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U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

TONY ASBERRY,  
CDCR #P-63853,

Plaintiff,

vs.

MATTHEW CATE, Secretary;  
D. PARAMO, Warden; WALKER,  
Medical Doctor; SILVA, Medical Doctor;  
DENBELLA, Medical Doctor; CHOW,  
Medical Doctor; NEWTON, Medical  
Doctor; and JOHN DOE, Medical Doctor,  
Defendants.

Civil No. 13cv2573 WQH (RBB)

**ORDER:**

**(1) RE-OPENING CIVIL  
ACTION**

**(2) GRANTING PLAINTIFF'S  
MOTION TO PROCEED  
IN FORMA PAUPERIS  
(ECF Doc. No. 10)**

**AND**

**(2) SUA SPONTE DISMISSING  
COMPLAINT WITHOUT  
PREJUDICE FOR FAILING TO  
STATE A CLAIM PURSUANT  
TO 28 U.S.C. §§ 1915(e)(2)  
AND 1915A(b)**

Tony Asberry ("Plaintiff"), an inmate currently incarcerated at Richard J. Donovan Correctional Facility ("RJD") in San Diego, California, and proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983.

Plaintiff alleges prison officials at RJD have provided him with inadequate medical treatment in violation of the Eighth Amendment since he was transferred there in March 2012. *See* Compl. (ECF Doc. No. 1) at 4-14. Plaintiff further alleges that he

1 “believes ... RJD officials are [acting in] retaliation” for a previously-filed civil action  
2 and “602s.” *Id.* at 14. Plaintiff seeks general and punitive damages as well as injunctive  
3 relief in the form of a court order directing Defendants to return his wheelchair. *Id.* at  
4 17.

## 5 I. PROCEDURAL HISTORY

6 After he was denied leave to proceed *in forma pauperis* (“IFP”) pursuant to 28  
7 U.S.C. § 1915(a) without prejudice on January 2, 2014, due to his failure to provide the  
8 trust account certificates required by § 1915(a)(2), and was granted 45 days in which to  
9 either file a new properly-supported IFP or to prepay the civil filing fee required by 29  
10 U.S.C. § 1914 in its entirety (ECF Doc. No. 7), Plaintiff submitted a new Motion to  
11 Proceed IFP, dated February 13, 2014, and filed on February 19, 2014, which still fails  
12 to include the trust account documentation required by statute (ECF Doc. No. 10).  
13 Plaintiff contends he has submitted a request for the certified copies of his trust account  
14 statements to prison officials at RJD twice to no avail, and “believe that there is a  
15 coordinated effort ... to block [his] efforts,” and “undermine [his] rights to challenge the  
16 conditions of his confinement.” (*Id.* at 6.)

17 However, before the Court had a chance to consider his latest IFP Motion, Plaintiff  
18 submitted another document to the Clerk on March 20, 2014, which repeated his  
19 allegations of obstruction by RJD trust account officials, and concluded with a “request  
20 to appeal to the Ninth Circuit Court of Appeals.” *See* ECF Doc. No. 11 at 3-4.

21 On April 15, 2014, the Ninth Circuit issued an Order remanding Plaintiff’s Notice  
22 of Appeal “for the limited purpose of enabling the district court to consider whether, in  
23 light of [Plaintiff’s] February 19, 2014 motion to proceed in forma pauperis, the district  
24 court would reopen the action or whether [Plaintiff’s] filing raises a substantial issue  
25 pursuant to Federal Rule of Appellate Procedure 12.1(b).”<sup>1</sup> *See Asberry v. Cate, et al.*,

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26  
27 <sup>1</sup> Federal Rule of Appellate Procedure 12.1 governs “remand[s] after an indicative ruling  
28 by the district court on motion for relief that is barred by a pending appeal” and provides that  
“[i]f the district court states that it would grant the motion or that the motion raises a substantial  
issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it  
expressly dismisses the appeal.” FED.R.APP.P. 12.1(b). “If the court of appeals remands but

1 9th Cir. No. 14-55476 (April 15, 2014 Order) (ECF Doc. No. 14) at \*2. Thus, because  
2 the Ninth Circuit has remanded the matter for “an indicative ruling,” this Court now has  
3 jurisdiction to determine whether the case may be re-opened in light of Plaintiff’s  
4 February 19, 2014 Motion to Proceed IFP.

