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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 TLN AC P

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner, and former Sutter County prisoner, proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983; Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131-12134; Section 504 of the Rehabilitation Act (RA) of 1973; and state tort claims. Currently before the court is plaintiff’s second amended complaint. ECF No. 66.

I. Statutory Screening of Prisoner Complaints

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th

1 Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an  
2 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
3 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
4 pleaded, has an arguable legal and factual basis. Jackson v. Arizona, 885 F.2d 639, 640 (9th Cir.  
5 1989) (“[A] judge may dismiss [in forma pauperis] claims which are based on indisputably  
6 meritless legal theories or whose factual contentions are clearly baseless.”) (citation and internal  
7 quotations omitted), superseded by statute on other grounds as stated in Lopez v. Smith, 203  
8 F.3d 1122, 1130 (9th Cir. 2000); Franklin, 745 F.2d at 1227.

9 “Federal Rule of Civil Procedure 8(a)(2) requires only ‘a short and plain statement of the  
10 claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of  
11 what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550  
12 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order to  
13 survive dismissal for failure to state a claim, a complaint must contain more than “a formulaic  
14 recitation of the elements of a cause of action;” it must contain factual allegations sufficient “to  
15 raise a right to relief above the speculative level.” Id. (citations omitted). “[T]he pleading must  
16 contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a  
17 legally cognizable right of action.” Id. (alteration in original) (quoting 5 Charles Alan Wright &  
18 Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004)).

19 “[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to  
20 relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell  
21 Atl. Corp., 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual  
22 content that allows the court to draw the reasonable inference that the defendant is liable for the  
23 misconduct alleged.” Id. (citing Bell Atl. Corp., 550 U.S. at 556). In reviewing a complaint  
24 under this standard, the court must accept as true the allegations of the complaint in question,  
25 Hospital Bldg. Co. v. Rex Hosp. Trs., 425 U.S. 738, 740 (1976), as well as construe the pleading  
26 in the light most favorable to the plaintiff and resolve all doubts in the plaintiff’s favor, Jenkins v.  
27 McKeithen, 395 U.S. 411, 421 (1969).

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1           II.       Second Amended Complaint

2           The second amended complaint is prefaced by a lengthy statement of facts. ECF No. 66-2  
3 at 3-25. According to the statement of facts, plaintiff was incarcerated at the Sutter County Jail  
4 from approximately June 18, 2009, through April 5, 2010. Id. at 5, ¶ 15. Following his statement  
5 of facts, plaintiff proceeds to separate his second amended complaint into five separate counts  
6 against defendants Parker, Bidwell, Saunders, Brown, Sutter County Sheriff’s Department, Sutter  
7 County Jail, Sutter County, and Denny. ECF No. 66 at 2; ECF No. 66-2 at 25-45. Plaintiff also  
8 lists a John Doe defendant (hereinafter defendant Doe), who he identifies as the supervising  
9 custody officer at the jail. ECF No. 66 at 2; ECF No. 66-2 at 16, ¶ 73. The complaint includes  
10 Eighth Amendment claims for deliberate indifference and failure to protect, a Fourteenth  
11 Amendment equal protection claim, state tort claims, and claims under the ADA and RA. ECF  
12 No. 66-2 at 25-45.

13           In Count I, plaintiff alleges that all defendants violated his rights under the Eighth  
14 Amendment<sup>1</sup> because they were deliberately indifferent to his serious medical needs. Id. at 25-  
15 32, ¶¶ 117-147. He claims that all defendants created a policy and practice of limiting, delaying,  
16 and denying medical care for budgetary reasons despite knowing such policy would create a  
17 substantial risk of harm. Id. at 3, 25-27, ¶¶ 1-4, 118-119, 122, 128-129. He identifies defendants  
18 Parker, Bidwell, Doe, Saunders, Brown, Sutter County Sheriff’s Department, Sutter County Jail,  
19 and Sutter County as “policymakers” and alleges that these “policymakers” were aware that he  
20 suffered from “(1) a serious and extremely painful low back condition, (2) a serious viral  
21 infection in his right eye, (3) a serious and potentially life-threatening allergy to mold, and history

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22           <sup>1</sup> It is not clear from the complaint whether plaintiff was a pretrial detainee or whether he had  
23 already been convicted at the time he was housed at the jail. If plaintiff was a pretrial detainee,  
24 his claims regarding medical care and failure to protect would arise out of the Fourteenth  
25 Amendment rather than the Eighth Amendment. However, “the ‘deliberate indifference’ test is  
26 the same for pretrial detainees and for convicted prisoners.” Castro v. County of Los Angeles,  
27 797 F.3d 654, 664-65 (9th Cir. 2015) (finding test is the same, but acknowledging that Kingsley  
28 v. Hendrickson, 135 S. Ct. 2466 (2015), may establish a different standard for pretrial detainees  
in excessive use of force cases). Because the standards are the same and plaintiff refers to his  
claims as being brought under the Eighth Amendment, the court will also do so for the time  
being.

1 of severe allergies (multiple reactants), and (4) a history of asthma and respiratory conditions”  
2 while incarcerated at the jail. Id. at 3-4, ¶¶ 1, 6. As a result of the policies and practices created  
3 by the “policymakers,” defendants allegedly denied and delayed plaintiff’s medical care,  
4 including referrals to specialists and diagnostic testing, for approximately eight months and failed  
5 to obtain plaintiff’s medical history or review medical records provided by plaintiff, all while  
6 knowing that plaintiff was suffering from painful medical conditions. Id. at 3-6, 25-30, ¶¶ 5-20,  
7 119, 121, 126-140. Plaintiff further alleges that defendants Brown and Saunders, both medical  
8 staff, violated his Eighth Amendment rights when they failed to provide proper treatment for his  
9 lower back pain and eye infection. Id. at 5-6, 8-9, 11, 29, ¶¶ 11-20, 28-36, 39, 45-49, 134.

10 Count II alleges that defendants Parker, Bidwell, Doe, Sutter County Sheriff’s  
11 Department, Sutter County Jail, Sutter County, Saunders, and Brown violated plaintiff’s Eighth  
12 Amendment rights by failing to protect him from hazardous living conditions. Id. at 32-34, ¶¶  
13 148-155. Specifically, he alleges that these defendants failed to properly maintain the jail  
14 ventilation system, leading to mold and other hazardous materials accumulating in the vents. Id.  
15 at 16, 32-33, ¶¶ 74, 76, 148-150. The accumulation of hazardous materials exacerbated plaintiff’s  
16 asthma and other respiratory conditions, of which defendants were aware, and put him at risk for  
17 complications to his existing conditions and long term side-effects from the exposure. Id. at 16-  
18 17, 32-34, ¶¶ 75, 78-81, 148, 150, 152, 155.

19 Count III alleges that defendants Brown and Saunders committed professional negligence  
20 and are subject to statutory liability. Id. at 34-38, ¶¶ 156-176. Plaintiff bases this claim on his  
21 allegations that defendants Brown and Saunders failed to properly diagnose and treat plaintiff’s  
22 lower back pain and eye infection. Id. He alleges that defendants Brown and Saunders failed to  
23 order timely or appropriate diagnostic tests, properly monitor plaintiff’s conditions, obtain and  
24 review his medical history prior to commencing treatment, make timely or appropriate referrals to  
25 specialists, and prescribe proper treatment. Id.

