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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

NYLES LAWAYNE WATSON,

Plaintiff,

v.

D. K. SISTO, et al.,

Defendants.

CIV-S-07-1871 LKK GGH P

**NOTICE OF MOTION AND MOTION
TO DISMISS FIRST AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF; AND
DECLARATION OF CATHERIN GUESS**

Date: July 30, 2009
Time: 10:00 a.m.
Dept: 24, 8th Floor
Judge Gregory Hollows
Trial Date N/A
Action Filed: September 10, 2007

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1 TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on July 30, 2009 or as soon thereafter as the matter may be
3 heard in Courtroom 24 the above-entitled court, located at 501 I Street, Sacramento, CA,
4 Defendants California Department of Corrections and Rehabilitation, Jason Rohrer, M.D.,
5 Alfredo Noriega, M.D., Richard Tan, M.D., Dennis K. Sisto and Alvaro C. Traquina, M.D. will
6 move the court to dismiss the action pursuant to Federal Rules of Civil Procedure Rule 12(b)(6)
7 because plaintiff's amended complaint fails to state a claim upon which relief can be granted, on
8 the grounds that: the court lacks jurisdiction to grant relief and plaintiff fails to state a valid claim
9 against defendants.

10 The motion will be based on this Notice of Motion and Motion, the Memorandum of Points
11 and Authorities filed herewith, the Declarations of Catherine Guess and N. Grannis and the
12 pleadings and papers filed herein.

13 Dated: June 30, 2009

Respectfully submitted,

14 EDMUND G. BROWN JR.
15 Attorney General of California
16 STEVEN M. GEVERCER
Supervising Deputy Attorney General

17 /s/ Catherine Woodbridge Guess

18 CATHERINE WOODBRIDGE GUESS
19 Deputy Attorney General
20 *Attorneys for Defendants*
21 *California Department of Corrections and*
22 *Rehabilitation, Jason Rohrer, M.D., Alfredo*
23 *Noriega, M.D., Richard Tan, M.D., Dennis*
24 *K. Sisto and Alvaro C. Traquina, M.D.*

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO
DISMISS**

I. INTRODUCTION

Plaintiff is an inmate incarcerated at California State Prison Solano (CSP-Solano). He was convicted of armed robbery and is serving a 26-year determinate sentence.

Plaintiff brings this lawsuit for alleged deliberate indifference to medical needs, alleged violation of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, and violation of the First Amendment for alleged retaliation. The named defendants are California Department of Corrections and Rehabilitation (CDCR), CSP- Solano, Dr. Tan, Dr. Rohrer, Dr. Traquina, Dr. Noriega, Dr. Naku and retired warden Dennis Sisto.

The first cause of action under 42 U.S.C. § 1983 is alleged deliberate indifference to medical needs against defendants Sisto, Traquina, Tan, Rohrer, Noriega, Naku, CDCR and CSP-Solano. The first cause of action allegedly arises out of events dating back to 2002 and continuing to present.

The second cause of action for alleged violation of the First Amendment is asserted against defendant doctors Traquina and Tan.

The third cause of action is for alleged violation of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (RA) against defendants Sisto, Traquina, Tan, Rohrer, Noriega, Naku, CDCR and CSP-Solano.

II. FACTUAL ALLEGATIONS

Plaintiff alleges he suffered a back injury sometime in the 1990's. He was transferred from California State Prison – Sacramento to CSP-Solano in 2001. After being transferred to CSP-Solano, plaintiff alleges defendants were deliberately indifferent to his medical needs by failing to provide adequate medical care. Plaintiff's first amended complaint chronicles the extensive and exhaustive medical care he received at CSP-Solano.

Between July 2002 and August 2006, the first amended complaint lists over 50 occasions on which plaintiff was seen and treated for his back complaints, including MRI studies, doctor's visits, x-rays, orthopedic consultations and epidural injections. (First Amended Complaint pp. 5-

1 13, ¶¶ 25-73). Between December 2006 and August 2007, plaintiff was seen an additional five
2 times for back complaints, including yet another MRI study of the low back. (First Amended
3 Complaint pp. 13-14, ¶¶ 74-80).

