

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIARICHARD WHITEHURST,  
Plaintiff,  
v.  
CVS PHARMACY,  
Defendant.Case No. [13-cv-05932-JSC](#)**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

Re: Dkt. No. 6, 24

United States District Court  
Northern District of California

12 Richard Whitehurst, proceeding pro se, brings this action alleging that Defendant CVS  
13 failed to accommodate him due to his physical disability and race in violation of the Americans  
14 with Disabilities Act and various California state laws. (Dkt. No. 1.) Before the Court is  
15 Defendant's motion to dismiss and to impose sanctions on Plaintiff, arguing that his complaint is  
16 barred by the doctrine of res judicata and fails to state a claim. (Dkt. No. 6.) Plaintiff opposes  
17 Defendant's motion (Dkt. No. 22) and cross-moves for sanctions (Dkt. No. 24). Upon  
18 consideration of the papers submitted by the parties and the arguments at a hearing held on March  
19 20, 2014, the Court GRANTS Defendant's motion to dismiss and DENIES each party's motion  
20 for sanctions.

**FACTUAL & PROCEDURAL BACKGROUND**

22 This is Plaintiff's fourth suit against CVS in two and a half years. The first two were filed  
23 in the United States District Court for the Central District of California. Plaintiff withdrew his  
24 claims against CVS in the first case by omitting it as a defendant in the amended complaint (Dkt.  
25 No. 6-2 at 2, 42), and voluntarily dismissed the second case (*id.* at 82).<sup>1</sup> The third was filed in this

26  
27  
28

---

<sup>1</sup> The Court grants Defendant's request for judicial notice of the court records and orders (Dkt. No. 6-1) because "those proceedings have a direct relation to the matters at issue." *United States ex. rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th

1 district and assigned to Judge White, who transferred it to the Central District because, in  
2 dismissing Plaintiff’s second case, Judge Guilford of the Central District ordered that “if the  
3 claims made in his case are ever reasserted in another case, they must be brought before this  
4 Court.” (Dkt. 6-3 at 22). Plaintiff’s third complaint alleged that CVS and three particular CVS  
5 locations in Oakland, San Francisco, and Long Beach refused to fill his prescription because he is  
6 “a person of color, Disabled, and is a Senior Citizen,” (Dkt. 6-3 at 2 (“Central District action”) at ¶  
7 18.) Concluding that Plaintiff failed to state a claim under the Unruh Civil Rights Act, the Civil  
8 Rights Act of 1964 and 1991, the Americans with Disabilities Act or for fraud, intentional  
9 infliction of emotional distress, or conspiracy, Judge Guilford granted defendants’ motion to  
10 dismiss without leave to amend and entered judgment for defendants. (Dkt. 6-3 at 44, 46); *see*  
11 *also Whitehurst v. CVS Pharm.*, No. CV 13-6275(ANx), 2013 WL 6086905, at \*4-5 (C.D. Cal.  
12 Nov. 18, 2013).

13 About a month later, in December 2013, Plaintiff filed the present action, alleging that  
14 Defendant refused to fill his prescriptions at three locations “because Plaintiff is Black, Senior  
15 Citizen, and handicapped.” (Dkt. No. 1 at 9). In particular, Plaintiff states that a CVS located in  
16 Oakland told him that it did not have the medications to fill his five prescriptions, but filled  
17 prescriptions for two of those medications for a white female. (*Id.* at 7-8.) In addition, when he  
18 tried to fill his prescriptions at a CVS located in San Francisco, the clerk used a racial epithet and  
19 explained that no CVS Pharmacy would fill any prescriptions for him because he had filed a civil  
20 rights complaint against the company and because he was black. (*Id.* at 8.) Plaintiff also alleges  
21 that he finds it difficult to reach the top shelves at CVS due to his disability. (*Id.* at ¶ 20.)

22 Plaintiff’s Complaint brings causes of action under (1) the Americans with Disabilities  
23 Act; (2) the California Disabled Persons Act, California Civil Code section 54; (3) the Unruh Civil  
24 Rights Act, California Civil Code section 51; (4) California Health & Safety Code section 19955;  
25 (5) the Unfair Business Practices Act, California Business and Professions Code section 17200;  
26 and (6) California Civil Code section 3345. (Dkt. No. 1.) In addition, Plaintiff brings claims for  
27

1 negligence and intentional and negligent infliction of emotional distress. (*Id.*) Defendant moves  
2 to dismiss Plaintiff’s complaint under Federal Rule of Civil Procedure 12(b)(6) and for sanctions.

3 **DISCUSSION**

4 Defendant argues that Plaintiff’s claims are barred by res judicata because Judge Guilford  
5 dismissed them on the merits in Plaintiff’s third suit against Defendants. In the alternative,  
6 Defendant asserts that Plaintiff’s complaint should be dismissed for Plaintiff’s failure to comply  
7 with Judge Guilford’s Order to file any such claims before that court.

