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5 **UNITED STATES DISTRICT COURT**  
6 EASTERN DISTRICT OF CALIFORNIA

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8 JESSE JOHNSON, 1:09-cv-00541-AWI-GSA-PC  
9 Plaintiff, [Kern County Superior Court case #08C0409]

10 v. FINDINGS AND RECOMMENDATIONS,  
11 K. CLARK, et al., RECOMMENDING THAT CASE BE  
REMANDED TO KERN COUNTY SUPERIOR  
COURT

12 Defendants. / OBJECTIONS, IF ANY, DUE IN 30 DAYS

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14 **I. BACKGROUND**

15 This is a civil action filed by plaintiff Jesse Johnson (“plaintiff”), a state prisoner  
16 proceeding pro se. This action was initiated by civil complaint filed by plaintiff in the Kern  
17 County Superior Court on October 16, 2008 (case #08C0409). On March 19, 2009, defendants  
18 Heck, Prud’Homme, Martinez, Enenmoh, Crum, Clark, Miller, Fouch and Baires (“defendants”)  
19 removed the case to federal court by filing a Notice of Removal of Action pursuant to 28 U.S.C.  
20 § 1441(b). (Doc. 1.)

21 **II. SUMMARY OF COMPLAINT**

22 Plaintiff is a wheelchair-bound inmate who is presently incarcerated at the California  
23 Substance Abuse Treatment Facility (“SATF”) in Corcoran, California, where the events at issue  
24 allegedly occurred. Plaintiff names as defendants M. L. Crum, A. Enenmoh (M.D.), Jack Lane  
25 (M.D.), H. Benyamin (M.D.), K. Clark, C. M. Heck, Fouch, G. Martinez, S. Suryadevara (M.D.),  
26 K. Kachare (M.D.), G. Miller, Prud’homme, M. A. Baires, and R. Pranger. All of the defendants  
27 are employees of the California Department of Corrections and Rehabilitation (“CDCR”) at  
28 SATF.

1 Plaintiff makes the following allegations.

2 In March 2007, plaintiff requested medical items which had already been approved for  
3 him, including a wheelchair barrier free access cell, a helmet, and padding on the edge of his  
4 lockers for protection due to frequent seizures. He was given a helmet but not the other items.  
5 Defendants Heck and Martinez failed to use their authority to grant plaintiff's request to be  
6 housed in a wheelchair cell, and as a result plaintiff was injured when he had a violent seizure  
7 and fell, requiring 8 staples in his head.

8 In April 2007, plaintiff requested physical therapy, padding of his lockers and shelves, to  
9 see a foot doctor, to see a sleep specialist, to have x-rays taken of his right hand, to be given  
10 assistance with losing weight, to have his c-pap machine cleaned, and to be given another pair of  
11 wheelchair gloves, a knee brace, and a back brace. He was given x-rays, wheelchair gloves, and  
12 physical therapy, but not the knee and back brace. Knowing plaintiff's physical condition,  
13 defendants Martinez and Pranger still failed to use their authority to grant plaintiff's request for  
14 the custom fitting knee/ankle supports.

15 In June 2007, when plaintiff was transported to the medical department, several items of  
16 his personal property were misplaced. After plaintiff complained, all of the items were returned  
17 to him except for two photographs of his mother and his aunt. A search was made for the photos,  
18 but they were not found or replaced. Defendants Fouch, Baires, Clark, and Prud'homme failed to  
19 follow up on the search for plaintiff's photos, to discover which staff members were present  
20 when plaintiff was transported to the medical department.

21 In March 2008, plaintiff requested permission to take a shower every day and to be given  
22 a bag of ice during the summer months. Dr. Leon agreed that plaintiff should have these items;  
23 however, the requests were denied. Knowing how difficult it is for plaintiff to properly bathe in  
24 his cell, defendants Martinez and Crum still denied plaintiff's request for a daily shower.

25 Plaintiff's injuries include extreme back pain, extreme knee and ankle pain, injuries from  
26 falling during a seizure, and emotional distress. Plaintiff requests monetary damages as relief.

