



1 See Haines v. Kerner, 404 U.S. 519, 520 (1972).

2 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement  
3 of the claim showing that the pleader is entitled to relief” in order to “give the defendant fair  
4 notice of what the . . . claim is and the grounds upon which it rests.” Bell Atl. Corp v. Twombly,  
5 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, in order  
6 to survive dismissal for failure to state a claim under Rule 12(b)(6), a complaint must contain  
7 more than “a formulaic recitation of the elements of a cause of action;” it must contain factual  
8 allegations sufficient “to raise a right to relief above the speculative level.” Id. at 555-56. The  
9 complaint must contain “enough facts to state a claim to relief that is plausible on its face.” Id. at  
10 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the  
11 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
12 Iqbal, 129 S. Ct. at 1949. “The plausibility standard is not akin to a ‘probability requirement,’ but  
13 it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. (quoting  
14 Twombly, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a  
15 defendant’s liability, it ‘stops short of the line between possibility and plausibility for entitlement  
16 to relief.” Id. (quoting Twombly, 550 U.S. at 557).

17 In deciding a Rule 12(b)(6) motion, the Court generally may not consider materials  
18 outside the complaint and pleadings. See Cooper v. Pickett, 137 F.3d 616, 622 (9th Cir. 1998);  
19 Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994). The Court may, however, consider: (1)  
20 documents whose contents are alleged in or attached to the complaint and whose authenticity no  
21 party questions, see Branch, 14 F.3d at 454; (2) documents whose authenticity is not in question,  
22 and upon which the complaint necessarily relies, but which are not attached to the complaint, see  
23 Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001); and (3) documents and materials  
24 of which the court may take judicial notice, see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir.  
25 1994).

26 Finally, leave to amend must be granted “[u]nless it is absolutely clear that no  
27 amendment can cure the defects.” Lucas v. Dep’t of Corr., 66 F.3d 245, 248 (9th Cir. 1995) (per  
28 curiam); see also Lopez v. Smith, 203 F.3d 1122, 1126 (9th Cir. 2000) (en banc).

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## I. BACKGROUND

### A. Procedural History

Plaintiff initiated this action with a complaint filed through retained counsel in the United States District Court for the Northern District of California on September 6, 2022. See ECF No. 1. Plaintiff named the following as defendants: (1) Gavin Newsom; and (2) Jennifer Benavidez. See id. at 1. The matter was transferred to this Court on November 1, 2022. See ECF No. 11. On December 22, 2022, the Court determined the complaint was appropriate for service and directed Plaintiff to serve process. See ECF No. 13.

Defendants filed a motion to dismiss on March 1, 2023. See ECF No. 20. Plaintiff did not oppose. On July 24, 2023, the Court issued findings and recommendations that Defendants' motion to dismiss be granted, that Defendant Benavidez be dismissed with prejudice, that Plaintiff's equal protection claim be dismissed with prejudice, that Plaintiff's state law claims be dismissed with leave to amend, that Plaintiff's due process claim against Defendant Newsom be dismissed with leave to amend, and that Plaintiff be directed to file a first amended complaint. See ECF No. 23. The District Judge adopted the findings and recommendations in full on March 21, 2024. See ECF No. 31. Plaintiff filed his first amended complaint through retained counsel on June 13, 2024. See ECF No. 35.

On July 18, 2024, Defendant Newsom filed the pending motion to dismiss the first amended complaint. See ECF No. 39. As with the prior motion to dismiss, Plaintiff has not filed an opposition

### B. Plaintiff's Allegations

The caption of Plaintiff's first amended complaint lists Gavin Newsom as the sole named defendant. See ECF No. 35, pg. 1. Throughout the amended complaint, however, Plaintiff refers to "Defendants" and includes a specific allegation as to Benavidez, who is alleged to be the prison warden and who is alleged to have violated Plaintiff's rights by not responding to Plaintiff's request for a medical parole. See generally ECF No. 35. Plaintiff states that he is a state prisoner confined to a wheelchair and that he is suffering pulmonary embolism, deep vein thrombosis, and cardiopulmonary disorder, all of which necessitated the amputation of his leg.

1 See id. at 1. According to Plaintiff:

2                   On 5/24/2022 CMF [California Medical Facility] Warden Jennifer  
3 Benavidez was notified that Plaintiff was requesting a medical review for  
4 a Medical Parole Hearing. The Defendant has not responded to Plaintiff's  
5 request, denying him his fundamental right to due process and equal  
6 protection under the Fourteenth Amendment of the United States  
7 Constitution. . . .

8 Id. at 2.

9 Plaintiff asserts two separate causes of action, both arising under state law, for  
10 negligent infliction of emotional distress and intentional infliction of emotional distress. See id.  
11 at 2-3. Plaintiff seeks damages and an order directing that a medical parole hearing be set. See  
12 id. at 4.

