

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERIC L. GONZALEZ,

No. C 11-5561 CW (PR)

Plaintiff,

v.

DR. ZIKA, DR. GARBARINO,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, DENYING PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT,
DENYING PLAINTIFF'S REQUEST TO RENEW
PRELIMINARY INJUNCTION, DENYING
DEFENDANTS' MOTION FOR LEAVE TO FILE
MOTION FOR RECONSIDERATION

(Docket nos. 18, 35, 43, 45, 47, 59)

Plaintiff, a state prisoner incarcerated at the Correctional Training Facility (CTF) in Soledad, California, filed this pro se civil rights action pursuant to 42 U.S.C. § 1983, alleging deliberate indifference to his serious mental health and medical needs. With his complaint, Plaintiff filed a motion for preliminary injunctive relief, asking the Court to order that he be housed in a single cell for ninety days.

On September 26, 2012, the Court granted in part Plaintiff's motion for a preliminary injunction and ordered Defendants to recommend to prison officials that Plaintiff be single-celled for ninety days. Docket no. 24. Thereafter, on December 27, 2012, the Court granted Plaintiff's request to renew the preliminary injunction. Docket no. 40.

Now pending before the Court are the following motions, each of which has been fully briefed by the parties: (1) Defendants' motion for summary judgment, (2) Plaintiff's cross-motion for summary judgment, (3) Plaintiff's motion to renew the preliminary injunction for a second time, and (4) Defendants' motion for leave

1 to file a motion for reconsideration of the order renewing the
2 preliminary injunction for the first time.

3 For the reasons discussed below, Defendants' motion for
4 summary judgment is GRANTED, Plaintiff's cross-motion for summary
5 judgment and motion to renew the preliminary injunction are
6 DENIED, and Defendants' motion for leave to file a motion for
7 reconsideration is DENIED.

8 BACKGROUND

9 The following statement of facts is taken from the
10 allegations in Plaintiff's verified complaint and the exhibits
11 attached thereto, as summarized in the Court's prior order
12 partially granting the motion for preliminary injunction.¹

13 Plaintiff is a convicted sex offender. He entered
14 the CDCR [California Department of Corrections and
15 Rehabilitation] prison system in 1998 and is serving a
term of thirty-one years to life. Compl. Ex. A-5.

16 Prior to entering the CDCR, Plaintiff served some
17 jail time, living in a dorm set-up. He did not suffer
18 any anxiety or panic attacks. When he entered the CDCR,
19 he was double celled. Soon thereafter, he became
20 fearful that his cellmate would discover he was a sex
offender, and he began to suffer from physical symptoms
that resulted in his being admitted to the hospital for
evaluation. He was not referred for mental health care.
Compl. Ex. A-6.

21 In 2003, at CTF, his cellmate assaulted him after
22 discovering he was a sex offender. After this event,
23 Plaintiff began to suffer from frequent panic attacks
and symptoms associated with post-traumatic stress
disorder (PTSD), including nightmares, flashbacks, poor

24
25 ¹ A verified complaint may be used as an affidavit on summary
26 judgment, as long as it is based on personal knowledge and sets
27 forth specific facts admissible in evidence. See Schroeder v.
28 McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995). The Court
addresses the disputed facts presented by Defendants in its
analysis of the summary judgment motion.

1 sleep and paranoia. He was seen in the medical clinic,
2 but was not referred for mental health care. Compl.

3 Ex.A-6.

4 In June 2007, Plaintiff's symptoms worsened during
5 a prolonged lockdown. He was referred for mental health
6 care. Plaintiff's psychologist, Dr. Katz, diagnosed him
7 as suffering from serious panic attacks as the result of
8 having been attacked by his cellmate and his fear of
9 being attacked again. In August 2008, Plaintiff was
10 prescribed cognitive therapy that consisted of breathing
11 techniques and relaxation skills while housed in a
12 double cell. He also was prescribed Celexa, an anti-
13 depressant, and Vistaril, an anti-anxiety medication.
14 Nevertheless, his symptoms worsened. Compl. at 1:11-2:2
15 & Ex. A-7.

16 Dr. Katz then brought Plaintiff before the CTF
17 Mental Health Interdisciplinary Treatment Team (IDTT) to
18 determine whether double celling posed a serious threat
19 to Plaintiff's mental health. The IDTT members were Dr.
20 Katz, Dr. Bony, Ph.D., and Defendant Dr. Zika. On
21 October 9, 2008, all IDTT members approved the following
22 recommendation to CTF custody staff:

23
24 Single cell status for 90 days based on Dx
25 [diagnosis] of panic disorder without agoraphobia
26 300.01 comorbid with multiple medical problems and
27 emergency room visits ongoing since 1998 when
28 placed in double cell housing.

Compl. Ex. A-1.1²

CTF custody staff followed the IDTT's
recommendation and placed Plaintiff on single cell
status for ninety days. Compl. at 2:22-3:1. During
that period, Plaintiff's panic attacks subsided.

Additionally, Dr. Katz informed him that, because
his anxiety was "worse" than panic disorder, it would be
"virtually impossible" for him to manage it effectively
in double cell housing. Compl. at 3:1-8 & Ex. A-7. Dr.

² The IDTT cannot order that a prisoner be housed in a single cell or a double cell; it can only make a recommendation to custody staff about medically appropriate housing. According to Plaintiff, custody staff "will grant single-cell status 100% of the time when requested by the IDTT committee." Compl. at 2 n.2.

