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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF ARIZONA

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10 MICHAEL A. LEON,

11 Plaintiff,

12 vs.

13 STATE OF ARIZONA, et al.,

14 Defendants.

No. CIV 12-556-TUC-CKJ

ORDER

15 On July 23, 2012, Plaintiff Michael A. Leon (“Leon”) filed a pro se Complaint
16 alleging a civil rights violation, an American with Disabilities Act violation, and tort claims.
17 On November 16, 2012, this Court issued an Order dismissing with leave to amend the
18 Complaint. On January 27, 2013, Leon filed a First Amended Complaint (“FAC”). Leon
19 having been granted IFP status, *see* Doc. 8, the Court finds it appropriate to screen the FAC.
20 *See* 28 U.S.C. § 1915 Additionally, a Motion to Dismiss filed by Defendant Oro Valley
21 Police Department (Doc. 24), a Motion for Entry of Default filed by Leon (Doc. 31), an
22 Objection to the Court’s Order denying recusal filed by Leon (Doc. 32), and a Motion for
23 Recusal, Disqualification of Judge Cindy K. Jorgenson filed by Leon (Doc. 33) are pending
24 before the Court. Leon has requested the issues be set for oral argument; the Court does not
25 find that scheduling this matter for oral argument would assist the Court. The Court
26 declines to set these matters for argument. *See* LRCiv 7.2(f); 27A Fed.Proc., L. Ed. §
27 62:367 (“A district court generally is not required to hold a hearing or oral argument before
28 ruling on a motion.”).

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Objection/Motion for Recusal, Disqualification

As the Court stated in its February 25, 2013, Order, the Court is unaware of and has not learned of any basis to recuse itself. *United States v. Morrison*, 153 F.3d 34 (2nd Cir. 1998) (court could confirm there was no basis to recuse herself). Just as the Court has a duty to recuse itself when appropriate, the Court has a duty not to recuse itself if it is not appropriate. *United States v. Burger*, 964 F.2d 1065 (10th Cir. 1992); *see also United States v. Sierra Pacific Ind.*, 759 F.Supp.2d 1198 (E.D.Cal. 2010). The Court finds Leon has not presented a basis for the Court to reconsider its prior decision and finds that recusal is not appropriate. *See e.g., Above the Belt, Inc. v. Mel Bohanan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va. 1983) (limiting motions for reconsideration to cases where the court has patently misunderstood a party, where the court has made a decision outside the adversarial issues presented to the court, where the court has made an error not of reasoning but of apprehension, or where there has been a controlling or significant change in the law or facts since the submission of the issue to the court; a motion for reconsideration is not to be used to ask a court “to rethink what the court had already thought through – rightly or wrongly.”); *see also United States v. Rezzonico*, 32 F.Supp.2d 1112, 1116 (D.Ariz. 1998).

Screening Order – First Amended Complaint

This Court is required to dismiss a case if the Court determines that the allegation of poverty is untrue, 28 U.S.C. § 1915(e)(2)(A), or if the Court determines that the action "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." 28 § 1915(e)(2)(B). A complaint is to contain a "short and plain statement of the claim showing that the pleader is entitled to relief[.]" Rule 8(a), Fed.R.Civ.P. Especially where the pleader is *pro se*, the pleading should be liberally construed in the interests of justice. *Johnson v. Reagan*, 524 F.2d 1123 (9th Cir. 1975). Nonetheless, a complaint must set forth a set of facts that serves to put defendants on notice as to the nature and basis of the claim(s).

1 Furthermore, all allegations of a claim are to be set forth in numbered paragraphs that should
2 be limited to a single set of circumstances. Rule 10(a), Fed.R.Civ.P. "Each claim . . . shall
3 be stated in a separate count . . . whenever a separation facilitates the clear presentation of
4 the matters set forth." *Id.* Failure to set forth claims in such a manner places the onus on
5 the court to decipher which, if any, facts support which claims, as well as to determine
6 whether a plaintiff is entitled to the relief sought. *Haynes v. Anderson & Strudwick, Inc.*,
7 508 F.Supp. 1303 (D.C.Va. 1981).

