UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 23 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JEFF BAOLIANG ZHANG, Ph.D,

Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; LOS ANGELES SHERIFF'S DEPARTMENT, at TTCF; DOES, 1 through 20,

Defendants-Appellees.

No. 23-55353

D.C. No. 2:22-cv-08365-GW-PVC
Central District of California,
Los Angeles

ORDER

Before: FERNANDEZ, NGUYEN, and OWENS, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On July 13, 2023, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the responses to the court's July 13, 2023 order, and the opening brief filed on May 24, 2023, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 9) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions and requests are denied as moot.

app. 4

No further filings will be entertained in this closed case.

DISMISSED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF BAOLIANG ZHANG,

Plaintiff,

v.

COUNTY OF LOS ANGELES, et al.,

Defendants.

Case No. CV 22-8365 GW (PVC)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE RE: DEFENDANTS' MOTION TO DISMISS (Dkt. No. 10)

This Report and Recommendation is submitted to the Honorable George H. Wu, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I.

INTRODUCTION

Plaintiff, a former state prisoner, filed the instant *pro se* civil rights action on November 16, 2022, more than two years after his release from custody. ("Complaint," Dkt. No. 1, ¶ 10). The suit challenges Plaintiff's treatment as a pre-trial detainee at the Twin Towers Correctional Facility in Los Angeles from December 2011 to October 2015. (*Id.* ¶ 2).

On December 8, 2022, the County of Los Angeles ("Defendant") filed a Motion to Dismiss Complaint, ("MTD," Dkt. No. 10), supported by the declaration of counsel Laura E. Inlow and accompanying exhibits ("Inlow Decl.," *id.* at 22-24; "Exhs. A-G," Dkt. Nos. 10-1 through 10-7), and a Request for Judicial Notice.[1] ("RJN," Dkt. No. 10-9; "RJN Exhs. A-F," Dkt. Nos. 10-10 through 10-15). After Plaintiff failed to file a timely opposition, the Court *sua sponte* extended the deadline for doing so to January 23, 2023. (Dkt. No. 15). However, instead of filing an opposition to the Motion to Dismiss, on January 23, 2023 Plaintiff filed an "Opposition to 2 Judges' Willful Orders," in which he primarily complained that the District Judge and Magistrate Judge assigned to his case had wrongfully denied his motions for recusal and for appointment of counsel. ("Opp.," Dkt. No. 17). The Opposition utterly failed to address the issues raised in the Motion to Dismiss, which is therefore functionally unopposed. Defendant filed a Reply on January 26, 2023. ("Reply," Dkt. No. 18).

The Complaint suffers from numerous incurable deficiencies. Because amendment

---

[1] "When ruling on a motion to dismiss, [a court] may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Colony Cove Properties, LLC v. City Of Carson*, 640 F.3d 948, 955 (9th Cir. 2011) (internal quotation marks omitted). "[N]otice may be taken where the fact is 'not subject to reasonable dispute,' either because it is 'generally known within the territorial jurisdiction,' or is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017, 1026 (9th Cir. 1992) (quoting Fed. R. Evid. 201(b)). Courts are permitted to take judicial notice of matters of public record without converting a Rule 12(b)(6) motion into a motion for summary judgment. *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007). This includes decisions and proceedings in state court. *See Rosales-Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014) ("It is well established that we may take judicial notice of judicial proceedings in other courts."); *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) ("We may take judicial notice of undisputed matters of public record, including documents on file in federal or state courts." (citations omitted)).

Defendant requests judicial notice of Plaintiff's First Amended Complaint filed in the Los Angeles County Superior Court on September 22, 2021 in the matter of *Jeff Baoliang Zhang, Ph.D. v. Los Angeles Cnty. Sheriff Dept.*, L.A. Cnty. Sup. Ct. Case No. 21STCV27608, and several other state court decisions arising from or related to that action. (RJN, Exhs. A-F). All of the documents are matters of public record, the existence of which cannot be reasonably disputed, and Plaintiff has raised no objection to Defendant's Request for Judicial Notice of these documents. Accordingly, Defendant's Request for Judicial Notice is GRANTED.

would be futile, it is recommended that the Court GRANT Defendant's Motion to Dismiss in part and DISMISS this action with prejudice as untimely, and, with respect to Claim I, as barred by the claim preclusion doctrine, or, in the alternative, dismissing this action without prejudice, but without leave to amend, pursuant to the *Rooker-Feldman* doctrine and for failure to state a claim.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff fired gunshots at the Chinese consulate building in Los Angeles on December 15, 2011 because he believed that Chinese agents were attempting to murder him due to his political beliefs. (Compl., Exh. D at 31).[2] He was 67 years old at the time of the incident. (Id. ¶ 74). He turned himself in to the Brea City Police Department, (*id.* at 31), and was taken into the custody of the Los Angeles County Sheriff's Department. (*Id.* at 2). Plaintiff was housed at the Twin Towers Correctional Facility ("Twin Towers") from December 2011 to October 2015, (*id.* ¶ 2), except for two periods when he was sent to Patton State Hospital "for a bogus mental case," from April 2, 2012 to February 10, 2013, and again from May 13, 2013 to January 26, 2014. (*Id.* ¶ 13).

On March 11, 2013 – in between Plaintiff's two stays at Patton State Hospital – Plaintiff was assigned a new cellmate at Twin Towers. (*Id.* ¶ 15). The cellmate attacked Plaintiff and caused him to suffer serious injury that Plaintiff contends the County did not adequately treat. (*Id.* ¶¶ 18-34). Plaintiff filed a government tort claim concerning the attack on July 25, 2013. (*Id.* ¶ 35 & Exh. A). The County denied the claim on September 16, 2013. (*Id.*, Exh. B). In the claim and denial letter, Plaintiff was advised that he had only six months to file a court action on this claim. (*Id.*).

[2] Citations to the exhibits attached to the Complaint will follow the CM/ECF-generated page numbers.

Following competency proceedings in July 2015, Plaintiff was deemed capable of standing trial. (*Id.* at 32-33). In October 2015, Plaintiff accepted a plea deal under which he was convicted of aggravated assault in violation of California Penal Code § 245(b), with an enhancement pursuant to Penal Code § 12022.5(a) for personally using a firearm in the commission of a felony, and was sentenced to nine years in state prison. (*Id.* at 34-35). He was transferred to the custody of the California Department of Corrections and Rehabilitation later that same month. (*Id.* ¶ 46). Plaintiff served at least part of his sentence at Atascadero State Hospital. (*See id.* ¶ 50). He was discharged from the state's physical custody on July 6, 2020. (*Id.* at 47). However, because Plaintiff had to serve a year on parole, he did not "get back his freedom until after August 2021." (*Id.* ¶ 72).

