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

JAMES OLIVER,

Plaintiff,

No. CIV S-06-0390 MCE EFB P

vs.

THOMAS CAREY, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Defendants Solomon and Thor have filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).¹ Dckt. Nos. 30, 36. Plaintiff has filed an opposition to both motions. Dckt. No. 39. For the reasons explained, defendants' motions must be denied.

Plaintiff's amended complaint, Dckt. No. 12, alleges that Drs. Solomon and Thor were deliberately indifferent to plaintiff's serious medical needs by failing adequately to respond to plaintiff's requests for treatment. Am. Compl., at 5. After conducting the review required by 28 U.S.C. § 1915A, this court found that plaintiff failed to state any claim for relief, and recommended that this action be dismissed. Dckt. No. 13. Over plaintiff's objections, that

¹ Plaintiff has named four defendants in this action. Only two, each represented by his own attorney, have filed motions to dismiss.

1 recommendation was adopted in full and the action was dismissed for failure to state a claim.
2 Dckt. No. 16, 17. Plaintiff appealed and the Ninth Circuit reversed. The Circuit found that
3 plaintiff had stated claims for relief and remanded the matter to this court for further
4 proceedings. Dckt. No. 26, at 3-4. Thus, defendants' instant motions essentially seek
5 reconsideration of the Ninth Circuit's order. This court cannot reconsider the Ninth Circuit's
6 ruling. Therefore, defendants' motion must be denied.

7 Accordingly, it hereby is RECOMMENDED that:

- 8 1. Defendant Solomon's July 16, 2009, motion to dismiss be denied;
- 9 2. Defendant Thor's August 19, 2009, motion to dismiss be denied; and,
- 10 3. All defendants be given 30 days to file answers to the complaint.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
16 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
17 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: December 2, 2009.

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20 EDMUND F. BRENNAN
21 UNITED STATES MAGISTRATE JUDGE
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