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

ROBERT MCCULLOCK,

Plaintiff,

vs.

R. STEVEN THARRATT, et al.,

Defendants.

CASE NO. 16cv457-LAB (DHB)

**ORDER ADOPTING REPORT AND  
RECOMMENDATION; AND**

**ORDER DISMISSING COMPLAINT  
WITH LEAVE TO AMEND**

Plaintiff, a prisoner in state custody, filed this 28 U.S.C. § 1983 action. Defendants' motion to dismiss was referred to the magistrate judge for a report and recommendation. On January 20, 2017, Magistrate Judge Louisa Porter issued her report and recommendation (the "R&R"), recommending that the motion to be dismissed with leave to amend. The R&R also ordered McCullock to show cause why Jin Kul Yu should not be dismissed, because this Defendant has not been served as required by Fed. R. Civ. P. 4(m). (See Docket no. 12 (return of service unexecuted, dated July 13, 2016).) The R&R gave the parties until February 10, 2017 to file objections.

Plaintiff then filed a motion for extension of time (Docket no. 25), which the Court construed as a motion for more time to file an amended complaint and possibly also for an extension of time to show cause regarding his failure to serve Jin Kul Yu. The Court issued an order giving Plaintiff until April 12, 2017 to amend his complaint. The order noted that the

1 Court understood his request to mean he agreed with the R&R that his complaint should be  
2 dismissed without prejudice.

3 McCulloch in quick succession then filed two sets of objections to the R&R. (Docket  
4 nos. 27, 29.) A district court has jurisdiction to review a Magistrate Judge's report and  
5 recommendation on dispositive matters. Fed. R. Civ. P. 72(b). The Court may accept, reject,  
6 or modify, in whole or in part, the R & R's findings or recommendations. 28 U.S.C.  
7 § 636(b)(1). The Court reviews de novo those portions of the R & R to which specific written  
8 objection is made. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.2003) (en  
9 banc). "The statute makes it clear that the district judge must review the magistrate judge's  
10 findings and recommendations de novo *if objection is made*, but not otherwise." *Id.*

11 In his first set of objections, he complains that Magistrate Judge Louisa Porter is not  
12 the magistrate judge assigned to this case. Second, he alleges that the R&R "has not taken  
13 into consideration CCHCS's Utilization Management Medical Services Review Procedures."  
14 Third, he argues he has been denied discovery.

15 With regard to Judge Porter's involvement in this case, the Court referred the motion  
16 to dismiss to her, and mentioned this in its earlier order. Second, because McCulloch has  
17 not yet pleaded a claim, he is not yet entitled to discovery.<sup>1</sup> See *Mujica v. AirScan Inc.*, 771  
18 F.3d 580, 593 (9th Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009)) ("The  
19 Supreme Court has stated, however, that plaintiffs must satisfy the pleading requirements  
20 of Rule 8 before the discovery stage, not after it.") His terse and generalized objection that  
21 Judge Porter failed to take review procedures into account, without more, does not amount  
22 to a "specific written objection." But in his second set of objections, he adds more  
23 explanation.

24 McCulloch's second set of objections argues, without elaboration, that the R&R did  
25 not liberally construe his complaint. Although the Court agrees such pleadings are to be  
26 liberally construed, see *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), this standard does not

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28 <sup>1</sup> McCulloch has not requested jurisdictional discovery. See, e.g., *Columbia Ins. Co.*  
*v. seescandy.com*, 185 F.R.D. 573, 577 (N.D. Cal. 1999). But even if he had, it is not  
apparent he would be entitled to it.

1 allow the Court to plead McCullock's claims for him. See *Ivey v. Board of Regents of the*  
2 *Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.1982). He doesn't say what he thinks the R&R  
3 missed, or how his complaint should have been construed. The Court has reviewed the  
4 R&R and finds that it properly identified and applied standards applicable to *pro se* civil rights  
5 complaints. (See R&R at 7:27–8:9 (giving standards for construction of *pro se* civil rights  
6 claims).)

7 McCullock also cites *Hydrick v. Hunter*, 449 F.3d 978, 991 (9<sup>th</sup> Cir. 2006) for the  
8 principle that supervisors can be liable for constitutional violations by their subordinates, if  
9 they knowingly failed to prevent them. On this basis, he contends that Defendants are liable  
10 for the poor medical treatment he has been receiving, because they reviewed his requests  
11 for service. That decision has since been modified, however. See *Hunter v. Hydrick*, 129  
12 S. Ct. 2431 (2009) (vacating and remanding for further consideration in light of *Iqbal*);  
13 *Hydrick v. Hunter*, 669 F.3d 937, 942 (9<sup>th</sup> Cir. 2012) (requiring plaintiffs alleging supervisory  
14 liability to plead specific facts showing the supervisors' participation in wrongdoing).

15 No alleged facts connect Defendants Steven Tharratt, a state official, and Daniel  
16 Paramo, warden of the prison where McCullock is held, with any deprivations of his rights.  
17 McCullock's is essentially either a *respondeat superior* theory, or a negligence claim based  
18 on their knowledge that prison medical care was generally bad. (See Complaint (Docket no.  
19 1) at 2 (alleging Tharratt and Paramo are responsible for those under them, and therefore  
20 should be held liable) and 10–11 (alleging these two Defendants are responsible because  
21 they knew prison medical care was generally bad, and failed to act).) Factual allegations  
22 connecting Defendants Glynn (*id.* at 3), Roberts (*id.* at 4), and Walker (*id.* at 4–5) with  
23 violations of McCullock's constitutional rights are also missing.

24 The complaint also asserts that several of these Defendants failed to adequately train  
25 Defendant Jin Kul Yu, but provides no factual allegations to support this conclusion. The  
26 complaint alleges that after McCullock was denied adequate medical care, some of these  
27 Defendants required Jin Kul Yu to undergo a 30-minute training session, which the complaint  
28 alleges was inadequate. It also alleges that Walker removed Jin Kul Yu from his position

1 later. But those things happened only after McCullock alleges the violations occurred, and  
2 could not have caused any injury to him. No facts are alleged to support a claim that these  
3 Defendants knew of and were deliberately indifferent to a serious risk of harm to McCullock.

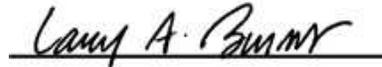
4 After a review of the complaint, the Court finds it to be inadequately pled. Even with  
5 the benefit of liberal construction, it does not meet pleading standards. See *Erickson*, 551  
6 U.S. at 94; *Hydrick*, 669 F.3d at 942.

7 Other than this, McCullock has offered no specific written objections. For reasons set  
8 forth above, the objections are **OVERRULED** and the R&R is **ADOPTED**. The complaint is  
9 **DISMISSED WITH LEAVE TO AMEND**. No later than **April 12, 2017**, McCullock shall file  
10 his amended complaint that corrects the defects the R&R identified. **Failure to file an**  
11 **amended complaint as ordered may result in dismissal of the case without further**  
12 **notice to McCullock.**

13 McCullock must still show cause why Defendant Jin Kul Yu should not be dismissed  
14 for failure to serve, as previously ordered. (See Docket no. 26.)

15 **IT IS SO ORDERED.**

16 DATED: February 15, 2017

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18 **HONORABLE LARRY ALAN BURNS**  
19 United States District Judge

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