5 **II. INDICATIVE RULING AS TO PLAINTIFF’S RENEWED MOTION TO PROCEED IFP**

6 As Plaintiff is aware, all parties instituting any civil action, suit or proceeding in  
7 a district court of the United States, except an application for writ of habeas corpus, must  
8 pay a filing fee. *See* 28 U.S.C. § 1914(a).<sup>2</sup> An action may proceed despite the plaintiff’s  
9 failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28  
10 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).  
11 However, if the plaintiff is a prisoner and is granted leave to proceed IFP, he  
12 nevertheless remains obligated to pay the entire fee in installments, regardless of whether  
13 his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v.*  
14 *Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

15 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act  
16 (“PLRA”), a prisoner seeking leave to proceed IFP must also submit a “certified copy  
17 of the trust fund account statement (or institutional equivalent) for ... the six-month  
18 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);  
19 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). It is from the certified trust  
20 account statement, that the Court must assess an initial payment of 20% of (a) the  
21 average monthly deposits in the account for the past six months, or (b) the average

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22  
23 retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has  
24 decided the motion on remand.” *Id.*; *see also* FED.R.CIV.P. 62.1; *Cencich v. Miller-Stout*, 2013  
25 WL 693209 at \*1 & n.1 (W.D. Wash. 2013) (unpub.) (discussing FED.R.APP.P. 12.1 and noting  
26 that “[t]he Advisory Committee Notes to FED.R.CIV.P. 62.1 explain that the rule was adopted  
for the purposes of providing a clear procedure for district courts to follow whenever any motion  
is filed that the district court cannot grant because of a pending appeal.”).

27 <sup>2</sup> In addition to the \$350 statutory fee, all parties filing civil actions *on or after May 1,*  
28 *2013*, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a), (b); Judicial  
Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May 1, 2013). However,  
*Id.* the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP.

1 monthly balance in the account for the past six months, whichever is greater, unless the  
2 prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The  
3 institution having custody of the prisoner must thereafter collect subsequent payments,  
4 assessed at 20% of the preceding month's income, in any month in which the prisoner's  
5 account exceeds \$10, and forward those payments to the Court until the entire filing fee  
6 is paid. *See* 28 U.S.C. § 1915(b)(2).

7 In support of his new IFP application, Plaintiff has again failed to provide the  
8 certified copies of his trust account statements as required by 28 U.S.C. § 1915(a)(2) and  
9 S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. However, because Plaintiff has  
10 declared under penalty of perjury that he is not employed at RJD, receives no payments  
11 from RJD, has no money or assets whatsoever, currently owes restitution, court costs,  
12 and fines, and he has attached photocopies of a CDCR 22 Inmate/Parolee Request which  
13 indicates two attempts, on January 16, 2014, and again on January 26, 2014, to obtain  
14 the trust account statements required by 28 U.S.C. § 1915(a)(2) from RJD trust account  
15 officials to no avail, the Court hereby re-opens Plaintiff's case and GRANTS his Motion  
16 to Proceed IFP (ECF Doc. No. 10). *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no  
17 event shall a prisoner be prohibited from bringing a civil action or appealing a civil  
18 action or criminal judgment for the reason that the prisoner has no assets and no means  
19 by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at 850 (finding that 28  
20 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal of a prisoner's IFP case  
21 based solely on a "failure to pay ... due to the lack of funds available to him when  
22 payment is ordered.").

23 And while the Court can assess no initial filing fee under these circumstances, the  
24 full balance of the \$350 total owed in this case shall be collected by the Secretary of the  
25 California Department of Corrections and Rehabilitation ("CDCR") and forwarded to the  
26 Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.  
27 § 1915(b)(1).

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1 **III. INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(b)(ii) AND 1915A(b)(1)**

2 Notwithstanding Plaintiff's IFP status, the PLRA also obligates the Court to  
3 review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who  
4 are "incarcerated or detained in any facility [and] accused of, sentenced for, or  
5 adjudicated delinquent for, violations of criminal law or the terms or conditions of  
6 parole, probation, pretrial release, or diversionary program," "as soon as practicable after  
7 docketing." See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions of the  
8 PLRA, the Court must sua sponte dismiss complaints, or any portions thereof, which are  
9 frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
10 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b); *Lopez v. Smith*, 203 F.3d  
11 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d  
12 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

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

22 "When there are well-pleaded factual allegations, a court should assume their  
23 veracity, and then determine whether they plausibly give rise to an entitlement to relief."  
24 *Iqbal*, 556 U.S. at 679; see also *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000)  
25 ("[W]hen determining whether a complaint states a claim, a court must accept as true all  
26 allegations of material fact and must construe those facts in the light most favorable to  
27 the plaintiff."); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that  
28 § 1915(e)(2) "parallels the language of Federal Rule of Civil Procedure 12(b)(6)").

