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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 DR. K. DEAN, et al.,

15 Defendants.  
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Case No.: 15-CV-2247 JLS (JLB)

**ORDER: (1) SUSTAINING IN PART  
AND OVERRULING IN PART  
PLAINTIFF’S OBJECTIONS; (2)  
ADOPTING IN PART REPORT AND  
RECOMMENDATION; AND  
(3) GRANTING IN PART AND  
DENYING IN PART DEFENDANTS’  
MOTIONS TO DISMISS**

(ECF Nos. 23, 32, 46)

20 Presently before the Court is Magistrate Judge Jill L. Burkhardt’s Report and  
21 Recommendation, (“R&R,” ECF No. 46), advising that the Court should grant in part and  
22 deny in part Defendants Dr. Dean, Pasha, Roberts, Glynn and Lewis’s Motions to Dismiss,<sup>1</sup>  
23 (ECF Nos. 23, 32). Also before the Court are Plaintiff’s Objections to the R&R, (“R&R  
24 Objs.,” ECF No. 50), and Defendants’ Reply to Plaintiff’s Objections, (“Reply,” ECF No.  
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26  
27 <sup>1</sup> When Defendants filed their first Motion to Dismiss, (ECF No. 23), Defendant Dean had not be served.  
28 Therefore, the first Motion to Dismiss contains arguments as to the served Defendants. After the first  
Motion was filed, Plaintiff effected service of Defendant Dean, (*see* ECF No. 30). The second Motion to  
Dismiss, (ECF No. 32), contains argues as to Defendant Dean.

1 51). After considering the parties’ arguments and the law, the Court **SUSTAINS IN PART**  
2 **AND OVERRULES IN PART** Plaintiff’s Objections, (2) **ADOPTS IN PART** the R&R,  
3 and (3) **GRANTS IN PART AND DENIES IN PART** Defendants’ Motions to Dismiss.

#### 4 **BACKGROUND**

5 Judge Burkhardt’s R&R contains a thorough and accurate recitation of the factual  
6 and procedural histories underlying the instant Motion to Dismiss. (*See* R&R 2–5.)<sup>2</sup> This  
7 Order incorporates by reference the background as set forth therein.

#### 8 **LEGAL STANDARD**

9 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district  
10 court’s duties regarding a magistrate judge’s report and recommendation. The district court  
11 “shall make a de novo determination of those portions of the report . . . to which objection  
12 is made,” and “may accept, reject, or modify, in whole or in part, the findings or  
13 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(c); *see also*  
14 *United States v. Raddatz*, 447 U.S. 667, 673–76 (1980). In the absence of a timely  
15 objection, however, “the Court need only satisfy itself that there is no clear error on the  
16 face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72 advisory  
17 committee’s note (citing *Campbell v. U.S. Dist. Court*, 510 F.2d 196, 206 (9th Cir. 1974)).

#### 18 **ANALYSIS**

##### 19 **I. Summary of the R&R Conclusion**

20 On October 6, 2015, Plaintiff filed a Complaint against Defendants for alleged  
21 violations of his civil rights. (“Compl.,” ECF No. 1.) Plaintiff’s Complaint and his First  
22 Amended Complaint were dismissed under the mandatory screening required by 28 U.S.C.  
23 §§ 1915(e)(2)(B) and 1915A(b). (*See* ECF Nos. 3, 8.) On October 31, 2016, Plaintiff filed  
24 a Second Amended Complaint that alleges violations of 42 U.S.C. § 1983 and accuses the  
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27 <sup>2</sup> Pin citations to docketed material refer to the CM/ECF numbers electronically stamped at the top of each  
28 page.

1 moving Defendants of violating his Eighth, and Fourteenth Amendment rights. (Second  
2 Am. Compl., (“SAC”), ECF No. 11, at 5–11.)

