

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

11 DAVID PAUL RUFF,
12 CDCR #E-74808,

13 Plaintiff,

14 vs.

15 DANIEL PARAMO,

16 Defendant.
17
18
19
20
21
22
23
24
25

Case No.: 3:17-cv-2030-WQH-KSC

ORDER:

**1) GRANTING MOTION TO
PROCEED IN FORMA PAUPERIS
[ECF No. 8]**

**2) DISMISSING COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO 28 U.S.C. § 1915(e)(2)
AND § 1915A(b)**

AND

**3) DENYING MOTION FOR
RESTRAINING ORDER
[ECF No. 6]**

26 David Paul Ruff (“Plaintiff”), currently incarcerated at the Richard J. Donovan
27 Correctional Facility (“RJD”) located in San Diego, California, and proceeding pro se, has
28 filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1). In addition,

1 Plaintiff has filed a Motion for Restraining Order (ECF No. 6), along with a certified copy
2 of his inmate trust account statement which the Court liberally construes to be a Motion to
3 Proceed In Forma Pauperis (“IFP”) (ECF No. 8).

4 **I. Motion to Proceed In Forma Pauperis**

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); *Rodriguez v.*
10 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed
11 IFP remains obligated to pay the entire fee in “increments” or “installments,” *Bruce v.*
12 *Samuels*, ___ U.S. ___, 136 S. Ct. 627, 629 (2016); *Williams v. Paramo*, 775 F.3d 1182,
13 1185 (9th Cir. 2015), and regardless of whether his action is ultimately dismissed. See 28
14 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

15 Section 1915(a)(2) requires prisoners seeking leave to proceed IFP to submit a
16 “certified copy of the trust fund account statement (or institutional equivalent) for ... the 6-
17 month period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);
18 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account
19 statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits
20 in the account for the past six months, or (b) the average monthly balance in the account
21 for the past six months, whichever is greater, unless the prisoner has no assets. See 28
22 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner
23 then collects subsequent payments, assessed at 20% of the preceding month’s income, in
24

25
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 any month in which his account exceeds \$10, and forwards those payments to the Court
2 until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2); *Bruce*, 136 S. Ct. at 629.

3 Plaintiff's trust account statement shows Plaintiff has had no monthly deposits to his
4 account, has carried no balance over the six month period preceding the filing of his
5 Complaint, and that his current available balance is zero. *See* 28 U.S.C. § 1915(b)(4)
6 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or
7 appealing a civil action or criminal judgment for the reason that the prisoner has no assets
8 and no means by which to pay the initial partial filing fee."); *Bruce*, 136 S. Ct. at 630;
9 *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"
10 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay . . . due to
11 the lack of funds available to him when payment is ordered.").

12 Therefore, the Court GRANTS Plaintiff's Motion to Proceed IFP (ECF No. 8),
13 declines to "exact" any initial filing fee because his trust account statement shows he "has
14 no means to pay it," *Bruce*, 136 S. Ct. at 629, and directs the Secretary for the California
15 Department of Corrections and Rehabilitation ("CDCR") to instead collect the entire \$350
16 balance of the filing fees required by 28 U.S.C. § 1914 and forward them to the Clerk of
17 the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
18 § 1915(b)(1).

19 **II. Sua Sponte Screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A**

20 **A. Standard of Review**

21 Because Plaintiff is a prisoner and is proceeding IFP, his Complaint requires a pre-
22 answer screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these statutes,
23 the Court must sua sponte dismiss a prisoner's IFP complaint, or any portion of it, which
24 is frivolous, malicious, fails to state a claim, or seeks damages from defendants who are
25 immune. *See Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing
26 28 U.S.C. § 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)
27 (discussing 28 U.S.C. § 1915A(b)). "The purpose of [screening] is 'to ensure that the
28 targets of frivolous or malicious suits need not bear the expense of responding.'"

1 *Nordstrom v. Ryan*, 762 F.3d 903, 920 n.1 (9th Cir. 2014) (citations omitted.)

2 “The standard for determining whether a plaintiff has failed to state a claim upon
3 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of
4 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d
5 1108, 1112 (9th Cir. 2012); *see also Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir.
6 2012) (noting that screening pursuant to § 1915A “incorporates the familiar standard
7 applied in the context of failure to state a claim under Federal Rule of Civil Procedure
8 12(b)(6)”). Rule 12(b)(6) requires a complaint “contain sufficient factual matter, accepted
9 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S.
10 662, 678 (2009) (internal quotation marks omitted); *Wilhelm*, 680 F.3d at 1121.

