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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 TIMOTHY E. SPELLMAN,
12 CDCR #G-23848,

13 Plaintiff,

14 vs.

15 D. PARAMO, Warden, et al.,

16 Defendants.
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Case No.: 16cv2731-JLS (AGS)

**ORDER (1) GRANTING PLAINTIFF
LEAVE TO PROCEED *IN FORMA
PAUPERIS* (ECF Nos. 2, 3) AND (2)
DIRECTING U.S. MARSHAL TO
EFFECT SERVICE OF SUMMONS
AND COMPLAINT PURSUANT
TO 28 U.S.C. § 1915(d) AND
FED. R. CIV. P. 4(c)(3)**

22 Timothy E. Spellman (“Plaintiff”), currently incarcerated at Richard J. Donovan
23 Correctional Facility (“RJD”) in San Diego, California, and proceeding pro se, has filed a
24 civil rights complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1.)

25 Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when he
26 filed this civil action; instead, he filed a letter advising the Court of his intent to proceed *in*
27 *forma pauperis* (“IFP”) (ECF No. 2), followed by a prison certificate certified by a RJD
28 accounting official and copies of his California Department of Corrections and

1 Rehabilitation (“CDCR”) Inmate Trust Account Statement Report (ECF No. 3). Therefore,
2 the Court construes these documents together as Plaintiff’s request to proceed IFP pursuant
3 to 28 U.S.C. § 1915(a).

4 **I. Leave to Proceed IFP**

5 All parties instituting any civil action, suit, or proceeding in a district court of the
6 United States, except an application for writ of habeas corpus, must pay a filing fee of
7 \$400.¹ See 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to
8 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.
9 § 1915(a). See *Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007). However,
10 prisoners who are granted leave to proceed IFP remain obligated to pay the entire fee in
11 “increments” or “installments,” *Bruce v. Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016);
12 *Williams v. Paramo*, 775 F.3d 1182, 1185 (9th Cir. 2015), and regardless of whether their
13 action is ultimately dismissed. See 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281
14 F.3d 844, 847 (9th Cir. 2002).

15 Section 1915(a)(2) also requires prisoners seeking leave to proceed IFP to submit a
16 “certified copy of the trust fund account statement (or institutional equivalent) for . . . the
17 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.
18 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified
19 trust account statement, the Court assesses an initial payment of 20% of (a) the average
20 monthly deposits in the account for the past six months, or (b) the average monthly balance
21 in the account for the past six months, whichever is greater, unless the prisoner has no
22 assets. See 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody
23 of the prisoner then collects subsequent payments, assessed at 20% of the preceding
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26 ¹ In addition to the \$350 statutory fee, civil litigants must pay an additional administrative
27 fee of \$50. See 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court
28 Misc. Fee Schedule, § 14 (eff. June 1, 2016)). The additional \$50 administrative fee does
not apply to persons granted leave to proceed IFP. *Id.*

1 month's income, in any month in which his account exceeds \$10, and forwards those
2 payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*,
3 136 S. Ct. at 629.

4 In support of his letter requesting leave to proceed IFP, Plaintiff has submitted a
5 certified prison certificate signed by a senior RJD accounting official attesting to his trust
6 account activity, as well as copies of his CDCR Inmate Statement Reports for the six
7 months preceding the filing of his Complaint. *See* ECF No. 3 at 4–6; 28 U.S.C.
8 § 1915(a)(2); S.D. Cal. Civ. L.R. 3.2; *Andrews*, 398 F.3d at 1119. These statements show
9 that Plaintiff had an average monthly balance of \$80.93, and made average monthly
10 deposits of \$238.83 to his account over the six-month period immediately preceding the
11 filing of his Complaint. (*See* ECF No. 3 at 4.) Plaintiff's available balance was \$9.58 at the
12 time of filing. (*Id.*) Based on this financial information, the Court **GRANTS** Plaintiff leave
13 to proceed IFP, and assesses his initial partial filing fee to be \$47.76 pursuant to 28 U.S.C.
14 § 1915(b)(1).