4 Plaintiff's original complaint was filed September 11, 2007. The first amended complaint
5 alleges that since filing the original complaint, plaintiff has received continued medical care,
6 including a specialty consultation with an orthopedic surgeon, pain medication, physical therapy
7 and epidural injections. Nevertheless, plaintiff contends that defendants' continued care for his
8 back complaints rises to the level of deliberate indifference.

9 At no time has any doctor, including the orthopedic surgeons who saw plaintiff,
10 recommended surgery for plaintiff's back condition. According to the amended complaint, the
11 last orthopedic surgeon to see plaintiff, Dr. Huffman, recommended physical therapy, pain
12 medication and epidural injections. Plaintiff received these treatment recommendations. (First
13 Amended Complaint pp. 16- 17, ¶¶ 90, 93, 94, 97.)

14 **III. LEGAL STANDARD**

15 Federal Rules of Civil Procedure 12(b)(6) provides that a party may move to dismiss a
16 claim for relief in any pleading for failure to state a claim upon which relief can be granted.

17 **IV. ARGUMENT IN SUPPORT OF MOTION TO DISMISS**

18 The amended complaint fails to state a valid claim against defendants. The first cause of
19 action for deliberate indifference to medical needs fails against defendants CDCR, CSP-Solano,
20 Dr. Traquina and retired warden Sisto because of Eleventh Amendment immunity. Additionally,
21 the court lacks jurisdiction for any claim of injunctive relief based on the pending class action
22 matter known as *Plata v. Schwarzenegger*, Case No. C-01-01351, (N.D. Cal., filed April 5, 2001).
23 See *Meyer v. Schwarzenegger* 2008 WL 2223253 (E.D. Cal.) *12-13.

24 The second cause for alleged violation of the First Amendment against defendant Drs.
25 Traquina and Tan fails to state a claim. The third cause of action for alleged violation of the
26 ADA and Section 504 of the RA also fails to state a claim against defendants.

A. The first cause of action for alleged deliberate indifference to medical needs fails to state a claim against defendants.

1. The Eleventh Amendment bars plaintiff's claims against CDCR, CSP-Solano, Chief Medical Officer Dr. Traquina and retired warden Sisto.

The court lacks jurisdiction over the claims against CDCR and CSP-Solano. Likewise, the court lacks jurisdiction over Dr. Traquina and retired warden Sisto in their official capacity. The Eleventh Amendment precludes states and state officials from being sued in federal court for money damages. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). In this case, plaintiff seeks money damages for alleged violation of § 1983 arising out of deliberate indifference to medical needs. Accordingly, the first amended complaint against defendants CDCR, CSP-Solano, Dr. Traquina and Mr. Sisto is barred.

Plaintiff's request for injunctive relief against these defendants fails for three reasons:

a. *Ex Parte Young* does not apply.

First, in *Ex Parte Young*, 209 U.S. 123 (1908), the U.S. Supreme Court created an exception to Eleventh Amendment immunity by holding that a suit challenging the constitutionality of a state official's action in enforcing a law is not one against the state and therefore immunity does not attach. *Id.* at 159-160. The Court went on to hold that the Eleventh Amendment does not bar federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law. *Id.* at 155-156, 159. However, the Supreme Court has refused to extend *Ex Parte Young* to claims of retrospective relief. *Pennhurst*, 465 U.S. at 102-103; *Quern v. Jordan*, 440 U.S. 332, 337 (1979); *Eldeman v. Jordan*, 415 U.S. 651, 668-669 (1971) (overruled on other grounds); *Green v. Mansour*, 474 U.S. 64, 73 (1985). As a result, where the remedy sought is an injunction or award of money damages for past violations of federal law, as is the case here, the Eleventh Amendment bars federal court jurisdiction. See *Eldeman*, 415 U.S. at 666-669; *Green*, 474 U.S. at 73.

b. The court lacks jurisdiction to grant retroactive relief.