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

18 B. Plaintiff’s Allegations

19 Plaintiff alleges that he was diagnosed with liver cancer in November 2016. (ECF
20 No. 1 at 4.) Plaintiff was told that he would undergo surgery to remove the tumor in his
21 liver but he was later informed that the operation was “too complicated.” (*Id.*) Plaintiff
22 claims this is causing him “undue stress” and he is concerned that he will be assigned a
23 cellmate who “wants to fight.” (*Id.*) Due to Plaintiff’s medical condition he has to “arise
24 at all times of the night to use toilet and sink.” (*Id.*) Plaintiff believes that a cellmate would
25 rather harm Plaintiff and receive a cell transfer than “suffer the environment of living with
26 [an] inmate suffering from bodily illnesses that wake you up through the night.” (*Id.* at 5.)
27 In addition to compensatory and punitive damages, Plaintiff is seeking an Order from this
28 Court directing prison officials to place Plaintiff on permanent “single cell status.” (*Id.* at

1 9.)

2 D. Individual Liability

3 Plaintiff names Warden Paramo as the only named Defendant in this action. (Compl.
4 at 1.) However, under section 1983, Plaintiff must allege facts sufficient to show that each
5 named Defendant individually participated in causing a constitutional violation. *Iqbal*, 556
6 U.S. at 676-77; *Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1020-21 (9th Cir. 2010).
7 Liability may not be imposed on supervisory personnel under the theory of respondeat
8 superior, *Iqbal*, 556 U.S. at 676-77; *Simmons*, 609 F.3d at 1020-21, and as an RJD
9 administrator, Defendant Paramo may only be held liable if he personally “participated in
10 or directed the violations, or knew of the violations and failed to act to prevent them.”
11 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.1989); *accord Starr v. Baca*, 652 F.3d 1202,
12 1205-08 (9th Cir. 2011). Some culpable action or inaction must be attributable to the
13 Defendant individually, and while the creation or enforcement of, or acquiescence in, an
14 unconstitutional policy may support a claim, Plaintiff must further allege that the policy
15 was the moving force behind the violation. *Starr*, 652 F.3d at 1205; *Jeffers v. Gomez*, 267
16 F.3d 895, 914-15 (9th Cir. 2001).

17 Thus, Plaintiff’s claims against Defendant Paramo are DISMISSED for failing to
18 state a claim upon which relief may be granted.

19 E. Eighth Amendment

20 Plaintiff seeks to bring this action claiming that his Eighth Amendment rights are
21 being violated by Defendants failing to address his concerns that he may suffer injury if he
22 is housed with another inmate. (ECF No. 1 at 3-5.)

23 The Eighth Amendment requires that prison officials take reasonable measures to
24 guarantee the safety and well-being of prisoners. *Farmer v. Brennan*, 511 U.S. 825, 832–
25 33 (1994); *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). To state an Eighth
26 Amendment failure to protect claim, however, Plaintiff must allege facts sufficient to
27 plausibly show that (1) he faced conditions posing a “substantial risk of serious harm” to
28 his health or safety, and (2) the individual prison official he seeks to hold liable was

1 “deliberately indifferent” to those risks. *Farmer*, 511 U.S. at 837; *Thomas v. Ponder*, 611
2 F.3d 1144, 1150 (9th Cir. 2010). To demonstrate deliberate indifference, Plaintiff must
3 allege facts sufficient to plausibly show that Defendant both knew of and disregarded a
4 substantial risk of serious harm to his health and safety. *Farmer*, 511 U.S. at 837. Thus,
5 Plaintiff must allege “the official [was] both be aware of facts from which the inference
6 could be drawn that a substantial risk of serious harm exist[ed], and [that] he . . . also
7 dr[e]w that inference.” *Id.*

8 Plaintiff’s Complaint does not plausibly suggest that Defendant Paramo would know
9 that Plaintiff faces a “substantial risk of serious harm.” *Id.* Plaintiff alleges no additional
10 facts from which the Court might reasonably infer that Defendant Paramo was aware or
11 became aware that Plaintiff faced any risk, let alone a substantial one from any other
12 inmate. *Iqbal*, 556 U.S. at 678; *see also Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987)
13 (“mere threat” of possible harm does not violate the Eighth Amendment); *Berg v.*
14 *Kincheloe*, 749 F.2d 457, 459 (9th Cir. 1986) (deliberate indifference requires showing of
15 “more than a mere suspicion that an attack will occur.”); *Hernandez v. Schriro*, No. CV
16 05-2853-PHX-DGC, 2011 WL 2910710, at *6 (D. Ariz. July 20, 2011) (“While theoretical
17 risk is always possible, *Farmer* requires more—‘conditions posing a substantial risk of
18 serious harm.’”).