Approximately one year following his release from custody, on July 1, 2021, Plaintiff filed suit against the County of Los Angeles in the Los Angeles County Superior Court. (*Id.* at 49). Plaintiff's First Amended Complaint ("FAC") in that action followed on September 22, 2021. (*See* Inlow Decl., ¶ 3 & Exh. B; RJN, Exh. A). The FAC raised three claims, all arising from Plaintiff's detention at Twin Towers while he was a pre-trial detainee. Specifically, Plaintiff alleged that the County: (1) denied him proper medical care after he was attacked by his cellmate in March 2013 (Claim I); (2) blocked his access to a newly-hired private attorney, which forced him to continue his defense with his "evil" "rascal" attorney (Claim II); and (3) blocked his communications, both written and telephonic, with friends, government agencies, news media, and the ACLU, thereby thwarting his attempts to get outside assistance for his defense (Claim III). (FAC ¶¶ 4-43).

The County filed a demurrer to the FAC on October 12, 2021. (MTD at 2). On January 26, 2022, the Superior Court dismissed the first cause of action without leave to amend on timeliness grounds, and, in the alternative, on the merits, and the second and third causes of action with leave to amend within ten days because the record before the

court did not disclose whether those claims had ever been submitted to the County pursuant to California's Government Claims Act.[3] (Inlow Decl., ¶ 4 & Exh. C). After Plaintiff failed to file an amended complaint by the court's deadline, on February 18, 2022, the County filed an *ex parte* application seeking dismissal of the entire action on that ground. (MTD at 2). The *ex parte* application was granted at a hearing on February 22, 2022, and the Superior Court entered the Order and Judgment of Dismissal dismissing the FAC with prejudice on May 18, 2022. (MTD at 2; *see also* Inlow Decl., ¶ 5 & Exh. D).

Plaintiff filed a notice of appeal of the Superior Court's adverse judgment on March 7, 2022. (*Id.*, ¶ 6 & Exh. E). The Court of Appeal dismissed the appeal on procedural grounds on July 7, 2022. (*Id.*, ¶ 7 & Exh. F). The California Supreme Court denied Plaintiff's petition for review on September 26, 2022. (*Id.*, ¶ 8 & Exh. G). Plaintiff filed his federal action just over seven weeks later, on November 16, 2022. (Dkt. No. 1).

III.

ALLEGATIONS OF THE COMPLAINT

The Complaint in this action, brought less than two months after the California Supreme Court denied Plaintiff's petition for review, sues the County of Los Angeles and Doe Defendants 1-20, all of whom were Sheriff's Deputies at Twin Towers at the time of the incidents at issue. (Compl. at 1, ¶¶ 5-6). The claims and allegations closely track

[3] As one California court explained: "The Government Claims Act requires that, before filing a complaint for money or damages against a public entity, the plaintiff must present the claim to the entity in a manner set forth in the statutes and within a statutory deadline. (*See* Gov. Code, §§ 910, 945.4.) Compliance with these provisions is an element of a lawsuit seeking monetary damages against a public entity. (*State of California v. Superior Court* (*Bodde*) (2004) 32 Cal.4th 1234, 1237, 1239-1245.) If the plaintiff does not properly allege compliance with these provisions, the suit is subject to dismissal on a demurrer. (*Id.* at p. 1241.)" *McCallum v. Escondido Union High Sch. Dist.*, 2012 WL 967622, at *5 (Cal. Ct. App. Mar. 22, 2012).

those in Plaintiff's Superior Court complaint.

A. Alleged Cellmate Attack And Failure To Provide Medical Care

Plaintiff alleges that on March 11, 2013, approximately one month after he came back to Twin Towers following his first extended stay at Patton State Hospital, he was assigned a new cellmate, a "strong, black man in his late 40's." (*Id.* ¶¶ 14-15). That evening, the cellmate demanded that Plaintiff give him a burrito that Plaintiff had set aside, which Plaintiff did. The cellmate also demanded that Plaintiff relinquish his lower bunk and blanket to him, which Plaintiff refused to do. (*Id.* ¶¶ 16-18). When Plaintiff was brushing his teeth in preparation to go to bed, the cellmate punched Plaintiff's right temple, which caused Plaintiff to almost fall to the ground. (*Id.* ¶¶ 18-19). Plaintiff pressed the emergency button, and another inmate also tried to find an officer. (*Id.* ¶ 21). Approximately ten minutes later, an officer appeared and, after Plaintiff told him about the "sudden vicious attack," took him to the clinic. (*Id.* ¶ 22).

At the clinic, Plaintiff told the nurse on duty that he was in "severe pain" and needed to see a doctor. (*Id.*). The nurse "immediately made a phone call" and told Plaintiff that a doctor was coming. (*Id.* ¶ 23). While Plaintiff was waiting for the doctor to arrive, the nurse took "some care" of him by giving him a small pack of ice and telling him to place it on his head where it hurt. (*Id.*). Then the nurse "disappeared," and the doctor never came. (*Id.* ¶¶ 23-24). After three in the morning, the nurse returned and told Plaintiff to go back to his cell. (*Id.* at ¶ 24). When he got to the cell, an officer led him to a different unit nearby. (*Id.* ¶ 25).

Plaintiff was in "a lot of pain" for "quite a few days" and kept asking for a doctor. (*Id.* ¶ 26). The only treatment he received was Tylenol, which he got from the evening shift nurse. (*Id.*). When the pain finally subsided, Plaintiff still suffered from a "strong

numbness" on the right side of his head. (*Id.* ¶ 27). Plaintiff asked to see a neurologist, but his requests were denied. (*Id.*). He eventually saw a physician in mid-April, but the only care the doctor offered was sleeping pills. (*Id.*).

Finally, on April 30, 2013, some 50 days after the incident, Plaintiff was seen by a neurologist. (*Id.* ¶ 28). She performed a few tests, including pricking the numb portion of Plaintiff's head with a pin, which showed that the numbness was "quite severe." (*Id.* ¶ 29). Afterwards, Plaintiff had no more check-ups, despite making many requests for medical care. (*Id.* ¶ 30). A physician looked at Plaintiff and offered sleeping pills again, but Plaintiff's request to see a neurologist was denied. (*Id.*).

According to Plaintiff, "jail staff paid little attention all the time to Plaintiff's injury from the violent incident." (*Id.*). Plaintiff believes that the attack by his cellmate was "premeditated" by the Doe Defendants at Twin Towers because the assault was sudden, staff showed "willful neglect and disregard" concerning his medical condition and treatment, and the cellmate went unpunished. (*Id.* ¶ 32). Plaintiff contends that staff were paid off by Chinese communists to have him killed. (*Id.* ¶ 33).

In May 2020, when Plaintiff was housed at Atascadero State Hospital, he saw a neurologist for a second time. (*Id.* ¶ 34). The neurologist told Plaintiff to wait longer for his nerve injury to recover. (*Id.*). Plaintiff continues to suffer a "kind of numbness" occasionally on the right side of his head, though the symptoms are not as severe as they once were. (*Id.*).

B. Interference With Plaintiff's New Attorney

In mid-August 2015, with the assistance of an inmate and his outside relatives, Plaintiff was able to hire a new attorney to replace the attorney who was representing him.

