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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 RAUL ARELLANO, JR.,

12 Plaintiff,

13 v.

14 OFFICER HODGE, et al.,

15 Defendants.

Case No.: 14-CV-590 JLS (JLB)

**ORDER: (1) OVERRULING
PLAINTIFF'S OBJECTIONS;
(2) ADOPTING REPORT AND
RECOMMENDATION;
(3) GRANTING DEFENDANTS'
MOTIONS TO DISMISS CLAIMS
AGAINST DEFENDANTS GLYNN,
SEELEY, AND ZAMORA; AND
(4) DENYING AS MOOT
PLAINTIFF'S MOTION FOR
CONSIDERATION**

(ECF Nos. 63, 69, 110, 112)

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22 Presently before the Court are Defendants K. Seeley, M. Glynn, and L. D. Zamora's
23 Motion to Dismiss Claims Against Defendants Glynn and Seeley in Plaintiff's Third
24 Amended Complaint (Glynn & Seeley MTD, ECF No. 63) and Motion to Dismiss Claims
25 Against Defendant Zamora in Plaintiff's Third Amended Complaint (Zamora MTD, ECF
26 No. 69) (collectively, Defendants' MTDs). Also before the Court is Magistrate Judge Jill
27 L. Burkhardt's Report and Recommendation advising the Court to grant Defendants'
28 MTDs (R&R, ECF No. 110); Plaintiff Raul Arellano, Jr.'s Objections to the R&R (ECF

1 No. 114); and Defendants’ Reply to Plaintiff’s Objection (ECF No. 115). Having
2 considered the facts and the law, the Court **VERRULES** Plaintiff’s Objections (ECF No.
3 114), **ADOPTS** the R&R in its entirety (ECF No. 110), and **GRANTS** Defendants’ MTDs
4 (ECF Nos. 63, 69).¹

5 **BACKGROUND**

6 Magistrate Judge Burkhardt’s R&R contains a thorough and accurate recitation of
7 the factual and procedural history underlying the instant motions. (*See* R&R 2–8,² ECF
8 No. 110.) This Order incorporates by reference the background as set forth therein.

9 **LEGAL STANDARD**

10 **I. Review of the Report and Recommendation**

11 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
12 court’s duties in connection with a magistrate judge’s R&R. The district court must “make
13 a de novo determination of those portions of the report or specified proposed findings or
14 recommendations to which objection is made,” and “may accept, reject, or modify, in
15 whole or in part, the findings or recommendations made by the magistrate judge.” 28
16 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667, 673–76 (1980); *United*
17 *States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989). However, in the absence of timely
18 objection, the Court “need only satisfy itself that there is no clear error on the face of the
19 record in order to accept the recommendation.” Fed. R. Civ. P. 72 advisory committee’s
20 note (citing *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974)).

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23 ¹ The Court also **DENIES AS MOOT** Plaintiff’s Motion for the Court to Take in Consideration that Dock
24 103 Did Arrived [sic] on Time. (Mot. for Consideration, ECF No. 112.) The Court notes that Plaintiff’s
25 Response to Court’s Use of Internet Site was mailed on July 25, 2016 (*see* ECF No. 108), rendering it
26 timely under the mailbox rule, *see, e.g., Houston v. Lack*, 487 U.S. 266, 270. In her R&R, Magistrate
27 Judge Burkhardt notes that Plaintiff’s Response “took no position on the Court’s reliance on outside source
28 materials, and . . . instead . . . reiterate[d] Plaintiff’s] substantive arguments” (R&R 5 n.3, ECF No.
110.) Accordingly, both Magistrate Judge Burkhardt and this Court recognize the timeliness of Plaintiff’s
Response and have considered it to the extent permissible.

² Pin citations to docketed materials refer to the CM/ECF page numbers electronically stamped at the top
of each page.

1 **II. Motion to Dismiss**

2 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
3 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
4 generally referred to as a motion to dismiss. The Court evaluates whether a complaint
5 states a cognizable legal theory and sufficient facts in light of Federal Rule of Civil
6 Procedure 8(a), which requires a “short and plain statement of the claim showing that the
7 pleader is entitled to relief.” Although Rule 8 “does not require ‘detailed factual
8 allegations,’ . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-
9 me accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
10 *Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to provide
11 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and
12 a formulaic recitation of a cause of action’s elements will not do.” *Twombly*, 550 U.S. at
13 555 (alteration in original). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’
14 devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S. at 678 (alteration in original)
15 (quoting *Twombly*, 550 U.S. at 557).

