

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 FRANCISCO MORENO,  
12 CDCR #AP-8200,

13 Plaintiff,

14 vs.

15 DANIEL PARAMO, Warden;  
16 Dr. R. WALKER, DO,  
17 Dr. TRI LUU, MD;  
18 Dr. DANNY BATES, MD,

19 Defendants.  
20  
21

Case No.: 3:17-cv-01449-CAB-KSC

**ORDER:**

**1) SUA SPONTE DISMISSING  
DEFENDANT PARAMO PURSUANT  
TO 28 U.S.C. § 1915A(b)(1)**

**AND**

**2) ORDERING PLAINTIFF TO  
SERVE REMAINING PARTIES  
OR REQUEST U.S. MARSHAL  
SERVICE PURSUANT TO  
Fed. R. Civ. P. 4(c)(3)**

22 FRANCISCO MORENO (“Plaintiff”), currently incarcerated at the California  
23 Health Care Facility (“CHCF”) in Stockton, California, and proceeding pro se, filed a  
24 civil rights Complaint against the Warden of Richard J. Donovan Correctional Facility  
25 (“RJD”) (Paramo), and three RJD doctors (Walker, Luu, and Bates) pursuant to 42  
26 U.S.C. § 1983, on July 17, 2017. *See* Compl., ECF No. 1.

27 Plaintiff claims Defendants violated his Eighth Amendment rights, as well as his  
28 rights under the Americans with Disabilities Act (“ADA”), by failing to adequately

1 address, treat and/or accommodate his serious medical needs while he was incarcerated at  
2 RJD from January 2016 through September 2016. *Id.* at 2-22. He seeks both injunctive  
3 relief as well as compensatory and punitive damages. *Id.* at 25-26.

#### 4 **I. Procedural Background**

5 On August 10, 2017, the Court denied Plaintiff's Motion to Proceed In Forma  
6 Pauperis ("IFP") pursuant to 28 U.S.C. § 1915(a) because he did not attach a certified  
7 copy of his prison trust account statement for the 6-month period preceding the filing of  
8 his Complaint, as required by § 1915(a)(2). *See* ECF No. 3. The Court granted Plaintiff  
9 leave, however, to either prepay the full filing fee, or to file a properly supported IFP  
10 Motion within 45 days. *Id.* at 3-4. On November 16, 2017, Plaintiff paid the full filing  
11 fee, *see* ECF No. 4, and the Clerk of Court re-opened the case.

12 Plaintiff did not, however, simultaneously "present a summons to the clerk for  
13 signature and seal" pursuant to Fed. R. Civ. P. 4(a), nor has he requested that the Clerk  
14 issue a summons for service on any defendant. *Id.* "A summons must be served with a  
15 copy of the complaint," and the "plaintiff is responsible for having the summons and  
16 complaint served within the time allowed by Rule 4(m)." Fed. R. Civ. P. 4(c)(1). If the  
17 Plaintiff is granted leave to proceed IFP, "the officers of the court shall issue and serve all  
18 process." 28 U.S.C. § 1915(d). Otherwise, plaintiff must request "that service be made by  
19 a United States Marshal or deputy marshal or by a person specially appointed by the  
20 court." Fed. R. Civ. P. 4(c)(3).

#### 21 **II. Screening pursuant to 28 U.S.C. § 1915A**

##### 22 **A. Standard of Review**

23 Regardless of service and IFP status, however, Plaintiff was at the time he filed his  
24 Complaint, and still remains, a "prisoner." "As used in this section, the term 'prisoner'  
25 means any person incarcerated or detained in any facility who is accused of, convicted of,  
26 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
27 conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C.  
28 § 1915A(c). *See also Olivas v. Nevada ex rel. Dept. of Corr.*, 856 F.3d 1281, 1284 (9th

