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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ERIC ANTHONY ALSTON, JR.,
Plaintiff,
v.
COUNTY OF SACRAMENTO, et al.,
Defendants.

No. 2:18-cv-02420-TLN-CKD PS

ORDER AND
FINDINGS & RECOMMENDATIONS

I. Introduction

Plaintiff is proceeding in this action pro se. This matter was referred to the undersigned in accordance with Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1). Currently before the court is plaintiff’s motion for leave to file a first amended complaint (“FAC”). (ECF Nos. 33, 34.) The court deemed this matter suitable for decision without oral argument under Local Rule 230(g). Having considered the motion, opposition, and reply papers, and the record in this matter, the court recommends denying the motion.

II. Background

On February 7, 2019, the undersigned entered findings and recommendations recommending dismissal of plaintiff’s claims against all defendants except his § 1983, California Bane Act, and battery claims against defendant Ken Lloyd (Claims 5, 6, and 10, respectively) (“Lloyd Claims”). (ECF No. 20.) On May 31, 2019, District Judge Troy L. Nunley adopted the

1 findings and recommendations and dismissed with prejudice the claims in this action as to all
2 defendants except Claims 5, 6, and 10 against Lloyd. (ECF No. 23.) Lloyd was ordered to
3 answer the remaining claims, id., which answer was filed on July 25, 2019. (ECF No. 29.)
4 Plaintiff did not file a motion for reconsideration of the court’s May 31, 2019 order. On August
5 12, 2019, plaintiff filed the instant motion for leave to file a first amended complaint. (ECF Nos.
6 33, 34.)

7 **III. Plaintiff’s Motion and Proposed First Amended Complaint**

8 According to plaintiff, the FAC would add a new defendant, Jessie Espejo, in his official
9 and individual capacities. (ECF No. 33 at 1–2.) Jessie Espejo would be “added” “to the claims of
10 deliberate indifference, Negligence and Due Process.” (Id. at 2.) Plaintiff also vaguely claims
11 that the proposed FAC “adds more detail as this court has stated the previous complaint was
12 vague in some areas, and additional factual allegations relating to Plaintiffs [sic] previously
13 asserted claims and Doe defendants.” (Id.) Further, plaintiff claims that “[t]he adding of
14 Defendant Jessie Espejo in the claim is based on new information that Plaintiff has learned since
15 the filing of its original complaint.” (Id.)

16 As noted above, the court dismissed plaintiff’s claims against all defendants with
17 prejudice—except the Lloyd Claims. (ECF Nos. 20, 23.) Plaintiff acknowledges that the court
18 dismissed all but one defendant but argues that “not once did the court state the complaint was
19 futile to amend or any reason for not allowing of an amended complaint, thus Accordingly,
20 Plaintiff seeks an order permitting Plaintiff to file the proposed Amended Complaint.” (ECF No.
21 33 at 2.)

22 Plaintiff attempts to add far more to the FAC than purely adding defendant Jessie Espejo
23 to three claims. In fact, the majority of plaintiff’s proposed amendments focus on the claims that
24 were previously dismissed with prejudice. In that regard, the following is a summary of the
25 proposed changes plaintiff moves to include in a FAC:

- 26 - Paragraph 10 now includes, “Defendant Jones is being sued in his official and individual
27 capacities.” (Compare ECF No. 1 at ¶ 10, with ECF No. 34 at ¶ 10.)
- 28 - Paragraph 15 of the proposed FAC adds information regarding new defendant Jessie

