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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

6 LARRY LEWIS HIGHTOWER,
7 Plaintiff,
8 v.
9 DR. EDWARD BIRDSONG,
10 Defendant.
11

Case No. [15-cv-03966-YGR](#) (PR)

ORDER OF PARTIAL DISMISSAL AND SERVICE

12 Plaintiff, a state prisoner currently incarcerated at Salinas Valley State Prison (“SVSP”),
13 has filed a *pro se* civil rights complaint under 42 U.S.C. § 1983. He alleges a claim of deliberate
14 indifference to medical needs against SVSP Physician Edward Birdsong, M.D., stemming from
15 severe complications from treatment Plaintiff received from February and April 2013. Dkt. 1 at 3.

16 Plaintiff has filed a motion for leave to proceed *in forma pauperis*, which will be granted in
17 a separate written Order.

18 Venue is proper because the events giving rise to the claim are alleged to have occurred at
19 SVSP which is located in this judicial district. *See* 28 U.S.C. § 1391(b).

20 In his complaint, Plaintiff has named Defendant Birdsong and the California Department
21 of Corrections and Rehabilitation (“CDCR”). Plaintiff seeks monetary damages.

22 **DISCUSSION**

23 **I. STANDARD OF REVIEW**

24 A federal court must conduct a preliminary screening in any case in which a prisoner seeks
25 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
26 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims
27 that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek
28 monetary relief from a defendant who is immune from such relief. *Id.* § 1915A(b)(1), (2). *Pro se*

1 pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th
2 Cir. 1988).

3 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements,
4 namely that: (1) a right secured by the Constitution or laws of the United States was violated, and
5 (2) the alleged violation was committed by a person acting under the color of state law. *West v.*
6 *Atkins*, 487 U.S. 42, 48 (1988).

7 **II. LEGAL CLAIMS**

8 **A. Claim Against CDCR**

9 The Eleventh Amendment prevents the CDCR, which is a state agency, from being sued in
10 federal court. *See Simmons v. Sacramento County Superior Court*, 318 F.3d 1156,1161 (9th Cir.
11 2003) (Eleventh Amendment bars suit against state superior court and its employees); *Bennett v.*
12 *California*, 406 F.2d 36, 39 (9th Cir. 1969) (California Adult Authority and California Department
13 of Corrections not persons within meaning of Civil Rights Act); *see also Raygor v. Regents of the*
14 *University of Minnesota*, 534 U.S. 533, 541-42 (2002) (Eleventh Amendment bar includes state
15 law claims brought against a state in federal court under the supplemental jurisdiction statute, 28
16 U.S.C. § 1367). All claims against the CDCR—state and federal—are DISMISSED.

17 **B. Deliberate Indifference to Medical Needs Claim**

18 Deliberate indifference to serious medical needs violates the Eighth Amendment's
19 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104
20 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*,
21 *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc); *Jones v.*
22 *Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). A determination of "deliberate indifference" involves
23 an examination of two elements: the seriousness of the prisoner's medical need and the nature of
24 the defendant's response to that need. *See McGuckin*, 974 F.2d at 1059. A "serious" medical
25 need exists if the failure to treat a prisoner's condition could result in further significant injury or
26 the "unnecessary and wanton infliction of pain." *Id.* (citing *Estelle v. Gamble*, 429 U.S. at 104).
27 A prison official is deliberately indifferent if he or she knows that a prisoner faces a substantial
28 risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer*

1 form that more completely describes the duties of the parties with regard to waiver of service of
2 the summons. If service is waived after the date provided in the Notice but before Defendant has
3 been personally served, the Answer shall be due **sixty (60) days** from the date on which the
4 request for waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever
5 is later.

6 5. Defendant shall answer the complaint in accordance with the Federal Rules of Civil
7 Procedure. The following briefing schedule shall govern dispositive motions in this action:

8 a. No later than **sixty (60) days** from the date their answer is due, Defendant
9 shall file a motion for summary judgment or other dispositive motion. The motion must be
10 supported by adequate factual documentation, must conform in all respects to Federal Rule of
11 Civil Procedure 56, and must include as exhibits all records and incident reports stemming from
12 the events at issue. A motion for summary judgment also must be accompanied by a *Rand*¹ notice
13 so that Plaintiff will have fair, timely and adequate notice of what is required of him in order to
14 oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out
15 in *Rand* must be served concurrently with motion for summary judgment). A motion to dismiss
16 for failure to exhaust available administrative remedies must be accompanied by a similar notice.
17 However, the Court notes that under the new law of the circuit, in the rare event that a failure to
18 exhaust is clear on the face of the complaint, Defendant may move for dismissal under Rule
19 12(b)(6) as opposed to the previous practice of moving under an unenumerated Rule 12(b) motion.
20 *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (overruling *Wyatt v. Terhune*, 315 F.3d 1108,
21 1119 (9th Cir. 2003), which held that failure to exhaust available administrative remedies under
22 the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), should be raised by a defendant as an
23 unenumerated Rule 12(b) motion). Otherwise if a failure to exhaust is not clear on the face of the
24 complaint, Defendant must produce evidence proving failure to exhaust in a motion for summary
25 judgment under Rule 56. *Id.* If undisputed evidence viewed in the light most favorable to
26 Plaintiff shows a failure to exhaust, Defendant is entitled to summary judgment under Rule 56. *Id.*

