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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JAMES FERNANDEZ, a person;

Plaintiff,

vs.

**NORTH KERN STATE PRISON, a
governmental entity, and a division of
CALIFORNIA DEPARTMENT OF
CORRECTIONS; ALEXANDER M.
AUSTRIA, M.D., LEIF AGBAYANI, T.
GARCIA; ROLANDO D. ROBLES;
SMALLS; BELTRANS; DUNCAN; and
DOES 1-20,**

Defendants.

1:16-cv-1612 AWI JLT

**MEMORANDUM OPINION AND
ORDER ON DEFENDANTS' MOTION
TO DISMISS AND TO STRIKE**

Doc. # 3

This is an action for damages by defendant James Fernandez (“Plaintiff”) against North Kern State Prison (“NKSP”) and individuals involved in the delivery of medical care on behalf of NKSP to Plaintiff. The action, originally filed in the Superior Court of Kern County, was removed to this court on October 25, 2016. Currently before the court is the motion of defendants NKSP, et al. (“Defendants”) for dismissal of all or portions of Plaintiff’s complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331 based on Plaintiff’s claim pursuant to 28 U.S.C. § 1983. Venue is proper in this court.

1 **FACTUAL BACKGROUND AND PROCEDURAN HISTORY**

2 At the time of events giving rise to this action, Plaintiff was an inmate at KVSP. On or
3 about August 8, 2016, Plaintiff reported inflammation in his eyes. On August 12, 2015, Plaintiff
4 was seen for his eye inflammation by Defendant Alexander M. Austria, M.S. (“Austria”), who
5 prescribed the drug clotomozole to be applied directly in Plaintiffs eyes. It appears that Plaintiff
6 was not informed of the name of the drug prescribed at the time, but was told only to apply it to
7 his eyes. Plaintiff did so in the presence of the dispensing nurse Leif Agbayani (“Agbayani”)
8 and experienced “an immediate intense burning sensation in his eyes.” Doc. # 1 at 15:26.
9 Agbayani expressed no surprise and directed Plaintiff to appear later the same day for a second
10 dose. Plaintiff returned later the same day as directed and the same medication was dispensed by
11 Defendant Garcia who also expressed no surprise when Plaintiff reported a burning sensation
12 that was more intense that he felt following the first dose.

13 Plaintiff returned for a third dose the following day as ordered. On this occasion, the
14 medication was dispensed by Defendant Hurtado. Prior to applying the medication to his eyes,
15 Plaintiff asked Hurtado what the medication in the bottle was. Hurtado replied that the
16 medication in the bottle was clotomozole, a drug used to treat fungal infections of the toenails.
17 Plaintiff alleges Hurtado expressed no surprise at the fact Plaintiff had been directed to apply the
18 drug to his eyes and that doing so had caused intense burning and that he was still experiencing
19 intense burning in his eyes. Plaintiff alleges Hurtado “did nothing to alleviate Plaintiff’s distress
20 nor treat the eyes for an obvious injury. Doc. # 1 at 16:17. Plaintiff alleges that he requested
21 that Hurtado and correctional officer Smals take Plaintiff to one of the prison doctors for
22 immediate treatment, but the request was refused.

23 Plaintiff alleges he made further requests for treatment for his burning eyes but
24 Defendants repeatedly “refused to authorize additional treatment, telling him that his eye was not
25 seriously damaged.” Doc. # 1 at 16:24-25. It is not clear from the complaint whether Plaintiff
26 alleges his eyes were examined and further treatment was denied or whether further treatment
27 including examination by a physician was denied. Plaintiff alleges that he did receive an
28 examination of his eyes by a prison physician on August 15, 2015, because Plaintiff forced the

1 examination by assuming a “man down” position and insisting to see a physician “due to a
2 medical emergency.” Doc. # 1 at 17:3-4. As a result of this examination, Plaintiff was
3 scheduled to see a specialist outside the prison. The outside appointment occurred on or about
4 September 9, 2015, and the “specialist concluded surgery was necessary.” Doc. # 1 at 17:8.

