FILED

MAY 23 2024

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID JAMES LACK,

Plaintiff-Appellant,

v.

POSNER, Dr; et al.,

Defendants-Appellees.

No. 23-55522

D.C. No.
2:22-cv-02955-RGK-GJS
Central District of California,
Los Angeles

ORDER

Before: CANBY, TASHIMA, and KOH, Circuit Judges.

The motion to file a substitute reply brief (Docket Entry No. 36) is granted. The Clerk will file the reply brief submitted at Docket Entry No. 32.

Upon a review of the record and the parties' filings in this court, we conclude that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (stating summary affirmance standard). Accordingly, the motion for summary affirmance filed by appellees Koenig, Moeller, Posson (erroneously sued as Dr. Posner), and Skipper-Dotta (Docket Entry No. 22) is granted.

We summarily affirm the district court's judgment as to all parties.

AFFIRMED.

JS6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID LACK,

Plaintiff

v.

DR. POSNER, et al.,

Defendants.

Case No. 2:22-cv-02955-RGK (GJS)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendation of the United States Magistrate Judge,

IT IS HEREBY ADJUDGED THAT the above-captioned action is dismissed with and without prejudice as set forth in the foregoing Order.

DATE: June 1, 2023

Gary Klausner

R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

APPENDIX B.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID LACK,

Plaintiff

v.

DR. POSNER, et al.,

Defendants.

Case No. 2:22-cv-02955-RGK (GJS)

ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Complaint [Dkt. 5], all relevant documents filed and lodged in this action, the motion to dismiss filed by Defendants Judge Thomas P. Anderle, Judge Clifford R. Anderson, III, Judge Michael Carrozzo, and Judge Jean M. Dandona [Dkt. 32, "Judicial Defendants Motion"] and the related briefing and filings by the parties [Dkts. 33, 58, and 61], the motion to dismiss filed by Defendant Robert Sanger [Dkts. 41-42, "Sanger Motion"], the motion to dismiss filed by Defendants C. Koenig, D. Moeller, S. Posson, and R. Skipper-Dota [Dkt. 51, the "CDCR Motion"] and related briefing and filings by the parties [Dkts. 63, 66], the Report and Recommendation of United States Magistrate Judge [Dkt. 68, "Report"], Plaintiff's Objection to the Report [Dkt. 69], and Defendant Sanger's Reply [Dkt. 71].

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the Court has conducted a de novo review of those portions of the Report to which objections have been stated.

The Court has carefully considered all of the arguments raised in the Objection to the Report. Having completed its review, the Court accepts the findings, conclusions, and recommendations set forth in the Report.

Accordingly, **IT IS ORDERED** that: the Judicial Defendants Motion, the Sanger Motion, and the CDCR Defendants Motion are GRANTED; the First Amended Complaint is dismissed without leave to amend and with prejudice as to Claims I, II, III, V, and VI and Defendants Judge Thomas P. Anderle, Judge Clifford R. Anderson, III, Judge Michael Carrozzo, Judge Jean M. Dandona, Robert Sanger, Neil Levinson, C. Koenig, D. Moeller, S. Posson, and R. Skipper-Dota, and without prejudice as to Claim IV and Defendants Brian Cota, Jeff Sanger, Santa Barbara Sheriff Moennro [sic], CTF Prison Transportation, CTF Prison Doctor John Doe, and two John Doe Defendants alleged to be Santa Barbara Sheriff's Department Deputies; and Judgment shall be entered dismissing this action with and without prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATE: June 1, 2023

Gary Klausner

R. GARY KLAUSNER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DAVID LACK,
Plaintiff

v.

DR. POSNER, et al.,
Defendants.

Case No. 2:22-cv-02955-RGK (GJS)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to United States District Judge R. Gary Klausner, pursuant to 28 U.S.C. § 636 and General Order No. 05-07 of the United States District Court for the Central District of California.

BACKGROUND

On May 2, 2022, Plaintiff filed a pro se civil rights complaint against 12 named Defendants, along with a Doe Defendant. [Dkt. 1.] On June 18, 2022, Plaintiff filed his First Amended Complaint, which is the operative complaint in this action. [Dkt. 5, "Complaint."] The Complaint names the same 12 Defendants as before and the Doe Defendant, but also added a named sheriff Defendant and several Doe Defendants. The Complaint asserts six claims under 42 U.S.C. § 1983.

Some, but not all, of the Defendants thereafter were served with process. The Fed. R. Civ. P. 4(m) deadline – as extended at Plaintiff's request – expired in September 2022, and the following Defendants have not been served with process: Brian Cota; Jeff Sanger; Santa Barbara Sheriff Moennro; CTF Prison Transportation; CTF Prison Doctor John Doe; and two John Doe Defendants alleged to be Santa Barbara Sheriff's Department Deputies (collectively, the "Unserved Defendants").

On September 14, 2022, Defendants Judge Thomas P. Anderle, Judge Clifford R. Anderson, III, Judge Michael Carrozzo, and Judge Jean M. Dandona (collectively, the "Judicial Defendants")[1] filed a motion to dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. [Dkt. 32, "Judicial Defendants Motion."] They also filed a concurrent Request for Judicial Notice. [Dkt. 33, "Judicial Defendants Request."][2] On December 26, 2022, Plaintiff filed his Opposition to the Judicial Defendants Motion. [Dkt. 58.] On January 3, 2023, the Judicial Defendants filed their Reply. [Dkt. 61.]

On October 4, 2022, Defendant Robert Sanger filed a motion to dismiss the Complaint pursuant to Rule 12(b)(6). [Dkt. 41, "Sanger Motion."] He also filed a Request for Judicial Notice. [Dkt. 42, "Sanger Request."][3] Plaintiff has not filed an opposition to the Sanger Motion.

On November 18, 2022, Defendants Craig Koenig, S. Posson (mistakenly sued as "Dr. Posner"), Ronda Skipper-Dotta, and Daniel Moeller (collectively, the

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[1] These four Defendants erroneously were named as "Justices" in the Complaint; however, they are Judges of the Superior Court of California for the County of Santa Barbara.

[2] The Judicial Defendants Request is GRANTED, as the subject items are court records of which judicial notice properly may be taken under Fed. R. Evid. 201(b). See, e.g., *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir. 2001).

[3] The Sanger Request is GRANTED, as the subject items also are court records of which judicial notice properly may be taken under Fed. R. Evid. 201(b).

"CDCR Defendants") filed a motion to dismiss the Complaint pursuant to Rule 8 and Rule 12(b)(6). [Dkt. 51, "CDCR Defendants Motion."] On February 26, 2023, Plaintiff filed his Opposition to the CDCR Defendants Motion. [Dkt. 63.] On March 27, 2023, the CDCR Defendants filed their Reply. [Dkt. 66.]