15 However, the Court will direct the Secretary of the CDCR, or his designee, to collect
16 this initial fee only if sufficient funds are available in Plaintiff's account at the time this
17 Order is executed. *See* 28 U.S.C. § 1915(b)(4) (providing that “[i]n no event shall a prisoner
18 be prohibited from bringing a civil action or appealing a civil action or criminal judgment
19 for the reason that the prisoner has no assets and no means by which to pay the initial partial
20 filing fee”); *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C.
21 § 1915(b)(4) acts as a “safety-valve” preventing dismissal of a prisoner's IFP case based
22 solely on a “failure to pay . . . due to the lack of funds available to him when payment is
23 ordered”). Whatever balance of the \$350 total fee remaining due in this case must be
24 collected by CDCR officials and forwarded to the Clerk of the Court pursuant to 28 U.S.C.
25 § 1915(b)(1).

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

2 **A. Standard of Review**

3 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint also requires a
4 pre-answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these
5 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of it,
6 which is frivolous, malicious, fails to state a claim, or seeks damages from defendants who
7 are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc)
8 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.
9 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that
10 the targets of frivolous or malicious suits need not bear the expense of responding.’”
11 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*
12 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

13 “The standard for determining whether a plaintiff has failed to state a claim upon
14 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
15 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
16 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
17 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
18 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
19 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
20 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
21 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

22 Detailed factual allegations are not required, but “[t]hreadbare recitals of the
23 elements of a cause of action, supported by mere conclusory statements, do not suffice.”
24 *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible claim for relief
25 [is] . . . a context-specific task that requires the reviewing court to draw on its judicial
26 experience and common sense.” *Id.* The “mere possibility of misconduct” or “unadorned,
27 the defendant-unlawfully-harmed me accusation[s]” fall short of meeting this plausibility
28 standard. *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

1 **B. Plaintiff's Allegations**

2 Plaintiff contends he has “been under doctor’s orders throughout his incarceration”
3 and has been diagnosed with a seizure disorder and chronic depression. (ECF No. 1 at 3.)
4 Due to this diagnosis, Plaintiff “has maintained a valid doctor’s order chrono . . . CDC 128-
5 C, for a lower bunk, [on a] lower tier, no stairs, no ladder, no heights.” (*Id.*, see also Ex. B
6 at 19.) Plaintiff further claims to have undergone a cardio artery bypass generic (“CABG”)
7 surgery at Tri-City Medical Center on April 18, 2014, and suffered complications
8 afterward. (*Id.* at 4, 6.)

9 In November 2014, Plaintiff claims Defendants notified him that because he was not
10 designated as “ADA with a wheelchair,” he would need to either accept an upper bunk or
11 upper tier housing assignment, or face discipline. (*Id.* at 4.) Plaintiff claims to have
12 informed Defendants of his medical chrono, but “they still ordered [him] to make the
13 move.” (*Id.* at 6.) On November 19, 2014, while moving to the upper tier as instructed
14 Plaintiff fell down a staircase, re-opened his CABG surgical incision, and suffered an
15 “extreme back injury and leg pain.” (*Id.* at 7.) He claims Defendants violated his Eighth
16 Amendment rights by refusing to honor his doctor’s orders, for which he seeks declaratory
17 relief and unspecified amounts of compensatory and punitive damages. (*Id.* at 11.)

18 Based on these allegations, the Court finds Plaintiff’s Complaint sufficient to
19 survive the “low threshold” for proceeding past the sua sponte screening required by 28
20 U.S.C. §§ 1915(e)(2) and 1915A(b).² See *Wilhelm v. Rotman*, 680 F.3d 1113, 1123 (9th
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23 ² Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is cumulative
24 of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may
25 choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).
26 However, the Court finds it is not “clear from the face of the complaint,” whether Plaintiff
27 has exhausted all available administrative remedies pursuant to 42 U.S.C. § 1997e(a). See
28 *Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc); *Williams*, 775 F.3d at 1191;
Marella v. Terhune, 568 F.3d 1024, 1027–28 (9th Cir. 2009) (remanding exhaustion issue
to district court for determination of whether administrative remedies were “available”). In
his Complaint, Plaintiff alleges he “timely submitted” a CDC 602 administrative appeal

1 Cir. 2012; *Iqbal*, 556 U.S. at 678; *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976) (prison
2 officials are liable if they act with deliberate indifference to a prisoner’s serious medical
3 needs); *id.* at 104 (deliberate indifference “is manifested by prison [officials] intentionally
4 denying or delaying access to medical care,” or “intentionally interfering with the treatment
5 once prescribed” by a physician); *see also Akhtar v. Mesa*, 698 F.3d 1202, 1213–14 (9th
6 Cir. 2012) (finding plaintiff’s claims that prison officials refused to honor a medical chrono
7 requiring lower tier/lower bunk housing sufficient “to show that [defendants] were
8 deliberately indifferent”); *Singson v. Marrero*, 2013 WL 1759009, at *1–2 (S.D. Cal. Mar.
9 8, 2013) (denying motion to dismiss Eighth Amendment claims where prisoner was issued
10 a “lower tier order which was communicated to the prison staff,” but where prisoner
11 officials “refused to honor the doctors [sic] orders” by moving prisoner to an upper tiered
12 cell).

