

1 Shelton, Hatley, and Mell. See ECF No. 3. Defendant Hatley filed a waiver of service on August
2 16, 2018. See ECF No. 15. Defendant Mel filed a waiver of service on September 7, 2018. See
3 ECF No. 17. Though the docket did not reflect service of process or waiver thereof on Defendant
4 Shelton at the time, on September 25, 2018, Defendants Shelton and Hatley, through the Attorney
5 General of California, requested an extension of time to file a response to Plaintiff's complaint.
6 See ECF No. 18. Defendant Mell, through private counsel, filed an answer to the original
7 complaint on October 2, 2018. See ECF No. 19. On the same day, the Court granted Defendants
8 Shelton and Hatley an additional 30 days to respond to the complaint. See ECF No. 21.

9 On October 30, 2018, Defendants Shelton and Hatley filed a motion to dismiss the
10 original complaint. See ECF No. 23. Plaintiff did not file an opposition and, on January 3, 2019,
11 the Court issued an order submitting the motion to dismiss on the papers without oral argument.
12 See ECF No. 26. On February 11, 2019, the Court issued findings and recommendations that the
13 motion to dismiss be granted, that Plaintiff's original complaint be dismissed for failure to
14 comply with Federal Rule of Civil Procedure 8(a)(3), and that Plaintiff be directed to file a first
15 amended complaint. See ECF No. 30. The findings and recommendations were adopted in full
16 by the District Judge on April 13, 2019, and Plaintiff was directed to file a first amended
17 complaint within 30 days. See ECF No. 31.

18 After having been granted an extension of time, Plaintiff timely filed his first
19 amended complaint on June 3, 2019. See ECF No. 34. On June 17, 2019, Plaintiff filed a second
20 pleading captioned "First Amended Complaint." See ECF No. 36. On June 18, 2019, Defendants
21 Shelton and Hatley filed a motion to dismiss the first amended complaint filed on June 3, 2019.
22 See ECF No. 38. Defendant Mell filed his answer to the June 3, 2019, first amended complaint
23 on the same day. See ECF No. 37.

24 Prior to the scheduled hearing on the motion to dismiss Plaintiff's June 3, 2019,
25 first amended complaint, Plaintiff filed a pleading captioned "First/Second Amended Complaint"
26 on July 8, 2019. See ECF No. 40. On August 8, 2019, the Court issued an order clarifying the
27 status of the pleadings and determining that this action properly proceeds on Plaintiff's amended
28 complaint filed on June 17, 2019. See ECF No. 41. The then-pending motion to dismiss and

1 Defendant Mell's answer filed on June 18, 2019 – both addressing the June 3, 2019, pleading
2 which was superseded by the June 17, 2019, pleading – were disregarded. See id. The Court also
3 found that Plaintiff's July 8, 2019, pleading had been improperly filed. See id. Defendants were
4 directed to file a response to Plaintiff's June 17, 2019, pleading within 30 days. See id. The
5 operative pleading – Plaintiff's June 17, 2019, filing – is referred to as Plaintiff's second amended
6 complaint. See id.

7 On August 19, 2019, Plaintiff filed a motion for leave to amend. See ECF No. 42.
8 On August 28, 2019 – prior to any ruling on Plaintiff's August 19, 2019, motion – Defendants
9 Shelton and Hatley filed a motion to dismiss Plaintiff's second amended complaint. See ECF No.
10 43. On August 30, 2019, the Court denied Plaintiff's August 19, 2019, motion for leave to amend
11 and granted Defendant Mell additional time to respond to the operative second amended
12 complaint. See ECF No. 44.

13 On September 9, 2019, Plaintiff again moved for leave to amend. See ECF No.
14 45. On September 27, 2019 -- prior to a ruling on the renewed motion for leave to amend –
15 Defendant Mell filed an answer to the second amended complaint. See ECF No. 46. On
16 November 11, 2019, the Court vacated the hearing scheduled on the motion to dismiss the second
17 amended complaint and took the matter under submitted without oral argument. See ECF No. 47.