(*Id.* ¶ 37). Plaintiff asserts that his old attorney was "harmful" and worked for Chinese communists against Plaintiff's interests. (*Id.*). Plaintiff informed his old attorney about his new attorney before the new attorney came to see Plaintiff at the jail. (*Id.*).

However, when the new attorney arrived at the jail on August 17, 2015, Doe Defendants arrested him on the ground that because Plaintiff was already represented, no new attorney was allowed. (*Id.* ¶ 38). The new attorney was held in jail for one day before he was released. (*Id.*). The new attorney also attempted to see Plaintiff at the courthouse on August 25, 2015, but Doe Defendants blocked him there, too. (*Id.*).

Because Plaintiff's new attorney was prevented from working on Plaintiff's case, Plaintiff's old, "evil" attorney remained his counsel and was able to continue to "bring more devastating harms" to Plaintiff, including a nine-year term plea deal based on Plaintiff's "wrongful conviction." (*Id.* ¶ 39). Plaintiff asserts that the new attorney would have taken his case to trial and secured his freedom. (*Id.*).

C. Interference With Plaintiff's Communications

Plaintiff alleges that while he was incarcerated at Twin Towers, Doe Defendants blocked him from communicating with the outside world. (*Id.* ¶ 40). Although Plaintiff wrote "many letters" "to friends, to federal government agencies, and to some news media" regarding the lawless conduct of government agencies involved in his case, he "could never get a word in reply." (*Id.*). Similarly, Plaintiff made many phone calls to secure "effective outside assistance" such as when, for example, the County Public Defender's Office slandered him with false medical reports in the Spring of 2013 and forced his return to Patton State Hospital. However, the Doe Defendants blocked the calls. (*Id.* ¶ 41). Plaintiff made over 100 calls to the American Civil Liberties Union to ask for help, but none of the calls went through, even though Plaintiff used his personal

money for the calls. (*Id.*).

The Doe Defendants who prevented Plaintiff from reaching the outside world represented the interests of Chinese communists. (*Id.* ¶ 42). As a result, Plaintiff suffered terribly, including being tortured at Twin Towers and being subjected to involuntary medication at the mental hospital. (*Id.*). He was also wrongfully convicted and sentenced to a nine-year term. (*Id.*).

D. Plaintiff's Claims And Prayer For Relief

The Complaint purports to raise four civil rights claims under 42 U.S.C. § 1983. First, Plaintiff claims that the County's failure to provide medical assistance following the March 2013 attack by his cellmate constituted cruel and unusual punishment under the Eighth Amendment and elder abuse in light of his advanced age. (*Id.* ¶¶ 43-44). Second, Plaintiff contends that the Doe Defendants deprived him of the opportunity to hire a reasonable attorney by preventing the new attorney from meeting with him, in violation of his First Amendment rights. (*Id.* ¶¶ 51-52). Third, Plaintiff argues that the willful blockage of his communications with the outside world while he was incarcerated at Twin Towers also violated his First Amendment rights. (*Id.* ¶ 53). Fourth, Plaintiff maintains that all of the aforementioned mistreatment constituted elder abuse because he was already 67 years old when he was sent to Twin Towers in 2011.[4] (*Id.* ¶ 54). Plaintiff

[4] Plaintiff attempts to style his "elder abuse" cause of action as a federal constitutional violation. (*See* Complaint at 14 (heading stating "Fourth Cause of Action – 42 U.S.C. Civil Rights Violations – Elder Abuse – Torture and Maltreatment at Plaintiff's Senior Age"); *see also id.* ¶ 43 (alleging that the County's failure to treat Plaintiff's injuries following the attack by his cellmate violated the 8th Amendment and also qualified as "elder abuse as Plaintiff was 69 years old when [he] received such vicious attack without medical treatment")).

Although Plaintiff attempts to frame his elder abuse allegations as violations of his constitutional rights, it is also possible that he is attempting to raise a claim under California's Elder Abuse Act, codified at Cal. Welf. & Inst. Code §§ 15600-15675. Elsewhere in the Complaint, Plaintiff expressly invokes that statute, stating "Under California's Elder Abuse and Dependent Adult Civil Protection Act, physical elder abuse

appears to seek monetary damages for the wrongs committed against him, although he frames his prayer for relief simply as seeking unspecified "relief." (*Id.* at 20).

IV.

DEFENDANT'S MOTION TO DISMISS

Defendant seeks dismissal of Plaintiff's claims on multiple alternative grounds. First, Defendant argues that all of Plaintiff's claims are barred by the doctrine of *res judicata*. (MTD at 5-6). Second, Defendant contends that all of Plaintiff's claims are time-barred. (*Id.* at 6-9). Third, Defendant argues that all of Plaintiff's claims are barred under the *Rooker-Feldman* doctrine. (*Id.* at 10-11). Fourth, Defendant maintains that all of Plaintiff's claims are unexhausted, in violation of the Prison Litigation Reform Act. (*Id.* at 11-12). Fifth, Defendant asserts that all of Plaintiff's claims fail on the merits. (*Id.* at 12-14).

Although Plaintiff filed an Opposition, it did not address any of Plaintiff's contentions in the MTD, but instead targeted the Court's adverse rulings on other issues. Indeed, Plaintiff concludes his Opposition by stating: "Hey, corrupt judges, you can do whatever to this case. . . . You can deny everything from Plaintiff for the case now. But you are forever on the shameful monument for your impudence, wickedness, and corruption in the American judicial system." (Opp. at 7). Accordingly, the MTD is functionally unopposed, and Defendant's MTD could be granted on that ground alone, as Defendant argues in its Reply. (*See* Reply at 2-3); *see also* C.D. Cal. L.R. 7-12 (with an exception not relevant here, a party's failure to file a required document "may be deemed

---

includes physical injuries, sexual abuse, neglect, abandonment, abduction, failure to provide necessities, and isolation." (Complaint at 18) (citing Cal. Welf. & Inst. Code § 15610, *et seq.*). To state a claim under the Elder Abuse Act, "a plaintiff must show defendant was guilty of 'recklessness, oppression, fraud, or malice in the commission of [physical, neglectful, or financial elder abuse].'" *Benen v. Superior Court*, 123 Cal. App. 4th 113, 119 (2004) (quoting Cal. Welf. & Inst. Code § 15657; brackets in original).

consent to the granting . . . of the motion").

V.
STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the court may dismiss a complaint for failure to state a claim if the plaintiff fails to proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although the plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[,]" *Twombly*, 550 U.S. at 555, "[s]pecific facts are not necessary; the [complaint] need only give the defendant[s] fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (*per curiam*) (citations and internal quotation marks omitted). Similarly, "'[s]pecific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief.'" *Williams v. Boeing Co.*, 517 F.3d 1120, 1131 (9th Cir. 2008) (quoting *Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001)).