1 Katz also diagnosed Plaintiff as suffering from
2 "depressive disorder." Compl. Ex. A-7.

3 On December 23, 2008, Dr. Katz brought Plaintiff
4 before the IDTT and recommended extending his single
5 cell status permanently. Compl. at 3:17-22. At the
6 hearing, Dr. Zika opined that Plaintiff should be double
7 celled because "exposure therapy" is a common treatment
8 for those suffering from severe anxiety, and because of
9 the lack of single cells for more serious cases.
10 Plaintiff objected to this recommended treatment because
11 of the real threat he would be attacked again. Compl.
12 at 4:9-17.

13 Dr. Zika denied Plaintiff's request for permanent
14 single cell status. He agreed to recommend extending
15 Plaintiff's temporary single cell status for another
16 ninety days, with the caveat that Plaintiff be returned
17 thereafter to a double cell as part of his treatment
18 plan. Compl. at 4:18-23. Thus, the IDTT, consisting of
19 Dr. Katz and Dr. Zika, approved the following
20 recommendation to CTF custody staff:

21 I/P Gonzalez has been working on his depression and
22 panic d/o sx. Request permission to extend his
23 single cell status for 3 months until 3/31/09 and
24 then return to double cell status as part of his
25 treatment plan.

26 Compl. Ex. A-2

27 Plaintiff then filed an administrative health care
28 appeal requesting that, among other things, he be
diagnosed as suffering from PTSD with panic attacks and
agoraphobia, and that he be single celled permanently
with yearly checkups and monthly counseling. On January
12, 2009 he was interviewed by CTF psychiatrist Dr.
Hutchinson, who prepared a lengthy evaluation of his
mental health history and diagnosed him as suffering
from panic disorder with agoraphobia "in partial
remission," PTSD and depressive disorder. Compl. Ex. A-
9. Dr. Hutchinson concluded the evaluation by stating
that Plaintiff "appears to have significant PTSD + panic
attacks that are made worse by double cell situation."
Id. In response to Plaintiff's administrative appeal,
Dr. Hutchinson and Dr. Zika granted his diagnostic
request and partially granted his celling request, as
follows:

You are currently assigned to single cell until
03/31/09. A decision then will be made about
extension at that time and will be reviewed every
six months.

Compl. Ex. A-3.

1 Plaintiff filed a second level appeal which, on
2 February 4, 2009, Dr. Zika reviewed and responded to as
3 follows:

4 Dr. Hutchinson agreed that you meet the criteria to
5 be diagnosed with Post Traumatic Stress Disorder
6 and Panic Disorder. He has recommended that you be
7 considered for single cell status, in part, based
8 upon this diagnosis. He, therefore, referred you
9 to another Special IDTT that will look at extending
10 your single cell status beyond 03/31/09. This must
11 be done in a Special IDTT meeting, since it is a
12 program change and all program changes must go
13 through a Special IDTT, according to our Program
14 Guide. If you are granted an extension of the
15 single cell status, it can be made for up to one
16 year. It can be re-evaluated after one year for a
17 subsequent year, and so forth. A new chrono would
18 be written at that time.

19 It should also be made clear that no one is
20 recommending "exposure therapy" for either Post
21 Traumatic Stress Disorder or Panic Disorder.
22 However, your case manager (psychologist) and your
23 psychiatrist can work with you, using a variety of
24 treatments, to help you manage your stress and
25 anxiety more effectively. This is done on a
26 voluntary treatment basis, and cannot be given
27 without your consent (unless you are a danger to
28 yourself, a danger to others, or gravely disabled).
We are required by law to follow this mandate.

I hope that this clarifies the situation for you
and that your mental health clinicians can help you
better manage your stress and anxiety.

Compl. Ex. A-11.

On March 19, 2009, the IDTT, which included Dr.
Zika, recommended that Plaintiff's single cell status be
continued for one year, "based on mental health
condition." Compl. Ex. A-12.

On March 25, 2010, the IDTT, which included
Plaintiff's psychologist, Defendant Dr. Garbarino,
recommended that Plaintiff's single cell status be
continued for another year, "based on mental health
condition." Compl. Ex. A-25.

In March 2011, Dr. Garbarino met with Plaintiff to
discuss his upcoming IDTT meeting to determine whether
his single cell status would be continued. She told him
that Dr. Zika no longer would recommend extending his
single cell status because of pressure from custody
staff, and that being double celled would force him to
participate in exposure therapy. Compl. at 12:22-13:14.

1 Plaintiff filed an administrative appeal, asking
2 that his single cell status be extended. Defs.' Ex. A-
3 3. Before he received a response, his scheduled IDTT
4 meeting was held on March 28, 2011. At the meeting,
5 Plaintiff argued to Dr. Zika that returning him to a
6 double cell would seriously harm his mental health.
7 Although Dr. Garbarino initially recommended that
8 Plaintiff be single celled for another year, the IDTT,
9 which consisted of Dr. Zika and Dr. Garbarino,
10 recommended to custody staff that Plaintiff's request be
11 denied, and that he receive "treatment for
12 PTSD/Exposure/medical intervention." Compl. Ex. A-27.

13 On April 5, 2011, Dr. Zika responded to Plaintiff's
14 administrative appeal. The decision was also signed by
15 G. Ellis, Chief Executive Officer. In the response, Dr.
16 Zika clarified for Plaintiff that only the IDTT could
17 recommend single cell status. He also summarized what
18 had occurred at the IDTT meeting, as follows:

19 . . . The Treatment Team was patient in
20 letting you present your case for extension of your
21 single cell status. The IDTT also offered you
22 alternatives, such as living on a Sensitive Needs
23 Yard and taking psychotropic medication that can
24 help with your symptoms of anxiety.

25 You refused to accept any of those alternatives.
26 Since you do not suffer from a major mental illness
27 and there are other ways to treat your mental
28 health symptoms that do not require living in a
single cell situation, the IDTT did not recommend
an extension of your single cell living situation
on mental health grounds. Your Primary Clinician
is still happy to work with you to manage your
symptoms through psychotherapy, which can lead to
cognitive, behavioral, and emotional change. A
Psychiatrist can also work with you by reviewing
psychotropic medications that can help manage your
symptoms.

29 Defs.' Ex. A-9.

30 On April 6, 2011, Plaintiff was returned to a
31 double cell with a cellmate. Compl. at 8:12-16.

32 On April 27, 2011, Plaintiff was seen by his
33 primary care physician, Dr. Kohler, who noted that since
34 being returned to a double cell Plaintiff was unable to
35 sleep more than two hours per night, his asthma was
36 exacerbated due to the lack of sleep, he was suffering
37 chest pain resulting from increased asthma inhaler use,
38 and he was suffering from continued migraine cluster
headaches and sleep apnea. In evaluating Plaintiff's
medical condition, Dr. Kohler reached the following
conclusion about his need to be single celled:

1 PTSD - pt has been attacked in his cell and his
2 commitment offense makes him vulnerable to further
3 violence. Has been single celled since 10/2008 and
4 was recently given a cellie. Housing with a cellie
5 is not therapeutic but poses real threat to the
6 patient of violence, worsening mental health, and
7 physical health consequences. Single cell status
8 is needed for his protection and to maintain stable
9 mental health and physical health.

10 Compl. Ex. A-21.

11 On May 11, 2011, Plaintiff's administrative
12 grievance was denied at the second level of review. The
13 response was prepared and signed by Dr. Zika and G.
14 Ellis, the same two individuals who denied the response
15 at the first level of review. In addition to the
16 information Dr. Zika had provided in the first level
17 response, he included the following in the second level
18 response:

19 . . . The members of the IDTT offered you a
20 number of alternatives to help you with your mental
21 health symptoms. You were offered support for
22 living on a Sensitive Needs Yard. This would give
23 you a more protective environment and be less
24 stressful. You were also offered an appointment
25 with a psychiatrist to review possible psychotropic
26 medications that can help manage your mental health
27 symptoms. Your primary clinician (Dr. Garbarino,
28 psychologist) was also part of the IDTT and she
offered to continue treating you, using
recognized treatment approaches to help you manage
your mental health symptoms. You have refused
these alternatives, saying they are not helpful to
you. If your functioning was so impaired that you
couldn't live in a General Population environment,
we could recommend a change in level of care to
Enhanced Outpatient Program from CCCMS
[Correctional Clinical Case Management System].
However, your Global Assessment of Functioning
(GAF) is too high and you are functioning at too
high a level to indicate going to an E.O.P. living
environment. With all of this in mind, we still
believe that treatment of your symptoms, so that
you can manage your condition more successfully, is
the best approach. Living in a single cell would
not, in our opinion, lead to an improvement in your
condition in the long run. It would be similar to
a person with panic and agoraphobia never leaving
their home in order to manage their symptoms. This
would not lead to an improvement in their
condition, but would lead to reinforcing their
panic and agoraphobia. Your Primary Clinician, Dr.
Garbarino, is still happy to work with you so that
you can improve and manage your symptoms more

effectively. I hope that you will work with her toward this goal.

Defs.' Ex. A-7.

In May 2011, Plaintiff relayed Dr. Kohler's evaluation to Dr. Zika and Dr. Garbarino. Both responded that, regardless of what Plaintiff's doctor opined, they would not recommend single cell status for him. Compl. at 10:6-12, 16:28-17:6.

Plaintiff saw Dr. Garbarino on September 14, 2011, at which time he informed her that, because he was double celled, his migraine headaches were more frequent and his medication had been changed to a stronger prescription, his asthma was exacerbated, and he was now prescribed two inhalers, one of which is a steroid. Compl. at 17:26-18:13 & Ex. A-24.

On October 12, 2011, Plaintiff's administrative appeal was denied at the third level of review. Dr. L.D. Zamora, Chief of California Correctional Health Care Services, concluded that, based on a review of Plaintiff's appeal file, he had received adequate mental health care. Dr. Zamora also reiterated that mental health staff does not have the authority to write a chrono for single cell status, but can only recommend single cell status for mental health concerns. Defs.' Ex. A-2.

On October 20, 2011, Plaintiff again saw Dr. Garbarino to request single cell status; she informed him that he was wasting his time and she would not recommend such status. Compl. at 18:18-19:4.

On February 15, 2012, Dr. Kohler re-evaluated Plaintiff and made the following assessment: "Sleep deprivation related to concern re potential assault. Pt becoming increasingly agitated." Reply Ex. A-4. She also noted that it was difficult to assess whether Plaintiff's asthma symptoms "are related to bronchospasm vs panic." Id.

On February 6, 2012, Plaintiff filed another administrative appeal requesting single cell status. Dr. Zika responded to the appeal on February 22, 2012. He granted Plaintiff's request to schedule an IDTT meeting to discuss a recommendation for single cell status. He denied Plaintiff's request that a case manager, rather than the IDTT, have authority to recommend single cell status, and that his serious mental disorders be recognized as a disability under the ADA. He stated, however, that the ADA request was partially granted because "mental health staff have already placed you into the Mental Health Service Delivery System for treatment of a mental disorder that

1 is significantly impairing your functioning." Reply Ex.
2 A-5.

3 An IDTT meeting was held on March 20, 2012, at
4 which Plaintiff told Dr. Zika and Dr. Garbarino that
5 because he still fears being assaulted by his cellmate
6 he is not getting more than three and one-half hours of
7 sleep per night, is having multiple asthma attacks, is
8 unable to use his C-pap machine for sleep apnea because
9 of severe panic attacks, and is waking up at least four
10 times a week choking and gasping for air. Dr. Zika and
11 Dr. Garbarino denied Plaintiff's request to recommend
12 single cell status. Pl.'s Decl. Supp. Reply (Decl.) at
13 1:26-3:2.

14 On July 3, 2012, Plaintiff went to his annual IDTT
15 hearing, at which Dr. Zika and custody staff were
16 present. He requested a different case manager, because
17 his present case manager is "trying to force [him] to
18 use cognitive therapy in a double-cell situation which
19 previously proved ineffective and painful." Decl. at
20 3:10-13. Dr. Zika told Plaintiff it doesn't matter who
21 his case manager is because he will be provided only
22 with cognitive therapy treatment, and if he will not
23 accept cognitive therapy treatment then Dr. Zika wants
24 him "out" of the CCCMS program. Decl. at 3:3-21.

25 As of July 8, 2012, the date on which Plaintiff
26 signed his declaration in support of his reply,
27 Plaintiff still was experiencing all of the ailments
28 described in Dr. Kohler's progress notes and continues
to fear he will be killed by another inmate while double
celled. Decl. at 3:22-4:5.

Docket no. 24 at 4:2-13:5.

DISCUSSION

I. Defendants' Motion for Summary Judgment

A. Legal Standard

Summary judgment is only proper where the pleadings,
discovery and affidavits show there is "no genuine issue as to any
material fact and that the moving party is entitled to judgment as
a matter of law." Fed. R. Civ. P. 56(c). Material facts are
those that may affect the outcome of the case. Anderson v.
Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a
material fact is genuine if the evidence is such that a reasonable

1 jury could return a verdict for the nonmoving party. Id.

2 The court will grant summary judgment "against a party who
3 fails to make a showing sufficient to establish the existence of
4 an element essential to that party's case, and on which that party
5 will bear the burden of proof at trial." Celotex Corp. v.
6 Catrett, 477 U.S. 317, 322-23 (1986). The moving party bears the
7 initial burden of identifying those portions of the record that
8 demonstrate the absence of a genuine issue of material fact. The
9 burden then shifts to the nonmoving party to "go beyond the
10 pleadings, and by his own affidavits, or by the 'depositions,
11 answers to interrogatories, or admissions on file,' designate
12 'specific facts showing that there is a genuine issue for trial.'" Id.
13 at 324 (citing Fed. R. Civ. P. 56(e)).

14 In considering a motion for summary judgment, the court must
15 view the evidence in the light most favorable to the nonmoving
16 party. See Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir.
17 1999). The court's function on a summary judgment motion is not
18 to make credibility determinations or weigh conflicting evidence
19 with respect to a disputed material fact. See T.W. Elec. Serv. v.
20 Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.
21 1987).

22 A district court may consider only admissible evidence in
23 ruling on a motion for summary judgment. See Fed. R. Civ. P.
24 56(e); Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002).
25 A verified complaint may be used as an opposing affidavit under
26 Rule 56, as long as it is based on personal knowledge and sets
27 forth specific facts admissible in evidence. See Schroeder v.
28 McDonald, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995).

1 B. Deliberate Indifference Standard

2 Deliberate indifference to serious medical needs violates the
3 Eighth Amendment's proscription against cruel and unusual
4 punishment. See Estelle v. Gamble, 429 U.S. 97, 104 (1976);
5 McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled
6 on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133,
7 1136 (9th Cir. 1997) (en banc). Serious medical needs include
8 serious mental health needs. See Doty v. County of Lassen, 37
9 F.3d 540, 546 (9th Cir. 1994). A determination of "deliberate
10 indifference" involves an examination of two elements: the
11 seriousness of the prisoner's medical need, and the nature of the
12 defendant's response to that need. McGuckin, 974 F.2d at 1059.

13 A serious medical need exists if the failure to treat a
14 prisoner's condition could result in further significant injury or
15 the unnecessary and wanton infliction of pain. Id. The existence
16 of an injury that a reasonable doctor or patient would find
17 important and worthy of comment or treatment, the presence of a
18 medical condition that significantly affects an individual's daily
19 activities, or the existence of chronic and substantial pain are
20 examples of indications that a prisoner has a serious need for
21 medical treatment. Id. at 1059-60.

22 A prison official is deliberately indifferent if he knows
23 that a prisoner faces a substantial risk of serious harm and
24 disregards that risk by failing to take reasonable steps to abate
25 it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The prison
26 official must not only "be aware of facts from which the inference
27 could be drawn that a substantial risk of serious harm exists,"
28 but he "must also draw the inference." Id. In order for

1 deliberate indifference to be established, therefore, there must
2 be a purposeful act or failure to act on the part of the defendant
3 and resulting harm. See McGuckin, 974 F.2d at 1060.

4 Deliberate indifference may be shown when prison officials
5 deny, delay or intentionally interfere with medical treatment, or
6 it may be shown in the way in which they provide medical care.
7 See id. at 1062. But neither a difference of opinion between a
8 prisoner-patient and prison medical authorities regarding
9 treatment nor a showing of nothing more than a difference of
10 medical opinion as to the need to pursue one course of treatment
11 over another is sufficient to establish deliberate indifference.
12 See Toguchi v. Chung, 391 F.3d 1051, 1059-60 (9th Cir. 2004). In
13 order to prevail on a claim involving choices between alternative
14 courses of treatment, a plaintiff must show that the course of
15 treatment the doctors chose was medically unacceptable under the
16 circumstances, and that they chose this course in conscious
17 disregard of an excessive risk to the plaintiff's health. Id. at
18 1058.

19 C. Analysis

20 Plaintiff claims that Defendants' refusal, in 2011, to
21 recommend that he continue to be single celled amounted to
22 deliberate indifference to his serious mental health and medical
23 needs.

24 1. Defendants' Evidence

25 Defendants do not dispute that Plaintiff has serious mental
26 health and medical needs. Instead, they move for summary judgment
27 on the ground that he cannot show that they acted with deliberate
28 indifference because their revised recommendation that he no

1 longer be single celled is based on their considered evaluation of
2 his mental health needs and his objections thereto amount to
3 nothing more than a difference of opinion from that of his mental
4 health care providers. In particular, Defendants assert that,
5 although they previously diagnosed Plaintiff with PTSD and
6 determined that he required single cell housing for that reason,
7 they subsequently determined that he does not have PTSD and,
8 consequently, their treatment plan has changed. Specifically,
9 Defendants maintain that Plaintiff has more generalized panic
10 attacks and anxiety, which conditions are most amenable to being
11 treated by, among other things, housing him with a cellmate.

12 Defendants present the following evidence in support of their
13 argument. In 2008, CTF mental health staff accepted Plaintiff
14 into CDCR's mental health delivery system, evaluated and diagnosed
15 his condition, and developed a treatment plan that focused on
16 having him address and control his anxiety disorder. Decl. B.
17 Zika Supp. Mot. Summ. J. ("Zika Decl.") ¶ 4. In October 2008,
18 Plaintiff was diagnosed by mental health staff with Panic Disorder
19 Without Agoraphobia, a condition which includes sudden, intense,
20 and brief anxiety, but without avoidance, related to open spaces
21 or any place outside of one's home or a safe zone. Id. ¶ 5.
22 Following this diagnosis, mental health staff recommended to CTF
23 custody staff that Plaintiff be placed in single cell housing for
24 a short duration. Id.

25 In February 2009, Plaintiff's mental condition was reassessed
26 and clinical staff diagnosed him with PTSD and Panic Attacks with
27 Agoraphobia, stemming from an incident that occurred in 2003.
28 Zika Decl. ¶ 8. According to a 2004 confidential memorandum in

1 Plaintiff's central file, the incident involved physical pushing
2 and shoving between Plaintiff and his former cellmate after the
3 cellmate found some of Plaintiff's legal paperwork. Zika Decl.
4 Supp. Reply ¶ 5.

5 PTSD is classified as an anxiety disorder, characterized by
6 adverse anxiety-related experiences, behaviors, and physiological
7 responses that develop after exposure to a psychologically
8 traumatic event, sometimes referred to as a "triggering event."
9 Zika Decl. ¶ 8. At regular intervals after diagnosing Plaintiff
10 with PTSD, mental health staff recommended extending his single
11 cell status as he worked on his panic symptoms, with the intention
12 that he eventually be returned to double cell housing. Id.

13 Plaintiff began seeing Defendant Dr. Garbarino, a staff
14 psychologist, in March 2010. Through October 2011, Dr. Garbarino
15 met with him at least twenty-one times concerning his anxiety
16 disorder. Zika Decl. ¶ 10 & Ex. A at 245-444. During the course
17 of this treatment, Dr. Garbarino assessed him with significant
18 PTSD and panic attacks, and developed a treatment plan that
19 included helping him to identify triggers to increased anxiety,
20 depression and hopelessness; establish rapport and trust to
21 provide appropriate and constructive communication of moods;
22 address triggers to trauma and engage in proactive relaxation
23 techniques. Dr. Garbarino also recommended renewal of Plaintiff's
24 request for single cell housing at IDTT meetings. As his
25 treatment progressed, however, Dr. Garbarino's diagnosis changed
26 from PTSD to Adjustment Disorder and then Depressive Disorder, Not
27 Otherwise Specified. These diagnostic changes resulted from
28 Plaintiff's evolving symptomology and response to treatments.

Decl. J. Garbarino Supp. Mot. Summ. J. ("Garbarino Decl.") ¶¶ 4-22; Zika Decl. ¶ 10.

One piece of information Defendants considered when adjusting Plaintiff's diagnosis and treatment plan was the fact that they were unable to identify a "triggering event" that led to PTSD, because it appeared that his anxiety disorder more likely stemmed from perceived threats by other inmates as a consequence of his rape conviction, rather than the alleged assault that occurred in 2003. This was not the only factor on which they based their assessment, however. In addition to Plaintiff's stated beliefs that his problems were "mood and situational," he admitted mental issues with the death of his mother, disappointment in his accomplishments and acceptance of his life in prison. Zika Decl. ¶¶ 9-11; Garbarino Decl. ¶¶ 9-11.

Plaintiff had been in single cell housing for two-and-one-half years by March 2011, when CTF mental health staff determined that his mental condition had not satisfactorily improved and another treatment course was needed that did not include single celling. Zika Decl. ¶ 16; Garbarino Decl. ¶ 16. In addition to CTF staff and Defendants' determination that his mental condition did not justify continued placement in single cell housing, they believed that his continued single cell housing placement could actually reinforce and harden his panic disorder. Id. Defendants offered Plaintiff a variety of housing, programmatic and treatment options to address and work on his anxiety disorder, but he refused each, insisting that single celling is his only treatment option. Zika Decl. ¶¶ 13-28.

2. Plaintiff's Opposition

1 In opposition to Defendants' motion for summary judgment,
2 Plaintiff argues that their refusal to renew the single cell
3 recommendation was not medically reasonable, but his opposition
4 evidence does not raise a triable issue of material fact with
5 respect to the reasonableness of Defendants' diagnosis and
6 treatment.

7 Plaintiff argues that Defendants' contention that he does not
8 have PTSD is not medically reasonable because they had previously
9 properly diagnosed him with PTSD, as did seven other CDCR doctors.
10 Defendants do not deny that they at one time diagnosed Plaintiff
11 with PTSD. The evidence shows, however, that, during the two-year
12 period when he was diagnosed with PTSD, he also had other
13 diagnoses that did not include PTSD. Additionally, since March
14 2011, not only Defendants but other CTF mental health staff as
15 well have concluded that he does not have PTSD and is not entitled
16 to single cell housing for his mental health condition. Zika
17 Decl. ¶¶ 21-27; Zika Decl. Supp. Reply ¶¶ 8-9.

18 Plaintiff claims his PTSD diagnosis is supported by progress
19 notes written on March 14, 2011, by Dr. Burton, a psychiatrist,
20 eight days before the CTF IDTT declined to recommend him for
21 continued single cell housing. The notes were the product of a
22 telepsychiatry meeting between Dr. Burton and Plaintiff, during
23 which Dr. Burton spoke with him about his medications and concerns
24 about being single celled. In his notes memorializing the
25 meeting, Dr. Burton did not diagnose Plaintiff with PTSD; rather,
26 he wrote that Plaintiff presented "with symptoms of depression,
27 panic disorder, and PTSD," that he declined a prescription for an
28 anti-depressant to help him with his depression and anxiety, and

1 that he was not a danger to himself or others and was able to
2 provide for himself in a correctional setting. Zika Decl. Ex. A
3 at 363.

4 Plaintiff also claims that his PTSD diagnosis is supported by
5 Dr. Kohler's progress notes from her April 27, 2011 and February
6 15, 2012 medical appointments with him, which took place after he
7 had been returned to a double cell. In the notes from April 27,
8 2011, Dr. Kohler recorded her medical assessment of Plaintiff's
9 condition as "PTSD" and wrote that "[h]ousing with a cellie is not
10 therapeutic but poses real threat to the patient of violence,
11 worsening mental health, and physical health consequences. Single
12 cell status is needed for his protection and to maintain stable
13 mental health and physical health." Opp'n Ex. A-14. In her notes
14 from February 15, 2012, Dr. Kohler recorded her medical assessment
15 of Plaintiff's condition as: "Sleep deprivation related to concern
16 re potential assault. Pt becoming increasingly agitated." Opp'n
17 Ex. A-23. She also wrote that it was difficult to assess whether
18 Plaintiff's asthma symptoms "are related to bronchospasm vs
19 panic." Id.

20 Notwithstanding the above assessments, Dr. Kohler, in her
21 declaration in support of Defendants' reply to Plaintiff's
22 opposition, asserts that she is not a mental health clinician
23 qualified to make a diagnosis of PTSD and, based on her experience
24 with PTSD, she does not believe that Plaintiff has the appropriate
25 case factors to indicate that he suffers from PTSD. Decl. L.
26 Kohler Supp. Reply ("Kohler Decl.") ¶ 3. Further, she avers that,
27 in her April 2011 and February 2012 medical progress notes, she
28 did not determine that Plaintiff was suffering physical harm

1 because of his double-cell housing status, rather, she only
2 recorded his statements to her concerning his experience. Id. ¶
3 4.

4 Further, in response to Plaintiff's reliance on Dr. Kohler's
5 progress notes, Dr. Zika attests:

6 As a mental-health professional with nearly thirty
7 years of practice experience, I disagreed with Dr.
8 Kohler's assessment of Plaintiff's need for single-cell
9 housing. I believed that her diagnosis and plan resulted
10 from incomplete information provided by Plaintiff, and
11 lacked the professional insight that CTF mental-health
12 staff had concerning anxiety disorders and Plaintiff's
13 particular case. Prolonged single-cell housing had not
14 fully addressed Plaintiff's evolving anxiety disorders,
15 and I agreed with my mental-health care practitioners
16 that Plaintiff needed to return to a double-cell prison
17 environment to address his anxiety symptoms, while also
18 engaging in and benefitting from the many treatment
19 options we afforded him.

14 Zika Decl. ¶ 20.³

15 Based on the above, the Court finds that, even if Dr.
16 Kohler's progress notes reflect her assessment that Plaintiff has
17 PTSD and has manifested adverse physical effects as a result of
18 being double celled, such evidence does not raise a triable issue
19 of material fact with respect to whether Defendants' diagnosis and
20 treatment of Plaintiff was medically reasonable. It is undisputed
21 that Dr. Kohler is not a mental health care professional and was
22

23 ³ Plaintiff moves to strike the declarations submitted by Dr.
24 Kohler and Dr. Zika in support of the reply on the ground that the
25 statements made therein are contradicted directly by the evidence
26 he has presented in support of his opposition to the motion for
27 summary judgment. The motion is DENIED. The declarations are
28 evidence the Court may consider in support of Defendants' motion.
Plaintiff's request that he be granted leave for his motion to
exceed the applicable page limit is GRANTED.

1 not responsible for diagnosing or treating Plaintiff's mental
2 health needs. Additionally, the undisputed evidence shows that
3 Defendants are responsible for making such assessments and are not
4 bound by Dr. Kohler's medical opinion about Plaintiff's mental
5 health treatment.

6 Plaintiff further claims that Dr. Bright, with whom he
7 consulted about his request for a single cell as an accommodation
8 under the Americans with Disabilities Act, diagnosed him with
9 PTSD. The record shows, however, that Dr. Bright is not a mental
10 health professional and assessed Plaintiff based on his subjective
11 description of Plaintiff's mental health needs and medical
12 records. Zika Decl. Ex. A at 422-23. After reviewing Plaintiff's
13 request, Dr. Bright concluded: "The patient has no medical
14 indication for being single cell housed. [His need for a single
15 cell] is a psychiatric evaluation and diagnosis. He was
16 instructed to follow this up with Psychiatry." Id. at 423.

17 Plaintiff maintains that the treatment plans chosen by
18 Defendants are medically unacceptable. However, he has not
19 presented evidence that raises a triable issue of material fact in
20 this regard. The evidence is undisputed that he has refused all
21 treatment options offered by CTF mental health staff other than
22 being single celled, including further therapy sessions, Special
23 Needs Yard housing and medications. Zika Decl. ¶¶ 17, 22, 23, 26,
24 27; Decl. K. Lewis Supp. Reply ("Lewis Decl.") Ex. B, Pl.'s
25 Response to Request for Admission No. 6. While he claims that
26 many of these treatment options were ineffective and caused him to
27 be single celled in 2008, there is no medical support in the
28 record for this assertion. To the contrary, the record shows that

1 some of the anxiety-management techniques that Dr. Garbarino
2 recommended have helped Plaintiff bring his panic symptoms under
3 control, Garbarino Decl. ¶ 5-6, and that he has been treated with
4 only one drug (Celexa, an antidepressant) and has refused to try
5 any of the myriad other drug options that Defendants attest are
6 available to treat anxiety disorders. Zika Decl. Supp. Reply ¶ 3.

7 Further, Plaintiff's objection that placement on a Special
8 Needs Yard is medically unreasonable because he will still be in
9 fear of the violent inmates housed there is unsubstantiated
10 because he has presented no evidence that he has ever lived on
11 such a yard or that sex offender inmates are targeted for assault
12 on those yards. Moreover, the evidence shows that he was not
13 assaulted or threatened by his cellmate between April 2011, when
14 he was moved to double cell housing, and October 3, 2012, when he
15 was returned to a single cell after the Court granted his request
16 for a preliminary injunction. Lewis Decl. Ex. B, Pl.'s Response
17 to Request for Admission No. 5.

18 Finally, Plaintiff claims that Defendants have acted with
19 deliberate indifference because they changed their diagnosis of
20 his condition and prescribed treatment in response to pressure
21 from custody staff to house him in a double cell. Defendants deny
22 any such pressure and attest that custody concerns have no role in
23 the IDTT's recommendations regarding housing for mental health
24 program inmates; the only reason they refused to recommend
25 Plaintiff for single cell housing was because, in their clinical
26 opinions, it was not needed for his anxiety condition. Zika Decl.
27 ¶ 18; Garbarino Decl. ¶ 15. Further, as Plaintiff has
28 acknowledged, custody staff make the final decisions on inmate

1 housing issues and can disregard any IDTT recommendation. Thus,
2 the evidence supports the reasonable inference that custody staff
3 would have no reason to pressure mental health staff about making
4 any particular recommendation.

5 3. Findings

6 As discussed above, deliberate indifference is not
7 established simply by a difference of opinion between a prisoner-
8 patient and prison medical authorities regarding treatment. See
9 Franklin, 662 F.2d at 1344. In order to prevail on a claim
10 involving choices between alternative courses of treatment, a
11 plaintiff must show that the course of treatment the doctors chose
12 was medically unacceptable under the circumstances, and that they
13 chose this course in conscious disregard of an excessive risk to
14 the plaintiff's health. Toguchi, 391 F.3d at 1058.

15 Having reviewed the parties' evidence and arguments, the
16 Court finds that Plaintiff has not raised a genuine issue for
17 trial with respect to whether Defendants acted with deliberate
18 indifference to his serious medical and mental health needs.
19 Although Plaintiff disagrees with Defendants' diagnosis of, and
20 treatment plan for, his anxiety disorder, the record evidence
21 shows that over a course of several years Defendants have made
22 reasonable attempts to attend to his mental health needs and the
23 physical manifestations resulting therefrom. In particular, the
24 record shows that Defendants' diagnoses and recommended treatments
25 have evolved over time based on their considered evaluation of his
26 symptoms and responses to treatment.

27 In sum, Plaintiff has not presented evidence which shows that
28 Defendants' care has been medically unacceptable, Toguchi, 391

1 F.3d at 1058, or that they have acted with a "sufficiently
2 culpable state of mind" to establish deliberate indifference to
3 his serious mental health and medical needs. See Farmer, 511 U.S.
4 at 847. Accordingly, Defendants' motion for summary judgment is
5 GRANTED and Plaintiff's motion to renew the preliminary injunction
6 is DENIED.⁴

7 II. Pending Class Action

8 Defendants argue that Plaintiff is precluded from seeking
9 injunctive relief by the currently pending class actions Coleman
10 v. Brown, et al., No. S 90-0520 LKK-JFM (E.D. Cal.), and Plata v.
11 Brown, No. 01-cv-01351 TEH (N.D. Cal.). The Court rejected this
12 argument in its order granting Plaintiff's request for preliminary
13 injunctive relief. Defendants do not assert new or different
14 grounds in the present motion that persuade the Court to rule
15 otherwise. Additionally, the Ninth Circuit recently held that
16 prisoners who are members of the Plata class action seeking
17 systemic medical injunctive relief may proceed with individual
18 claims for medical treatment that pertain solely to their own
19 individual care. See Pride v. Correa, 719 F.3d 1130, 1137-38 (9th
20 Cir. 2013). Accordingly, Defendants' motion for summary judgment
21 on this ground is not well-taken.

22 III. Qualified Immunity

23 Defendants argue that they are entitled to qualified
24

25
26 ⁴ Defendants' motion for reconsideration of the order
27 granting Plaintiff's first request to renew the preliminary
28 injunction is DENIED as moot, as is Plaintiff's motion to dismiss
that motion.

1 immunity. In this case, Plaintiff seeks both injunctive relief
2 and money damages. "Qualified immunity is only an immunity from
3 suit for money damages, and does not provide immunity from a suit
4 seeking declaratory or injunctive relief." Hydrick v. Hunter, 669
5 F.3d 937, 939-40 (9th Cir. 2012). Accordingly, Defendants are not
6 entitled to qualified immunity on Plaintiff's injunctive relief
7 claims.

8 With respect to Plaintiff's damages claims, the defense of
9 qualified immunity protects "government officials . . . from
10 liability for civil damages insofar as their conduct does not
11 violate clearly established statutory or constitutional rights of
12 which a reasonable person would have known." Harlow v.
13 Fitzgerald, 457 U.S. 800, 818 (1982). A court considering a claim
14 of qualified immunity must determine whether the plaintiff has
15 alleged the deprivation of an actual constitutional right and
16 whether the right was clearly established, such that it would be
17 clear to a reasonable officer that his conduct was unlawful in the
18 situation he confronted. See Pearson v. Callahan, 555 U.S. 223,
19 236 (2009).

20 On the facts presented herein, viewed in the light most
21 favorable to Plaintiff, Defendants prevail as a matter of law on
22 their qualified immunity defense because the record establishes no
23 constitutional violation. Even if a constitutional violation did
24 occur, however, Defendants reasonably could have believed their
25 conduct was lawful. Specifically, it would not have been clear to
26 Defendants that they failed to take reasonable steps to abate a
27 substantial risk of harm to Plaintiff by providing him with the
28 above-described care and treatment for his serious mental health

1 and medical needs, notwithstanding their refusal to renew their
2 recommendation that he be single celled. Accordingly, Defendants
3 are entitled to qualified immunity and their motion for summary
4 judgment is GRANTED for this reason as well.

5 IV. Plaintiff's Cross-Motion for Summary Judgment

6 Plaintiff has filed a cross-motion for summary judgment in
7 which he argues that he is entitled to a favorable judgment on his
8 claims as a matter of law. When the parties file cross-motions
9 for summary judgment, the district court must consider all of the
10 evidence submitted in support of both motions to evaluate whether
11 a genuine issue of material fact exists precluding summary
12 judgment for either party. The Fair Housing Council of Riverside
13 County, Inc. v. Riverside Two, 249 F.3d 1132, 1135 (9th Cir.
14 2001).

15 In considering Plaintiff's cross-motion, the Court regards as
16 true Defendants' version of the evidence and draws all reasonable
17 inferences in favor of them. Celotex, 477 U.S. at 324. To show
18 that he is entitled to judgment as a matter of law, Plaintiff must
19 establish there is an absence of a genuine issue of material fact
20 and that he has made a showing sufficient to establish the
21 existence of the elements essential to his case. Id. at 322-23.

22 Under Defendants' version of the facts discussed above,
23 Plaintiff has not made a showing sufficient to establish that they
24 acted with deliberate indifference to his serious mental health
25 and medical needs by refusing to renew the recommendation that he
26 be single celled. Accordingly, Plaintiff's cross-motion for
27 summary judgment is DENIED.

28 CONCLUSION

1 For the foregoing reasons, the Court orders as follows:

2 1. Defendants' motion for summary judgment is GRANTED.
3 Docket no. 18. Judgment shall be entered in favor of all
4 Defendants and against Plaintiff.

5 2. Plaintiff's motion to strike Defendants' reply evidence
6 is DENIED; his request to exceed the applicable page limit of the
7 motion to strike is GRANTED. Docket no. 45.

8 3. Plaintiff's cross-motion for summary judgment is DENIED.
9 Docket no. 35.

10 4. Plaintiff's motion to renew the preliminary injunction
11 for an additional ninety days from the date of this Order is
12 DENIED. Docket no. 59.

13 5. Defendants' motion to file a motion for reconsideration
14 of the Court's order renewing the preliminary injunction is
15 DENIED. Docket no. 43.

16 6. Plaintiff's motion to dismiss Defendants' motion to file
17 a motion for reconsideration is DENIED. Docket no. 47.

18 The Clerk of the Court shall enter judgment and close the
19 file.

20 This Order terminates Docket nos. 18, 35, 43, 45, 47 and 59.

21 IT IS SO ORDERED.

22 Dated: 8/27/2013

23 
CLAUDIA WILKEN
24 United States District Judge
25
26
27
28