

1 6. He chose to proceed on the screened original complaint. ECF No. 13. After defendants
2 Saukhla, Osman, and Sanders filed their answer, plaintiff filed a first amended complaint as a
3 matter of course as permitted by Federal Rule of Civil Procedure 15. ECF No. 25. The court
4 screened the first amended complaint and found that once again plaintiff had stated claims for
5 deliberate indifference against Saukhla, Osman, and Sanders, but that all of his claims against
6 Fox, Collins, Bick, Ditomas, and Jenden and his § 1985 and § 1986 claims against defendants
7 Saukhla, Osman, and Sanders failed to state a claim for relief. ECF No. 26. Plaintiff was advised
8 of the deficiencies in the claims that were being dismissed and given the option to proceed on his
9 cognizable claims or to amend the complaint. Id. at 9. Plaintiff opted to amend the complaint
10 (ECF No. 27) and has now filed his second amended complaint (ECF No. 29).

11 II. Second Amended Complaint

12 Plaintiff has submitted a second amended complaint. ECF No. 29. However, he has
13 failed to sign the complaint, in violation of Federal Rule of Civil Procedure 11(a). Id. at 10. The
14 court has reviewed the second amended complaint and found that with the exception of minor
15 changes to paragraphs 28 and 35, it is identical to the first amended complaint. Compare ECF
16 No. 29 with ECF No. 25. The court finds that the additional, conclusory statements that Fox and
17 Collins were allowing prisoners to “die off” in hopes of easing prison overcrowding (ECF No. 29
18 at 5, ¶ 28) and that the denial of medical care was racially motivated (id. at 7, ¶ 35) fail to remedy
19 the deficiencies identified in the amended complaint. Furthermore, in light of the guidance
20 plaintiff has received regarding the elements of each cause of action and the advisement that
21 conclusory statements unsupported by any factual allegations were insufficient to support a claim
22 (ECF Nos. 12, 26), the court finds that allowing plaintiff to amend the complaint a third time
23 would be futile. Accordingly, the second amended complaint will be stricken as deficient and the
24 case will proceed on the First Amended Complaint.

25 III. First Amended Complaint

26 Although plaintiff is not currently incarcerated, he is proceeding in forma pauperis (ECF
27 No. 12 at 7) and the amended complaint is therefore subject to screening under 28 U.S.C. §
28 1915(e)(2)(B). Under § 1915(e)(2)(B), the court must dismiss a complaint or portion thereof if

1 the plaintiff has raised claims that are “frivolous or malicious,” fail to state a claim upon which
2 relief may be granted, or that seek monetary relief from a defendant who is immune from such
3 relief.

4 In the first amended complaint, plaintiff names the same defendants as in his original
5 complaint, with the exception of Lewis, who has not been identified as a defendant in the
6 amended complaint. ECF No. 25 at 1-2. In addition to his original Eighth Amendment claims,
7 plaintiff also asserts claims under 42 U.S.C. §§ 1985 and 1986. Id. at 3-9.

8 A. Claims for Which a Response Will Be Required

9 Plaintiff’s Eighth Amendment claims against Saukhla, Osman, and Sanders are nearly
10 identical to the claims in the original complaint and are therefore cognizable as set forth in the
11 original screening order (ECF No. 12 at 5). Defendants Saukhla, Osman, and Sanders will
12 therefore be required to respond to these claims.

13 B. Failure to State a Claim

14 For the reasons set forth below, plaintiff’s § 1985 and § 1986 claims against Saukhla,
15 Osman, and Sanders, as well as all of his claims against Fox, Collins, Bick, Ditomas, and Jenden,
16 fail to state claims for relief.

17 i. Deliberate Indifference

18 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
19 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091,
20 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This requires plaintiff
21 to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition
22 could result in further significant injury or the unnecessary and wanton infliction of pain,’” and
23 (2) “the defendant’s response to the need was deliberately indifferent.” Id. (some internal
24 quotation marks omitted) (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992)).

25 Deliberate indifference is established only where the defendant *subjectively* “knows of and
26 disregards an *excessive risk* to inmate health and safety.” Toguchi v. Chung, 391 F.3d 1051, 1057
27 (9th Cir. 2004) (emphasis added) (citation and internal quotation marks omitted). Deliberate
28 indifference can be established “by showing (a) a purposeful act or failure to respond to a

1 prisoner's pain or possible medical need and (b) harm caused by the indifference." Jett, 439 F.3d
2 at 1096 (citation omitted). Civil recklessness (failure "to act in the face of an unjustifiably high
3 risk of harm that is either known or so obvious that it should be known") is insufficient to
4 establish an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825, 836-37 & n.5
5 (1994) (citations omitted).

6 A difference of opinion between an inmate and prison medical personnel—or between
7 medical professionals—regarding appropriate medical diagnosis and treatment is not enough to
8 establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);
9 Toguchi, 391 F.3d at 1058. Additionally, "a complaint that a physician has been negligent in
10 diagnosing or treating a medical condition does not state a valid claim of medical mistreatment
11 under the Eighth Amendment. Medical malpractice does not become a constitutional violation
12 merely because the victim is a prisoner." Estelle, 429 U.S. at 106.

