusory and fails to give the responding
7 defendants . . . adequate notice of what particular claims he is asserting against them,” and
8 therefore request that “Plaintiff’s First Amended Complaint . . . be dismissed pursuant to
9 Rule 8.” Mot. at 6; *see also* Reply at 2–3.

10 Plaintiff counters that, as a pro se litigant, his pleadings are to be construed liberally,
11 *see* Opp’n at 11 (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)), and adds that “[i]llegal
12 search constitutes a Fourth Amendment violation, Excessive Force, False Arrests,
13 Malicious Prosecution, Cruel and Unusual Punishment Constitutes an Eighth Amendment
14 violation and Due Process and deprivation of Due Process Constitutes the Violation of the
15 Fourteenth Amendment; and Plaintiff has illustrated each component of the law in his
16 Complaint.” *Id.* at 12–13. Plaintiff also claims that the Responding Defendants’ argument
17 “appears to be a legal ‘loophole’ that allows Defendants to petition the Court to dismiss a
18 Complaint based on ambiguity and inadequacy.” Sur-Reply at 7.

19 Ninth Circuit precedent is clear that “[f]ailure, in an initial complaint, to set forth the
20 claim by means of a short and plain statement, as required by Rule 8(a)(2), is not a ground
21 for dismissal of an action with prejudice, since there are procedures available for correcting
22 a vague or prolix complaint,” such as a Rule 12(e) motion for a more definite statement.
23 *DeWitt v. Pail*, 366 F.2d 682, 685 (9th Cir. 1966) (citing *Glus v. Brooklyn E. Dist.*
24 *Terminal*, 359 U.S. 231, 235 (1959)). It is only “[w]here a plaintiff persists in violating
25 Rule 8(a)(2), after being given an opportunity to replead,” that “dismissal may be proper.”
26 *Id.* at 685 n.1 (citing *Corcoran v. Yorth*, 347 F.2d 222, 223 (9th Cir. 1965); *Agnew v.*
27 *Moody*, 330 F.2d 868, 870–71 (9th Cir. 1964)).

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1 Plaintiff's First Amended Complaint could be clearer as to his precise causes of
2 action and against which particular defendants those causes of action are asserted.
3 Nonetheless, if the Responding Defendants truly believed that the First Amended
4 Complaint was so defective as to fail to provide adequate notice as to what causes of action
5 were being asserted against them, their proper recourse was under Rule 12(e). The Court
6 therefore declines to dismiss Plaintiff's First Amended Complaint pursuant to Rule
7 12(b)(6) for failure to comply with Rule 8(a)(2), electing instead to address Plaintiff's First
8 Amended Complaint on the merits.

9 **II. Causes of Action Against Sheriff Gore**

10 The Responding Defendants argue that any claims against Sheriff Gore must be
11 dismissed because "[t]here are no factual allegations indicating Sheriff Gore was involved
12 in the incident or even has awareness of its existence." Mot. at 6. Plaintiff explains in his
13 First Amended Complaint that he "has included the aforementioned named defendants in
14 his complaint because Sheriff William Gore is the highest ranking officer in San Diego
15 County Sheriff[']s Department thus he is responsible for the actions and behavior of the
16 subordinate officers within his department." FAC at 9. Plaintiff adds that "Sheriff Gore
17 has deputies within his department who act without regard to civil procedure and California
18 State regulations as it relates to having probable cause to search and arrest an individual
19 without a justifiable reason and without following Federal and State rules as prescribed by
20 the Constitution of the United States of America." *Id.*

21 As the Responding Defendants note, *see* Mot. at 6, "[a] supervisor is only liable for
22 constitutional violations of his subordinates if the supervisor participated in or directed the
23 violations, or knew of the violations and failed to act to prevent them. There is no
24 respondeat superior liability under section 1983." *Taylor v. List*, 880 F.2d 1040, 1045 (9th
25 Cir. 1989) (citing *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680–
26 81 (9th Cir. 1984)). Because such allegations are wholly lacking in Plaintiff's First
27 Amended Complaint, the Court **GRANTS** the Responding Defendants' Motion and
28 **DISMISSES WITHOUT PREJUDICE** all causes of action against Sheriff Gore.

1 **III. Causes of Action Against Sergeant Michalke**

2 The Responding Defendants contend that “[i]t is entirely unclear what constitutional
3 right under § 1983 Plaintiff believed Sergeant Michalke violated” because “any specific
4 allegations in the complaint involving Sergeant Michalke are confined to discussions
5 regarding Plaintiff’s cell phone” but “Plaintiff has . . . failed to present sufficient facts
6 supporting that Sergeant Michalke effectuated a constitutional injury” rather than that
7 “Sergeant Michalke attempted to assist Plaintiff in tracking down the allegedly lost phone.”
8 Mot. at 8–9.

