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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 LEANDRO LEONEL GONZALEZ,  
12 CDCR #V-74928,

13 Plaintiff,

14 vs.

15 GUSMAN, Correctional Officer;  
16 RODRIN, Correctional Officer,

17 Defendants.

Case No.: 3:17-cv-00241-GPC-BGS

**ORDER**

**1) GRANTING MOTION TO  
PROCEED IN FORMA PAUPERIS  
[ECF No. 2]**

**AND**

**2) DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE PURSUANT  
TO 28 U.S.C. § 1915(d) AND  
Fed. R. Civ. P. 4(c)(3)**

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22 LEANDRO LEONEL GONZALEZ (“Plaintiff”), currently incarcerated at Mule  
23 Creek State Prison (“MCSP”) in Ione, California, and proceeding pro se, has filed a civil  
24 rights complaint pursuant to 42 U.S.C. § 1983 (ECF No. 1).<sup>1</sup>

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28 <sup>1</sup> Plaintiff was incarcerated at Salinas Valley State Prison (“SVSP”) at the time of filing,  
but on April 12, 2017, he filed a Notice of Change of Address to MCSP (ECF No. 3).

1 Plaintiff claims Defendants Gusman and Rodrin, both Correctional Officers at  
2 Richard J. Donovan Correctional Facility (“RJD”) in San Diego, California, violated his  
3 Eighth Amendment rights on April 6, 2015, by closing a cell door on his arm and  
4 refusing to provide him medical care afterward. (ECF No. 1 at 8-13, 23-24.) Plaintiff  
5 seeks a declaratory judgment and an unspecified amount of compensatory and punitive  
6 damages “to be determined at trial.” (*Id.* at 7.)<sup>2</sup>

7 Plaintiff has not prepaid the \$400 civil filing fee required to commence a civil  
8 action pursuant to 28 U.S.C. § 1914(a); instead he has filed a Motion to Proceed In  
9 Forma Pauperis (“IFP”) pursuant to 28 U.S.C. § 1915(a) (ECF No. 2).

### 10 **I. Motion to Proceed IFP**

11 All parties instituting any civil action, suit or proceeding in a district court of the  
12 United States, except an application for writ of habeas corpus, must pay a filing fee of  
13 \$400.<sup>3</sup> *See* 28 U.S.C. § 1914(a). The action may proceed despite a plaintiff’s failure to  
14 prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C.  
15 § 1915(a). *See Andrews v. Cervantes*, 493 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v.*  
16 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner who is granted leave to  
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19 <sup>2</sup> The Court takes judicial notice that Plaintiff Leandro Leonel Gonzalez, CDCR #V-74928,  
20 has another civil rights action currently pending before the Honorable John A. Houston in  
21 *Gonzalez v. Armenta, et al.*, S.D. Cal. Civil Case No. 3:16-cv-02494-JAH-JLB. *See Bias*  
22 *v. Moynihan*, 508 F.3d 1212, 1225 (9th Cir. 2007) (court “may take notice of proceedings  
23 in other courts, both within and without the federal judicial system, if those proceedings  
24 have a direct relation to matters at issue.” (quoting *Bennett v. Medtronic, Inc.*, 285 F.3d  
25 801, 803 n.2 (9th Cir. 2002)). *Gonzalez v. Armenta*, S.D. Cal. Civil Case No. 3:16-cv-  
02494-JAH-JLB, however, does not allege the same claims, does not appear related, and  
does not name the same correctional defendants as are involved in this subsequently filed  
case. *See id.* (ECF No. 14 at 3-7).

26 <sup>3</sup> 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 proceed IFP remains obligated to pay the entire fee in “increments” or “installments,”  
2 *Bruce v. Samuels*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d  
3 1182, 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed.  
4 *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir.  
5 2002).

6 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a  
7 “certified copy of the trust fund account statement (or institutional equivalent) for ... the  
8 6-month period immediately preceding the filing of the complaint.” 28 U.S.C.  
9 § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified  
10 trust account statement, the Court assesses an initial payment of 20% of (a) the average  
11 monthly deposits in the account for the past six months, or (b) the average monthly  
12 balance in the account for the past six months, whichever is greater, unless the prisoner  
13 has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having  
14 custody of the prisoner then collects subsequent payments, assessed at 20% of the  
15 preceding month’s income, in any month in which his account exceeds \$10, and forwards  
16 those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2);  
17 *Bruce*, 136 S. Ct. at 629.

