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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

PETER ROMERO LOMAX,

Plaintiff,

vs.

CANLAS; WHITEHEAD; FARINAS;  
LEHV; CHOO; JAYASUNDARA; JOHN  
LUBISICH; K.L. HAWTHORNE;  
MATTHEW KATE; N. GRANNIS; E.  
FRANKLIN; MEDICAL  
AUTHORIZATION REVIEW  
COMMITTEE; TYLER; R.  
HERNANDEZ; SILVA; E. ROMERO; G.  
CASSESI,

Defendants.

CASE NO. 10cv2226 WQH-WMc

ORDER

HAYES, Judge:

The matter before the court is the Report and Recommendation filed by United States Magistrate Judge William McCurine recommending that the Motion to Dismiss filed by Defendants Canlas, Whitehead, Choo, Jayasundara, Franklin, Tyler, Hernandez, Silva, and Romero be granted. (ECF No. 43).

**BACKGROUND**

On October 26, 2010, Plaintiff, a prisoner then incarcerated at R.J. Donovan Correctional Facility (“Donovan”) and proceeding pro se, initiated this action by filing a civil rights complaint pursuant to 42 U.S.C. § 1983 (“Complaint”). (ECF No. 1). Plaintiff also filed

1 a motion to proceed in forma pauperis that was granted by the Court on December 7, 2010.  
2 (ECF No. 4). In the Complaint, Plaintiff alleges that Defendants violated his Eighth  
3 Amendment rights by failing to provide adequate medical care while Plaintiff was incarcerated  
4 at Donovan from 2007 to 2009.

5 Among other allegations in the Complaint, Plaintiff alleges that: Defendant  
6 Jayasundara, nurse practitioner, performed unauthorized surgery on Plaintiff without providing  
7 pain medication; Defendant Romero, health care manager, made false statements in a staff  
8 response report; Defendants Grannis and Franklin, Chief of Inmate Appeals and Appeals  
9 Coordinator, respectively, denied Plaintiff's right to redress of his emergency grievances; and  
10 Defendants Cate and Hernandez, Director of the California Department of Corrections and  
11 Rehabilitation and Warden of Donovan, respectively, disregarded Plaintiff's pleas for  
12 assistance regarding his medical treatment.

13 On April 21, 2011, Defendants Canlas, Whitehead, Choo, Jayasundara, Franklin, Tyler,  
14 Hernandez, Silva, and Romero filed a Motion to Dismiss. (ECF No. 24). Defendants contend  
15 that Plaintiff fails to state a claim against Defendant Jayasundara for deliberate indifference  
16 to medical needs under the Eighth Amendment; Plaintiff fails to state a claim against  
17 Defendants Franklin, Romero, and Grannis under the Fourteenth Amendment due process  
18 clause with respect to plaintiff's inmate appeal; Plaintiff fails to state a claim against  
19 Defendants Hernandez and Cate for supervisory liability; and further that Plaintiff cannot sue  
20 any of the Defendants in their official capacities. On June 9, 2011, Plaintiff filed an  
21 opposition. (ECF No. 29). On July 1, 2011, Defendants filed a reply. (ECF No. 36).

22 On December 9, 2011, the Magistrate Judge issued a Report and Recommendation  
23 recommending that the Motion to Dismiss be granted. (ECF No. 43). The Report and  
24 Recommendation concluded:

25 IT IS HEREBY ORDERED that no later than January 6, 2012, any party  
26 to this action may file written objections with the Court....

27 IT IS FURTHER ORDERED that any reply to the objections shall be  
28 filed with the Court and served on all parties no later than January 13, 2012.  
The parties are advised that failure to file objections within the specified time  
may waive the right to raise those objections on appeal of the Court's order.

1 (ECF No. 43 at 15, citing *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991)). The docket reflects  
2 that no objections to the Report and Recommendation have been filed.

### 3 **REVIEW OF THE REPORT AND RECOMMENDATION**

4 The duties of the district court in connection with a report and recommendation of a  
5 magistrate judge are set forth in Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b).  
6 The district judge must “make a de novo determination of those portions of the report ... to  
7 which objection is made,” and “may accept, reject, or modify, in whole or in part, the findings  
8 or recommendations made by the magistrate.” 28 U.S.C. § 636(b). The district court need not  
9 review de novo those portions of a report and recommendation to which neither party objects.  
10 *See Wang v. Masaitis*, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); *U.S. v. Reyna-Tapia*, 328 F.3d  
11 1114, 1121-22 (9th Cir. 2003) (en banc).

