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

RAMON MURILLO,

Plaintiff,

vs.

TAYLOR, et. al.,

Defendant.

CASE NO. 14cv876-WQH  
(WVG)

ORDER

HAYES, Judge:

The matter before the Court is the review of the Report and Recommendation (ECF No. 32) issued by United States Magistrate Judge William V. Gallo, recommending that this Court grant Respondent's Motion to Dismiss with prejudice. *Id.* at 3, 20.

**I. Background**

On October 31, 2012, Plaintiff commenced an action in this Court, case no. 12-cv-2642 WQH (WVG), by filing a Complaint pursuant to Section 1983 against Defendants T. Taylor ("Taylor"), Rucker, Owens, E. Solis ("Solis"), J. Cedano ("Cedano"), J. Elias ("Elias"), R. Davis ("Davis"), R. Cobb ("Cobb"), Ives, C. Hamilton ("Hamilton"), D. Strayhorn ("Strayhorn"), L. Romero ("Romero"), D. Fuston ("Fuston"), T. Goff ("Goff"), Reed ("Reid"), T. Hernandez ("Hernandez"), Daniel Paramo ("Paramo"), CDCR Dental, and Pickett. (Case No. 12-cv-2642 WQH (WVG), ECF. No. 1). On May 30, 2013, Defendants a Motion to Dismiss and for Severance of Parties and Claims. (Case No. 12-cv-2642 WQH (WVG), ECF. No. 36). On October 15, 2013, this Court issued an Order stating that:

1 Based on the foregoing, the Court hereby:

2 1) DENIES Defendants' Motion to Dismiss Plaintiff's Complaint pursuant  
3 to FED.R.CIV.P.8 and S.D. CIVLR 8.2;

4 2) DENIES Defendants' Motion to Sever Claims pursuant to  
5 FED.R.CIV.P. 18 and 20;

6 3) DISMISSES Defendants Dental Dept and CDCR Dental Department,  
7 without prejudice pursuant to FED.R.CIV.P. 41(a)(2);

8 4) Sua sponte DISMISSES all claims against Defendants Davis and Pickett  
9 for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2) & § 1915A;

10 5) Issues an ORDER TO SHOW CAUSE no later than thirty (30) days  
11 from the date this Order is filed why the claims against Defendant  
12 Hamilton should not be dismissed for want of prosecution pursuant to  
13 FED.R.CIV.P. 4(m). If Plaintiff fails to provide the Court with  
14 documentation demonstrating proper service on Defendant Hamilton  
15 within thirty (30) days from the date this Order is filed, the claims against  
16 Defendant Hamilton in this action will be dismissed without prejudice.

17 (Case No. 12-cv-2642 WQH (WVG), ECF. No. 47).

18 On November 6, 2013, Plaintiff filed a non-opposition to the Court's OSC. (Case  
19 No. 12-cv-2642 WQH (WVG), ECF. No. 53). On November 8, 2013, the Court  
20 dismissed Defendant Hamilton from the First Action. (Case No. 12-cv-2642 WQH  
21 (WVG), ECF. No. 55).

22 On November 22, 2013, Defendants Elias, Cedano, Cobb, Davis, Foston, Goff,  
23 Hernandez, Ives, Owens, Paramo, Romero, Rucker, Solis, Strayhorn, and Taylor filed  
24 a Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure  
25 12(b) for failure to exhaust administrative remedies. (Case No. 12-cv-2642 WQH  
26 (WVG), ECF. No. 61). On November, 26, 2013, Defendant Reid filed a Motion to  
27 Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b) for  
28 failure to exhaust administrative remedies. On February 26, 2014, this Court issued an  
Order granting both Defendants' Motions to Dismiss Plaintiff's Complaint without  
prejudice for failure to exhaust his administrative remedies. (Case No. 12-cv-2642  
WQH (WVG), ECF. No. 89).

On March 14, 2014, Plaintiff filed a notice of appeal of the District Court's ruling  
before the Ninth Circuit. (Case No. 12-cv-2642 WQH (WVG), ECF. No. 91).

