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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT WILLIAM TUNSTALL, Jr.,  
Plaintiff,  
v.  
D. BODENHAMER, et al.,  
Defendants.

No. 2:16-cv-2665 JAM DB P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action under 42 U.S.C. § 1983. Plaintiff alleges his cell at California State Prison – Sacramento (“CSP-Sac”) was not in compliance with the Americans with Disabilities Act (“ADA”) or with section 504 of the Rehabilitation Act (“RA”) and he suffered injury as a result. In an order signed on May 17, 2017, in response to plaintiff’s motion to file an amended complaint, the court instructed plaintiff on filing an amended complaint and gave him thirty days to do so. The court informed plaintiff that if he failed to file an amended complaint, this case would proceed on his original complaint. Plaintiff has not filed an amended complaint.

Because plaintiff did not file an amended complaint, the court will screen his original complaint filed here on November 9, 2016. (ECF No. 1.) For the reasons set forth below, the court finds plaintiff fails to state cognizable claims under the ADA and RA. Plaintiff will be given an opportunity to amend his complaint to do so.



1 Constitution . . . shall be liable to the party injured in an action at  
2 law, suit in equity, or other proper proceeding for redress.

3 42 U.S.C. § 1983. The statute requires that there be an actual connection or link between the  
4 actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See  
5 Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362  
6 (1976). “A person ‘subjects’ another to the deprivation of a constitutional right, within the  
7 meaning of § 1983, if he does an affirmative act, participates in another's affirmative acts or  
8 omits to perform an act which he is legally required to do that causes the deprivation of which  
9 complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978).

10 Moreover, supervisory personnel are generally not liable under § 1983 for the actions of  
11 their employees under a theory of respondeat superior and, therefore, when a named defendant  
12 holds a supervisory position, the causal link between him and the claimed constitutional  
13 violation must be specifically alleged. See Faule v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979);  
14 Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). Vague and conclusory allegations  
15 concerning the involvement of official personnel in civil rights violations are not sufficient. See  
16 Ivey v. Board of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

## 17 **II. Allegations of the Complaint**

18 Plaintiff's claims involve his treatment when he was confined at CSP-Sac.<sup>1</sup> Plaintiff  
19 identifies the following defendants: Physician Assistant D. Bodenhamer, Chief Executive Officer  
20 M. Felder, Deputy Director J. Lewis, Associate Warden B.D. Forsterer, and Federal Receiver J.  
21 Clark Kelso. (Comp. (ECF No. 1 at 1-4).)

22 Plaintiff alleges that he has numerous disabilities, including a seizure disorder, loss of  
23 balance, degenerative joint disease, abdominal problems caused by three abdominal surgeries,  
24 and impaired mobility. He claims his cell at CSP-Sac was not ADA compliant because the  
25 doorway was too narrow to accommodate his walker without folding it, the cell had no mirror, the  
26 cell had no side bar to assist with using the toilet, the toilet flush valve's location required  
27 bending, and the cell had no trapeze to assist getting in and out of bed. (Id. at 4-6.)

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28 <sup>1</sup> Plaintiff is currently confined at California State Prison-Corcoran (“CSP-Corcoran”).

1 Plaintiff further contends the cell did not have an emergency call light system so he was  
2 unable to call for assistance when he fell due to a seizure. (Id. at 6.)

3 Plaintiff contends that as a result of these inadequacies in his cell, he suffered abdominal pain  
4 daily from being forced to fold and carry his walker through his cell doorway. He also suffered  
5 pain because he could not summon medical assistance and had to wait until the medication nurse  
6 made his or her rounds. (Id. at 8.)

7 Plaintiff seeks a transfer to the California Medical Facility, an order requiring defendants to  
8 make all medical cells at CSP-Sac ADA compliant, and damages. (Id. at 9.)

### 9 **III. Does Plaintiff State Cognizable Claims?**

#### 10 **A. Legal Standards under the ADA and RA**

##### 11 **1. Standards to State a Claim**

12 Title II of the ADA provides that “no qualified individual with a disability shall, by reason of  
13 such disability, be excluded from participation in or be denied the benefits of the services,  
14 programs, or activities of a public entity, or be subjected to discrimination by any such entity.”  
15 42 U.S.C. § 12132. Title II authorizes suits by private citizens for money damages against public  
16 entities, United States v. Georgia, 546 U.S. 151, 153 (2006), and state prisons “fall squarely  
17 within the statutory definition of ‘public entity,’” Pennsylvania Dept. of Corrs. v. Yeskey, 524  
18 U.S. 206, 210 (1998).