8 The United States Supreme Court has found that a plaintiff must allege "enough facts
9 to state a claim to relief that is plausible on its facts." *Bell Atlantic Corp. v. Twombly*, 550
10 U.S. 544, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). While a complaint need not plead
11 "detailed factual allegations," the factual allegations it does include "must be enough to raise
12 a right to relief above the speculative level." *Id.* at 1964-65; *see also Moss v. U.S. Secret*
13 *Service*, 572 F.3d 962 (9th Cir. 2009) (for a complaint to survive a motion to dismiss, the
14 non-conclusory "factual content," and reasonable inferences from that content, must be
15 plausibly suggestive of a claim entitling the plaintiff to relief); *Starr v. Baca*, 652 F.3d 1202,
16 1216 (9th Cir. 2011) ("If there are two alternative explanations, one advanced by defendant
17 and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint
18 survives a motion to dismiss[.]"). Indeed, Fed.R.Civ.P. 8(a)(2) requires a showing that a
19 plaintiff is entitled to relief "rather than a blanket assertion" of entitlement to relief. *Id.* at
20 1965 n. 3

21 This Court must take as true all allegations of material fact and construe them in the
22 light most favorable to Leon. *See Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir.
23 2003). In general, a complaint is construed favorably to the pleader. *See Scheuer v. Rhodes*,
24 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), *overruled on other grounds*, 457
25 U.S. 800. Nonetheless, the Court does not accept as true unreasonable inferences or
26 conclusory legal allegations cast in the form of factual allegations. *Western Mining Council*
27 *v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Furthermore, the Court is not to serve as an
28 advocate of a *pro se* litigant, *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987),

1 *superseded on other grounds*, in attempting to decipher a complaint.

2 The FAC in this case is an 89 page document, plus exhibits. This includes
3 approximately 80 pages consisting of mainly conclusory facts and a discussion of legal and
4 religious theories. The FAC also includes a statement of ten claims. Generally, in stating
5 his claims, Leon does not specify which facts and which Defendants apply to each claim.
6 “As written, the court does not see means for any of the named defendants to decipher
7 which allegations in the amended complaint plaintiff is making against whom.” *Dustin v.*
8 *Galaza*, No. 1:05-cv-00697-AWI-DLB (PC), 2008 WL 314106 * 3 (E.D.Cal. 2008).

9
10 *Count One – Civil/Constitutional Rights Violation*

11 Leon asserts Defendants denied his Fifth, Seventh, and Fourteenth Amendment
12 rights; specifically Leon asserts that Defendants denied Leon’s right to pursue litigation,
13 denied Leon access to the courts, and ridiculed and belittled him. Leon does not specifically
14 state, with the exception of the Oro Valley Police Department, which Defendants this claim
15 applies to. There is a First Amendment right of meaningful access to the courts and a right
16 to petition the government for redress. *See e.g.*, *Bill Johnson's Rest., Inc. v. NLRB*, 461
17 U.S. 731, 741 (1983) (finding that “the right of access to the courts is an aspect of the First
18 Amendment right to petition the Government for redress of grievances”).¹ Cases addressing

19 _____
20 ¹The constitutional source of the right of access to the courts is not settled. *See*
21 *Christopher v. Harbury*, 536 U.S. 403, 413–14 & 415 n. 12, 122 S.Ct. 2179, 153 L.Ed.2d 413
22 (2002); *Lewis v. Casey*, 518 U.S. 343, 366–67, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996)
23 (Thomas, J., concurring). The Supreme Court has grounded the right in the Article IV
24 Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth
25 Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due
26 Process Clauses. *Christopher*, 536 U.S. at 415 n. 12 (citing cases). The Ninth Circuit has
27 also has found various constitutional sources for the right. *See, e.g.*, *Cornett v. Donovan*, 51
28 F.3d 894, 897 (9th Cir.1995) (right grounded in due process and equal protection clauses);
Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir.1995) (use of prison grievance procedure
protected by prisoner's right to meaningful access to courts along with broader right to
petition government for redress of grievances); *see also Soranno's Gasco, Inc. v. Morgan*,
874 F.2d 1310, 1314 (9th Cir.1989) (nonprisoner case finding right of access to courts
subsumed under 1st Amendment).

