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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TIMOTHY PETER LAMBESIS,
Plaintiff,
v.
ABIARO, et al.,
Defendants.

Case No.: 15cv1359-MMA (NLS)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT
ABIARO’S MOTION TO DISMISS**

[Doc. No. 7]

Plaintiff Timothy Peter Lambesis is a California state prisoner, proceeding *pro se* in this civil rights action. Plaintiff alleges that Defendant Nurse Abiario was medically negligent when she failed to log his prescription for anastrozole upon his arrival at Vista Detention Facility in Vista, California. *See* Doc. Nos. 1, 18. On January 7, 2016, the Court granted Defendant Abiario’s unopposed motion and dismissed Plaintiff’s claim against Abiario based on Plaintiff’s failure to oppose dismissal. *See* Doc. No. 10. Plaintiff moved for reconsideration of the Court’s order dismissing his claim against Defendant Abiario. *See* Doc. No. 14. The Court granted Plaintiff’s motion in part, vacated its previous dismissal order, and gave Plaintiff leave to oppose Defendant Abiario’s motion. *See* Doc. No. 15. Plaintiff subsequently filed his response in opposition to Defendant Abiario’s motion to dismiss. *See* Doc. No. 17. For the reasons

1 set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant
2 Abiario's motion.

3 **BACKGROUND**¹

4 On May 16, 2014, Plaintiff appeared in state court in Vista, California, for a
5 sentencing hearing. Subsequent to the hearing, bailiffs escorted Plaintiff to Vista
6 Detention Facility. Plaintiff carried with him on his person a prescription from his
7 private physician for anastrozole, a medication prescribed to combat the side effects of
8 withdrawal from anabolic steroids. Plaintiff had been self-administering large doses of
9 anabolic steroids long term and he was supposed to begin the once-daily anastrozole
10 regimen immediately.

11 Upon his arrival at Vista Detention Facility, Defendant Abiario medically cleared
12 Plaintiff for admission to the facility. According to Plaintiff, he handed Abiario the
13 anastrozole prescription and she advised him that the facility did not customarily stock
14 anastrozole. Abiario told Plaintiff that he would have to wait for a facility physician to
15 prescribe the medication. Plaintiff informed Defendant Abiario that he needed the
16 medication immediately, and Abiario advised him that he would be scheduled to see a
17 physician as soon as possible.

18 Plaintiff alleges that Defendant Abiario failed to log his anastrozole prescription
19 into his medical record. Plaintiff claims that this negligent act resulted in a delay in
20 receiving the medication, and in the interim, a denial of necessary medical treatment.
21 Plaintiff states that he was not seen by a physician until his transfer to a different facility
22 on May 25, 2014. Plaintiff alleges that as a result of not receiving his medication for that
23 ten day period, he experienced "exponential terror" as he "contemplated the very
24 potentials [sic] of my suffering male breast development." *Complaint* ¶ 8. Plaintiff avers
25 that he now suffers from gynecomastia due to the hormonal imbalance caused by the
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28 ¹ This description of events is taken from Plaintiff's complaint and is not to be construed as findings of
fact by the Court.

1 failure to receive his prescribed medication until July 17, 2014.

2 Defendant Abiaro moves to dismiss Plaintiff’s medical negligence claim, as well
3 as his claim against her for punitive damages.

4 **DISCUSSION**

5 ***I. Legal Standard***

6 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
7 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
8 Plaintiffs must plead “enough facts to state a claim to relief that is plausible on its face.”
9 Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The
10 plausibility standard thus demands more than a formulaic recitation of the elements of a
11 cause of action, or naked assertions devoid of further factual enhancement. *Ashcroft v.*
12 *Iqbal*, 556 U.S. 662, 678 (2009). Instead, the complaint “must contain allegations of
13 underlying facts sufficient to give fair notice and to enable the opposing party to defend
14 itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

15 In reviewing a motion to dismiss under Rule 12(b)(6), courts must accept as true
16 all material allegations in the complaint, as well as reasonable inferences to be drawn
17 from them, and must construe the complaint in the light most favorable to the plaintiff.
18 *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004), *citing Karam v. City*
19 *of Burbank*, 352 F.3d 1188, 1192 (9th Cir. 2003). The court need not take legal
20 conclusions as true merely because they are cast in the form of factual allegations.
21 *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Similarly, “conclusory
22 allegations of law and unwarranted inferences are not sufficient to defeat a motion to
23 dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

24 Where a plaintiff appears *pro se* in a civil rights case, the court must construe the
25 pleadings liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los*
26 *Angeles Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction
27 is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
28 (9th Cir. 1992). Furthermore, the court must give a *pro se* litigant leave to amend his

1 complaint “unless it determines that the pleading could not possibly be cured by the
2 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc)
3 (quotation omitted) (citing *Noll v. Carlson*, 809 F.2d 1446, 1447 (9th Cir. 1987)). Thus,
4 before a *pro se* civil rights complaint may be dismissed, the court must provide the
5 plaintiff with a statement of the complaint’s deficiencies. *Karim-Panahi*, 839 F.2d at
6 623-24. But where amendment of a *pro se* litigant’s complaint would be futile, denial of
7 leave to amend is appropriate. *See James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000).