1 Cir. 2017) (citing 28 U.S.C. § 1915(h), 1915A(c); 42 U.S.C. § 1997e(h)).

2 Section 1915A “mandates early review—‘before docketing [] or [] as soon as  
3 practicable after docketing’—for all complaints ‘in which a prisoner seeks redress from a  
4 governmental entity or officer or employee of a governmental entity.’” *Chavez v.*  
5 *Robinson*, 817 F.3d 1162, 1168 (9th Cir. 2016). The mandatory screening provisions of  
6 § 1915A apply to all prisoners, no matter their fee status, who bring suit against a  
7 governmental entity, officer, or employee. *See, e.g. Resnick v. Hayes*, 213 F.3d 443, 446-  
8 47 (9th Cir. 2000). “On review, the court shall ... dismiss the complaint, or any portion of  
9 the complaint,” if it “(1) is frivolous, malicious, or fails to state a claim upon which relief  
10 may be granted; or (2) seeks monetary relief from a defendant who is immune from such  
11 relief.” *Olivas*, 856 F.3d at 1283 (quoting 28 U.S.C. § 1915A(b)). “The purpose of  
12 § 1915A is to ‘ensure that the targets of frivolous or malicious suits need not bear the  
13 expense of responding.’” *Nordstrom v. Ryan*, 762 F.3d 903, 907 n.1 (9th Cir. 2014)  
14 (quoting *Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 681 (7th Cir. 2012)).<sup>1</sup>

15 Section 1915A “incorporates the familiar standard applied in the context of failure  
16 to state a claim under Federal Rule of Civil Procedure 12(b)(6).” *Wilhelm v. Rotman*, 680  
17 F.3d 1113, 1121 (9th Cir. 2012). Rule 12(b)(6) requires a complaint “contain sufficient  
18 factual matter, accepted as true, to state a claim to relief that is plausible on its face.”  
19 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*,  
20 680 F.3d at 1121. Detailed factual allegations are not required, but “[t]hreadbare recitals  
21 of the elements of a cause of action, supported by mere conclusory statements, do not  
22 suffice.” *Iqbal*, 556 U.S. at 678. “Determining whether a complaint states a plausible  
23 claim for relief [is] ... a context-specific task that requires the reviewing court to draw on  
24 its judicial experience and common sense.” *Id.* The “mere possibility of misconduct” or  
25 “unadorned, the defendant-unlawfully-harmed me accusation[s]” fall short of meeting

---

26  
27  
28 <sup>1</sup> A similar screening would be required if Plaintiff successfully moved to proceed IFP. *See*  
28 U.S.C. § 1915(e)(2)(B); *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

1 this plausibility standard. *Id.*; *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969  
2 (9th Cir. 2009).

3 B. Plaintiff's Allegations

4 Plaintiff claims that beginning on January 1, 2016, he reported trouble breathing,  
5 chest pain, and felt a stent in his throat “was moving up and down.” *See* Compl., ECF No.  
6 1 at 3. Plaintiff was evaluated by Dr. Bates, and admitted to a Sharp Hospital emergency  
7 room the next day, where he remained until January 9, 2016, and was treated for COPD,  
8 pneumonia, bronchitis, and an upper respiratory infection. *Id.* at 5. After his release,  
9 Plaintiff claims unidentified RJD medical official failed to provide the medication  
10 recommended by his physicians at Sharp, and he continued to experience difficulty  
11 breathing. *Id.* at 5-7.

12 Plaintiff was again evaluated by Dr. Luu on January 21, 2016, and requested  
13 hospitalization, but Luu determined it was “not an emergency” and instead referred  
14 Plaintiff to the “TTA” medical clinic. *Id.* at 8. That night, however, Plaintiff “passed out  
15 in [his] cell,” was transported to Sharp Hospital in Chula Vista, and on January 22, 2016,  
16 transferred to the ICU at UCSD where he stayed for 6 days and underwent a surgical  
17 tracheostomy. *Id.* at 11. On January 26, 2016, Plaintiff was again transferred to Alvarado  
18 Hospital for a “tracheal stenosis status post-removal of a stent which had migrated to the  
19 ‘tree of [his] lungs.’” *Id.* Plaintiff was discharged on January 29, 2016, and returned to  
20 RJD. *Id.* at 12.