5 Plaintiff’s eye surgery occurred on December 7, 2015, approximately five months after
6 the initial injury and approximately three months after the need for the surgery was identified.
7 Plaintiff alleges a number of aspects of Defendants’ conduct between the injury and the surgery
8 that unreasonably delayed the surgery. Plaintiff alleges that at least a portion of the delay was
9 imposed because Plaintiff refused to waive any potential causes of action arising from the initial
10 injury or because Plaintiff used the prison appeals process to try to advance his eye surgery or to
11 appeal the treatment decisions of Defendants. Plaintiff alleges his vision remains compromised
12 (“blurry”) after the surgery and the damage is permanent. He also alleges he suffers continuing
13 pain due to the injury. Of some significance, Plaintiff does not put a name to the injury he
14 suffered or to the type of surgery he underwent (except that it was eye surgery) nor does he
15 allege, other than by inference, that the application of the clotomozole to his eyes cause the
16 permanent injury.

17 Plaintiff’s complaint alleges a total of seven claims for relief. As will be discussed *infra*,
18 Plaintiff’s first claim for relief pursuant to 28 U.S.C. § 1983 appears to allege claims under the
19 Eighth, First and possibly Fourteenth Amendments, although, as will be discussed *innfra*, critical
20 aspects of these claims are not entirely clear. Plaintiff’s second and third claims allege
21 negligence and negligent medical malpractice, respectively. The fourth claim alleges negligent
22 infliction of emotional distress. Plaintiff’s fifth claim for relief alleges negligent training and
23 supervision although it is not clear whether the claim is pursuant to common law or pursuant to
24 Monell. Plaintiff’s sixth and seventh claims for relief allege “state constitutional rights
25 violations” and “civil conspiracy” although neither appears to allege a statutory vehicle for the
26 claims.

1 Defendants' motion to dismiss was filed on November 1, 2016. Plaintiff's opposition
2 was filed on November 18, 2016 and Defendants' reply was filed on November 22, 2016. The
3 matter was taken under submission as of December 5, 2016.
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5 LEGAL STANDARD

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9 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure
10 can be based on the failure to allege a cognizable legal theory or the failure to allege sufficient
11 facts under a cognizable legal theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530,
12 533-34 (9th Cir.1984). To withstand a motion to dismiss pursuant to Rule 12(b)(6), a complaint
13 must set forth factual allegations sufficient "to raise a right to relief above the speculative level."
14 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Twombly"). While a court
15 considering a motion to dismiss must accept as true the allegations of the complaint in question,
16 Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738, 740 (1976), and must construe the
17 pleading in the light most favorable to the party opposing the motion, and resolve factual
18 disputes in the pleader's favor, Jenkins v. McKeithen, 395 U.S. 411, 421, reh'g denied, 396 U.S.
19 869 (1969), the allegations must be factual in nature. See Twombly, 550 U.S. at 555 ("a
20 plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than
21 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not
22 do"). The pleading standard set by Rule 8 of the Federal Rules of Civil Procedure "does not
23 require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-
24 unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009) ("Iqbal").

25 The Ninth Circuit follows the methodological approach set forth in Iqbal for the
26 assessment of a plaintiff's complaint:

27 "[A] court considering a motion to dismiss can choose to begin by identifying
28 pleadings that, because they are no more than conclusions, are not entitled to the

1 assumption of truth. While legal conclusions can provide the framework of a
2 complaint, they must be supported by factual allegations. When there are well-
3 pleaded factual allegations, a court should assume their veracity and then
determine whether they plausibly give rise to an entitlement to relief.”

4 Moss v. U.S. Secret Service, 572 F.3d 962, 970 (9th Cir. 2009) (quoting Iqbal, 129 S.Ct. at
5 1950).

6 DISCUSSION

7 At the outset, some general comments regarding the organization of Plaintiff’s complaint
8 are in order. The court recognizes that the complaint was originally filed in Superior Court and
9 that pleading standards and customs may differ between federal and state courts. The court also
10 realizes that, where a case is removed from a state court to this court, some reasonable balance
11 should be struck between the application of pleading standards imposed by Rule 8 as interpreted
12 by Iqbal and Twombly and state pleading standards such that reasonable inferences are made in
13 the non-moving party’s favor where appropriate. The court has reviewed Plaintiff’s complaint
14 and has concluded that failure to meet Rule 8 standards is the dominant, although not the only,
15 problem and that dismissal on that ground is warranted with regard to significant parts of
16 Plaintiff’s complaint. Leave to amend will be granted. For the most part, the following
17 discussion is intended to facilitate further amendment of the complaint rather than to provide an
18 incisive legal basis for the rejection of Plaintiff’s claims.

