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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ALONZO SMITH,
Plaintiff,
v.
RICHARD MACK, et al.,
Defendants.

Case No. [13-cv-00246-VC](#)

**ORDER DENYING MOTION TO
DISMISS**

Re: Dkt. No. 39

Plaintiff Alonzo Smith claims in his second amended complaint ("SAC") that the defendants, medical staff at the prison where Smith is incarcerated, were deliberately indifferent to the severe pain he experienced when he was denied the "soft chopped diet" ordered by his doctor in the wake of treatment for a broken jaw. The defendants move to dismiss the SAC, arguing primarily that it fails to state a claim because even though they were responsible for Smith's care, they were powerless to prevent other prison staff (in particular, kitchen staff) from denying Smith the soft chopped diet. But the SAC does not merely allege the defendants were powerless to prevent Smith's severe pain; it alleges they were unwilling to make any effort to remedy the problem, despite being aware of it and despite being responsible for Smith's care. As the Ninth Circuit explained in a case with facts somewhat similar to those alleged here, awareness by prison medical personnel of a broken jaw causing severe pain, combined with an unwillingness to ensure the prisoner receives a diet designed to minimize that pain, gives rise to an Eighth Amendment claim. *See Lopez v. Smith*, 203 F.3d 1122, 1131-32 (9th Cir. 2000).

The defendants' remaining arguments for dismissal lack merit as well. Although they argue that Ellis cannot be sued merely for denying Smith's administrative grievance, the SAC alleges more: namely, that Ellis is the Medical CEO of the facility and that he refused to order a

1 soft chopped diet despite being aware of Smith's severe pain, and despite being ultimately
2 responsible for Smith's care. The defendants' also argue they are entitled to qualified immunity,
3 but at the pleading stage, taking the allegations as true and construing them liberally, qualified
4 immunity does not apply for the same reason that the SAC states a claim in the first place.
5 For these reasons, the motion to dismiss is denied. The parties are ordered to appear at a case
6 management conference on June 27, 2014 at 10:30 a.m.

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IT IS SO ORDERED.

Dated: May 13, 2014



VINCE CHHABRIA
United States District Judge