16 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
17 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
18 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
19 when the facts pled “allow[] the court to draw the reasonable inference that the defendant
20 is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to
21 say that the claim must be probable, but there must be “more than a sheer possibility that a
22 defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556). “[F]acts that are
23 ‘merely consistent with’ a defendant’s liability” fall short of a plausible entitlement to
24 relief. *Id.* (quoting *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true
25 “legal conclusions” contained in the complaint. *Id.* at 678–79 (citing *Twombly*, 550 U.S.
26 at 555). This review requires “context-specific” analysis involving the Court’s “judicial
27 experience and common sense.” *Id.* at 679. “[W]here the well-pleaded facts do not permit
28 the court to infer more than the mere possibility of misconduct, the complaint has alleged—

1 but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* (quoting Fed. R. Civ.
2 P. 8(a)(2)).

3 When a plaintiff appears pro se, the Court construes the pleadings liberally and
4 affords the plaintiff any benefit of the doubt. *See Erickson v. Pardus*, 551 U.S. 89, 94
5 (2007) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *Thompson v. Davis*, 295 F.3d
6 890, 895 (9th Cir. 2002) (citing *Oretz v. Wash. Cnty., Or.*, 88 F.3d 804, 807 (9th Cir.
7 1996)). When giving liberal construction to a pro se complaint, however, the Court is not
8 permitted to “supply essential elements of claims that were not initially pled.” *Easter v.*
9 *Cal. Dep’t of Corr.*, 694 F. Supp. 2d 1177, 1183 (S.D. Cal. 2010) (quoting *Ivey v. Bd. of*
10 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)). “Vague and conclusory
11 allegations of official participation in civil rights violations are not sufficient to withstand
12 a motion to dismiss.” *Id.* (quoting *Ivey*, 673 F.2d at 268) (citing *Jones v. Cmty. Redev.*
13 *Agency*, 733 F.2d 646, 649 (9th Cir. 1984)). The Court should allow a pro se plaintiff leave
14 to amend “unless the pleading ‘could not possibly be cured by the allegation of other
15 facts.’” *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003) (quoting *Lopez v. Smith*, 203
16 F.3d 1122, 1130, 1131 (9th Cir. 2000)).

17 ANALYSIS

18 Plaintiff asserts two constitutional claims against Defendants Glynn, Seeley, and
19 Zamora: (1) cruel and unusual punishment in violation of the Eighth Amendment, and
20 (2) denial of equal protection. (*See* Third Am. Compl. (TAC) 23–26, ECF No. 59.)

21 I. Summary of the R&R’s Conclusions

22 A. Cruel and Unusual Punishment

23 1. Defendants Glynn and Seeley

24 Magistrate Judge Burkhardt concludes that Plaintiff failed to plead facts supporting
25 a plausible deliberate indifference claim against Defendants Glynn and Seeley based upon
26 their response to Plaintiff’s second-level grievance. (*See* R&R 13, ECF No. 110.) In
27 reaching this conclusion, Magistrate Judge Burkhardt first notes that “Plaintiff fails to plead
28 any facts from which the Court may draw the reasonable inference that Defendants Glynn