1 On April 11, 2014, Plaintiff, a prisoner of the State of California proceeding pro  
2 se and in forma pauperis, commenced the present action by filing a Civil Rights  
3 Complaint pursuant to Section 1983 against Defendants Taylor, Rucker, Owens, Solis,  
4 Cedano, Elias, Davis, Cobb, Ives, and Jannush. On August 14, 2014, all Defendants  
5 filed a Motion to Dismiss the Complaint as Duplicative of an Existing Action. (ECF  
6 No. 13). On November 14, 2014, Plaintiff filed a response opposing Defendants'  
7 Motion to Dismiss the Complaint. (ECF No. 30). Defendants have not filed a reply.

## 8 **II. Allegations of Complaint Case No. 12-cv-2642**

9 In 2011, Plaintiff was housed at the Richard J. Donovan Correctional Facility  
10 ("RJD"). (Case No. 12-cv-2642 WQH (WVG), ECF. No. 1 at 9). On December 31,  
11 2011, Plaintiff alleges that he was "slam[ed] on the ground" by Defendant Rucker, with  
12 assistance by Defendant Owens and "dragged" across the dayroom floor. *Id.* Plaintiff  
13 alleges that after he was "forced" into a cell, Defendant Rucker "started beating up"  
14 Plaintiff by "punching" and "kicking" Plaintiff in the face while Defendant Owens  
15 watched. *Id.* Plaintiff alleges that Defendant Owens encouraged Defendant Rucker's  
16 behavior and began to participate by "kicking the Plaintiff several times." *Id.* at 12.  
17 Plaintiff alleges Defendants Rucker and Owens "threatened Plaintiff if he reported the  
18 beating he would regret it." *Id.* Defendants Rucker and Owens "closed the cell door"  
19 and allegedly failed to provide Plaintiff with medical treatment. *Id.*

20 Plaintiff alleges that he "cut his arm" approximately twenty minutes later so he  
21 could call for medical attention and report the incident. *Id.* Plaintiff was interviewed  
22 by Captain Stout and Lieutenant Salas regarding the incident at the RJD "crisis bed."  
23 *Id.* On January 9, 2012, while still housed in the "crisis bed," Plaintiff alleges that a  
24 "nurse and Defendant Cedano" verbally assaulted him. *Id.* at 13. Plaintiff alleges that  
25 Defendant Cedano entered his cell door and pushed Plaintiff "violently" that caused  
26 Plaintiff to fall to the floor and "hit his head on the wall made of concrete." *Id.*  
27 Plaintiff alleges that Defendant Cedano "jumped on Plaintiff," choked him and  
28 ultimately "covered up" the use of force by claiming that he pinned Plaintiff down to

1 give him a hormone shot. *Id.*

2 Three days later, Plaintiff reported the incident to his psychologist and  
3 psychiatrist, who in turn reported the incident to Captain Stout. *Id.* Captain Stout  
4 ordered that a video interview of Plaintiff be conducted by Lieutenant Franco. *Id.* On  
5 January 10, 2012, Plaintiff was released from the crisis bed and returned to “EOP  
6 Building.” *Id.* Plaintiff alleges that the actions by Defendant Cedano were in retaliation  
7 for Plaintiff reporting the incident with Defendant Rucker. *Id.*

8 Plaintiff alleges that his attempts to file complaints and grievances relating to  
9 these actions were thwarted by the actions of Defendants Paramo, Hernandez, Cobb and  
10 Foston. *Id.* at 14. As a result, Plaintiff alleges that he was subjected to “more  
11 retaliation, harassment, sexual harassment and beatings.” *Id.* Plaintiff further alleges  
12 that despite the knowledge of these Defendants regarding the allegations that Plaintiff  
13 was “sexually assaulted by CDCR staff, beaten by staff, receiving retaliation, that his  
14 property was being taken and he was not receiving his medical appliance,” they chose  
15 “not to act.” *Id.*

16 Plaintiff alleges that Defendant Taylor and Solis retaliated against him by  
17 denying his medical appliances and property while he was in Administrative  
18 Segregation (“Ad-Seg”) for more than five months. *Id.* at 15. In addition, Plaintiff  
19 alleges Defendants Strayhorn and Romero called Plaintiff a “faggot” in front of other  
20 inmates, searched his cell and took his property in retaliation for Plaintiff filing reports  
21 against them with Captain Franco, Sergeant Strickland, Sergeant Ashberry, Sergeant  
22 E. Garcia and Captain Reed. *Id.* Plaintiff alleges that he continued to have his cell  
23 searched on a daily basis in retaliation for reporting Defendants. *Id.* at 16.

