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8 UNITED STATES DISTRICT COURT  
9 EASTERN DISTRICT OF CALIFORNIA  
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11 JOSEPH D. RODRIGUEZ,

12 Plaintiff,

13 vs.

14 EDMUND G. BROWN, JR., et al.,

15 Defendants.

1:15-cv-01754-LJO-EPG-PC

FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT DEFENDANT'S  
MOTIONS TO DISMISS STATE LAW  
CLAIMS BE GRANTED, WITHOUT  
PREJUDICE

(ECF No. 19.)

16 OBJECTIONS, IF ANY, DUE WITHIN  
17 TWENTY (20) DAYS

18 **I. BACKGROUND**

19 Joseph D. Rodriguez ("Plaintiff") is a state prisoner proceeding *pro se* and *in forma*  
20 *pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the  
21 complaint initiating this action against three defendants on November 19, 2015. (ECF No. 1.)  
22 Plaintiff is presently incarcerated in the custody of the California Department of Corrections  
23 and Rehabilitation (CDCR) at the California Substance Abuse Treatment Facility (SATF) in  
24 Corcoran, California, where the events at issue in the Complaint allegedly occurred.

25 Plaintiff alleges that SATF was constructed approximately twenty years ago and has not  
26 undergone any significant modification or repair since then. Since January 2014, Plaintiff has  
27 been housed on E-Yard at SATF, a level 3 Special Needs Yard reserved for inmates who,  
28 because of their lack of disciplinary problems, qualify to be housed at an Enhanced Program

1 Facility. There are five housing buildings on E-Yard. Four of the buildings, including  
2 Plaintiff's building, are utilized as E-Yard housing units, each designed for a capacity of 100  
3 inmates. E-Yard is currently operating at approximately 195% of capacity, although this  
4 number, the actual rate of capacity, has never been reported to the Federal three-judge panel  
5 overseeing issues of overcrowding of California prisons.

6 In addition to the four housing units, E-Yard also contains a separate kitchen and dining  
7 facility, which are subject to California's health and sanitation standards.

8 Defendants have failed and refused, and continue to fail and refuse, to maintain SATF  
9 in conformity with the laws of the state and federal constitutions. Although Defendants have  
10 known about the deteriorating physical plant at SATF for many years, they have refused to  
11 remedy the substantial substandard living conditions at SATF.

12 Neglect of the physical plant is evident by visual inspection. All of the roofs leak.  
13 During the rainy season, there is continual flooding in the dining facility, visiting facility,  
14 educational facility, housing unit common areas, and the cells themselves. Inmates often  
15 awaken to the sound of rain actually coming into the cells. Many of the ceiling tiles in the  
16 dining facility are missing as a result of Defendants' neglect.

17 As a result of Defendants' deliberate indifference to the health and safety of inmates,  
18 including Plaintiff, the E-Yard dining facility has been infested with cockroaches and rats for  
19 many years, in violation of California's health codes. The rat infestation is so severe that every  
20 morning the kitchen staff must clean rat feces from the griddle and other cooking surfaces  
21 before preparing inmate meals on those same surfaces.

22 Defendants have been aware for years that the E-Yard dining facility is infested with  
23 vermin. There have been numerous complaints by staff and inmates over the years, all which  
24 have been ignored. On November 19, 2014, at a meeting with D. Perkins, Correctional Food  
25 Manager responsible for the E-Yard dining facility, inmate representatives voiced concerns.  
26 Numerous complaints had been received regarding "debris, cockroaches and screws falling out  
27 of the ceiling onto inmates' trays during the evening meal," and the inmate representatives  
28 reported an "increase in pest infestation in the Facility E Dining Room." (Plaintiff here refers

1 to a copy of minutes of the meeting attached to Complaint as Exhibit A.) The vermin problem  
2 was also directly brought to defendant Sherman’s attention at the Warden’s Meeting on January  
3 27, 2015. (Copy of minutes attached as Exhibit B.) At another meeting on October 6, 2015  
4 between inmate representatives and the E-Yard Correctional Food Manager, the Manager  
5 acknowledged that the issue had been previously discussed, and stated that the reason cold  
6 cereal could not be stored at the facility was because of the continuing cockroach infestation.  
7 (Copy of minutes attached as Exhibit C.)