21 On March 21, 2016, however, Plaintiff again experienced trouble breathing, and  
22 requested an emergency request for transport back to the hospital from Dr. Walker,  
23 whom he claims is the “supervisor of all doctors.” *Id.* at 12. Plaintiff was admitted to  
24 RJD’s “(CTC) clinic infirmary” on March 24, 2016, and again evaluated by Dr. Luu, who  
25 tested his need for the “oxygen machine,” and “continued to ignore” his requests and  
26 symptoms. *Id.* at 13. On March 25, 2016, Plaintiff again experienced shortness of breath  
27 and chest pain, and was transported to Sharp, then UCSD, where he underwent another  
28 surgery to implant a “tracheostomy tube.” *Id.* at 15. Plaintiff was later transported from

1 UCSD to another “Vibra” Hospital on April 2, 2016, where he was treated and remained  
2 until May 2, 2016, when he was again returned to RJD, placed in the infirmary, and re-  
3 evaluated by Dr. Luu. *Id.* at 18.

4 On June 8, 2016, Plaintiff claims he filed a medical grievance, Log No. RJD-HC  
5 16055502, alleging medical negligence. *Id.* at 19. On June 30, 2016, Dr. Luu informed  
6 Plaintiff that he would be “meeting with Dr. Walker,” and on July 1, 2016, Dr. Luu told  
7 Plaintiff that Dr. Walker “decided to move [him] out of the infirmary,” and into the “C”  
8 yard. *Id.* at 19. Plaintiff claims Drs. Luu and Walker violated the ADA by doing so,  
9 however, since he “was supposed to be in [a] high acuity medical unit” due to his  
10 “physical disabilities,” and his need for a “wheelchair, oxygen machine, suction machine,  
11 breathing machine, [and] walker.” *Id.* at 19-20.

12 Plaintiff was next transferred to Tri City Medical Center for four days beginning  
13 on July 21, 2016, after he was “coughing blood from [his] tracheotomy tube.” *Id.* at 20.  
14 Plaintiff was informed on August 25, 2016, that his tube needed to be changed every 60  
15 days, and Dr. Walker “want[ed] to do it ... in the EOP clinic” at RJD. *Id.* at 20. Plaintiff  
16 objected, and was transported back to Tri City for 3 days. *Id.*

17 On August 28, 2016, Plaintiff requested he be returned to the infirmary, because  
18 dust caused by ongoing construction in RJD’s “C” yard was exacerbating his condition.  
19 *Id.* at 21. On September 1, 2016, Plaintiff was told Dr. Walker was not moving him to the  
20 infirmary, but was instead transferring him to Building 13 “Gang Unit” #147, which is  
21 “not a medical building,” and which had “no ADA cells.” *Id.* at 21-22. On September 2,  
22 2016, Plaintiff again coughed blood, experienced shortness of breath, reported chest pain,  
23 “passed out,” and awoke in Tri City ICU, where he was again admitted for 5 days. *Id.* at  
24 22.

25 Upon his return to RJD on September 8, 2016, Plaintiff was placed in the  
26 infirmary, where he was told on September 10, 2016, that he had been endorsed for a  
27 transfer to CHCF in Stockton. *Id.* at 22.

28 ///

1 Plaintiff alleges Drs. Bates, Luu, and Walker all acted with deliberate indifference  
2 to his serious medical needs from January through September 2016 in violation of the  
3 Eighth Amendment and the ADA. *Id.* at 3, 19-20, 23.

4 C. 42 U.S.C. § 1983

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
6 elements: (1) that a right secured by the Constitution or laws of the United States was  
7 violated, and (2) that the alleged violation was committed by a person acting under the  
8 color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Naffe v. Frye*, 789 F.3d 1030,  
9 1035-36 (9th Cir. 2015).

10 D. Individual Liability – Warden Paramo

11 First, the Court notes that in addition to Drs. Bates, Luu, and Walker, Plaintiff has  
12 named the Warden of RJD, Daniel Paramo, as a Defendant. *See* Compl., ECF No. 1 at 1,  
13 2. Nowhere in the body of his Complaint does Plaintiff include “further factual  
14 enhancement” which describes when, how, or to what extent, Defendant Paramo  
15 personally caused him any injury. *Iqbal*, 556 U.S. at 678. Instead, Plaintiff simply  
16 identifies Paramo as RJD’s Warden, and never mentions him again. *See* ECF No. 1 at 2.