19 For these reasons, the Court finds Plaintiff’s failure to protect claims must be
20 DISMISSED for failing to state a claim.

21 In addition, the Court finds that because Plaintiff plainly concedes, on the face of his
22 Complaint, that the administrative exhaustion of his claims is currently pending at the time
23 of filing (ECF No. 1 at 8), this entire action must be dismissed. *See Albino v. Baca*, 747
24 F.3d 1162, 1169 (9th Cir. 2014) (en banc) (noting that where “a prisoner’s failure to exhaust
25 is clear from the face of the complaint,” his complaint is subject to dismissal for failure to
26 state a claim), *cert. denied sub nom, Scott v. Albino*, 135 S. Ct. 403 (2014); *Wyatt v.*
27 *Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003) (“A prisoner’s concession to nonexhaustion
28 is a valid ground for dismissal[.]”), *overruled on other grounds by Albino*, 747 F.3d at

1 1166. The “exhaustion requirement does not allow a prisoner to file a complaint addressing
2 non-exhausted claims.” *Rhodes*, 621 F.3d at 1004 (citing *McKinney v. Carey*, 311 F.3d
3 1198, 1199 (9th Cir. 2002)).

4 Thus, for all the reasons discussed, the Court finds Plaintiff’s Complaint must be
5 dismissed in its entirety for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2) and
6 § 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Rhodes*, 621 F.3d at 1004.

7 E. Leave to Amend

8 Because Plaintiff is proceeding without counsel, and he has now been provided with
9 “notice of the deficiencies in his complaint,” the Court will also grant him an opportunity
10 to amend. *See Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v.*
11 *Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992)).²

12 **IV. Plaintiff’s Motion for Preliminary Injunction**

13 Finally, Plaintiff also requests an Order “for temporary single-cell status during the
14 Court proceedings.” (Pl.’s Mot, ECF No. 6, at 1.)

15 Procedurally, a federal district court may issue emergency injunctive relief only if it
16 has personal jurisdiction over the parties and subject matter jurisdiction over the lawsuit.
17 *See Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) (noting
18 that one “becomes a party officially, and is required to take action in that capacity, only
19 upon service of summons or other authority-asserting measure stating the time within
20 which the party served must appear to defend.”). The court may not attempt to determine
21 the rights of persons not before it. *See, e.g., Hitchman Coal & Coke Co. v. Mitchell*, 245
22 U.S. 229, 234-35 (1916); *Zepeda v. INS*, 753 F.2d 719, 727-28 (9th Cir. 1983). Pursuant to
23 Federal Rule of Civil Procedure 65(d)(2), an injunction binds only “the parties to the
24 action,” their “officers, agents, servants, employees, and attorneys,” and “other persons
25

26
27 ² Plaintiff is cautioned that *all* claims re-alleged in his Amended Complaint must be
28 exhausted pursuant to 42 U.S.C. § 1997e(a) prior to its filing. *See Cano v. Taylor*, 739
F.3d 1214, 1220 (9th Cir. 2014).

1 who are in active concert or participation.” FED. R. CIV. P. 65(d)(2)(A)-(C).

2 Substantively, “[a] plaintiff seeking a preliminary injunction must establish that he
3 is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence
4 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is
5 in the public interest.” *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726, 2736-37 (2015)
6 (quoting *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). “Under
7 *Winter*, plaintiffs must establish that irreparable harm is likely, not just possible, in order
8 to obtain a preliminary injunction.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
9 1127, 1131 (9th Cir. 2011).

10 First, because Plaintiff’s Complaint has not survived the initial sua sponte screening
11 required by 28 U.S.C. § 1915(e)(2) and § 1915A, the United States Marshal has not yet
12 been directed to effect service on his behalf, and the named Defendants have no actual
13 notice of either of Plaintiff’s Complaint or his Motion for injunctive relief. Therefore, the
14 Court cannot grant Plaintiff injunctive relief because it has no personal jurisdiction over
15 any Defendant at this time. *See* FED. R. CIV. P. 65(a)(1), (d)(2); *Murphy Bros., Inc.*, 526
16 U.S. at 350; *Zepeda*, 753 F.2d at 727-28. A district court has no authority to grant relief in
17 the form of a temporary restraining order or permanent injunction where it has no
18 jurisdiction over the parties. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999)
19 (“Personal jurisdiction, too, is an essential element of the jurisdiction of a district ... court,
20 without which the court is powerless to proceed to an adjudication.”) (citation and internal
21 quotation omitted).