1 and Seeley knew of an excessive risk of harm to Plaintiff’s health” because “the second-
2 level response demonstrates that it was Defendants Glynn and Seeley’s understanding that
3 all of the medical issues Plaintiff complained of in his grievance were adequately assessed
4 and remedied at the first level of review.” (*Id.*) Moreover, “[t]he allegations in the Third
5 Amended Complaint fail to demonstrate that Defendants Glynn and Seeley purposefully
6 disregarded any risk of harm to Plaintiff’s health” because, “[t]o the contrary, the second-
7 level response demonstrates Defendants Glynn and Seeley reviewed and considered
8 Plaintiff’s grievance and appeal file in full and issued a written response in accordance with
9 the finding of Defendant Velardi, a medical professional, that Plaintiff’s medical conditions
10 were being treated adequately.” (*Id.* at 14.) Magistrate Judge Burkhardt rejects the
11 allegation that Defendants Glynn and Seeley should have conducted an independent
12 examination of Plaintiff, reasoning “[i]t is not deliberate indifference for prison officials
13 serving in administrative roles to rely on the opinions of qualified medical staff in
14 responding to plaintiff’s second-level grievance.” (*Id.* (citing *Peralta v. Dillard*, 744 F.3d
15 1076, 1087 (9th Cir. 2014) (en banc), *cert. denied*, 135 S. Ct. 946 (2015); *Doyle v. Cal.*
16 *Dep’t of Corr. & Rehab.*, No. 12-cv-2769-YGR, 2015 WL 5590728, at *9 (N.D. Cal. Sept.
17 23, 2015)).) Magistrate Judge Burkhardt also rejects Plaintiff’s collateral argument that
18 Defendants were deliberately indifferent when they were late in responding to Plaintiff’s
19 grievance, noting that “Plaintiff fails to plead any facts that suggest the Defendants’
20 tardiness was purposeful or anything more than a mere inadvertence.” (*Id.* at 14–15.)
21 Magistrate Judge Burkhardt therefore recommends that Plaintiff’s Eighth Amendment
22 claims against Defendants Glynn and Seeley be dismissed with prejudice. (*Id.* at 15.)

23 2. Defendant Zamora

24 Magistrate Judge Burkhardt determines that “Plaintiff fails to plead any facts that
25 support a plausible deliberate indifference claim against Defendant Zamora” stemming
26 from Defendant Zamora’s response to Plaintiff’s third-level grievance. (*Id.* at 15–16.)
27 Magistrate Judge Burkhardt first notes that “the Third Amended Complaint fails to plead
28 any facts that suggest Defendant Zamora herself performed any action that would have

1 caused her to become aware of the existence of an excessive risk to Plaintiff’s health”
2 because although Defendant Zamora signed the response to Plaintiff’s third-level
3 grievance, the response reveals that the grievance was reviewed by Defendant Zamora’s
4 staff and not Defendant Zamora personally. (*Id.* at 16.) Magistrate Judge Burkhardt also
5 concludes that she “cannot reasonably infer from the Third Amended Complaint that
6 Defendant Zamora became aware of an excessive risk of harm to Plaintiff’s health via the
7 information her staff communicated to her” because the response indicates that “the
8 information Defendant Zamora’s staff provided to her suggests . . . that all of the medical
9 issues Plaintiff raised in his third-level grievance had been adequately assessed and
10 remedied at a lower level of review.” (*Id.*) Moreover, that Defendant Zamora’s response
11 differs from Plaintiff’s own assessment of his medical needs does not establish deliberate
12 indifference (*id.* (citing *Estelle*, 429 U.S. at 107; *Sanchez v. Vild*, 891 F.3d 240, 242 (9th
13 Cir. 1989)), and a prison administrator may rely on the medical opinions of other qualified
14 staff (*id.* at 17 (citing *Peralta*, 744 U.S. at 1087)). Finally, “Plaintiff’s Third Amended
15 Complaint fails to allege any facts that suggest Defendant Zamora directed her staff to be
16 deliberately indifferent in responding to Plaintiff’s medical needs or otherwise personally
17 participated in any deliberately indifferent conduct of her staff,” as would be required to
18 establish vicarious liability. (*Id.* at 17.) Accordingly, Magistrate Judge Burkhardt
19 recommends that the Court dismiss with prejudice Plaintiff’s Eighth Amendment claims
20 against Defendant Zamora. (*Id.* at 17–18.)