All three Motions are under submission to the Court. For the reasons set forth below, the Court recommends that the three Motions be granted, that the Complaint be dismissed without leave to amend, and that this case be dismissed both with and without prejudice (as explained below).[4]

STANDARD OF REVIEW

A. Rule 12(b)(1)

"Normally, [s]ubject-matter jurisdiction refers to the courts' statutory or constitutional power to adjudicate the case. . . . Under that general rule, when a federal court . . . lacks subject-matter jurisdiction, the court must dismiss the complaint, sua sponte if necessary." *Pistor v. Garcia*, 791 F.3d 1104, 1110-11 (9th Cir. 2015) (quotation marks and internal citations omitted). "Once challenged, the party asserting subject matter jurisdiction has the burden of proving its existence." *Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095, 1102 n.1 (9th Cir. 2007)

A Rule 12(b)(1) motion to dismiss either attacks the allegations of jurisdiction contained in the complaint or challenges the pleaded factual basis for subject matter jurisdiction. *Thornhill Publishing Co. v. General Tel. & Elect. Corp.*, 594 F.2d 730,

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[4] Defendant Neil Levinson filed an Answer to the Complaint on September 9, 2022. [Dkt. 28.] As discussed *infra*, several of the grounds for dismissal discussed herein apply equally to him, and thus, this case should be dismissed in full. *See Abagninin v. AMVAC Chemical Corp.*, 545 F.3d 733, 742 (9th Cir. 2008) ("As a legal matter, we have upheld dismissal with prejudice in favor of a party which had not appeared, on the basis of facts presented by other defendants which had appeared."); *Silverton v. Dep't of Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981) (holding that a court "may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related").

733 (9th Cir. 1979); *see also White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000) ("Rule 12(b)(1) jurisdictional attacks can be either facial or factual."). "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When a Rule 12(b)(1) motion constitutes a facial attack, the Court must presume the factual allegations of the complaint to be true and construe them in the light most favorable to the plaintiff. *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). "With a factual Rule 12(b)(1) attack . . ., a court may look beyond the complaint to matters of public record without having to convert the motion into one for summary judgment." *White*, 227 F.3d at 1242. An action may be dismissed for lack of subject matter jurisdiction, without leave to amend, when it is clear that the jurisdictional deficiency cannot be cured by amendment. *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir. 1980).

Based on the nature of the Judicial Defendants' arguments, the Court concludes that their Motion makes a facial Rule 12(b)(1) jurisdictional attack, rather than a factual Rule 12(b)(1) jurisdictional attack.

B. Rule 12(b)(6)

A defendant is entitled to dismissal under Rule 12(b)(6) when a complaint fails to state a cognizable legal theory or alleges insufficient facts under a cognizable legal theory. *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is

liable for the misconduct alleged. *Id.* Conclusory allegations are insufficient. *Id.* at 678-79. Although a complaint need not set forth detailed factual allegations, "a formulaic recitation of the elements of a cause of action will not do," and the factual allegations of the complaint "must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In addition to appropriate factual allegations, a complaint must include fair "notice of the claim such that the opposing party may defend himself or herself effectively." *Starr v. Baca*, 652 F.3d 1202, 1212 (9th Cir. 2011).

On review of a Rule 12(b)(6) motion, the Court accepts all facts alleged in a complaint as true and draws all reasonable inferences in favor of the plaintiff. *Gant v. Cnty. of L.A.*, 772 F.3d 608, 614 (9th Cir. 2014). For an allegation to be "entitled to the assumption of truth," however, it must be well-pleaded, that is, it must set forth a non-conclusory factual allegation rather than a legal conclusion. *Iqbal*, 556 U.S. at 679. "In sum, for a complaint to survive a motion to dismiss, the non-conclusory factual content, and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation omitted).

C. Rule 8

Pursuant to Rule 8(a) of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought." Further, Rule 8(d)(1) requires that each allegation be "simple, concise, and direct." Rule 8(a) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). The plaintiff must allege a minimum factual and legal basis for each claim that is sufficient to give each defendant fair notice of what the plaintiff's claims are and the grounds upon which they rest. *See, e.g., Brazil v. United States Dep't of the Navy*, 66 F.3d 193, 199 (9th Cir. 1995)

("Although a *pro se* litigant like Brazil may be entitled to great leeway when the court construes his pleadings, those pleadings nonetheless must meet some minimum threshold in providing a defendant with notice of what it is that it allegedly did wrong."). "Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice." *Bautista v. Los Angeles Cnty.*, 216 F.3d 837, 841 (9th Cir. 2000) (citations and internal quotation marks omitted).

If a plaintiff fails to clearly and concisely set forth allegations sufficient to provide defendants with notice of which defendant is being sued on which theory and what relief is being sought against them, the complaint fails to comply with Rule 8. *See, e.g., McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996). When a complaint is so confusing that its "'true substance, if any, is well disguised,'" it may be dismissed for violating Rule 8(a)(2). *Hearns v. San Bernardino Police Dep't*, 530 F.3d 1124, 1131 (9th Cir. 2008) (citation omitted)). The failure to comply with Rule 8(a) constitutes an independent basis for dismissal of a complaint that applies even if the claims in a complaint are not found to be wholly without merit. *See McHenry*, 84 F.3d at 1179; *Nevijel v. Northcoast Life Ins. Co.*, 651 F.2d 671, 673 (9th Cir. 1981).

D. Amendment

It is well established that the Court has a duty to construe pro se filings liberally. That said, the Court may not relieve pro se litigants entirely from their obligation to comply with the Federal Rules of Civil Procedure, and the Supreme Court has made it clear that the Court has "no obligation to act as counsel or paralegal to pro se litigants." *Pliler v. Ford*, 542 U.S. 225, 231 (2004); *see also Noll v. Carlson*, 809 F.2d 1446, 1448-49 (9th Cir. 1987) ("courts should not have to serve as advocates for pro se litigants" or as "legal advisors"). It has never been the

Court's function "to supervise laymen in the practice of law." *Springer v. Best*, 264 F.2d 24, 26 (9th Cir. 1959). The Ninth Circuit explicitly has warned against "becoming a player in the adversary process rather than remaining its referee." *Jacobsen v. Filler*, 790 F.2d 1362, 1365 (9th Cir. 1986) ("it is not for the trial court to inject itself into the adversary process on behalf of one class of litigant"). Moreover, a "pro se litigant is not excused from knowing the most basic pleading requirements" or "from following court rules." *American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107 (9th Cir. 2000). Further, "a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (quoting *Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982) and declining to "read numerous unalleged facts into [the] complaint in order to find a" civil rights claim).