- 1 Espejo. (See ECF No. 34 at ¶ 15.)
- 2 - Paragraph 20 now includes, “Defendant Iniguez has failed to look up previous domestic
3 violence to stop it from happening further.” (Compare ECF No. 1 at ¶ 19, with ECF No.
4 34 at ¶ 20.)
- 5 - Paragraph 24 removed, “words and action . . . supplied by the defendants,” and replaced it
6 with, “but each time defendants refused to listen what [sic] I had to say, simply just the
7 female.” (Compare ECF No. 1 at ¶ 23, with ECF No. 34 at ¶ 24.)
- 8 - Paragraph 25 removed, “At this point . . . of his employment.” (Compare ECF No. 1 at
9 ¶ 24, with ECF No. 34 at ¶ 25.)
- 10 - Paragraph 27 was modified to remove and add allegations, including adding an allegation
11 that Jessie Espejo denied plaintiff his “orthopedic Appliance after [plaintiff] told him of
12 [plaintiff] needing it” and of plaintiff’s alleged knee ailments. (Compare ECF No. 1 at
13 ¶ 27, with ECF No. 34 at ¶ 27.)
- 14 - Paragraph 28 now includes “defendant Rivera along with Does” at line 7. (Compare ECF
15 No. 1 at ¶ 28, with ECF No. 34 at ¶ 28.)
- 16 - Paragraph 29 in the original complaint is not included in the proposed FAC.
- 17 - Paragraph 32 now includes “caused constitutional injuries” at line 20. (Compare ECF No.
18 1 at ¶ 33, with ECF No. 34 at ¶ 32.)
- 19 - The following last sentence was removed from Paragraph 32: “Lastly, Defendant Iniguez
20 is liable for all causes of actions because without his failure to protect, none of the
21 damages suffered herein would have occurred.” (Compare ECF No. 1 at ¶ 33, with ECF
22 No. 34 at ¶ 32.)
- 23 - The following was added to Paragraph 34: “The objective here was intent gender
24 discrimination by the County and their employees to adversely disregard any statement I
25 made as solely listen [sic] to the other gender being that of a female.” (Compare ECF No.
26 1 at ¶ 35, with ECF No. 34 at ¶ 34.)
- 27 - Defendants Jones, Iniguez, and Buehler were removed from the second claim, and Jess
28 Espejo was added to the second claim. Plaintiff also made a number of substantive

1 changes to claim two, including allegations that defendant Ball and Jessie Espejo did not
2 allow plaintiff his Knee Brace against his liberty. (Compare ECF No. 1 at 16, with ECF
3 No. 34 at 14–15.)

4 - Plaintiff modified the allegations in his third claim. (Compare ECF No. 1 at ¶ 43, with
5 ECF No. 34 at ¶ 44.)

6 - Plaintiff appears to have combined his fourth and fifth claims into claim four in the
7 proposed FAC, which includes further modifications to the allegations. (Compare ECF
8 No. 1 at 17–19, with ECF No. 34 at 16–17.)

9 - Plaintiff removed defendants Iniguez and Milligan from his unreasonable
10 seizure/excessive force claim and made similar modifications to the allegations.
11 (Compare ECF No. 1 at ¶¶ 53–57, with ECF No. 34 at ¶¶ 50–54.)

12 - Plaintiff removed defendants County of Sacramento, Jones, Buehler, and Iniguez from his
13 deliberate indifference claim, and added Jessie Espejo. Plaintiff made similar
14 modifications to the allegations. (Compare ECF No. 1 at ¶¶ 58–61, with ECF No. 34 at
15 55–58.)

16 - Plaintiff removed defendants Ball, Madriago, Iniguez, Riviera, and Jones from his
17 Americans with Disabilities Act claim, and added the following to Paragraph 61: “I am
18 qualified to participate in simple enjoyment of service and programs provided in the jail.
19 Plaintiff was excluded/ and discriminated against programs and services from
20 participation by County of Sacramento due/ and to reason of disability” and “by
21 discrimination and reason of disability.” (Compare ECF No. 1 at ¶¶ 62–65, with ECF No.
22 34 at ¶¶ 59–62.)

23 - Plaintiff removed defendants Jones, Buehler, Riviera, Milligan, and Iniguez from his
24 California Unruh Act claim, and made modifications to the allegations therein. (Compare
25 ECF No. 1 at ¶¶ 66–68, with ECF No. 34 at ¶¶ 63–65.)

26 - Plaintiff removed defendants County of Sacramento and Milligan from his state law
27 battery claim and removed the last paragraph regarding the County of Sacramento.
28 (Compare ECF No. 1 at ¶¶ 69–72, with ECF No. 34 at ¶¶ 66–68.)