21 ***B. Equal Protection***

22 ***1. Defendants Glynn and Seeley***

23 Magistrate Judge Burkhardt concludes that “Plaintiff fails to plead any facts that
24 support a plausible equal protection claim against Defendants Glynn and Seeley,” either
25 under the theory that they intentionally discriminated against him based upon his
26 membership in a protected class or under a “class of one” theory that Defendant Glynn and
27 Seeley intentionally treated Plaintiff differently from other similarly situated individuals
28 without a rational basis. (*Id.* at 19.) With respect to the former theory of liability,

1 Magistrate Judge Burkhardt notes that Plaintiff’s TAC “fails to allege any facts that suggest
2 Defendants Glynn and Seeley acted with the intent or purpose to discriminate against
3 Plaintiff based upon his being Hispanic.” (*Id.*) Under the latter theory, the TAC “is devoid
4 of any facts that suggest that Defendants Glynn and Seeley harbored any hostility toward
5 Plaintiff individually and that as a result of such hostility, the Defendants intentionally
6 treated Plaintiff differently from other similarly situated individuals.” (*Id.* at 19–20.)
7 Accordingly, Magistrate Judge Burkhardt recommends that the Court dismiss without
8 prejudice and with leave to amend Plaintiff’s equal protection claim against Defendants
9 Glynn and Seeley. (*Id.* at 20.)

10 2. *Defendant Zamora*

11 Magistrate Judge Burkhardt also “finds Plaintiff’s Third Amended Complaint fails
12 to plead any facts that support a plausible equal protection claim against Defendant
13 Zamora.” (*Id.*) First, “[t]he Third Amended Complaint is devoid of any facts connecting
14 any intentional conduct by Defendant Zamora to Plaintiff’s protected class status.” (*Id.*)
15 Second, “the Third Amended Complaint fails to allege any facts that suggest Defendant
16 Zamora harbored any hostility toward Plaintiff individually and that as a result of such
17 hostility, she intentionally treated Plaintiff differently from other similarly situated
18 individuals.” (*Id.*) Moreover, the response to Plaintiff’s third-level grievance reveals that
19 Defendant Zamora had a rational basis for treating Plaintiff differently from other similarly
20 situated individuals, as the medical staff evaluating Plaintiff with respect to the appeal
21 issues determined that Plaintiff’s medical treatment was adequate and appropriate and,
22 under California law, prisoners may not demand that they be prescribed certain
23 medications. (*Id.* at 20–21.) Magistrate Judge Burkhardt therefore recommends that the
24 Court dismiss without prejudice and with leave to amend Plaintiff’s equal protection claim
25 against Defendant Zamora. (*Id.* at 21.)

26 ***C. Plaintiff’s Request for Appointment of Expert***

27 Magistrate Judge Burkhardt also recommends that the Court deny without prejudice
28 Plaintiff’s request that the Court grant Plaintiff an expert witness (*see* Opp’n to Glynn &

1 Seeley MTD 7–8, ECF No. 72) for failure to comply with the Court’s Local Rules (R&R
2 21, ECF No. 110).

3 **II. Discussion**

4 Plaintiff “object[s] to all recommendations of the Magistrate.” (Objs. 1, ECF No.
5 114.) Accordingly, the Court reviews Magistrate Judge Burkhardt’s R&R de novo.

6 **A. Cruel and Unusual Punishment**

7 An inmate has an Eighth Amendment right to adequate physical and mental health
8 care. *Doty v. Cnty. of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994). Deliberate indifference to
9 the serious medical needs of an inmate is not only inconsistent with the basic standards of
10 decency but, more importantly, is antithetical to the Eighth Amendment’s proscription of
11 “unnecessary and wanton infliction of pain.” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

12 A determination of deliberate indifference involves a two-step analysis consisting of
13 both objective and subjective inquiries. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
14 First, the plaintiff must demonstrate a serious medical need such that failure to provide
15 treatment could “result in further significant injury” or “unnecessary and wanton infliction
16 of pain.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting *Estelle v. Gamble*,
17 429 U.S. 97, 104 (1976)). Second, the plaintiff must show that the defendant’s response
18 to the medical need was deliberately indifferent. *Jett*, 439 F.3d at 1096 (citing *McGuckin*
19 *v. Smith*, 974 F.2d 1050, 1059–60 (9th Cir. 1992)). Deliberate indifference consists of (1) a
20 purposeful act or failure to respond to a prisoner’s pain or possible medical need and
21 (2) harm caused by the indifference. *Id.* Such indifference may be manifested when
22 “prison officials deny, delay[,] or intentionally interfere with medical treatment, or it may
23 be shown by the way in which prison physicians provide medical care.” *Hutchinson v.*
24 *United States*, 838 F.2d 390, 394 (9th Cir. 1988). This standard is one of subjective
25 recklessness. *Farmer*, 511 U.S. at 839–40. Therefore, mere negligence in responding to
26 and treating a medical condition does not rise to the standard of deliberate indifference.
27 *Estelle*, 429 U.S. at 106. Rather, the defendant must have acted or failed to act despite
28 knowing of a substantial risk of serious harm. *Farmer*, 511 U.S. at 843 n.8.