1 right to access claims fall into two general categories. “In the first are claims that systemic
2 official action frustrates a plaintiff or plaintiff class in preparing and filing suits at the
3 present time[.]” *Christopher*, 536 U.S. at 413. “The second category covers claims not in
4 aid of a class of suits yet to be litigated, but of specific cases that cannot now be tried (or
5 tried with all material evidence), no matter what official action may be in the future,” with
6 these claims targeting official acts that “allegedly have caused the loss or inadequate
7 settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an
8 opportunity to seek some particular order of relief.” *Christopher*, 536 U.S. at 413–14,
9 *footnote and citations omitted*. Cases falling in this latter group “do not look forward to a
10 class of future litigation, but backward to a time when specific litigation ended poorly, or
11 could not have commenced, or could have produced a remedy subsequently unobtainable.”
12 536 U.S. at 414, *footnotes omitted*.

13 Leon’s FAC appears to seek to state a claim under the second category. Leon
14 appears to be alleging that conduct of Defendants interfered with his access to the courts in
15 prior cases. The right of access in the second category is “ancillary to the underlying claim,
16 without which a plaintiff cannot have suffered injury by being shut out of court.”
17 *Christopher*, 536 U.S. at 415. In order to state a claim, Leon must identify 1) a nonfrivolous
18 arguable underlying claim; 2) the official acts frustrating the litigation, and 3) the remedy
19 that may be awarded as recompense, but that is not otherwise available in a future suit. *Id.*
20 The predicate claim must “be described well enough to apply the nonfrivolous test and to
21 show that the arguable nature of the underlying claim is more than hope.” *Id.* at 416.
22 Although Leon refers to state litigation, C20091791, discovery issues, and whistleblower
23 status, Leon does not describe any non-frivolous predicate claim(s).

24 Leon also asserts that the Oro Valley Police Department failed to investigate and was
25 biased in upholding the law. However, these allegations are conclusory and fail to present
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1 a factual basis for a denial of access claim.²

2 Additionally, the right of access to the courts is not absolute. *See Hudson v. Palmer*,
3 468 U.S. 517, 523, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (“[T]he constitutional right to
4 petition the Government for redress of their grievances ... includes a reasonable right of
5 access to the courts”). “Moreover, the right must be exercised ‘within the limits ... of [the
6 courts] prescribed procedures.’” *Wilbur v. Locke*, 423 F.3d 1101, 1116 (9th Cir. 2005),
7 *abrogated on other grounds, quoting Cal. Motor Transp. Co. v. Trucking Unlimited*, 404
8 U.S. 508, 515, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Lastly, this Court does not have
9 jurisdiction to review state court judicial proceedings. *Southern California Edison Co. v.*
10 *Lynch*, 307 F.3d 794, 804 (9th Cir. 2002) (“[T]he *Rooker-Feldman* doctrine bars direct
11 federal district court appellate review of state court judicial proceedings.”).