19 I. Federal Claims – First Claim for Relief

20 Rule 8(a)(2) Of the Federal Rules of Civil; Procedure requires a “claim for relief” to
21 contain “a short and plain statement of the claim showing that the pleader is entitled to relief[.]”
22 Fed.R.Civ.P. 8(a)(2). While detailed factual allegations are not necessary, it is well established
23 that the claim be stated with sufficient specificity to “‘give the defendant fair notice of what the
24 ... claim is and the grounds upon which it rests.’ [Citation.]” Twombly, 550 US at 555 (citing
25 Conley v. Gibson, 355 U.S. 41, 47 (1957)). Courts in this circuit have consistently held that, in
26 the context of civil rights claims pursuant to 42 U.S.C. § 1983, a plaintiff is required to “set forth
27 with some specificity the acts allegedly depriving her of Constitutional rights, as well as the
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1 nature of the constitutional rights involved in each instance.” Shakespeare v. Wilson, 40 F.R.D.
2 500, 504 (S.D. Cal. 1966).

3 Plaintiff’s first claim for relief alleges constitutional violations against “all Defendants.”
4 It begins at paragraph 19 with a two-page exposition quoting from the Fourteenth, Eighth and
5 First Amendments. The nine paragraphs that comprise this part of Plaintiff’s complaint have no
6 discernable purpose. Violations of federal constitutional or statutory rights by state actors are
7 vindicated through 18 U.S.C. § 1983 if a plaintiff is able to allege facts to show “(1) that the
8 defendant acted under color of state law and (2) that the conduct deprived a person of rights,
9 privileges, or immunities conferred by the Constitution or laws of the United States. Ctr. for
10 Legal Studies, Inc. v. Lindley, 64 F. Supp. 2d 970, 978 (D. Or. 1999) (citing West v. Atkins, 487
11 U.S. 42, 48, (1988); Daniels v. Williams, 474 U.S. 327 (1986)). Padding a pleading for
12 constitutional violation with the text of the Amendment itself is a distraction from the required
13 succinct and concise statement of entitlement to relief that is required.

14 While it is permissible under federal pleading standards to allege alternative legal
15 theories for the violation of a single constitutional right in the same claim for relief; it is
16 generally not proper to allege different violations of different constitutional rights in a single
17 claim for relief. Thus, Plaintiff’s federal constitutional claims under the First, Eighth and
18 Fourteenth Amendments should be pled in separate claims for relief. However, it is permissible
19 to, for example, plead alternative theories (for example interference and intimidation) in a single
20 claim for First Amendment violation. In addition, Rule 8 requires that each defendant who is
21 being sued for a constitutional violation be placed on notice of the specific conduct that they are
22 alleged to have participated in that constitutes that violation. Thus, for example, a violation of
23 the First Amendment cannot be alleged against “all Defendants” unless facts are alleged that
24 would, if proven, show that *each* Defendant committed the violation under a legal theory that
25 applies to *each* Defendant.

26 Defendants’ motion to dismiss Plaintiff’s first claim for relief contends that Plaintiff has
27 failed to plead facts sufficient to support Eighth Amendment claims against Defendants Austria,
28 Agbayani, Garcia and Duncan. Defendants’ contentions are well taken; however, it seems to the

1 court that expending judicial resources on the specific flaws of Plaintiff's claims against
2 individual Defendants sued under Plaintiff's first claim for relief would be a waste in view of the
3 larger problem of vagueness and failure to provide adequate notice to individual Defendants.
4 With the exception of NKSP which is an entity and not a "person" for purposes of section 1983,
5 the court cannot say that, as a matter of law, there are no facts that could support Eighth
6 Amendment claims against any particular individual Defendant. Therefore, leave to amend
7 Plaintiff's Eighth Amendment claims against each of the individual Defendants would properly
8 be granted.