24 Plaintiff alleges that on April 17, 2012, Defendants Elias, Ives and Davis called  
25 Plaintiff, a transgender inmate, a “man with a dick and tits” and a “queer.” *Id.* Plaintiff  
26 alleges that Defendants Elias and Davis then went to search Plaintiff's cell and  
27 confiscate his property, including his legal work. *Id.* at 16-17. Plaintiff alleges that  
28 Defendant Davis read a personal letter belonging to Plaintiff to staff and inmates, then

1 proceeded to call him a “faggot” while Defendant Ives confiscated Plaintiff’s deodorant  
2 and told him “now [Plaintiff] could smell like a flaming queer.” *Id.* at 17.

3 When Plaintiff requested the return of his property, he was told by Defendant  
4 Elias to “prove it” and “you could 602 bitch.” *Id.* Plaintiff alleges that Defendant  
5 Davis then told Plaintiff “I’m going to get you killed Murillo.” *Id.* Plaintiff filed a staff  
6 complaint against Defendant Elias on April 5, 2012 and was assisting other inmates in  
7 filing grievances against Defendants Ives and Elias, which he alleges resulted in further  
8 retaliation by Defendants Elias, Davis and Ives. *Id.* Plaintiff alleges that Defendants  
9 Elias, Davis and Ives threatened Plaintiff that if he “continued to file staff complaints  
10 and help others, he would be sorry.” *Id.*

11 Plaintiff alleges that on July 26 and 27, 2011, Defendant Pickett and Davis  
12 violated his Eighth Amendment rights when they “forced Plaintiff to take an x-ray and  
13 exposing him to radiation without protection.” *Id.* at 18. Plaintiff alleges that they  
14 subjected him to “unwanted, unauthorized and offensive touching” when he was  
15 “pinned down” on the x-ray table. *Id.*

16 Plaintiff alleges that Defendant Hamilton also called Plaintiff a “faggot” in front  
17 of other inmates and threatened to “stick the baton into Plaintiff.” *Id.* at 19. Plaintiff  
18 further alleges that Defendant Hamilton informed other inmates of Plaintiff’s criminal  
19 history in an attempt to have other inmates “beat up” Plaintiff. *Id.* Plaintiff alleges that  
20 Defendant Hamilton told Plaintiff to “stay away” and “stop flirting” with inmate  
21 Rodriguez because this inmate “belonged” to Defendant Hamilton. *Id.* Plaintiff  
22 reported these threats to Defendant Goff, Sergeant Ashberry, Sergeant Strickland and  
23 Defendant Reed. *Id.* at 20. Plaintiff alleges Defendant Goff and Reed “failed to protect  
24 Plaintiff from the reported sexual harassment and from sexual misconduct from staff.”  
25 *Id.* Plaintiff alleges that Defendant Goff failed to investigate the issue and Defendants  
26 Reed and Goff threatened to put Plaintiff in Ad-Seg if he “continued to report the  
27 conduct” as retaliation. *Id.* at 21.

28 Plaintiff’s Complaint requests (1) an injunction preventing Defendants from

1 “further retaliation or placement in Ad-Seg without direct order from the chief warden,”  
2 (2) damages in the sum of \$500,000.00, (3) punitive damages in the sum of  
3 \$800,000.00, and (4) other “nominal compensation, pain and suffering, emotional pain,  
4 physical pain, court costs, costs incurred, [and] attorney[s] fees.” *Id.* at 7.