When determining whether to dismiss a complaint for failure to state a claim, the court must accept the complaint's allegations as true, *Twombly*, 550 U.S. at 555-56, construe the pleading in the light most favorable to the pleading party, and resolve all doubts in the pleader's favor. *Berg v. Popham*, 412 F.3d 1122, 1125 (9th Cir. 2005). However, the court "need not accept as true allegations contradicting documents that are referenced in the complaint or that are properly subject to judicial notice." *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2006). Likewise, "the tenet that a court must

accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

Dismissal for failure to state a claim can be warranted based on either a lack of a cognizable legal theory or the absence of factual support for a cognizable legal theory. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint may also be dismissed for failure to state a claim if it discloses some fact or complete defense that will necessarily defeat the claim. *Franklin v. Murphy*, 745 F.2d 1221, 1228-29 (9th Cir. 1984), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319, 324 & n.3 (1989). *Pro se* pleadings are "to be liberally construed" and are held to a less stringent standard than those drafted by a lawyer. *Erickson*, 551 U.S. at 94; *see also Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010) ("[W]e continue to construe pro se filings liberally when evaluating them under *Iqbal*."). However, "a liberal interpretation of a pro se civil rights complaint may not supply essential elements of the claim that were not initially pled." *Litmon v. Harris*, 768 F.3d 1237, 1241 (9th Cir. 2014) (internal quotation marks and citation omitted).

If the court finds that a complaint fails to state a claim, it must also decide whether to grant the plaintiff leave to amend. Even when a request to amend is not made, "[l]eave to amend should be granted unless the pleading could not possibly be cured by the allegation of other facts, and should be granted more liberally to pro se plaintiffs." *Lira v. Herrera*, 427 F.3d 1164, 1176 (9th Cir. 2005) (internal quotation marks omitted); *Lopez v. Smith*, 203 F.3d 1122, 1128-29 (9th Cir. 2000) (*en banc*). However, if amendment of the pleading would be futile, leave to amend is properly denied. *See Ventress v. Japan Airlines*, 603 F.3d 676, 680 (9th Cir. 2010); *Mirmehdi v. United States*, 689 F.3d 975, 985 (9th Cir. 2012) ("[A] party is not entitled to an opportunity to amend his complaint if any potential amendment would be futile . . . ."); *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1039 (9th Cir.2002) ("Because any amendment would be futile, there was no need to

prolong the litigation by permitting further amendment.").

VI.

DISCUSSION

Defendant raises several alternative grounds for dismissal of Plaintiff's claims. While not all of Defendant's arguments are successful, it is clear that the Complaint suffers from certain incurable defects such that dismissal of this action is warranted.

A. Plaintiff's Claim Alleging The County's Failure To Provide Medical Care Is Barred By The Doctrine Of *Res Judiciata*

"'Res judicata' describes the preclusive effect of a final judgment on the merits" on further litigation. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896 (2002). Although *res judicata* is an affirmative defense that typically rests on facts outside the complaint, the Ninth Circuit has routinely held that a *res judicata* defense may be raised in a motion to dismiss under Rule 12(b)(6) so long as it does not depend on disputed issues of fact. *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984); *see also Goldberg v. Cameron*, 694 Fed. App'x. 564, 566 (9th Cir. 2017).

"Under 28 U.S.C. § 1738, federal courts are required to give state court judgments the preclusive effects they would be given by another court of that state." *Brodheim v. Cry*, 584 F.3d 1262, 1268 (9th Cir. 2009) (citing *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984), and *Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004)); *see also* 28 U.S.C. § 1738 (authenticated records and judicial proceedings of any state, territory or possession of the United States "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are

taken"). Accordingly, when determining whether claims adjudicated in California state court are precluded in a subsequent federal action, a district court applies the California law of *res judicata*. *See Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993) (to determine the preclusive effect of a state court judgment, federal courts look to state law).

Under California law, claim preclusion, the "primary aspect" of *res judicata*, "acts to bar claims that were, or should have been, advanced in a previous suit involving the same parties." *DKN Holdings LLC v. Faerber*, 61 Cal. 4th 813, 824 (2015). In contrast, issue preclusion, the "secondary aspect" of *res judicata*, "historically called collateral estoppel, describes the bar on relitigating issues that were argued and decided in the first suit." (*Id.*). The California Supreme Court notes that "[i]t is important to distinguish these two types of preclusion because they have different requirements," and explains:

> *Claim preclusion* "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. If claim preclusion is established, it operates to bar relitigation of the claim altogether.
>
> *Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action. Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party.

> [¶] . . . . In summary, issue preclusion applies: (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.

Id. at 824-25 (internal case citations omitted; italics and brackets in original).

Furthermore, with respect to claim preclusion, the Ninth Circuit explains,

> California law holds a final judgment of a state court "precludes further proceedings if they are based on the same cause of action." *Maldonado*, 370 F.3d at 952. Unlike the federal courts, which apply a "transactional nucleus of facts" test, "California courts employ the 'primary rights' theory to determine what constitutes the same cause of action for claim preclusion purposes." *Id.*
>
> Under this theory, "a cause of action is (1) a primary right possessed by the plaintiff, (2) a corresponding primary duty devolving upon the defendant, and (3) a harm done by the defendant which consists in a breach of such primary right and duty." *City of Martinez v. Texaco Trading & Transp., Inc.*, 353 F.3d 758, 762 (9th Cir. 2003), citing *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App. 4th 1053, 1065, 71 Cal. Rptr. 2d 77 (1998). "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170, 1174, 197 Cal. Rptr. 612 (1983), quoted in [*San Diego Police Officers' Ass'n v. San*

Diego City Employees' Retirement Sys., 568 F.3d 725, 734 (9th Cir. 2009)]. *Brodheim*, 584 F.3d at 1268; *see also Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 798 (2010) (for *res judicata* purposes, a "claim" or "cause of action" is "the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced").

As noted above, the Los Angeles County Superior Court granted the County's demurrer and dismissed the first cause of action in Plaintiff's state court FAC without leave to amend, and the second and third causes of action with leave to amend within ten days. (Inlow Decl., ¶ 4 & Exh. C). Despite having received leave to amend, Plaintiff failed to file an amended complaint by the court's deadline. (MTD at 2). Accordingly, the County moved *ex parte* for dismissal of the entire action pursuant to California Civil Procedure Code § 581(f)(2), which provides, with an exception not relevant here, that a court may dismiss a complaint when, "after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal." The Superior Court granted the County's *ex parte* application and dismissed the action with prejudice pursuant to § 581(f)(2). (*See* Inlow Decl., ¶ 5 & Exh. D). Thereafter, the California Court of Appeal dismissed Plaintiff's appeal, (*id.*, ¶ 6 & Exh. E), and the California Supreme Court denied Plaintiff's petition for review. (*Id.*, ¶ 8 & Exh. G).

Defendant's contention that Plaintiff's claims are barred by "*res judicata*" rests on the doctrine claim preclusion. (MTD at 5-6). Accordingly, Plaintiff's claims are barred if they involve "(1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." *DKN Holdings*, 61 Cal. 4th at 824. The Court concludes that claim preclusion bars Claim I, but not Claims II or III because neither of the latter two claims was dismissed on the merits.

