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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARCELO LARIOS FERNANDEZ,
Reg. No. 87515-298,

Plaintiff,

v.
MCC, Metropolitan Correctional Center;
C/O SANDOVAL, John DOES 1-4,

Defendants.

Case No.: 3:20-cv-01265-GPC-AHG

**ORDER DIRECTING U.S.
MARSHAL TO EFFECT SERVICE
OF THIRD AMENDED
COMPLAINT UPON DEFENDANT
C/O SANDOVAL PURSUANT
TO 28 U.S.C. § 1915(d) AND
Fed. R. Civ. P. 4(c)(3)**

I. Procedural History

On October 18, 2021, the Court dismissed Plaintiff Marcelo Larios Fernandez’s Second Amended Complaint (“SAC”) *sua sponte* pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), but granted him leave in which to file a Third Amended Complaint against “C/O Sandoval and any [] other individual MCC or BOP officer he is able to identify as having participated in his alleged assault [at MCC] on October 14 or 15, 2019.” *See* ECF No. 26 at 13. Because Plaintiff is proceeding pro se, the Court’s Order provided him with notice of his SAC’s pleading deficiencies, explained the legal standards governing his claims, and granted him time and one final opportunity to plead further factual allegations with respect to his excessive force claims in a Third Amended Complaint (“TAC”). *See id.*

1 at 8–12. Plaintiff has since filed his TAC seeing damages pursuant to *Bivens v. Six*
2 *Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and
3 naming only C/O Sandoval and John Does 1–4 as parties. *See* ECF No. 30 at 2. While the
4 caption of his TAC also lists the MMC (Metropolitan Correctional Center) as a Defendant,
5 *id.* at 1, 12, the Court has previously dismissed Plaintiff’s claims against the MCC, and has
6 denied him leave to amend as to the MCC. *See* ECF No. 26 at 12.

7 **II. Screening Pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

8 **A. Standard of Review**

9 As Plaintiff now knows, his TAC, like his original, First, and Second Amended
10 Complaints, requires a pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and
11 § 1915A(b). Under these statutes, the Court must *sua sponte* dismiss a prisoner’s IFP
12 complaint, or any portion of it, which is frivolous, malicious, fails to state a claim, or seeks
13 damages from defendants who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27
14 (9th Cir. 2000) (en banc) (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621
15 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of
16 [screening] is ‘to ensure that the targets of frivolous or malicious suits need not bear the
17 expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014)
18 (quoting *Wheeler v. Wexford 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 F.3d
22 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
23 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 relief
 4 [is] ... a context-specific task that requires the reviewing court to draw on its judicial
 5 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
 6 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
 7 standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

8 **B. Factual Allegations**

9 On October 15, 2019, at approximately 7:30 a.m., Plaintiff alleges he was placed in
 10 “the care and custody of [] 4 unnamed officers & C/O Sandoval,” and searched “by an
 11 unnamed officer on the 2d Floor” of the MCC in San Diego prior to his transport for a
 12 scheduled court date.¹ *See* TAC at 12. Plaintiff alleges the unnamed officer ordered him
 13 to remove his jumpsuit and other clothing “per normal searching guidelines,” but Plaintiff
 14 had “trouble removing [his] jumpsuit.” *Id.* The officer “responded with shouting & verbal
 15 abuses,” was “annoy[ed]” Plaintiff was unable to timely comply with his requests, and
 16 solicited C/O Sandoval’s “assistance in completing the search of [Plaintiff’s] person.” *Id.*

17 After Sandoval arrived, Plaintiff alleges he was removed to a “laundry room” where
 18 Sandoval “forcefully assisted in the removal of [Plaintiff’s] clothes” and the search of his
 19 person. *Id.* at 13. Once the search was complete, Plaintiff alleges he was re-cuffed, and
 20 moved to a different room, where he was “made to wait for approximately one and a half
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 23 ¹ Plaintiff was arrested on September 16, 2019, at the San Ysidro Port of Entry by a Customs and Border
 24 Protection Officer and charged with importation of a controlled substance in violation of 21 U.S.C. §§ 952
 25 and 960. *See United States v. Larios-Fernandez*, 3:19-cr-04102-BAS-1 (ECF No. 1). On September 23,
 26 2019, he was ordered detained pending trial in that case. *Id.*, *see also* ECF No. 10. The case was dismissed
 27 on the government’s oral motion on January 10, 2020. *Id.*, ECF No. 26. On January 9, 2020, however,
 28 Plaintiff was indicted by a federal grand jury on one count of importation of heroin in violation of 21
 U.S.C. §§ 952 and 960 in the related case entitled *United States v. Marcelo Larios-Fernandez*, 3:20-cr-
 0162-BAS-1. *See id.*, ECF Nos. 1, 2; *Bias v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (A court
 “may take notice of proceedings in other courts, both within and without the federal judicial system, if
 those proceedings have a direct relation to matters at issue.”) (quoting *Bennett v. Medtronic, Inc.*, 285
 F.3d 801, 803 n.2 (9th Cir. 2002)).

