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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID G. LEONARD,  
Plaintiff,  
v.  
JIM DENNY, et al.,  
Defendants.

No. 2:12-cv-0915 AC P

ORDER and  
FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, and former Sutter County prisoner, proceeding pro se and in forma pauperis in this action for relief under 42 U.S.C. § 1983. The court previously dismissed the original complaint with leave to amend, and after plaintiff failed to amend, the court directed service on defendants with respect only to plaintiff’s claims that he received inadequate medical care, in violation of the Eighth and Fourteenth Amendments, while detained at the Sutter County Jail from June 2009 through April 2010. Defendants now move to dismiss the entire complaint with prejudice for, among other things, failure to state a claim. In the alternative, defendants ask the court to dismiss the complaint with leave to amend. For the reasons set forth below, the undersigned recommends that the motion to dismiss be granted in part, and denied in part, and that plaintiff be granted leave to amend the complaint.

***Defendants***

Plaintiff alleges that defendant Denney is the Sherriff of Sutter County, and is legally

1 responsible for the overall operations of the Sutter County Jail and Sherriff's Department. ECF  
2 No. 1 at ¶ 6. Plaintiff alleges that defendant Denney is "responsible for developing,  
3 implementing, and monitoring the policies and procedures for the Jail including the medical  
4 services delivery, and housing environments of the Jail facility." Id.

5 Plaintiff alleges that defendant Saunders is a medical doctor "legally responsible for the  
6 delivery of medical services to inmates housed at the Sutter County Jail, developing and  
7 implementing policies and procedures for the delivery of medical services, providing care as a  
8 medical care provider for inmates in the custody and care of the Sutter County Jail." ECF No. 1  
9 at ¶ 9.

10 Plaintiff alleges that defendant Brown is a nurse practitioner "responsible for providing  
11 and implementing medical services (care), scheduling and ordering diagnostics such as x-rays,  
12 MRI's, and blood tests, diagnosing and treating medical conditions, and making referrals to  
13 specialist care. She is directly responsible for providing medical care, and for the day-to-day  
14 operations of the medical services for all inmates." ECF No. 1 at ¶ 10.

15 Plaintiff alleges that defendant Sutter County Sherriff's Department is legally responsible  
16 for the operations and maintenance of the facilities known as the Sutter County Jail, including  
17 policies and procedures related to jail operations. ECF No. 1 at 11. Plaintiff alleges that  
18 defendant Sutter County Sherriff's Department establishes acceptable customs and policies. Id.

19 Plaintiff alleges that defendant County of Sutter is responsible for the construction and  
20 maintenance of the Sutter County Jail facilities, including the provision of medical services to the  
21 jail through the use of the Sutter County Health Department. ECF No. 1 at ¶ 12. Plaintiff alleges  
22 that defendant County of Sutter also establishes policies, procedures, and customs related to  
23 health care services provided to inmates at the jail, and is responsible for the "medical Delivery  
24 System." Id.

### 25 ***Background***

26 Plaintiff alleges that, during his detention at the Sutter County Jail, he suffered from the  
27 following medical conditions: (1) "low back condition or injury," including disc bulges, resulting  
28 in, among other things, severe pain and numbness, which plaintiff claims affected his ability to

1 sleep, walk, stand, lift, bend and exercise (ECF No. 1 at ¶¶ 68-70); (2) “viral infection right eye,”  
2 which requires specialist care, and which affects plaintiff’s ability to see and to read (id. at ¶ 71);  
3 and (3) asthma and allergies, requiring specialist care and treatment (id. at ¶ 72). Plaintiff alleges  
4 that he would be a “qualified individual with a disability” as defined by 42 U.S.C. § 12132,  
5 because he has physical impairments that substantially limit one or more major life activities.  
6 ECF No. 1 at ¶¶ 66-67.