The first *res judicata* factor is satisfied as to the claims Plaintiff raises here. Plaintiff not only raised the same three claims in his state court FAC that he raises in his federal Complaint, but he did so in the same order. In both his state and federal pleadings, Plaintiff asserts that the County, or its agents, (1) denied him proper medical care after he was attacked by his cellmate in March 2013 (Claim I); (2) blocked his access to a newly-hired private attorney, which forced him to continue his defense with his "evil" "rascal" attorney (Claim II); and (3) blocked his communications, both written and telephonic, with friends, government agencies, news media, and the ACLU, thereby thwarting his attempts to get outside assistance for his defense (Claim III). (FAC ¶¶ 4-43; *compare* Complaint ¶¶ 13-42). The same harms for which Plaintiff seeks redress are alleged in both actions. Although Plaintiff did not expressly allege in his state court action that the County was liable for elder abuse, that claim is merely a different theory of recovery that arises from the same "primary rights" to medical care, representation by counsel of choice, and communication in furtherance of a criminal defense that are put at issue in both the state and federal actions. (*See* Complaint ¶¶ 68-70). Additionally, Plaintiff could have raised his elder abuse claim it in state court.

The second *res judicata* factor is also satisfied, as the parties are the same. Plaintiff, the party against whom the *res judicata* doctrine is being invoked, was also the plaintiff in the state court action. Likewise, the County of Los Angeles was the defendant in both the state court action and the instant action. (*See id.*, Exh. C (Superior Court decision noting that Plaintiff "filed suit against the County of Los Angeles (erroneously named as Los Angeles County Sheriff's Department")). To the extent that Plaintiff purports to sue unknown Los Angeles County Sheriff's Department deputies in the instant action, they are "in privity" with Los Angeles County, the named Defendant in each action. *See Branson v. Sun-Diamond Growers*, 24 Cal. App. 4th 327, 340 (1994) ("In its primary aspect, *res judicata* operates as a bar to the maintenance of a second suit between the same parties or parties in privity with them on the same cause of action.").

However, of Plaintiff's three state law claims, only the first was arguably adjudicated on the merits, and as such, only Claim I satisfies all three *res judicata* factors. As one California court recently explained:

> "A judgment or adjudication is on the merits if the substance of the claim or issue is tried and determined." ([(*Parkford Owners for a Better Community v. Windeshausen* (2022) 81 Cal. App. 5th 216, 227, 296 Cal. Rptr. 3d 825] [neither claim nor issue preclusion applied where appeal in first action was dismissed as moot]; *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 77, 99 Cal. Rptr. 2d 316, 5 P.3d 874 [trial court's ruling based on laches was not a judgment on the merits].) "'A prior adjudication of an issue in another action may be deemed "sufficiently firm" to be accorded preclusive effect based on the following factors: (1) whether the decision was not avowedly tentative; (2) whether the parties were fully heard; (3) whether the court supported its decision with a reasoned opinion; and (4) whether the decision was subject to an appeal.'" (*South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal. App. 4th 634, 663, 123 Cal. Rptr. 3d 301; *accord, Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal. App. 4th 1538, 1565, 49 Cal. Rptr. 3d 259.)

Mills v. Facility Sols. Grp., Inc., 84 Cal. App. 5th 1035, 1049 (2022).

In sustaining the County's demurrer to the FAC, the Superior Court held in the first instance that Plaintiff's first cause of action, pertaining to the County's purported failure to provide medical care following the attack by Plaintiff's cellmate, was untimely. (Inlow Decl., Exh. C at 3). The Court explained that Plaintiff's state court action was untimely not only because it was filed eight years after the date the County denied his Government Claims Act claim instead of the requisite six months, but also because it was not filed

even within the relevant two-year statute of limitations period applying to personal injury claims. (*Id.*). For purposes of claim preclusion, "a prior judgment based on the statute of limitations ordinarily is not on the merits." *Boyd v. Freeman*, 18 Cal. App. 5th 847, 856 (2017). However, the court also agreed with Defendant in the alternative that "Plaintiff's FAC, as pled, fails to allege facts which could show a failure to take reasonable action to summon medical care." (Inlow Decl., Exh. C at 4). The court explained:

> Plaintiff himself alleges that he was taken to the clinic after reporting the attack, and was treated by a nurse. While Plaintiff alleges he should have been seen by a doctor, rather than a nurse, and that he has residual numbness from the attack, this does not equate to a failure to take reasonable action. Moreover, while Plaintiff alleges that there was delay in sending him to see two different neurologists, Plaintiff does not allege that those doctors made any recommendations for treatment that were ignored, or that the numbness would have mitigated if he had seen a neurologist earlier. For example, Plaintiff alleges that the first doctor discovered his numbness on the side of his head, but does not allege that she recommended any course of treatment that was ignored or that her requests to perform tests on Plaintiff were refused.

(*Id.*). Even though the state court determined that leave to amend Claim I was not warranted because the claim was time-barred "on its face," the Court addressed the merits of Plaintiff's allegations and determined that they did not state a claim. (*Id.*). Plaintiff's Complaint in this action does not allege facts that could cure the substantive defects identified by the state court.

However, the state court sustained Defendant's demurrer to Claims II and III (pertaining, respectively, to interference with Plaintiff's new counsel and his efforts to

communicate with the outside world) solely on Plaintiff's apparent failure to present those claims to the County prior to filing suit, as required by the California Government Claims Act. The state court dismissed Claims II and III with leave to amend in identical language:

> Plaintiff does not allege he has filed a Government Tort Claims Act against Defendant for this cause of action. The Tort Claim filed by Plaintiff in 2013 [alleging the failure to provide medical care] does not embrace these allegations. Accordingly, it is uncertain whether or not Plaintiff may proceed with this cause of action. Defendant did not address any of the substance of this cause of action, and thus the Court is without any other grounds to sustain the demurrer.
>
> Based on the foregoing, Defendant's demurrer to the [second/third] cause of action is sustained, with 10 days leave to amend.

(Inlow Decl., Exh. C at 5).

Judgment was entered in Plaintiff's state court action pursuant to § 581(f)(2). Under California law, a dismissal under § 581(f)(2) "is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will, accordingly, be a bar to a subsequent action alleging the same facts." *Keidatz v. Albany*, 39 Cal. 2d 826, 828 (1952); *see also Wells v. Marina City Properties, Inc.*, 29 Cal.3d 781, 788-89 (Cal. 1981); *Crowley v. Mod. Faucet Mfg. Co.*, 44 Cal. 2d 321, 323 (1955); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993) ("In California, a judgment entered after the sustaining of a general demurrer is a judgment on the merits, and, to the extent that it adjudicates that the facts alleged do not establish a cause of action, it will bar a second action on the same facts."); *see also Lovell*

v. Cnty. of Los Angeles, 116 F.3d 1486 (9th Cir. 1997) ("Because a dismissal under Cal. Civ. Proc. Code § 581(f)(2) precludes Lovell from bringing a subsequent action alleging the same facts, and because Lovell's complaint alleged the same facts as his state court complaint, the district court did not err by granting judgment on the pleadings for the defendants."). However, in dismissing Claims II and III solely on the ground that it was unclear whether Plaintiff had complied with the claims presentation requirement of the Government Claims Act, the state court did not purport to rule on the "substance" of the claims, not even in the alternative. As such, there is no ruling "on the merits" as to these two claims, and claim preclusion does not apply.