9 As indicated above, Plaintiff alleges four causes of action: (1) excessive force,
10 (2) unlawful seizure, (3) unlawful arrest and unlawful detention, and (4) malicious
11 prosecution. *See* FAC at 11–12; Sur-Reply at 9–15. Plaintiff explains in his First Amended
12 Complaint that he “has included Sergeant Paul Michalke in his complaint due to the fact
13 that [Sgt. Michalke] is the contact person that was given to plaintiff after the plaintiff was
14 subsequently released from jail the following day.” FAC at 10. From the face of Plaintiff’s
15 First Amended Complaint, it appears that Sergeant Michalke was not among the officers
16 involved in the events alleged on March 12, 2016. Instead, Sergeant Michalke first entered
17 the scene “a few days” after Plaintiff was released from jail on March 13, 2016, when
18 Sergeant Michalke “called [Plaintiff] at his place of employment” about Plaintiff’s cell
19 phone. *See id.* at 4. Sergeant Michalke gave conflicting information about the fate of
20 Plaintiff’s cell phone, *see id.* at 4–5, and eventually suggested that Plaintiff file a claim
21 with the Sheriff’s Department, *see id.* at 5, which was denied. *See id.* at 6, 8. The Court
22 therefore concludes that, to the extent Plaintiff asserts his first, second, or third causes of
23 action against Sergeant Michalke, Plaintiff fails to state a claim because he alleges no
24 involvement by Sergeant Michalke in the use of force, the unlawful seizure of Plaintiff’s
25 cell phone, or Plaintiff’s detention or arrest.

26 With regard to Plaintiff’s fourth cause of action for malicious prosecution, “the tort
27 has traditionally been regarded as a disfavored cause of action” because “courts have long
28 recognized that the tort has the potential to impose an undue ‘chilling effect’ on the

1 ordinary citizen’s willingness to report criminal conduct or to bring a civil dispute to court.”
2 *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 872 (1989) (citing *Babb v. Super.*
3 *Ct.*, 3 Cal. 3d 841, 847 (1971); *Jaffe v. Stone*, 18 Cal. 2d 146, 159–160 (1941)). “Under
4 the governing authorities, in order to establish a cause of action for malicious prosecution
5 of either a criminal or civil proceeding, a plaintiff must demonstrate ‘that the prior action
6 (1) was commenced by or at the direction of the defendant and was pursued to a legal
7 termination in his, plaintiff’s, favor . . . ; (2) was brought without probable cause . . . ; and
8 (3) was initiated with malice.’” *Sheldon Appel Co.*, 47 Cal. 3d at 871–72 (quoting *Bertero*
9 *v. Nat’l Gen. Corp.*, 13 Cal. 3d 43, 50 (1974)) (citing Rest. 2d Torts §§ 653–681B (1977)).
10 A defendant may lack probable cause where “he relies upon facts which he has no
11 reasonable cause to believe to be true.” *Sangster v. Paetkau*, 68 Cal. App. 4th 151, 164
12 (1998). The standard is objective, *see id.* (citing *Sheldon Appel Co.*, 47 Cal. 3d at 878–79),
13 and, “[i]n making its determination whether the prior action was legally tenable, the trial
14 court must construe the allegations of the underlying complaint liberally in a light most
15 favorable to the malicious prosecution defendant.” *Sangster v. Paetkau*, 68 Cal. App. 4th
16 151, 165 (1998) (citing *Leonardini v. Shell Oil Co.*, 216 Cal. App. 3d 547, 571 (1989)).

17 Here, Plaintiff alleges that Sergeant Michalke told Plaintiff that “[Sergeant
18 Michalke] did not believe that [Plaintiff] was under the influence of drugs of alcohol on
19 the night of March 12, 2016[,] but only agreed to charge [Plaintiff] [with public
20 intoxication] to go along with what the other two reporting officers who wanted to charge
21 [Plaintiff] on these false charges.” FAC at 5. Plaintiff was later charged with resisting
22 arrest. *Id.* He was eventually acquitted of the charge. *Id.* at 7. Even construing these facts
23 most favorable to Sergeant Michalke, the Court finds that the first two elements of
24 Plaintiff’s cause of action are satisfied.