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

9           **A.     42 U.S.C. § 1983**

10           “Section 1983 creates a private right of action against individuals who, acting  
11 under color of state law, violate federal constitutional or statutory rights.” *Devereaux v.*  
12 *Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of  
13 substantive rights, but merely provides a method for vindicating federal rights elsewhere  
14 conferred.” *Graham v. Connor*, 490 U.S. 386, 393–94 (1989) (internal quotation marks  
15 and citations omitted). “To establish § 1983 liability, a plaintiff must show both (1)  
16 deprivation of a right secured by the Constitution and laws of the United States, and (2)  
17 that the deprivation was committed by a person acting under color of state law.” *Tsao*  
18 *v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

19           **B.     Respondeat Superior and Individual Liability**

20           First, Plaintiff names Matthew Cate, the former Secretary of the CDCR, and D.  
21 Paramo, Warden of RJD, as Defendants. *See* Compl. at 1-2. However, his Complaint  
22 contains virtually no allegations that either of these individuals knew of or took any part  
23 in any constitutional violation. “Because vicarious liability is inapplicable to ... § 1983  
24 suits, a plaintiff must plead that each government-official defendant, through the  
25 official’s own individual actions, has violated the Constitution.” *Ashcroft v. Iqbal*, 556  
26 U.S. 662, 676 (2009); *see also Jones v. Cmty. Redev. Agency of City of Los Angeles*, 733  
27 F.2d 646, 649 (9th Cir. 1984) (even pro se plaintiff must “allege with at least some  
28 degree of particularity overt acts which defendants engaged in” in order to state a claim).

1 Plaintiff alleges only that both Cate and Paramo are “in charge” of the CDCR and  
2 “every facility at RJD” respectively. *See* Compl. at 2. Plaintiff’s Complaint, however,  
3 includes no further detail as to what Cate or Paramo specifically did, or failed to do,  
4 which resulted in the violation of any constitutional right. *Iqbal*, 662 U.S. at 678 (noting  
5 that FED.R.CIV.P. 8 “demands more than an unadorned, the-defendant-unlawfully-  
6 harmed-me accusation,” and that “[t]o survive a motion to dismiss, a complaint must  
7 contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is  
8 plausible on its face.’”) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570  
9 (2007)).

10 To the extent it appears Plaintiff seeks to sue former Secretary Cate and Warden  
11 Paramo only by virtue of their positions and their supervisory duties over other  
12 correctional or medical officials, in order to avoid the respondeat superior bar, his  
13 pleading must include sufficient “factual content that allows the court to draw the  
14 reasonable inference that the defendant is liable for the misconduct alleged,” *Iqbal*, 556  
15 U.S. at 678, and contain a description of personal acts by each individual defendant  
16 which show a direct causal connection to a violation of specific constitutional rights.  
17 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor is only liable for the  
18 constitutional violations of his subordinates if the supervisor participated in or directed  
19 the violations, or knew of the violations and with deliberate indifference, failed to act to  
20 prevent them. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Taylor*, 880 F.2d at 1045. If  
21 there is no affirmative link between a defendant’s conduct and the alleged injury, there  
22 is no deprivation of the plaintiff’s constitutional rights. *Rizzo v. Goode*, 423 U.S. 362,  
23 370 (1976).

24 As currently pleaded, Plaintiff’s Complaint similarly lacks specific “factual  
25 content that allows the court to draw the reasonable inference” that either Cate or Paramo  
26 may be held personally liable for any misconduct, and thus it fails to “state a claim to  
27 relief [against either of them] that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citing  
28 *Twombly*, 550 U.S. at 556, 570). Instead, it appears Plaintiff seeks to sue Cate and

1 Paramo based on the positions they hold and not because of any individually identifiable  
2 conduct alleged to have caused him harm. “Causation is, of course, a required element  
3 of a § 1983 claim.” *Estate of Brooks v. United States*, 197 F.3d 1245, 1248 (9th Cir.  
4 1999). “The inquiry into causation must be individualized and focus on the duties and  
5 responsibilities of each individual defendant whose acts or omissions are alleged to have  
6 caused a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988)  
7 (citing *Rizzo*, 423 U.S. at 370-71). Therefore, Plaintiff has failed to state a claim against  
8 Cate and Paramo and his Complaint requires dismissal on this basis pursuant to 28  
9 U.S.C. § 1915(e)(2) and § 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d  
10 at 446.