12 The Court finds Leon has failed to state a denial of access claim upon which relief
13 may be granted.

14
15 *Count Two – Constitutionality of a Law*

16 Leon appears to be asserting that the principle that a person conducting litigation in
17 *propria persona* is held to the same familiarity with required procedures and the same notice
18 of statutes and local rules as would be attributed to a qualified member of the bar is
19 unconstitutional. Leon does not state which of the Defendants this claim is against and does
20 not state what constitutional provision is violated by this principle. Moreover, the Supreme
21 Court has stated that procedural requirements for gaining access to courts are “not to be
22 disregarded by courts out of a vague sympathy for particular litigants.” *Baldwin County*
23 *Welcome Center v. Brown*, 466 U.S. 147, 152 (1984); *see also Mohasco Corp. v. Silver*, 447
24 U.S. 807, 826 (1980) (“[i]n the long run, experience teaches that strict adherence to the
25 procedural requirements specified by the legislature is the best guarantee of evenhanded

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27 ²It appears Leon may be attempting to state a claim under the first category of denial
28 of access claims. However, without sufficient factual allegations, the Court cannot say that
Leon has stated a claim upon which relief may be granted.

1 administration of the law”). The Court finds Leon has failed to state a claim upon which
2 relief can be granted.

3
4 *Count Three – ADA Violation*

5 Leon asserts Defendants denied him access to the court system by holding him, a
6 “handicapped pro se litigant with communication disabilities, physical/mental disabilities
7 to the same standards as attorneys not providing reasonable accommodation for the disabled
8 in compliance with ADA. The Courts allowed, encouraged and facilitated the mistreatment
9 of a terminally ill citizen in violation of the ADA.” FAC, Doc. 12, p. 77. Leon appears to
10 be asserting the violation is based on trial courts requiring him to re-write pleadings and not
11 accepting his objections and the appellate courts ruling against him and sanctioning him,
12 However, Leon does not support this conclusory allegations with specific facts: e.g., Leon
13 does not state why his pleadings adequately stated claims, why any objections should have
14 been well-taken, or on what basis he was entitled to appellate relief. Other than implying
15 that the courts should have ruled in his favor, Leon has not stated what reasonable
16 accommodation the state courts failed to provide. *Memmer v. Marin County Courts*, 169
17 F.3d 630 (9th Cir. 1999); *see also United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)
18 (“Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to
19 spell out its arguments squarely and distinctly ...”), *internal citations and quotation marks*
20 *omitted, cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990).

21 Although courts must take reasonable measures to remove any barriers to
22 accessibility, “Title II does not require States to employ any and all means to make judicial
23 services accessible to persons with disabilities. . .” *Tennessee v. Lane*, 541 U.S. 509,
24 531–32 (2004). “It requires only reasonable modifications that would not fundamentally
25 alter the nature of the service provided, and only when the individual seeking modification
26 is otherwise eligible for the service.” *Id.* at 532, 124 S.Ct. 1978, *internal quotation marks*
27 *and citations omitted*; *see also* 28 C.F.R. § 35.130(b)(7). Because Leon has not adequately
28 stated the basis for his claims, the Court speculates that Leon is asserting that he should not

1 have been required to present adequate facts and legal authorities to support his claims and
2 arguments. Allowing Leon to avoid these requirements would fundamentally alter the
3 nature of litigation, the service offered by the courts. The Court finds Leon has failed to
4 state a claim upon which relief can be granted.

5
6 *Count IV – Intentional Infliction of Emotional Distress*

7 Leon asserts Defendants, through scurrilous and outrageous conduct, intentionally
8 and/or recklessly inflicted emotional distress by denying him, a terminally ill ADA plaintiff,
9 access to the courts and failing to provide reasonable accommodations. Leon does not
10 specify which Defendants this claim applies to. Leon also asserts that Defendant Oro Valley
11 Police Department presented Leon in a false light to community and did not possess
12 probable cause to “conduct security detail or security measures for terminally ill Plaintiff
13 pursuing constitutional right to litigate in federal and state proceedings.” FAC, Doc. 12, p.
14 78. Specifically, Leon alleges the Oro Valley Police Department provided security detail
15 for one party in a department of labor litigation and tampered with witnesses. *Id.* at 14.