25 As for the third element, “[t]he ‘malice’ element of the malicious prosecution tort
26 relates to the subjective intent or purpose with which the defendant acted in initiating the
27 prior action, and past cases establish that the defendant’s motivation is a question of fact
28 to be determined by the jury.” *Sheldon Appel Co.*, 47 Cal. 3d at 874 (citing *Runo v.*

1 *Williams*, 162 Cal. 444, 450 (1912); Rest. 2d Torts § 681B(2)(b) (1977)). The California
2 Court of Appeal has explained:

3 [M]alice is present when proceedings are instituted primarily for
4 an improper purpose. Suits with the hallmark of an improper
5 purpose are those in which: (1) the person initiating them does
6 not believe that his claim may be held valid; (2) the proceedings
7 are begun primarily because of hostility or ill will; (3) the
8 proceedings are initiated solely for the purpose of depriving the
9 person against whom they are initiated of a beneficial use of his
10 property; (4) the proceedings are initiated for the purpose of
forcing a settlement which has no relation to the merits of the
claim.

11 *Sierra Club Found. v. Graham*, 72 Cal. App. 4th 1135, 1157 (1999) (internal quotation
12 marks and alteration omitted).

13 [B]y itself, the conclusion that probable cause is absent logically
14 tells the trier of fact nothing about the defendant’s subjective
15 state of mind. . . . [T]he presence of malice must be established
16 by other, additional evidence. [¶] . . . [T]hat evidence must
17 include proof of either actual hostility or ill will on the part of the
18 defendant or a subjective intent to deliberately misuse the legal
system for personal gain or satisfaction at the expense of the
wrongfully sued defendant.

19 *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 498–99 (1998) (footnote omitted).

20 Such allegations are missing here. Although Plaintiff alleges that Sergeant Michalke
21 acceded to charging Plaintiff with public intoxication to “go along with” two of the
22 arresting officers, *see* FAC at 5, there is no allegation that he did so out of any hostility or
23 ill will toward Plaintiff. Plaintiff’s fourth cause of action against Sergeant Michalke must
24 therefore fail.

25 Consequently, the Court **GRANTS** the Responding Defendants’ Motion and
26 **DISMISSES WITHOUT PREJUDICE** Plaintiff’s causes of action against Sergeant
27 Michalke.

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1 **CONCLUSION**

2 In light of the foregoing, the Court **GRANTS** Defendants’ Motion (ECF No. 17) and
3 **DISMISSES WITHOUT PREJUDICE** Plaintiff’s First Amended Complaint as to
4 Defendants Sheriff William D. Gore and Sergeant Paul Michalke. Because the dismissal
5 is without prejudice, Plaintiff **MAY FILE** a Second Amended Complaint within thirty (30)
6 days of the electronic docketing of this Order. *Should Plaintiff fail to file an amended*
7 *complaint, dismissal of Plaintiff’s claims as to Defendants Sheriff Gore and Sergeant*
8 *Michalke shall be with prejudice.*

9 The Court also notes that Plaintiff has failed to serve Defendants Detective Jesus
10 Lizarraga, Detective B. Shea, Detective M. Snelling, Deputy K. Racine, and Rural/Metro
11 Fire Paramedics Services E. Lancaster. Consequently, the Clerk of the Court **SHALL**
12 **ISSUE** a summons as to Plaintiff’s First Amended Complaint (ECF No. 15) upon
13 Defendants and forward it to Plaintiff along with a blank U.S. Marshal Form 285. The
14 Clerk of the Court **SHALL PROVIDE** Plaintiff with a certified copy of his First Amended
15 Complaint (ECF No. 15) and a summons so that he may serve the Defendants. Once he
16 receives this “IFP Package,” Plaintiff **SHALL COMPLETE** Form 285 as completely and
17 accurately as possible, including an address where Defendants may be found and/or subject
18 to service pursuant to Civil Local Rule 4.1(c) and returning it to the United States Marshal
19 according to the instructions the Clerk of the Court provides in the letter accompanying his
20 IFP package. Upon receipt of Plaintiff’s completed Form 285, the U.S. Marshal timely
21 **SHALL SERVE** a copy of Plaintiff’s First Amended Complaint and summons upon
22 Defendants as directed by Plaintiff, with all costs advanced by the United States. *See* 28
23 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3). Once they have been served, Defendants
24 **SHALL RESPOND** to Plaintiff’s First Amended Complaint within the time provided by
25 the applicable provisions of Federal Rule of Civil Procedure 12(a).

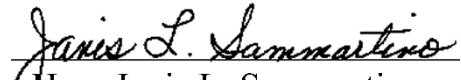
26 Should Plaintiff elect to file a Second Amended Complaint, the Clerk of the Court
27 **SHALL ISSUE** a new summons and all parties **SHALL ABIDE** by the above procedure.

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1 *Failure timely to serve any unserved Defendants may result in dismissal without*
2 *prejudice of Plaintiff's claims as to those Defendants.*

3 **IT IS SO ORDERED.**

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5 Dated: November 27, 2018


Hon. Janis L. Sammartino
United States District Judge

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