

1 Plaintiff alleges that he suffers from several medical conditions consisting of
2 deep vein thrombosis, complications of brawny edema, a stasis ulcer, and venous
3 insufficiency. (FAC at p.5). His medical conditions allegedly cause swollen
4 extremities and he is prone to blood clots. Id. Plaintiff takes several medications for
5 his medical conditions. Id. He has suffered three previous pulmonary embolisms. Id.

6 Plaintiff was arrested on August 20, 2004 and transported to the San Diego
7 County Jail. As a part of the booking process, Plaintiff was interviewed by a nurse,
8 Defendant Beverly Orr. Plaintiff informed her that he suffered from deep vein
9 thrombosis, a stasis ulcer, his swollen legs were tender and painful, he was having
10 difficulty breathing and feeling lethargic. Id. at p.6. He also informed Defendant Orr
11 that he had not been taking care of himself and that he had not taken his medications for
12 several days. Id. Defendant Orr then ordered Plaintiff placed in a holding cell. Plaintiff
13 alleges that established protocol called for her to make sure that he was “immediately
14 seen by medical staff,” and that she deliberately ignored the protocols. Plaintiff alleges
15 that the failure to obtain immediate medical attention resulted in permanent harm,
16 including shortness of breath, painful swelling in his legs, an increase in the size of his
17 stasis ulcer, loss of feeling in three toes, short-term memory loss, and emotional
18 distress. Id. at p. 15.

19 After being moved to several different holding cells and after about 12 hours
20 from the time of admission, he was sent to the Central Infirmary. Id. at p.7. While in
21 the infirmary he was seen by a nurse and two doctors, he explained his medical
22 conditions, and told them that he believed that he was having a pulmonary embolism.
23 “During this time I was never given a medical exam including exrays (sic), ultra sound,
24 and a CAT scan, all of which are standard procedures for treating someone with my
25 condition.” Id. He was then returned to a holding cell

26 After a period of time, he spoke with the Classification and Housing Sergeant and
27 told him that he “needed immediate attention because [he] was on conscious (sic) for
28 extended periods of time and was having difficulty breathing.” Id. His request to be

1 housed in the Infirmary was denied. Instead, Plaintiff was placed with the general
2 population. Within a day or two he received further medical attention.

3 Based upon the above generally described conduct, Plaintiff alleges that
4 Defendants violated his right to adequate medical care and thereby subjected him to
5 cruel and unusual punishment in violation of the Eighth Amendment.

7 DISCUSSION

8 Legal Standards

9 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in
10 "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.
11 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a
12 "cognizable legal theory" or sufficient facts to support a cognizable legal theory.
13 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should
14 dismiss a complaint for failure to state a claim when the factual allegations are
15 insufficient "to raise a right to relief above the speculative level." Bell Atlantic Corp
16 v. Twombly, __550 U.S. __, 127 S.Ct. 1955 (2007) (the complaint's allegations must
17 "plausibly suggest[]" that the pleader is entitled to relief); Ashcroft v. Iqbal, 129 S.Ct.
18 1937 (2009) (under Rule 8(a), well-pleaded facts must do more than permit the court
19 to infer the mere possibility of misconduct). "The plausibility standard is not akin to
20 a 'probability requirement,' but it asks for more than a sheer possibility that a defendant
21 has acted unlawfully." Id. at 1949. Thus, "threadbare recitals of the elements of a
22 cause of action, supported by mere conclusory statements, do not suffice." Id. The
23 defect must appear on the face of the complaint itself. Thus, courts may not consider
24 extraneous material in testing its legal adequacy. Levine v. Diamantheset, Inc., 950
25 F.2d 1478, 1482 (9th Cir. 1991). The courts may, however, consider material properly
26 submitted as part of the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co.,
27 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

28 Finally, courts must construe the complaint in the light most favorable to the

1 plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116
2 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in
3 the complaint, as well as reasonable inferences to be drawn from them. Holden v.
4 Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of
5 law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In
6 Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

7 **The Motion to Dismiss**

8 Defendant Balcita moves to dismiss the complaint for failure to state a claim.
9 Plaintiff's claim arises from the alleged delay or denial of medical care in violation of
10 the Eighth Amendment right to be free from cruel and unusual punishment. The Eighth
11 Amendment prohibits punishment that involves the "unnecessary and wanton infliction
12 of pain." Estelle v. Gamble, 429 U.S. 97, 103 (1976) (quoting Gregg v. Georgia, 428
13 U.S. 153, 173 (1976)). This principle "establish[ed] the government's obligation to
14 provide medical care for those whom it is punishing by incarceration." Id. The
15 Supreme Court has noted that "[a]n inmate must rely on prison authorities to treat his
16 medical needs; if the authorities fail to do so, those needs will not be met." Id.; West
17 v. Atkins, 487 U.S. 42, 54-55 (1988).