### 5 **III. Allegations of Complaint in the Present Action**

6 In 2011, Plaintiff was housed at the Richard J. Donovan Correctional Facility  
7 (“RJD”). (ECF No. 1 at 6. Plaintiff alleges that on December 31, 2011 he was  
8 slammed on the ground by Defendant Rucker, with assistance by Defendant Owens,  
9 and dragged across the dayroom floor. *Id.* Plaintiff alleges that after he was forced into  
10 a cell, Defendant Rucker started beating Plaintiff by punching and kicking Plaintiff in  
11 the face while Defendant Owens kept watch for Defendant Rucker. *Id.* Plaintiff alleges  
12 that Defendant Owens encouraged Defendant Rucker’s behavior and began to  
13 participate by also kicking Plaintiff. *Id.* at 7. Plaintiff alleges that Defendants Rucker  
14 and Owens threatened Plaintiff not to report the incident or he would regret it. *Id.*  
15 Plaintiff alleges that Defendants Rucker and Owens used excessive force against him  
16 as a form of retaliation for Plaintiff filing staff complaints against other officers within  
17 RJD. *Id.* at 6. Plaintiff alleges that Defendant Rucker then failed to provide Plaintiff  
18 with medical treatment. *Id.*

19 Plaintiff alleges that after reporting the beating by Defendants Rucker and  
20 Owens, he was housed in the RJD “crisis bed.” *Id.* at 9. Plaintiff alleges that on  
21 January 9, 2012, while still housed in the “crisis bed,” Defendant Cedano verbally  
22 assaulted him. *Id.* at 9. Plaintiff alleges that Defendant Cedano entered his cell door  
23 and pushed Plaintiff violently, which caused Plaintiff to fall to the floor and hit his head  
24 on the concrete wall. *Id.* Plaintiff alleges that Defendant Cedano jumped on Plaintiff,  
25 choked him, and covered up the use of force by claiming that he pinned Plaintiff down  
26 to give him a hormone shot. *Id.* Plaintiff alleges that the actions by Defendant Cedano  
27 were in retaliation for Plaintiff reporting the incident with Defendant Rucker. *Id.*

28 Plaintiff alleges that his attempts to file complaints and grievances relating to

1 these actions were thwarted by the actions of Defendant Cobb. *Id.* at 13. Plaintiff  
2 alleges that as a result, he was subjected to more harm, retaliation, sexual harassment,  
3 and beatings. *Id.* Plaintiff further alleges that Defendant Cobb had a duty to process  
4 staff complaints, especially dealing with claims of sexual harassment and excessive  
5 force, but he breached that duty. *Id.* at 15. Plaintiff alleges that Defendants Taylor and  
6 Solis retaliated against him by denying his medical appliances and property. *Id.*

7 Plaintiff alleges that on April 7, 2012, Defendants Elias, Ives, and Davis called  
8 Plaintiff, a transgender inmate, “a man with tits” and a “queer.” *Id.* at 10-12. Plaintiff  
9 alleges that Defendants Elias and Davis then went to search Plaintiff’s cell and  
10 confiscate his property, including his legal work. *Id.* at 10, 12. Plaintiff alleges that  
11 Defendant Davis read a personal letter belonging to Plaintiff to other inmates. *Id.* at 12.  
12 Plaintiff alleges that this was done in retaliation for Plaintiff assisting other inmates in  
13 filing grievances against Defendants Ives, Davis, and Elias. *Id.*

14 Plaintiff’s Complaint requests (1) damages in the sum of \$800,000.00, (2)  
15 punitive damages in the sum of \$800,000.00, and (3) other “nominal compensation,  
16 pain and suffering, emotional pain and physical pain, [and] costs incurred.” *Id.* at 18.

#### 17 **IV. Report and Recommendation**

18 The Magistrate Judge issued the Report and Recommendation Granting  
19 Defendants’ Motion to Dismiss Plaintiff’s Complaint with Prejudice. (ECF No. 32).  
20 The Magistrate Judge stated that “this Court must make a two-part determination. First,  
21 it must ascertain to what extent, if any, the First and Present Actions arise from the  
22 same concatenation of critical facts. Next, the Court weighs to what extent the parties  
23 are the same or in privity.” (ECF No. 32 at 15) (internal citations omitted).