## 13 **II. DISCUSSION**

14 In his unopposed motion to dismiss, Defendant Newsom renews the arguments  
15 raised in the prior motion as follows: (1) to the extent Plaintiff is suing him in his official capacity  
16 for damages under § 1983, he is immune under the Eleventh Amendment; (2) to the extent  
17 Plaintiff is suing Defendant in his official capacity for injunctive relief under § 1983, the first  
18 amended complaint continues to fail to allege sufficient facts to establish an entitlement to such  
19 relief; (3) to the extent Plaintiff is suing Defendant in his individual capacity for damages or  
20 injunctive relief under § 1983, Plaintiff's allegations continue to be insufficient to establish  
21 Defendant's liability as a supervisor; and (4) Plaintiff fails to allege facts sufficient to sustain his  
22 state law claims for infliction of emotional distress. See ECF No. 39. Defendant also contends  
23 that, pursuant to the District Judge's order granting the first motion to dismiss, Plaintiff cannot  
24 now attempt to revive his equal protection claim or his claims against Benavidez. See id.  
25 Defendant asks that the first amended complaint be dismissed without further leave to amend.  
26 See id.

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1 At the outset, the Court agrees with Defendant that the first amended complaint  
2 cannot revive claims and defendants which have already been dismissed with prejudice.  
3 Plaintiff's equal protection claim has been dismissed with prejudice and is no longer before the  
4 Court. Likewise, Benavidez has been dismissed with prejudice and is no longer a party to this  
5 action.

6 As to capacity, the Court notes that the first amended complaint remains unclear.  
7 Specifically, despite the issue having been addressed in the Court's prior findings and  
8 recommendations, Plaintiff continues to fail to specify in which capacity Defendant Newsom is  
9 sued. Therefore, the Court will address Plaintiff's allegations as if Defendant is being sued in  
10 both his official and individual capacities.

11 Plaintiff's allegations will be addressed in the context of both § 1983 for violations  
12 of constitutional civil rights and Plaintiff's state law claims. While the first amended complaint  
13 lists two state law causes of action, the pleading also alleges generally that Plaintiff's claims arise  
14 under the Fourteenth Amendment. Despite counsel's inartful pleading, the Court will consider all  
15 possible contours of Plaintiff's allegations.

16 **A. Section 1983 Claim**

17 1. Official Capacity

18 The Court agrees with Defendant that, to the extent Plaintiff is suing him in his  
19 official capacity for damages, he is immune from suit under the Eleventh Amendment. See  
20 Eaglesmith v. Ward, 73 F.3d 857, 859 (9th Cir. 1995); Pena v. Gardner, 976 F.2d 469, 472 (9th  
21 Cir. 1992) (per curiam). Plaintiff may, however, proceed against Defendant Newsom in his  
22 official capacity on his claim for injunctive relief. See Armstrong v. Wilson, 124 F.3d 1019,  
23 1025 (9th Cir. 1997). As to Plaintiff's claim for injunctive relief based on an alleged due process  
24 violation, Defendant argues that Plaintiff's claim is foreclosed because he has no role in medical  
25 parole and cannot provide the requested injunctive relief. See ECF No. 39, pgs. 6-8.

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1 By way of background, Defendant first outlines the provisions of Title 15 of the  
2 California Code of Regulations governing medical parole. See ECF No. 39, pgs. 6-7. According  
3 to the regulation, the decision to grant or deny a hearing for medical parole lies with the prison's  
4 Chief Medical Officer and Classification and Parole Representative. See Cal. Code Regs. tit. 15,  
5 § 3359.2(c); see also Cal. Code Regs. tit. 15, § 3359.2(b). The regulations also establish that the  
6 decision to grant or deny medical parole lies with the Board of Parole Hearings. See Cal. Code  
7 Regs. tit. 15, § 3359.1(d); Cal. Pen. Code § 3350(g).

8 Against this background, Defendant's argument is persuasive because, while there  
9 is an exception to Eleventh Amendment immunity for prospective injunctive relief, that exception  
10 “only applies to state officials with the ability to provide injunctive relief in their official  
11 capacities.” Roberts v. California Dep’t of Corrections, 2007 WL 951289 \*2 (N.D. Cal., March  
12 27, 2007) (citing Kentucky v. Graham, 472 U.S. 159, 167 n.14 (2002)). Here, state regulations  
13 establish that Defendant Newsom does not have the ability to order that Plaintiff be provided a  
14 medical parole hearing. Further amendment will not change this fact.