Second, even if plaintiff properly sought prospective relief, the CDCR and CSP-Solano are not proper parties. Plaintiff would be required to proceed against the appropriate state actor in his

1 official capacity. Here, however, plaintiff's allegations against Traquina, as Chief Medical
 2 Officer, and retired warden Sisto do not overcome Eleventh Amendment immunity because
 3 plaintiff complains of past alleged violations and not a continuing violation against him. A state
 4 official's alleged constitutional violation(s) must be ongoing and continuous, not just a one-time
 5 violation or recurring past violations. *Papasan v. Allain*, 478 U.S. 265, 277-278 (1985). As a
 6 result, the court lacks jurisdiction and the first amended complaint should be dismissed against
 7 CDCR, CSP-Solano and Dr. Traquina and retired warden Sisto in their official capacity.

8 **c. Plaintiff's injunctive relief claim falls within the scope of a**
 9 **pending class action involving prison medical care, and,**
 10 **therefore, this court is without jurisdiction to hear plaintiff's**
 11 **claim.**

12 Third, the court lacks jurisdiction to hear plaintiff's claim for injunctive relief arising out of
 13 prison medical care. A plaintiff who is a member of a class action for equitable relief from prison
 14 conditions may not maintain a separate individual suit for equitable relief involving the same
 15 subject matter of the class action. See *Crawford v. Bell*, 599 F.2d 890, 892-93 (9th Cir. 1979) ;
 16 see also *McNeil v. Guthrie*, 945 F.2d 1163, 1165 (10th Cir. 1991) (noting "[i]ndividual suits for
 17 injunctive and equitable relief from alleged unconstitutional prison conditions cannot be brought
 18 where there is an existing class action"); *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir.
 19 1988) (en banc) (noting that "[t]o allow individual suits would interfere with the orderly
 20 administration of the class action and risk inconsistent adjudications"); see also, *Choyce v.*
 21 *Saylor, et al.*, 2007 WL 3035406 (N.D. Cal.) (dismissing claim for injunctive relief to address
 22 alleged inadequate medical care based on *Plata* class action lawsuit); *Grajeda v. Horel, et al.*,
 23 2009 WL 302708 (N.D. Cal.) (dismissing injunctive relief claim for medical care to treat severe
 24 and continuing back and hip pain due to *Plata* class action); and *Meyer v. Schwarzenegger, et al.*,
 25 2008 WL 2223253 (E.D. Cal.) (dismissing injunctive relief claim for orthopedic consultation and
 26 medical care to treat chronic back pain due to pending *Plata* class action); and *Ortega v. Kelly, et*
 27 *al.*, 2008 WL 3928236 (E.D. Cal.) (dismissing claim for equitable relief claim to address
 28 inadequate mental health care based on Coleman class action).

///

1 A class action is presently pending in the United States District Court for the Northern
2 District of California which involves the same subject matter presented by plaintiff's equitable
3 claims in this action. *Plata v. Schwarzenegger*, Case No. C-01-01351, (N.D. Cal., filed April 5,
4 2001). The class in *Plata* is comprised of inmates incarcerated in California prisons alleging that
5 prison officials are depriving them of constitutionally required health care. See *Plata* Stipulation
6 for Injunctive Relief (*Plata* Stipulation) attached as Exhibit A to accompanying Request to Take
7 Judicial Notice. The class members in *Plata* allege that they are not receiving adequate medical
8 care in violation of the Eighth Amendment. The *Plata* class consists of all inmates in the custody
9 of the California Department of Corrections and Rehabilitation with serious medical needs. *Plata*
10 Stipulation, ¶ 8.