24 The Magistrate Judge found that:

25 Here, it is clear the First and Present Actions share such a common  
26 transactional nucleus. The same purported misdeeds—retaliation during  
27 Plaintiff’s time at RJD; use of excessive force on December 31, 2011; a  
28 subsequent utilization of too much force on January 9, 2012; one more  
round of retaliation perpetrated while Plaintiff was at the RJD on April 7,  
2012; more retaliation and a related failure to properly file Plaintiff’s  
grievance; and the causes of action for negligence and intentional  
infliction of emotional distress, specifically based on the previous

1 allegations of retaliation and excessive force—underlie both actions.  
2 Additionally, it is certain that the Ninth Circuit’s decision regarding this  
3 Court’s dismissal of the First Complaint will affect the extent to which  
4 Defendants will be liable—and Plaintiff’s rights have been violated, and his  
5 request for redress timely made—for the very same actions that form the  
6 essential bedrock of the Present Action. If the Ninth Circuit determines  
7 Plaintiff’s First Complaint is time-barred, nearly every general action,  
8 from Defendants’ allegedly retaliatory acts to their use of excessive force  
9 to the emotional toll attributable to this conduct, detailed in the Present  
10 Complaint will just as surely be rendered unviable, and this action will  
11 need to be promptly dismissed. In other words, any “rights established by  
12 the judgment in the first action [by the Ninth Circuit] would be destroyed  
13 or impaired by a judgment in the present action,” *Adams*, 487 F.3d at 691;  
14 conversely, a negative decision in the former will itself destroy any chance  
15 for judgment in the present matter. Furthermore, as the papers make plain,  
16 Plaintiff seeks the same relief in both complaints—an injunction; “nominal  
17 damages, pain & suffering, emotional pain, physical pain, court cost, cost  
18 incurred, attorney fees”; punitive damages in the amount of \$800,000; and  
19 compensatory damages. (Compare Present Complaint at 18, with First  
20 Complaint at 7.) True, his request for damages has grown by \$300,000,  
21 but the same type of relief, at nearly the same financial quantity, is sought.  
22 Still, a more crucially, as a brief perusal reveals, “the facts essential to the  
23 second suit were present in the [Plaintiff’s] first suit.” *McCoy v. Blossom*,  
24 No. 09-cv-2146, 2014 U.S. Dist. LEXIS 37605, at \*14, 2014 WL  
25 1120346, at \*5 (W.D. La. Feb. 27, 2014). With the same general relief  
26 sought and the same general transaction pled, this Court finds a sufficient  
27 factual commonality, the first prong set forth in the Adams duplication  
28 test.

*Id.* at 16-17.

The Magistrate Judge further found that:

17 Here, though Jannush is named anew, this party has an interest concurrent  
18 with that of his colleagues and his employer, CDCR, all defendants against  
19 which Plaintiff moved in the First Action. Quite surely, the interest of the  
20 Present Action’s one new defendant were and are being “adequately  
21 represented by those in the first suit”; quite surely, the substance of this  
22 defendant’s rejoinder has been and will be made by his or her employer,  
23 the very agency “vested with the authority of representation” by statutory  
24 command. *Digennaro v. Whitehair*, 467 F. App’x 42, 44 (2d Cir. 2012)  
25 (quoting *Barclay*, 131 F. App’x at 779 (internal quotation marks omitted)).  
26 Furthermore—and significantly—the same tactical choices made by  
27 Defendants in the first suit will ultimately rebound to the benefit or the  
28 detriment of Jannush. If his colleagues are found exempt from liability,  
regardless of the basis he (or she) too will find himself (or herself) freed  
from further litigation implicating this same series of incidents. In short,  
a sufficient alignment between new and old herein appears, and an  
ineluctable privity of concern and advantage can be discerned from both  
the pleadings and the motions submitted in this proceeding. *McCarroll v.*  
*U.S. Fed. Bureau of Prisons*, No. 3:11-CV-934 (VLB), 2012 U.S. Dist.  
LEXIS 128394, at \*25–27, 2012 WL 3940346, at \*8 (D. Conn. Sept. 10,  
2012) (collecting cases so concluding); accord *Clark v. Kitt*, No.  
12-CV-8061 (CS), 2014 U.S. Dist. LEXIS 112494, at \*35, 2014 WL  
4054284, at \*11 (S.D.N.Y. Aug. 15, 2014) (holding that a new defendant  
was in sufficient privity with “her employer and co-workers” so as to