9 Plaintiff's First and Fourteenth Amendment claims are expressed at Paragraphs 45 and
10 46 of the complaint as follows:

11 By refusing for many months to *grant* his appeal, and by finding
12 numerous supposed flaws in his paperwork, Defendants frustrated
13 Plaintiff's right to due process. By acting as they did, Defendants also
14 impaired Plaintiff's right to petition the government for redress of
15 grievances and attempted to nullify it completely. ¶¶ By conditioning his
16 transfer to a less oppressive prison environment on his signing a waiver of
17 his claims against the Defendants, Defendants attempted to interfere with
18 Plaintiff's access to the courts, in violation of the Privileges and
19 Immunities Clause of the Fourteenth Amendment, the Due Process Clause
20 of the same Amendment, and the First Amendment petition right. And
21 rights in this way, [sic] Defendants succeeded in further prolonging the
22 violation of his Eighth Amendment rights.

23 Doc. # 1 at ¶¶ 45,46 (italics added).

24 Plaintiff's claims for violation of the First Amendment right to "access to the courts" or
25 to "petition the government for redress of grievances" are unavailing because those claims do
26 not make sense as pled. Plaintiff cannot be said to have been denied access to the courts because
27 in court is where Plaintiff's claims are. Plaintiff does not allege he was impaired in any way
28 from getting here. Similarly, Plaintiff cannot claim he was denied the right to petition for
redress of grievances because he does not allege he was *prevented* from alleging grievances
through the prison system. The fact the grievances were denied does not, as explained below,
give rise to a constitutional claim. Plaintiff's narrative description of the facts giving rise to this
case provides the suggestion that Plaintiff may have intended to allege a First Amendment claim
for retaliation. To the extent that may have been Plaintiff's intent, the attempt to allege a

1 retaliation claim fails because Plaintiff has failed to give notice to the Defendants that they are
2 being sued under that legal theory as required by Rule 8.

3 As to Plaintiff's Fourteenth Amendment claims, Defendants correctly point out there is
4 no substantive right conferred by right to procedural due process under the Fourteenth
5 Amendment. The existence of a prison grievance procedure does not create any substantive
6 rights enforceable under the Due Process Clause. See, e.g., Antonelli v. Sheahan, 81 F.3d 1422,
7 1430 (7th Cir. 1996) ("With respect to the Due Process Clause, any right to a grievance
8 procedure is a procedural right, not a substantive one. Accordingly, a state's inmate grievance
9 procedures do not give rise to a liberty interest protected by the Due Process Clause"); Doe v.
10 Moore, 410 F.3d 1337, 1350 (11th Cir. 2005) ("State-created procedural rights that do not
11 guarantee a particular substantive outcome are not protected by the Fourteenth Amendment,
12 even where such procedural rights are mandatory. Consequently, an inmate does not have a right
13 to any particular grievance procedure or result. See, e.g., Ramirez v. Galaza, 334 F.3d 850, 860
14 (9th Cir. 2003) ("[I]nmates lack a separate constitutional entitlement to a specific prison
15 grievance procedure").

16 To the extent Plaintiff's reference to the "Privileges and Immunities Clause of the
17 Fourteenth Amendment" is an attempt to plead a claim for violation of substantive due process
18 rights under the Fourteenth Amendment, that claim must fail. It is well established that the
19 liability of a state actor alleged to have violated a right specifically protected by a constitutional
20 amendment is judged according to the standards applicable to the specific constitutional
21 amendment. "'The first inquiry in any § 1983 suit' is 'to isolate the precise constitutional
22 violation with which [the defendant] is charged.' In most instances, that will be either the Fourth
23 Amendment's prohibition against unreasonable seizures of the person, or the Eighth
24 Amendment's ban on cruel and unusual punishments, which are the two primary sources of
25 constitutional protection against physically abusive governmental conduct. The validity of the
26 claim must then be judged by reference to the specific constitutional standard which governs that
27 right, rather than to some generalized 'excessive force' standard." Graham v. Connor, 490 U.S.
28 386, 394 (U.S. 1989) (internal ellipsis and citations omitted).