11 Under the *Plata* Stipulation, the CDCR is to implement health care policies and procedures
12 that "meet or exceed the minimum level of care necessary to fulfill the defendants' obligation to
13 plaintiffs under the Eighth Amendment..." *Plata* Stipulation, ¶ 4. Any disputes as to the
14 adequacy of the health care policies and procedures are to be resolved by the dispute resolution
15 procedures set forth in the stipulation. *Id.*, at ¶¶ 4, 7, 30. The agreement also provides that the
16 Court may grant injunctive relief to resolve any disputes regarding the adequacy of health care as
17 a means to enforce the terms of the stipulation. *Id.* at ¶¶ 28-30.

18 In this case, plaintiff is a CDCR inmate incarcerated at CSP-Solano, and he is seeking
19 injunctive relief with respect to his alleged inadequate medical care. Plaintiff's claim falls
20 squarely within the ambit of the *Plata* class action. Plaintiff, therefore, must bring his "claims for
21 equitable relief ... through the class representative until the class action is over or the consent
22 decree is modified." *McNeil v. Guthrie*, 945 F.2d at 1166; see also *Crawford v. Bell*, 599 F.2d at
23 892-93; *Frost v. Symington*, 197 F.3d 348, 359 (9th Cir. 1999). Plaintiff's action is improper and
24 must be dismissed.

25 Moreover, plaintiff agrees that *Plata* is applicable to his claims as the first amended
26 complaint devotes several pages to the *Plata* case. In addition, plaintiff attaches to his first
27 amended complaint a copy of the *Plata* case.

28 ///

1 **2. Plaintiff fails to state a viable claim under § 1983.**

2 **a. CDCR and CSP-Solano are not “persons” within the meaning**
 3 **of § 1983.**

4 Plaintiff’s first cause of action under § 1983 fails against CDCR and CSP-Solano fails.

5 CDCR and CSP-Solano are not “persons” under 1983. 42 U.S.C. § 1983 (2000) reads in
 6 pertinent part:

7 Every person who, under color of any statute, ordinance, regulation, custom, or
 8 usage ... subjects ... any citizen of the United States ... to the deprivation of any rights,
 9 privileges, or immunities secured by the Constitution and laws, shall be liable to the
 10 party injured in any action at law...

11 “States or governmental entities that are considered ‘arms of the state’ ... are not persons
 12 within the meaning of 1983.” *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir.
 13 1989) quoting *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 70 (1989). Because CDCR
 14 and CSP-Solano are arms of the State of California, they not a “person” within the meaning of §
 15 1983 and therefore the first cause of action fails to state a valid claim against CDCR and CSP-
 16 Solano.

17 **b. Dr. Traquina and retired warden Sisto in their official capacity**
 18 **are not “persons” under § 1983.**

19 Dr. Traquina and retired warden Sisto in their official capacity are not “persons” within the
 20 meaning of 1983. State officials acting in their official capacities are not “persons” within the
 21 meaning of the 1983. *Hafer v. Melo* 502 U.S. 21, 25, (1991). Moreover, a suit against a state
 22 official in his or her official capacity is not a suit against the official but rather is a suit against the
 23 official’s office. *Brandon v. Holt*, 469 U.S. 464, 471 (1985). As such, it is no different from a
 24 suit against the State itself. See, *Kentucky v. Graham*, 473 U.S. 159, 165-166 (1985); *Will v.*
 25 *Michigan Dep’t of State Police*, *supra*, 491 U.S.at 71. Accordingly, the first cause of action fails
 26 to state a claim against Dr. Traquina and retired warden Sisto.