3 Judge Burkhardt concluded that Plaintiff plausibly stated a claim for deliberate  
4 indifference against Defendant Dr. Dean. (R&R 9–10.) Plaintiff made specific allegations  
5 that, during the course of Plaintiff’s medical treatment, Defendant Dean laughed when  
6 Plaintiff complained his medication caused him to have suicidal thoughts. For example,  
7 when Plaintiff told Defendant Dean of his suicidal ideations, Defendant Dean allegedly  
8 said, “Don’t tell no one that, just do it.” (*Id.* at 9 (quoting SAC 8).)

9 Judge Burkhardt then found that Plaintiff had not stated a claim against Defendant  
10 Pasha, a nurse working with Defendant Dean. (*Id.* at 10.) Plaintiff generally alleged that  
11 he saw Defendant Pasha a few weeks after he saw Defendant Dean and told her that  
12 Defendant Dean was wrong to ignore his severe medical necessity and that Pasha would  
13 be putting his life and health at risk by ignoring Plaintiff. Judge Burkhardt concluded that  
14 Plaintiff’s allegations were too vague and conclusory to support a plausible inference of  
15 deliberate indifference against Nurse Pasha. (*Id.*)

16 Next, Judge Burkhardt concluded that Plaintiff’s claims against Defendants Roberts,  
17 Glynn, and Lewis fail to state a claim because the claims against those defendants arose  
18 solely from the administrative grievance process. (*Id.*) Judge Burkhardt found that  
19 Plaintiff failed to allege facts sufficient to demonstrate that the defendants were personally  
20 involved in any decisions regarding the appropriate course of Plaintiff’s medical treatment.  
21 (*Id.* at 11.) Instead, Judge Burkhardt found that prison officials, serving in administrative  
22 roles, could rely on the opinions of qualified medical staff when responding to a plaintiff’s  
23 medical care grievance. (*Id.* at 12 (citing *Peralta v. Dillard*, 744 F.3d 1076, 1087 (9th Cir.  
24 2014), *cert. denied*, 135 S. Ct. 946 (2015); and *Doyle v. Cal. Dep’t of Corr. & Rehab.*, No.  
25 12cv2769, 2015 WL 5590728, at \*9 (N.D. Cal. Sept. 23, 2015)).)

26 Finally, Judge Burkhardt found that Plaintiff failed to state a claim for equal  
27 protection under the Fourteenth Amendment because he did not demonstrate that he was  
28

1 in a protected class or that he was treated differently than similarly situated prisoners. (*Id.*  
2 at 13–14.)

## 3 **II. Summary of Plaintiff’s Objections**

4 Plaintiff objects to Judge Burkhardt’s recommendation to grant Defendant Pasha’s  
5 motion to dismiss as to deliberate indifference. (R&R Objs. 1–2.) He argues that  
6 everything he told to Defendant Dean he also told to Defendant Pasha. (*Id.* at 2.) Plaintiff  
7 reasons that if Defendant Dean is liable then Defendant Pasha should be equally liable. He  
8 points to his SAC as demonstrating that Defendant Pasha was aware of the pain he was  
9 experiencing, as well as the fact that the side effects from the medication put his life and  
10 health at risk. (*See id.*) Plaintiff also cites two cases where courts found deliberate  
11 indifference allegations sufficient. In those cases, prison officials knew of prisoners’  
12 complaints and reports of pain and ignored or did not treat those issues. (*Id.* at 3 (citing  
13 *Ahdom v. Lopez*, No. 09cv1874, 2015 WL 5922020, at \*5 (E.D. Cal. Oct 9, 2015); and  
14 *Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005)).)

15 Next, Plaintiff objects to Judge Burkhardt’s recommendation to grant Defendants  
16 Glynn, Roberts, and Lewis’s motion on deliberate indifference grounds. (*Id.* at 4.) Plaintiff  
17 argues that his SAC alleges sufficient facts to state deliberate indifference because  
18 whenever a prisoner does not agree with the results of his doctor, his only recourse is  
19 through the grievance process. (*Id.*) Plaintiff states that his SAC alleges that his grievance  
20 against Defendant Dean went to each level of review: to Defendant Roberts at the first  
21 level, Defendant Glynn at the second, and Defendant Lewis at the third level. (*Id.*) Each  
22 Defendant at each level had access to Plaintiff’s medical records and his grievance yet  
23 denied Plaintiff a re-evaluation from a different doctor. (*See id.* at 4–5.) Plaintiff  
24 acknowledges that prison officials in the administrative grievance process may rely on  
25 qualified medical staff opinions, but argues the rule is distinguishable because Defendants  
26 were medical providers. (*Id.* at 6.) He goes on to argue Defendants were personally  
27 involved in decisions of the appropriate course of his medical treatment. (*Id.* at 7.)  
28