Only Claim I satisfies all three elements for claim preclusion under California law. Accordingly, it is recommended that Defendant's MTD be GRANTED to the extent that it contends that Claim I, alleging the County's failure to provide medical care, is barred on the ground of *res judicata*, and DENIED as to Claims II and III.

B. All Of Plaintiff's Claims Are Untimely

"The applicable statute of limitations for actions brought pursuant to 42 U.S.C. § 1983 is the forum state's statute of limitations for personal injury actions." *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 828 (9th Cir. 2003). Effective January 1, 2003, the statute of limitations for personal injury actions in California is two years. Cal. Code Civ. Proc. § 335.1. While state law determines the statute of limitations for § 1983 claims, "'federal law determines when a civil rights claim accrues.'" *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir. 2002) (quoting *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153-54 (9th Cir. 2000)). Under federal law, "a claim accrues when the plaintiff knows or should know of the injury that is the basis of the cause of action." *Douglas v. Noelle*, 567 F.3d 1103, 1109 (9th Cir. 2009). When a federal court borrows the state statute of limitations, it also borrows the state's tolling rules.

Canatella v. Van De Kamp, 486 F.3d 1128, 1132 (9th Cir. 2007). This applies to both statutory and equitable tolling. *See Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004) ("For actions under 42 U.S.C. § 1983, courts apply the forum state's statute of limitations for personal injury actions, along with the forum state's law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law.").

California Civil Procedure Code § 352.1(a) provides that when a plaintiff is "imprisoned on a criminal charge" for "a term less than life" at the time a claim accrues, the statute of limitations is statutorily tolled during the time of his imprisonment for up to two more years. *See* Cal. Civ. Proc. Code § 352.1(a); *see also Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999) (citing same).[5] Whether or not a plaintiff is entitled to the automatic tolling provisions of § 352.1, equitable tolling may still extend the running of the statute of limitations. "Equitable tolling under California law 'operates independently of the literal wording of the Code of Civil Procedure to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.'" *Jones*, 393 F.3d 918, 928 (quoting *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 370 (2003)). "Under California law, a plaintiff must meet three conditions to equitably toll a statute of

[5] In *Elliott v. City of Union City*, 25 F.3d 800 (9th Cir. 1994), the Ninth Circuit found that "being continuously incarcerated prior to arraignment constitutes being 'imprisoned on a criminal charge'" under Cal. Civ. Proc. Code § 352(a)(3), the predecessor to § 352.1, and thus encompasses all post-arrest custody. *Id.* at 802-03. However, the California Court of Appeal more recently held as a matter of first impression that "a would-be plaintiff is 'imprisoned on a criminal charge' within the meaning of section 352.1 [only] if he or she is serving a term of imprisonment in the state prison." *Austin v. Medicis*, 21 Cal. App. 5th 577, 597 (2018). Accordingly, the *Austin* court found that an arrestee who was in pretrial custody in a county jail at the time his claims accrued was not "imprisoned on a criminal charge" for purposes of § 352.1 and the statute's automatic tolling provisions did not apply. *Id.*; *see also Shaw v. Sacramento Cnty. Sheriff's Dept*, 810 F. App'x 553, 554 (9th Cir. 2020) (federal courts "are 'obligated to follow' [the California Court of Appeal's decision in *Austin*] in the absence of evidence that the California Supreme Court would rule to the contrary") (quoting *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 995 (9th Cir. 2007) (internal quotation marks omitted)). "After *Austin*, there has been a split among district courts in California whether to follow *Elliott* or *Austin* in applying the tolling provisions of Section 352.1 for plaintiffs whose claims accrued while in pretrial detention." *Cota v. Santa Ana Police Dep't*, 2022 WL 2199324, at *4 (C.D. Cal. Feb. 28, 2022) (citing cases). It is unnecessary for the Court to decide whether to apply *Elliot* or *Austin* because even if § 352.1 applies to Plaintiff's claims, they are still untimely.

limitations: (1) defendant must have had timely notice of the claim; (2) defendant must not be prejudiced by being required to defend the otherwise barred claim; and (3) plaintiff's conduct must have been reasonable and in good faith." *Fink*, 192 F.3d at 916 (internal quotation marks and citation omitted).

Plaintiff's first cause of action, for inadequate medical care, arose after he was attacked by his new cellmate on March 11, 2013. (*See generally* Compl. ¶¶ 15-34). In his second cause of action, Plaintiff claims that County prison guards prevented him from meeting with his new attorney in August 2015. (*Id.* ¶¶ 37-39). Finally, in his third cause of action, Plaintiff claims that County prison guards interfered with his efforts to contact the outside world for assistance. (*Id.* ¶¶ 40-41). While he is less exactly about the dates of this alleged interference, at least some of it happened in the Spring of 2013, when Plaintiff sought help to avoid returning to Patton State Hospital based on purportedly false medical reports. (*Id.* ¶ 41). Regardless of exactly when and for how long the County's wrongful acts harmed Plaintiff, they necessarily came to an end in October 2015 when he was convicted and transferred from Twin Towers to the custody of the CDCR. (*Id.* ¶ 46). Accordingly, construing the allegations of the Complaint liberally, the Court will assume for purposes of this discussion only that Plaintiff's claims against the County accrued at least by October 31, 2015.

Even with the generous assumption that Plaintiff's claims did not accrue until the end of October 2015, the two-year statute of limitations would have run by October 31, 2017. Additionally, even if the Court were to apply the additional two years of statutory tolling provided by California Civil Procedure Code § 352.1(a), his claims would have expired on October 31, 2019. Plaintiff did not file the instant lawsuit until November 16, 2022. Accordingly, even under this extremely generous scenario, Plaintiff's Complaint would still be untimely by more than three and a half years.

Plaintiff does not plead in his Complaint-- or argue in any of his filings in this action -- any facts showing that he is entitled to equitable tolling. Plaintiff could have filed the instant suit at any time after October 2015, once he was no longer in the County's custody. Even if the County had timely notice of Plaintiff's claims, which the Court need not decide, Plaintiff's decision to wait more than seven years, including more than two years after he was released from any form of custody, before filing the instant action is plainly prejudicial to the County and the extreme delay is not reasonable or in good faith. As such, equitable tolling will not render Plaintiff's claims timely.