If a complaint is to be dismissed, "[u]nder Ninth Circuit case law, district courts are only required to grant leave to amend if a complaint can possibly be saved. Courts are not required to grant leave to amend if a complaint lacks merit entirely." *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000); *see Rosati v. Igbinoso*, 791 F.3d 1037, 1039 (9th Cir. 2015) ("A district court should not dismiss a pro se complaint without leave to amend unless 'it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" (internal citations and quotation omitted)). Leave to amend is not appropriate, even given the liberal pleading standard for *pro se* litigants, when "the pleading 'could not possibly be cured by the allegation of other facts.'" *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003) (internal quotation omitted).

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DISCUSSION

I. The Unserved Defendants And Claim IV Should Be Dismissed.

As noted above, there are seven Defendants who have never been served with process. Claim IV of the Complaint is brought solely against three of the Unserved Defendants, and the remaining Unserved Defendants are parties to Claims I, II, III, and VI.

Rule 4(m) of the Federal Rules of Civil Procedure provides that, if service of the summons and complaint is not made upon a defendant within 90 days of filing the complaint, federal district courts have the authority to sua sponte dismiss an action without prejudice, after notice to the plaintiff. *See generally Crowley v. Bannister*, 734 F.3d 967, 975 (9th Cir. 2013). If, however, a plaintiff shows good cause for the failure to serve the complaint within that time frame, the Court must extend the time for accomplishing service. Fed. R. Civ. P. 4(m). The burden of establishing good cause is on the plaintiff. *Efaw v. Williams*, 473 F.3d 1038, 1040 (9th Cir. 2007). The "good cause" exception to Rule 4(m) applies "only in limited circumstances" and is not satisfied by "inadvertent error or ignorance of the governing rules." *Hamilton v. Endell*, 981 F.2d 1062, 1065 (9th Cir. 1992). "*Pro se* litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987); *see also Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (*per curiam*) (failure of *pro se* litigant to follow procedural rules justified dismissal of civil rights action).

The Complaint was filed on June 18, 2022. Starting the 90-day clock from the filing of the Complaint, the Rule 4(m) deadline expired in mid-September 2022. Plaintiff twice requested extensions of the Rule 4(m) deadline to serve Defendant Jeffrey Sanger with process, which the Court granted to him [Dkts. 21, 23, 26-27], yet this Defendant has not been served with process. On September 23, 2022, the Court expressly advised Plaintiff that his attempted service of Defendant Brian Cota with process was ineffective [Dkt. 40], yet Plaintiff failed to thereafter request

additional time in which to attempt to serve Cota properly. There is no evidence that Plaintiff has served any of the remaining Unserved Defendants with process, nor has he requested an extension of time to do so even though he plainly is aware of the Rule 4(m) deadline.

Accordingly, the Unserved Defendants should be dismissed under Rule 4(m), as should Claim IV in full given that it is not alleged against any Defendant who has been served with process. This dismissal should be on a without prejudice basis. This Report and Recommendation provides Plaintiff with the required notice, because he has the right to file objections in response and the opportunity to establish good cause for his failure to effect service of process, if he can.

II. The Judicial Defendants Motion

By way of background, in the Santa Barbara County Superior Court, Plaintiff was charged with various crimes in two criminal cases: *People v. Lack*, Case No. 1335893 ("Case 1"); and *People v. Lack*, Case No. 1446497 ("Case 2"). Case 1 was commenced on August 31, 2010, and Petitioner's jury trial began on July 7, 2014. Defendant Judge Dandona was the trial judge, Unserved Defendant Cota was the prosecutor, and Defendant Robert Sanger was Plaintiff's counsel. [Judicial Defendants Request, Ex. 1 at 1, 26-35.] On August 7, 2014, the jury convicted Plaintiff of one count of grand theft by embezzlement from an individual and two counts of grand theft by false pretenses from two banks. Plaintiff was sentenced to a term of nine years and eight months in state prison. [*Id.*, Ex. 1 at 35; Ex. 2 at 1.] Plaintiff appealed, and on June 15, 2016, the California Court of Appeal affirmed the judgment. The remittitur issued on September 2, 2016. [*Id.*, Ex. 1 at 43; Ex. 2, *passim*.]

Case 2 was commenced on June 20, 2014. Unserved Defendant Cota again was the prosecutor. [Judicial Defendants Request, Ex. 3 at 1.] On December 13, 2018, before Defendant Judge Carrozzo, Plaintiff entered a plea of nolo contendere

to multiple counts of tax evasion, grand theft, and using a false contractor's license, and he then was convicted and sentenced. [*Id.*, Ex. 3 at 4-9, 38.] No appeal ensued and the judgment is final. [*Id.*, Ex. 3 at 39-40.]

The four Judicial Defendants are sued only pursuant to Claims III and V of the Complaint. In Claim III, Plaintiff alleges that Unserved Defendant Cota and Defendants Judge Anderle, Judge Anderson, and Judge Carrozzo violated his Fifth Amendment right against double jeopardy, his Sixth Amendment right to a speedy trial, and his Fourteenth Amendment rights to due process and equal protection by failing to bring Case 2 to trial by December 30, 2015, and not thereafter dismissing Case 2 as a result of that speedy trial violation. [Complaint at 12-14.] In Claim V, Plaintiff sues Defendants Judge Anderle, Judge Dandona, Robert Sanger, and Neil Levinson.[5] Plaintiff alleges that, in connection with Case 1, Judge Dandona violated due process by failing to rule on a *Kellett* motion[6] brought by counsel Sanger. Plaintiff alleges that Judge Anderle violated unspecified rights by denying the *Kellett* motion when it was made again during Case 2. Plaintiff further alleges that Defendants Sanger and Levinson provided ineffective assistance, apparently in connection with the *Kellett* motion, although this is unclear given the barebones allegations of Claim V. [Complaint at 17-19.]

The Judicial Defendants raise four grounds for dismissing this action. First, they assert that the Court lacks jurisdiction to hear the claims asserted against them, because the claims are barred by the *Rooker-Feldman* doctrine, as discussed *infra*. Second, they assert that the judicial immunity doctrine bars the claims against them. Third, the Judicial Defendants assert that the applicable statute of limitations bars

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[5] Plaintiff alleges that Sanger was his counsel in Case 1 and Levinson was his counsel in Case 2.

[6] In brief, following the adjudication of one criminal case, a *Kellett* motion seeks to preclude a successive prosecution for criminal conduct that allegedly should have been part of the prior case. *See Kellett v. Superior Court*, 63 Cal. 2d 822 (1966).

Plaintiff's claims against them. Fourth, they assert that the claims against them are barred by the *Heck* doctrine, as discussed *infra*, and more generally, fail to state a claim upon which relief can be granted. The Court declines to resolve the statute of limitations and failure to state a claim grounds raised by the Judicial Defendants, because it need not do so given that there are several other fatal defects that plainly doom Claims III and V, as discussed below.

A. *Rooker-Feldman*

The *Rooker-Feldman* doctrine provides that federal district courts may exercise only original jurisdiction; they may not exercise appellate jurisdiction over lower court decisions. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482, 482-86 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). The doctrine applies to "cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). "The purpose of the doctrine is to protect state judgments from collateral federal attack." *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001).