16 To state a claim for intentional infliction of emotional distress, a plaintiff must allege
17 (1) the conduct of defendant was “extreme” and “outrageous,” (2) defendant intended to
18 cause emotional distress or recklessly disregarded the near certainty that such distress
19 would result from his conduct, and (3) severe emotional distress did occur as a result of
20 defendant’s conduct. *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 516, 115 P.3d 107,
21 110 (2005); *Wells Fargo Bank v. Arizona Laborers, Teamsters, and Cement Masons Local*
22 *No. 395 Pension Trust Fund*, 201 Ariz. 474, 38 P.3d 12 (2002) (discussing difference
23 between negligent and intentional torts). The acts must be “so outrageous in character and
24 so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded
25 as atrocious and utterly intolerable in a civilized community.” *Mintz v. Bell Atlantic*
26 *Systems Leasing International, Inc.*, 183 Ariz. 550, 554, 905 P.3d 559, 563 (App. 1995),
27 *quotation omitted*. Further, the defendant must either intend to cause emotional distress or
28 recklessly disregard the near certainty that such distress will result from his conduct. *Ford*

1 *v. Revlon*, 153 Ariz. 38, 43, 734 P.2d 580 (1987).

2 The Court finds that conduct Leon alleges to constitute a denial of access to the
3 courts and failure to provide reasonable accommodations, as stated in the FAC, does not
4 constitute extreme and outrageous conduct. Furthermore, other than conclusory allegations,
5 Leon does not provide facts to support his claim that Defendant Oro Valley Police
6 Department presented Leon in a false light to community. Lastly, the Court finds that the
7 allegations that Defendant Oro Valley Police Department did not possess probable cause to
8 “conduct security detail or security measures” and tampered with witnesses are conclusory
9 and do not constitute extreme or outrageous conduct.

10 Additionally, Leon has not stated any facts to support that any Defendant intended
11 to cause emotional distress or recklessly disregarded the near certainty that distress would
12 result from his conduct. Moreover, Leon has not alleged any facts that he suffered severe
13 emotional distress as a result of Defendant’s conduct. Leon alleges he suffered harassment,
14 embarrassment, and emotional distress. FAC, Doc. 12, p. 6 n. 1. Leon also asserts that he
15 was subjected to medical abuses. *Id.* at p. 25.³ These conclusory allegations do not provide
16 any factual support. The Court finds Leon has failed to state a claim upon which relief can
17 be granted.

18
19 *Count V – Negligent Infliction of Emotional Distress*

20 Leon asserts that, through scurrilous and outrageous conduct and false statements,
21 Defendants negligently inflicted emotional distress upon Leon. Leon alleges the same
22 conduct as that alleged in Leon’s claim for intentional infliction of emotional distress. A
23

24 ³Leon appears to be alleging that a protective order was denied despite medical
25 documentation that he was suffering extreme distress at the thought of a video deposition.
26 However, Leon does not state what protective action was requested. For example, if Leon
27 was seeking to avoid the taking of his deposition as a party or seeking to not permit another
28 party from attending a deposition, such requests would understandably be denied. As
previously stated, reasonable accommodations cannot fundamentally alter the nature of
litigation.

1 claim for negligent infliction of emotional distress requires that the “the emotional distress
2 inflicted ‘must be manifested as a physical injury.’” *Rowland v. Union Hills Country Club*,
3 157 Ariz. 301, 304, 757 P.2d 105, 108 (App. 1988). Leon has not alleged that the emotional
4 distress was manifested as a physical injury. “Furthermore, ‘[t]he plaintiff/ bystander must
5 himself have been in the zone of danger so that the negligent defendant created an
6 unreasonable risk of bodily harm to him.’” *Rowland v. Union Hills Country Club*, 157 Ariz.
7 301, 304, 757 P.2d 105, 108 (App. 1988), *quoting Keck v. Jackson*, 122 Ariz. 114, 593 P.2d
8 668 (1979). The Court finds Leon has failed to state a claim for negligent emotional
9 distress.