### 11 C. Inadequate Medical Care Claims

12 The remaining Defendants, Walker, Silva, Denbella, Chow, Newton, and John  
13 Doe, are all identified as doctors at RJD, and are alleged to have failed to provide  
14 Plaintiff with adequate medical treatment for a lower back injury after his arrival there  
15 on March 28, 2012. *See Compl.* at 2-4.

16 Specifically, Plaintiff claims that upon arrival, he was examined by Dr. Walker  
17 who provided him with a “mobility impaired” vest and issued him a “chrono” or medical  
18 authorization for wheelchair use. *Id.* at 4-5. Walker also advised Plaintiff to submit  
19 “7362 medical slips” if his lower back problems continued. *Id.* at 5. Plaintiff alleges  
20 that while he “was seen by Dr. Walker a few more times,” each time complaining of  
21 lower back pain, Walker “did nothing to fix” him. *Id.*

22 Plaintiff alleges he was later examined by Defendant Doe “two to four times,” but  
23 “received no treatment.” *Id.* at 5-6. When he continued to submit medical request forms,  
24 he was seen by Dr. Denbella, who is also alleged to have also provided “no treatment of  
25 any kind,” and to have told Plaintiff that if “he could not pay for his wheelchair, [he]  
26 would have to return it.” *Id.* at 6.

27 Plaintiff continued to request treatment, however, and was later examined by Dr.  
28 Silva who “ordered MRI exams.” *Id.* Plaintiff alleges these MRI results showed a

1 “miraculous recover[y]” and that “there was no longer any kind of injur[y].” *Id.* at 7.  
2 Silva advised Plaintiff to “stop submitting ... medical slips for his lower back,” and “did  
3 not provide ... any treatment.” *Id.*

4 On April 17, 2013, Plaintiff was placed in segregation (“Ad-Seg”) for unspecified  
5 reasons, where he “continued to submit CDCR 7362 medical slips for his lower back  
6 injuries.” *Id.* While in Ad-Seg, Plaintiff was examined by Dr. Chow who “ordered a  
7 (CT) scan and some nerve tests.” *Id.*<sup>3</sup> Plaintiff was later examined by Dr. Newton, who  
8 suggested Plaintiff seek “psychological treatment,” and also informed him “she was  
9 going to take his wheelchair.” *Id.* at 8, 10. On October 17, 2013, Plaintiff received a  
10 CDC 1845 form, signed by Dr. Newton, revoking his wheelchair chrono. *Id.* at 12-13.

11 Plaintiff contends that he “has not experienced any miraculous recovery,” and that  
12 he “is unable to walk any distance” due to pain which “shoot[s] down his leg.” *Id.* at 13.  
13 He further admits that while he has “under[gone] at least (5) different MRI exams ... all  
14 on his lower back,” has had “at least (7) X-rays,” “a (CT) scan,” and a “nerve test in [his]  
15 legs and back,” Defendants have nevertheless failed to provide him adequate medical  
16 care because they have “done everything everything except fix [his] lower back.” *Id.*

17 The government is obliged under the Eighth Amendment to provide medical care  
18 to incarcerated prisoners in its custody. *See e.g., Estelle v. Gamble*, 429 U.S. 97, 103  
19 (1976). However, only “deliberate indifference to serious medical needs of prisoners  
20 constitutes the unnecessary and wanton infliction of pain ... proscribed by the Eighth  
21 Amendment.” *Id.* at 104 (citation and internal quotation marks omitted).

22 “A determination of ‘deliberate indifference’ involves an examination of two  
23 elements: (1) the seriousness of the prisoner’s medical need and (2) the nature of the  
24 defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.