18 On December 24, 2019 – again prior to any ruling on the then-pending motions to
19 dismiss and amend – Plaintiff filed an appeal from Court's November 11, 2019, order taking the
20 matter under submission. See ECF No. 48. The Ninth Circuit Court of Appeals dismissed the
21 appeal for lack of jurisdiction on January 28, 2020. See ECF No. 52. The appellate court's
22 mandate was docketed in this Court on February 19, 2020. See ECF No. 53.

23 On May 7, 2020, the Court issued an order denying Plaintiff's September 9, 2019,
24 motion for leave to amend. See ECF No. 55. On the same day, the Court issued findings and
25 recommendations that the motion to dismiss the second amended complaint filed by Defendants
26 Shelton and Hatley be granted and that Plaintiff be granted an opportunity to file a third amended
27 complaint. See ECF No. 56. The District Judge adopted the findings and recommendations in
28 full on January 21, 2021, and directed Plaintiff to file a third amended complaint within 30 days.

1 See ECF No. 58.

2 On February 1, 2021, Plaintiff filed his third amended complaint naming “David
3 Melborue” as the sole defendant. See ECF No. 59. On February 16, 2021, Defendant Mell filed
4 an answer to the third amended complaint, acknowledging that he was erroneously named as
5 “David Melboru.” See ECF No. 60. On February 19, 2021, Defendants Shelton and Hatley filed
6 a motion to be dismissed from the action because Plaintiff no longer named them in the now-
7 operative third amended complaint filed on February 1, 2021. See ECF No. 61. On February 24,
8 2021, the Court directed the parties to meet and confer and submit a joint statement for purposes
9 of scheduling. See ECF No. 62. On February 26, 2021, the Court issued an order directing the
10 Clerk of the Court to terminate Shelton and Hatley as defendants to this action because they were
11 not named in the third amended complaint. See ECF No. 63. The Court also denied as
12 unnecessary the then-pending motion to dismiss filed by Defendants Shelton and Hatley. See id.

13 Defendant Mell submitted a separate scheduling report on March 26, 2021. See
14 ECF No. 64. On March 29, 2021, Plaintiff sought a 60-day extension of time to submit his
15 portion of the required scheduling report. See ECF No. 65. On April 15, 2021, the Court granted
16 Plaintiff’s motion for an extension of time in part and directed Plaintiff to submit his portion of
17 the scheduling report within 30 days. See ECF No. 66.

18 Rather than filing his scheduling report, Plaintiff filed another motion for leave to
19 amend on April 30, 2021. See ECF No. 67. In his motion, Plaintiff stated that he inadvertently
20 failed to name Shelton and Hatley in the third amended complaint and sought further leave to
21 amend to correct the error. See id. No opposition to Plaintiff’s motion was filed and, on August
22 25, 2021, the Court granted Plaintiff leave to file a fourth amended complaint within 30 days.
23 See ECF No. 68. Plaintiff timely filed a fourth amended complaint against all defendants on
24 September 24, 2021. See ECF No. 69. Defendants Shelton and Hatley timely filed the now-
25 pending motion to dismiss Plaintiff’s fourth amended complaint on October 1, 2021. See ECF
26 No. 70. Defendant Mell filed his answer to the fourth amended complaint on October 12, 2021.
27 See ECF No. 71. After Plaintiff again failed to file any opposition to the motion to dismiss, the
28 Court took the matter under submission without oral argument on October 28, 2021. See ECF

1 No. 72. To date, Plaintiff has not filed any scheduling report.

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3 **II. PLAINTIFF’S ALLEGATIONS**

4 This action currently proceeds against defendants Mell², Shelton, and Hatley on
5 Plaintiff’s fourth amended complaint. See ECF No. 69. Relative to the moving defendants,
6 Plaintiff alleges that Defendant Shelton is a Parole Agent in Butte County, California, and that
7 Defendant Hatley is a Supervisor of the Chico Parole Unit, also in Butte County, California. See
8 id. at 2-3. Plaintiff alleges three claims for relief: (1) Count 1 for violation of the Americans with
9 Disabilities Act; (2) Count 2 for denial of medical care; and (3) Count 3 for denial of Kosher
10 meals. See id. at 5, 6, 9. In Count 1, Plaintiff asserts claims against Defendants Shelton and
11 Hatley. In Count 2, Plaintiff asserts a claim against Defendant Mell. No defendants are
12 mentioned in Count 3. Plaintiff’s allegations on Count 2 and Count 3 are, therefore, not relevant
13 to the pending motion filed by Defendants Shelton and Hatley.