"If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker–Feldman* bars subject matter jurisdiction in federal district court." *Noel v. Hall*, 341 F.3d 1148, 164 (9th Cir. 2003); *see also Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1139-40 (9th Cir. 2004) (the doctrine bars a de facto appeal from a state court judgment). "This doctrine applies even when the challenge to the state court decision involves federal constitutional issues." *Worldwide Church of God v. McNair*, 805 F.2d 888, 891 (9th Cir. 1986) (citations omitted). A federal district court may not examine claims that are inextricably intertwined with state court

decisions, "even where the party does not directly challenge the merits of the state court's decision but rather brings an indirect challenge based on constitutional principles." *Bianchi v. Rylaarsdam*, 334 F.3d 895, 900 n.4 (9th Cir. 2003); *see also Ignacio v. Judges of U.S. Court of Appeals*, 453 F.3d1160, 1165–66 (9th Cir. 2006) (affirming district court's dismissal of the case "because the complaint is nothing more than another attack on the California superior court's determination in [plaintiff's] domestic case").

Claims III and V directly attack state court rulings. In Claim III, Plaintiff alleges that he exercised his speedy trial rights by asking that Case 2 be brought to trial by a certain date, the trial court failed to do so, the trial court thereafter failed to dismiss the case as Plaintiff believes was required, and this violated his federal constitutional rights to a speedy trial, due process, and equal protection, and to avoid being placed in double jeopardy. In Claim V, Plaintiff alleges that the state courts erred in failing to grant his *Kellett* motion made in both Case 1 and Case 2. As relief, Plaintiff asks that he be given a new trial in Case 1 due to the failure to rule on and grant the *Kellett* motion and that his nolo contendere plea in Case 2 be overturned. [Complaint at 22.] These are classic example of claims barred by the *Rooker-Feldman* doctrine. As a result, the Court lacks jurisdiction to consider them as to the Judicial Defendants and dismissal under Rule 12(b)(1) is required.[7] As this

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[7] The *Rooker-Feldman* doctrine may not bar Claim V as alleged against Defendants Robert Sanger and Neil Levinson, because as to them, Plaintiff alleges ineffective assistance rather than legal error by the state courts. *See Kougasian*, 359 F.3d at 1139-40. That said, as discussed below, there is a non-rectifiable defect in Claim V as to these Defendants that requires its dismissal against them without leave to amend. In addition, as to Claim III, prosecutorial immunity bars the claim as to Unserved Defendant Cota. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) (prosecutors are entitled to absolute immunity from suit under Section 1983 for conduct that is "intimately associated with the judicial phase of the criminal process"); *see also Butz v. Economou*, 438 U.S. 478, 512 (1977). Claim III's allegations against Cota are predicated solely on his prosecutorial decisions and actions, and these decisions and actions plainly constitute an integral part of the judicial process to which absolute immunity adheres. Thus, both Claim III and Claim V should be dismissed in full.

defect is non-rectifiable, the dismissal should be without leave to amend and with prejudice as to the Judicial Defendants.

B. Judicial Immunity

It is well established that "[a]bsolute judicial immunity 'insulates judges from charges of erroneous acts or irregular action.'" *Burton v. Infinity Capital Mgmt.*, 753 F.3d 954, 959 (9th Cir. 2014) (citation omitted). Absolute immunity not only insulates judges from charges of erroneous or irregular acts but also when the judge's acts are alleged to be attributable to malicious or corrupt motives or when "the exercise of judicial authority is 'flawed by the commission of grave procedural errors.'" *In re Castillo*, 297 F.3d 940, 946 (9th Cir. 2002) (quoting *Stump v. Sparkman*, 435 U.S. 349, 359 (1978)); *see also Mireles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam). Judicial immunity applies "'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.'" *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc) (citation omitted). This absolute immunity protects judges from civil actions for money damages, although "judicial immunity does not bar declaratory or injunctive relief in actions under § 1983." *Mullis v. United States Bankruptcy Court for the Dist. Of Nevada*, 828 F.2d 1385, 1391 (9th Cir. 1987); *see also Pulliam v. Allen*, 466 U.S. 522, 541042 (1984). Actions against judicial officers for declaratory or prospective injunctive relief are barred, however, when the subject criminal proceedings are over. *Ashelman*, 793 F.2d at 1075.

Plaintiff's claims against the Judicial Defendants arise solely out of their judicial acts presiding over Case 1 and Case 2. Plaintiff's characterization of these judicial acts as wrongful and/or constitutionally violative is ineffective to take them outside of the absolute immunity that cloaks them.[8] Plaintiff's reliance on *Hafer v.*

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[8] In his Opposition to the Motion, Plaintiff alleges additional wrongful and/or unconstitutional acts committed by the Judicial Defendants. These allegations are not contained in

Melo, 502 U.S. 21 (1991), is misplaced, as that decision involved the issue of Eleventh Amendment immunity as to a state official sued under Section 1983 in his or her official capacity, not the distinct common law doctrine of judicial immunity. Plaintiff's reliance on 18 U.S.C. § 242 is equally misplaced. That a judge can be criminally prosecuted under that federal criminal statute is irrelevant to the question of his or her immunity in a civil Section 1983 action for damages. *See Dennis v. Sparks*, 449 U.S. 24, 29 n.5 (1980) ("A state judge can be found criminally liable under § 242 although that judge may be immune from damages under § 1983."). Plaintiff also is mistaken in believing that judicial immunity does not apply to Section 1983 claims due to Section 1983's exclusionary language reading "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." The Supreme Court rejected this argument in *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967), reasoning that there is nothing in the legislative history of Section 1983 to support finding that Congress – in enacting Section 1983 – intended to do away with a long-established common law immunity such as absolute immunity for judicial acts.

Under the allegations of the Complaint, the Judicial Defendants are absolutely immune with respect to Plaintiff's attempt to seek Section 1983 damages against them. They also have absolute judicial immunity as to Plaintiff's requests for relief that is in the nature of declaratory and/or injunctive relief, because Cases 1 and 2 concluded years ago. *Ashelman*, 793 F.2d at 1075. This defect is fundamental and cannot be rectified with amendment. Accordingly, judicial immunity serves as

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the Complaint, but even if they had been, they also would not be cognizable under Section 1983 due to the absolute judicial immunity doctrine, as they all relate to exercises of judicial authority in connections with Cases 1 and 2. Thus, these additional allegations cannot serve as a basis for affording amendment, as doing so would be futile.

another basis for dismissing Claims III and V of the Complaint without leave to amend and with prejudice as to the Judicial Defendants.