26 In Count IV, plaintiff alleges that defendants Parker, Bidwell, Doe, Sutter County  
27 Sheriff’s Department, Sutter County Jail, and Sutter County are guilty of general negligence and  
28 subject to statutory liability. Id. at 38-41, ¶¶ 177-183. Plaintiff alleges that these defendants

1 failed to ensure, or enact policies or procedures that would ensure, proper delivery of health care  
2 and proper maintenance of the ventilation system to keep it free of contaminants. Id. These  
3 failures led to defendants violating their statutory duties. Id. at 39-40, ¶ 179.

4 Finally, in Count V, plaintiff alleges that the actions of unspecified defendants violated the  
5 ADA, RA, and his Fourteenth Amendment equal protection rights. Id. at 41-45, ¶¶ 184-201.  
6 Defendants allegedly failed to implement policies and procedures that would ensure compliance  
7 with the ADA and RA and failed to accommodate plaintiff when they housed him on an upper  
8 tier, making programs and activities inaccessible to him because his disability made it difficult to  
9 impossible to navigate stairs without suffering injury. Id. He was also denied other  
10 accommodations such as a thicker mattress; air mask, filter, or other method of providing air  
11 without mold; back brace; and TENS unit, which exacerbated his disabilities, making it more  
12 difficult to participate in programs and activities. Id. at 43-44, ¶¶ 193, 195.

### 13 III. Personal Involvement

14 There can be no liability under 42 U.S.C. § 1983 unless there is some affirmative link or  
15 connection between a defendant's actions and the claimed deprivation. Rizzo v. Goode, 423 U.S.  
16 362, 371 (1976); May v. Enomoto, 633 F.2d 164, 167 (9th Cir. 1980). "Vague and conclusory  
17 allegations of official participation in civil rights violations are not sufficient." Ivey v. Board of  
18 Regents, 673 F.2d 266, 268 (9th Cir. 1982) (complaint devoid of specific factual allegations of  
19 personal participation is insufficient).

20 Additionally, "[t]here is no respondeat superior liability under section 1983." Taylor v  
21 List, 880 F.2d 1040, 1045 (9th Cir. 1989). "A defendant may be held liable as a supervisor under  
22 § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation,  
23 or (2) a sufficient causal connection between the supervisor's wrongful conduct and the  
24 constitutional violation.'" Starr v. Baca, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting Hansen v.  
25 Black, 885 F.2d 642, 646 (9th Cir. 1989)). A supervisor may be liable for the constitutional  
26 violations of his subordinates if he "knew of the violations and failed to act to prevent them."  
27 Taylor, 880 F.2d at 1045. Finally, supervisory liability may also exist without any personal  
28 participation if the official implemented "a policy so deficient that the policy itself is a

1 repudiation of the constitutional rights and is the moving force of the constitutional violation.”  
2 Redman v. County of San Diego, 942 F.2d 1435, 1446 (9th Cir. 1991) (citations and internal  
3 quotations marks omitted), abrogated on other grounds by Farmer v. Brennan, 511 U.S. 825  
4 (1970).

5 “[M]unicipalities and other local government units . . . [are] among those persons to  
6 whom § 1983 applies.” Monell v. Department of Soc. Servs., 436 U.S. 658, 690 (1978).  
7 However, “a municipality can be liable under § 1983 only where its policies are the ‘moving  
8 force [behind] the constitutional violation.” City of Canton v. Harris, 489 U.S. 378, 389 (1989)  
9 (alteration in original) (quoting Monell, 436 U.S. at 694 and Polk Cnty. v. Dodson, 454 U.S. 312,  
10 326 (1981)). There must be “a direct causal link between a municipal policy or custom and the  
11 alleged constitutional deprivation.” Id. at 385.

12 “[A]n act performed pursuant to a ‘custom’ that has not been formally approved by an  
13 appropriate decisionmaker may fairly subject a municipality to liability on the theory that the  
14 relevant practice is so widespread as to have the force of law.” Board of Cnty. Comm’rs. v.  
15 Brown, 520 U.S. 397, 404 (1997) (citations omitted); see also Monell, 436 U.S. at 690-91. “[A]  
16 local governmental body may [also] be liable if it has a policy of inaction and such inaction  
17 amounts to a failure to protect constitutional rights.” Oviatt v. Pearce, 954 F.2d 1470, 1474 (9th  
18 Cir. 1992) (citing City of Canton, 489 U.S. at 388. “[A] policy is ‘a deliberate choice to follow a  
19 course of action . . . made from among various alternatives by the official or officials responsible  
20 for establishing final policy with respect to the subject matter in question.” Id. at 1477 (quoting  
21 Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986) (plurality opinion)). “[A]  
22 municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a  
23 municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” Monell, 436  
24 U.S. at 691 (emphasis in original).

#### 25 IV. Doe Defendant

26 In the second amended complaint, plaintiff identifies a single Doe defendant. ECF No. 66  
27 at 2. Although the use of fictitiously named Doe defendants is generally not favored, Gillespie v.  
28 Civiletti, 629 F.2d 637, 642 (9th Cir. 1980), amendment is allowed to substitute true names for

1 fictitiously named defendants, Merritt v. County of Los Angeles, 875 F.2d 765, 768 (9th Cir.  
2 1989). Because the first amended complaint indicates that plaintiff may be able to identify  
3 defendant Doe through discovery<sup>2</sup> and plaintiff has stated a cognizable claim against defendant  
4 Doe, the court will screen the claims against defendant Doe. However, due to the impossibility of  
5 serving an unknown individual, the court will not order service on defendant Doe until plaintiff  
6 has identified him and filed a motion to substitute a named defendant for defendant Doe. Plaintiff  
7 should seek to discover the identity of defendant Doe and move to substitute him into the case as  
8 soon as is possible. Failure to identify defendant Doe and serve him prior to the close of  
9 discovery will result in a recommendation that the claims against defendant Doe be dismissed.

10 V. Statute of Limitations for State Tort Claims

11 The statute of limitations is an affirmative defense, not a pleading requirement. Wyatt v.  
12 Terhune, 315 F.3d 1108, 1117 (9th Cir. 2003), overruled on other grounds Albino v. Baca, 747  
13 F.3d 1162 (2014); Aryeh v. Canon Bus. Solutions, Inc., 292 P.3d 871, 874-75 (Cal. 2013).  
14 However, under California law, the timely presentation of a claim under the California Tort  
15 Claims Act is a condition precedent and therefore is an element of the cause of action that must  
16 be pled in the complaint. Shirk v. Vista Unified Sch. Dist., 164 P.3d 630, 634 (Cal. 2007)  
17 (quoting State v. Superior Court, 90 P.3d 116, 119-20 (Cal. 2004). This court previously granted  
18 defendants' motion to dismiss the state tort claims in the original complaint because plaintiff  
19 failed to explicitly allege facts supporting his entitlement to tolling of the statute of limitations  
20 and because he failed to allege compliance with the California Tort Claims Act. ECF No. 41 at  
21 13-14. Plaintiff was given leave to amend. Id.