8 **2. Analysis**

9 The elements of a medical negligence claim include: “(1) the duty of the
10 professional to use such skill, prudence, and diligence as other members of his profession
11 commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal
12 connection between the negligent conduct and resulting injury; and (4) actual loss or
13 damage resulting from the professional’s negligence.” *Avivi v. Centro Medico Urgente*
14 *Medical Center*, 159 Cal. App. 4th 463, 468, n.2 (2008) (internal quotations and citation
15 omitted); *Johnson v. Superior Court*, 143 Cal. App. 4th 297, 305 (2006).

16 Plaintiff alleges that Defendant Abiaro owed a duty to provide him proper medical
17 care, and that by failing to log into his medical record a physician’s previously
18 administered prescription for anastrozole, Defendant Abiaro breached that duty. Plaintiff
19 further alleges that Defendant Abiaro’s negligent act caused a concomitant denial of
20 medical treatment, causing him to suffer painful side effects from his consequential
21 anabolic steroid withdrawal.

22 Defendant Abiaro argues that Plaintiff fails to state a plausible claim for medical
23 negligence because “[a]s a jail nurse, Nurse Abiaro is not authorized to prescribe drugs;
24 she is only permitted to dispense drugs on the order of a licensed physician.” *Reply* at 2
25 (citing Calif. Bus. & Prof Code §§ 4170 (c), 2725.1(a)). However, Plaintiff does not
26 claim that Abiaro should have personally prescribed him anastrozole. Plaintiff alleges
27 that he presented Abiaro with a prescription from his private physician, which he further
28 alleges she failed to include in his medical record. Abiaro also argues that Plaintiff

1 suffered no harm as a result of her alleged mishandling of his prescription, but Plaintiff
2 alleges otherwise. According to Plaintiff, ten days elapsed between his encounter with
3 Abiaro and his first visit with a physician, during which time he suffered “exponential
4 terror” and had begun experiencing withdrawal from anabolic steroids.

5 While Plaintiff’s allegations fall far short of stating a constitutional violation, he
6 need not do so in order to pursue a supplemental state law negligence claim against
7 Defendant Abiaro. *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir.1998) (no constitutional
8 claim for alleged delay in administering pain medication, because the claim did not
9 amount to more than negligence). Construing Plaintiff’s pleadings liberally, as the Court
10 must, Plaintiff has stated a plausible claim for medical negligence against Defendant
11 Abiaro.

12 Defendant Abiaro also moves to dismiss Plaintiff’s punitive damages claim against
13 her. Abiaro cites California Code of Civil Procedure Section 425.13 in support of
14 dismissal, but district courts in this circuit have concluded that this provision is a state
15 procedural rule that does not apply to actions brought in federal court. *Estate of Prasad*
16 *ex rel. Prasad v. Cnty. of Sutter*, 958 F. Supp. 2d 1101, 1121 (E.D. Cal. 2013) (“[T]he
17 plain meaning of Rule 8(a)(3) conflicts with Cal. Civ. Proc. Code § 425.13, making §
18 425.13 inapplicable in federal court.”); *Jackson v. E. Bay Hosp.*, 980 F. Supp. 1341, 1352
19 (N.D. Cal. 1997) (“The requirement is essentially a method of managing or directing a
20 plaintiff’s pleadings, rather than a determination of substantive rights.”); *Burrows v.*
21 *Redbud Cmty. Hosp. Dist.*, 188 F.R.D. 356, 361 (N.D. Cal. 1997) (“[S]ection 425.13 is a
22 procedural rule for managing and directing pleadings: it does not create substantive limits
23 on the damages a plaintiff may seek.”). However, Plaintiff’s punitive damages claim is
24 subject to dismissal based on the other grounds raised by Defendant Abiaro, including
25 Plaintiff’s failure to allege the necessary intent. The Court also notes that Plaintiff did
26 not respond to this aspect of Defendant Abiaro’s motion to dismiss.

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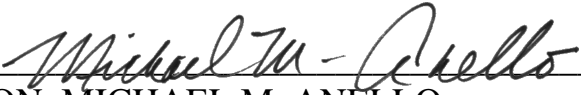
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1 CONCLUSION

2 Based on the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART**
3 Defendant Abiaro's motion to dismiss. The Court dismisses Plaintiff's punitive damages
4 claim against Defendant Abiaro. Plaintiff's medical negligence claim against Defendant
5 Abiaro will proceed.

6 **IT IS SO ORDERED.**

7 DATE: April 11, 2016

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10 HON. MICHAEL M. ANELLO
11 United States District Judge
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