27 **c. Respondeat superior liability does not exist for 1983 claims.**

28 In order for a supervisor or other person acting under color of state law to be liable under
 42 U.S.C., § 1983 there must be a showing of personal participation in the alleged rights

1 deprivation. *Jones v. Williams*, 270 F.3d 930 (9th Cir. 2002). There is no respondeat superior
 2 liability under § 1983. *Monnell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

3 When a named defendant holds a supervisory position, the causal link between him and
 4 the claimed constitutional violation must be specifically alleged. See *Fayle v. Stapley*, 607 F.2d
 5 858, 862 (9th Cir. 1979); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), cert. denied, 442
 6 U.S. 941, 99 S. Ct. 2883, 61 L. Ed. 2d 311 (1979). To state a claim for relief under section 1983
 7 based on a theory of supervisory liability, plaintiff must allege some facts that would support a
 8 claim that supervisory defendants either: personally participated in the alleged deprivation of
 9 constitutional rights; knew of the violations and failed to act to prevent them; or promulgated or
 10 "implemented a policy so deficient that the policy 'itself is a repudiation of constitutional rights'
 11 and is 'the moving force of the constitutional violation.'" *Hansen v. Black*, 885 F.2d 642, 646 (9th
 12 Cir. 1989) (internal citations omitted); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

13 The argument that anyone who knows about an alleged violation of the Constitution, and
 14 fails to cure it, has violated the Constitution himself is not correct. "Only persons who cause or
 15 participate in the violations are responsible. Ruling against a prisoner on an administrative
 16 complaint does not cause or contribute to the violation. A guard who stands and watches while
 17 another guard beats a prisoner violates the Constitution; a guard who rejects an administrative
 18 complaint about a completed act of misconduct does not." *George v. Smith*, 507 F.3d 605, 609-10
 19 (7th Cir. 2007) citing *Greeno v. Daley*, 414 F.3d 645, 656-57 (7th Cir. 2005); *Reed v. McBride*,
 20 178 F.3d 849, 851-52 (7th Cir. 1999); *Vance v. Peters*, 97 F.3d 987, 992-93 (7th Cir. 1996).

21 Plaintiff fails to identify any facts supporting a 1983 cause of action against retired warden
 22 Sisto. The first amended complaint is devoid of any factual allegations regarding Mr. Sisto's
 23 knowledge or involvement in plaintiff's medical care. As a result, plaintiff fails to state a 1983
 24 claim against Mr. Sisto.

25 Plaintiff alleges liability against Dr. Traquina based on his failure to train, supervise, and
 26 discipline. (First Amended Complaint p. 3, ¶8; p. 9, ¶ 53.) Since this is liability based on
 27 respondeat superior, plaintiff fails to state a cognizable section 1983 claim against Dr. Traquina.
 28 *Monnell v. Dep't of Soc. Servs.*, 436 U.S. 658.

1 **3. Plaintiff's allegations regarding actions between 2002-September 11,**
 2 **2003 are time-barred.**

3 The applicable statute of limitations for a 1983 action is the forum state's statute of
 4 limitations for personal injury actions. *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004).
 5 In California, a two year statute of limitations became effective as of January 1, 2003. *Id.* at 954-
 6 955; Cal. Code Civ. Proc., §335.1.

7 A 1983 cause of action accrues, and the statute of limitations begins to run, at the time that
 8 "the plaintiff knows or has reason to know of the injury which is the basis of the action."
 9 *Maldonado*, at 954, citing *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) .

10 The cause of action accrues even though the full extent of the injury is not then
 11 known or predictable. [citation] Were it otherwise, the statute would begin to run
 12 only after a plaintiff became satisfied that he had been harmed enough, placing the
 13 supposed statute of repose in the sole hands of the party seeking relief.
 14 *Wallace v. Kato* 127 S. Ct. 1091,1095 1096-1097 (2007). Under California law, the statute is
 15 tolled for a period of two years on civil rights claims when a person is imprisoned for a term less
 16 than life. Cal. Code Civ. Proc., § 352.1. As a result, any actions giving rise to plaintiff's claims
 17 must have occurred no earlier than September 11, 2003. Consequently, plaintiff's allegations
 18 against defendants between 2002-September 11, 2003 are time barred and should be dismissed.