22 A plaintiff seeking to bring a lawsuit for money or damages against a local public entity<sup>3</sup>  
23 for personal injury must first submit a claim to the entity within six months after accrual of the  
24 cause of action. Cal. Gov't Code §§ 905; 911.2. A claim against a public employee or former

25 <sup>2</sup> In the first amended complaint plaintiff states that he believes defendant Doe has an officer  
26 identification number of 72299. ECF No. 58 at 10.

27 <sup>3</sup> "Local public entity" is defined as "a county, city, district, public authority, public agency, and  
28 any other political subdivision or public corporation in the State, but does not include the State."  
Cal. Gov't Code § 900.4.

1 public employee is not required to be presented prior to filing an action against the employee if  
2 the alleged injury resulted from an act or omission in the scope of the defendant's employment as  
3 a public employee.<sup>4</sup> Cal. Gov't Code § 950. However, a cause of action against the employee  
4 cannot be maintained if an action for the injury would be barred against the employing public  
5 entity for failure to comply with the notice of claim requirements. Cal. Gov't Code § 950.2. In  
6 other words, a plaintiff must submit a notice of claim to the employing public entity before he can  
7 bring suit against the public employee.

8 In his "statement of compliance" filed with the second amended complaint, plaintiff states  
9 that he timely served defendants with a notice of claim that complied with relevant state law.  
10 ECF No. 66-1 at 2, ¶¶ 3-4. He further states that he gave the required notice "during his  
11 incarceration in the jail." *Id.*, ¶ 6. These statements, in conjunction with the more detailed  
12 statements made by plaintiff in his first amended complaint (ECF No. 58 at 23-24, ¶¶ 26-31),<sup>5</sup> are  
13 sufficient to allege compliance with the California Tort Claims Act.

14 With respect to the statute of limitations for bringing an action, and the tolling of that  
15 statute of limitations, the court notes that the statutes previously relied upon by plaintiff and  
16 defendants are not applicable to the state tort claims in this case. Plaintiff alleges that he is  
17 entitled to tolling under California Code of Civil Procedure § 352.1. ECF No. 66-1 at 2, ¶ 8.  
18 However, § 352.1 "does not apply to an action against a public entity or public employee upon a  
19 cause of action for which a claim is required to be presented." Cal. Civ. Proc. Code § 352.1(b);  
20 Moore v. Twomey, 16 Cal. Rptr. 3d 163, 165 (Cal. Ct. App. 2004) (citing Cal. Civ. Proc. Code §  
21 352.1(b)). Defendants' reliance on California Code of Civil Procedure § 340.5 for the statute of  
22 limitations in professional negligence cases is also misplaced. The proper statute of limitations is

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23 <sup>4</sup> If the employee is a health care provider being sued for professional negligence, there is a  
24 separate requirement that the health care provider be provided notice of intent to sue at least  
25 ninety days prior to commencement of the suit. Cal. Civ. Proc. Code § 364. Plaintiff has alleged  
26 that he provided the required notice. ECF No. 66-1 at 2, ¶¶ 3-4; see also ECF No. 58 at 23-24, ¶¶  
26-31.

27 <sup>5</sup> Although the court will not typically rely on a previous complaint, for purposes of judicial  
28 economy, the court will not require plaintiff to amend the complaint yet again solely for the  
purpose of providing the additional detail from the first amended complaint referenced here.



1 that specified by California Government Code § 945.6. Anson v. County of Merced, 249 Cal.  
2 Rptr. 457, 461 (Cal. Ct. App. 1988) (statute of limitations in Government Code § 945.6 controls  
3 over statute of limitations in Code of Civil Procedure § 340.5); see also Cal. Gov't Code § 950.6  
4 (time for bringing an action against a public employee same as time prescribed by § 945.6).  
5 California Government Code § 945.6 provides two different time periods for bringing a suit  
6 against a public entity or employee, depending upon whether the public entity responded to the  
7 notice of claim. Cal. Gov't Code § 945.6(a)(1)-(2). Plaintiff does not expressly state whether or  
8 not the public entity responded to his claim. He does assert that he has never been notified of any  
9 defects in his claims (ECF No. 66-1 at 2, ¶ 5), which arguably supports an inference that he did  
10 not receive a response to his notice of claim. If so, plaintiff would be entitled to the longer, two  
11 year statute of limitations, Cal. Gov't Code § 945.6(a)(2).

12 While it remains possible that plaintiff's state tort claims have been brought outside the  
13 applicable statute of limitations, it is equally possible based upon the complaint alone that some,  
14 if not all, of his state tort claims are timely. Therefore, the court cannot definitively find that  
15 plaintiff's claims are barred or that he would not be entitled to some kind of tolling.<sup>6</sup> Such a  
16 determination would likely require consideration of materials outside the pleadings. Accordingly,  
17 the claims should not be dismissed as timely at the screening stage.

18 VI. Count I: Eighth Amendment – Deliberate Indifference to Medical Needs

19 A. Legal Standard

20 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate  
21 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091,  
22 1096 (9th Cir. 2006), (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This requires  
23 plaintiff to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat a prisoner’s  
24 condition could result in further significant injury or the unnecessary and wanton infliction of  
25 pain,’” and (2) “the defendant’s response to the need was deliberately indifferent.” Jett, 439 F.3d

26 \_\_\_\_\_  
27 <sup>6</sup> The tolling provision for prisoners in Government Code § 945.6(b) no longer applies because  
28 prisoners no longer lose their civil right to commence a lawsuit. Moore, 16 Cal. Rptr. 3d at 165  
n.2.

1 at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992) (citation and internal  
2 quotations marks omitted), overruled on other grounds WMX Technologies v. Miller, 104 F.3d  
3 1133 (9th Cir. 1997) (en banc)).

4 Deliberate indifference is established only where the defendant *subjectively* “knows of and  
5 disregards an *excessive risk* to inmate health and safety.” Toguchi v. Chung, 391 F.3d 1051, 1057  
6 (9th Cir. 2004) (emphasis added) (citation and internal quotation marks omitted). Deliberate  
7 indifference can be established “by showing (a) a purposeful act or failure to respond to a  
8 prisoner’s pain or possible medical need and (b) harm caused by the indifference.” Jett, 439 F.3d  
9 at 1096 (citation omitted). A difference of opinion between an inmate and prison medical  
10 personnel—or between medical professionals—regarding appropriate medical diagnosis and  
11 treatment are not enough to establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d  
12 240, 242 (9th Cir. 1989); Toguchi, 391 F.3d at 1058.

13 B. Failure to State a Claim

14 Except as set forth in Section VI.C. below, plaintiff’s allegations against defendants  
15 Bidwell and Doe fail to allege sufficient personal involvement of either defendant with relation to  
16 his medical care. Plaintiff alleges that both Bidwell and Doe were supervisors, but fails to make  
17 anything beyond vague and conclusory allegations that they were aware of plaintiff’s health  
18 issues and prevented or delayed his treatment. ECF No. 66-2 at 3-6, ¶¶ 1-10, 14, 16-19. Plaintiff  
19 simply concludes that these defendants were aware of his conditions and prevented and delayed  
20 his treatment, while offering no factual allegations of specific conduct by defendants or any other  
21 facts that would support this conclusion. Defendants Bidwell and Doe’s supervisory positions  
22 alone do not support an inference that they were aware of or involved in plaintiff’s specific  
23 circumstances.