27 Plaintiff brings four distinct and separate causes of action in the complaint. First, plaintiff  
28 claims that defendant Clark failed to properly hire, train, supervise, assign, and discipline the

1 CDCR medical and custody staff, in violation of California Penal Code §4008. (Notice of  
2 Removal, Exh. A, Complaint at p. 16.) Second, plaintiff claims that defendants Heck, Martinez,  
3 Miller, Prud'homme, Fouch, Baires, Pranger and Crum failed to protect plaintiff from the  
4 violation of his constitutional rights, in violation of California Civil Code §43. (Notice of  
5 Removal, Exh. A, Complaint at p. 18.) Third, plaintiff claims that defendants Benyamin,  
6 Kachare, Lane Suryadevara and Enenmoh were medically negligent in failing to properly treat  
7 plaintiff for his medical condition, in violation of California Civil Code §1714(a). (Notice of  
8 Removal, Exh. A, Complaint at p. 19.) Fourth, plaintiff claims that defendants Benyamin,  
9 Kachare, Lane, Suryadevara and Enenmoh violated his state constitutional right to be free from  
10 corporal punishment when they denied him medical treatment, in violation of California Penal  
11 Code §673 and California Constitution Article I §17, causing plaintiff to suffer pain, injury, and  
12 emotional distress. (Notice of Removal, Exh. A, Complaint at p. 20.)

13 **III. REMOVAL AND REMAND**

14 Under 28 U.S.C. § 1441(a), a defendant may remove from state court any action “of  
15 which the district courts of the United States have original jurisdiction.” Federal courts “shall  
16 have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the  
17 United States.” 28 U.S.C. § 1331. Removal of an action under 28 U.S.C. § 1441(b) depends  
18 solely on the nature of the plaintiff’s complaint, and is properly removed only if “a right or  
19 immunity created by the Constitution or laws of the United States [constitutes] an element, and  
20 an essential one, of the plaintiff’s cause of action.” Gully v. First National Bank in Meridian, 299  
21 U.S. 109, 112 (1936). The plaintiff is the master of his or her own complaint and is free to ignore  
22 the federal cause of action and rest the claim solely on a state cause of action. See The Fair v.  
23 Kohler Die & Specialty Co., 228 U.S. 22, 25 (1913).

24 Because of the “Congressional purpose to restrict the jurisdiction of the federal courts on  
25 removal,” the removal statute is strictly construed against removal.<sup>1</sup> Shamrock Oil & Gas Corp.  
26 v. Sheets, 313 U.S. 100, 108-109 (1941); Duncan v. Stuetzle, 76 F.3d 1480, 1485 (9th Cir.  
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28 <sup>1</sup> “At the core of the federal judicial system is the principle that the federal courts are courts of limited jurisdiction.” Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979).

1 1996). Federal jurisdiction “must be rejected if there is any doubt as to the right of removal in  
2 the first instance.” Id.; Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992). Courts “must  
3 consider whether federal jurisdiction exists, even if no objection is made to removal, and even if  
4 both parties stipulate to federal jurisdiction.” Rains v. Criterion Systems, Inc., 80 F.3d 339, 342  
5 (9th Cir. 1996) (citations omitted).

6 ***Well-Pleaded Complaint***

7 “The presence or absence of federal-question jurisdiction is governed by the well-pleaded  
8 complaint rule, which provides that federal jurisdiction exists only when a federal question is  
9 presented on the face of the plaintiff’s properly pleaded complaint.” Caterpillar, Inc., v.  
10 Williams, 482 U.S. 386, 392 (1987) (internal quotations and citations omitted). “The rule makes  
11 the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive  
12 reliance on state law.” Id.