1 As noted above, Plaintiff's first claim for relief is alleged against "all Defendants"
2 including KVSP which, as noted, is not an individual and may not be sued under Section 1983.
3 Plaintiff's opposition to Defendants' motion to dismiss contends that Plaintiff's complaint "in
4 essence" alleges its constitutional claims against KVSP pursuant to Monell v. Dep't Soc.
5 Services. Plaintiff's argument is not persuasive on two grounds. First, under Monell, a claim
6 pursuant to section 1983 may be alleged against an *individual* who is responsible for an
7 offending policy, practice, training or similar administrative function. Section 1983 does not
8 authorize a claim against a state entity, nor does it authorize vicarious liability. Second, as noted
9 above, Rule 8 does not accommodate pleading "in essence." If Plaintiff intends to assert a claim
10 pursuant to Monell, such claim must be clearly alleged and the individual against whom the
11 claim is alleged must be identified.

12 Based on the above, the court finds that Plaintiff's first claim for relief for federal
13 constitutional violations under section 1983 fails to state any claim upon which relief can be
14 granted because the claim fails to meet the pleading standards set forth in Rule 8. Plaintiff's first
15 claim for relief will therefore be dismissed with prejudice as to NKSP and will be dismissed
16 without prejudice as to all other Defendants.

17 **II. Plaintiff's Non-Constitutional State Law Claims – Claims 2, 3, 4 and 5**

18 Defendants allege Plaintiff's state constitutional law claims are subject to dismissal
19 because Plaintiff's claims do not comply with the California Tort Claims Act, Cal. Gov. Code §§
20 900 et seq. (hereinafter, the "CTCA"). Defendants refer to documents contained in their motion
21 for judicial notice to support their contention that, while Plaintiff did file administrative claims
22 sufficient to meet the requirements of the Tort Claims Act with respect to claims 2,3,4 and 5,
23 Plaintiff did not comply with the CTCA with regard to his claims pursuant to the California
24 Constitution. Defendants therefore do not contend that Plaintiff's state law claims are barred by
25 reason of non-compliance with the CTCA.

26 Defendants point out correctly that "[c]ompliance with the CTCA's presentation
27 requirement constitutes an element of a cause of action for damages against a public entity or
28 official," Doc # 3-1 at 20:23-24 (citing State v. Superior Court (bode), 32 Cal.4th 1234, 1244

1 (2004). However, neither party addresses the implications of this requirement as regards
2 Plaintiff's state law claims. As noted above, Rule 8 requires that a plaintiff plead facts in the
3 complaint that, if proven would demonstrate entitlement to relief. Given that conformity with
4 the CTCA is an element of a tort claim against a state entity or actor, it follows that a plaintiff is
5 obliged to plead the fact of conformity with the CTCA in his or her complaint in order to
6 successfully plead the elements of a claim under California tort law. "[F]ailure to allege
7 compliance with the [CTCA] renders the complaint subject to general demurrer." Wood v.
8 Riverside General Hosp., 25 Cal.App.4th 1113, 1119 (4th Dist. 1994). The court has reviewed
9 Plaintiff's complaint and can find no facts alleged that would constitute or even suggest
10 compliance with the CTCA. Plaintiff's Claims numbered 2, 3, 4 and 5 will therefore be
11 dismissed with leave to amend.

12 The court notes that Plaintiff has withdrawn state law claims for negligent supervision
13 and training (claim 5) and that Plaintiff does not dispute Defendant's motion to dismiss Plaintiff's
14 fourth claim for relief on the contention that the claim for negligent infliction of emotional
15 distress, as alleged in claim 4, is encompassed within the second and third claims for relief. The
16 court wishes to emphasize at this point that the court's intention in dismissing Plaintiff's state
17 law claims for failure to adequately allege compliance with the CTCA is only to facilitate the
18 amendment of the complaint to meet minimum federal pleading standards. In so doing, the court
19 does not intend that any conclusions should be drawn regarding the court's opinion of the
20 validity of other, more specific defenses asserted by Defendants.