Finally, Plaintiff's cursory contention that he was "unable to file a lawsuit due to constant torture and threat[s] to [his] life in the jail and other institutions" may be an attempt to assert that the County is equitably estopped from invoking a statute of limitations defense. (Complaint ¶ 10). California courts have found that "[a] public entity may be estopped from asserting noncompliance with the claims statutes where its agents or employees have deterred the filing of a timely claim by some 'affirmative act.'" *Christopher P. v. Mojave Unified Sch. Dist.*, 19 Cal. App. 4th 165, 170 (1993). The elements of equitable estoppel are "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." *Schafer v. City of Los Angeles*, 237 Cal. App. 4th 1250, 1261 (2015) (internal quotation marks and citation omitted). "[A]cts of violence or intimidation on the part of the public entity that are intended to prevent the filing of a claim may create an estoppel." *Christopher P.*, 19 Cal. App. 4th at 170.

Plaintiff does not describe the acts of "constant torture and threat[s] to [his] life" purportedly committed by County employees; nor does he allege facts that plausibly suggest that any such threats were made for the purpose of preventing Plaintiff from filing

a claim against the County. Even if he had, he does not explain how the *County* prevented him from filing a lawsuit after he was no longer in the County's custody. Plaintiff admits that he was able to file suit after he "was released from detention in July 2020." (Complaint ¶ 10). However, even if he were somehow entitled to equitable estoppel against the County up to July 2020, by that point the two-year statutory tolling granted to incarcerated individuals by § 351.2 would not apply, and the two-year statute of limitations for § 1983 actions would alone control. Even so, Plaintiff still waited more than two years before filing this action, until November 2022, during which period there was no possibility of County torture or threats. As such, any claim to equitable estoppel to forgive the untimely filing of Plaintiff's claims necessarily fails.

Even construing the Complaint in the light most favorable to Plaintiff, there is no scenario under which his claims, which mostly arise from incidents that took place ten years ago, are timely. Accordingly, it is recommended that Defendant's MTD be GRANTED to the extent that it contends that Plaintiff's claims are barred by the statute of limitations.

C. Plaintiff's Claims Are Barred In The Alternative By The *Rooker-Feldman* Doctrine

Under the *Rooker-Feldman* doctrine, "a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court." *Noel v. Hall*, 341 F.3d 1148, 1154 (9th Cir. 2003); *see Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). As the Ninth Circuit has explained,

> In its routine application, the *Rooker–Feldman* doctrine is exceedingly easy. A party disappointed by a decision of a state court may seek reversal

> of that decision by appealing to a higher state court. A party disappointed by a decision of the highest state court in which a decision may be had may seek reversal of that decision by appealing to the United States Supreme Court. In neither case may the disappointed party appeal to a federal district court, even if a federal question is present or if there is diversity of citizenship between the parties.

Noel, 341 F.3d at 1155.

"*Rooker-Feldman* may also apply where the parties do not directly contest the merits of a state court decision, as the doctrine 'prohibits a federal district court from exercising subject matter jurisdiction over a suit that is a de facto appeal from a state court judgment.'" *Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 859 (9th Cir. 2008) (quoting *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004)). "A federal action constitutes such a de facto appeal where 'claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules.'" *Reusser*, 525 F.3d at 859 (quoting *Bianchi v. Rylaarsdam*, 334 F.3d 895, 898 (9th Cir. 2003)). In such circumstances, "the district court is in essence being called upon to review the state court decision." *Feldman*, 460 U.S. at 483 n.16; *see also Cooper v. Ramos*, 704 F.3d 772, 778 (9th Cir. 2012) (a federal constitutional claim is "inextricably intertwined with [a] state court's denial" of a plaintiff's request where adjudication of the claim would require district court to "review the [validity of the] state court decision"); *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001) (issues presented in a federal claim are "inextricably intertwined" with a state court ruling if the district court could not rule in favor of the plaintiff "without holding that the state court had erred"); *Sonia v. California Highway Patrol*, 2015 WL 5178434, at *5 (E.D. Cal. Sept. 4, 2015) (even though plaintiff's claims

did not directly challenge state court ruling, they were "clearly 'inextricably intertwined' . . . because a decision in this case favorable to plaintiff would necessarily require this court to make determinations inconsistent with the state court's judgment").

Here, as Defendant argues, Plaintiff's federal claims are not just "inextricably intertwined" with his state court claims, they are identical. (MTD at 10). This Court could not grant Plaintiff relief on his claims without making determinations that are at the very least "inconsistent" with the state court's judgment, or that would undermine the state's application of its own state laws. Because this action is an impermissible *de facto* appeal of adverse state court rulings, it is recommended that Defendant's MTD be granted and this action dismissed in the alternative without prejudice pursuant to the *Rooker-Feldman* doctrine. *See Edwards v. Martinez*, 713 F. App'x 636 (9th Cir. 2018) ("A dismissal under the *Rooker-Feldman* doctrine is a dismissal for lack of subject matter jurisdiction, *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139 (9th Cir. 2004), and thus should be without prejudice, *Kelly v. Fleetwood Enters., Inc.*, 377 F.3d 1034, 1036 (9th Cir. 2004)."); *Chaudhary v. Gupta*, 749 F. App'x 614, 615 (9th Cir. 2019) ("Because we affirm for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, we treat the dismissal of the action as being without prejudice.") (citing *Kelly*, 377 F.3d at 1036).

D. Defendant Has Not Shown That Plaintiff's Claims Are Unexhausted

Defendant asserts, correctly, that a prisoner-plaintiff in a § 1983 action must exhaust all administrative remedies as to each of his claims. (MTD at 11) (citing *Vaden v. Summerhill*, 448 F.3d 1047, 1050 (9th Cir. 2006); *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005)). The Prison Litigation Reform Act of 1995 (the "PLRA"), 42 U.S.C. § 1997e(a), requires a prisoner to exhaust all available administrative remedies before suing over prison conditions in federal court. *Booth v. Churner*, 532 U.S. 731, 733-34 (2001); *see also* 42 U.S.C. § 1997e(a) ("No action shall be brought . . . until such

administrative remedies as are available are exhausted."). Defendant is mistaken, however, in contending that Plaintiff "does not assert compliance with the PLRA [Prison Litigation Reform Act], thus mandating dismissal of these claims." (MTD at 11-12).

A plaintiff alleging state law claims against a government entity or employee must affirmatively allege compliance with the California Government Claims Act's claims presentation requirement in the complaint or explain why compliance should be excused. *Mangold v. Cal. Pub. Utils. Comm'n*, 67 F.3d 1470, 1477 (9th Cir. 1995); *see also State v. Superior Court (Bodde)*, 32 Cal. 4th 1234, 1245 (2004) ("[F]ailure to allege compliance or circumstances excusing compliance with the [CGCA] claim presentation requirement subjects a complaint to a general demurrer [dismissal] for failure to state facts sufficient to constitute a cause of action."). In contrast, while a prisoner-plaintiff in a § 1983 action is required to exhaust his claims prior to filing suit, he does not have to affirmatively plead exhaustion. Failure to exhaust is an affirmative defense that the defendant must plead and prove. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc); *see also Jones v. Bock*, 549 U.S. 199, 216 (2007) ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints."). Therefore, the defendant bears the initial burden of proving that a plaintiff failed to exhaust his administrative remedies by showing that "there was an available administrative remedy, and that the prisoner did not exhaust that available remedy." *Albino*, 747 F.3d at 1172; *see also Jones*, 549 U.S. at 212.