19 “Generally, public entities must ‘make reasonable modifications in policies, practices, or  
20 procedures when the modifications are necessary to avoid discrimination on the basis of  
21 disability, unless the public entity can demonstrate that making the modifications would  
22 fundamentally alter the nature of the service, program, or activity.’” Pierce v. County of Orange,  
23 526 F.3d 1190, 1215 (9th Cir. 2008) (quoting 28 C.F.R. § 35.130(b)(7)). The state is responsible  
24 for providing inmates with “the fundamentals of life, such as sustenance, the use of toilet and  
25 bathing facilities, and elementary mobility and communication,” and as such, the ADA requires  
26 that these “opportunities” be provided to disabled inmates “to the same extent that they are  
27 provided to all other detainees and prisoners.” Armstrong v. Schwarzenegger, 622 F.3d 1058,  
28 1068 (9th Cir. 2010); see also Pierce, 526 F.3d at 1220 (finding ADA violation where defendant

1 failed to articulate “any legitimate rationale for maintaining inaccessible bathrooms, sinks,  
2 showers, and other fixtures in the housing areas and commons spaces assigned to mobility- and  
3 dexterity-impaired detainees”).

4 In order to state a claim that a public program or service violated Title II of the ADA, a  
5 plaintiff must show: (1) he is a “qualified individual with a disability;” (2) he was either excluded  
6 from participation in or denied the benefits of a public entity's services, programs, or activities, or  
7 was otherwise discriminated against by the public entity; and (3) such exclusion, denial of  
8 benefits, or discrimination was by reason of his disability. McGary v. City of Portland, 386 F.3d  
9 1259, 1265 (9th Cir. 2004); see also Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir.  
10 2001) (“If a public entity denies an otherwise ‘qualified individual’ ‘meaningful access’ to its  
11 ‘services, programs, or activities’ ‘solely by reason of’ his or her disability, that individual may  
12 have an ADA claim against the public entity.”).

13 Furthermore, “[t]o recover monetary damages under Title II of the ADA, a plaintiff must  
14 prove intentional discrimination on the part of the defendant.” Duvall v. County of Kitsap, 260  
15 F.3d 1124, 1138 (9th Cir. 2001). The standard for intentional discrimination is deliberate  
16 indifference, “which requires both knowledge that a harm to a federally protected right is  
17 substantially likely, and a failure to act upon that likelihood.” Id. at 1139. The ADA plaintiff  
18 must both “identify ‘specific reasonable’ and ‘necessary’ accommodations that the state failed to  
19 provide” and show that the defendant's failure to act was “a result of conduct that is more than  
20 negligent, and involves an element of deliberateness.” Id. at 1140.

21 To establish a violation of section 504 of the RA, plaintiff must show “(1) she is handicapped  
22 within the meaning of the [RA]; (2) she is otherwise qualified for the benefit or services sought;  
23 (3) she was denied the benefit or services solely by reason of her handicap; and (4) the program  
24 providing the benefit or services receives federal financial assistance.” Lovell v. Chandler, 303  
25 F.3d 1039, 1052 (9th Cir. 2002). The elements of claims under the ADA and the RA are  
26 functionally the same. See Atcherley v. Hanna, No. 2:13-cv-0576 AC P, 2014 WL 2918852, at  
27 \*7 (E.D. Cal. June 26, 2014).

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1                   **2. Appropriate Defendants in ADA/RA Actions**

2           The proper defendant in an ADA action is the public entity responsible for the alleged  
3 discrimination. Georgia, 546 U.S. at 153. State correctional facilities are “public entities” within  
4 the meaning of the ADA. See 42 U.S.C. § 12131(1)(A) & (B); Yeskey, 524 U.S. at 210;  
5 Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997). However, a state official sued in her  
6 official capacity is, in effect, a suit against the government entity and is an appropriate defendant  
7 in an ADA action. See Applegate v. CCI, No. 1:16-cv-1343 MJS (PC), 2016 WL 7491635, at \*5  
8 (E.D. Cal. Dec. 29, 2016) (citing Miranda B. v. Kitzhaber, 328 F.3d 1181, 1187-88 (9th Cir.  
9 2003); Kentucky v. Graham, 473 U.S. 159, 165 (1985)).