19 **B. The second cause of action for violation of the First Amendment fails to**
 20 **state a claim.**

21 "Within the prison context, a viable claim of First Amendment retaliation entails five basic
 22 elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
 23 because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
 24 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
 25 correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005).

26 Here, plaintiff's allegations against Drs. Tan and Traquina are not sufficiently alleged.
 27 Plaintiff alleges that one of his inmate appeals was processed by Traquina, albeit not to his
 28 satisfaction. (First Amended Complaint p. 15, ¶ 83.) Plaintiff's allegations that concern solely
 actions reviewing plaintiff's grievances do not state a cognizable due process claim. "[A prison]
 grievance procedure is a procedural right only, it does not confer any substantive right upon the

inmates.” *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993) (citing *Azeez v. De Roberts*, 568 F.Supp. 8, 10 (N.D. Ill. 1982)); see also *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (no liberty interest in processing of appeals because no entitlement to a specific grievance procedure). Actions in reviewing prisoner’s administrative appeal cannot serve as the basis for liability under section 1983 action. *Buckley*, 997 F.2d at 495. As a result, plaintiff fails to state a claim.

Likewise, plaintiff fails to allege any facts which support a claim of retaliation by Dr. Tan. Plaintiff admits that Dr. Tan saw plaintiff on October 4, 2007, and noted that plaintiff was waiting for a neurosurgery consult. (First Amended Complaint p. 15, ¶ 83.) Plaintiff alleges he filed an inmate grievance based on Dr. Tan’s alleged lack of professionalism. (First Amended Complaint p. 15, ¶ 83.) Plaintiff provides no further factual allegations regarding how, if at all, Dr. Tan interfered with plaintiff’s medical treatment afterward. Instead, plaintiff identifies seven occasions on which plaintiff received medical care, including medication renewals, an orthopedic surgery consultation and the physical therapy treatments recommended by the orthopedic surgeon. (First Amended Complaint pp. 15-17.) There are no allegations that Dr. Tan took some adverse action against plaintiff because of plaintiff’s protected conduct. See *Rhodes v. Robinson*, *supra*, 408 F.3d at 567-68. Accordingly, the second cause of action fails to state a claim.

C. Plaintiff’s third cause of action for violation of the ADA and Section 504 fails to state a claim against defendants.

1. Individuals cannot be sued under the ADA and Section 504.

In suits brought under Title II of the ADA or Section 504 of the Rehabilitation Act (RA), individuals may not be sued in their individual capacities. See 42 U.S.C. § 12131(1); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1188 n.7 (9th Cir. 2003); *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002); *Lollar v. Baker*, 196 F.3d 603, 609 & n.6 (5th Cir. 1999); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (en banc). As a result, plaintiff’s claim is barred against Drs. Tan, Traquina, Rohrer, Noriega and retired warden Sisto.

Several circuit courts have likewise barred suits against public officials for violation of the ADA and Section 504. E.g., *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 107 (2d Cir. 2001); *Hiler v. Brown*, 177 F.3d 542, 545-46 (6th Cir. 1999), cited in *Baird v. Rose*, 192 F.3d 462,

1 472 (4th Cir. 1999). While the Ninth Circuit has not addressed the issue of public official liability,
 2 at least two district courts within the Ninth Circuit have denied any such liability. See *C.O. v*
 3 *Portland Pub. Sch.* 406 F Supp 2d 1157 (D. Or 2005); *Doe v Haw. Dep't of Educ.*, 351 F Supp 2d
 4 998 (D. Haw. 2004).

5 **2. There is no ADA or Section 504 cause of action for a challenge to**
 6 **medical treatment.**

7 "To establish a violation of Title II of the ADA, a plaintiff must show that (1) [he] is a
 8 qualified individual with a disability; (2) [he] was excluded from participation in or otherwise
 9 discriminated against with regard to a public entity's services, programs, or activities; and (3)
 10 such exclusion or discrimination was by reason of [his] disability." *Lovell v. Chandler*, 303 F.3d
 11 1039, 1052 (9th Cir. 2002).