18 In support of his IFP Motion, Plaintiff has submitted a copy of his CDCR Inmate  
19 Statement Report as well as a prison certificate certified by a trust account official at  
20 SVSP. *See* ECF No. 2 at 5-6; 28 U.S.C. § 1915(a)(2); S.D. CAL. CIVLR 3.2; *Andrews*,  
21 398 F.3d at 1119. These statements show that while Plaintiff had an average monthly  
22 balance of \$2.35 and average monthly deposits of \$1.87 to his account over the 6-month  
23 period immediately preceding the filing of his Complaint, he had an available balance of  
24 zero at the time of filing. *See* ECF No. 2 at 6. Thus, the Court assesses Plaintiff’s initial  
25 partial filing fee to be \$0.47 pursuant to 28 U.S.C. § 1915(b)(1), but acknowledges he  
26 may be unable to pay even that minimal initial fee at this time. *See* 28 U.S.C.  
27 § 1915(b)(4) (providing that “[i]n no event shall a prisoner be prohibited from bringing a  
28 civil action or appealing a civil action or criminal judgment for the reason that the

1 prisoner has no assets and no means by which to pay the initial partial filing fee.”);  
2 *Bruce*, 136 S. Ct. at 630; *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4)  
3 acts as a “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a  
4 “failure to pay ... due to the lack of funds available to him when payment is ordered.”).

5 Therefore, the Court GRANTS Plaintiff’s Motion to Proceed IFP (ECF No. 2),  
6 declines to exact any initial filing fee because his prison certificate indicates he may have  
7 “no means to pay it,” *Bruce*, 136 S. Ct. at 629, and directs the Secretary of the California  
8 Department of Corrections and Rehabilitation (“CDCR”), or his designee, to instead  
9 collect the entire \$350 balance of the filing fees required by 28 U.S.C. § 1914 and  
10 forward them to the Clerk of the Court pursuant to the installment payment provisions set  
11 forth in 28 U.S.C. § 1915(b)(1). *See id.*

## 12 **II. Screening of Complaint per 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)**

13 Because Plaintiff is a prisoner and is proceeding IFP, his complaint requires a pre-  
14 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these  
15 statutes, the Court must sua sponte dismiss a prisoner’s IFP complaint, or any portion of  
16 it, which is frivolous, malicious, fails to state a claim, or seeks damages from defendants  
17 who are immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)  
18 (discussing 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir.  
19 2010) (discussing 28 U.S.C. § 1915A(b)). “The purpose of [screening] is ‘to ensure that  
20 the targets of frivolous or malicious suits need not bear the expense of responding.’”  
21 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (quoting *Wheeler v. Wexford*  
22 *Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).

23 “The standard for determining whether a plaintiff has failed to state a claim upon  
24 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
25 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668  
26 F.3d 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th  
27 Cir. 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard  
28 applied in the context of failure to state a claim under Federal Rule of Civil Procedure

1 12(b)(6)"). Rule 12(b)(6) requires a complaint "contain sufficient factual matter, accepted  
2 as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S.  
3 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

4 Detailed factual allegations are not required, but "[t]hreadbare recitals of the  
5 elements of a cause of action, supported by mere conclusory statements, do not suffice."  
6 *Iqbal*, 556 U.S. at 678. "Determining whether a complaint states a plausible claim for  
7 relief [is] ... a context-specific task that requires the reviewing court to draw on its  
8 judicial experience and common sense." *Id.* The "mere possibility of misconduct" or  
9 "unadorned, the defendant-unlawfully-harmed me accusation[s]" fall short of meeting  
10 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969  
11 (9th Cir. 2009).

12 As currently pleaded, the Court finds Plaintiff's Complaint contains allegations  
13 sufficient to survive the "low threshold" for proceeding past the sua sponte screening  
14 required by 28 U.S.C. §§ 1915(e)(2) and 1915A(b).<sup>4</sup> *See Wilhelm*, 680 F.3d at 1123;

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17 <sup>4</sup> Plaintiff is cautioned that "the sua sponte screening and dismissal procedure is cumulative  
18 of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may  
19 choose to bring." *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).  
20 However, the Court finds it is *not* "clear from the face of the complaint," whether Plaintiff  
21 has exhausted all "available" administrative remedies pursuant to 42 U.S.C. § 1997e(a).  
22 *See Albino v. Baca*, 747 F.3d 1162, 1169 (9th Cir. 2014) (en banc), *cert denied*, 135 S. Ct.  
23 403 (2014); *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015). In his Complaint,  
24 Plaintiff claims under penalty of perjury both to have exhausted his administrative  
25 remedies before filing suit, *see* ECF No. 1 at 6, 7, *and* to have had multiple CDC 602  
26 appeals related to his claims "cancelled," "rejected" and "screened out." (*Id.* at 13-23.)  
27 "[A]n inmate is required to exhaust those, but only those, grievance procedures that are  
28 'capable of use' to obtain 'some relief for the action complained of.'" *Ross v. Blake*, 136  
S. Ct. 1850, 1859 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)); *id.* at  
1859-60 (noting unavailability where "prison administrators thwart inmates from taking  
advantage of a grievance process through machination, misrepresentation, or  
intimidation."). Therefore, because exhaustion is an affirmative defense, Defendants "will  
have to present probative evidence ... 'to plead and prove' ... that [Plaintiff] has failed to  
exhaust" all *available* administrative remedies pursuant to FED. R. CIV. P. 56, should they