7 Plaintiff alleges that the cooling and ventilation systems at the Sutter County Jail were not  
8 properly maintained, resulting in the proliferation of “mold and other contaminants.” Id. at 75.  
9 He alleges that debris, mold and other contaminants were allowed to drop into the ventilation  
10 system, and contaminate the inmates’ living areas, during the operation and cleaning of the  
11 ventilation and cooling systems. Id. at ¶ 76. Plaintiff alleges that the contaminants and mold left a  
12 visible black coating, and caused plaintiff difficulties with breathing, lightheadedness, and  
13 “severe allergic/asthmatic reactions. . . .” Id. at ¶¶ 78 - 80. Plaintiff claims that exposure to the  
14 contaminants has “created on-going and potential long-term/life-long side-effects.” Id. at ¶ 80.

15 Plaintiff alleges that defendants Denney, Saunders, and Brown failed to provide plaintiff  
16 with adequate medical care, or delayed providing him with adequate care, in compliance with a  
17 policy to delay treatment in order to conserve county resources. ECF No. 1 at ¶¶ 109 – 132.  
18 Plaintiff cites the failure of defendants Denney, Saunders, and Brown to refer him to an  
19 orthopedic specialist or refer plaintiff for a MRI until March 2012, more than 10 months after he  
20 was first housed at the Sutter County Jail (id. at ¶ 85, 87), as well as the delay of defendants  
21 Denney, Saunders, and Brown in referring plaintiff to a specialist for his eye condition, and  
22 defendants Denney, Brown and Saunders’ failure to follow the treatment plan requested by the  
23 eye specialist. Id. at ¶¶ 89 - 91.

24 Plaintiff alleges that defendants Denney, Brown, and Saunders were aware of plaintiff’s  
25 medical conditions, and that defendants Brown and Saunders were specifically on notice of  
26 plaintiff’s low back condition, as well as his need for treatment, and his continued pain while  
27 treatment was delayed. ECF No. 1 at ¶ 27.

28 Plaintiff also advised unnamed members of the jail staff, including the “intake staff,” of

1 all of his then-current conditions. ECF No. 1 at ¶ 30. Plaintiff additionally claims that his  
2 conditions were obvious. Id. at ¶ 31.

3 Plaintiff alleges that, as a result of the delay in treatment of his eye condition, he has  
4 suffered additional, permanent damage. ECF No. 1 at ¶ 93.

5 Plaintiff alleges that unnamed medical staff members prescribed his transfer to a lower tier  
6 cell, and a thicker mattress, but that an unnamed custody officer refused plaintiff these  
7 accommodations. ECF No. 1 at ¶¶ 49-60.

### 8 ***The Complaint***

9 In his complaint, plaintiff originally sought injunctive and declaratory relief, as well as  
10 compensatory damages, punitive damages, and “third party damages.” In his “Claims for Relief,”  
11 plaintiff alleged that defendants were deliberately indifferent to his medical needs, and failed to  
12 protect him from harm. Plaintiff also alleged that defendants Brown and Saunders violated state  
13 law by their provision of inadequate care. Plaintiff further alleged that defendants Denney,  
14 Saunders, and Brown were negligent in their provision of care, in violation of state law.

15 In the body of his complaint, plaintiff alleged that an unnamed defendant failed to provide  
16 plaintiff with medically ordered accommodations (ECF No. 1 at ¶¶ 48-65), including a thicker  
17 mattress (ECF No. 1 at ¶ 50) and a lower-tier cell (¶¶ 60-61). Plaintiff alleges that defendants  
18 Denney, Saunders, and Brown, along with this unnamed officer, failed to provide plaintiff with  
19 reasonable accommodations for plaintiff’s medical conditions. ECF No. 1 at ¶ 65. Plaintiff does  
20 not identify in his prayer for relief any remedy he seeks on account of this failure to provide a  
21 reasonable accommodation.

22 In his prayer for relief, plaintiff also seeks declaratory relief. Specifically as to the federal  
23 claims, he seeks a declaration that defendants violated plaintiff’s Constitutional rights, including  
24 deliberate indifference to plaintiff’s serious medical needs and plaintiff’s Equal Protection rights.  
25 ECF No. 1 at 43, ¶ 2.