24 Plaintiff also identifies Bidwell as both the jail commander and a sergeant or lieutenant  
25 and Doe as the supervising custody officer. ECF No. 66 at 2; ECF No. 66-2 at 16, ¶ 73. To the  
26 extent plaintiff is attempting to establish supervisory liability, he does not allege facts to show  
27 that either defendant was aware of a violation of his constitutional rights by subordinates that they  
28 failed to stop. Finally, with the exception of the conclusory identification of defendants as

1 “policy makers” and equally conclusory claims that they instituted facially deficient policies  
2 (ECF No. 66-2 at 3, ¶¶ 1-4), plaintiff fails to allege any facts that would demonstrate either  
3 defendant was responsible for promulgating policies within the jail related to medical care or had  
4 authority to modify such policies. Moreover, plaintiff specifically identifies defendants Denny  
5 and Parker, the former and current sheriff, as the individuals responsible for the creation of the  
6 allegedly unconstitutional policies. *Id.* at 26, 31-32, ¶¶ 122, 145, 147.

7 Plaintiff’s conclusory and non-specific allegations against defendants Bidwell and Doe  
8 fail to state a claim for deliberate indifference to a serious medical need and should be dismissed.

9 C. Claims for Which a Response Will Be Required

10 In the complaint, plaintiff states that “Defendants (including JOHN DOE No. 1, and  
11 ‘Policymakers’)” failed to provide the medical accommodations ordered by medical staff even  
12 though there was no valid security reason for denying the accommodations. *Id.* at 20, ¶ 95.  
13 Specifically, he states that he was to be moved to a lower tier cell and issued a double or thicker  
14 mattress and that the failure to do so resulted in plaintiff suffering “unnecessary limitations, pain,  
15 and potential risk of harm.” *Id.* at 20, 42, ¶¶ 95, 96, 190. Plaintiff’s singling out of defendant  
16 Doe, who falls within plaintiff’s definition of “policymaker” (*id.* at 3, ¶ 1), supports an inference  
17 that defendant Doe was the individual that refused to provide plaintiff with the accommodations  
18 medical staff ordered. This inference is supported by plaintiff’s description of defendant Doe’s  
19 duties in the first amended complaint, where he states that defendant Doe was aware of the  
20 medical orders and was responsible for providing accommodations ordered by medical staff and  
21 approving and conducting cell moves. ECF No. 58 at 10-11. To promote judicial economy and  
22 prevent further delay in this case, the court will not require plaintiff to further amend his instant  
23 complaint just to add a description of defendant Doe’s duties. Plaintiff’s claim that defendant  
24 Doe refused to house him in a lower tier cell or provide him with a double mattress, as ordered by  
25 medical staff and without justification, states a claim for deliberate indifference to plaintiff’s  
26 serious medical need.

27 Plaintiff alleges that defendants Denny and Parker are, respectively, the former and  
28 current sheriffs of Sutter County. ECF No. 66 at 2. Plaintiff fails to allege facts to support an

1 allegation that either defendant was personally involved in his medical care and his general claim  
2 that they were aware of his medical conditions is unsupported by any facts that would permit such  
3 an inference. However, plaintiff alleges that Denny and Parker created and perpetuated a policy  
4 or practice that encouraged delaying and denying necessary medical care until an inmate was  
5 transferred to the custody of the California Department of Corrections and Rehabilitation in order  
6 to cut costs associated with medical care. ECF No. 66-2 at 26, 31-32, ¶¶ 122, 145, 147. Since  
7 plaintiff alleges that these policies resulted in the denial of necessary medical care, such as  
8 diagnostic testing and referrals to specialists, and increased pain and his medical conditions  
9 worsening (id. at 3-7, 10-11, ¶¶ 5, 9-10, 17-19, 22, 26, 43, 49), he has sufficiently alleged an  
10 Eighth Amendment claim based on supervisory liability. Because of Denny and Parker's  
11 positions as decision makers, plaintiff's allegations also state a claim for relief against the Sutter  
12 County Sheriff's Department, Sutter County Jail, and Sutter County for deliberate indifference to  
13 his serious medical needs under Monell.

14 With respect to defendants Saunders and Brown, plaintiff alleges that they were medical  
15 providers at the jail and saw him for his various health conditions. Id. at 8, ¶ 29. He alleges that  
16 they failed to provide appropriate treatment for his lower back pain, asthma, and eye infection.  
17 Id. at 8-13, 29, 33, 35-37, ¶¶ 28-34, 39-41, 45-48, 52, 57, 134, 150, 160-169. Specifically, he  
18 alleges that Saunders and Brown failed to obtain or review his previous medical records prior to  
19 treating him, failed to refer him to appropriate specialists, provided deficient and incompetent  
20 treatment by refusing to prescribe proper pain medication and prescribing other medication  
21 without providing proper instructions for use, refused to allow plaintiff to use his medical  
22 appliances, and failed to properly examine and diagnose plaintiff. Id. Additionally, plaintiff's  
23 allegations in Count II that Saunders and Brown failed to protect him more properly state a claim  
24 for deliberate indifference to his medical needs to the extent that the complaint includes claims  
25 that they failed to provide a proper examination to determine what was causing or aggravating his  
26 respiratory problems and failed to provide proper treatment for his respiratory problems,  
27 including ordering appropriate housing accommodations. Id. at 33, 37, 43, ¶¶ 150, 169, 193.

28 As set forth above, plaintiff has stated cognizable claims against defendants Doe, Parker,

1 Denny, Saunders, Brown, Sutter County Sheriff's Department, Sutter County Jail, and Sutter  
2 County.

3 VII. Count II: Eighth Amendment – Failure to Protect

4 A. Legal Standard

5 “The Constitution does not mandate comfortable prisons, but neither does it permit  
6 inhumane ones.” Farmer v. Brennan, 511 U.S. 825, 832 (1994) (internal quotation marks and  
7 citation omitted). “[A] prison official violates the Eighth Amendment only when two  
8 requirements are met. First, the deprivation alleged must be, objectively, sufficiently serious, a  
9 prison official’s act or omission must result in the denial of the minimal civilized measure of  
10 life’s necessities.” Id. at 834 (internal quotation marks and citations omitted). Second, the prison  
11 official must subjectively have a sufficiently culpable state of mind, “one of deliberate  
12 indifference to inmate health or safety.” Id. (internal quotation marks and citations omitted). The  
13 official is not liable under the Eighth Amendment unless he “knows of and disregards an  
14 excessive risk to inmate health or safety; the official must both be aware of facts from which the  
15 inference could be drawn that a substantial risk of serious harm exists, and he must also draw the  
16 inference.” Id. at 837. Then he must fail to take reasonable measures to abate the substantial risk  
17 of serious harm. Id. at 847. Mere negligent failure to protect an inmate from harm is not  
18 actionable under § 1983. Id. at 835.