1 justify preclusion as well as citing to other cases in the same vein).  
2 Accordingly, based on this ever-accreting plethora of case law, this Court  
3 finds the second factor in Adams essential for deeming the Present Action  
4 duplicative of Plaintiff’s first iteration has been shown by the bare record  
5 alone, with no more evidence needed for this conclusion to be drawn.

6 *Id.* at 18-19. The Report and Recommendation concludes that “[f]or the  
7 aforementioned reasons, the Court RECOMMENDS the MTD be GRANTED with  
8 prejudice.” *Id.* at 20.

9 On May 11, 2015, Plaintiff filed an objection to the Report and Recommendation.  
10 (ECF No. 38).

### 11 **V. Discussion**

12 The duties of the district court in connection with a report and recommendation  
13 of a Magistrate Judge are set forth in Federal Rule of Civil Procedure 72(b) and 28  
14 U.S.C. § 636(b)(1). When a party objects to a report and recommendation, “[a] judge  
15 of the [district] court shall make a de novo determination of those portions of the  
16 [Report and Recommendation] to which objection is made.” 28 U.S.C. § 636(b)(1).

#### 17 **Plaintiff’s Objection to Report and Recommendation**

18 Plaintiff contends that “none of the claims in the first action or on appeal are  
19 time-barred.” *Id.* at 4. Plaintiff contends that the “current named Defendants are not  
20 named on the pending appeal before the Ninth Circuit, therefore - such Ninth Circuit  
21 should not effect the process or outcome of this current action.” *Id.* at 5.

#### 22 **Whether the Present Action is Duplicative of the First Action**

23 To ascertain whether the Present Action is sufficiently duplicative of the First  
24 Complaint, this Court must make a two-part determination. *See, e.g., Risinger v. SOC*  
25 *LLC*, 936 F. Supp. 2d 1235, 1245 (D. Nev. 2013) (noting that “two suits are duplicative  
26 where ‘the causes of action and relief sought, as well as the parties or privies to the  
27 action, are the same’ (citing Adams, 487 F.3d at 689)); *Goggia v. Fed. Nat’l Mortg.*  
28 *Ass’n*, No. Civ. S-12-3091 LKK/KJN, 2013 U.S. Dist. LEXIS 44202, at \*14, 2013 WL  
1279179, at \*5 (E.D. Cal. Mar. 27, 2013). First, it must ascertain to what extent, if any,  
the First and Present Actions arise from the same concatenation of critical facts. *See*

1 *Laube v. FURminator, Inc.*, 765 F. Supp. 2d 1206, 1207 (C.D. Cal. 2012) (finding that  
2 two actions “share a common transactional nucleus of facts” as both claims sought the  
3 same relief and disputed ownership of the same patents). Next, the Court weighs to  
4 what extent the parties are the same or in privity. *Adams*, 487 F.3d at 689. If the same  
5 cause of action and the same interests typify the two actions, dismissal on the basis of  
6 an action’s duplication is merited, whether the reason be deemed a complaint’s frivolity  
7 or its maliciousness, even though pro se filing are to be liberally construed. *See Patel*  
8 *v. Prince*, 276 F. App’x 531, 532 (8th Cir. 2008).