1 *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (When prison officials stand accused of  
2 using excessive force in violation of the Eighth Amendment, the core judicial inquiry is  
3 “... whether force was applied in a good-faith effort to maintain or restore discipline, or  
4 maliciously and sadistically to cause harm.”); *Estelle v. Gamble*, 429 U.S. 97, 105-06  
5 (1976) (prison officials are liable if they act with deliberate indifference to a prisoner’s  
6 serious medical needs); *id.* at 104 (deliberate indifference “is manifested by prison  
7 [officials] intentionally denying or delaying access to medical care.”).

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

### 14 **III. Conclusion and Orders**

15 Good cause appearing, the Court:

16 1. **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a)  
17 (ECF No. 2);

18 2. **DIRECTS** the Secretary of the CDCR, or his designee, to collect from  
19 Plaintiff’s prison trust account the \$350 filing fee owed in this case by garnishing  
20 monthly payments from his account in an amount equal to twenty percent (20%) of the  
21 preceding month’s income and forwarding those payments to the Clerk of the Court each  
22 time the amount in the account exceeds \$10 pursuant to 28 U.S.C. § 1915(b)(2). **ALL**  
23 **PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**  
24 **ASSIGNED TO THIS ACTION;**

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28 elect to defend on this basis. *Albino*, 747 F.3d at 1169 (quoting *Jones v. Bock*, 549 U.S.  
199, 204 (2007)).

1           3.       **DIRECTS** the Clerk of the Court to serve a copy of this Order on Scott  
2 Kernan, Secretary, CDCR, P.O. Box 942883, Sacramento, California, 94283-0001;

3           4.       **DIRECTS** the Clerk to issue a summons as to Plaintiff's Complaint (ECF  
4 No. 1) and forward it to Plaintiff along with a blank U.S. Marshal Form 285 for  
5 Defendants GUSMAN and RODRIN. In addition, the Clerk will provide Plaintiff with a  
6 certified copy of this Order, a certified copy of his Complaint and the summons so that he  
7 may serve these Defendants. Upon receipt of this "IFP Package," Plaintiff must complete  
8 the Form 285s as completely and accurately as possible, *include an address where each*  
9 *Defendant may be found*, and return them to the United States Marshal according to the  
10 instructions the Clerk provides in the letter accompanying his IFP package;

11          5.       **ORDERS** the U.S. Marshal to serve a copy of the Complaint and summons  
12 upon Defendants GUSMAN and RODRIN as directed by Plaintiff on the USM Form  
13 285s provided to him. All costs of that service will be advanced by the United States. *See*  
14 *28 U.S.C. § 1915(d); FED. R. CIV. P. 4(c)(3);*

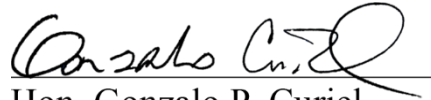
15          6.       **ORDERS** Defendants GUSMAN and RODRIN, once served, to reply to  
16 Plaintiff's Complaint within the time provided by the applicable provisions of Federal  
17 Rule of Civil Procedure 12(a). *See 42 U.S.C. § 1997e(g)(2)* (while a defendant may  
18 occasionally be permitted to "waive the right to reply to any action brought by a prisoner  
19 confined in any jail, prison, or other correctional facility under section 1983," once the  
20 Court has conducted its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and §  
21 1915A(b), and thus, has made a preliminary determination based on the face on the  
22 pleading alone that Plaintiff has a "reasonable opportunity to prevail on the merits,"  
23 defendant is required to respond); and

24          7.       **ORDERS** Plaintiff, after service has been effected by the U.S. Marshal, to  
25 serve upon Defendants GUSMAN and RODRIN, or, if appearance has been entered by  
26 counsel, upon Defendants' counsel, a copy of every further pleading, motion, or other  
27 document submitted for the Court's consideration pursuant to FED. R. CIV. P. 5(b).  
28 Plaintiff must include with every original document he seeks to file with the Clerk of the

1 Court, a certificate stating the manner in which a true and correct copy of that document  
2 has been was served on Defendants or their counsel, and the date of that service. *See* S.D.  
3 CAL. CIVLR 5.2. Any document received by the Court which has not been properly filed  
4 with the Clerk, or which fails to include a Certificate of Service upon Defendants, may be  
5 disregarded.

6 **IT IS SO ORDERED.**

7 Dated: April 18, 2017

8   
9 Hon. Gonzalo P. Curiel  
United States District Judge

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