13 In screening the original complaint, the court advised that

14 [p]laintiff must demonstrate how the conditions about which he
15 complains resulted in a deprivation of his constitutional rights.
16 Rizzo v. Goode, 423 U.S. 362, 370-71 (1976). Also, the complaint
17 must allege in specific terms how each named defendant is
18 involved. Arnold v. Int'l Bus. Machs. Corp., 637 F.2d 1350, 1355
19 (9th Cir. 1981). There can be no liability under 42 U.S.C. § 1983
20 unless there is some affirmative link or connection between a
21 defendant's actions and the claimed deprivation. Id.; Johnson v.
22 Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore, "[v]ague
23 and conclusory allegations of official participation in civil rights
24 violations are not sufficient." Ivey v. Bd. of Regents, 673 F.2d 266,
25 268 (9th Cir. 1982) (citations omitted).

21 ECF No. 12 at 4. As with in the original complaint, although plaintiff has identified defendants
22 Fox, Collins, Bick, Ditomas, and Jenden as defendants, he has not alleged any facts showing what
23 these defendants did or did not do that violated his rights under the Eighth Amendment. ECF No.
24 25 at 3-6. The first amended complaint does not allege any actions by Bick, Ditomas, or Jenden,
25 and his general assertion that Fox and Collins allowed doctors to give substandard care is too
26 vague and conclusory to demonstrate the necessary personal involvement in the violation of his
27 rights. Id. Conclusory allegations that "defendants" violated his rights are insufficient to state
28 claims for relief.

1 When the court originally screened the first amended complaint and dismissed these
2 defendants with leave to amend, plaintiff was advised that he was being given one final
3 opportunity to amend that that “continued failure to allege specific conduct by these defendants
4 will result in a recommendation that the claims be dismissed without leave to amend.” ECF No.
5 26 at 4. The additional allegation in the second amended complaint that Fox and Collins allowed
6 substandard care in an attempt to reduce overcrowding does not change the court’s previous
7 analysis and demonstrates that further leave to amend would be futile. The undersigned will
8 therefore recommend that the Eighth Amendment claims against defendants Fox, Collins, Bick,
9 Ditomas, and Jenden be dismissed without leave to amend.

10 ii. § 1985 Conspiracy

11 To state a cause of action under § 1985(3), a complaint must allege
12 (1) a conspiracy, (2) to deprive any person or a class of persons of
13 the equal protection of the laws, or of equal privileges and
14 immunities under the laws, (3) an act by one of the conspirators in
furtherance of the conspiracy, and (4) a personal injury, property
damage or a deprivation of any right or privilege of a citizen of the
United States.

15 Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980) (citing Griffin v. Breckenridge, 403 U.S.
16 88, 102-03 (1971)). “[T]here must be some racial, or perhaps otherwise class-based, invidiously
17 discriminatory animus behind the conspirators’ action.” Griffin, 403 U.S. at 102. To state a
18 claim under § 1985(3) for a non-race-based class, the Ninth Circuit requires “either that the
19 courts have designated the class in question a suspect or quasi-suspect classification requiring
20 more exacting scrutiny or that Congress has indicated through legislation that the class required
21 special protection.” Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (quoting
22 Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985)). “[T]he absence of a section 1983
23 deprivation of rights precludes a section 1985 conspiracy claim predicated on the same
24 allegations.” Caldeira v. County of Kauai, 866 F.2d 1175, 1182 (9th Cir. 1989) (citing Cassettari
25 v. Nevada County, 824 F.2d 735, 739 (9th Cir. 1987)).

26 The Ninth Circuit requires a plaintiff alleging a conspiracy to violate civil rights to “state
27 specific facts to support the existence of the claimed conspiracy.” Olsen v. Idaho State Bd. of
28 Med., 363 F.3d 916, 929 (9th Cir. 2004) (citation and internal quotation marks omitted); Caldeira,

1 866 F.2d at 1181 (“the plaintiff must show an agreement or ‘meeting of the minds’ by the
2 defendants to violate his constitutional rights”). The mere statement that defendants “conspired”
3 is not sufficient to state a claim, as “[t]hreadbare recitals of the elements of a cause of action,
4 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678
5 (2009).

6 Plaintiff’s allegations of a conspiracy fail to state a claim upon which relief may be
7 granted because his claims are vague and conclusory. There are no facts that demonstrate an
8 agreement between any of the defendants; mere joint employment by the California Department
9 of Corrections and Rehabilitation is insufficient to establish the common objective required for a
10 conspiracy. Furthermore, although plaintiff states that he is African-American, there are no facts
11 to support the presence of a race-based, discriminatory motive behind defendants’ actions,
12 particularly since he appears to allege that inmates in general were provided deficient medical
13 care “in hopes that inmates at the California Medical Facility would simply die off!” ECF No. 25
14 at 5. While prisoners can be members of a protected class by virtue of their race, religion, or
15 other recognized protected status, the fact that plaintiff is a prisoner does not itself qualify him as
16 a member of a protected class. See Webber v. Crabtree, 158 F.3d 460, 461 (9th Cir. 1998); see
17 also Pryor v. Brennan, 914 F.2d 921, 923 (7th Cir. 1990) (“Prisoners do not constitute a suspect
18 class.”); Moss v. Clark, 886 F.2d 686, 690 (4th Cir. 1989) (“The status of incarceration is neither
19 an immutable characteristic, nor an invidious basis of classification.” (internal citations omitted)).