### 9 **Common Nucleus**

10 In *Adams*, the Ninth Circuit identified the four relevant criteria: “(1) whether  
11 rights or interests established in the prior judgment would be destroyed or impaired by  
12 prosecution of the second action; (2) whether substantially the same evidence is  
13 presented in the two actions; (3) whether the two suits involve infringement of the same  
14 right; and (4) whether the two suits arise out of the same transactional nucleus of facts.”  
15 *Adams*, 487 F.3d at 689 (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199,  
16 1201–02 (9th Cir. 1982)). A test adopted in the claim preclusion context, “[w]hether  
17 two events are part of the same transaction or series depends on whether they are related  
18 to the same set of facts and whether they could conveniently be tried together.” *W. Sys.*  
19 *Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992) (citing RESTATEMENT (SECOND)  
20 OF JUDGMENTS § 24(1) (1982)). The possibility that different evidence may be  
21 presented in the second action does not by itself foreclose a finding of a shared factual  
22 core. *Int’l Union of Operating Eng’rs-Emp’rs Constr. Indus. Pension v. Karr*, 994 F.2d  
23 1426, 1430 (9th Cir. 1993). A finding of every potential element listed in *Costantini*  
24 is hence not required so long as “two claims arose out of the same transaction.” *Id.*;  
25 *accord, e.g., Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000) (citing  
26 *Costantini*, 681 F.2d at 1201–02); *C.D. Anderson & Co., Inc. v. Lemos*, 832 F.2d 1097,  
27 1100 (9th Cir. 1987) (placing within a common nucleus any and all allegations that  
28 arose from a singular act of securities trading). In making this determination, a court

1 must be mindful of an old admonition: “[an] [a]ppellant is not permitted . . . to litigate  
2 piecemeal the issues which could have been resolved in one action.” *Flynn v. State Bd.*  
3 *of Chiropractic Examiners*, 418 F.2d 668, 668 (9th Cir. 1969) (per curiam); *see also*  
4 *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975) (noting that this rule “is made  
5 to apply to federal claims under 42 U.S.C. § 1983”).

6 The Magistrate Judge correctly applied the applicable standard and correctly  
7 found a “sufficient factual commonality” to satisfy the first prong of the *Adams*  
8 duplication test because the present action seeks the same general relief and pleads the  
9 same general transaction as the first action. (ECF No. 32 at 17).

### 10 **Same Parties and Privities**

11 If the same cause of action and the same interests typify the two actions,  
12 dismissal on the basis of an action’s duplication is merited, whether the reason be  
13 deemed a complaint’s frivolity or its maliciousness, even though pro se filing are to be  
14 liberally construed. *See Patel v. Prince*, 276 F. App’x 531, 532 (8th Cir. 2008). So long  
15 as even the new parties “represent the same interests,” a sufficient similarity exists. *The*  
16 *Haytian Republic*, 154 U.S. 118, 124, 14 S. Ct. 992, 993, 38 L. Ed. 930 (1894), cited  
17 in *Adams*, 497 F.3d at 689; *see also, e.g., Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th  
18 Cir. 2012) (discussing “the general principle regarding claim-spitting” still embodied  
19 by *The Haytian Republic*). Reflecting this second factor’s close, even derivative,  
20 connection to the doctrine of virtual representation, a court looks for “adequate  
21 representation” and such features as “a close relationship, substantial participation, and  
22 tactical maneuvering.” *Adams*, 487 F.3d at 691, cited in, *e.g., Thomas v. Almager*, No.  
23 1:07-cv-01132-OWW-TAG HC, 2008 U.S. Dist. LEXIS 63240, at \*3, 2008 WL  
24 2858361, at \*1 (E.D. Cal. July 24, 2008) (quoting *id.*); *Garza v. Warden*, No.  
25 1:07-cv-01067-LJO-TAG HC, 2008 U.S. Dist. LEXIS 4065, at \*3, 2008 WL 203564,  
26 at \*2 (E.D. Cal. Jan. 18, 2008) (same).


27 The Magistrate Judge correctly applied the applicable standard and correctly  
28 found that “the second factor in *Adams* essential for deeming the Present Action

1 duplicative of Plaintiff's first iteration has been shown by the bare record alone, with  
2 no more evidence needed for this conclusion to be drawn." (ECF No. 32 at 19).

3 **VI. Conclusion**

4 IT IS HEREBY ORDERED that the Report and Recommendation (ECF No. 32)  
5 is ADOPTED in its entirety. Defendants' Motion to Dismiss the Complaint as  
6 Duplicative of an Existing Action (ECF No. 13) is GRANTED with prejudice.

7 DATED: July 22, 2015

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9 **WILLIAM Q. HAYES**  
United States District Judge

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