8 **A. Plaintiff’s Complaint is Barred by Res Judicata**

9 Res judicata bars the relitigation of a claim “where there is (1) an identity of claims, (2) a  
10 final judgment on the merits, and (3) identity or privity between parties.” *Tritz v. U.S. Postal*  
11 *Serv.*, 721 F.3d 1133, 1141 (9th Cir. 2013). Two of these factors are easily met. First, Plaintiff  
12 and Defendant were both parties to the Central District action. (Dkt. 6-3 at 2.) Second, Judge  
13 Guilford’s dismissal of that case without leave to amend constitutes a final judgment on the  
14 merits. *Stewart v. U.S. Bancorp*, 297 F.3d 953, 957 (9th Cir. 2002).

15 Third, to determine whether the present action concerns the same claims as the prior  
16 litigation, the Court considers “(1) whether rights or interests established in the prior judgment  
17 would be destroyed or impaired by prosecution of the second action; (2) whether substantially the  
18 same evidence is presented in the two actions; (3) whether the two suits involve infringement of  
19 the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.”  
20 *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (internal quotation marks and  
21 citation omitted). The last of these is the most important. *Id.* Indeed, satisfaction of the fourth  
22 factor alone is sufficient to find an identity of claims without an analysis of the other factors. *See*  
23 *Int’l Union of Operating Eng’rs–Employers Constr. Indus. Pension, Welfare and Training Trust*  
24 *Funds v. Karr*, 994 F.2d 1426, 1430 (9th Cir. 1993) (citing cases finding successive claims barred  
25 by res judicata based solely on analysis of the fourth factor). “Whether two suits arise out of the  
26 same transactional nucleus depends upon whether they are related to the same set of facts and  
27 whether they could be conveniently tied together.” *ProShipLine Inc. v. Aspen Infrastructures Ltd.*,  
28 609 F.3d. 960, 968 (9th Cir. 2010).

1 Plaintiff's Complaint alleges Defendant refused to fill his prescriptions "because Plaintiff  
2 is Black, Senior Citizen, and handicapped." (Dkt. No. 1 at 9.) Plaintiff's specific factual  
3 allegations that two CVS locations refused to fill his prescriptions amounts to a claim of race  
4 discrimination, just like his complaint in the Central District action. *See* Dkt. No. 1 at 7-8.  
5 Plaintiff does not dispute that this Complaint alleges race discrimination once again. Instead,  
6 Plaintiff relies on the argument that the Central District action did not allege violations of the  
7 California Disabled Persons Act, California Civil Code section 54; the Unruh Civil Rights Act,  
8 California Civil Code section 51, California Health & Safety Code section 19955, or California  
9 Civil Code section 3345. However, Plaintiff "cannot avoid the bar of res judicata merely by  
10 alleging conduct by the defendant not alleged in his prior action or by pleading a new legal  
11 theory." *McClain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir. 1986). The inclusion of new claims  
12 is irrelevant because the basis of his claims—race discrimination—is the same. Plaintiff also  
13 contends this Complaint involves three CVS locations not listed in Central District complaint.  
14 (Dkt. No. 22 at 18.) Nevertheless, the Court cannot find that these are new claims that arose after  
15 the dismissal of his prior complaint on November 18, 2013, because Plaintiff does not state when  
16 the incidents at each of these locations occurred. Again, he filed this action less only one month  
17 after dismissal of the Central District action. Finally, alleging he was told that no CVS would fill  
18 Plaintiff's prescriptions because he had filed a civil rights complaint against the company, Plaintiff  
19 seems to suggest CVS's conduct is retaliatory, but he cites no law prohibiting such conduct.

20 Because the Central District case involved the same parties and claims and resulted in a  
21 final judgment on the merits, Plaintiff's Complaint is barred by the doctrine of res judicata.

22 **B. The Court Declines to Impose Sanctions**

23 Defendant asks the Court to impose sanctions on Plaintiff under Federal Rule of Civil  
24 Procedure 11 to deter Plaintiff from continuing to file claims against CVS that he knows to be  
25 meritless, and to issue an order requiring Plaintiff to seek leave of court before filing future  
26 lawsuits. In support of its motion, Defendant cites to a PACER record of 220 cases Plaintiff has  
27 filed in this District since 2003, in addition to 44 in the Eastern District and 26 in the Central  
28 District. (Dkt. No. 6-6 at 4-10.) The Court finds that monetary sanctions are not appropriate here,

1 and Defendant does not adequately demonstrate the need for imposing a pre-filing order, which  
2 the Ninth Circuit has cautioned is “an extreme remedy that should rarely be used.” *Molski v.*  
3 *Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007). Given that more than 200 of the  
4 cases Plaintiff filed in this District date were filed in 2003 and less than ten were filed in the last 5  
5 years, the Court concludes that the sanction is not warranted at this time.

6 Plaintiff’s motion for sanctions must also be denied because Defendant’s motion to dismiss  
7 is in no way procedurally or legally improper, and, as indicated by the Court’s conclusion, is well  
8 founded.

9 **CONCLUSION**

10 For the foregoing reasons, the Court GRANTS Defendant’s Motion to Dismiss without  
11 leave to amend and DENIES both parties’ motion for sanctions.

12 **IT IS SO ORDERED.**

13 Dated: April 4, 2014

14   
15 \_\_\_\_\_  
16 JACQUELINE SCOTT CORLEY  
17 United States Magistrate Judge  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28