## 15 2. Individual Capacity

16 The Eleventh Amendment does not bar suits for damages and/or injunctive relief  
17 against Defendant Newsom in his individual capacity. See Eaglesmith, 73 F.3d at 859; Pena, 976  
18 F.2d at 472. To the extent Plaintiff is suing Defendant in his individual capacity, Defendant  
19 argues that the first amended complaint fails to assert allegations sufficient to establish  
20 Defendant's supervisory liability. See ECF No 39, pg. 10. The Court agrees.

21 Supervisory officials, such as Defendant Newsom, who is the Governor of  
22 California, are generally not liable under § 1983 for the actions of subordinates. See Taylor v.  
23 List, 880 F.2d 1040, 1045 (9th Cir. 1989) (holding that there is no respondeat superior liability  
24 under § 1983). A supervisor is only liable for the constitutional violations of subordinates if the  
25 supervisor participated in or directed the violations. See id. Supervisory personnel who  
26 implement a policy so deficient that the policy itself is a repudiation of constitutional rights and  
27 the moving force behind a constitutional violation may be liable even where such personnel do  
28 not overtly participate in the offensive act. See Redman v. Cnty of San Diego, 942 F.2d 1435,

1 1446 (9th Cir. 1991) (en banc). A supervisory defendant may also be liable where he or she knew  
2 of constitutional violations but failed to act to prevent them. See Taylor, 880 F.2d at 1045; see  
3 also Starr v. Baca, 633 F.3d 1191, 1209 (9th Cir. 2011).

4 When a defendant holds a supervisory position, the causal link between such  
5 defendant and the claimed constitutional violation must be specifically alleged. See Fayle v.  
6 Stapley, 607 F.2d 858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir.  
7 1978). Vague and conclusory allegations concerning the involvement of supervisory personnel in  
8 civil rights violations are not sufficient. See Ivey v. Board of Regents, 673 F.2d 266, 268 (9th  
9 Cir. 1982). “[A] plaintiff must plead that each Government-official defendant, through the  
10 official’s own individual actions, has violated the constitution.” See Ashcroft v. Iqbal, 556 U.S.  
11 662, 676 (2009).

12 Defendant argues:

13 Here, the FAC fails to allege any facts establishing Defendant  
14 Newsom was in any way aware of Plaintiff’s medical parole request or  
Warden Benavidez’s alleged inaction on that request.

15 Accordingly, to the extent Plaintiff bases Defendant Newsom’s  
16 liability on any possible supervisory role he has in relation to Defendant  
Benavidez, the facts as alleged are insufficient to state a claim against  
Defendant Newsom.

17 ECF No. 39, pg. 10.

18 Defendant's argument is persuasive. Except for the caption, the first amended  
19 complaint makes no reference whatsoever to Defendant Newsom. Benavidez, who is no longer a  
20 party to this action, is the only individual named in the body of the first amended complaint.  
21 Plaintiff's allegation that "Defendants are responsible for implementing the Medical Parole  
22 statute. . .," ECF No. 25, pg. 2, suggests a non-cognizable respondeat superior theory of liability  
23 and fails to provide any specificity as to Defendant Newsom's conduct. Given that Plaintiff has  
24 previously been advised of the pleading standard applicable to supervisory officials and continues  
25 to provide insufficient allegations to establish Defendant Newsom's supervisory liability, further  
26 leave to amend is not warranted.

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1           **B.     State Law Claims**

2           The first amended complaint renews Plaintiff's state law claims for negligent  
3     infliction of emotional distress and intentional infliction of emotional distress, both of which were  
4     dismissed with leave to amend. Defendant Newsom argues in the pending motion to dismiss the  
5     first amended complaint that Plaintiff's state law claims continue to be deficient. ECF No. 39,  
6     pgs. 8-9. As discussed below, the Court agrees.

7           1.     Negligent Infliction of Emotional Distress

8           The Court previously addressed Plaintiff's claim of negligent infliction of  
9     emotional distress. In the July 24, 2023, findings and recommendations, which were adopted in  
10    full by the District Judge, the Court stated:

11                                 Negligent infliction of emotional distress is not an  
12                                 independent cause of action under California law and, instead, falls within  
13                                 the tort of negligence. See Burgess v. Superior Court, 2 Cal. 4th 1064,  
14                                 1072 (1992). The traditional negligence elements of duty, breach,  
  causation, and damage apply to a claim of negligent infliction of  
  emotional distress. See id.

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16                                 As Defendants correctly note, Plaintiff's complaint is  
17                                 devoid of any specific allegations regarding the emotional distress he  
18                                 suffered. Plaintiff thus fails to allege damages. Further, Plaintiff has not  
19                                 explained the nature of the duty allegedly owed by Defendants or how  
20                                 Defendants' alleged conduct caused him emotional distress. Plaintiff  
21                                 should be provided leave to amend.