C. *Heck* Bar

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that to recover damages under Section 1983 for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid," the plaintiff must prove that the conviction has been reversed, expunged, or invalidated. *Id.* at 486-87. Under *Heck*, "[w]hen a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, 'the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.' If the answer is yes, the suit is barred." *Hooper v. Cty. of San Diego*, 629 F.3d 1127, 1130 (9th Cir. 2011) (citations omitted). Subsequently, the Supreme Court has made clear that the *Heck* bar applies regardless of the type of relief sought. *See Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005) ("a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration"). When a finding in a plaintiff's favor on a Section 1983 claim would effectively render his conviction invalid – for instance, by finding that he was deprived of federal constitutional rights at trial – *Heck* will bar the claim unless and until he succeeds in setting it aside.

By Claims III and V, Plaintiff alleges that he was convicted in Cases 1 and 2 as the result of numerous federal constitutional defects, including the Judicial Defendants' violations of his rights to a speedy trial, due process and equal protection, and to be free from double jeopardy, and the ineffective assistance of counsel provided by Defendants Robert Sanger and Neil Levinson. For the Court to

rule in Plaintiff's favor on these claims, it would have to find that Plaintiff, indeed, was deprived of one or more of these federal constitutional rights – a finding that in turn necessarily would imply, if not demonstrate, the invalidity of his convictions sustained in Case 1 and/or Case 2. Plaintiff's convictions in Cases 1 and 2, however, are extant. No appeal was taken in connection with Case 2, and Plaintiff's appeal of Case 1 failed, as did his subsequent federal habeas proceeding.[9] As both such convictions remain, his attack on them made through Claims III and V are barred by *Heck*. Accordingly, both claims should be dismissed without prejudice[10] on that basis.[11]

* * * * *

For the foregoing reasons, the Judicial Defendants Motion should be granted and Claims III and V of the Complaint should be dismissed without leave to amend. This case should be dismissed as to the Judicial Defendants on a with prejudice basis (*Rooker-Feldman* and judicial immunity grounds) and on a without prejudice

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[9] In *Lack v. Koenig*, 2:10-cv-02060-RGK (GJS), Plaintiff sought federal habeas relief as to Case 1. That action was dismissed with prejudice as untimely [Dkts. 71, 75-76], and Plaintiff's appeal is pending [Dkts. 78-79]. Thus, at present, Case 1 remains a valid conviction.

[10] While the above-discussed *Rooker-Feldman* and judicial immunity grounds warrant dismissal with prejudice, *Heck*-based dismissals are to be on a without prejudice basis. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir.1995) (per curiam) (dismissals under *Heck* are without prejudice).

[11] This *Heck*-based dismissal applies not only to the Judicial Defendants but to Defendants Robert Sanger and Neil Levinson, Plaintiff's trial attorneys in Cases 1 and 2 alleged to have provided ineffective assistance. The *Heck* bar has been found applicable to claims of ineffective assistance of counsel. *See Trimble*, 49 F.3d at 585 (concluding that Sixth Amendment claim of ineffective assistance of counsel brought under Section 1983 is precluded under *Heck*); *Escalera v. Public Defenders Office*, No. 08-2168 IEG, 2009 WL 88597, at *3 (S.D. Cal. 2009) ("to the extent Plaintiff seeks damages under 42 U.S.C. § 1983 ... based on the alleged ineffective assistance of his trial counsel, his claim amounts to an attack on the validity of his underlying criminal proceedings, and as such, is not cognizable under 42 U.S.C. § 1983"). While neither Defendant has invoked *Heck* as a basis for dismissal (unlike the moving Judicial Defendants), as the Court observed earlier in Note 4, such dismissal nonetheless is appropriate given that the *Heck* bar plainly is applicable as to all Defendants named in Claims III and V (including Unserved Defendant Cota). *See Abagninin*, 545 F.3d at 742; *Silverton*, 644 F.2d at 1345 (9th Cir. 1981).

basis (*Heck* ground).

III. The Sanger Motion

The Complaint alleges a single claim against Defendant Robert Sanger – Claim V. As discussed in the preceding Section, the Court has concluded that Claim V is *Heck*-barred and should be dismissed without prejudice on that basis, including as to Sanger. The Sanger Motion raises four additional grounds for dismissal. First, Sanger argues that the Complaint is untimely under California Code of Civil Procedure § 340.6(a), which pertains to California state law actions against attorneys. Second, Sanger argues that the Complaint fails to meet federal pleading standards, as it does not provide fair notice of the substance of Plaintiff's claim against Sanger. Third, Sanger asserts that actual innocence is a required element of a state law legal malpractice claim based on a criminal case, and that Plaintiff has failed to plead actual innocence and could not do so given that he has been convicted twice and lost on appeal once. Fourth, Sanger argues that the Complaint fails to state a claim upon which relief can be granted under Section 1983, because the requisite "under color of state law" element does not exist.

Dismissal is not warranted based on Sanger's first and third grounds, because they rest on an erroneous premise, namely, that the Complaint asserts a state law legal malpractice claim against him. The sole claim alleged against Sanger (albeit defectively) is brought only under Section 1983 and asserts (without explanation) that Sanger provided ineffective assistance, which implicates the Sixth Amendment. Claim V is a federal claim, not a state law claim, and thus, the state law authorities on which the first and third arguments rest are inapplicable.

Sanger's second argument has merit. The sole allegation against Sanger is that "Petitioner had ineffective assistance of counsel by Robert Sanger (who even admitted it in court) a[nd] Neil Levinson." [Complaint at 19.] The Court assumes this pertains to something done (or not done) with respect to the unsuccessful *Kellett*

motion that is the subject of Claim V, but this is mere surmise given the lack of any allegations of fact against both Sanger and Levinson.[12] The Complaint is entirely bereft of any allegations as to what Sanger did or did not do that could rise to the level of a Sixth Amendment violation, much less how and when Sanger purportedly admitted in open court that he had provided ineffective assistance. Under the foregoing Rule 8 and Rule 12(b)(6) standards, the Complaint fails woefully to provide the Court, Sanger, and Levinson with fair notice of the basis for Plaintiff's Section 1983 claim against these two Defendants. As the Complaint lacks sufficient factual allegations to give rise to a claim that is plausible against these two Defendants, dismissal is warranted on this ground.[13] *Iqbal*, 556 U.S. at 678; *see also Twombly*, 550 U.S. at 556; *Brazil*, 66 F.3d at 199.

Sanger's fourth argument also has merit and presents a dispositive basis for dismissal. Section 1983 requires a violation of federal constitutional or statutory rights caused by a person acting under color of state law. *Crumpton v. Gates*, 947 F.2d 1418-1420 (9th Cir. 1991). To state a viable Section 1983 claim, a pleading must allege facts that, if true, would establish that the defendant was acting under color of state law with respect to the complained-of matters. *See, e.g., Marsh v. County of San Diego*, 680 F.3d 1148, 1158 (9th Cir. 2012). Generally, private individuals and entities cannot be held liable, because Section 1983 "excludes from its reach merely private conduct, no matter how discriminatory or wrong." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49 (1999).