20 Plaintiff was previously advised that conclusory allegations of a conspiracy would not be
21 sufficient to state a claim and that a failure to provide factual allegations would result in a
22 recommendation that the claim be dismissed without leave to amend. ECF No. 26 at 5-6.
23 Plaintiff’s attempt in the second amended complaint to fix these deficiencies by adding that
24 defendants hoped inmates would “die off” to reduce overcrowding (ECF No. 29 at 5, ¶ 28) fails
25 to demonstrate a race-based motive. Furthermore, though the second amended complaint alleges
26 that “[t]he conduct in depriving Plaintiff of the proper medical care was racially motivated against
27 African-Americans at the California Medical Facility” (id. at 7, ¶ 35), this allegation is
28 unsupported by any factual allegations and therefore too conclusory to support a claim for relief.

1 Plaintiff's failure to provide additional factual allegations, despite clear instruction on the need to
2 do so, convinces the undersigned that further leave to amend would be futile and it will be
3 recommended that the conspiracy claims be dismissed without leave to amend.

4 iii. § 1986 Neglect to Prevent

5 "Section 1986 authorizes a remedy against state actors who have negligently failed to
6 prevent a conspiracy that would be actionable under § 1985." Cerrato v. San Francisco Cmty.
7 Coll. Dist., 26 F.3d 968, 971 n.7 (9th Cir. 1994); Karim-Panahi v. Los Angeles Police Dep't, 839
8 F.2d 621, 626 (9th Cir. 1988). "A claim can be stated under section 1986 only if the complaint
9 contains a valid claim under section 1985." Id. at 626 (citing Trerice v. Pedersen, 769 F.2d 1398,
10 1403 (9th Cir. 1985)). Because plaintiff has not stated a cognizable claim under § 1985, he has
11 not stated a claim under § 1986 and it will be recommended that these claims be dismissed
12 without leave to amend.

13 C. No Leave to Amend

14 Leave to amend should be granted if it appears possible that the defects in the complaint
15 could be corrected, especially if a plaintiff is pro se. Lopez v. Smith, 203 F.3d 1122, 1130-31
16 (9th Cir. 2000) (en banc); Cato v. United States, 70 F.3d 1103, 1106 (9th Cir. 1995) ("A pro se
17 litigant must be given leave to amend his or her complaint, and some notice of its deficiencies,
18 unless it is absolutely clear that the deficiencies of the complaint could not be cured by
19 amendment." (citing Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987))). However, if, after
20 careful consideration, it is clear that a complaint cannot be cured by amendment, the court may
21 dismiss without leave to amend. Cato, 70 F.3d at 1005-06.

22 The undersigned finds that, as set forth above, all of the claims against defendants Fox,
23 Collins, Bick, Ditomas, and Jenden and the § 1985 and § 1986 claims against defendants Saukhla,
24 Osman, and Sanders fail to state a claim for relief and that amendment would be futile. These
25 claims should therefore be dismissed without leave to amend.

26 IV. Plain Language Summary of this Order for a Pro Se Litigant

27 Some of your allegations in the amended complaint state claims against the defendants
28 and some do not. Your allegations of deliberate indifference against defendants Saukhla, Osman,

1 and Sanders state a claim and require a response.

2 All of your allegations against defendants Fox, Collins, Bick, Ditomas, and Jenden and
3 your § 1985 and § 1986 claims against Saukhla, Osman, and Sanders do not state cognizable
4 claims and will be dismissed without leave to amend because it does not appear that you can
5 allege additional facts to state a claim.

6 In accordance with the above, IT IS HEREBY ORDERED that:

7 1. The Clerk of the Court is directed to strike the second amended complaint (ECF No.
8 29) from the record.

9 2. Defendants Saukhla, Osman, and Sanders will be required to respond to the first
10 amended complaint (ECF No. 25) as set forth above in Section III.A. Their response shall be due
11 within twenty-one days after the United States District Judge assigned to the case rules on the
12 findings and recommendations.

13 It is further RECOMMENDED that all of plaintiff's claims against defendants Fox,
14 Collins, Bick, Ditomas, and Jenden and his § 1985 and § 1986 claims against defendants Saukhla,
15 Osman, and Sanders be dismissed without leave to amend.

16 These findings and recommendations are submitted to the United States District Judge
17 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
18 after being served with these findings and recommendations, any party may file written
19 objections with the court and serve a copy on all parties. Such a document should be captioned
20 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
21 objections shall be served and filed within fourteen days after service of the objections. The
22 parties are advised that failure to file objections within the specified time may waive the right to
23 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

24 DATED: January 10, 2018

25 
26 ALLISON CLAIRE
27 UNITED STATES MAGISTRATE JUDGE
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