10
11 *Count VI – 42 U.S.C. § 1983: First Amendment*

12 It is not clear upon what Leon bases a § 1983 First Amendment claim upon. Indeed,
13 the FAC acknowledges that the First Amendment only protects against abuses by state
14 actors. *See e.g. Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (42 U.S.C. § 1983 is not
15 itself a source of substantive rights, but merely provides a method for vindicating federal
16 rights elsewhere conferred); *see also Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699
17 (9th Cir. 1990) (to state a claim under § 1983, a plaintiff must allege: (1) the violation of
18 a right secured by the Constitution and laws of the United States and (2) the alleged
19 deprivation was committed by a person action under color of state law.

20 Although Leon may be trying to state a claim that a private employer retaliated
21 against him for exercising his free speech rights, Leon has not included an employer as a
22 Defendant. Further, Leon has not alleged facts to state a claim that any state actor retaliated
23 against him for the exercise of his First Amendment rights. The Court finds Leon has failed
24 to state a claim upon which relief could be granted.

25
26 *Count VII – 42 U.S.C. § 1983: Equal Protection Claim*

27 It is not clear what Leon claims is the basis of this claim. “The Equal Protection
28 Clause of the Fourteenth Amendment . . . is essentially a direction that all persons similarly

1 situated should be treated alike.” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S.
2 432, 439 (1985). “To state a claim . . . for a violation of the Equal Protection Clause . . .
3 a plaintiff must show that the defendants acted with an intent or purpose to discriminate
4 against the plaintiff based upon membership in a protected class.” *Lee v. City of Los*
5 *Angeles*, 250 F.3d 668, 686 (9th Cir. 2001), quoting *Barren v. Harrington*, 152 F.3d 1193,
6 1194 (9th Cir. 1998). The Equal Protection Clause also forbids unequal enforcement of
7 valid laws where such unequal enforcement is the product of improper motive. *Yick Wo v.*
8 *Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); see also *United States v.*
9 *Bourgeois*, 964 F.2d 935 (9th Cir. 1992); *Church of Scientology of California v. C.I.R.*, 823
10 F.2d 1310 (9th Cir. 1987).

11 Leon has not alleged that any defendant acted with an intent or purpose to
12 discriminate against his based upon membership in a protected class. See generally *Barren*
13 *v. Harrington*, 152 F.3d 1193,1194 (9th Cir. 1998). Leon may be attempting to allege that
14 he is part of a protected class of disabled persons or persons acting pro se. However, rather
15 than alleging that he has been treated differently as a member of this class, Leon has alleged
16 that he *should* be treated differently. The Court finds Leon has failed to state a claim upon
17 which relief can be granted.

18
19 *Count VIII – 42 U.S.C. § 1983: Denial of Medical Attention*

20 Leon appears to be alleging that there was deliberate indifference to a serious medical
21 need while he was in custody.⁴ The treatment a prisoner receives in *prison* and the
22 conditions under which he is confined are subject to scrutiny under the Eighth Amendment.
23 *Helling v. McKinney*, 509 U.S. 25, 31, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); see also
24 *Spain v. Procnier*, 600 F.2d 189, 193-94 (9th Cir. 1979) (“Whatever rights one may lose
25 at the prison gates, . . . the full protections of the eighth amendment most certainly remain
26

27 ⁴Documents attached as exhibits for Count Ten indicate that Leon was incarcerated
28 in a prison in the mid-1990s.

1 in force. The whole point of the amendment is to protect persons convicted of crimes.”).
2 The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the punishment
3 of persons prior to a judgment of conviction; the Due Process Clauses govern conditions or
4 restrictions of pretrial detention. *See Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60
5 L.Ed.2d 447 (1979).