10           Plaintiff also cannot bring a § 1983 action against defendants in their individual capacities  
11 based on allegedly discriminatory conduct. See Vinson v. Thomas, 288 F.3d 1145, 1156 (9th Cir.  
12 2002). “[A] plaintiff cannot bring an action under 42 U.S.C. § 1983 against a State official in her  
13 individual capacity to vindicate rights created by Title II of the ADA or section 504 of the  
14 Rehabilitation Act.” Id.

15           Generally, a plaintiff is not entitled to monetary damages against defendants in their official  
16 capacities. Aholelei v. Dept. of Public Safety, 488 F.3d 1144, 1147 (9th Cir. 2007) (“The  
17 Eleventh Amendment bars suits for money damages in federal court against a state, its agencies,  
18 and state officials in their official capacities.”). However, the Eleventh Amendment does not bar  
19 ADA or RA suits against state officials in their official capacities for injunctive relief or damages.  
20 See Phiffer v. Columbia River Corr. Inst., 384 F.3d 791, 792-93 (9th Cir. 2004).

21                   **B. Does Plaintiff Sufficiently Allege ADA Claims?**

22                   **1. Claims against Defendant Kelso**

23           Defendant Kelso, who is the Receiver for CDCR's health care system, is entitled to quasi-  
24 judicial immunity. Plata v. Schwarzenegger, No. C01-1351-THE (N.D. Cal., Order dated Jan. 23,  
25 2008) (appointing Kelso as Receiver).<sup>2</sup> In appointing a receiver, the court stated that “[t]he

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27 <sup>2</sup> The court “may take notice of proceedings in other courts, both within and without the federal  
28 judicial system, if those proceedings have a direct relation to matters at issue.” United States ex  
rel. Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992)  
(citation and internal quotation marks omitted) (collecting cases); Fed. R. Evid. 201(b)(2) (court

1 Receiver and his staff shall have the status of officers and agents of this Court, and as such shall  
2 be vested with the same immunities as vest with this Court.” Id. (Order dated Feb. 14, 2006).

3 “Absolute judicial immunity is not reserved solely for judges, but extends to nonjudicial  
4 officers for ‘all claims relating to the exercise of judicial functions.’” In re Castillo, 297 F.3d  
5 940, 947 (9th Cir. 2002) (quoting Burns v. Reed, 500 U.S. 478, 499 (1991) (Scalia, J., concurring  
6 in part and dissenting in part)). “Judicial or quasi-judicial immunity is not available only to those  
7 who adjudicate disputes in an adversarial setting. Rather, the immunity is extended in appropriate  
8 circumstances to non jurists ‘who perform functions closely associated with the judicial  
9 process.’” Id. at 948 (quoting Cleavinger v. Saxner, 474 U.S. 193, 200 (1985)). “Under federal  
10 law, court-appointed ‘receivers are court officers who share the immunity awarded to judges.’”  
11 Alta Gold Mining Co. v. Aero-Nautical Leasing Corp., 656 F. App’x 316, 318 (9th Cir. 2016)  
12 (quoting New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1303 (9th Cir. 1989)). “[Judicial]  
13 immunity is overcome in only two sets of circumstances. First, a judge is not immune from  
14 liability for nonjudicial actions, i.e., actions not taken in the judge’s judicial capacity. Second, a  
15 judge is not immune for actions, though judicial in nature, taken in the complete absence of all  
16 jurisdiction.” Mireles v. Waco, 502 U.S. 9, 11-12 (1991) (internal citations omitted).

17 Plaintiff brings suit against Kelso, as Receiver “to over see the California Department of  
18 Corrections and Rehabilitation.” (ECF No. 1 at 4.) Plaintiff makes no other reference to Kelso in  
19 the body of his complaint or, as far as the court can tell, in the attachments thereto. Defendant  
20 Kelso is entitled to immunity unless his actions were taken in the complete absence of all  
21 jurisdiction.

22 Kelso’s jurisdiction encompasses the following specific charge from the court: “the duty to  
23 control, oversee, supervise, and direct all administrative, personnel, financial, accounting,  
24 contractual, legal, and other operational functions of the medical delivery component of the  
25 CDCR.” Plata, No. C01-1351-THE (Order dated Feb. 14, 2006). Defendant Kelso’s authority  
26 over treatment policies and personnel are entirely within his jurisdiction. See Williams v. CDCR,

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27 may take judicial notice of facts that are capable of accurate determination by sources whose  
28 accuracy cannot reasonably be questioned).