19 B. Failure to State a Claim

20 As previously noted, defendant Doe is identified as the supervising custody officer. ECF  
21 No. 66 at 2; ECF No. 66-2 at 16, ¶ 73. However, plaintiff makes only general claims that Doe  
22 (along with defendants Parker, Bidwell, Sutter County Jail, Sutter County Sheriff’s Department,  
23 Sutter County, and non-defendants Sutter County Department of Public Works and Department of  
24 Health and their employees) was responsible for maintenance of the ventilation system. ECF No.  
25 66-2 at 16, 32, 38-39 ¶¶ 73, 148, 177. Plaintiff makes no specific allegations against defendant  
26 Doe regarding the failure to maintain the ventilation system, nor are there any facts that would  
27 establish that Doe’s supervisory capacity extended over the individuals responsible for  
28 maintaining the ventilation system and that he was aware of their continual failure to perform

1 their duties.

2 As set forth above in Section VI.C., plaintiff’s claims against defendants Saunders and  
3 Brown as they relate to mitigating his exposure to the contaminants from the ventilation system  
4 are more properly categorized as a medical deliberate indifference claim. Plaintiff makes no  
5 allegations that Saunders or Brown were responsible for the maintenance of the ventilation  
6 system or supervised the individuals responsible for maintenance, and therefore fails to state a  
7 claim for failure to protect against these defendants.

8 For these reasons, plaintiff’s failure to protect claims against defendants Doe, Saunders,  
9 and Brown should be dismissed.

10 C. Claims for Which a Response Will Be Required

11 Plaintiff fails to allege sufficient personal involvement of defendants Parker and Bidwell<sup>7</sup>  
12 to state a claim against them for failure to protect based upon inadequate maintenance of the jail’s  
13 ventilation system. There are no facts to support a claim that any of these defendants were  
14 personally responsible for maintaining the system. However, as the sheriff and jail commander,  
15 these defendants were in positions where they were responsible for the administration and  
16 operation of the jail.<sup>8</sup> Furthermore, as the facility administrator Parker was required to “develop  
17 written policies and procedures for the maintenance of an acceptable level of cleanliness, repair  
18 and safety throughout the facility.” Cal. Code Regs., tit. 15, § 1280. The policies were to include  
19 “a regular schedule of housekeeping tasks and inspections to identify and correct unsanitary or  
20 unsafe conditions or work practices.” Id. In the complaint, plaintiff alleges that due to the mold

21 <sup>7</sup> Plaintiff does not make any allegations against defendant Denny regarding the maintenance of  
22 the ventilation system.

23 <sup>8</sup> “Facility/system administrator” means the sheriff, chief of police,  
24 chief probation officer, or other official charged by law with the  
25 administration of a local detention facility/system.

26 “Facility manager” means the jail commander, camp  
27 superintendent, or other comparable employee who has been  
28 delegated the responsibility for operating a local detention facility  
by a facility administrator.

Cal. Code Regs. tit. 15, § 1006.

1 and other contaminants in the ventilation system, there was “a visible ‘black’ coating on the wall,  
2 ceilings, and vent faces near the vents, (that were easily visible and obvious).” ECF No. 66-2 at  
3 16, ¶ 74. These facts support an inference that defendant Parker failed to either create an  
4 appropriate policy or to ensure that it was implemented, and assuming the latter scenario,  
5 defendant Bidwell, as the jail commander, failed to carry out the policies as part of his duties in  
6 operating the jail. In light of the health hazards that improperly maintained ventilation systems  
7 can potentially cause, and plaintiff’s allegations that he suffered such complications, this is  
8 sufficient to state a claim for failure to protect. Johnson v. Duffy, 588 F.2d 740, 744 (9th Cir.  
9 1978) (failure to act, in violation of duties imposed by statute or regulation, may subject a  
10 supervisor to § 1983 liability). As with the deliberate indifference claim, Parker’s position as  
11 decision maker subjects the Sutter County Sheriff’s Department, Sutter County Jail, and Sutter  
12 County to liability for failure to protect under Monell.

13 VIII. Count III: Professional Negligence – Medical Malpractice

14 A. Legal Standard

15 California Government Code § 845.6 provides that

16 [n]either a public entity nor a public employee is liable for injury  
17 proximately caused by the failure of the employee to furnish or  
18 obtain medical care for a prisoner in his custody . . . . Nothing in  
19 this section exonerates a public employee who is lawfully  
20 engaged in the practice of one of the healing arts under any law of  
this state from liability for injury proximately caused by  
malpractice.

21 Professional negligence is defined as “a negligent act or omission to act by a health care provider  
22 in the rendering of professional services, which act or omission is the proximate cause of a  
23 personal injury.” Cal. Civ. Proc. Code § 340.5(2). The provider must be licensed to provide the  
24 services at issue and the services must not be “within any restriction imposed by the licensing  
25 agency or licensed hospital.” Id.

26 B. Claims for Which a Response Will Be Required

27 Plaintiff makes claims for professional negligence against defendants Brown and  
28 Saunders, both of whom are medical professionals. ECF No. 66-2 at 34-38, ¶¶ 156-176. He

1 alleges that they did not properly treat his lower back pain, eye infection, and respiratory  
2 conditions when they failed to evaluate his condition, obtain his medical history, make  
3 appropriate referrals to specialists, conduct diagnostic testing, and properly prescribe medications.  
4 Id. at 8-13, 34-38, ¶¶ 28-58, 156-176. Plaintiff alleges that the deficient treatment he received  
5 resulted in aggravation of his conditions and long-term injury. These allegations are sufficient to  
6 state a claim for professional negligence against defendants Brown and Saunders.

7 IX. Count IV: Negligence – Personal Injury

8 A. Legal Standard

9 “Notwithstanding any other provision of this part, except as provided in this section and in  
10 Sections 814, 814.2, 845.4, and 845.6, or in Title 2.1 (commencing with Section 3500) of Part 3  
11 of the Penal Code, a public entity is not liable for . . . [a]n injury to any prisoner,” but a public  
12 employee may still be liable “for injury proximately caused by his negligent or wrongful act or  
13 omission.” Cal. Gov’t Code § 844.6(a)(2), (d).

14 Except as provided by statute, “a public employee is not liable for injury caused by a  
15 condition of public property where such condition exists because of any act or omission of such  
16 employee within the scope of his employment.” Cal. Gov’t Code § 840. A public employee is  
17 liable for an injury caused by a dangerous condition on public property if (1) the dangerous  
18 condition existed at the time of the injury, (2) the condition proximately caused the injury, and (3)  
19 the kind of injury incurred was a reasonably foreseeable risk of the dangerous condition. Cal.  
20 Gov’t Code § 840.2. The plaintiff must also show that either (1) “[t]he dangerous condition was  
21 directly attributable wholly or in substantial part to a negligent or wrongful act of the employee”  
22 and the employee had the authority and funds immediately available to take other action that  
23 would not have created the dangerous condition or (2) the employee had the authority and  
24 responsibility to take adequate measures to protect against the condition at the public entity’s  
25 expense, the funds to take such measures were immediately available, and the employee had  
26 actual or constructive notice of the condition a sufficient time before the injury that he could have  
27 taken measures to protect against the dangerous condition. Id.