1 hours.” *Id.*

2 When Sandoval and the “4 unnamed officers” returned, Plaintiff complained his
3 handcuffs were too tight, and requested that they be adjusted. *Id.* “After his request C/O
4 Sandoval & the 4 unnamed officers proceeded to throw [Plaintiff] to the floor, kick [him]
5 in [his] body & face, punch [him] in the head, and generally beat [him] & abuse [him].” *Id.*
6 Plaintiff claims to have sustained a concussion, injuries to his left eyebrow, and “cuts &
7 bruises [to] both wrists where [he] was bound.” *Id.*

8 After the “beating,” Plaintiff was “moved to the 3d floor” where he was “seen by
9 C/O Castro” who made an incident report, and who “took pictures and C/O Sandoval’s
10 statement.” *Id.* at 5, 13.² Plaintiff was then transported to his “scheduled court date.” *Id.* at
11 13. On the next morning, however, Plaintiff alleges he was transported to Paradise Valley
12 Hospital “due to [his] injuries” from the day before. *Id.* Plaintiff claims his injuries were
13 so severe he remained in the hospital for 13 days, and “missed [his] following court date
14 due to [his] hospitalization and rehabilitation.” *Id.* He seeks \$2 million in general and
15 punitive damages “due to the trauma[,] pain and suffering” he endured. *Id.* at 5.

16 As the Court noted in its previous screening Orders, in order to state an excessive
17 force claim as a pretrial detainee, Plaintiff must plead factual content sufficient to plausibly
18 show that individual Defendants “purposely or knowingly” employed force against him in
19 an “objectively unreasonable” manner. *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97
20 (2015); *Iqbal*, 556 U.S. at 678. Objective reasonableness turns on the “facts and
21 circumstances of each particular case.” *Kingsley*, 576 U.S. at 397 (citing *Graham v.*
22 *Connor*, 490 U.S. 386, 396 (1989)); *see also Hyde v. City of Willcox*, __ F. 4th __, No. 21-
23 15142, 2022 WL 55542, at *3 (9th Cir. Jan. 6, 2022). Those facts and circumstances
24 include “the relationship between the need for the use of force and the amount of force
25 used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit
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28 ² Plaintiff does not name C/O Castro as a party and does not allege Castro was one of the 4 unnamed
officers who beat him.

1 the amount of force; the severity of the security problem at issue; the threat reasonably
 2 perceived by the officer; and whether the plaintiff was actively resisting.” *Kingsley*, 576
 3 U.S. at 397; *Hyde*, 2022 WL 55542, at *4.

4 As currently pleaded, the Court now finds Plaintiff’s TAC alleges a plausible
 5 excessive force claim against C/O Sandoval sufficient to survive the “low threshold” set
 6 for *sua sponte* screening as required by 28 U.S.C. § 1915(e)(2) and § 1915A(b). *See*
 7 *Wilhelm*, 680 F.3d at 1123; *Iqbal*, 556 U.S. at 678; *see also Hyde*, 2022 WL 55542, at *4
 8 (finding allegations that officers employed a Taser and head restraint against a pretrial
 9 detainee who was already on his knees, cuffed, and surrounded by several officers
 10 sufficient to state an excessive force claim under *Kingsley*). Therefore, the Court will order
 11 U.S. Marshal service upon C/O Sandoval on Plaintiff’s behalf.³ *See Lopez*, 203 F.3d at
 12 1126-27; 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process,
 13 and perform all duties in [IFP] cases.”); Fed. R. Civ. P. 4(c)(3) (providing that “service be
 14 effected by a United States marshal, deputy United States marshal, or other officer
 15 specially appointed by the court . . . when the plaintiff is authorized to proceed *in forma*
 16 *pauperis* pursuant to 28 U.S.C. § 1915.”).