26 On July 11, 2012, the court dismissed plaintiff’s claims for injunctive relief, as well as his  
27 claims for third-party damages. ECF No. 9. The court additionally dismissed the complaint with  
28 leave to amend. Id. After plaintiff failed to file an amended complaint, the court ordered that the

1 complaint proceed only on plaintiff's claims that he received inadequate medical care, in  
2 violation of the Eighth and Fourteenth Amendments, and directed service of the complaint on the  
3 following defendants: Jim Denney; J. Saunders; Dorris Brown; Sutter County Sherriff's  
4 Department; and County of Sutter. ECF No. 11.

5 ***The Motion to Dismiss***

6 Defendants move to dismiss the complaint with prejudice, arguing that: (1) defendants  
7 Sutter County Sherriff's Department and Sutter County Jail should be dismissed as superfluous  
8 parties; (2) plaintiff fails to allege sufficient facts to state a claim for relief for deliberate  
9 indifference to a serious medical need; (3) plaintiff fails to allege sufficient facts to state a claim  
10 for relief for supervisory liability against former Sherriff Denney because plaintiff fails to allege  
11 that Denney know of and consciously disregarded a serious risk of harm arising out of the  
12 ventilation system; (4) plaintiff fails to state a claim for relief against the defendant Sutter County  
13 under Monell for claim stemming from discrimination, Equal Protection, or violations of the  
14 Americans with Disabilities Act; (5) plaintiff's negligence claims are barred by the statute of  
15 limitations; (6) plaintiff failed to allege compliance with the Tort Claims Act; and (7) plaintiff  
16 fails to state a statutory basis for state law negligence liability against defendant Sutter County.  
17 ECF No. 19-1 at 2.

18 Plaintiff has filed a lengthy opposition and "supplemental opposition," arguing essentially  
19 that his complaint adequately alleges the elements required to defeat a Rule 12(b)(6) motion.  
20 Plaintiff also moves for the appointment of counsel, which defendants oppose.

21 ***Standard of Review***

22 A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6)  
23 challenges the sufficiency of the pleadings set forth in the complaint. Vega v. JPMorgan Chase  
24 Bank, N.A., 654 F.Supp.2d 1104, 1109 (E.D.Cal.2009). Under the "notice pleading" standard of  
25 the Federal Rules of Civil Procedure, a plaintiff's complaint must provide, in part, a "short and  
26 plain" statement of plaintiff's claims showing entitlement to relief. Fed. R. Civ. P. 8(a)(2); see  
27 also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009). "A complaint may survive a  
28 motion to dismiss if, taking all well-pleaded factual allegations as true, it contains 'enough facts

1 to state a claim to relief that is plausible on its face.” Coto Settlement v. Eisenberg, 593 F.3d  
2 1031, 1034 (9th Cir. 2010) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). “A claim has  
3 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
4 reasonable inference that the defendant is liable for the misconduct alleged.” Caviness v.  
5 Horizin Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Iqbal, 556 U.S. at  
6 678). The court accepts all of the facts alleged in the complaint as true and construes them in the  
7 light most favorable to the plaintiff. Corrie v. Caterpillar, 503 F.3d 974, 977 (9th Cir. 2007). The  
8 court is “not, however, required to accept as true conclusory allegations that are contradicted by  
9 documents referred to in the complaint, and [the court does] not necessarily assume the truth of  
10 legal conclusions merely because they are cast in the form of factual allegations.” Paulsen v.  
11 CNF, Inc., 559 F.3d at 1071 (citations and quotation marks omitted).

12 In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court “may generally  
13 consider only allegations contained in the pleadings, exhibits attached to the complaint, and  
14 matters properly subject to judicial notice.” Outdoor Media Group, Inc. v. City of Beaumont, 506  
15 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted); see also Heliotrope Gen.,  
16 Inc. v. Ford Motor Co., 189 F.3d 971, 980 n. 18 (9th Cir. 1999) (“When considering a motion for  
17 judgment on the pleadings, [the] court may consider facts that are contained in material of which  
18 the court may take judicial notice.”) (citation and quotation marks omitted).

19 *Stating a Claim under 42 U.S.C. § 1983*

20 The Civil Rights Act under which this action was filed provides as follows:

21 Every person who, under color of [state law] . . . subjects, or causes  
22 to be subjected, any citizen of the United States . . . to the  
23 deprivation of any rights, privileges, or immunities secured by the  
24 Constitution . . . shall be liable to the party injured in an action at  
25 law, suit in equity, or other proper proceeding for redress.