1 No. 1:14-CV-01912-JLT (PC), 2015 WL 6669816, at \*6 (E.D. Cal. Oct. 29, 2015) (finding no  
2 allegation that Kelso acted outside his jurisdiction in claim that he did not properly monitor  
3 plaintiff's disease); Martinez v. Beard, No. 1:14-CV-00405-AWI-JLT (PC), 2014 WL 5305883, at  
4 \*9 (E.D. Cal. Oct. 15, 2014) (finding no allegation Kelso acted outside his jurisdiction despite  
5 plaintiff's allegation that he was liable as Receiver because he acted in such a way to deny  
6 medical care).

7 Plaintiff will be given an opportunity to amend his complaint to explain what actions  
8 defendant Kelso took that caused plaintiff harm and why defendant Kelso should not be protected  
9 by judicial immunity.

## 10 **2. Claims against the Remaining Defendants**

11 As it stands, plaintiff's complaint fails to state any claims for relief against the remaining  
12 defendants. First, because plaintiff is no longer incarcerated at CSP-Sac, his claims for injunctive  
13 relief – orders requiring defendants to make cells ADA compliant and for a transfer to CMF – are  
14 moot and will be dismissed.<sup>3</sup> Therefore, plaintiff's only remaining claims are for damages.  
15 Second, plaintiff's claims against defendants in their individual capacities will be dismissed  
16 because they are not proper defendants under the ADA and RA. See Vinson, 288 F.3d at 1156.

17 Finally, plaintiff's claims against defendants in their official capacities will be dismissed  
18 because he fails to allege intentional discrimination. In order to state a claim for damages under  
19 the ADA against defendants in their official capacities, plaintiff must allege defendants  
20 intentionally discriminated against him. Duvall, 260 F.3d at 1138. The standard for intentional  
21 discrimination is deliberate indifference, which “requires both knowledge that a harm to a  
22 federally protected right is substantially likely, and a failure to act upon that likelihood.” Id. at  
23 1139. The first prong is satisfied if plaintiff identifies a specific, reasonable, and necessary  
24 accommodation that the defendant failed to provide. Id. The second prong is satisfied by  
25 showing that the defendant deliberately failed to fulfill his duty to act in response to plaintiff's  
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27 <sup>3</sup> To the extent plaintiff is attempting to state claims on behalf of the class of disabled prisoners at  
28 CSP-Sac, he may not do so. See C.E. Pope Equity Trust v. United States, 818 F.2d 696, 697 (9th  
Cir. 1987) (a pro se litigant may not appear as an attorney for others).

1 request for accommodation. Id. at 1139–40.

2 Plaintiff fails to allege specific actions by any defendants. Rather, he simply explains that his  
3 cell was inadequate and, as a result, he suffered injury. Plaintiff will be given an opportunity to  
4 amend his complaint to state a claim for damages against defendants Bodenhamer, Felder, Lewis,  
5 and Forsterer in their official capacities.

## 6 UNRELATED CLAIMS

7 Plaintiff has filed numerous motions for injunctive relief<sup>4</sup> and notices informing the court  
8 that he has been subjected to harassment and retaliation at CSP-Corcoran, where he is currently  
9 confined. Plaintiff is advised that he may not bring unrelated claims against unrelated parties in a  
10 single action. Fed. R. Civ. P. 18(a), 20(a)(2); Owens v. Hinsley, 635 F.3d 950, 952 (7th Cir.  
11 2011); George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007). A plaintiff may bring a claim against  
12 multiple defendants so long as (1) the claim arises out of the same transaction or occurrence, or  
13 series of transactions and occurrences, and (2) there are common questions of law or fact. Fed.  
14 R. Civ. P. 20(a)(2); Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997); Desert Empire  
15 Bank v. Insurance Co. of North America, 623 F.3d 1371, 1375 (9th Cir. 1980). If plaintiff wishes  
16 to pursue relief in this court for actions taken by officials at CSP-Corcoran, he must file a separate  
17 suit.

18 In his many filings, plaintiff does state one claim that may be considered in this case.  
19 Plaintiff contends multiple times that he was transferred from CSP-Sac to CSP-Corcoran in  
20 retaliation for filing this suit. (See ECF Nos. 22, 22, 24.) If plaintiff wishes to pursue this claim,  
21 he must identify the prison official or officials who were responsible for his transfer, include them  
22 as defendant(s) in this action, and present facts showing each of the following five elements of a  
23 retaliation claim: “(1) An assertion that a state actor took some adverse action against an inmate  
24 (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's  
25 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate  
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27 <sup>4</sup> Prior to issuance of the May 17 order, plaintiff had filed five motions for injunctive relief. The  
28 court denied those motions. (See ECF Nos. 12, 18.) Plaintiff's pending motions for injunctive  
relief are addressed by the court in separate findings and recommendations.