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25  
26 <sup>3</sup> Plaintiff also claims both Dr. Chow and Dr. Newton conducted unwelcomed and  
27 uncomfortable rectal exams after a colonoscopy revealed a growth which required removal in  
28 December 2012, and despite the fact that Plaintiff “was told he would not need another one for  
at least 5 to 10 years.” *Id.* at 7, 10-11. Plaintiff’s Complaint alleges only inadequate medical  
treatment related to his lower back, however; he does not appear to raise any additional Eighth  
Amendment violations related to his colonoscopy.

1 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th  
2 Cir. 1997) (en banc) (citing *Estelle*, 429 U.S. at 104).

3 “Because society does not expect that prisoners will have unqualified access to  
4 health care, deliberate indifference to medical needs amounts to an Eighth Amendment  
5 violation only if those needs are ‘serious.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992),  
6 *citing Estelle*, 429 U.S. at 103-104. “A ‘serious’ medical need exists if the failure to treat  
7 a prisoner’s condition could result in further significant injury or the ‘unnecessary and  
8 wanton infliction of pain.” *McGuckin*, 914 F.2d at 1059 (quoting *Estelle*, 429 U.S. at  
9 104). “The existence of an injury that a reasonable doctor or patient would find  
10 important and worthy of comment or treatment; the presence of a medical condition that  
11 significantly affects an individual’s daily activities; or the existence of chronic and  
12 substantial pain are examples of indications that a prisoner has a ‘serious’ need for  
13 medical treatment.” *Id.*, *citing Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir.  
14 1990); *Hunt v. Dental Dept.*, 865 F.2d 198, 200-01 (9th Cir. 1989).

15 Plaintiff’s allegations of chronic lower back injury and pain sufficient to  
16 compromise his ability to “walk any distance,” are sufficient to show an objectively  
17 serious medical need. *See* Compl. at 13; *McGuckin*, 914 F.2d at 1059; *Garner v.*  
18 *Hazzard*, No. 06-CV-0985, 2008 WL 552872, at \*6 (N.D. N.Y. Feb. 27, 2008) (holding  
19 that severe back pain, especially if long-lasting, can amount to a serious medical need).  
20 Thus, the Court finds, for purposes of screening pursuant to 28 U.S.C. § 1915(e)(2) and  
21 § 1915A, that Plaintiff has a serious medical requiring attention under the Eighth  
22 Amendment. *See McGuckin*, 974 F.2d at 1059.

23 However, even assuming Plaintiff’s back pain was sufficiently objectively serious  
24 to invoke Eighth Amendment protection, he must also include in his pleading enough  
25 factual content to show that all the doctors who treated him and who he wishes to sue,  
26 acted with “deliberately indifference” to his needs. *Id.* at 1060; *see also Jett v. Penner*,  
27 439 F.3d 1091, 1096 (9th Cir. 2006). “This second prong—defendant’s response to the  
28 need was deliberately indifferent—is satisfied by showing (a) a purposeful act or failure

1 to respond to [the] prisoner’s pain or possible medical need and (b) harm caused by the  
2 indifference.” *Jett*, 439 F.3d at 1096. “Deliberate indifference is a high legal standard,”  
3 and claims of medical malpractice or negligence are insufficient to establish a  
4 constitutional deprivation. *Simmons v. Navajo County*, 609 F.3d 1011, 1019 (9th Cir.  
5 2010) (citing *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004)).

6 As currently pleaded, the Court finds none of Plaintiff’s allegations as to  
7 Defendant Doctors Walker, Silva, Denbella, Chow, Newton, or Doe contain facts  
8 sufficient to show that they were deliberately indifferent to his plight by “knowing of and  
9 disregarding an[y] excessive risk to [Plaintiff’s] health and safety.” *Farmer v. Brennan*,  
10 511 U.S. 825, 837 (1994). Officials “must be both aware of facts from which the  
11 inference could be drawn that a substantial risk of serious harm exist[ed], and he must  
12 also [have] draw[n] the inference.” *Id.* Specifically, then, Plaintiff must allege “factual  
13 content,” *Iqbal*, 556 U.S. at 678, which demonstrates “(a) a purposeful act or failure to  
14 respond to [his] pain or possible medical need, and (b) harm caused by the indifference.”  
15 *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (citing *Jett*, 439 F.3d at 1096). The requisite  
16 state of mind is one of subjective recklessness, which entails more than ordinary lack of  
17 due care. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir. 2012) (citation and quotation  
18 marks omitted); *Wilhelm*, 680 F.3d at 1122.