13 Therefore, the Court will direct the U.S. Marshal to effect service on Plaintiff’s
14 behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all process,
15 and perform all duties in [IFP] cases.”); FED. R. CIV. P. 4(c)(3) (“[T]he court may order
16 that service be made by a United States marshal or deputy marshal . . . if the plaintiff is
17 authorized to proceed in forma pauperis under 28 U.S.C. § 1915.”).

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20 regarding his fall, but that it was “lost,” later “cancelled due to time restraints,” and that he
21 “received [a] third level response . . . which exhausts the administrative remedy available
22 to [him] within the CDCR.” (ECF No. 1 at 10, *see also* Exs. S-V). Therefore, because
23 exhaustion is an affirmative defense, Defendants “will have to present probative evidence
24 . . . ‘to plead and prove’ . . . that [Plaintiff] has failed to exhaust” pursuant to FED. R. CIV.
25 P. 56, should they wish to defend on this basis. *Albino*, 747 F.3d at 1169 (quoting *Jones v.*
26 *Bock*, 549 U.S. 199, 204 (2007)); *see also Williams*, 775 F.3d at 1190 (finding summary
27 judgment inappropriate where there were “genuine disputes of material fact” as to whether
28 prisoner “failed to exhaust available administrative remedies”); *see also Ross v. Blake*,
___ U.S. ___, 136 S. Ct. 1850, 1856, 1860 (2016) (proper administrative exhaustion under
the PLRA is mandatory, but those remedies may not be “available” when “prison
administrators thwart inmates from taking advantage of a grievance process through
machination, misrepresentation, or intimidation”); *Whatley v. Nanez*, ___ Fed. Appx. ___,
No. 15-55813, 2016 WL 6561295, at *1 (9th Cir. Nov. 4, 2016).

1 **CONCLUSION**

2 Given the foregoing, the Court:

3 1. **GRANTS** Plaintiff leave to proceed IFP pursuant to 28 U.S.C. § 1915(a)
4 (ECF Nos. 2, 3).

5 2. **ORDERS** the Secretary of the CDCR, or his designee, to collect from
6 Plaintiff's trust account the \$47.76 initial filing fee assessed, if those funds are available at
7 the time this Order is executed, and to forward whatever balance remains of the full \$350
8 owed in monthly payments in an amount equal to twenty percent (20%) of the preceding
9 month's income to the Clerk of the Court each time the amount in Plaintiff's account
10 exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS MUST BE CLEARLY**
11 **IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

12 3. **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott
13 Kernan, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
14 942883, Sacramento, California, 94283-0001.

15 4. **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF No.
16 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for each named
17 Defendant. In addition, the Clerk will provide Plaintiff with a certified copy of this Order,
18 a certified copy of his Complaint, and the summons so that he may serve the Defendants.
19 Upon receipt of this "IFP Package," Plaintiff must complete the USM Form 285s as
20 completely and accurately as possible, *include an address where each named Defendant*
21 *may be found and/or subject to service*, and return them to the United States Marshal
22 according to the instructions the Clerk provides in the letter accompanying his IFP package.

23 5. **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons
24 upon Defendants as directed by Plaintiff on the USM Form 285s provided to him. All costs
25 of that service will be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED. R.
26 Civ. P. 4(c)(3).

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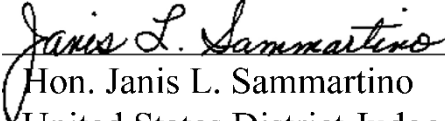
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1 6. **ORDERS** Defendants, once they have been served, to reply to Plaintiff's
2 Complaint within the time provided by the applicable provisions of Federal Rule of Civil
3 Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally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

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

19 **IT IS SO ORDERED.**

20 Dated: March 1, 2017


21 Hon. Janis L. Sammartino
22 United States District Judge
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