1 1. *Defendants Glynn and Seeley*

2 Plaintiff first contests Magistrate Judge Burkhardt’s conclusion that he did not plead
3 any facts that Defendants Glynn and Seeley knew of an excessive risk of harm to Plaintiff’s
4 health, noting that Defendants do not contest that he had a serious medical need. (Objs. 4,
5 ECF No. 114.) While it is true that Defendants do not dispute Plaintiff’s serious medical
6 need (*see* R&R 11, ECF No. 110 (citing Glynn & Seeley MTD Mem. 6–8, ECF No. 63-1;
7 Zamora MTD Mem. 6–8, ECF No. 69-1)), that does not mean that Defendants knew of a
8 substantial risk of serious harm to Plaintiff, *see, e.g., Jett*, 439 F.3d at 1096 (explaining two
9 prongs of deliberate indifference test).

10 Plaintiff next argues that “Defendants could not have determined that Nurse Velardi
11 had already addressed all [his] issues” for several reasons: (1) neither the first nor second
12 level review addressed the adequacy of Plaintiff’s seizure medication (Objs. 4–5, 6–10,
13 ECF No. 114), (2) Plaintiff wrote in his second level grievance that he was suffering from
14 severe pain (*id.* at 5, 11–12), and (3) neither the first nor second level review addressed the
15 adequacy of Plaintiff’s request for “neurotins [sic]” (*id.* at 5–6, 12–15). Plaintiff argues
16 that prison administrative officials “can be found liable even for following the advice of
17 prison medical officials if it is obvious, even to a layperson, that the person is in need of
18 critical medical care.” (*Id.* at 9 (citing *McRaven v. Sanders*, 577 F.3d 974 (8th Cir. 2009))
19 (emphasis in original).) Defendants counter that “Defendants Glynn and Seeley knew that
20 Plaintiff was not being denied medications or medical care—only that he was not receiving
21 the medication of his choice.” (Reply 3, ECF No. 115.)

22 The Court agrees with Magistrate Judge Burkhardt and Defendants that Plaintiff has
23 failed adequately to allege that Defendants Glynn and Seeley were deliberately indifferent
24 in responding to Plaintiff’s second-level grievance. As Magistrate Judge Burkhardt (*see*
25 R&R 14, ECF No. 110) and Defendants (*see* Reply 3, ECF No. 115) recognize, prison
26 administrative officials are not deliberately indifferent when they rely on the opinions of
27 qualified medical staff in responding to a second-level grievance, *see, e.g., Peralta*, 744
28 F.3d at 1087 (affirming judgment as a matter of law in favor of second-level reviewer who

1 authorized someone else to sign a second-level response on his behalf where the second-
2 level reviewer “understood his role to be administrative” and didn’t think . . . that he should
3 second-guess staff dentists’ [who signed the first-level appeals] diagnoses”); *Doyle*, 2015
4 WL 5590728, at *9 (“It simply cannot be said that, by signing off on the denials at the
5 second . . . level[], defendants . . . disregarded a substantial risk of harm to [plaintiff]’s
6 health by failing to take reasonable steps to abate it.”).

7 Here, Defendants Glynn and Seeley’s response to Plaintiff’s second level appeal
8 notes that Defendant Velardi’s response to Plaintiff’s first level appeal “stated based on the
9 Primary Care Providers interview and exam, [Plaintiff is] being treated adequately for [his]
10 back pain which is musculoskeletal in nature.” (TAC 40, ECF No. 59.) Defendants Glynn
11 and Seeley then note that although Plaintiff is now requesting “[n]erve pain medication &
12 a stronger pain medication for back,” he “ha[s] not provided any new information or
13 documentation that would alter the 1st level review findings.” (*Id.*) Defendants Glynn and
14 Seeley reasonably relied on the expertise of Plaintiff’s Primary Care Provide and
15 Defendant Velardi, and there is no indication from their response to Plaintiff’s second-level
16 grievance that Plaintiff was in need of critical medical care, much less that Defendants
17 Glynn and Seeley were made aware of such a need or were deliberately indifferent to it, as
18 Plaintiff claims.