13 **IV. DISCUSSION**

14 In their Notice of Removal, defendants state that “this is a civil action for the alleged  
15 violation of Plaintiff’s federal constitutional rights.” (Notice of Removal at p. 2 ¶3.) Defendants  
16 acknowledge that plaintiff did not specifically refer to his federal constitutional rights in the  
17 complaint. Id. However, they argue that federal jurisdiction is present because plaintiff’s  
18 exhibits to the complaint, upon which plaintiff relies, “demonstrate[] that Plaintiff is pleading  
19 that Defendants’ actions violated the Americans with Disabilities Act (ADA).” Id. Defendants  
20 cite as authority an opinion rendered by the Second Circuit, in support of the argument that  
21 plaintiff’s lack of reference to federal law in the body of the complaint is not controlling where  
22 the nature of the federal right is clearly set forth, allowing federal jurisdiction to attach. North  
23 American Phillips Corp. V. Emery Air Freight Corp., 579 F.2d 229, 233-34 (2nd Cir. 1978.)  
24 However, the opinion of the Second Circuit does not serve as precedent for this court, nor does it  
25 conform with the Ninth Circuit’s authority.

26 As stated above, removal of an action under 28 U.S.C. § 1441(b) depends solely on the  
27 nature of the plaintiff’s complaint. Gully, 299 U.S. at 112. The court has thoroughly reviewed  
28 the body of plaintiff’s complaint and finds no reference to the United States Constitution,

1       treaties, the ADA, or any other federal law. Plaintiff uses a California state civil case cover sheet  
2       to describe his case as a tort action within the Personal Injury/Property Damage/Wrongful Death  
3       category. On the face of the complaint itself, plaintiff checked the box designating the case as a  
4       Personal Injury Complaint. On page 3 of the form complaint, plaintiff selected as causes of  
5       action General Negligence and Intentional Tort. Plaintiff does allege that defendants failed to  
6       protect him from the violation of his “constitutional rights;” however, this reference to the  
7       constitution was in the context of plaintiff’s claim that defendants violated California Civil Code  
8       §43, not the constitution. Moreover, in light of the fact that plaintiff specifically refers to the  
9       court’s jurisdiction under the California Constitution, but not the United States Constitution, it  
10      appears more than likely that “constitutional rights” refers only to the California Constitution.

11           The court has also thoroughly reviewed plaintiff’s exhibits to the complaint. Plaintiff  
12      submits as exhibits copies of requests and appeals he filed at SATF and the responses he  
13      received. Plaintiff’s initial Requests, #07-1171, #07-1904, #07-2889, and #08-1737 were filed  
14      on form CDC-1824 (Reasonable Modification or Accommodation Request, Category 18.ADA),  
15      requesting medical items, medical treatment, and the return of his property. The fact that  
16      plaintiff filed his Requests on ADA forms is not enough to confer federal jurisdiction. It is clear  
17      in the complaint that plaintiff has not based any of his claims on defendants’ violation of the  
18      ADA. Moreover, in their responses to plaintiff’s requests and appeals, prison officials indicate  
19      their decisions are primarily based on the California Code of Regulations, the Armstrong  
20      Remedial Plan, and the CDCR’s Department Operations Manual, not the ADA. As such, the  
21      nature of plaintiff’s complaint on its face creates doubt as to the right of removal in the first  
22      instance. As stated above, plaintiff is the master of his own complaint and is free to rest his  
23      claims solely on state causes of action. See The Fair, 228 U.S. at 25. Based on the foregoing, the  
24      court finds that plaintiff’s complaint does not present a claim arising under federal law, and this  
25      action does not implicate a federal interest sufficient to sustain removal of the action to federal  
26      court.

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## V. CONCLUSION AND RECOMMENDATIONS

The Court finds that the federal court lacks jurisdiction over plaintiff's complaint and the action is not removable. Accordingly, IT IS HEREBY RECOMMENDED that:

1. This action be remanded to the Kern County Superior Court; and
2. The Clerk be directed to close the case and serve notice of the remand.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within thirty days after being served with these findings and recommendations, any party may file written objections with the court. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: April 15, 2009

/s/ **Gary S. Austin**  
UNITED STATES MAGISTRATE JUDGE