21 **III. Plaintiff's Claims for Violation of the California Constitution – Sixth Claim**

22 Plaintiff acknowledges that his claims for violation of provisions of California's
23 Constitution are limited to those alleged or capable of being alleged pursuant to California Civil
24 Code section 52.1. Section 52.1(b) authorizes claims for relief by individuals who are denied the
25 exercise of rights established by the Constitution or laws of the state of California, or whose
26 rights are interfered with or where there is an attempt to interfere with such rights by means of
27 coercion or threats of coercion. The gist of Plaintiff's opposition to Defendants' motion to
28 dismiss is, as the court understands it, that because Plaintiff's constitutional claims arise in the

1 context of his confinement in a state prison and because such confinement is inherently coercive,
2 Plaintiff's constitutional claims are each cognizable under subsection 52.1(b).

3 To the extent it Plaintiff's contention that his claims of constitutional violation that are
4 based on denials of requests, delays in response to grievances, delays in provision of services or
5 transfer to a "less coercive" institution are actionable under subsection 52.1(b) merely by reason
6 of having occurred in the prison setting, that contention is not persuasive. The fact that
7 Defendants may have "not respond[ed] to [Plaintiff's] requests, grievances and appeals are not
8 'threats intimidation or coercion' for purposes of § 53.1." Brook v. Carey, 352 Fed.Appx 184,
9 185 (9th Cir. 2005).

10 As noted above, the court notes that Plaintiff's complaint alleges facts from which a
11 claim for intimidation for exercise of First Amendment Rights is suggested but not actually
12 alleged. Since this claim would fit within the ambit of subsection 52.1(b), the court will dismiss
13 Plaintiff's state constitutional claims with leave to amend.

14 **IV. Plaintiff's Claim for Civil Conspiracy – Claim 7**

15 Plaintiff's opposition to Defendants' motion to dismiss acknowledges that a complaint
16 for civil conspiracy must "articulate the elements of the independent torts or wrongs that formed
17 the conspiracy's purpose. Doc. # 5 at 24:9-10 (citing Okum v. Superior Court, 29 Cal.3d 442,
18 454 (1981). Because Plaintiff's complain fails to allege any substantive claims for the reasons
19 discussed above, it follows that Plaintiff's claim for civil conspiracy must be dismissed with
20 leave to amend.

21 Of some significance, Plaintiff acknowledges that Defendants expressed concern as to
22 whether the conspiracy claim was alleged pursuant to state or federal law to which Plaintiff
23 answers that the civil conspiracy is pursuant to both state and federal law because "Plaintiff [has]
24 pled the action broadly enough to encompass violations of both state and federal constitutional
25 rights and [the complaint] can therefore be reasonably constructed as both a State and Federal
26 Cause of Action." Doc. 5 at 24:25-27. This passage articulates most concisely Plaintiff's
27 misunderstanding of federal pleading standards. A complaint that meets Rule 8 standards
28 alleges the claim or claims that it states explicitly; not the claims that might be inferred from the

1 facts. No federal conspiracy claim was alleged because no federal statute authorizing such claim
2 was alleged. It is not the job of the Defendants or the court to anticipate legal theories for relief
3 where none are made express.
4

5 THEREFORE, in accord with the foregoing, it is hereby ORDERED that:

- 6 1. Plaintiff's first claim for relief is DISMISSED with prejudice as to Defendant KVSP.
- 7 2. Plaintiff's first claim for relief is DISMISSED without prejudice as to all other Defendants.
- 8 3. Plaintiff's claims two through seven are DISMISSED without prejudice as to all defendants.
- 9 4. Any amended complaint shall be filed and served not less than thirty (30) days from the date
10 of service of this order.
- 11 5. If no amended complaint is served upon Defendants within the thirty-day time limit imposed
12 by this order, Defendants shall so notify the court and shall move for dismissal of all claims with
13 prejudice.
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15 IT IS SO ORDERED.

16 Dated: December 15, 2016


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SENIOR DISTRICT JUDGE