1 correctional goal.” Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir. 2005) (footnote and  
2 citations omitted).

### 3 **FILING AN AMENDED COMPLAINT**

4 As set out above, plaintiff fails to state cognizable claims against any defendant. He will be  
5 given an opportunity to do so.

6 Plaintiff is advised that in an amended complaint he must clearly identify each defendant and  
7 the action that defendant took that violated his constitutional rights. The court is not required to  
8 review exhibits to determine what plaintiff’s charging allegations are as to each named defendant.  
9 If plaintiff wishes to add a claim, he must include it in the body of the complaint. The charging  
10 allegations must be set forth in the amended complaint so defendants have fair notice of the  
11 claims plaintiff is presenting. That said, plaintiff need not provide every detailed fact in support  
12 of his claims. Rather, plaintiff should provide a short, plain statement of each claim. See Fed. R.  
13 Civ. P. 8(a).

14 Any amended complaint must show the federal court has jurisdiction, the action is brought in  
15 the right place, and plaintiff is entitled to relief if plaintiff’s allegations are true. It must contain a  
16 request for particular relief. Plaintiff must identify as a defendant only persons who personally  
17 participated in a substantial way in depriving plaintiff of a federal constitutional right. Johnson v.  
18 Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a  
19 constitutional right if he does an act, participates in another’s act or omits to perform an act he is  
20 legally required to do that causes the alleged deprivation).

21 In an amended complaint, the allegations must be set forth in numbered paragraphs. Fed. R.  
22 Civ. P. 10(b). Plaintiff may join multiple claims if they are all against a single defendant. Fed. R.  
23 Civ. P. 18(a). If plaintiff has more than one claim based upon separate transactions or  
24 occurrences, the claims must be set forth in separate paragraphs. Fed. R. Civ. P. 10(b).

25 The federal rules contemplate brevity. See Galbraith v. County of Santa Clara, 307 F.3d  
26 1119, 1125 (9th Cir. 2002) (noting that “nearly all of the circuits have now disapproved any  
27 heightened pleading standard in cases other than those governed by Rule 9(b)"); Fed. R. Civ. P.  
28 84; cf. Rule 9(b) (setting forth rare exceptions to simplified pleading). Plaintiff’s claims must be

1 set forth in short and plain terms, simply, concisely and directly. See Swierkiewicz v. Sorema  
2 N.A., 534 U.S. 506, 514 (2002) (“Rule 8(a) is the starting point of a simplified pleading system,  
3 which was adopted to focus litigation on the merits of a claim.”); Fed. R. Civ. P. 8.

4 An amended complaint must be complete in itself without reference to any prior pleading.  
5 E.D. Cal. R. 220. Once plaintiff files an amended complaint, all prior pleadings are superseded.

6 By signing an amended complaint, plaintiff certifies he has made reasonable inquiry and has  
7 evidentiary support for his allegations, and for violation of this rule the court may impose  
8 sanctions sufficient to deter repetition by plaintiff or others. Fed. R. Civ. P. 11.

- 9 1. Plaintiff’s claims for injunctive relief and his claims against defendants in their  
10 individual capacities are dismissed. His remaining claims for damages against  
11 defendants in their official capacities are dismissed with leave to amend.
- 12 2. Plaintiff is granted thirty days from the date of service of this order to file an amended  
13 complaint that complies with the requirements of the Civil Rights Act, the Federal  
14 Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint  
15 must bear the docket number assigned this case and must be labeled “First Amended  
16 Complaint.” Plaintiff must file an original and two copies of the amended complaint.  
17 Plaintiff’s failure to file an amended complaint within the time provided, or otherwise  
18 respond to this order, may result in a recommendation that this case be dismissed.
- 19 3. The Clerk of the Court is directed to send plaintiff a copy of the prisoner complaint  
20 form used in this district.

21  
22 Dated: August 17, 2017

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26 DEBORAH BARNES  
27 UNITED STATES MAGISTRATE JUDGE

28 DLB:9  
DLB1/prisoner-civil rights/tuns2665.am comp

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