28 ///



1           B.     Failure to State a Claim

2           The only potentially applicable exception to the statutory protection of public entities  
3 from liability for injuries to prisoners is provided in California Government Code § 845.6.

4 Section 845.6 states, in pertinent part, that

5                     [n]either a public entity nor a public employee is liable for injury  
6 proximately caused by the failure of the employee to furnish or  
7 obtain medical care for a prisoner in his custody, but . . . a public  
8 employee, and the public entity where the employee is acting within  
9 the scope of his employment, is liable if the employee knows or has  
reason to know that the prisoner is in need of immediate medical  
care and he fails to take reasonable action to summon such medical  
care.”

10           “Section 845.6 is very narrowly written to authorize a cause of action against a public entity for  
11 its employees’ failure to summon immediate medical care only, not for certain employee’s  
12 malpractice in providing that care.” Castaneda v. Department of Corr. & Rehab., 151 Cal. Rptr.  
13 3d 648, 663 (Cal. Ct. App. 2013); Watson v. State, 26 Cal. Rptr. 2d 262, 265 (Cal. Ct. App. 1993)  
14 (citing Hart v. County of Orange, 62 Cal. Rptr. 73, 77 (Cal. Ct. App. 1967); CEB, Cal. Govt. Tort  
15 Liability Practice (3d ed. 1992) § 4.15, p. 484). Public entities have no liability for a general  
16 failure to provide care or to provide adequate care. Castaneda, 151 Cal. Rptr. 3d at 663-64;  
17 Watson, 26 Cal. Rptr. 2d at 265; Cal. Gov’t Code § 845.6.

18           Plaintiff claims that defendants Sutter County Sheriff’s Department, Sutter County Jail,  
19 and Sutter County negligently caused him injury by failing to ensure he was provided with  
20 adequate medical care and safe living conditions. ECF No. 66-2 at 38-40, ¶¶ 177-183. Plaintiff  
21 does not allege that medical care was not provided and specifically states that he was seen by  
22 medical staff. Id. at 4-6, 8-13, ¶¶ 7-20, 28-58. His complaint is that the care he was provided was  
23 deficient. Id. Such claims do not fall within the exceptions to California Government Code §  
24 844.6(a)(2). Plaintiff therefore fails to overcome defendants Sutter County Sheriff’s Department,  
25 Sutter County Jail, and Sutter County’s statutory immunity and Count IV against these defendants  
26 must be dismissed.

27           With respect to plaintiff’s claims regarding the maintenance of the ventilation system, his  
28 negligence claim against defendant Doe fails because he does not allege facts that show the

1 condition of the ventilation system was due to defendant Doe's actions or inaction or that Doe  
2 had the authority, responsibility, or funds to correct or prevent the dangerous condition presented  
3 by the mold and contaminants in the ventilation system. Plaintiff's negligence claim against  
4 defendant Doe should therefore be dismissed.

5 As for plaintiff's negligence claims based upon the creation of a policy to delay and deny  
6 medical care, his claims against defendants Doe and Bidwell fail for the same reason his  
7 deliberate indifference claims against these defendants fails: there are no facts that either  
8 defendant was involved in his medical care or that they were responsible for or had the authority  
9 to change the offending policies. Accordingly, the negligence claims related to medical care  
10 against defendants Doe and Bidwell should be dismissed.

11 C. Claims for Which a Response Will Be Required

12 With respect to plaintiff's claim that he was injured as a result of the negligent  
13 maintenance of the ventilation system, he states a claim against defendants Parker and Bidwell.  
14 Plaintiff alleges that the mold and contaminants in the ventilation system aggravated his  
15 respiratory conditions leading to a number of problems, including difficulty breathing, dizziness,  
16 severe headaches and an inability to perform daily tasks. ECF No. 66-2 at 17, ¶¶ 78-79. As  
17 discussed in Section VII.C. above, defendants Parker and Bidwell were statutorily responsible for  
18 the operation and administration of the jail and the allegations in the complaint support two  
19 alternative theories. If defendant Parker failed to create an appropriate policy, as he was  
20 statutorily required to do, Cal. Code Regs., tit. 15, § 1280, then this failure was arguably the cause  
21 of the dangerous condition and Parker had the authority and ability to take action that would have  
22 prevented the dangerous condition or would have had the ability to correct the dangerous  
23 condition. Alternatively, if Parker created a policy but failed to ensure the policy was  
24 implemented and Bidwell failed to carry out the policy, the dangerous condition would be  
25 attributable to the negligent acts of both Parker and Bidwell and they had the authority,  
26 responsibility, and means to either prevent or correct the dangerous condition.

27 ///

28 ///

1 Plaintiff's negligence claim against defendant Parker related to the creation of medical care  
2 policies also states a claim for relief.<sup>9</sup> As facility administrator, defendant Parker was responsible  
3 for ensuring the provision of inmate health care services and, in cooperation with the health  
4 authority, creating policies and procedures for the provision of health care. Cal. Code Regs., tit.  
5 15, §§ 1200, 1206. Defendant Parker will therefore be required to respond to this claim.

6 X. Count V: ADA, RA, and Fourteenth Amendment

7 A. Legal Standard

8 1. ADA and RA

9 Title II of the ADA prohibits a public entity from discriminating against a qualified  
10 individual with a disability on the basis of that disability. 42 U.S.C. § 12132 (1994); Weinreich  
11 v. Los Angeles Cnty. Metro Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997). In other words, the  
12 ADA is designed to challenge the denial of a benefit or service accorded similarly situated  
13 individuals "by reason of" the plaintiff's disability. The Supreme Court has held that Title II of  
14 the ADA applies to state prisons. Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 210  
15 (1998). To state a claim under Title II, the plaintiff must allege four elements:

16 (1) he is an individual with a disability; (2) he is otherwise qualified  
17 to participate in or receive the benefit of some public entity's  
18 services, programs, or activities; (3) he was either excluded from  
19 participation in or denied the benefits of the public entity's services,  
20 programs, or activities, or was otherwise discriminated against by  
the public entity; and (4) such exclusion, denial of benefits, or  
discrimination was by reason of [his] disability.

21 Simmons v. Navajo Cnty., 609 F.3d 1011, 1021 (9th Cir. 2010) (alteration in original) (quoting  
22 McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004)); Weinreich, 114 F.3d at 978.

23 "[I]nsofar as Title II [of the ADA] creates a private cause of action for damages against the States  
24 for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state  
25 sovereign immunity." United States v. Georgia, 546 U.S. 151, 159 (2006) (emphasis in original).

26  
27 <sup>9</sup> Plaintiff does not include defendant Denny in his general negligence claim. ECF No. 66-2 at  
28 38-41, ¶¶ 177-183.

1 While the RA has the additional requirement that the program or activity receive federal  
2 funds, 29 U.S.C. § 794, “[t]here is no significant difference in analysis of the rights and  
3 obligations created by the ADA and the Rehabilitation Act. Thus, courts have applied the same  
4 analysis to claims brought under both statutes,” Zukle v. Regents of the Univ. of California, 166  
5 F.3d 1041, 1045 n.11 (9th Cir. 1999) (citations omitted).