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[12] This particular defect in the Complaint as to Sanger, and thus ground for dismissal, is equally applicable to Levinson, given that the only allegation against him is as quoted above. As a result, dismissal as to Levinson is warranted for the same reasons as it is with respect to Sanger.

[13] As noted earlier, Plaintiff has not opposed the Sanger Motion. The Court has reviewed the additional factual allegations set forth in Plaintiff's Oppositions to the Judicial Defendants Motion and to the CDCR Defendants Motion. There is nothing in those Opposition filings that provides any basis for a viable claim against Defendants Sanger and Levinson, no matter how liberally Plaintiff's assertions are construed.

Attorneys appointed to represent a criminal defendant during trial do not act under color of state law, because representing a client "is essentially a private function . . . for which state office and authority are not needed." *Polk County v. Dodson*, 454 U.S. 312, 319 (1981); *see also United States v. De Gross*, 960 F.2d 1433, 1442 n.12 (9th Cir. 1992). This is so whether defense counsel is privately-retained or an appointed public defender. *See Miranda v. Clark County*, 319 F.3d 465, 468 (9th Cir. 2003) (en banc) (finding that public defender was not a state actor subject to suit under Section 1983 because, so long as he performs a traditional role of an attorney for a client, "his function," no matter how ineffective, is "to represent his client, not the interests of the state or county"); *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003) (affirming Rule 12(b)(6) dismissal for failure to state a claim as to a private attorney defendant, because a private attorney does not act under color of state law, and conclusory allegations that the lawyer was conspiring with state officers to deprive the plaintiff of due process are insufficient to satisfy the under color of state law requirement).

Sanger is sued solely for his acts taken in his role as Plaintiff's counsel in connection with Case 1. Levinson is sued solely for his acts taken in his role as Plaintiff's counsel in Case 2. Plaintiff seeks to hold them liable under Section 1983 for conduct taken in those roles, *i.e.*, for allegedly ineffective representation while serving as his defense counsel. As a result, Sanger and Levinson were not acting under color of state law for purposes of Section 1983 and no cognizable claim is or can be stated against then. As this defect is fundamental and fatal, amendment would be futile,[14] the Sanger Motion should be granted, and Sanger and Levinson should be dismissed with prejudice.

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[14] The Court's finding of futility is bolstered by the fact that it previously has advised Plaintiff of this same defect. In late November 2018, Plaintiff filed a Section 1983 complaint making many of the same allegations as in this action and against many of the same Defendants. On January 10, 2019, the Court issued an Order denying Plaintiff leave to proceed without prepayment of the filing fee based on the complaint's numerous defects, including this same lack

IV. The CDCR Defendants Motion

The Complaint asserts three claims against the four CDCR Defendants.

Claim I is brought against CDCR Defendants S. Posson ("Dr. Posson") and C. Koenig ("Warden Koenig), among others, based on an event that is alleged to have occurred on March 14, 2018. [Complaint at 7.] Plaintiff alleges that: he was taken to the hospital on March 4, 2018, with stomach pains; upon testing, a mass was detected; Dr. Tabbaa indicated it might be cancer; Dr. Tabbaa's March 9, 2018 discharge papers stated that Plaintiff would benefit from a referral to UCSF for further testing within 3-5 days; such testing "never happened"; and, instead, Plaintiff was sent back to court in Santa Barbara. Plaintiff further alleges that: on May 8, 2018, he again was rushed to the hospital with stomach pain; Dr. Tabbaa noted that he had instructed the prison to send plaintiff to UCSF; and Plaintiff responded that "they won't follow your orders but they keep sending me to court." Plaintiff asserts that these two CDCR Defendants violated his Eighth Amendment rights by acting in deliberate indifference to his medical needs, namely, by failing to follow the March 9, 2018 discharge recommendation by Dr. Tabbaa that Plaintiff be sent to UCSF for further testing within 3-5 days, *i.e.,* by March 14, 2018. [Complaint at 7, 9.][15]

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of "under color of state law" defect as to the attorney defendants sued. *See Lack v. Carrozzo*, 2:18-cv-09939-RGK (GJS), Docket No. 6. Given that Plaintiff has been given prior notice of this defect and has been unable to rectify it here, it is plain that he cannot do so.

[15] Plaintiff also states, without explanation, that his rights under the Fifth, Sixth, and Fourteenth Amendments were violated by this alleged deliberate indifference, as well as that the Defendants' deliberate indifference deprived him of his "rights under Title 18, U.S.C. Section 242." [Complaint at 9.] 18 U.S.C. § 242 is a federal criminal statute and Plaintiff may not bring a Section 1983 claim premised on that statute. *See, e.g., Allen v. Gold Country*, 464 F.3d 1044, 1048 (9th Cir. 2006) (Section 242 does not give rise to civil liability); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (same). A Section 1983 medical deliberate indifference claim by a prisoner properly arises under the Eighth Amendment's proscription against cruel and unusual punishment, rather than under the Fifth and Sixth Amendments or the Fourteenth Amendment's substantive due process guarantee. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("[w]here a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing such a claim").

Claim II is brought against CDCR Defendants R. Skipper-Dota ("Skipper-Dota") and D. Moeller ("Moeller"), as well as an Unserved Defendant, based on an event alleged to have occurred on November 16, 2017. [Complaint at 10.] Plaintiff alleges that both Defendants interfered with his "due process rights" under 18 U.S.C. § 242 when: Skipper-Dota twice vacated Plaintiff's already-approved parole release under Proposition 57, which prevented Plaintiff from being released to have medical treatment and defending himself in Case 2; and Moeller called Plaintiff a violent criminal and denied Plaintiff Proposition 57 release. [Complaint at 10-11.][16]

Claim VI is brought against CDCR Defendant Warden Koenig, among others, based on an event alleged to have occurred on May 26, 2017. [Complaint at 20.] Plaintiff alleges that, on that date, the United States Court of Appeals for the Ninth Circuit issued a "'Stay Order'"[17] that he showed to a prison counselor, and the "warden office says 'They don't listen to that court'" and transported Plaintiff. He contends that by transporting him, Warden Koenig violated the Fifth, Eleventh, and Fourteenth Amendments, 28 U.S.C. § 2251, and "Federal Rule 23(a)."[18] [Complaint at 21-22.]

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[16] As noted above, Plaintiff cannot bring a Section 1983 claim premised on an asserted 18 U.S.C. § 242 violation. Claim II also states that Plaintiff's rights under the Fourth and Sixth Amendments were violated in some unspecified manner, but there is nothing in the claim that implicates these two Amendments.