26 42 U.S.C. § 1983.

27 The statute requires that there be an actual connection or link between the actions of the  
28 defendants and the deprivation alleged to have been suffered by plaintiff. See Monell v.  
Department of Social Servs., 436 U.S. 658, 692 (1978); Rizzo v. Goode, 423 U.S. 362, 370-71  
(1976); Leer v. Murphy, 844 F.2d 628, 633-34 (9th Cir. 1988). “A person ‘subjects’ another to

1 the deprivation of a constitutional right, within the meaning of § 1983, if he does an affirmative  
2 act, participates in another's affirmative acts or omits to perform an act which he is legally  
3 required to do that causes the deprivation of which complaint is made.” Johnson v. Duffy, 588  
4 F.2d 740, 743 (9th Cir. 1978) (citing Sims v. Adams, 537 F.2d 829 (5th Cir. 1976)). The  
5 requisite causal connection can be established not only by some kind of direct personal  
6 participation in the deprivation, but also by setting in motion a series of acts by others which the  
7 actor knows or reasonably should know would cause others to inflict the constitutional injury. Id.  
8 at 743-44.

9 When an inmate seeks money damages, as opposed to injunctive relief, the inquiry into  
10 causation must be individualized and focus on the duties and responsibilities of each individual  
11 defendant whose acts or omissions are alleged to have caused a constitutional deprivation. See  
12 Leer, 844 F.2d at 633; see also OSU Student Alliance v. Ray, 699 F.3d 1053, 1072, n.12 (9th Cir.  
13 2012) (“To state a § 1983 claim against a government defendant, the plaintiff must allege that the  
14 defendant acted with sufficient culpability to breach a duty imposed by the relevant provision of  
15 federal law.”)

16 The undersigned will address each of defendants’ arguments in turn:

17 *Defendants Sutter County Sherriff’s Department and Sutter County Jail Should Not Be*  
18 *Dismissed as Superfluous*

19 Citing twenty-plus-year old law from the districts of Colorado and Massachusetts,  
20 defendants ask this court to dismiss two parties from the action on the allegation that each is a  
21 merely a subdivision of defendant County of Sutter, and is consequently superfluous.<sup>1</sup>  
22 Defendants provide the court with no evidence to indicate that, for example, either the Sherriff’s  
23 Department or the Jail are mere subdivisions or departments of the County of Sutter, and  
24 therefore are not subject to suit under § 1983. Cf., e.g., Pellum v. Fresno Police Dep’t., 2011 WL  
25 350155 \*2 (E.D.Cal. Feb. 2, 2011). Indeed, plaintiff has offered to dismiss these parties, so long  
26 as such a dismissal would not limit any alleged claims or causes of action (ECF No. 24 at 13-14),

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27 <sup>1</sup> A review of the court’s records reflects that the Court has not directed service on the Sutter  
28 County Jail.

1 yet defendants have refused to do so. See ECF No. 37 at 3. In light of defendants’ failure to  
2 establish that they are entitled to this relief, the undersigned recommends that this request be  
3 denied.

4 *Plaintiff Has Adequately Alleged Sufficient Facts to State A Claim for Deliberate*  
5 *Indifference to a Serious Medical Need*

6 The Ninth Circuit has held that, in order to maintain an Eighth Amendment claim based  
7 on prison medical treatment, an inmate must show “deliberate indifference to serious medical  
8 needs.” See Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006), citing Estelle v. Gamble, 429  
9 U.S. 97, 104 (1976):