22 Second, in conducting its initial sua sponte screening of Plaintiff’s Complaint, the
23 Court has found it fails to state a claim upon which relief can be granted, and has dismissed
24 it without prejudice pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b). Therefore,
25 Plaintiff has necessarily failed to show, for purposes of justifying preliminary injunctive
26 relief, any likelihood of success on the merits of his claims at this time. *Id.*; *see also Asberry*
27 *v. Beard*, Civil Case No. 3:13-cv-2573-WQH JLB, 2014 WL 3943459, at *9 (S.D. Cal.
28 Aug. 12, 2014) (denying prisoner’s motion for preliminary injunction because his

1 complaint was subject to dismissal pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A, and
2 therefore he had not shown he was “likely to succeed on the merits” of any claim, that “the
3 balance of equities tip[ped] in his favor,” or the issuance of an injunction would serve the
4 public interest (citing *Winter*, 555 U.S. at 20)).

5 Finally, Plaintiff has not alleged, and cannot yet demonstrate that he is or will be
6 subject to immediate and irreparable harm if an injunction does not issue. To meet FED. R.
7 CIV. P. 65’s “irreparable injury” requirement, Plaintiff must do more than simply allege
8 imminent harm; he must demonstrate it. *Caribbean Marine Servs. Co., Inc. v. Baldrige*,
9 844 F.2d 668, 674 (9th Cir. 1988). This requires he allege “specific facts in an affidavits
10 or a verified complaint [which] clearly show” a credible threat of “immediate and
11 irreparable injury, loss or damage.” FED R. CIV. P. 65(b)(A). “Speculative injury does not
12 constitute irreparable injury sufficient to warrant granting a preliminary injunction.” *Id.* at
13 674-75.

14 Thus, because Plaintiff has failed to serve the required notice upon the adverse
15 parties, has not shown a likelihood of success on the merits, and has offered only
16 speculative allegations of harm which are neither immediate nor irreparable, the Court
17 DENIES his Motion for Restraining Order and finds he is not entitled to the extraordinary
18 injunctive relief he seeks. *See Dymo Indus. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th
19 Cir. 1964) (“The grant of a preliminary injunction is the exercise of a very far reaching
20 power never to be indulged in except in a case clearly warranting it.”).

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **IV. Conclusion and Orders**

2 Based on the foregoing the Court:

3 1) **GRANTS** Plaintiff's Motion to Proceed IFP (ECF No. 8);

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

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

13 4) **DENIES** Plaintiff's Motion for Restraining Order (ECF No. 6); and

14 5) **DISMISSES** Plaintiff's Complaint for failing to state a claim upon which
15 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and **GRANTS**
16 him forty-five (45) days leave from the date of this Order in which to file an Amended
17 Complaint which cures all the deficiencies of pleading noted. Plaintiff's Amended
18 Complaint must be complete by itself without reference to his original pleading.
19 Defendants not named and any claim not re-alleged in his Amended Complaint will be
20 considered waived. *See* S.D. Cal. CivLR 15.1; *Hal Roach Studios, Inc. v. Richard Feiner*
21 *& Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended pleading supersedes the
22 original.”); *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims
23 dismissed with leave to amend which are not re-alleged in an amended pleading may be
24 “considered waived if not repled.”).

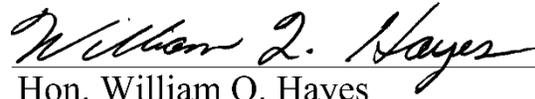
25 If Plaintiff fails to file an Amended Complaint within the time provided, the Court
26 will enter a final Order dismissing this civil action based both on Plaintiff's failure to state
27 a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915(e)(2) and
28 1915A(b), and his failure to prosecute in compliance with a court order requiring

1 amendment. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a plaintiff does
2 not take advantage of the opportunity to fix his complaint, a district court may convert the
3 dismissal of the complaint into dismissal of the entire action.”).

4 6) The Clerk of Court is directed to mail Plaintiff a court approved civil rights
5 complaint form for his use in amending.

6 **IT IS SO ORDERED.**

7 Dated: November 21, 2017

8 
9 Hon. William Q. Hayes
United States District Court

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28