22                                 ECF No. 23, pg. 9.

23                                 In the pending motion to dismiss, Defendant argues:

24                                 Here, Plaintiff's FAC fails to allege any facts supporting the  
25                                 elements of a negligence claim. Plaintiff does hardly more than recite the  
26                                 elements of the claim with conclusory statements. The FAC alleges that a  
27                                 duty exists between Defendant Newsom and the Plaintiff but fails to  
28                                 explain the nature of that duty. And if we assume that the alleged inaction  
  on Plaintiff's requests for medical parole was the supposed breach of a  
  duty, Plaintiff's FAC still fails to explain how this caused Plaintiff's  
  emotional distress. As the Court previously found in the initial Complaint,  
  Plaintiff has not explained the nature of the duty owed by Defendant  
  Newsom or how his alleged conduct caused Plaintiff emotional distress.  
  (ECF no. 23 at 9.)

  ECF No. 39, pg. 9.

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1 Defendant's argument is persuasive. As with the original complaint, the first  
2 amended complaint continues to fail to describe the duty owed to Plaintiff beyond the conclusory  
3 statement that "Defendants. . . owed a duty to Plaintiff to treat him in a non-negligent and fair  
4 manner. . . ." ECF No. 35, pg. 3. Further, Plaintiff continues to fail to explain how the denial of  
5 medical parole caused him emotional distress. The first amended complaint thus fails to establish  
6 any of the necessary elements of a negligent infliction of emotional distress claim. Because  
7 Plaintiff has been previously advised of the standards for this claim and continues to fail to plead  
8 sufficient facts, further leave to amend is not warranted.

9 2. Intentional Infliction of Emotional Distress

10 This claim was also addressed previously in the July 24, 2023, findings and  
11 recommendations, as follows:

12 A claim for intentional infliction of emotional distress  
13 requires: (1) extreme and outrageous conduct by the defendant with the  
14 intent of causing emotional distress or reckless disregard of the possibility  
15 of causing emotional distress; (2) the plaintiff must have suffered extreme  
16 emotional distress; and (3) the defendant's conduct must be the actual and  
17 proximate cause of the plaintiff's extreme emotional distress. See Hughes  
18 v. Pair, 46 Cal. 4th 1035, 1051 (2009).

19 \* \* \*

20 As with Plaintiff's claim of negligent infliction of  
21 emotional distress, the Court agrees that Plaintiff's claim for intentional  
22 infliction of emotional distress is also deficient because Plaintiff has not  
23 asserted facts as to the emotional distress he allegedly suffered. Nor has  
24 Plaintiff alleged that Defendants acted intentionally or recklessly for the  
25 purpose of causing Plaintiff to suffer emotional distress. This claim should  
26 be dismissed with leave to amend.

27 ECF No. 23, pg. 10.

28 According to Defendant:

Here, again, the FAC merely recites the elements of the claim  
through conclusory statements containing no alleged facts to support them.  
Nothing is alleged to establish that the alleged inaction by Defendant  
Newsom was extreme or outrageous. Nor does Plaintiff allege facts to  
show that Defendant Newsom acted with the intention of causing, or with  
reckless disregard of the probability of causing, severe or extreme

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1 emotional distress. And there are no alleged facts to establish how  
2 Defendant Newsom's alleged inaction caused severe or extreme emotional  
3 distress. Finally, the FAC offers no facts to show Plaintiff is experiencing  
4 emotional distress which is severe or extreme.

5 ECF No. 39, pg. 9.

6 The Court agrees. The first amended complaint merely sets forth the formulaic  
7 elements of an intentional infliction of emotional distress claim. Plaintiff alleges that Defendant's  
8 conduct was "outrageous," and that he suffered "severe emotional distress." ECF No. 35, pg. 3.  
9 Plaintiff does not, however, describe with any particularity what Defendant's conduct is alleged to  
10 have been. Additionally, as with his claim of negligent infliction of emotional distress discussed  
11 above, Plaintiff fails to describe how the denial of Medical Parole caused him emotional distress.  
12 Again, because Plaintiff has been previously advised of the standards for this claim and continues  
13 to fail to plead sufficient facts, further leave to amend is not warranted.

### 14 III. CONCLUSION

15 Based on the foregoing, the undersigned recommends that Defendant's unopposed  
16 motion to dismiss, ECF No. 39, be GRANTED and that this action be DISMISSED with  
17 prejudice.

18 These findings and recommendations are submitted to the United States District  
19 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days  
20 after being served with these findings and recommendations, any party may file written objections  
21 with the Court. Responses to objections shall be filed within 14 days after service of objections.  
22 Failure to file objections within the specified time may waive the right to appeal. See Martinez v.  
23 Ylst, 951 F.2d 1153 (9th Cir. 1991).

24  
25 Dated: March 4, 2025



26 DENNIS M. COTA  
27 UNITED STATES MAGISTRATE JUDGE  
28