- 1 - Plaintiff eliminated the eleventh cause of action for entity liability for failure to adequately
2 train and supervise from the original complaint. (See ECF No. 1 at ¶¶ 73–75.)
- 3 - Plaintiff made significant modifications to the allegations in his negligence claim,
4 including adding allegations that defendant County of Sacramento “has mandatory
5 liability pursuant to Govt. Code 815.6 to look up previous domestic violence abuse”
6 Plaintiff also added allegations specific to defendants Jones, Buehler, Milligan, Iniguez,
7 Ball, Madriago, and Riviera. (Compare ECF No. 1 at ¶¶ 76–78, with ECF No. 34 at
8 ¶¶ 69–79.)
- 9 - Finally, plaintiff added a separate heading for professional negligence/medical
10 malpractice against Jessie Espejo. (See ECF No. 34 at ¶¶ 80–84.) However, the court
11 will not consider this as a separate claim because plaintiff clarifies in his motion that he
12 seeks to add Jessie Espejo to his existing negligence claim. (ECF No. 33 at 1–2 (stating
13 that Jessie Espejo would be “added” “to the claims of deliberate indifference, Negligence
14 and Due Process.”).) Jessie Espejo is also added to the Prayer for Relief at paragraph 2.
15 (ECF No. 34 at 23.)

16 **IV. Plaintiff’s Proposed First Amended Complaint As to All Defendants and Claims**
17 **Previously Dismissed With Prejudice is Improper**

18 **A. Plaintiff Cannot Amend Claims That Were Dismissed With Prejudice**

19 Although plaintiff argues the court did not “state the complaint was futile to amend or any
20 reason for not allowing of [sic] an amended complaint,” ECF No. 33 at 2, a dismissal for failure
21 to state a claim under Rule 12(b)(6) bars further litigation on the particular claim pleaded unless
22 leave to amend is granted or the dismissal is made “without prejudice” to refile. Federated
23 Dep’t Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3 (1981) (explaining that “[t]he dismissal for
24 failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a ‘judgment on the
25 merits.’” (citing Angel v. Bullington, 330 U.S. 183, 190 (1947); Bell v. Hood, 327 U.S. 678
26 (1946))); see also Allen v. U.S. Bank Nat. Ass’n, No. CV F 13-1527 LJO SMS, 2013 WL
27 5970401, at *1 (E.D. Cal. Nov. 8, 2013) (citing Cannon v. Loyola Univ. of Chicago, 784 F.2d
28 777, 780 (7th Cir. 1986)).

1 Here, the court dismissed the claims in this action as to all defendants “with prejudice”
2 except as to the Lloyd Claims. (ECF Nos. 20, 23.) In other words, the court did not grant
3 plaintiff leave to amend as to any of the defendants or claims dismissed in the complaint.
4 Plaintiff’s motion to amend the complaint as to all prior defendants and claims previously
5 dismissed with prejudice is improper and should therefore be denied. Accord, Bever v.
6 CitiMortgage, Inc., No. 1:11-CV-01584-AWI, 2014 WL 1577250, at *11 (E.D. Cal. Apr. 18,
7 2014), aff’d, 708 F. App’x 341 (9th Cir. 2017) (holding that, considering the plaintiff’s claim “was
8 previously dismissed with prejudice, Plaintiff may not attempt to amend the complaint to reassert
9 the claim based on facts already known, or that should have been known to him at the inception
10 of this suit or at the time the complaint was amended in 2012”).

11 **B. Even Construing the Motion to Amend as a Motion for Reconsideration, the**
12 **Motion Should be Denied**

13 Even if the court were to construe plaintiff’s motion to amend as a motion for
14 reconsideration of the court’s May 31, 2019 order dismissing plaintiff’s claims with prejudice, the
15 motion should be denied.

16 Federal Rule of Civil Procedure 60(b)(1) provides that “[o]n motion and upon such terms
17 as are just, the court may relieve a party . . . from a final judgment, order, or proceeding” for
18 “mistake, inadvertence, surprise, or excusable neglect,” or “any other reason justifying relief from
19 the operation of judgment.” Relief under Rule 60 “is to be used sparingly as an equitable remedy
20 to prevent manifest injustice and is to be utilized only where extraordinary circumstances” exist.
21 Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and citation
22 omitted) (addressing reconsideration under Rule 60(b)(1)–(5)). The moving party “must
23 demonstrate both injury and circumstances beyond his control.” Id. (internal quotation marks and
24 citation omitted).