[17] The Court has reviewed the dockets of this District Court and the Ninth Circuit, which fail to show the existence of any such court-issued stay order. Rather, they show that: in Plaintiff's habeas action in this District Court – *Lack v. Brown*, 2:17-cv-00026-BRO (AJW) – Judgment was entered on January 11, 2017, dismissing the case without prejudice; on May 22, 2017, Plaintiff filed a "notice" citing Fed. R. App. 23 and seeking an order from the District Court precluding him from being transferred to another prison, but no court order issued in response to that notice, whether from the District Court or the Ninth Circuit; and on May 26, 2017, the Ninth Circuit opened an appeal docket and issued a form notice assigning a case number (17-55759) and advising that a briefing schedule would not be set until there was a ruling on the certificate of appealability issue.

[18] A purported violation of a Federal Rule of Appellate Procedure cannot serve as the basis for a Section 1983 claim. Nor do 28 U.S.C. § 2251 or the Eleventh Amendment appear to have any applicability to the subject-matter of Claim VI.

The CDCR Defendants Motion raises four grounds for dismissal. First, the CDCR Defendants contend that the Complaint violates Rule 8, because it lacks sufficient factual allegations to provide them with fair notice. Second, they contend that the Complaint fails to state a cognizable Section 1983 claim against them, because it fails to allege that any of them personally participated in, or caused, any violation of Plaintiff's constitutional rights. Third, they contend that Plaintiff's claims against them are untimely under the applicable statute of limitations. Fourth, they contend that Plaintiff's official capacity claims against them for monetary damages (compensatory and punitive) are barred by the Eleventh Amendment.

The CDCR Defendants' first and second arguments for dismissal have some merit. The Complaint's allegations are barebones and cryptic, failing to identify clearly what each such Defendants allegedly did or did not do. For example, as to Claim II and Skipper-Dota and Moeller, Plaintiff apparently contends that they did something to thwart a grant of parole under Proposition 57 that he already had received, but he fails to allege when he was so granted parole and what each Defendant actually did to overturn such a grant. As to Claim I and Dr. Posson and Warden Koenig, the Complaint does not plead a single fact that could support finding that they had anything to do with Plaintiff not being sent to UCSF in accordance with Dr. Tabbaa's discharge instructions or that they were somehow involved in Plaintiff being sent to court after his discharge from the hospital. As to Claim VI and Warden Koenig, there is no fact alleged in the Complaint that could support a finding that this Defendant had anything to do with the decision to transport Plaintiff notwithstanding the purported "stay order" he alleges.

In short, not only does the Complaint violate Rule 8 by failing to provide the CDCR Defendants (and the Court) with fair notice of the alleged bases for liability under Section 1983, but it also fails to plead the required causation for a viable Section 1983 claim. *See, e.g., Rizzo v. Goode*, 423 U.S. 362, 372-73 (1976); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Thus, dismissal on this basis is

warranted. That said, Plaintiff's Opposition to the CDCR Defendants Motion indicates that Plaintiff likely could plead his claims against at least three of these Defendants with more factual detail,[19] given the numerous additional factual allegations set forth in the Opposition that are *not* pleaded in the Complaint. Thus, while dismissal under Rules 8 and 12(b)(6) of the three claims pleaded against the CDCR Defendants is warranted, such a dismissal would be on a leave to amend basis. The two other grounds for dismissal raised by the CDCR Defendants, however, warrant a dismissal that should be without leave to amend and with prejudice.

The CDCR Defendants' fourth ground for dismissal plainly has merit; indeed, in his Opposition, Plaintiff ignores it entirely, presumably because he cannot contest it. The Complaint sues Skipper-Dota and Moeller in both their individual and official capacities as to the sole claim in which they are named (Claim II), and Warden Koenig in both capacities in connection with Claim VI. As to Claim I, in which both Dr. Posson and Warden Koenig are named as defendants, the Complaint fails to indicate the capacities in which they are sued, but given that Plaintiff sues the other CDCR Defendants in both capacities, the Court assumes he intends to do so as to this claim as well. The Complaint seeks compensatory and punitive damages against these four Defendants. All four CDCR Defendants are alleged to be employed by a state agency. To the extent that Plaintiff sues these four Defendants in their official capacities for damages, this is tantamount to a damages claim against the State of California itself. *See Kentucky v. Graham*, 473 U.S. 159, 169-70 (1985); *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). Such a claim is barred by the Eleventh Amendment.

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[19] The Opposition asserts a variety of factual allegations against CDCR Defendants Dr. Posson, Skipper-Dota, and Moeller that are missing entirely from the Complaint, including clarifying the dates on which they allegedly wrongfully acted, as discussed *infra*. The Complaint, however, fails to set forth any *facts* as to Warden Koenig which could serve as a basis for finding that, with amendment, a viable Section 1983 claim could be stated against him.

The Eleventh Amendment prohibits federal jurisdiction over claims against a state – whether brought by its own citizens or noncitizens – unless the state has consented to suit or Congress has abrogated its immunity. *See, e.g., Kimel v. Florida Board of Regents*, 528 U.S. 62, 72-73 (2000); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98-101 (1984). "The Eleventh Amendment bars suits which seek either damages or injunctive relief against a state, an 'arm of the state,' its instrumentalities, or its agencies." *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995) (citation omitted). The Eleventh Amendment's grant of sovereign immunity to states encompasses not only actions when a state itself is a defendant but also actions against state agencies and instrumentalities, as well as its officials. *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997).

The Eleventh Amendment bars all monetary damages claims asserted in the Complaint against the CDCR Defendants in their official capacities. *See Pennhurst*, 465 U.S. at 100. Because the Eleventh Amendment operates to deny this Court jurisdiction to adjudicate such damages claims, this defect is jurisdictional and cannot be remedied through amendment, and thus, the dismissal of the damages claims must be with prejudice.

Finally, the CDCR Defendants' third ground for dismissal – untimeliness – has merit. The Court notes that, in his Opposition, Plaintiff has ignored the untimeliness defense raised in the CDCR Defendants Motion. The failure to respond in an opposition brief to an argument put forward in an opening brief can constitute waiver with respect to the matter in issue. *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011); *see also Quinones v. Cnty. of Orange*, No. SACV 20-666-JVS (KESx), 2020 WL 5289923, at *4 (C.D. Cal. July 15, 2020) (construing plaintiff's failure to address a statute of limitations argument in a motion to dismiss "as her concession that this is a valid reason to dismiss the claim") (citing *Allen v. Dollar Tree Stores, Inc.*, 475 Fed. Appx. 159, 159 (9th Cir. 2012)); *Heraldez v. Bayview Loan Servicing, LLC*, No. CV

16-1978-R, 2016 WL 10834101, at *2 (C.D. Cal. Dec. 15, 2016) ("Failure to oppose constitutes a waiver or abandonment of the issue."), aff'd by 719 F. App'x 663 (9th Cir. 2018). But even without any such presumed concession, it is readily apparent that the claims alleged against the CDCR Defendants are time-barred.