12 After reviewing the Report and Recommendation, the record in this case, and the  
13 submissions of the parties regarding the claims against Defendant Jayasundara, the Court finds  
14 that the Magistrate Judge correctly stated that “mere claims of ‘indifference,’ ‘negligence,’ or  
15 ‘medical malpractice’ do not support a claim under § 1983.” (ECF No. 43 at 9, citing  
16 *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir.1980)). The Magistrate Judge correctly  
17 concluded that, “[a]lthough plaintiff’s allegations suggest Jayasundara may have acted  
18 negligently, something more than negligence, or gross negligence, or medical malpractice is  
19 required for a violation of the Eighth Amendment.” *Id.* at 10, citing *Toguchi v. Chung*, 391  
20 F.3d 1051, 1060 (9th Cir. 2004). The Magistrate Judge correctly concluded that “the  
21 Complaint fails to set forth facts to demonstrate Jayasundara acted with a deliberate  
22 indifference to plaintiff’s medical needs.” *Id.*

23 The Magistrate Judge correctly stated that “[a] dismissal under Rule 12(b)(6) is  
24 generally proper only where there ‘is no cognizable legal theory or an absence of sufficient  
25 facts alleged to support a cognizable legal theory.’” *Id.* at 10, citing *Navarro v. Block*, 250 F.3d  
26 729, 732 (9th Cir. 2001). Regarding the claims against Defendant Romero, the Magistrate  
27 Judge correctly found that, “Plaintiff neither specifies what false things Romero wrote in his  
28 response nor identifies the issues Romero failed to address.” *Id.* at 11. The Magistrate Judge

1 correctly concluded that Plaintiff’s claims against Defendant Romero “lack the specificity and  
2 factual content required for a cognizable claim.” *Id.* Regarding the claims against Defendants  
3 Grannis and Franklin, the Magistrate Judge correctly found that the grievance forms and  
4 inmate appeals submitted to these Defendants “contain general grievances regarding the delay  
5 of surgery.” *Id.* at 12. The Magistrate Judge correctly concluded that Plaintiff “failed to allege  
6 any facts to indicate these defendants intentionally denied, delayed, or interfered with his  
7 medical treatment” and that Plaintiff “failed to state a cognizable Eighth Amendment claim  
8 against Grannis and Franklin.” *Id.* The Magistrate Judge correctly concluded that, “[t]o the  
9 extent plaintiff raises a Fourteenth Amendment due process claim against Grannis, Franklin,  
10 and Romero... Plaintiff fails to state a legally cognizable claim because he does not allege any  
11 facts in support thereof with sufficient specificity.” *Id.*

12       Regarding the claims against Defendant Hernandez and Cate, the Magistrate Judge  
13 correctly stated that, “a supervisor may be liable only if he or she is personally involved in the  
14 constitutional deprivation, or if there is a sufficient causal connection between the supervisor's  
15 wrongful conduct and the constitutional violation.” (*Id.* at 13, citing *Jones v. Williams*, 297  
16 F.3d 930, 937 (9th Cir. 2002); *MacKinney v. Nielsen*, 69 F.3d 1002, 1008 (9th Cir. 1995)).  
17 The Magistrate Judge correctly concluded that Plaintiff “failed to allege any facts to suggest  
18 Cate and Hernandez ‘participated in or directed the violations, or knew of the violations and  
19 failed to act to prevent them.’” (*Id.* at 14, citing *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir.  
20 1989)).

21       Regarding Plaintiff’s prayer for monetary damages and injunctive relief, the Magistrate  
22 Judge correctly stated that, “[w]hile the Eleventh Amendment bars a prisoner's section 1983  
23 claims against state actors sued in their official capacities, it does not bar damage actions  
24 against state officials in their personal capacities. In addition, it does not bar actions against  
25 state officers in their official capacities if the plaintiff seeks injunctive relief.” *Id.* (citations  
26 omitted). The Magistrate Judge correctly concluded that, “[a]lthough plaintiff is foreclosed  
27 from seeking money damages against defendants in their official capacity, he may still seek  
28 injunctive relief against the defendants in their official capacity as well as money damages


1 against the defendants in their individual capacity.” *Id.*

2 **CONCLUSION**

3 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 43) is  
4 ADOPTED in its entirety. The Motion to Dismiss Plaintiff’s claims against Defendants  
5 Jayasundra, Franklin, Romero, Grannis, Cate, and Hernandez is GRANTED with leave to amend.  
6 The Motion to Dismiss Plaintiff’s claim for monetary damages against all defendants in their  
7 official capacities is GRANTED with prejudice.

8 No later than **sixty (60) days** from the date of this Order, Plaintiff may file an amended  
9 complaint. If Plaintiff files an amended complaint, the pleading must be complete in itself and  
10 may not incorporate by reference any prior pleading. Any defendant not named, and all claims  
11 not re-alleged, will be deemed waived. If Plaintiff does not file an amended complaint within  
12 60 days from the date of this Order, this case shall proceed as to the claims in the Complaint  
13 which remain after this Order.

14 DATED: February 9, 2012

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16 **WILLIAM Q. HAYES**  
17 United States District Judge  
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