6 To prevail on a claim under the Eighth Amendment for prison medical care, a
7 prisoner must demonstrate “deliberate indifference to serious medical needs.” *Jett v.*
8 *Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006), *citing Estelle v. Gamble*, 429 U.S. 97, 104
9 (1976)). A plaintiff must show (1) a “serious medical need” by demonstrating that failure
10 to treat the condition could result in further significant injury or the unnecessary and wanton
11 infliction of pain and (2) the defendant’s response was deliberately indifferent. *Jett*, 439
12 F.3d at 1096, *citations omitted*. To act with deliberate indifference, a prison official must
13 both know of and disregard an excessive risk to inmate health; the official must both be
14 aware of facts from which the inference could be drawn that a substantial risk of serious
15 harm exists, and he must also draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837
16 (1994). Deliberate indifference in the medical context may be shown by a purposeful act
17 or failure to respond to a prisoner’s pain or possible medical need and harm caused by the
18 indifference. *Jett*, 439 F.3d at 1096.⁵

19 The Fourteenth Amendment's Due Process Clause protects a pretrial detainee from
20 punishment prior to an adjudication of guilt in accordance with due process of law. *Bell v.*
21 *Wolfish*, 441 U.S. 520 (1979). “This standard differs significantly from the standard
22 relevant to convicted prisoners, who may be subject to punishment so long as it does not
23 violate the Eighth Amendment's bar against cruel and unusual punishment.” *Pierce v.*
24

25
26 ⁵The Court notes that mere claims of “indifference,” “negligence,” or “medical
27 malpractice” do not support a claim under § 1983. *Broughton v. Cutter Laboratories*, 622
28 F.2d 458, 460 (9th Cir. 1980). Inadequate treatment due to malpractice or even gross
negligence does not constitute an Eighth Amendment violation. *Wood v. Housewright*, 900
F.2d 1332, 1334 (9th Cir. 1990).

1 *County of Orange*, 526 F.3d 1190, 1205 (9th Cir.2008). A pretrial detainee's due process
2 rights are at least as great as a convicted prisoner's Eighth Amendment rights. *City of Revere*
3 *v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983); *Oregon Advocacy Ctr. v. Mink*, 322
4 F.3d 1101, 1120 (9th Cir.2003) (“[E]ven though the pretrial detainees' rights arise under the
5 Due Process Clause, the guarantees of the Eighth Amendment provide a minimum standard
6 of care for determining their rights . . .”).

7 In this case, Leon has not provided any factual allegations in support of his claim of
8 a denial of medical attention. Further, the information that has been provided by Leon
9 indicates that any such claim would not be timely under the statute of limitations. The Court
10 finds Leon has failed to state a claim upon which relief can be granted.

11
12 *Count Nine – 42 U.S.C. § 1983: State Created Danger*

13 Leon appears to be alleging that some non-parties cause a state-created danger. FAC,
14 pp. 21-23. “As a general rule, members of the public have no constitutional right to sue
15 state employees who fail to protect them against harm inflicted by third parties. This
16 general rule is modified by two exceptions: (1) the ‘special relationship’ exception; and (2)
17 the ‘danger creation’ exception.” *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992),
18 *citations omitted*. The state-created danger exception “applies only where there is
19 affirmative conduct on the part of the state in placing the plaintiff in danger” and “only
20 where the state acts with deliberate indifference to a known or obvious danger.” *Patel v.*
21 *Kent Sch. Dist.*, 648 F.3d 965, 974 (9th Cir.2011), *internal quotation marks omitted*. Indeed,
22 a government actor must “affirmatively create [] an actual, particularized danger [that the
23 plaintiff] would not otherwise have faced.” *Kennedy v. City of Ridgefield*, 439 F.3d 1055,
24 1063 (9th Cir. 2006).

25 In this case, Leon has not alleged a state actor Defendant affirmatively created an
26 actual particularized danger that Leon would not otherwise have faced. The Court finds
27 Leon has failed to state a claim upon which relief can be granted.