## 6 2. Fourteenth Amendment (Equal Protection)

7 The Equal Protection Clause requires the State to treat all similarly situated people  
8 equally. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). “To state a claim  
9 for violation of the Equal Protection Clause, a plaintiff must show that the defendant acted with  
10 an intent or purpose to discriminate against him based upon his membership in a protected class.”  
11 Serrano v. Francis, 345 F.3d 1071, 1082 (9th Cir. 2003) (citing Barren v. Harrington, 152 F.3d  
12 1193, 1194 (9th Cir. 1998)).

### 13 B. Failure to State a Claim

14 Because plaintiff refers to defendants only generically in Count V of the complaint, it is  
15 difficult to determine who plaintiff is attempting to bring claims against. However, because  
16 plaintiff is proceeding pro se, his complaint is entitled to liberal construction, and the court  
17 considers the complaint as a whole in determining whether plaintiff has stated any claims under  
18 the ADA, RA, and Fourteenth Amendment.

19 To the extent plaintiff is attempting to bring ADA and RA claims against any of the  
20 defendants in their individual capacities, these claims must be dismissed. Stewart v. Unknown  
21 Parties, 483 F. App’x 374, 374 (9th Cir. 2012) (citing Lovell v. Chander, 303 F.3d 1039, 1052  
22 (9th Cir. 2002)); Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d 98, 107 (2d Cir.  
23 2001) (“[N]either Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual  
24 capacity suits against state officials.”); see also A.W. v. Jersey City Pub. Sch., 486 F.3d 791, 804  
25 (3rd Cir. 2007) (no cause of actions against individuals under RA). If plaintiff is attempting to  
26 bring his individual capacity ADA and RA claims under § 1983, he also fails to state a claim.  
27 Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir. 2002) (“[A] plaintiff cannot bring an action  
28 under 42 U.S.C. § 1983 against a State official in her individual capacity to vindicate rights

1 created by Title II of the ADA or section 504 of the Rehabilitation Act.”)).

2           Additionally, although a plaintiff may pursue ADA and RA claims against defendants in  
3 their official capacities, “[w]hen both a municipal officer and a local government entity are  
4 named, and the officer is named only in an official capacity, the court may dismiss the officer as a  
5 redundant defendant.” Center for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep’t,  
6 533 F.3d 780, 799 (9th Cir. 2008). Thus, to the extent he is making them, plaintiff’s official  
7 capacity ADA and RA claims against defendants Parker, Bidwell, Doe, Saunders, Brown, and  
8 Denny should be dismissed as duplicative.

9           It is not clear whether plaintiff is alleging that the denial of specific medical appliances  
10 and accommodations was a separate violation of his rights under the ADA and RA. ECF No. 66-  
11 2 at 42-43, ¶¶ 189, 191, 193, 195. If plaintiff is attempting to make this claim, it fails because he  
12 does not allege that he was denied these things *because of* his disability, just that they were  
13 denied. Id.

14           With respect to plaintiff’s equal protection claim, he fails to identify any specific actions  
15 by any specific defendants that would constitute a violation of his Fourteenth Amendment rights.  
16 Moreover, plaintiff has not alleged he is a member of a protected class as “[t]he physically  
17 disabled are not a protected class for purposes of equal protection under the Fourteenth  
18 Amendment.” Gamble v. City of Escondido, 104 F.3d 300, 307 (9th Cir. 1997) (citing City of  
19 Cleburne, 473 U.S. at 446). However, the United States Supreme Court has “recognized  
20 successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that [he]  
21 has been intentionally treated differently from others similarly situated and that there is no  
22 rational basis for the difference in treatment.” Village of Willowbrook v. Olech, 528 U.S. 562,  
23 564 (2000).

24           “Similarly situated” persons are those “who are in all relevant respects alike.” Nordlinger  
25 v. Hahn, 505 U.S. 1, 10 (1992). The rationale is that “[w]hen those who appear similarly situated  
26 are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason  
27 for the difference, to ensure that all persons subject to legislation or regulation are indeed being  
28 ‘treated alike, under like circumstances and conditions.’” Engquist v. Oregon Dep’t of Agric.,

1 553 U.S. 591, 602 (2008). Plaintiff, however, has made only vague and conclusory allegations  
2 that he was treated differently than other similarly situated individuals and that there was no  
3 rational basis for treating him differently. ECF No. 66-2 at 19-20, 41-43, ¶¶ 94, 186, 189, 193.  
4 This is insufficient to support an equal protection claim and the claim should be dismissed.

5 C. Claims for Which a Response Will Be Required

6 “When a plaintiff brings a direct suit under either the Rehabilitation Act or Title II of the  
7 ADA against a municipality (including a county), the public entity is liable for the vicarious acts  
8 of its employees.” Duvall v. County of Kitsap, 260 F.3d 1124, 1141 (9th Cir. 2001). Plaintiff  
9 claims that he has a respiratory condition that qualifies as a disability under the ADA. ECF No.  
10 66-2 at 17, ¶ 80. He also indicates that his back pain issues constituted a disability. Id. at 31, ¶  
11 143. He alleges that the refusal to provide him with accommodations for his disabilities  
12 prevented him from being able to take advantage of a number of programs and services offered at  
13 the jail because, among other things, his upper tier cell required him to navigate stairs, which  
14 presented a significant risk of physical harm because of his disabilities. Id. at 42-43, ¶¶ 189, 191,  
15 193, 195. Plaintiff has pled sufficient facts to state a claim under Title II of the ADA and § 504  
16 of the RA against defendants Sutter County Sheriff’s Department, Sutter County Jail, and Sutter  
17 County based on the denial of access to jail programs and services as a result of the refusal to  
18 accommodate his disability.

19 XI. No Leave to Amend

20 If the court finds that a complaint should be dismissed for failure to state a claim, the court  
21 has discretion to dismiss with or without leave to amend. Lopez v. Smith, 203 F.3d 1122, 1130  
22 (9th Cir. 2000). Leave to amend should be granted if it appears possible that the defects in the  
23 complaint could be corrected, especially if a plaintiff is pro se. Id. at 1130-31; see also Cato v.  
24 United States, 70 F.3d 1103, 1106 (9th Cir. 1995) (“A pro se litigant must be given leave to  
25 amend his or her complaint, and some notice of its deficiencies, unless it is absolutely clear that  
26 the deficiencies of the complaint could not be cured by amendment.”) (citing Noll v. Carlson, 809  
27 F.2d 1446, 1448 (9th Cir. 1987)). However, if, after careful consideration, it is clear that a

28 ///

1 complaint cannot be cured by amendment, the court may dismiss without leave to amend. Id. at  
2 1105-06.

3 Despite guidance on the necessary pleading requirements (ECF Nos. 41, 61), notification  
4 of the defects in the original and first amended complaints (*id.*), and responsive filing of lengthy  
5 complaints (ECF Nos. 1, 58, 66), the undersigned finds that, as set forth above, portions of  
6 plaintiff's second amended complaint fail to state a claim upon which relief may be granted.  
7 Based upon the circumstances plaintiff challenges, the length and amount of factual information  
8 in the original and amended complaints, and plaintiff's two previous attempts at amendment, this  
9 court is persuaded that plaintiff is unable to allege any additional facts that would state a  
10 cognizable claim beyond those which have already been recognized. The court therefore  
11 concludes that further amendment would be futile. "A district court may deny leave to amend  
12 when amendment would be futile." Hartmann v. CDCR, 707 F.3d 1114, 1130 (9th Cir. 2013)  
13 (citing Chappel v. Laboratory Corp. of Am., 232 F.3d 719, 725-26 (9th Cir. 2000)).