10 In the Ninth Circuit, the test for deliberate indifference consists of  
11 two parts. McGuckin v. Smith, 974 F.2d 1050 (9th Cir. 1991),  
12 overruled on other grounds by WMX Techs., Inc. v. Miller, 104  
13 F.3d 1133 (9th Cir. 1997) (en banc). First the plaintiff must show a  
14 “serious medical need” by demonstrating that “failure to treat a  
15 prisoner’s condition could result in further significant injury or the  
16 ‘unnecessary and wanton infliction of pain.’” Id. at 1059 (citing  
17 Estelle, 429 U.S. at 104, 97 S.Ct. 285). Second, the plaintiff must  
18 show the defendant’s response to the need was deliberately  
19 indifferent. Id. at 1060. This second prong – defendant’s response  
20 to the need was deliberately indifferent – is satisfied by showing (a)  
21 a purposeful act or failure to respond to a prisoner’s pain or  
22 possible medical need and (b) harm caused by the indifference. Id.  
Indifference “may appear when prison officials deny, delay or  
intentionally interfere with medical treatment...” Id. at 1059  
(quoting Hutchinson v. United States, 838 F.2d 390, 392 (9th Cir.  
1988)). Yet, an ‘inadvertent [or negligent] failure to provide  
adequate medical care’ alone does not state a claim under § 1983.  
Id. (citing Estelle, 429 U.S. at 105, 97 S.Ct. 285). A prisoner need  
not show his harm was substantial; however, such would provide  
additional support for the inmate’s claim that the defendant was  
deliberately indifferent to his needs. Id. at 1060. If the harm is an  
‘isolated exception’ to the defendant’s ‘overall treatment of the  
prisoner [it] ordinarily militates against a finding of deliberate  
indifference.’ Id. (citations omitted).

23 See Jett, 439 F.3d at 1096.

24 The Ninth Circuit has recognized that a delay in treatment may state a claim under 42  
25 U.S.C. § 1983; however, the delay must result in further harm to the inmate. See, e.g., Jett, 439  
26 F.3d at 1097 (inmate presented sufficient information to present a genuine issue of material fact  
27 where inmate had fractured his thumb yet did not see a hand specialist, as recommended by other  
28 treating doctors, for more than nineteen months after the initial injury, in which time the fracture



1 had healed badly, resulting in continuing diminished use of the hand); Hunt v. Dental Dept., 865  
2 F.2d 198, 200 (9th Cir. 1989); Shapely v. Nevada Bd. Of State Prison Comm'rs, 766 F.2d 404,  
3 407 (9th Cir. 1985) (“[M]ere delay of surgery, without more, is insufficient to state a claim of  
4 deliberate medical indifference. . . . [Prisoner] would have no claim for deliberate medical  
5 indifference unless the denial was harmful.”) Cf. McGuckin v. Smith, 974 F.2d 1050, 1061 (9th  
6 Cir. 1992) (“unnecessary continuation of [plaintiff’s] condition and pain caused him ‘harm’ upon  
7 which a § 1983 claim can be based. . . .” when inmate waited more than three and half years after  
8 an injury causing massive herniation of plaintiff’s back and upper torso before receiving the  
9 surgery required to correct his condition.), overruled on other grounds by WMX Techs., Inc. v.  
10 Miller, 104 F.3d 1133 (9th Cir. 1997) (en banc).

11 In this case, plaintiff has alleged that defendants Denney, Brown, and Saunders were  
12 aware of plaintiff’s medical conditions, and either delayed treatment, or provided inadequate  
13 treatment, resulting in further damage to plaintiff’s eye, further aggravation of his respiratory  
14 conditions, and pain and suffering. This is sufficient. Defendants’ current arguments go to the  
15 weight of plaintiff’s allegations, a question to be decided after plaintiff has had an opportunity to  
16 take discovery and to offer proof. The undersigned accordingly recommends that defendants’  
17 motion to dismiss be denied as to plaintiff’s deliberate indifference claims.

18 *Plaintiff Alleges Sufficient Facts to State a Claim for Relief for Supervisory Liability*  
19 *Against Defendant Denney*

20 Supervisory personnel are generally not liable under § 1983 for the actions of their  
21 employees under a theory of respondeat superior and, therefore, when a named defendant holds a  
22 supervisory position, the causal link between him and the claimed constitutional violation must  
23 be specifically alleged. See Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v.  
24 Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442 U.S. 941 (1979). Vague and  
25 conclusory allegations concerning the involvement of official personnel in civil rights violations  
26 are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

27 The Ninth Circuit has held that a supervisor may be liable

28 if there exists either (1) his or her personal involvement in the

1 constitutional deprivation, or (2) a sufficient causal connection  
2 between the supervisor's wrongful conduct and the constitutional  
3 violations. Supervisory liability exists even without overt personal  
4 participation in the offensive act if supervisory officials implement  
5 a policy so deficient that the policy "itself is a repudiation of  
6 constitutional rights" and is "the moving force of the constitutional  
7 violation."