19 Accordingly, the Court **ADOPTS** Magistrate Judge Burkhardt’s recommendation
20 and **DISMISSES WITH PREJUDICE** Plaintiff’s Eighth Amendment claims against
21 Defendants Glynn and Seeley.

22 2. *Defendant Zamora*

23 Plaintiff first contests Magistrate Judge Burkhardt’s conclusion that there is no
24 evidence that Defendant Zamora herself reviewed Plaintiff’s grievance, arguing that the
25 fact that the third level response was reviewed by staff under Defendant Zamora’s
26 supervision “means that Zamora also had knowledge of what the grievance said and to
27 what her staff responded.” (Objs. 16, ECF No. 114.) The Court cannot draw the inference
28 Plaintiff urges from the face of the third-level response, which clearly indicates that “[t]his

1 appeal was reviewed on behalf of the Deputy Director, Policy and Risk Management
2 Services, by staff under the supervision of the Chief, Office of Third Level Appeals-Health
3 Care” and “[Plaintiff’s] appeal file . . . w[as] reviewed by licensed clinical staff.” (TAC
4 36, ECF No. 59.)

5 Turning to Magistrate Judge Burkhardt’s additional bases for dismissing his Eighth
6 Amendment claim against Defendant Zamora, Plaintiff argues that “everything stated on
7 the 3rd level grievance response by Zamora is all a lie[, a]nd in order to prove [it] is all a
8 lie [he] would need to use discovery.” (*See* Objs. 16–21, ECF No. 114). Additionally,
9 while Plaintiff concedes that a difference in judgment based on Plaintiff’s own assessment
10 of his medical needs is insufficient to state a claim for deliberate indifference, he notes that
11 such is the case “only if the current medication does not put [Plaintiff] in circumstances of
12 a serious medical need due to been [sic] ineffective.” (*Id.* at 21.) Defendants respond that
13 “Defendant Zamora noted that Plaintiff’s medical . . . records indicated that Plaintiff had
14 been evaluated for seizure disorder, his seizure disorder was currently managed on Keppra,
15 he was receiving Elavil for his chronic back pain, and he currently did not meet non-
16 formulary criteria for gabapentin.” (Reply 3, ECF No. 115 (citing TAC 36, ECF No. 59).)
17 Accordingly,

18 [t]he Magistrate Judge properly determined that Defendant
19 Zamora . . . did not purposely disregard an excessive risk to
20 Plaintiff’s health since the information that staff provided to her
21 suggested that all of the medical issues had been adequately
22 assessed by medical care providers and that Plaintiff merely
presented a different assessment of his medical need than that of
the medical-care professionals.

23 (*Id.*)

24 For the reasons set forth above, *see supra* Part II.A.1, the Court agrees with
25 Defendants. As with Defendants Glynn and Seeley, “[i]t simply cannot be said that, by
26 signing off on the denials at the . . . third level[], defendant[] . . . disregarded a substantial
27 risk of harm to [plaintiff]’s health by failing to take reasonable steps to abate it.” *Doyle*,
28 2015 WL 5590728, at *9. Whether or not Defendant Zamora’s staff relayed “lies” to her

1 does not change this analysis, as Defendant Zamora and her staff reasonably relied upon
2 the medical information relayed to them by Plaintiff’s Primary Care Provider and
3 Defendant Velardi.

4 Finally, Plaintiff explains that “there was [sic] reasons why [he] didn’t need to
5 specify facts on how supervisor Zamora was liable for her own subordinates[’] actions,”
6 namely, (1) “these issue [sic] was never an issue brought up to [Plaintiff] before in order
7 for [Plaintiff] to respond, and (2) “the Supervisor Zamora working and participating with
8 her subordinates, had knowledge of 3rd level response and the merits of claim.” (Objs.
9 21–22, ECF No. 114.) For the same reason that Plaintiff’s first objection to Magistrate
10 Judge Burkhardt’s dismissal of this claim fails, this objection therefore does also: the face
11 of the third-level response clearly indicates that Defendant Zamora was neither personally
12 involved in nor directed her staff in responding to Plaintiff’s third-level grievance. (*See*
13 TAC 36, ECF No. 59.) Therefore, as Magistrate Judge Burkhardt explained, “Plaintiff’s
14 Third Amended Complaint fails to allege any facts that suggest Defendant Zamora directed
15 her staff to be deliberately indifferent in responding to Plaintiff’s medical needs or
16 otherwise personally participated in any deliberately indifferent conduct of her staff.”
17 (R&R 17, ECF No. 110.)