19 Here, while Plaintiff repeatedly concludes he “received no treatment for his lower  
20 back injuries,” *see* Compl. at 5, and accuses his doctors of failing to “fix” his back , *id.*  
21 at 5, 15, his pleading also shows he was examined by no fewer than six different doctors  
22 on at least eleven separate occasions, was provided with a mobility vest, permitted  
23 wheelchair use for more than a year, underwent “5 different MRIs,” “7 x-rays,” a CT  
24 scan, and had nerve-testing conducted all in response to his continued complaints of back  
25 pain. *Id.* at 4-8; 15. And while Plaintiff clearly disagrees with Defendants as to the  
26 results of his diagnostic tests and his doctors’ assessments as to his continued need for  
27 a wheelchair, these disputes, without more, do not provide sufficient “factual content”  
28 to plausibly suggest that any Defendant acted with deliberate indifference by purposely

1 ignoring his pain or medical condition. *Iqbal*, 556 U.S. at 678 (“The plausibility  
2 standard is not akin to a ‘probability requirement,’ but it asks for more than the sheer  
3 possibility that a defendant has acted unlawfully.”). “A difference of opinion between  
4 a physician and the prisoner—or between medical professionals—concerning what medical  
5 care is appropriate does not amount to deliberate indifference.” *Snow v. McDaniel*, 681  
6 F.3d 978, 987 (9th Cir. 2012) (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989));  
7 *Wilhelm*, 680 F.3d at 1122-23. Rather, Plaintiff “must show that the course of treatment  
8 the doctors chose was medically unacceptable under the circumstances and that the  
9 defendants chose this course in conscious disregard of an excessive risk to [his] health.”  
10 *Snow*, 681 F.3d at 988 (citing *Jackson*, 90 F.3d at 332) (internal quotation marks  
11 omitted).

12       Indeed, in *Estelle* the Supreme Court rejected a prisoner’s Eighth Amendment  
13 claim that prison doctors should have done more by way of diagnosis and treatment after  
14 he injured his back, and emphasized that “the question whether an X-ray or additional  
15 diagnostic techniques or forms of treatment is indicated is a classic example of a matter  
16 for medical judgment” and “does not represent cruel and unusual punishment.” 429 U.S.  
17 at 107. The same is true in this case.

18       Accordingly, the Court finds that Plaintiff has failed to state an Eighth Amendment  
19 inadequate medical care claim against Defendants Walker, Silva, Denbella, Chow,  
20 Newton and Doe, and that these claims must be dismissed pursuant to 28 U.S.C.  
21 § 1915(e)(2) and § 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

#### 22       **D. Retaliation**

23       Finally, Plaintiff also alleges that he “believes ... the actions by the RJD[] officials  
24 are in retaliation for [his] civil action and 602’s,” *see* Compl. at 14, and mentions another  
25 civil law suit, filed in the Eastern District of California “relating to the cause of his lower  
26 back injuries.” *Id.* at 8.

27       “Within the prison context, a viable claim of First Amendment retaliation entails  
28 five basic elements: (1) [a]n assertion that a state actor took some adverse action against

1 an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)  
2 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not  
3 reasonably advance a legitimate correctional goal. *See, e.g., Resnick*, 213 F.3d at 449;  
4 *Barnett [v. Centoni]*, 31 F.3d [813] 815-16 [(9th Cir. 1994)].” *Rhodes v. Robinson*, 408  
5 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted).

6 As currently pleaded, Plaintiff's Complaint fails to include “sufficient factual  
7 matter” which identifies any particular adverse action was taken against him by any  
8 named Defendant *because* he exercised any constitutional right, *e.g.*, filed administrative  
9 grievances via the CDCR's Inmate/Appeal 602 process, or initiated another civil rights  
10 action in the Eastern District. *See Iqbal*, 556 U.S. at 678; *Soranno's Gasco, Inc. v.*  
11 *Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (plaintiff must show that the protected  
12 conduct was a “substantial” or “motivating” factor in the defendant's decision to act);  
13 *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). Plaintiff  
14 has further fail to allege facts sufficient to show that any Defendant's actions failed to  
15 advance a legitimate correctional goal such as “preserving institutional order and  
16 discipline,” *Barnett*, 31 F.3d at 815-16, and fails to allege that his First Amendment  
17 rights were in any way “chilled” as a result. *See Rhodes*, 408 F.3d at 568-69 (noting that  
18 while a prisoner need not show that “his speech was actually inhibited or suppressed,”  
19 he must show the adverse action taken against him “would chill or silence a person of  
20 ordinary firmness from future First Amendment activities.”) (internal quotation omitted).