"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." *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); *see also Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir. 1994). The statute of limitations for personal injury actions under California law is two years. *See* Cal. Code Civ. P. § 335.1. "Federal law determines when a federal civil rights claim accrues." *Lukovsky v. City and County of San Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008). Under federal law, a civil rights claim accrues when the plaintiff knows or has reason to know of the injury that forms the basis of the claim. *Id.; see also TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1991). A claim ordinarily accrues on the date of the injury. *Belanus v. Clark*, 796 F.3d 1021, 1025 (9th Cir. 2015). "[I]t is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (internal citations and punctuation omitted); *see also id.* at 391 (observing that a cause of action accrues even though the plaintiff may not yet know the full extent of his injury).

Plaintiff was incarcerated on the dates his claims accrued (as discussed below), and thus, statutory tolling under California Code of Civil Procedure § 352.1(a) may apply. This state statute provides up to two years of tolling for a plaintiff who was incarcerated at the time his claim accrued. Even if this California two-year tolling provision is applied in full so as to afford Plaintiff an additional two years in which to sue, on top of the two years provided under the Section 335.1

limitations period, each of Plaintiff's three claims asserted against the CDCR Defendants is untimely.

The wrong at issue in Claim I is the failure to send Plaintiff to UCSF for further testing within 5 days of his March 9, 2018 discharge by Dr. Tabbaa from another hospital. The Complaint expressly alleges that this wrongful event occurred on March 14, 2018. [Complaint at 7.] The only wrongdoing alleged against Warden Koenig is his asserted failure to send Plaintiff to USCF for further testing within 5 days of his March 9, 2018 discharge by Dr. Tabbaa. [Complaint at 7.] In his Opposition to the CDCR Motion, Plaintiff alleges that Dr. Posson's asserted wrongdoing occurred on or before March 15, 2018, the date on which Plaintiff was transferred to Wasco State Prison allegedly because Dr. Posson had decided to lift Plaintiff's medical hold on or before that date. [Opposition at 2-3.] Thus, at the latest, Plaintiff's own allegations show that Claim I accrued against these two CDCR Defendants on or before March 14 and/or 15, 2018, at the latest. This action, however, was not initiated until May 2, 2022, when Plaintiff no longer was incarcerated, more than four years after Claim I accrued. Even with the benefit of adding two years tolling pursuant to California Code of Civil Procedure § 352.1(a) to the two-year limitations period for this Section 1983 claim, Claim I remains untimely.

Claim II is based on a wrong that is alleged to have occurred on November 16, 2017. [Complaint at 10.] While the Complaint is bereft of facts about what happened, other than to allude vaguely to an apparent rescission of parole granted under Proposition 57, Plaintiff's Opposition provides more information. Plaintiff alleges therein that: on September 18, 2017, he received notice that his release on parole had been approved; on November 6, 2017, Skipper-Dota issued a decision which reversed that grant of parole; on January 12, 2018, Skipper-Dota denied Plaintiff's request for review and upheld her decision; and on February 26, 2018, Moeller affirmed Skipper-Dota's decision. [Opposition at 6-9.] Thus, Claim II

accrued, at the latest, by no later than February 26, 2018. Given that the Complaint was not filed until May 2, 2018 – more than four years after Claim II accrued – Claim II also is untimely.

Claim VI is based on an event alleged to have occurred on May 26, 2017, namely, the failure that day to adhere to a purported Ninth Circuit stay order by transporting Plaintiff to some unidentified location. [Complaint at 20-21.] Thus, Claim VI accrued by no later than May 26, 2017. Because the Complaint was filed on May 2, 2022 – more than four years after Claim VI accrued – Claim VI is untimely.

The Complaint, on its face, is untimely. Plaintiff has failed to respond to the timeliness issue raised by the CDCR Defendants Motion, and thus, there is no basis for concluding that this defect can be overcome through amendment. Accordingly, the CDCR Defendants Motion should be granted based on the untimely nature of the Complaint, and Claims I, II, and VI – as well as the CDCR Defendants – should be dismissed without leave to amend and with prejudice.

* * * * *

The Judicial Defendant Motion, the Sanger Motion, and the CDCR Defendant Motion, therefore, should be granted. As noted above, almost four years before he filed this action, Plaintiff brought a similar lawsuit raising many of these same claims against many of these same Defendants. That 2018 lawsuit was dismissed for failure to state a claim upon which relief can be granted, based on the Court's findings that the defects found – many of which are repeated in the instant Complaint – were futile, and thus, leave to amend was not appropriate. The Complaint is replete with a number of those some earlier-identified problems. Given that Plaintiff has not corrected them, this leads to the conclusion that he cannot do so (and, indeed, most of them are non-rectifiable and cannot be corrected through amendment). Because amendment would be futile for the reasons discussed above, the Complaint should be dismissed without leave to amend and the case

should be dismissed with prejudice as to Claims I, II, III, V, and VI and Defendants Judge Thomas P. Anderle, Judge Clifford R. Anderson, III, Judge Michael Carrozzo, Judge Jean M. Dandona, Robert Sanger, Neil Levinson, C. Koenig, D. Moeller, S. Posson, and R. Skipper-Dota, and without prejudice as to Claim IV and Defendants Brian Cota, Jeff Sanger, Santa Barbara Sheriff Moennro [*sic*], CTF Prison Transportation, CTF Prison Doctor John Doe, and two John Doe Defendants alleged to be Santa Barbara Sheriff's Department Deputies.[20]

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) accepting this Report and Recommendation; (2) granting the Judicial Defendants Motion, the Sanger Motion, and the CDCR Defendants Motion, and dismissing the Complaint without leave to amend; and (3) dismissing this action with and without prejudice as set forth above.

DATED: April 24, 2022

GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the United States Court of Appeals for the Ninth Circuit, but may be subject to the right of any party to file objections as provided in the Local Civil Rules for the United States District Court

[20] As noted above, the *Heck* bar ground the Court has found to have merit as to Claims III and V normally would result in a dismissal of those claims on a without prejudice basis. However, the Court also has found that two other grounds (*Rooker-Feldman* and judicial immunity) require that the two claims be dismissed on a with prejudice basis. Accordingly, the Court recommends that Claims III and V be dismissed with prejudice regardless of its alternative *Heck* finding.

for the Central District of California and review by the United States District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until the District Court enters judgment.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 18 2024

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

DAVID JAMES LACK,

Plaintiff-Appellant,

v.

POSNER, Dr; et al.,

Defendants-Appellees.

No. 23-55522

D.C. No.
2:22-cv-02955-RGK-GJS
Central District of California,
Los Angeles

ORDER

Before: CANBY, TASHIMA, and KOH, Circuit Judges.

We treat appellant's filing received on June 3, 2024 as a motion for reconsideration en banc. The motion for reconsideration en banc (Docket Entry No. 39) is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

APPENDIX A

Additional material from this filing is available in the Clerk's Office.