18 Accordingly, the Court **ADOPTS** Magistrate Judge Burkhardt’s recommendation
19 and **DISMISSES WITH PREJUDICE** Plaintiff’s Eighth Amendment claims against
20 Defendant Zamora.³

21 ***B. Equal Protection***

22 The “Equal Protection Clause of the Fourteenth Amendment commands that no State
23 shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is
24 essentially a direction that all persons similarly situated should be treated alike.” *City of*
25 _____

26 ³ Plaintiff also asks for leave to add Defendant Zamora’s staff to his complaint. (Objs. 22, ECF No. 114.)
27 To the extent this request can be construed as a motion for leave to amend, the Court **DENIES** Plaintiff’s
28 request on the grounds that amendment would be futile for the reasons stated above. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (“A district court does not err in denying leave to amend where the amendment would be futile . . . or would be subject to dismissal.”)

1 *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985). An equal protection
2 claim may be established by showing that defendants intentionally discriminated against a
3 plaintiff based on his membership in a protected class, *Comm. Concerning Cmty.*
4 *Improvement v. City of Modesto*, 583 F.3d 690, 702–03 (9th Cir. 2009); *Serrano v. Francis*,
5 345 F.3d 1071, 1082 (9th Cir. 2003), or that similarly situated individuals were
6 intentionally treated differently without a rational relationship to a legitimate state purpose,
7 *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601–02 (2008); *Lazy Y Ranch Ltd. v.*
8 *Behrens*, 546 F.3d 580, 592 (9th Cir. 2008).

9 *1. Defendants Glynn and Seeley*

10 Plaintiff notes that his “contention is that on the facts stated in 3rd Amendment
11 Complaint it can be inferred [sic] that defendants [sic] intentionally treated [him] different
12 that other similar situated inmates, as there was no rational basis for difference in
13 treatment.” (Objs. 23, ECF No. 114.) Additionally, “it can also be inferred that
14 discriminatory treatment was intentionally directed just at [him], and it was no accident or
15 a random act.” (*Id.*) Sending Plaintiff to a specialist or doctor to address his seizure and
16 pain medication “is something that 2nd level reviewers as how Defendants [sic] were will
17 do [sic] for any similar situated inmate because that’s [sic] part of their job whenever their
18 confronted with individuals expressing facts that are consider serious medical needs.” (*Id.*
19 at 24.) Defendants respond that “Plaintiff essentially argues that Defendants were
20 deliberately indifferent to his medical needs so they must have violated his equal protection
21 rights since they must have treated other inmates differently,” which “is not the basis for
22 an equal protection claim.” (Reply 4, ECF No. 115 (citing Objs. 22–26, ECF No. 114).)

23 Plaintiff has not alleged that Defendants Glynn and Seeley treated him any
24 differently from any other inmate filing a grievance because of his membership in any
25 cognizable protected class or that Defendants Glynn and Seeley harbored any hostility
26 against Plaintiff individually. Accordingly, the Court **ADOPTS** Magistrate Judge
27 Burkhardt’s recommendation and **DISMISSES WITHOUT PREJUDICE** Plaintiff’s
28 equal protection claim against Defendants Glynn and Seeley.

1 2. *Defendant Zamora*

2 Plaintiff contests that “those rational basis [Defendant Zamora provided in the third-
3 level response] are actually unfundamental [sic].” (Objs. 25, ECF No. 114.) Specifically,
4 “[b]y Zamora not doing what they should have done, and what they do whenever other
5 similar situated individuals bring forward claims like [Plaintiff’s], [i.e., sending Plaintiff to
6 a specialist,] this reveals that she intentionally disregarded a multiple serious medical needs
7 [Plaintiff] brought forward to her, as she left [him] to suffer daily without any help.” (*Id.*)
8 Moreover, a nurse’s determination over a year ago that Plaintiff was prescribed the correct
9 medication is not a rational basis for Defendant Zamora to deny Plaintiff help. (*Id.* at 25–
10 26.) Defendants’ response to Plaintiff’s Objections concerning Defendant Zamora are
11 identical to those raised regarding Defendants Glynn and Seeley. (*See* Reply 3–4, ECF
12 No. 115.)