25 Further, Local Rule 230(j) requires, in relevant part, that in moving for reconsideration of
26 an order denying or granting a prior motion, a party must show “what new or different facts or
27 circumstances are claimed to exist which did not exist or were not shown” previously, “what
28 other grounds exist for the motion,” and “why the facts or circumstances were not shown” at the

1 time the substance of the order which is objected to was considered. “A motion for
2 reconsideration should not be granted, absent highly unusual circumstances, unless the district
3 court is presented with newly discovered evidence, committed clear error, or if there is an
4 intervening change in the controlling law,” and it “may not be used to raise arguments or present
5 evidence for the first time when they could reasonably have been raised earlier in the litigation.”
6 Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009)
7 (internal quotations marks and citations omitted); Kona Enters., Inc. v. Estate of Bishop, 229 F.3d
8 877, 890 (9th Cir. 2000); see also U.S. v. Alexander, 106 F.3d 874, 876–77 (9th Cir. 1997)
9 (stating that “[t]he law of the case doctrine ordinarily precludes reconsideration of a previously
10 decided issue” and that failure to apply the doctrine constitutes an abuse of discretion).

11 Here, plaintiff did not make the requisite showing of any new or different facts that did
12 not exist before he filed the motion, that the court committed clear error, and/or of an intervening
13 change in the controlling law. Plaintiff’s only ground for amending the claims that were already
14 dismissed with prejudice is that the court did not “state the complaint was futile to amend or any
15 reason for not allowing of [sic] an amended complaint.” (ECF No. 33 at 2.) As noted above,
16 however, dismissing the claims “with prejudice” is an unequivocal ruling that any amendment is
17 futile. Thus, even construing the motion as a motion for reconsideration, the motion should be
18 denied.

19 The court now turns to plaintiff’s proposed amendments as to Jessie Espejo.

20 **V. Analysis of Plaintiff’s Motion to Amend the Complaint as to Jessie Espejo**

21 Rule 15(a)(2) of the Federal Rules of Civil Procedure allows amendment of pleadings
22 with leave of court “when justice so requires.” Although courts should freely give leave when
23 justice requires, a variety of reasons may be sufficient to deny leave to amend. See Foman v.
24 Davis, 371 U.S. 178, 182 (1962). The Foman factors commonly considered are: (1) undue delay;
25 (2) bad faith or dilatory motive on the part of the movant; (3) repeated failure to cure deficiencies
26 by amendments previously allowed; (4) undue prejudice to the opposing party; and (5) futility of
27 amendment. Id. The Ninth Circuit has held that it is the consideration of prejudice to the
28 opposing party that carries the greatest weight. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d

1 1048, 1052 (9th Cir. 2003). Absent prejudice, or a strong showing of any of the remaining
2 Foman factors, a presumption in favor of granting leave to amend exists under Rule 15(a). Id.
3 Further, undue delay alone is insufficient to justify denial of a motion to amend. Bowles v.
4 Reade, 198 F.3d 752, 758 (9th Cir. 1999). Finally, amendments seeking to add claims are granted
5 more freely than amendments seeking to add new parties. Union Pac. R. v. Nev. Power Co., 950
6 F.2d 1429, 1432 (9th Cir. 1991).

7 **A. Undue Delay and Bad Faith**

8 Plaintiff’s proposed amended complaint is predicated on facts that were or should have
9 been known to plaintiff when his complaint was filed in September 2018. As a result, plaintiff
10 has unduly delayed in setting forth his new claims and adding a new party.