8 On January 8, 2015, while eating his breakfast in the E-Yard dining facility, Plaintiff  
9 discovered a live cockroach crawling on his food. Plaintiff was alarmed and reported the  
10 incident immediately to the correctional officer (C/O) monitoring the morning meal. C/O  
11 Pelayo advised Plaintiff to “get another tray.” (Copy of C/O Pelayo’s acknowledgment of the  
12 incident attached as Exhibit D.)

13 On January 13, 2015, Plaintiff was again served a large cockroach crawling on his  
14 breakfast food. Plaintiff immediately reported the incident to C/O Paz who was monitoring the  
15 meal. (Copy of C/O Paz’s acknowledgment of the incident attached as Exhibit E.)

16 Plaintiff is sickened by the unsanitary conditions in which his food is prepared, handled,  
17 and served. Plaintiff has been unable to consume any of the food served at the E-Yard dining  
18 facility since being served a live cockroach on January 13, 2015. Plaintiff sought medical  
19 attention for persistent and severe abdominal pain and cramps that resulted from the unsanitary  
20 conditions. Plaintiff was also required to seek psychological and psychiatric care for severe  
21 shock and anxiety. Plaintiff filed and exhausted his remedies via a form 602 administrative  
22 appeal complaining about the conditions. (Copy of 602 appeal attached as Exhibit F.) Plaintiff  
23 has suffered and will continue to suffer injuries in the form of pain and suffering, shame,  
24 humiliation, degradation, extreme anxiety, emotional distress, and mental distress.

25 Plaintiff requests monetary damages, temporary restraining orders, declaratory and  
26 injunctive relief, costs of suit and attorney’s fees.

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1           **A. Initial Screening**

2           The Court screened the complaint pursuant to its authority in 28 U.S.C. § 1915A on  
3 December 8, 2015, and found that the complaint stated a cognizable federal claim against  
4 Defendant Sherman for adverse conditions of confinement in violation of the Eighth  
5 Amendment. (ECF No. 6.) In the screening order, the Court also found that Plaintiff failed to  
6 state a cognizable claim against the two other defendants listed in Plaintiff’s complaint, and  
7 that it was appropriate to exercise supplemental jurisdiction under 28 U.S.C. § 1367 for  
8 Plaintiff’s state law claims for violation of the California health codes and constitution. (*Id.*)  
9 The findings and recommendations in the screening order were adopted on May 9, 2016. (ECF  
10 No. 16.) The case now proceeds against Stuart Sherman (Warden of the SATF) (“Defendant”),  
11 for unconstitutional adverse conditions of confinement under 42 U.S.C. § 1983 and for related  
12 state claims. Specifically, Plaintiff alleges violations of a California state law, Cal. Health &  
13 Safety Code § 114259.1, providing that food facilities in the state must be kept free of vermin.  
14 The screening order did not rule upon the viability of the state law claim. (ECF No. 6, pp. 8-9.)

15           **B. Defendant’s Motion to Dismiss State Law Claims**

16           On June 28, 2016, Defendant filed a motion to dismiss Plaintiff’s state law claims  
17 pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim  
18 upon which relief can be granted. (ECF No. 19.) On July 11, Plaintiff filed an opposition to  
19 the motion. (ECF No. 21.) Defendant then filed a reply in support of the motion on July 18.  
20 (ECF No. 22.)

21           **II. DISCUSSION**

22           Defendant’s motion to dismiss challenges only the sufficiency of the state law claims  
23 found in the initial screening order. A complaint may survive a motion to dismiss only if,  
24 taking all well-pleaded factual allegations as true, it contains enough facts to state a claim to  
25 relief that is plausible on its face. *Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010) (citing  
26 *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); *Bell Atl. Corp.*  
27 *v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal quotations  
28 omitted). The Court is required to construe pleadings by *pro se* plaintiffs, particularly in civil

1 rights cases, liberally and to afford the petitioner the benefit of any doubt. *Id.* (citing *Bretz v.*  
2 *Kelman*, 773 F.2d 1026, 1027 n. 1 (9th Cir.1985) (en banc)).