17 There is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v.*  
18 *Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). “Because vicarious liability is  
19 inapplicable to ... § 1983 suits, [Plaintiff] must plead that each government-official  
20 defendant, through the official’s own individual actions, has violated the Constitution.”  
21 *Iqbal*, 556 at 676; *see also Jones v. Community Redevelopment Agency of City of Los*  
22 *Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (even pro se plaintiff must “allege with at  
23 least me degree of particularity overt acts which defendants engaged in” in order to state  
24 a claim).

25 Thus, as currently pleaded, Plaintiff’s Complaint offers no factual detail from  
26 which the Court might reasonably infer a plausible claim for relief based on a violation of  
27 any constitutional right on the part of Warden Paramo. *Iqbal*, 662 U.S. at 678 (noting that  
28 Fed. R. Civ. P. 8 “demands more than an unadorned, the-defendant-unlawfully-harmed-

me accusation,” and that “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’”) (citation omitted). Therefore, the Court sua sponte dismisses Daniel Paramo, as a party to this action based on Plaintiff’s failure to state a plausible claim against him. *See* 28 U.S.C. § 1915A(b)(1); *Wilhelm*, 680 F.3d at 1121.

### **III. Service of Complaint on Remaining Defendants**

As noted previously, Plaintiff filed his Complaint in this case on July 17, 2017, and paid the filing fee required by 28 U.S.C. § 1914(a) on November 16, 2017, after the Court denied his initial Motion to Proceed IFP. *See* ECF Nos. 3, 4.

The Court has now reviewed Plaintiff’s Complaint pursuant to 28 U.S.C. § 1915A, and has determined that it fails to state a claim as to Warden Paramo. As to Drs. Bates, Luu, and Walker, however, the Court finds Plaintiff’s pleading contains Eighth Amendment inadequate medical care claims sufficient to survive the “low threshold” for proceeding past the sua sponte screening required by 28 U.S.C. § 1915A(b). *See Wilhelm*, 680 F.3d at 1123; *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (noting that deliberate indifference to a serious medical need under the Eighth Amendment “may be manifested in two ways. It may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.”) (citing *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976)).

Therefore, because Plaintiff is *not* proceeding IFP in this case, he remains responsible for effecting service of the summons and Complaint upon Defendants Bates, Luu, and Walker within the 90 days permitted by Fed. R. Civ. P. 4(m). *See* Fed. R. Civ. P. 4(c)(1). The Rule 4(m) clock may be tolled while the Court screens a prisoner IFP complaint pursuant to 28 U.S.C. § 1915(e)(2) or § 1915A. *See Butler v. Nat’l Cmty. Renaissance of California*, 766 F.3d 1191, 1204 n.8 (9th Cir. 2014) (noting that “[o]ther federal circuit courts of appeals have held that the [90]–day service period is tolled until the court screens a plaintiff’s in forma pauperis complaint and authorizes service of

process”) (citing *Robinson v. Clipse*, 602 F.3d 605, 608 (4th Cir. 2010); *Urrutia v. Harrisburg Cnty. Police Dep’t*, 91 F.3d 451, 459 (3d Cir. 1996)).

#### IV. Conclusion and Order

For the reasons discussed, the Court:

1) **DISMISSES** Defendant Paramo sua sponte based on Plaintiff’s failure to state a claim against him pursuant to 28 U.S.C. § 1915A(b)(1), and **DIRECTS** the Clerk to terminate Paramo as a party in this matter; and

2) **ORDERS** Plaintiff within 30 days of the date of this Order to either:


a) File a written request that the Clerk issue a summons as to Defendants Bates, Luu, and Walker, so that he may effect service upon them within 90 days from the date the summons is issued pursuant to Fed. R. Civ. P. 4(b), (c)(1), and (m), *or*

b) File a written request that the Court order service upon Defendants Bates, Luu, and Walker be effected on his behalf by a United States marshal or deputy marshal pursuant to Fed. R. Civ. P. 4(c)(3).

If Plaintiff fails to comply with this Order within the time provided, the Court will dismiss the remainder of this civil action without prejudice based on Plaintiff’s failure to serve and/or prosecute pursuant to Fed. R. Civ. P. 4(m) and S.D. Cal. CivLR 41.1(a).

**IT IS SO ORDERED.**

Dated: January 25, 2018

  
\_\_\_\_\_  
Hon. Cathy Ann Bencivengo  
United States District Judge