18 As set forth in previous orders, prison officials violate a prisoner's Eighth
19 Amendment right to be free from cruel and unusual punishment if they are deliberately
20 indifferent to the prisoner's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 106
21 (1976); Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989). "Regardless of how
22 evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause
23 of action under § 1983." Estelle, 429 U.S. at 105. "This is true whether the
24 indifference is manifested by prison doctors in their response to the prisoner's needs,
25 or by prison guards in intentionally denying or delaying access to medical care or
26 intentionally interfering with the treatment once prescribed." Id. at 104-05 (footnotes
27 omitted).

28 "In order to show deliberate indifference, an inmate must allege sufficient facts

1 to indicate that prison officials acted with a culpable state of mind.” Wilson v. Seiter,
2 501 U.S. 294, 302 (1991). The indifference to medical needs also must be substantial;
3 inadequate treatment due to malpractice, or even gross negligence, does not amount to
4 a constitutional violation. Estelle, 429 U.S. at 106; Toguchi v. Chung, 391 F.3d 1051,
5 1060 (9th Cir. 2004) (“Deliberate indifference is a high legal standard.”) (citing Hallett
6 v. Morgan, 296 F.3d 732, 1204 (9th Cir. 2002); Wood v. Housewright, 900 F.2d 1332,
7 1334 (9th Cir. 1990)).


8 Here, Plaintiff simply alleges that Nurse Balcita, the individual who saw Plaintiff
9 five days after he received medical treatment from five staff and physicians at the San
10 Diego County Jail, (FAC at pp.16-17, 19, 21-24), was grossly negligent in failing to
11 immediately send him to a hospital or infirmary to receive medical treatment. (FAC at
12 pp. 20-21). Plaintiff alleges that he told Defendant Balcita that when he arrived at the
13 George Bailey detention center that he suffered from deep vein thrombosis and was
14 having “bouts with shortness of breath that were similar to the pulmonary embolisms
15 [he] had in the past.” (FAC at p.20:21-22). According to Plaintiff, Defendant Balcita
16 was grossly negligent in sending him to the general population non-medical dormitory,
17 “that was overcrowded, and forced to be housed on the top part of a tripple (sic) bunk,”
18 instead of an infirmary or hospital. (FAC at p.20:25. These allegations fail to go
19 beyond the plausibility standard set forth in Ashcroft v. Iqbal, 129 S.Ct. 1937(under
20 Rule 8(a), well-pleaded facts must do more than permit the court to infer the mere
21 possibility of misconduct). “The plausibility standard is not akin to a ‘probability
22 requirement,’ but it asks for more than a sheer possibility that a defendant has acted
23 unlawfully.” Id. at 1949. The fact that Plaintiff alleges he was seen by five different
24 doctors within days of his transfer to the Bailey Detention center undermines Plaintiff’s
25 central allegation that Nurse Balcita should have overruled the opinions of medical
26 professionals and admitted Plaintiff to the hospital, something Plaintiff’s treating
27 physicians allegedly did not do. (FAC at pp.16-17, 19, 21-24). These “threadbare
28 recitals of the elements of a cause of action, supported by mere conclusory statements,

1 do not suffice” to state a claim. Id. Moreover, differences in judgment between
2 Plaintiff and prison medical personnel regarding appropriate medical diagnosis and
3 treatment are not enough to establish deliberate indifference, Sanchez v. Vild, 891 F.2d
4 240, 242 (9th Cir. 1989), nor do allegations of gross negligence satisfy the deliberate
5 indifference standard. Estelle, 429 U.S. at 106.

6 In sum, the court grants the motion to dismiss.

7 **IT IS SO ORDERED.**

8 DATED: November 23, 2009

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11 Hon. Jeffrey T. Miller
12 United States District Judge

13 cc: All parties
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