21 Because Plaintiff is proceeding *in pro se*, however, the Court having now provided  
22 him with “notice of the deficiencies in his complaint,” will also grant him an opportunity  
23 to “effectively” amend. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing  
24 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).<sup>4</sup>

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25  
26 <sup>4</sup> In addition, the Court again notes, as it did in its January 2, 2014 Order, that while  
27 Plaintiff need not *allege* in his Complaint that he has exhausted all administrative remedies as  
28 are available pursuant to 42 U.S.C. § 1997e(a), *see Jones v. Bock*, 549 U.S. 199, 216 (2007)  
(concluding that the “failure to exhaust is an affirmative defense under the PLRA, and ... inmates  
are not required to specially plead or demonstrate exhaustion in their complaints.”), it is patently  
unclear from the face of his pleading, the exhibits attached, and from an additional document  
he has filed entitled “Notice of Efforts to Exhaust” (ECF Doc. No. 6), whether all the claims

1 **IV. CONCLUSION AND ORDER**

2 Good cause appearing, IT IS HEREBY ORDERED that:

3 1. This civil action is hereby re-opened, and Plaintiff's Motion to proceed IFP  
4 pursuant to 28 U.S.C. § 1915(a) (ECF Doc. No. 10) is GRANTED.

5 2. The Secretary of the California Department of Corrections and  
6 Rehabilitation, or his designee, shall collect from Plaintiff's prison trust account the \$350  
7 filing fee owed in this case by collecting monthly payments from the account in an  
8 amount equal to twenty percent (20%) of the preceding month's income and forward  
9 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in  
10 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY  
11 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

12 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey  
13 A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O. Box  
14 942883, Sacramento, California, 94283-0001.

15 IT IS FURTHER ORDERED that:

16 4. Plaintiff's Complaint is DISMISSED without prejudice for failing to state  
17 a claim pursuant to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is  
18 GRANTED forty five (45) days leave from the date this Order is entered into the Court's  
19 docket in which to file a First Amended Complaint which cures all the deficiencies of  
20 pleading noted above. Plaintiff's Amended Complaint must be complete in itself without  
21 reference to his original pleading. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios, Inc.*  
22 *v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended  
23 pleading supersedes the original.”); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)

24 \_\_\_\_\_  
25 raised in Plaintiff's Complaint have been fully exhausted prior to the initiation of this suit. *See*  
26 *Compl.* (ECF Doc. No. 1) at 16, 20 & Exs. B-G; *Pl.'s Notice* (ECF Doc. No. 6) at 5 (“Plaintiff  
27 is trying to exhaust, but can only do so when his appeal is returned to him. At this rate of  
28 response, Plaintiff can not be certain of when the exhaustion process will be completed.”).  
While the Court is not dismissing Plaintiff's Complaint on this basis, he is hereby advised that  
all “available remedies must be ‘exhausted’ *before* a complaint under § 1983 may be  
entertained,” and that “[e]xhaustion subsequent to the filing of suit will not suffice.” *McKinney*  
*v. Carey*, 311 F.3d 1198, 1199 (quoting *Booth v. Churner*, 523 U.S. 731, 738 (2001) (emphasis  
added)).

1 (citation omitted) (“All causes of action alleged in an original complaint which are not  
2 alleged in an amended complaint are waived.”).

3 Should Plaintiff fail to file an Amended Complaint within the time provided, the  
4 Court shall enter a final order dismissing this civil action without prejudice based on  
5 Plaintiff’s failure to state a claim upon which relief can be granted pursuant to 28 U.S.C.  
6 § 1915(e)(2) and § 1915A(b).

7 **5. The Clerk of this Court shall serve a copy of this Order upon the Clerk**  
8 **of the United States Court of Appeals for the Ninth Circuit for filing in reference**  
9 **to its April 15, 2014 Order of remand in Appeal Case No. 14-55476, as soon as**  
10 **practicable.**

11  
12 DATED: \_\_\_\_\_

*4/17/14*

*William O. Hayes*

HON. WILLIAM O. HAYES  
United States District Judge