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¹ *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

1 But if material facts are disputed, summary judgment should be denied and the district judge
2 rather than a jury should determine the facts in a preliminary proceeding. *Id.* at 1168.

3 If Defendant is of the opinion that this case cannot be resolved by summary judgment,
4 Defendant shall so inform the Court prior to the date the summary judgment motion is due. All
5 papers filed with the Court shall be promptly served on Plaintiff.

6 b. Plaintiff's opposition to the dispositive motion shall be filed with the Court
7 and served on Defendant no later than **twenty-eight (28) days** after the date on which Defendant's
8 motion is filed.

9 c. Plaintiff is advised that a motion for summary judgment under Rule 56 of
10 the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you
11 must do in order to oppose a motion for summary judgment. Generally, summary judgment must
12 be granted when there is no genuine issue of material fact—that is, if there is no real dispute about
13 any fact that would affect the result of your case, the party who asked for summary judgment is
14 entitled to judgment as a matter of law, which will end your case. When a party you are suing
15 makes a motion for summary judgment that is properly supported by declarations (or other sworn
16 testimony), you cannot simply rely on what your complaint says. Instead, you must set out
17 specific facts in declarations, depositions, answers to interrogatories, or authenticated documents,
18 as provided in Rule 56(c), that contradicts the facts shown in the defendant's declarations and
19 documents and show that there is a genuine issue of material fact for trial. If you do not submit
20 your own evidence in opposition, summary judgment, if appropriate, may be entered against you.
21 If summary judgment is granted, your case will be dismissed and there will be no trial. *Rand*, 154
22 F.3d at 962-63.

23 Plaintiff also is advised that—in the rare event that Defendant argues that the
24 failure to exhaust is clear on the face of the complaint—a motion to dismiss for failure to exhaust
25 available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit
26 without prejudice. To avoid dismissal, you have the right to present any evidence to show that
27 you did exhaust your available administrative remedies before coming to federal court. Such
28 evidence may include: (1) declarations, which are statements signed under penalty of perjury by

1 you or others who have personal knowledge of relevant matters; (2) authenticated documents—
2 documents accompanied by a declaration showing where they came from and why they are
3 authentic, or other sworn papers such as answers to interrogatories or depositions; (3) statements
4 in your complaint insofar as they were made under penalty of perjury and they show that you have
5 personal knowledge of the matters state therein. As mentioned above, in considering a motion to
6 dismiss for failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary judgment
7 motion under Rule 56, the district judge may hold a preliminary proceeding and decide disputed
8 issues of fact with regard to this portion of the case. *Albino*, 747 F.3d at 1168.

9 (The notices above do not excuse Defendant’s obligation to serve similar notices again
10 concurrently with motions to dismiss for failure to exhaust available administrative remedies and
11 motions for summary judgment. *Woods*, 684 F.3d at 935.)

12 d. Defendant shall file a reply brief no later than **fourteen (14) days** after the
13 date Plaintiff’s opposition is filed.

14 e. The motion shall be deemed submitted as of the date the reply brief is due.
15 No hearing will be held on the motion unless the Court so orders at a later date.

16 6. Discovery may be taken in this action in accordance with the Federal Rules of Civil
17 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendant to depose
18 Plaintiff and any other necessary witnesses confined in prison.

19 7. All communications by Plaintiff with the Court must be served on Defendant or
20 Defendant’s counsel, once counsel has been designated, by mailing a true copy of the document to
21 them.

22 8. It is Plaintiff’s responsibility to prosecute this case. Plaintiff must keep the Court
23 informed of any change of address and must comply with the Court’s orders in a timely fashion.
24 Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address changes
25 while an action is pending must promptly file a notice of change of address specifying the new
26 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail
27 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and
28 (2) the Court fails to receive within sixty days of this return a written communication from the *pro*

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se party indicating a current address. *See* L.R. 3-11(b).

9. Extensions of time are not favored, though reasonable extensions will be granted. Any motion for an extension of time must be filed no later than **fourteen (14) days** prior to the deadline sought to be extended.

IT IS SO ORDERED.

Dated: January 6, 2016



YVONNE GONZALEZ ROGERS
United States District Judge