11 “A party unduly delays seeking amendment by failing to seek amendment reasonably
12 promptly after it ‘knew or should have known’ that amendment was called for.” Johnson v.
13 Hewlett–Packard Co., 809 F. Supp. 2d 1114, 1120 (N.D. Cal. 2011) (quoting AmerisourceBergen
14 Corp. v. Dialysist W., Inc., 465 F.3d 946, 953 (9th Cir. 2006)); see also Jackson v. Bank of
15 Hawaii, 902 F.2d 1385, 1388 (9th Cir. 1990) (explaining that “[r]elevant to evaluating the delay
16 issue is whether the moving party knew or should have known the facts and theories raised by the
17 amendment in the original pleading”). A party’s undue delay and failure to explain the reasons
18 for delay weigh against leave to amend under Rule 15. Swanson v. U.S. Forest Serv., 87 F.3d
19 339, 345 (9th Cir. 1996) (citing Foman, 371 U.S. at 182); see also Lockheed Martin Corp. v.
20 Network Solutions, Inc., 194 F.3d 980, 986 (9th Cir. 1999) (stating that “[a]lthough delay is not a
21 dispositive factor in the amendment analysis, it is relevant, especially when no reason is given for
22 the delay” (citations omitted)). “While delay alone does not justify denial of leave to amend, late
23 amendments to assert new theories are not reviewed favorably when the facts and theory have
24 been known to the party seeking amendment since the inception of the cause of action.” Stearns
25 v. Select Comfort Retail Corp., 763 F. Supp. 2d 1128, 1159 (N.D. Cal. 2010) (quotations and
26 citations omitted).

27 Plaintiff vaguely argues that it is appropriate to add Jessie Espejo as a defendant because
28 there is new information plaintiff “has learned since the filing of its [sic] original complaint.”

1 (ECF No. 33 at 2.) However, plaintiff fails to identify the alleged “new” evidence or the
2 source(s) of new evidence. Plaintiff also fails to establish that the new facts alleged could not
3 have been known to him at an earlier time, and equally fails to provide any explanation for his
4 delay in asserting new allegations against a new defendant. Indeed, the allegations are simply a
5 re-tooling of theories relating to facts known or that should have been known to plaintiff when he
6 initiated suit in September 2018. See Burns v. Cty. of King, 883 F.2d 819, 823 (9th Cir. 1989)
7 (denying leave to amend when plaintiff “knew of the roles played by the two” parties he sought to
8 add for two years and “offered no excuse for failing to include these parties in the original
9 complaint or in his subsequent amendments”).¹

10 Plaintiff’s attempt to state facts or theories that were known or should have been known
11 demonstrates undue delay and bad faith, which weigh against permitting amendment.

12 **B. Prior Amendments**

13 Plaintiff has not previously amended the complaint. However, relevant to the instant
14 motion, the court has found that plaintiff’s original complaint failed to state a claim as to the same
15 claims he now attempts to make against Jessie Espejo. (ECF Nos. 20, 23.)

16 **C. Undue Prejudice to Defendant**

17 Prejudice to the opposing party carries the greatest weight. Eminence Capital, 316 F.3d at
18 1052. Defendants are correct that additional discovery may be necessary if Jessie Espejo is added
19 as a defendant and that he may not recall the alleged 2017 interaction with plaintiff. (ECF No. 36

20
21 ¹ Plaintiff also argued, for the first time in his reply brief, that he is permitted to add Jessie Espejo
22 as a defendant because he named Does 1 through 20 as defendants in his complaint. (ECF No. 37
23 at 3.) The only reference to Jessie Espejo as a Doe defendant in the motion is made in the notice
24 and introduction section. (ECF No. 33 at 1–2 (stating only that plaintiff seeks to add “Defendant
25 ‘Doe’ Jessie Espejo”).) No argument regarding substituting Doe defendants was made in either
26 plaintiff’s motion or defendants’ opposition. It was not until plaintiff’s reply brief that he chose
27 to articulate his Doe defendant argument. Consideration of this argument would be unfair to
28 defendants who did not have the advantage of briefing the issue. State of Nev. v. Watkins, 914
F.2d 1545, 1559–60 (9th Cir. 1990) (explaining the general rule that parties cannot raise a new
issue for the first time in a reply brief (citing United States v. Birtle, 792 F.2d 846, 848 (9th Cir.
1986))). This argument is therefore disregarded because new matters should not be raised in the
reply brief. See, e.g., Stewart v. Wachowski, 2004 WL 2980783, at *11 (C.D. Cal. Sept. 28,
2014) (explaining that “[c]ourts decline to consider arguments that are raised for the first time in
reply”).