1 Finally, Plaintiff objects to Judge Burkhardt’s finding that Plaintiff did not state an  
2 equal protection claim. Plaintiff argues he did state a claim because every indigent inmate  
3 who suffers neuropathy is prescribed shoes by the institution. (*Id.* at 8.) Plaintiff disagrees  
4 with Judge Burkhardt’s finding that Plaintiff could not know the diagnosis of every inmate,  
5 and thus could not qualify as a “class of one,” because Defendant Dean agreed that Plaintiff  
6 had neuropathy, but she still denied shoes because the shoes “cost money to the institution.”  
7 (*Id.* (quoting SAC 11).)

### 8 **III. Court’s Analysis**

9 The Court will review, *de novo*, each part of Judge Burkhardt’s R&R to which  
10 Plaintiff objects. As an initial matter, the Court agrees with Judge Burkhardt that Plaintiff  
11 has stated a valid claim against Defendant Dean. Neither Plaintiff nor Defendants contest  
12 this finding. (*See generally* R&R Obj.; Reply.) The Court **ADOPTS** Judge Burkhardt’s  
13 R&R as to Defendant Dean.

14 First, Plaintiff objects to Judge Burkhardt’s finding that he failed to state a deliberate  
15 indifference claim against Defendant Pasha. An inmate has an Eighth Amendment right  
16 to adequate physical and mental health care. *Doty v. Cnty. of Lassen*, 37 F.3d 540, 546  
17 (9th Cir. 1994). “To establish unconstitutional treatment of a medical condition . . . a  
18 prisoner must show deliberate indifference to a “serious” medical need. *Id.* (citing  
19 *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992)). Deliberate indifference to the  
20 serious medical needs of an inmate is inconsistent with the basic standards of human  
21 decency and antithetical to the Eighth Amendment’s proscription of “unnecessary and  
22 wanton infliction of pain.” *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

23 A determination of deliberate indifference to a serious medical need involves a two-  
24 step analysis consisting of both objective and subjective inquiries. *Farmer v. Brennan*, 511  
25 U.S. 825, 837 (1994). First, the plaintiff must demonstrate a serious medical need such  
26 that failure to provide treatment could “result in further significant injury” or “unnecessary  
27 and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting  
28 *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Second, the plaintiff must show that the

1 defendant's response to the medical need was deliberately indifferent. *Id.* (citing  
2 *McGuckin*, 974 F.2d at 1059–60).

3 Deliberate indifference consists of (1) a purposeful act or failure to respond to a  
4 prisoner's pain or possible medical need and (2) harm caused by the indifference. *Id.* Such  
5 indifference may be manifested when “prison officials deny, delay[,] or intentionally  
6 interfere with medical treatment, or it may be shown by the way in which prison physicians  
7 provide medical care.” *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).  
8 This standard is one of subjective recklessness. *Farmer*, 511 U.S. at 839–40. “To satisfy  
9 this subjective component of deliberate indifference, the inmate must show that prison  
10 officials ‘kn[e]w [ ] of and disregard[ed]’ the substantial risk of harm, but the officials need  
11 not have intended any harm to befall the inmate; ‘it is enough that the official acted or  
12 failed to act despite his knowledge of a substantial risk of serious harm.’” *Lemire v. Cal.*  
13 *Dep’t of Corr. & Rehab.*, 726 F.3d 1062, 1074 (9th Cir. 2013) (alterations in original)  
14 (quoting *Farmer*, 511 U.S. at 837, 842). “Deliberate indifference is a high legal standard.  
15 A showing of medical malpractice or negligence is insufficient to establish a constitutional  
16 deprivation under the Eighth Amendment.” *Hamby v. Hammond*, 821 F.3d 1085, 1092  
17 (9th Cir. 2016) (quoting *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004)); *see*  
18 *Estelle*, 429 U.S. at 106.