### 3 **A. California Tort Claims Act**

4 As a starting point, Defendant argues that all of Plaintiff's state law claims must be  
5 dismissed because Plaintiff did not plead the claim presentation requirement contained in  
6 California Government Code § 900 *et seq.* In order to bring a lawsuit against for damages as  
7 part of the California Tort Claims Act establishes certain conditions precedent to the filing of a  
8 lawsuit against a public entity. *State v. Superior Court (Bodde)*, 32 Cal. 4th 1234, 1237, 90  
9 P.3d 116, 118 (2004). "[A] plaintiff must timely file a claim for money or damages with the  
10 public entity, (§ 911.2.), and the failure to do so bars the plaintiff from bringing suit against that  
11 entity, (§ 945.4.)." *Id.* Compliance with the claim presentation requirement is an element of the  
12 cause of action, *Bodde*, 32 Cal.4th at 1240, 13 Cal.Rptr.3d 534, 90 P.3d 116, is required,  
13 *Mangold v. California Public Utilities Com'n*, 67 F.3d 1470, 1477 (9th Cir. 1995), and "failure  
14 to file a claim is fatal to a cause of action," *Hacienda La Puente Unified School Dist. Of Los*  
15 *Angeles v. Honig*, 976 F.2d 487, 495 (9th Cir. 1992); *City of Stockton*, 42 Cal.4th at 738.

16 Here, Plaintiff failed to plead compliance with the claim presentation requirement of the  
17 California Tort Claims Act. (ECF No. 1.) In response to the motion to dismiss, Plaintiff  
18 concedes that he did not comply with the requirement. (ECF No. 21.) Dismissal is thus  
19 appropriate as to Plaintiff's state law claim for violation of Cal. Health & Safety Code §  
20 114259.1.

21 Plaintiff states that any dismissal should be without prejudice because the defect can be  
22 cured. (*Id.*) Whether dismissal is with or without prejudice will depend upon whether it is  
23 possible for Plaintiff to cure any defects. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,  
24 1107–08 (9th Cir. 2003) (collecting cases).

### 25 **B. Private Right of Action**

26 Secondly, Defendant argues that Cal. Health & Safety Code § 114259.1 does not  
27 contain a private right of action. In his complaint, Plaintiff's factual allegations contain the  
28 following:

1 As a result of Defendants' deliberate indifference to the health and safety of  
2 inmates, including Plaintiff, the E-Yard dining facility has been for many years,  
3 and continues to be to this day, infested with cockroaches and rats in violation  
4 of California Health and Safety Code § 11425.1. The rate infestation is so  
5 severe that every morning the kitchen staff must clean rat feces from the griddle  
6 and other cooking surfaces before preparing inmate meals on those surfaces.

7 (ECF No. 1, p. 7 ¶ 13.) In continuing to describe how the unsanitary conditions of the prison  
8 fail to minimum sanitation standards, Plaintiff mentions the California Retail Food Code in  
9 three more paragraphs.<sup>1</sup> (*Id.* ¶¶ 19, 21-22.) Thus, Plaintiff's state law claim is brought  
10 pursuant to California Health and Safety Code § 114259.1, the complete text of which provides  
11 only that "[t]he premises of each food facility shall be kept free of vermin."<sup>2</sup> Cal. Health &  
12 Safety Code § 114259.1 (West 2015).

13 Defendant argues that § 114259.1 does not contain a private right of action because the  
14 California Health & Safety Code provides that primary enforcement responsibility of §  
15 114259.1 rests primarily with the local enforcement agency and secondarily with the State  
16 Department of Public Health.<sup>3</sup> *See* Cal. Health & Safety Code § 113713 (West 2015). "A  
17 statute creates a private right of action only if the enacting body so intended." *Farmers Ins.*  
18 *Exch. v. Superior Court*, 137 Cal. App. 4th 842, 849–50, 40 Cal. Rptr. 3d 653, 657 (2006)  
19 (citing *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305, 250  
20 Cal.Rptr. 116, 758 P.2d 58; *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th  
21 121, 131, 62 Cal.Rptr.2d 620.)).