1 at 5.) Adding to this prejudice is the fact that defendants have already defended against the same
2 claims in a motion to dismiss—considering the claims plaintiff seeks to add against Jessie Espejo
3 are largely a restatement of claims that have previously been dismissed with prejudice. The
4 addition of a new defendant would therefore create prejudice for defendants and Jessie Espejo.

5 **D. Futility of Amendment – Attempt to Restate Claims Previously Dismissed**
6 **With Prejudice**

7 “The party opposing amendment bears the burden of showing . . . futility of amendment.”
8 Eminence Capital, 316 F.3d at 1052. If a proposed amendment is legally insufficient it would be
9 futile to grant leave to amend. Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991).

10 The proposed amendments to the complaint are not tenable under Rule 15(a). The newly
11 proposed claims are either insufficiently pled or involve theories that have already been
12 considered by the court and dismissed with prejudice and without leave to amend.
13 Notwithstanding that plaintiff’s due process, deliberate indifference to serious medical needs, and
14 negligence claims were dismissed with prejudice as insufficiently pled as to all defendants,
15 plaintiff seeks to reassert these claims against a new defendant, Jessie Espejo. Plaintiff’s
16 proposed amendments again fail to state a claim.

17 The gravamen of plaintiff’s allegations in his proposed first amended complaint remain
18 unchanged. Regarding Jessie Espejo, plaintiff only alleges that he denied plaintiff his orthopedic
19 appliance (ECF No. 34 at ¶¶ 27, 40, 81) and acted indifferently towards plaintiff (id. at ¶ 56)—
20 allegations and theories the court has already considered and found failed to state a claim under
21 Rule 12(b)(6). The court will repeat its findings here as to the three claims to which plaintiff
22 seeks to add Jessie Espejo.

23 In Claim 2, plaintiff seeks to add the following allegation regarding Jessie Espejo:

24 40. Defendant Espejo didn’t not [sic] allow me to have my
25 Knee Brace against my Liberty and Right Pursuant to Penal
Code §2656

26 Failure to abide by this state law without process in
27 violation of my rights protected by the Fourteenth
28 Amendment of the United States Constitution (Procedural
Due Process)

1 (ECF No. 34 at ¶ 40.) In Claim 6 (Claim 7 in the operative complaint), plaintiff also complains
2 that he was denied a knee brace. However, plaintiff does not seek to add any allegations specific
3 to Jessie Espejo, instead including a general reference to “Defendants” and alleging they “were
4 told of permanent issues and given instructions for care, yet they acted indifferently towards the
5 plaintiff” in paragraph 56. (ECF No. 34 at ¶ 56.) As previously explained in the court’s findings
6 and recommendations,

7 In Claim 7, plaintiff asserts that defendants were deliberately
8 indifferent to his serious medical needs by ignoring his requests for
9 orthopedic appliances such as a knee brace, orthopedic insoles, and
10 wrist brace. ([ECF No. 16] ¶ 59.) Plaintiff contends that county
employees should have known of his need for these items from a
prior lawsuit in which plaintiff received a settlement. (Id.)

11 Denial or delay of medical care for a prisoner’s serious medical
12 needs may constitute a violation of the prisoner’s Eighth and
13 Fourteenth Amendment rights. Estelle v. Gamble, 429 U.S. 97,
14 104-05 (1976). An individual is liable for such a violation only
15 when the individual is deliberately indifferent to a prisoner’s
16 serious medical needs. Id. . . . Here, the complaint does not specify
17 how any defendant was deliberately indifferent to plaintiff’s serious
18 medical needs under [the applicable] standard. Plaintiff was
examined and given a wrist brace at Kaiser hospital prior to being
taken to jail, transported to jail in a wheelchair, searched upon
arrival at the jail, and seen by jail medical staff within several hours
of being booked. (ECF No. 1, ¶¶ 26-27.) See Cal. Penal Code
§ 2656(b) (if inmate’s orthopedic appliance is removed for security
reasons, inmate “shall be examined by a physician within 24 hours
after such removal”).