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 20 ³ Plaintiff must, of course, identify the Defendants currently described only as “”Does 1–4” by their true
 21 names and substitute those individual persons as parties before the U.S. Marshal will be ordered to serve
 22 them. *See Aviles v. Village of Bedford Park*, 160 F.R.D. 565, 567 (1995) (Doe defendants must be
 23 identified and served within [90] days of the commencement of the action against them); Fed. R. Civ. P.
 24 15(c)(1)(C) & 4(m). Generally, Doe pleading is disfavored, *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th
 25 Cir. 1980), and in most instances it is impossible for the United States Marshal to serve a party identified
 26 only as a Doe. *See Walker v. Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) (in order to properly effect
 27 service under Rule 4 in an IFP case, the plaintiff is required to “furnish the information necessary to
 28 identify the defendant.”); *Finefeuiaki v. Maui Cmty. Corr. Ctr. Staff & Affiliates*, 2018 WL 3580764, at
 *6 (D. Haw. July 25, 2018) (noting that “[a]s a practical matter, the United States Marshal cannot serve a
 summons and complaint on an anonymous defendant.”). However, the Court will not dismiss Does 1–4
 as Defendants at this time because where the identity of parties is not known prior to filing of an action,
 Ninth Circuit authority permits Plaintiff the opportunity to pursue appropriate discovery to identify the
 unknown Does, unless it is clear that discovery would not uncover their identity, or his pleading requires
 dismissal for other reasons. *See Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (citing
Gillespie, 629 F.2d at 642).

1 **III. Conclusion and Orders**

2 Based on the foregoing, the Court:

3 1. **DIRECTS** the Clerk of the Court to terminate Defendant MCC, Metropolitan
4 Correctional Center as a party to this case.

5 2. **DIRECTS** the Clerk of the Court to issue a summons as to Plaintiff’s Third
6 Amended Complaint (ECF No. 30) upon Defendant C/O SANDOVAL and to forward it
7 to Plaintiff along with a blank U.S. Marshal Form 285.⁴ In addition, the Clerk will provide
8 Plaintiff with certified copies of this Order, his Third Amended Complaint, and the
9 summons so that he may serve Defendant SANDOVAL. Upon receipt of this “IFP
10 Package,” Plaintiff is directed to complete the Form 285s as completely and accurately as
11 possible, include an address where service upon SANDOVAL is to be made, *see* S.D. Cal.
12 CivLR 4.1(c), and to return them to the United States Marshal according to the instructions
13 provided by the Clerk in the letter accompanying his IFP Package.

14 3. **ORDERS** the U.S. Marshal to serve a copy of the Third Amended Complaint
15 and summons upon Defendant SANDOVAL as directed by Plaintiff on the USM Form
16 285, and to promptly file proof of that service service, or proof of any attempt at service
17 returned executed, with the Clerk of Court. *See* S.D. Cal. CivLR 5.2. All costs of service
18 will be advanced by the United States. *See* 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(3).

19 4. **ORDERS** Defendant SANDOVAL, once served, to reply to Plaintiff’s Third
20 Amended Complaint within the time provided by the applicable provisions of Federal Rule
21 of Civil Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally
22 be permitted to “waive the right to reply to any action brought by a prisoner confined in
23 any jail, prison, or other correctional facility under section 1983,” once the Court has
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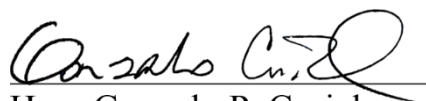
25 ⁴ Because Plaintiff is suing an officer or employee of the United States in both his individual and official
26 capacity, *see* TAC, ECF No. 30 at 2, he must also serve the United States. *See* Fed. R. Civ. P. 4(i)(1), (3).
27 Therefore, the Clerk will include in Plaintiff’s IFP package two separate copies of this Order, summons,
28 Plaintiff’s Third Amended Complaint, and additional blank USM Form 285s for Plaintiff’s use in serving
the United States via the United States Attorney for the Southern District of California, and the Attorney
General of the United States in Washington, D.C. *See* Fed. R. Civ. P. 4(i)(1)(A)(i), (B).

1 conducted its *sua sponte* screening pursuant to 28 U.S.C. § 1915(e)(2), and thus, has made
2 a preliminary determination based on the face on the pleading alone that Plaintiff has a
3 “reasonable opportunity to prevail on the merits,” the defendant is required to respond).

4 5. **ORDERS** Plaintiff to serve upon Defendant SANDOVAL or, if appearance
5 has been entered by counsel, upon Defendant’s counsel, a copy of every further pleading
6 or other document submitted for consideration of the Court. Plaintiff must also include
7 with the original paper to be filed with the Clerk of the Court a certificate stating the manner
8 in which a true and correct copy of any document filed was also served on Defendants, or
9 counsel for Defendants, and the date of such service. Any paper received by the Court
10 which has not been filed with the Clerk or which fails to include a Certificate of Service
11 may be disregarded.

12 **IT IS SO ORDERED.**

13 Dated: January 25, 2022


14 Hon. Gonzalo P. Curiel
15 United States District Judge
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