8 Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (internal citations and quotations omitted).

9 The Ninth Circuit has recently clarified the parameters of supervisor liability in the wake  
10 of Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011):

11 Iqbal makes crystal clear that constitutional tort claims against  
12 supervisory defendants turn on the requirements of the particular  
13 claim – and, more specifically, on the state of mind required by the  
14 particular claim – not on a generally applicable concept of  
15 supervisory liability.... [B]ecause Eighth Amendment claims for  
16 cruel and unusual punishment generally require only deliberate  
17 indifference (not specific intent), a Sheriff is liable for prisoner  
18 abuse perpetrated by his subordinates if he knowingly turns a blind  
19 eye to the abuse. See [Starr v. Baca, 652 F.3d] at 1205. The  
20 Sheriff need not act with the purpose that the prisoner be abused.  
21 See id. at 1206-07 ("A showing that a supervisor acted, or failed to  
22 act, in a manner that was deliberately indifferent to an inmate's  
23 Eighth Amendment rights is sufficient to demonstrate the  
24 involvement – and the liability – of that supervisor.") Put simply,  
25 constitutional tort liability after Iqbal depends primarily on the  
26 requisite mental state for the violation alleged.

27 OSU Student Alliance v. Ray, 699 F.3d at 1071.

28 Defendants argue that plaintiff has failed to allege that defendant Denney was "directly  
involved" in plaintiff's medical treatment, and that the motion should be granted on that basis  
alone. As noted in the above-cited cases, however, a supervisor may be liable even without direct  
participation where the supervisor implements an unconstitutional policy, or where he turns a  
blind eye to unconstitutional abuse.

In this case, construing plaintiff's complaint liberally and in light of the governing law,  
the undersigned finds that plaintiff has alleged: (1) a policy of delaying referrals for specialist  
medical care to jail detainees in order to shift costs to the State (ECF No. 1 at ¶¶ 109-116); and  
(2) a failure by defendant Denney to oversee the delivery of health services, as well as  
maintenance of the ventilation and cooling systems, resulting in continued exposure to mold and  
other contaminants (ECF No. 1 at ¶¶ 74-82, 122). This is sufficient. Again, defendants'

1 arguments go to the weight of plaintiff’s allegations. As noted above, defendants’ arguments are  
2 more appropriately raised after plaintiff has had an opportunity to take discovery, and to present  
3 his proof. The undersigned accordingly recommends that defendants’ motion be denied as to  
4 plaintiff’s claims against defendant Denney.

5 *Plaintiff Has Alleged a Sufficient Monell Claim Against the County*

6 Defendants argue that plaintiff has failed to state an adequate claim against the County  
7 because plaintiff’s “policy” allegations are too conclusory, and are also insufficient as a matter of  
8 law, because, among other things, plaintiff fails to allege that: (1) the alleged delays in referring  
9 plaintiff to a specialist are “official edicts of the COUNTY or that medical staff was acting in  
10 accordance therewith. . . .” (ECF No. 19 at 9); and (2) defendant DENNEY knew of the alleged  
11 delays and ratified them in his official capacity on behalf of the COUNTY.” Id.

12 However, the policy at issue need not be an “official edict,” nor does plaintiff have to  
13 allege that the Sherriff ratified an unconstitutional policy on behalf of the County. Instead,  
14 official municipal policy includes the decisions of a government’s lawmakers, the acts of its  
15 policymaking officials, and practices so persistent and widespread as to practically have the force  
16 of law. Connick v. Thompson, 131 S.Ct. 1350, 1359 (2011) (plaintiffs who seek to impose  
17 liability on local governments under § 1983 must prove that “action pursuant to municipal policy”  
18 caused the plaintiffs’ injury).