14 Regarding Count 1, Plaintiff alleges the following supporting facts:

15 June 27, 2017, I was asked to go down there 1370 Ridgewood Dr.
16 STE #14 at 8am (Chico Parole Unit). They did not provide State Certified
17 Sign language interpreter. I brought my power of attorney with me and
18 she was denied access to the back with me. I was interrogated and
19 threatened by Duane Shelton and Trevor Hatley (SUPERVISOR). I was
20 then arrested by four parole officers who cuffed my hands behind my back
(didn’t know why I was being arrested) no sign language interpreter was
21 provide upon arrest. I was informed later by my fiancé, who way and
22 video recorded my arrest outside, that my parole officer Duane Shelton
23 read my Miranda Rights verbally while I was face down on the ground
24 and hands cuffed back.

25 No written copy was provided and no sign language interpreter
26 was provided so I never knew the Miranda Rights were ever read to me
27 because I never heard it. After I was taken to Butte County Jail
(6/27/2017), I was denied my right to use TDD phone. I had to wait over
28 a week to call my fiancé and then waited 2 days to honor my request to
sue the TDD phone after 1st time.

Id. at 5-6.

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Plaintiff now names this defendant as “David Melbourne.”

1 As with Plaintiff's original complaint, the fourth amended complaint contains no
2 request for relief as required by Federal Rule of Civil Procedure 8(a)(3). See generally ECF No.
3 69.

4 5 **III. DISCUSSION**

6 In their unopposed motion to dismiss Plaintiff's fourth amended complaint,
7 Defendants Shelton and Hatley argue: (1) the fourth amended complaint violated Rule 8(a)(3)
8 because it does not contain a demand for relief; and (2) Plaintiff's ADA claims fail. The Court
9 notes that these defects were the subject of the prior motions to dismiss the first and second
10 amended complaints, both of which were granted for the reasons argued.

11 Under Eastern District of California Local Rule 230(c) (effective February 1,
12 2019), the failure to file a timely opposition to a motion may be construed as non-opposition to
13 the relief requested. Given the procedural history of this case, the Court exercises its discretion
14 under the local rules to construe Plaintiff's failure to file any opposition whatsoever to the
15 pending motion to dismiss as non-opposition to the motion. In doing so, the Court notes two
16 compelling factors. First, Plaintiff has consistently failed to oppose any of the various motions to
17 dismiss filed in this case, upon which the Court has expended considerable time. Second, the
18 defects Defendants Shelton and Hatley current argue are the same defects from which the original
19 complaint suffered. These defects were the basis of the District Judge's prior orders that the
20 original complaint and first amended complaint both be dismissed. To re-address those issues
21 again here, in light of allegations in the fourth amended complaint which are substantially
22 unchanged from previous amendments, would be a waste of judicial resources.

23 Defendants Shelton and Hatley, who have been brought in and out of the action
24 over the years, should finally be dismissed with prejudice. Though the Rule 8(c)(3) defect in the
25 fourth amended complaint would also apply to Plaintiff's claims against Defendant Mell,
26 Defendant Mell has answered and appears eager to defend on the merits of Count 2. The Court
27 thus recommends dismissal of the fourth amended complaint with leave to amend to include a
28 demand for relief. The action should proceed on amendment as against Defendant Mell only.

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IV. CONCLUSION

Based on the foregoing, the undersigned recommends that:

1. Plaintiff's failure to file an opposition to the pending motion to dismiss be construed as non-opposition to the relief requested;
2. The motion to dismiss filed by Defendants Shelton and Hatley, ECF No. 70, be granted;
3. Shelton and Hatley be dismissed with prejudice as defendants to this action;
4. The action proceed against Defendant Mell only;
5. The fourth amended complaint, ECF No. 69, be dismissed with leave to amend; and
6. Plaintiff be directed to file a fifth amended complaint against Defendant Mell only.

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 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: January 4, 2022



DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE