

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

RANDALL THOMPSON,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION;
THEODORE ABREU; THOMAS BZOSKIE;
HARRY NEWMAN; JEROME PRICE;
MARGARET HANNA; RONALD DAVIS; and
DOES 1 to 50, inclusive,

Defendants.

No. 16-cv-03415-CW

ORDER GRANTING IN PART
AND DENYING IN PART
INDIVIDUAL DEFENDANTS'
MOTION TO DISMISS
CLAIMS IN SECOND
AMENDED COMPLAINT

(Docket No. 94)

Defendants Thomas Bzoskie, Harry Newman, Jerome Price,
Margaret Hanna and Ronald Davis (the Individual Defendants) move
to dismiss Plaintiff Randall Thompson's first and second claims in
the second amended complaint (2AC).¹ Plaintiff opposed the motion
and the Individual Defendants filed a reply. Having considered
the parties' papers, the Court grants in part and denies in part
the Individual Defendants' motion to dismiss Plaintiff's two
claims for relief against them.

¹ Defendant Theodore Abreu, who is represented by separate
counsel, did not join in the motion to dismiss. Defendant Abreu
is not included in references in this order to the Individual
Defendants, unless specifically noted.

1 BACKGROUND

2 The following facts are taken from the 2AC and assumed to be
3 true for purposes of this motion. Plaintiff was incarcerated at
4 various prisons operated by the California Department of
5 Corrections and Rehabilitation (CDCR) from May 2014 through March
6 2015. In August 2014, while he was incarcerated at Deuel
7 Vocational Institute (DVI), Plaintiff was issued a Medical
8 Classification Chrono and a Comprehensive Accommodation Chrono for
9 "severe knee damage." Id. ¶ 13. The chronos indicated that
10 Plaintiff was to be housed in a ground floor cell, was not to use
11 the stairs and was restricted to limited duty.

12 Despite the chronos, Defendant Theodore Abreu, a correctional
13 officer at DVI, repeatedly ordered Plaintiff to shower on the
14 second floor even though showers were available on the ground
15 floor. On or about September 3, 2014, after being ordered to
16 shower on the second floor for about the fourth time, Plaintiff
17 fell from about the middle of staircase and tumbled down the metal
18 steps while descending. He immediately complained of pain in his
19 back, neck, knees and shoulder but had to wait for over thirty
20 minutes before medical personnel arrived with a gurney. The
21 person who arrived was unable to lift him, so Plaintiff had to
22 stand and climb onto the gurney, which "caused him an extreme
23 amount of pain." Id. ¶ 16.

24 Plaintiff was then transported to the DVI infirmary, where
25 x-rays were taken. No one read the x-rays, but Plaintiff was told
26 that he had no acute fractures, given a Motrin shot and sent back
27 to his cell. He was scheduled to see a doctor six days later.
28 After Plaintiff returned to his cell, Abreu told him "in a very

1 stern and threatening voice 'You know I didn't order you to go up
2 the stairs.'" Id. ¶ 18.

3 Plaintiff was unable to walk to the dining hall for dinner
4 that evening and his request to be fed in his cell was refused.
5 Other inmates helped him walk to the dining hall the next morning
6 but he collapsed when returning to his cell. He returned to the
7 infirmary, where Defendant Dr. Harry Newman told him he needed to
8 "tough it out" and refused to give him a wheelchair or crutches.
9 Id. ¶ 19. A worker in the infirmary told Plaintiff that, if he
10 fell down again, "We're not going to come get you. You're just
11 gonna lay there." Id.

12 Plaintiff alleges that over the next seven weeks, he filed
13 repeated requests for additional medical treatment and asked for
14 help with his condition and pain on a daily basis. "He was seen
15 several times by Dr. Newman, who began to recognize that he was in
16 serious pain, prescribed pain medication and told plaintiff he had
17 a fracture in his lower back and had resulting nerve damage,
18 although Dr. Newman did not document that statement." Id. ¶ 21.
19 Dr. Newman refused to order additional x-rays or an MRI. He told
20 Plaintiff that it was not his decision, that he had "a boss to
21 answer to," and that if "you don't have broken bones, you're out
22 of luck." Id. Plaintiff alleges that Dr. Newman was acting at
23 the direction of Defendant Bzoskie, the Chief Medical Officer
24 (CMO) at DVI, "who reviewed the 602's filed by Plaintiff and was
25 therefore aware of Plaintiff's serious medical condition,
26 substantial pain and Plaintiff's request for further medical
27 services, and directed the denial of those requests." Id. ¶ 22.
28

1 Plaintiff alleges that, because of his continued complaints
2 and documentation of the inadequacy of his medical care, he was
3 transferred without notice, in the middle of the night, to San
4 Quentin State Prison on October 21, 2014. The transfer occurred
5 during his administrative appeal regarding a referral to see an
6 orthopedic specialist, and was used by Michael D. Fox, M.D., who
7 is not a party to this action, as a basis to deny the appeal.
8 Plaintiff was encouraged to request services at San Quentin, but
9 his appeal of the previous denial was not transferred.

10 Upon his arrival at San Quentin, Plaintiff's "vitals were
11 taken," but he was not examined regarding his complaints. Id.
12 ¶ 24. Two and a half weeks after the transfer, Plaintiff saw
13 Individual Defendant Nurse Practitioner Margaret Hanna for
14 approximately three minutes. Id. N.P. Hanna did not examine
15 Plaintiff, but did a cursory review of his records and then let
16 his pain medication prescription expire, telling him that she
17 believed he was exaggerating his condition and leaving him without
18 pain relief. Plaintiff requested a specialist referral, and N.P.
19 Hanna denied the request and sent him back to his cell.

20 At San Quentin, Plaintiff continued to seek medical
21 treatment, but "appointments were more difficult to obtain and set
22 much further out than at DVI." Id. ¶ 25. He was given a pillow,
23 physical therapy, and a "TENS unit for his back," but did not get
24 additional x-rays or any magnetic resonance imaging (MRI). Id.
25 ¶ 29. Physical therapy brought him some relief, and his physical
26 therapist told him that he had a "severe neck injury and a lower
27 back injury, which needed further treatment and probably surgery."
28 Id. N.P. Hanna advised him to use the TENS unit on his neck for

1 pain relief, but only shrugged and walked away when Plaintiff
2 pointed out a warning label against use of the TENS unit on the
3 neck.

4 In February 2015, Plaintiff was transferred to Avenal State
5 Prison, where he remained until his release in March 2015. After
6 his release, Plaintiff sought medical attention. His doctor
7 ordered a MRI and was surprised that he had not previously
8 received a MRI. The MRI "revealed that Plaintiff has severe tears
9 of the rotator cuff in his right shoulder with
10 musculotendinoligamentous sprain/strain and a bulging disc in his
11 neck" as well as "significant facetarthropathy and mild
12 neuroforaminal narrowing in his lumber spine." Id. ¶ 30. He was
13 referred to an orthopedist and treated with injections and "is a
14 surgical candidate if the conservative treatment ultimately is not
15 effective." Id.

16 Plaintiff alleges two claims for relief against all
17 Individual Defendants. First, he claims deliberate indifference
18 to his medical needs in violation of the Eighth and Fourteenth
19 Amendments, pursuant to 42 U.S.C. § 1983. Second, he claims a
20 conspiracy to violate his civil rights, in violation of 42 U.S.C.
21 § 1985. The Individual Defendants move to dismiss both of these
22 claims.

23 On August 23, 2016, the Court denied Defendant CDCR's motion
24 to dismiss Plaintiff's third cause of action, for disability
25 discrimination in violation of Title II of the Americans with
26 Disabilities Act (ADA), 42 U.S.C. § 12132. On June 7, 2017, the
27 Court granted the Individual Defendants' motion to dismiss the two
28 claims against them in the first amended complaint (1AC) and

1 granted leave to amend. Defendants CDCR and Abreu filed an answer
2 to the 1AC on May 29, 2017, but have not filed an answer to the
3 2AC.

4 LEGAL STANDARD

5 A complaint must contain a "short and plain statement of the
6 claim showing that the pleader is entitled to relief." Fed. R.
7 Civ. P. 8(a). The plaintiff must proffer "enough facts to state a
8 claim to relief that is plausible on its face." Ashcroft v.
9 Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v.
10 Twombly, 550 U.S. 544, 570 (2007)). On a motion under Rule
11 12(b)(6) for failure to state a claim, dismissal is appropriate
12 only when the complaint does not give the defendant fair notice of
13 a legally cognizable claim and the grounds on which it rests.
14 Twombly, 550 U.S. at 555. A claim is facially plausible "when the
15 plaintiff pleads factual content that allows the court to draw the
16 reasonable inference that the defendant is liable for the
17 misconduct alleged." Iqbal, 556 U.S. at 678.

18 In considering whether the complaint is sufficient to state a
19 claim, the court will take all material allegations as true and
20 construe them in the light most favorable to the plaintiff.
21 Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d 1049,
22 1061 (9th Cir. 2008). The court's review is limited to the face
23 of the complaint, materials incorporated into the complaint by
24 reference, and facts of which the court may take judicial notice.
25 Id. at 1061. However, the court need not accept legal
26 conclusions, including threadbare "recitals of the elements of a
27 cause of action, supported by mere conclusory statements." Iqbal,
28 556 U.S. at 678 (citing Twombly, 550 U.S. at 555).

1 each Individual Defendant. However, the 2AC is not so lacking in
2 specifics as to be dismissed wholesale as a "shotgun pleading."

3 II. Deliberate Indifference

4 Title 42 U.S.C. § 1983 "provides a cause of action for the
5 'deprivation of any rights, privileges, or immunities secured by
6 the Constitution and laws' of the United States." Wilder v.
7 Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C.
8 § 1983). To state a claim under § 1983, a plaintiff must allege
9 two essential elements: (1) that a right secured by the
10 Constitution or laws of the United States was violated and
11 (2) that the alleged violation was committed by a person acting
12 under the color of state law. See West v. Atkins, 487 U.S. 42, 48
13 (1988).

14 Deliberate indifference to serious medical needs violates the
15 Eighth Amendment's proscription against cruel and unusual
16 punishment. See, e.g., Estelle v. Gamble, 429 U.S. 97, 104
17 (1976). A determination of "deliberate indifference" involves an
18 examination of two elements: the seriousness of the prisoner's
19 medical need and the nature of the defendant's response to that
20 need. See McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992),
21 overruled on other grounds, WMX Technologies, Inc. v. Miller, 104
22 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

23 A "serious" medical need exists if the failure to treat a
24 prisoner's condition could result in further significant injury or
25 the "unnecessary and wanton infliction of pain." McGuckin,
26 974 F.2d at 1059 (citing Estelle, 429 U.S. at 104). Examples of
27 indications that a prisoner has a serious need for medical
28 treatment include the existence of an injury that a reasonable

1 doctor or patient would find important and worthy of comment or
2 treatment, the presence of a medical condition that significantly
3 affects an individual's daily activities or the existence of
4 chronic and substantial pain. Id. at 1059-60 (citing Wood v.
5 Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990)).

6 A prison official is deliberately indifferent if he knows
7 that a prisoner faces a substantial risk of serious harm and
8 disregards that risk by failing to take reasonable steps to abate
9 it. Farmer v. Brennan, 511 U.S. 825, 837 (1994). The prison
10 official must not only "be aware of facts from which the inference
11 could be drawn that a substantial risk of serious harm exists,"
12 but he "must also draw the inference." Id. In order for
13 deliberate indifference to be established, therefore, there must
14 be a purposeful act or failure to act on the part of the defendant
15 and resulting harm. See McGuckin, 974 F.2d at 1060.

16 Indifference may exist when prison officials deny, delay or
17 intentionally interfere with medical treatment, or it may be shown
18 in the way in which prison officials provide medical care. See
19 id. at 1062 (delay of seven months in providing medical care
20 during which medical condition was left virtually untreated and
21 plaintiff was forced to endure "unnecessary pain" sufficient to
22 present colorable § 1983 claim); Wilhelm v. Rotman, 680 F.3d 1113,
23 1123 (9th Cir. 2012) (plaintiff stated a claim for deliberate
24 indifference where his failure to receive prescribed treatment was
25 due to defendant's failure to request the treatment properly and
26 then unexplained cancellation of a second treatment request).

27 A claim of medical malpractice or negligence is insufficient
28 to make out a violation of the Eighth Amendment. See, e.g.,

1 Toguchi v. Chung, 391 F.3d 1051, 1057, 1060-61 (9th Cir. 2004).
2 Likewise, a "difference of opinion between a prisoner-patient and
3 prison medical authorities regarding treatment does not give rise
4 to a § 1983 claim." Franklin v. Oregon, 662 F.2d 1337, 1344 (9th
5 Cir. 1981). In order to prevail on a claim involving choices
6 between alternative courses of treatment, a plaintiff must show
7 that the course of treatment the doctors chose was medically
8 unacceptable under the circumstances and that they chose this
9 course in conscious disregard of an excessive risk to the
10 plaintiff's health. Toguchi, 391 F.3d at 1058; Jackson v.
11 McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (citing Farmer,
12 511 U.S. at 837).

13 A. Fourteenth Amendment

14 Plaintiff stipulates that he alleges a claim under the Eighth
15 Amendment as made applicable to the States under the Fourteenth
16 Amendment, but does not allege a separate substantive due process
17 claim under the Fourteenth Amendment. Opp. at 1. Accordingly,
18 the Court does not reach the Individual Defendants' argument that
19 Plaintiff cannot state a separate claim under the Fourteenth
20 Amendment.

21 B. Dr. Newman and Dr. Bzoskie

22 Plaintiff claims deliberate indifference by two doctors at
23 DVI: Dr. Newman, who was his treating physician, and CMO Bzoskie.
24 These Defendants argue that Plaintiff again fails to allege that
25 their acts or omissions evince subjectively deliberate
26 indifference to Plaintiff's objectively serious medical needs.

27 Reviewing the allegations of the 2AC as a whole, the Court
28 finds that Plaintiff has plead sufficient facts to state a claim

1 against Dr. Newman and CMO Bzoskie. Plaintiff alleges that these
2 Defendants denied him additional treatment, a specialist referral
3 and additional diagnostic testing, despite knowing of Plaintiff's
4 objectively serious medical condition and pain. He alleges that
5 initial denials of treatment were not based on any review of his
6 x-rays and that later, Dr. Newman made statements to him that
7 implied that DVI had a policy of not providing additional
8 diagnosis or treatment unless an inmate had broken bones. See
9 Colwell v. Bannister, 763 F.3d 1060, 1068 (9th Cir. 2014) (holding
10 that a policy of denying cataract surgery in one eye to inmates
11 with another good eye would be "the very definition of deliberate
12 indifference"). He alleges that Dr. Newman was acting at the
13 direction of Dr. Bzoskie, who actually discussed and acquiesced in
14 the denials of care after being "provided information sufficient
15 to inform [him] of Plaintiff's serious medical condition and his
16 significant pain as well as and [sic] his regular requests to see
17 a specialist and for further diagnostic testing." 2AC ¶ 26; see
18 also id. ¶ 21-22.

19 The alleged statements by Dr. Newman, as plead, are open to
20 multiple interpretations other than the expression of a policy of
21 deliberate indifference and direct involvement of CMO Bzoskie in
22 the denial of care. In the Ninth Circuit, however, if "there are
23 two alternative explanations, one advanced by defendant and the
24 other advanced by plaintiff, both of which are plausible,
25 plaintiff's complaint survives a motion to dismiss under Rule
26 12(b)(6). Plaintiff's complaint may be dismissed only when
27 defendant's plausible alternative explanation is so convincing
28 that plaintiff's explanation is implausible." Starr v. Baca,

1 652 F.3d 1202, 1216 (9th Cir. 2011) (emphasis in original).
2 Plaintiff's allegations are not particularized, but they are
3 sufficient to provide Dr. Newman and CMO Bzoskie with "'fair
4 notice of what the . . . claim is and the grounds upon which it
5 rests.'" Twombly, 550 U.S. at 555 (quoting Conley v. Gibson,
6 355 U.S. 41, 47 (1957) (omission in original)).

7 C. Nurse Practitioner Hanna

8 Plaintiff alleges that during his three minutes with N.P.
9 Hanna, she performed a cursory review of his records on the
10 computer and then stated her subjective belief that he was "faking
11 and exaggerating his condition." 2AC ¶ 24. Plaintiff further
12 alleges that her belief that he was "'faking' was not based on
13 anything Plaintiff stated to Hanna and could only have come from
14 medical personnel at DVI." Id. Plaintiff alleges no facts
15 supporting a claim that it was "medically unacceptable under the
16 circumstances" for a nurse practitioner to rely on medical records
17 created by treating doctors at DVI. Toguchi v. Chung, 391 F.3d
18 1051, 1058 (9th Cir. 2004) (quoting Jackson v. McIntosh, 90 F.3d
19 330, 332 (9th Cir. 1996)).

20 Plaintiff alleges that N.P. Hanna's refusal to refill his
21 pain medication prescription, which appears to have occurred in
22 November 2014, left him "without pain relief." 2AC ¶ 24. He also
23 alleges, however, that at San Quentin in 2014, he was given a
24 pillow, a TENS unit and physical therapy that provided him with
25 some relief. Plaintiff has not alleged facts supporting a claim
26 that N.P. Hanna or other medical personnel at San Quentin chose
27 his alternative treatment "in conscious disregard of an excessive
28 risk" to his health. Toguchi, 391 F.3d at 1058.

1 Plaintiff's allegation relating to N.P. Hanna's discussion
2 with him about his TENS unit is insufficient to plead more than
3 negligence and is not, in any event, alleged to have resulted in
4 any harm to Plaintiff.

5 Finally, Plaintiff alleges no facts that plausibly support
6 his claim that N.P. Hanna was involved in the decision to transfer
7 him to San Quentin.

8 D. Wardens Price and Davis

9 Finally, Plaintiff names Warden Price of DVI and Warden Davis
10 of San Quentin as Defendants. The Supreme Court has explained
11 that, because § 1983 suits do not allow for the imposition of
12 vicarious liability, "a plaintiff must plead that each Government-
13 official defendant, through the official's own individual actions,
14 has violated the Constitution." Iqbal, 556 U.S. at 676. However,
15 "a plaintiff may state a claim against a supervisor for deliberate
16 indifference based upon the supervisor's knowledge of and
17 acquiescence in unconstitutional conduct by his or her
18 subordinates." Starr, 652 F.3d at 1207.

19 Plaintiff alleges generally that the wardens (and all other
20 Defendants) participated in staff meetings where they would have
21 been informed of Plaintiff's medical condition, pain and requests
22 for additional treatment. He further alleges that all Defendants
23 "participated in and/or directed the repeated denials and delays
24 of treatment and/or learned of the denials and delays and failed
25 to act to prevent them, and/or acted with deliberate indifference
26 to Plaintiff's serious medical condition." 2AC ¶ 26. Finally, he
27 alleges that the approval of the wardens was required for his
28 transfer to San Quentin. These boilerplate, group claims on

1 information and belief lack either plausibility or factual
2 allegations to support them with regard to the wardens. See
3 Twombly, 550 U.S. at 555 (plaintiff must provide “more than labels
4 and conclusions”). Even if the wardens were aware that Plaintiff
5 had injuries and wanted additional treatment, that does not,
6 without more, support the plausible inference that they
7 subjectively knew that the treatment Plaintiff was receiving was
8 deficient, only that Plaintiff was dissatisfied with it.

9 Additionally, Plaintiff alleges that Warden Davis “was the
10 Warden or Acting Warden of San Quentin from at least December of
11 2014 until Plaintiff’s transfer to Avenal.” Id. ¶ 26. In other
12 words, Davis was not yet the warden at the time of Plaintiff’s
13 transfer or even at the time of his initial appointment with N.P.
14 Hanna. Plaintiff alleges no individual actions by Davis before
15 his time as warden. Plaintiff’s claim against Davis is not
16 plausible for this additional reason. Iqbal, 556 U.S. at 682-83.

17 III. Conspiracy to Violate Civil Rights

18 Defendants contend that Plaintiff fails to state a claim
19 under 42 U.S.C. § 1985(3) because the 1AC does not sufficiently
20 allege that any defendant was motivated by “some racial, or
21 perhaps otherwise class-based, invidiously discriminatory animus.”
22 Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971); see also Bray
23 v. Alexandria Women’s Health Clinic, 506 U.S. 263, 267-68 (1993).

24 Plaintiff responds that his claim under § 1985(3) is based on
25 class-based animus against individuals with disabilities. For the
26 purpose of this motion to dismiss, the Individual Defendants have
27 not disputed that Plaintiff is an individual with a disability.
28 Mot. at 21.

1 The Ninth Circuit has explained that, to state a cause of
2 action under § 1985(3), a plaintiff must allege: "(1) a
3 conspiracy, (2) to deprive any person or a class of persons of the
4 equal protection of the laws, or of equal privileges and
5 immunities under the laws, (3) an act by one of the conspirators
6 in furtherance of the conspiracy, and (4) a personal injury,
7 property damage or a deprivation of any right or privilege of a
8 citizen of the United States." Gillespie v. Civiletti, 629 F.2d
9 637, 641 (9th Cir. 1980) (citing Griffin, 403 U.S. at 102-03); see
10 also Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1141 (9th Cir.
11 2000) (holding that § 1985(3) "prohibits two or more persons from
12 conspiring to deprive any person or class of persons of the equal
13 protection of the law").

14 "The Supreme Court has not defined the parameters of a
15 'class' beyond race," but federal courts must exercise restraint
16 in extending § 1985(3) beyond racial prejudice. Butler v. Elle,
17 281 F.3d 1014, 1028 (9th Cir. 2002). Section "1985(3) is not to
18 be construed as a general federal tort law." Gerritsen v. de la
19 Madrid Hurtado, 819 F.2d 1511, 1518-19 (9th Cir. 1987); see also
20 Griffin, 403 U.S. at 101 (Congress did not intend § 1985(3) to
21 reach "all tortious, conspiratorial interferences with the rights
22 of others"). The Ninth Circuit has explained:

23 Although both § 1983 and § 1985 are civil rights
24 statutes, they have different origins. Section 1983 is
25 based upon the fourteenth amendment and thus concerns
26 deprivations of rights that are accomplished under the
27 color of state law. Section 1985, on the other hand, is
28 derived from the thirteenth amendment and covers all
deprivations of equal protection of the laws and equal
privileges and immunities under the laws, regardless of
its source.

Gillespie, 629 F.2d at 641 (citations omitted).

1 In the Ninth Circuit, the “rule is that section 1985(3) is
2 extended beyond race only when the class in question can show that
3 there has been a governmental determination that its members
4 require and warrant special federal assistance in protecting their
5 civil rights.” Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536
6 (9th Cir. 1992) (internal quotation marks omitted). More
7 specifically, the Court requires “either that the courts have
8 designated the class in question a suspect or quasi-suspect
9 classification requiring more exacting scrutiny or that Congress
10 has indicated through legislation that the class required special
11 protection.” Id.