Even if the PLRA's exhaustion requirement continued to apply to Plaintiff's claims following his release from custody, an issue which the Court need not and does not decide, it is not Plaintiff's burden at the pleading stage to affirmatively allege exhaustion of his § 1983 claims. Accordingly, it is recommended that Defendant's MTD be DENIED to the extent that it seeks dismissal of Plaintiff's claims for failure to exhaust.

E. Plaintiff's Claims Fail On The Merits

In light of the numerous, incurable deficiencies in Plaintiff's claims highlighted above, the Court will not address Defendant's contention that Plaintiff's claims fail on the merits in depth. (*See* MTD at 12-14). However, it is clear that Plaintiff has failed to state a plausible, cognizable claim under § 1983.

Plaintiff's allegations in Claim I concerning the County's alleged failure to provide medical care following the attack by Plaintiff's cellmate fall under the Fourteenth Amendment, not the Eighth Amendment, because he was a pretrial detainee at the time of the alleged incident. *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996) ("Because pretrial detainees are not convicted prisoners, the rights of those in police custody to receive medical treatment arise under the Due Process Clause of the Fourteenth Amendment."); *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (the "more protective" Fourteenth Amendment standard applies to pretrial detainees). To state a claim against an individual (such as a Doe Defendant) for failure to provide medical care under the Fourteenth Amendment, a plaintiff must allege:

> (i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved -- making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries.

Gordon v. Cnty. of Orange, 888 F.3d 1118, 1125 (9th Cir. 2018). The defendant's

conduct must be "objectively unreasonable" and demonstrate the defendant's "reckless disregard" for Plaintiff's medical needs. *Id.*

Where the defendant is a local government entity (such as a County), to prevail on a § 1983 claim, a plaintiff must show both a deprivation of constitutional rights and a departmental policy, custom or practice that was the "moving force" behind the constitutional violation. *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 957 (9th Cir. 2008). The plaintiff may establish the existence of a policy, custom or practice in any one of three ways:

> First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity. Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with final policy-making authority and that the challenged action itself thus constituted an act of official governmental policy. Whether a particular official has final policy-making authority is a question of state law. Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it.

Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir. 1992) (citations and internal quotations omitted). There must be "'a direct causal link between a [governmental] policy or custom and the alleged constitutional deprivation.'" *Villegas*, 541 F.3d at 957 (quoting *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)).

Plaintiff does not plausibly allege that he was denied medical care. Within minutes

after the attack by his cellmate, Plaintiff was taken to the clinic, where he was seen by a nurse and given an ice pack. (Complaint ¶ 23). In the following days, he was given Tylenol by the night shift nurse. (*Id.* ¶ 26). The next month, he was seen by a physician, who offered him sleeping pills. (*Id.* ¶ 27). He was also seen by a neurologist, who performed certain tests. However, Plaintiff does not allege that the neurologist recommended any additional course of treatment, much less that the prison refused to provide it. (*Id.* ¶ 29). Nor does Plaintiff allege any facts to show that there was a County policy, custom or practice to deny medical care to prisoners complaining of head injuries inflicted by a fellow inmate. Plaintiff has simply not shown that the treatment he received was objectively unreasonable and resulted in further injury. Plaintiff's apparent belief that he should have been seen sooner and more frequently by a neurologist does not establish any Defendant's "reckless disregard" for Plaintiff's health. Furthermore, Plaintiff is not a physician, and his lay speculation about the type of treatment he should have received will not support a claim for unconstitutional health care. *See Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (deliberate indifference standard). As such, Plaintiff fails to state a claim in Claim I.

Plaintiff similarly fails to state claims for interference with his newly-hired counsel and the blockage of his communications with the outside world by Doe Defendants. As noted above, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Furthermore, where there are two possible explanations for a defendant's behavior, only one of which can be true, allegations that are "merely consistent" with a plaintiff's favored explanation but that "are also consistent with [an innocuous] alternative explanation" fail to state a claim. *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014); *see also Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to

relief."); *Sypherd v. Lazy Dog Restaurants, LLC*, 2020 WL 5846481, at *4 (C.D. Cal. July 24, 2020) ("[W]here a plaintiff's factual allegations equally support both a liability-creating scenario and a no-liability scenario, plaintiff has failed to state a claim."). Rather, "[s]omething more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (internal citation omitted). Plaintiff's cursory allegations -- nearly devoid of detail, based on paranoid accusations of collusion with Chinese communists (¶¶ 37, 42), and resting on fantastical assumptions that Plaintiff's new attorney could not meet with him at the jail because he was arrested for attempting to represent Plaintiff (*id.* ¶ 38) and that Plaintiff did not receive responses to any of his "many letters" or his 100 phone calls to the ACLU because Doe Defendants intercepted his outgoing communications (*id.* ¶¶ 40-41) -- fail to meet that standard. For the same reasons, Plaintiff's unsupported, conclusory attempts to state a claim for elder abuse are likewise insufficient to state a claim. Accordingly, Claims II, III and IV also fail to state a claim.

Plaintiff's claims fail on the merits either because they allege facts that undermine the claim or because they fail to state a plausible claim for relief. Accordingly, it is recommended that Defendant's MTD be GRANTED and this action dismissed without prejudice, but without leave to amend, to the extent that it alleges that Plaintiff's claims fail on the merits.

VII.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Court issue an Order (1) accepting this Report and Recommendation, (2) granting Defendant's Motion to Dismiss in part, and (3) dismissing this action with prejudice as untimely, and, with respect to Claim I, as barred by the claim preclusion doctrine, or, in the alternative, dismissing this action without prejudice, but without leave to amend, pursuant to the *Rooker-Feldman* doctrine and for failure to state a claim.

DATED: March 9, 2023

PEDRO V. CASTILLO
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF BAOLIANG ZHANG,

Plaintiff,

v.

COUNTY OF LOS ANGELES, et al.,

Defendants.

Case No. CV 22-8365 GW (PVC)

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint in the above-captioned matter, Defendant's Motion to Dismiss, all the records and files herein, the Report and Recommendation of the United States Magistrate Judge, and Plaintiff's Objections to the Report and Recommendation, including attached exhibits. After having made a *de novo* determination of the portions of the Report and Recommendation to which Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

IT IS ORDERED that Defendant's Motion to Dismiss is GRANTED IN PART. Judgment shall be entered dismissing this action with prejudice.

app. 1

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein on Plaintiff at his current address of record and on counsel for Defendant.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 27, 2023

GEORGE H. WU
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JEFF BAOLIANG ZHANG,

Plaintiff,

v.

COUNTY OF LOS ANGELES, et al.,

Defendants.

Case No. CV 22-8365 GW (PVC)

JUDGMENT

Pursuant to the Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS HEREBY ADJUDGED that the above-captioned action is dismissed with prejudice.

Dated: March 27, 2023

George H. Wu

GEORGE H. WU
UNITED STATES DISTRICT JUDGE

app. 3