1 *Count Ten – 42 U.S.C. § 1983: Wrongful Conviction*

2 Although Leon seeks to state a § 1983 claim, based on the content of this claim, it
3 appears Leon is attempting to state either a claim for malicious prosecution or defamation.
4 In Arizona, “[t]he elements of malicious prosecution are: (1) litigation instituted by
5 defendant; (2) termination of proceedings in favor of the plaintiff; (3) absence of probable
6 cause; and (4) presence of malice, i.e., improper motive.” *Morgan v. Klatzke*, 140 Ariz. 489,
7 682 P.2d 1156 (App. 1984). However, Leon has not alleged any facts that the prosecutor
8 is a defendant or that the prosecution was actuated by malice. *Frey v. Stoneman*, 150 Ariz.
9 106, 722 P.2d 274 (1986). The Court finds Leon has failed to state a claim upon which
10 relief can be granted as to any malicious prosecution claim.

11 “Defamation is composed of libel and slander. Oversimplifying, libel is a written or
12 visual defamation, while slander is an oral defamation.” *Boswell v. Phoenix Newspapers,*
13 *Inc.*, 152 Ariz. 1, 6 n. 4, 730 P.2d 178, 183 n. 4 (App. 1985), *citation omitted*. A publisher
14 of false and defamatory communication about a private person (or concerning a public
15 official or public figure, pertaining to a private matter) is liable for defamation only if he has
16 knowledge that statement is false and that it defames the other, if he acts in reckless
17 disregard of such matters or acts negligently in failing to ascertain such matters. *Peagler*
18 *v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977), *quoting* Res. (2nd) of
19 Torts § 580B. Leon appears to be alleging that the Arizona Department of Corrections
20 continues to list Leon as having been convicted of a felony. A review of the Department
21 of Correction documents indicates that the felony at issue was a CL3, Leon’s sentence was
22 vacated, Leon was released by the Court, and the findings on appeal have been upheld. *See*
23 *Doc. 14-5*. In other words, it appear to be a record of Leon’s incarceration, not a statement
24 of Leon’s current status. It is not clear what information Leon alleges is false. The Court
25 finds Leon has failed to state a claim upon which relief can be granted.

26
27 *Dismissal*

28 The Court finds that dismissal is appropriate. A review of the claims and facts that

1 have been alleged make it absolutely clear that the deficiencies cannot be cured by an
2 amended complaint. *See Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (leave to
3 amend is liberally granted unless absolutely clear deficiencies cannot be cured by
4 amendment).

5
6 *Motion to Dismiss and Motion for Entry of Default*

7 The Court having determined, after screening the FAC, that dismissal is appropriate,
8 the Court will deny the Motion to Dismiss and the Motion for Entry of Default as moot.

9
10 Accordingly, IT IS ORDERED:

11 1. Leon's Objection to the Court's Order denying recusal (Doc. 32) is
12 DENIED/OVERRULED.

13 2. Leon's Motion for Recusal, Disqualification of Judge Cindy K. Jorgenson
14 (Doc. 33) is DENIED.

15 3. Leon's First Amended Complaint and this action are DISMISSED for failure
16 to state a claim upon which relief can be granted.

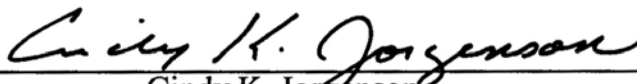
17 4. Oro Valley Police Department's Motion to Dismiss (Doc. 24) is DENIED AS
18 MOOT.

19 5. Leon's Motion for Entry of Default filed by Leon (Doc. 31) is DENIED AS
20 MOOT.

21 6. The Clerk of Court shall enter judgment and shall then close its file in this
22 matter.

23 7. Leon's Request for Service by Mail (Doc. 35), which references a different
24 case number and defendants that are not parties in this case, is STRICKEN.

25 DATED this 15th day of May, 2013.

26
27 

28 Cindy K. Jorgenson
United States District Judge