13 The Court again agrees with Defendants and Magistrate Judge Burkhardt that
14 Plaintiff’s equal protection claim against Defendant Zamora is deficient because Plaintiff
15 has failed to allege any facts suggesting that Defendant Zamora discriminated against
16 Plaintiff based upon his membership in a protected class or that Defendant Zamora
17 intentionally treated Plaintiff differently from other similarly situated individuals because
18 she harbored any hostility toward Plaintiff. The Court also agrees with Magistrate Judge
19 Burkhardt that Defendant Zamora’s reliance upon California law and Plaintiff’s evaluation
20 by medical staff provides a rational basis for denying Plaintiff’s third-level grievance.
21 Accordingly, the Court **ADOPTS** Magistrate Judge Burkhardt’s recommendation and
22 **DISMISSES WITHOUT PREJUDICE** Plaintiff’s equal protection claim against
23 Defendant Zamora.

24 **C. *Plaintiff’s Request for Appointment of Expert***

25 Neither Plaintiff nor Defendants address Magistrate Judge Burkhardt’s
26 recommendation that the Court deny without prejudice Plaintiff’s request for appointment
27 of an expert. (*See generally* Objs., ECF No. 114; Reply, ECF No. 115.) Plaintiff does,
28 however, request both that he be given leave to amend his complaint and that the Court

1 send him a copy of his Objections (Objs. 26, ECF No. 114), to neither of which requests
2 Defendants respond (*see generally* Reply, ECF No. 115).

3 The Court agrees with Magistrate Judge Burkhardt’s recommendation to **DENY**
4 **WITHOUT PREJUDICE** Plaintiff’s request that the Court grant him an expert witness
5 for failure to comply with Civil Local Rule 7.1. The Court additionally **ORDERS** the
6 Clerk of the Court to send Plaintiff a copy of his Objections (ECF No. 114). Finally, the
7 Court **GRANTS IN PART AND DENIES IN PART** Plaintiff’s request that he be given
8 leave to amend, as detailed above. Specifically, Plaintiff will be granted leave to amend
9 his equal protection claims against Defendants Glynn, Seeley, and Zamora, but will not be
10 granted leave to amend his Eighth Amendment claims against those defendants.

11 **CONCLUSION**

12 In light of the foregoing, the Court:

- 13 1. **OVERRULES** Plaintiff’s Objections (ECF No. 114);
- 14 2. **ADOPTS** in its entirety Magistrate Judge Burkhardt’s R&R (ECF No. 110);
- 15 3. **GRANTS** Defendants’ MTDs (ECF Nos. 63, 69). Specifically, the Court
16 **DISMISSES WITH PREJUDICE** Plaintiff’s Eighth Amendment claims against
17 Defendants Glynn, Seeley, and Zamora and **DISMISSES WITHOUT PREJUDICE**
18 Plaintiff’s equal protection claims against Defendants Glynn, Seeley, and Zamora.
19 Plaintiff **MAY FILE** an amended complaint within sixty (60) days of the date on which
20 this Order is electronically docketed. *Failure to file an amended complaint by this date*
21 *may result in dismissal of the aforementioned claims with prejudice;*

- 22 4. **DENIES AS MOOT** Plaintiff’s Motion for Consideration (ECF No. 112);

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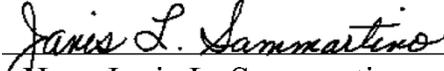
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1 5. **DENIES WITHOUT PREJUDICE** Plaintiff's Request for Appointment of
2 Expert; and

3 6. **ORDERS** the Clerk of the Court to send Plaintiff a copy of ECF No. 114.

4 **IT IS SO ORDERED.**

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6 Dated: September 9, 2016


Hon. Janis L. Sammartino
United States District Judge

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