14 The undersigned therefore recommends dismissing the claims outlined above without  
15 further leave to amend. While leave to amend "shall be freely given when justice so requires,"  
16 plaintiff has already been provided two opportunities to amend his complaint to correct  
17 deficiencies. See Fed.R.Civ.P. 15(a)(2). Further leave to amend is unwarranted, would unduly  
18 delay the proceedings and waste judicial resources, and would likely be futile.

## 19 XII. Summary

20 Plaintiff has stated a claim for deliberate indifference against defendant Doe for denying  
21 him a double mattress and lower tier cell. The court recommends that plaintiff's other claims for  
22 deliberate indifference against defendant Doe and all deliberate indifference claims against  
23 defendant Bidwell be dismissed because plaintiff has not alleged facts that show Doe or Bidwell  
24 had anything to do with plaintiff's medical treatment. Because the court cannot serve a defendant  
25 it cannot identify, service will not be ordered on defendant Doe. Plaintiff should work to find out  
26 defendant Doe's real name as soon as possible. Once plaintiff has defendant Doe's name, he  
27 should file a motion to substitute letting the court know defendant Doe's name. If plaintiff does

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1 not identify defendant Doe by the time discovery ends, the court will recommend defendant Doe  
2 be dismissed.

3 Plaintiff has stated a claim for deliberate indifference against defendants Denny, Parker,  
4 Sutter County Sheriff's Department, Sutter County Jail, and Sutter County based on their policy  
5 of delaying and denying medical care. All other claims for deliberate indifference against  
6 defendants Denny and Parker should be dismissed because plaintiff has not shown they were  
7 involved with his medical treatment. Plaintiff has stated a claim for deliberate indifference  
8 against defendants Saunders and Brown based on their failure to treat his lower back pain,  
9 respiratory conditions, and eye infection.

10 The court recommends that plaintiff's claims for failure to protect against defendants Doe,  
11 Saunders, and Brown be dismissed because plaintiff has not shown that any of them were  
12 responsible for the ventilation system. Although plaintiff has not shown that defendants Parker  
13 and Bidwell were the people who were actually supposed to clean and maintain the ventilation  
14 system, he has stated a claim for failure to protect against them because California law requires  
15 that they create and carry out policies and procedures to keep the jail clean and they failed to do  
16 so. Plaintiff has also stated a claim for failure to protect against Sutter County Sheriff's  
17 Department, Sutter County Jail, and Sutter County because of defendant Parker's position as a  
18 decision maker.

19 For the purpose of screening, the court cannot say whether plaintiff's state tort claims are  
20 timely and because timeliness is an affirmative defense, plaintiff is not required to include this  
21 information in his complaint. Plaintiff's statement of compliance is also enough to allege that  
22 plaintiff submitted a notice of claim as required by the California Tort Claims Act. The court  
23 does not decide whether plaintiff's claims are actually timely or whether he actually submitted a  
24 proper notice of claim.

25 Plaintiff has stated a claim for professional negligence against defendants Saunders and  
26 Brown based on their failure to treat his lower back pain, eye infection, and respiratory  
27 conditions.

28 The court recommends that plaintiff's negligence claims against Sutter County Sheriff's



1 Department, Sutter County Jail, and Sutter County be dismissed because they cannot be sued for  
2 this kind of claim under California law. Plaintiff's negligence claim against defendant Doe for  
3 failing to maintain the ventilation system should be dismissed because plaintiff has not stated  
4 facts that show defendant Doe was responsible for or had anything to do with the ventilation  
5 system. The negligence claims against defendants Doe and Bidwell for creating a policy to delay  
6 and deny medical care should also be dismissed because plaintiff does not show that either  
7 defendant was responsible for or could change the policy. Plaintiff's negligence claims against  
8 defendants Parker and Bidwell for failing to maintain the ventilation system state a claim because  
9 they were statutorily responsible for the operation and administration of the jail. Plaintiff's claim  
10 for negligence against defendant Parker for the policy of denying or delaying medical care also  
11 states a claim because Parker was required by law to ensure inmates received medical care.

12 Plaintiff's ADA and RA claims against defendants Parker, Bidwell, Doe, Saunders,  
13 Brown, and Denny in their individual capacity should be dismissed because the law does not  
14 allow them to be sued in their individual capacities. The claims against them in their official  
15 capacities should also be dismissed because the claims are more appropriate against Sutter  
16 County Sheriff's Department, Sutter County Jail, and Sutter County. Plaintiff has stated claims  
17 under the ADA and RA against Sutter County Sheriff's Department, Sutter County Jail, and  
18 Sutter County for denial of access to prison programs and activities based on his disability  
19 because they refused to accommodate his disabilities, making him unable to participate in the  
20 programs and activities. All other claims under the ADA and RA should be dismissed because  
21 plaintiff has not shown that he was treated differently *because of* his disability. Plaintiff's equal  
22 protection claims should be dismissed because he has not shown that he is part of a protected  
23 class and he does not give any specific examples of how he was treated differently from other  
24 inmates that were similar to him.

25 Plaintiff will not be given leave to amend because he has already been given two chances  
26 to amend and has not been able to fix the problems in his complaint even with direction from the  
27 court.

28 ///

1 IT IS HEREBY RECOMMENDED that:

2 1. Count I, II, IV, and V be dismissed in part, as set forth above, without leave to amend.

3 2. Within thirty days from the date of the District Judge’s review and adoption of the  
4 instant findings and recommendations, defendants be ordered to respond to the second amended  
5 complaint as follows:

6 a. Defendants Denny, Parker, Saunders, Brown, Sutter County Sheriff’s  
7 Department, Sutter County Jail, and Sutter County must respond to Count I as set forth in Section  
8 VI.C.

9 b. Defendants Parker, Bidwell, Sutter County Sheriff’s Department, Sutter County  
10 Jail, and Sutter County must respond to Count II as set forth in Section VII.C.


11 c. Defendants Saunders and Brown must respond to Count III as set forth in  
12 Section VIII.B.

13 d. Defendants Parker and Bidwell must respond to Count IV as set forth in  
14 Section IX.C.

15 e. Defendants Sutter County Sheriff’s Department, Sutter County Jail, and Sutter  
16 County must respond to Count V as set forth in Section X.C.

17 These findings and recommendations are submitted to the United States District Judge  
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days  
19 after being served with these findings and recommendations, any party may file written  
20 objections with the court and serve a copy on all parties. Such a document should be captioned  
21 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the  
22 objections shall be served and filed within fourteen days after service of the objections. The  
23 parties are advised that failure to file objections within the specified time may waive the right to  
24 appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

25 DATED: January 4, 2016

26   
27 ALLISON CLAIRE  
28 UNITED STATES MAGISTRATE JUDGE