19 (ECF No. 20 at 8–9.) This same finding applies to plaintiff’s attempt to add Jessie Espejo as a
20 defendant to near-identical allegations the court already found failed to state a claim upon which
21 relief can be granted. To the extent plaintiff moves to amend Claim 2 and Claim 6 to add Jessie
22 Espejo because he allegedly denied plaintiff a knee brace, such amendment would be futile for
23 the same reasons articulated in the court’s findings and recommendations. This is especially so
24 considering plaintiff does little to bolster his previous allegations and the court already found that
25 plaintiff failed to specify how any defendant was deliberately indifferent to plaintiff’s serious
26 medical needs.² The addition of one sentence to paragraph 56 does not change this analysis.

27 _____
28 ² Regarding plaintiff’s citation to California Penal Code § 2656, it was cited in the court’s
findings and recommendations to illustrate that an inmate shall be examined within 24 hours after

1 Finally, plaintiff moves to add Jessie Espejo to Claim 10 (Claim 12 in the operative
2 complaint). Regarding Jessie Espejo, plaintiff attempts to add the following allegations:

3 81. The acts and or omissions of Jessie Espejo of not allowing
4 me to have my orthopedic appliance and denying it along
5 with the access to a wheelchair is within his skill. Penal
6 code §2656 allowed appliance, as the records that where
7 [sic] signed over by plaintiff in 2012-2013 indicate
8 Plaintiffs Orthopedic doctor Amy Black built plaintiff a
9 custom build Knee brace. Also he is under duty to give me
10 equal access as a disabled person. the County of Sacramento
11 receives financial assistance from the State of California as
12 part of Realignment Legislation California Government
13 Code §30025, 30026, and 30029, and through other statues
14 and funding mechanisms, Defendant Espejo is under duty to
15 give disabled people accommodations, and give me equal
16 access to the jail which did not happen as he took a
17 wheelchair from me thus leaving me unable to access
18 services as a disabled man with permanent knee and foot
19 issues, see Government code §11135.

12 ...

13 83. Defendant Espejo is liable pursuant to 42 U.S.C. section
14 1983 and Government Code §820.

15 (ECF No. 34 at ¶¶ 81, 83.) Notwithstanding these additions, the court’s prior findings remain
16 applicable to plaintiff’s proposed Claim 10:

17 Plaintiff alleges in conclusory terms that defendants breached their
18 duty of care in transporting him to the jail, using force against him,
19 not letting him use the phone, *and not giving him his orthopedic
20 appliances*. Plaintiff does not allege the elements of negligence
21 against any defendant, and his allegations are too vague and
22 conclusory to state a claim.

23 (ECF No. 20 at 12.) For the same reasons articulated in the court’s prior findings and
24 recommendations, the amendments plaintiff seeks are futile.

25 Moreover, to the extent plaintiff’s proposed first amended complaint rests on new legal
26 theories against a new defendant (*id.* at ¶¶ 80–84), plaintiff has not established the underlying
27 facts were not known to him or could not have been known to him when he filed the action.
28 Because these proposed claims were previously dismissed with prejudice, plaintiff may not

such removal, which is precisely what the court found occurred. (ECF No. 20 at 9 (finding that
plaintiff was “seen by jail medical staff within several hours of being booked).) Thus, to the
extent plaintiff moves to amend Claim 6 because he was not examined within 24 hours, such
amendment would be futile.

1 attempt to amend the complaint to reassert the claims based on facts already known, or that
2 should have been known to him at the inception of this suit in September 2018.


3 In sum, consideration of the five factors discussed above weighs against granting plaintiff
4 leave to amend his complaint.

5 **VI. Conclusion**

6 For the reasons discussed above, IT IS HEREBY RECOMMENDED that plaintiff's
7 motion to amend (ECF No. 33) be DENIED.

8 Further, IT IS HEREBY ORDERED that a Status (Pretrial Scheduling) Conference is set
9 for December 4, 2019 at 10:00 a.m. in courtroom no. 24 before the undersigned. All parties shall
10 appear by counsel or in person if acting without counsel. The parties shall comply with the
11 September 4, 2018 Order Setting Status Conference (ECF No. 4) regarding status reports.

12 Dated: October 24, 2019

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14 _____
15 CAROLYN K. DELANEY
16 UNITED STATES MAGISTRATE JUDGE

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