12 As discussed more fully in the Court’s June 7, 2017 order
13 granting the Individual Defendants’ motion to dismiss the 1AC,
14 whether a § 1985(3) claim may be based on class-based animus
15 against the disabled is a close question. The Court need not
16 reach it to decide the pending motion to dismiss, however. This
17 is because even if Plaintiff is a member of a class that is
18 cognizable under § 1985(3), he still must plead sufficient facts
19 to allege a conspiracy to deprive him of the equal protection of
20 the laws because of invidious animus against him as a member of
21 that class. See, e.g., Scott v. Rosenberg, 702 F.2d 1263, 1270
22 (9th Cir. 1983) (holding that plaintiff “failed to allege any
23 facts from which we might infer a class-based animus”); see also
24 Bray, 506 U.S. at 269-70 (“The record in this case does not
25 indicate that petitioners’ demonstrations are motivated by a
26 purpose (malevolent or benign) directed specifically at women as a
27 class.”).

1 Assuming, without deciding, that a § 1985(3) claim may be
2 based on class-based animus against individuals with disabilities,
3 Plaintiff has not alleged facts supporting a plausible inference
4 that that any of the five Individual Defendants conspired to
5 deprive him of the equal protection of the laws, much less that
6 such a conspiracy was based on class-based invidiously
7 discriminatory animus due to his alleged disability. Plaintiff
8 alleges only that he was dissatisfied with his medical treatment,
9 that he pursued his right to that treatment and that he was
10 transferred to San Quentin with all Defendants' approval "to
11 silence and cover up Plaintiff's complaints." 2AC ¶ 27. This is
12 accompanied by the assertion that these actions "evidence a
13 pattern and practice constituting at a minimum an implicit
14 understanding to deny Plaintiff needed medical care and relief
15 from substantial pain." 2AC ¶ 46; see also id. ¶ 47.

16 As explained in the Court's prior order, even if a § 1985(3)
17 claim may be based on class-based animus against the disabled,
18 every act of deliberate indifference to medical needs is not
19 necessarily also a violation of § 1985(3). Plaintiff's allegation
20 of conspiracy lacks factual specificity or plausibility. See
21 Johnson v. State of California, 207 F.3d 650, 655 (9th Cir. 2000).
22 Moreover, his claim that the Individual Defendants' actions were
23 motivated by class-based discrimination against individuals with
24 disabilities is not plausible in light of "obvious alternative
25 explanations" including individual medical negligence, skepticism
26 of his complaints, deliberate indifference or even retaliation
27 directed at Plaintiff individually. Iqbal, 556 U.S. at 682-83.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the foregoing reasons, the Court GRANTS in part and denies in part the motion to dismiss Plaintiff's first and second claims for relief in the 2AC (Docket No. 94), as follows.

The Court GRANTS the motion to dismiss Plaintiff's first and second claims for relief against Defendants Margaret Hanna, Ronald Davis, and Jerome Price. Thus, they are no longer Defendants in this action.

The Court DENIES the motion to dismiss Plaintiff's first claim for relief against Individual Defendants Harry Newman and Thomas Bzoskie.

The Court GRANTS the motion of Defendants Newman and Bzoskie to dismiss Plaintiff's second claim for relief against them. The second claim for relief is therefore DISMISSED as to all five Individual Defendants, but remains pending as to Defendant Abreu.

The Court DENIES further leave to amend the dismissed claims. Plaintiff has already had two opportunities to amend these claims in response to the Individual Defendants' arguments, including one opportunity granted by the Court in the June 7, 2017 order of dismissal. The Court finds that further leave to amend would be futile in light of the facts plead in the 2AC.

Defendants Newman and Bzoskie shall file an answer to the remaining claim against them in the 2AC within fourteen days after the date of this order.

The case management conference remains scheduled for October 3, 2017. In addition to the other issues that the parties must address in the joint case management statement, the parties shall

1 address whether Defendants CDCR and Abreu must file an answer to
2 the 2AC.

3 IT IS SO ORDERED.

4
5 Dated: September 15, 2017



6 CLAUDIA WILKEN
7 United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28