12 "To establish a violation of § 504 of the Rehabilitations Act (RA), a plaintiff must show
 13 that (1) [he] is handicapped within the meaning of the RA; (2) [he] is otherwise qualified for the
 14 benefit or services sought; (3) [he] was denied the benefit or services solely by reason of [his]
 15 handicap; and (4) the program providing the benefit or services receives federal financial
 16 assistance." *Id.*

17 Plaintiff alleges that the defendants prevented him from receiving adequate, timely, and
 18 competent medical provision and treatment. (First Amended Complaint pp. 5-17.) As a result,
 19 plaintiff's third cause of action is based on failure to receive medical treatment because of his
 20 disability, not plaintiff's exemption from activities. Though the Ninth Circuit has not addressed
 21 this issue specifically, other courts have found that the ADA and Section 504 do not create a
 22 federal cause of action for prisoners challenging the medical treatment provided for their
 23 underlying disabilities. See, e.g., *Burger v. Bloomberg*, 418 F.3d 882, 882 (8th Cir. 2005)
 24 (medical treatment decisions not a basis for RA or ADA claims); *Schiavo ex rel. Schindler v.*
 25 *Schiavo*, 403 F.3d 1289, 1294 (11th Cir. 2005 (RA not intended to apply to medical treatment
 26 decisions); *Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1144 (10th Cir. 2005) (medical
 27 decisions not ordinarily within scope of ADA or RA); *Grzan v. Charter Hosp. of Northwest*
 28 *Indiana*, 104 F.3d 116, 121-22 (7th Cir. 1997); see also *Alexander v. Tilton*, 2009 U.S. Dist.

1 LEXIS 20179 (E.D. Cal. February 23, 2009); *McElroy v. Dep't of Corr.*, 2007 U.S. Dist. LEXIS
 2 37279 (E.D. Cal. May 8, 2007).

3 The Declaration of N. Grannis, Chief of the Inmate Appeals Branch, attached hereto is
 4 instructive. All of plaintiff's ADA claims are premised on his alleged failure to receive adequate
 5 medical care. At no time has he alleged a denial of programs or activities as a result of his
 6 disability. Plaintiff's third cause of action for alleged violation of the ADA and RA fails to state a
 7 valid claim. See *Id.*

8 **V. CONCLUSION**

9 The first amended complaint fails to state a claim against defendants. Plaintiff's first cause
 10 of action is barred against defendants CDCR, CSP-Solano, Dr. Traquina and Dennis Sisto
 11 because of Eleventh Amendment immunity and 42 U.S.C. § 1983. Additionally, plaintiff's first
 12 cause of action is barred by the statute of limitations.

13 Plaintiff's second cause of action for an alleged First Amendment violation fails to state a
 14 claim. Plaintiff's third cause of action for allegation violation of the ADA and Section 504 of the
 15 RA is barred because the claims are barred because plaintiff cannot sue individuals under these
 16 statutes and the claims cannot be based on a challenge to medical treatment.

17 Based on the foregoing, defendants respectfully request that the court dismiss the first
 18 amended complaint.

19 Dated: June 30, 2009

Respectfully submitted,

EDMUND G. BROWN JR.
 Attorney General of California
 STEVEN M. GEVERCER
 Supervising Deputy Attorney General

/s/ Catherine Woodbridge Guess

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K. Sisto and Alvaro C. Traquina, M.D.

DECLARATION OF CATHERINE GUESS IN SUPPORT OF MOTION TO DISMISS

I, Catherine Guess, declare:

1. I am an attorney licensed to practice before this court.

2. I am a Deputy Attorney General for the California Department of Justice, attorneys for defendants herein.

3. Attached hereto as Exhibit A is the Declaration of N. Grannis.

I declare under penalty of perjury that the foregoing is true and correct. Dated this 30th day of June, 2009, at Sacramento, California.

/s/ Catherine W. Guess
CATHERINE W. GUESS

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