19 In this case, plaintiff has adequately alleged that the Sherriff was one whose acts may  
20 fairly be said to represent official policy. See, e.g., ECF No. 1 at ¶ 6 (defendant “is legally  
21 responsible for the overall operations of the Sutter County Jail, and the Sutter County Sherriff’s  
22 Department. This defendant is responsible for developing, implementing, and monitoring the  
23 policies and procedures for the Jail including medical services delivery and housing  
24 environments. . . .”) At this stage in the proceeding, plaintiff’s allegations are sufficient. The  
25 undersigned accordingly recommends that defendants’ motion be denied as to plaintiff’s Monell  
26 claims against the County.

27 *Plaintiff Has Not Alleged a Sufficient ADA Claim against the County*

28 Plaintiff alleges that defendant John Doe 2 refused to provide accommodations ordered by

1 medical staff. ECF No. 1, ¶¶ 48-64. Plaintiff alleges that defendants Denney, Brown, and  
2 Saunders, as well as this unnamed defendant, failed to provide plaintiff with “Reasonable  
3 Accommodations for the plaintiff’s medical conditions, restrictions, limitations, and disabilities.”  
4 Id. at ¶ 65.

5 Title II of the ADA prohibits a public entity from discriminating against a qualified  
6 individual with a disability on the basis of a disability. 42 U.S.C. § 12132 (1994); Weinrich v.  
7 L.A. County Metro Transp. Auth., 114 F.3d 976, 978 (9th Cir.), cert. denied, 522 U.S. 971, 118  
8 S.Ct. 423 (1997). To state a claim under Title II, the plaintiff must allege facts to support all four  
9 elements of a violation: 1) the plaintiff is an individual with a disability; 2) the plaintiff is  
10 otherwise qualified to participate in or receive the benefit of some public entity’s services,  
11 programs, or activities; 3) the plaintiff was either excluded from participation in or denied the  
12 benefits by the public entity; and 4) such exclusion, denial of benefits or discrimination was by  
13 reason of the plaintiff’s disability. Weinrich, 114 F.3d at 978.

14 If plaintiff seeks to make a claim under the ADA, he may bring a claim pursuant to Title II  
15 of the ADA against state entities for injunctive relief and damages. See Phiffer v. Columbia  
16 River Correctional Institute, 384 F.3d 791, 792 (9th Cir. 2004), cert. denied, 546 U.S. 1137  
17 (2006); Lovell v. Chandler, 303 F.3d 1039, 1051 (9th Cir. 2002), cert. denied, 537 U.S. 1105  
18 (2003). A plaintiff cannot seek damages pursuant to the ADA against the defendants in their  
19 individual capacities. Eason v. Clark County School Dist., 303 F.3d 1137, 1144 (9th Cir. 2002),  
20 cert. denied, 537 U.S. 1190 (2003), citing Garcia v. S.U.N.Y. Health, 280 F.3d 98, 107 (2d Cir.  
21 2001). To the extent a plaintiff makes claims of violations of the ADA against any individual  
22 defendant, such claims may proceed only to the extent that plaintiff seeks injunctive relief and has  
23 sued such individual defendant in an official capacity. Miranda B. v. Kitzhaber, 328 F.3d 1181,  
24 1187-88 (9th Cir. 2003); Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002), cert. denied, 538  
25 U.S. 921 (2003).

26 In this case, plaintiff alleges that individual defendants Denney, Saunders, and Brown, as  
27 well as the unnamed officer Does 2, refused him a reasonable accommodation. In describing the  
28 violation, plaintiff alleges that the unnamed officer was responsible for providing the

1 accommodations, yet failed to do so – it is accordingly unclear from the face of the complaint  
2 how, if at all, defendants Denney, Saunders, and Brown, in their individual capacities, violated  
3 plaintiff’s ADA rights.

4 In any event, such claims would not lie for money damages, and the court has already  
5 determined that plaintiff’s requests for injunctive relief are moot. To the extent plaintiff raises an  
6 ADA claim, it was previously dismissed with leave to amend, and, to date, plaintiff has not  
7 amended. The undersigned accordingly recommends that defendants’ motion to dismiss  
8 plaintiff’s ADA claim against Sutter County be granted, and that plaintiff be granted leave to  
9 amend.