22 Plaintiff responds to this argument by citing to Cal. Gov't Code § 815.6, which provides  
23 that:

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24 <sup>1</sup> It is unclear whether Plaintiff intended to bring a state law claim or whether he merely cited to the  
25 California Health and Safety Code to provide context to his constitutional claims brought under 42 U.S.C. § 1983.  
Consistent with its duty to liberally construe allegations in *pro se* petitions, *Hebbe*, 627 F.3d at 341–42, the Court  
found a state law claim and exercised supplemental jurisdiction under 28 U.S.C. § 1367. (ECF No. 6, pp. 8-9).

26 <sup>2</sup> Plaintiff does not dispute that an alleged violation of § 114259.1 is the state law claim at issue here.  
27 (ECF No. 21.)

28 <sup>3</sup> Defendant did not present an argument that a prison is not a "food facility," as defined by Cal. Health &  
Safety Code § 113789, and therefore, that argument is not considered.

1 Where a public entity is under a mandatory duty imposed by an enactment that  
2 is designed to protect against the risk of a particular kind of injury, the public  
3 entity is liable for an injury of that kind proximately caused by its failure to  
4 discharge the duty unless the public entity establishes that it exercised  
reasonable diligence to discharge the duty.

5 Cal. Gov't Code § 815.6 (West 2015). According to Plaintiff, § 114259.1 contains a mandatory  
6 duty, and he was injured by SATF's failure to keep the facility free of vermin. Thus, Plaintiff  
7 argues that § 815.6 gives him a private right of action.

8 Defendant replies to this argument by asserting that he is not a "public entity" for  
9 purposes of § 815.6.<sup>4</sup> A "Public entity" is defined to include "the state, the Regents of the  
10 University of California, the Trustees of the California State University and the California State  
11 University, a county, city, district, public authority, public agency, and any other political  
12 subdivision or public corporation in the State." Cal. Gov't Code § 811.2 (West 2015).

13 Defendant is certainly correct that he is not a public entity in his personal capacity.  
14 However, Defendant has been sued both in his personal capacity and his official capacity as  
15 Warden of the SATF, a California state prison. (ECF No. 1.) Under *Ex parte Young*, "a suit  
16 against a state official in his or her official capacity is not a suit against the official but rather is  
17 a suit against the official's office." *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1187 (9th Cir.  
18 2003) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d  
19 45 (1989)). A state official sued in his official capacity has been found to be a public entity in  
20 other contexts. *See, e.g., Miranda B.*, 328 F.3d at 1187–88 (holding that a public official sued  
21 in his official capacity is "public entity" under Title II of the Americans with Disabilities Act in  
22 an action seeking injunctive relief). In such cases, however, monetary damages are generally  
23 unavailable to a Plaintiff. *See id.*

24 The Court cannot conclude, under the arguments presented here, that it would be  
25 impossible for Plaintiff to reassert his state law claim. While relief in the form monetary  
26 damages is unavailable here, it could be available in a separate state court action if Plaintiff can

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28 <sup>4</sup> Defendant did not present an argument that the duty imposed by § 114259.1 is not mandatory, and  
therefore, that argument is not considered.

1 properly allege compliance with the presentation requirement of the California Tort Claims  
2 Act. Accordingly, it is more appropriate that Plaintiff's be dismissed without prejudice.

3 **III. CONCLUSION AND RECOMMENDATIONS**

4 Based on the foregoing, IT IS HEREBY RECOMMENDED that Defendant's be  
5 GRANTED and that Plaintiff's state law claims be DISMISSED without prejudice. If the  
6 recommendation is adopted, this case will proceed only on Plaintiff's claim against defendant  
7 Sherman for unconstitutional conditions of confinement in violation of the Eighth Amendment.

8 These findings and recommendations are submitted to the United States District Judge  
9 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **twenty**  
10 **(20) days** after being served with these findings and recommendations, the parties may file  
11 written objections with the Court. Such a document should be captioned "Objections to  
12 Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be  
13 served and filed within ten days after service of the objections. The parties are advised that  
14 failure to file objections within the specified time may result in the waiver of rights on appeal.  
15 *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d  
16 1391, 1394 (9th Cir. 1991)).

17  
18 IT IS SO ORDERED.

19 Dated: November 1, 2016

20 /s/ Eric P. Gray  
21 UNITED STATES MAGISTRATE JUDGE  
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