10 *Plaintiff Has Not Alleged a Colorable Equal Protection Claim*

11 As noted above, plaintiff does not appear to make any explicit allegation of discrimination  
12 in violation of his Fourteenth Amendment rights, yet he does appear to seek remedies on account  
13 of such a violation. To the extent plaintiff raises such a claim, it was previously dismissed with  
14 leave to amend and, to date, has not been amended. Accordingly, the undersigned recommends  
15 that defendants’ motion to dismiss be granted as to plaintiff’s discrimination claims against the  
16 County, and that plaintiff be granted leave to amend.

17 *Plaintiff’s State Law Negligence Claims May Be Barred by the Statute of Limitations*

18 Defendants’ argument that plaintiff’s negligence claim should be barred as untimely  
19 because plaintiff has failed to allege explicitly the appropriate facts supporting plaintiff’s  
20 entitlement to tolling under California Code of Civil Procedure 335.2. The undersigned  
21 accordingly recommends that defendants’ motion to dismiss be granted as to plaintiff’s state law  
22 negligence claims, and that plaintiff be granted leave to amend.

23 *Plaintiff Has Failed to Allege Compliance with the Tort Claims Act*

24 According to defendants, plaintiff has failed to *allege* that he complied with the Tort  
25 Claims Act, and therefore may not bring any state-law-based claims. In his opposition, plaintiff  
26 argues that he has complied with the state Tort Claims Act. ECF No. 24-1 at 38.

27 The opposition, however, is not the operative complaint, and the failure of plaintiff to  
28 allege compliance is grounds for dismissal. See, e.g., Mangold v. California Public Utilities

1 Com'n, 67 F.3d 1470, 1477 (9th Cir. 1995). The undersigned accordingly recommends that  
2 defendants' motion to dismiss be granted as to plaintiff's state law claims, and that plaintiff be  
3 granted leave to amend.

4 *Plaintiff Has Failed to Allege a Statutory Basis for the County's Professional Negligence*  
5 *Liability*

6 Defendants argue that defendant County of Sutter must be dismissed because plaintiff has  
7 failed to identify the statutory source of the county's liability for professional negligence. In his  
8 opposition, plaintiff cites to various state statutes and cases in support of liability. The  
9 undersigned accordingly recommends that defendants' motion to dismiss be granted as to  
10 plaintiff's claims for professional negligence against the County, and that plaintiff be given leave  
11 to amend.

12 *Motion for Appointment of Counsel*

13 Plaintiff has requested the appointment of counsel. The United States Supreme Court has  
14 ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983  
15 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain exceptional  
16 circumstances, the court may request the voluntary assistance of counsel pursuant to 28 U.S.C. §  
17 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900  
18 F.2d 1332, 1335-36 (9th Cir. 1990).

19 In the present case, the court does not find the required exceptional circumstances. For  
20 example, while plaintiff appears to allege that he suffers from medical disabilities which prevent  
21 him from utilizing the legal resources available at his institution (ECF No. 25 at 6), the court  
22 notes that plaintiff has filed lengthy and substantial oppositions to the motion to dismiss,<sup>2</sup> as well  
23 as a lengthy motion for appointment of counsel, all of which include numerous citations to legal  
24 authority. Plaintiff's request for the appointment of counsel will therefore be denied.

25 Accordingly, IT IS HEREBY ORDERED that

26 1. Plaintiff's motion for permission to file an oversize opposition (ECF No. 23) is

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28 <sup>2</sup> Indeed, one of the motions currently pending before the court is made by plaintiff seeking  
permission to file an oversized opposition. ECF No. 23.

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granted;

- 2. Plaintiff’s motion for appointment of counsel (ECF No. 25) is denied; and
- 3. The Clerk assign a district judge to this matter.

IT IS HEREBY RECOMMENDED that defendants’ motion to dismiss (ECF No. 19) be granted in part and denied in part, as outlined above, and that plaintiff be given leave to amend the complaint within 28 days of any order adopting these findings and recommendations.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. ' 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served and filed within fourteen (14) days after service of the objections. 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).

DATED: July 31, 2013



ALLISON CLAIRE  
UNITED STATES MAGISTRATE JUDGE

AC:rb/leon0915.fr