19 Here, Defendants do not contest that Plaintiff had a serious medical need. The Court  
20 agrees: Plaintiff alleges he had “severe pain on [his] head and lower back due to 2 different  
21 incidents.” (SAC 5.) Plaintiff also attached his prescription list to the SAC, which supports  
22 his serious medical need. (*See id.* at 15.) Both Judge Burkhardt and Defendants conclude  
23 that Plaintiff fails to meet the second deliberate indifference element: Plaintiff failed to  
24 allege sufficient facts that Defendant Pasha “actually appreciated and deliberately ignored  
25 a serious medical risk to Plaintiff.” (Reply 2; *see also* R&R 10.)

26 The Court disagrees. Plaintiff alleges that he told Defendant Pasha that Defendant  
27 Dean was wrong to ignore his severe medical necessity. (SAC 5.) Plaintiff went on to tell  
28 Defendant Pasha that she was “basically leaving me to live in a everyday [sic] without

1 be[ing] able to sleep, eat, walk, exercise, eat.” (*Id.*) Thus far, Plaintiff allegations only  
2 establish that Defendant Pasha knew of his serious medical need. Yet, both Defendants  
3 and Judge Burkhardt conclude Plaintiff’s statement—“Pasha acknowledges knowing she  
4 will leave me on [sic] such conditions but because is [sic] not her on [sic] my shoes she  
5 don’t care,” (*id.*)—is vague and conclusory. (R&R 10; ECF No. 23-1, at 7.) At the motion  
6 to dismiss stage the Court must accept Plaintiff’s factual allegations as true. Plaintiff  
7 alleges not only that Defendant Pasha knew of his serious medical need and that Defendant  
8 Dean allegedly ignored that medical need, but also that Defendant Pasha *acknowledged*  
9 such knowledge and still did nothing. This is a close question as to whether these  
10 allegations plausibly state a claim for deliberate indifference, but the Court has an  
11 obligation to construe a pro se civil rights litigant’s pleadings liberally. *See Hebbe v. Pliker*,  
12 627 F.3d 338, 342 (9th Cir. 2010). Therefore, the Court finds Plaintiff has alleged  
13 sufficient facts to plausibly state a claim for deliberate indifference against Defendant  
14 Pasha.

15 Moreover, Plaintiff cites two cases where courts found prisoner allegations sufficient  
16 where the prisoner complained of severe pain and side effects that were ignored and  
17 untreated. *See Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005); *Ahdom v. Lopez*, No.  
18 09cv1874, 2015 WL 5922020, at \*5 (E.D. Cal. Oct 9, 2015). The Court finds these cases  
19 are persuasive and tend to support Plaintiff’s position. Notably, Defendants make no  
20 attempt to distinguish these cases. (*See generally* Reply.) Accordingly, the Court  
21 **SUSTAINS** Plaintiff’s first Objection.

22 Next, Plaintiff objects to Judge Burkhardt’s finding that Defendants Roberts, Glynn,  
23 and Lewis were liable under a deliberate indifference theory. There is no vicarious liability  
24 under 42 U.S.C. § 1983. *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009); *Starr v. Baca*,  
25 652 F.3d 1202, 1207 (9th Cir. 2011). Prison officials are only liable for their own conduct.  
26 *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1445–46 (9th Cir. 1991) (en banc),  
27 *abrogated on other grounds, Farmer*, 511 U.S. 825. Additionally, there are no “stand-  
28 alone due process rights related to the administrative grievance process.” *Jones v.*

1 *Cannedy*, No. 10-cv-2174 KJM KJN P, 2012 WL 3260457, at \*4 (E.D. Cal. Aug. 8, 2012)  
2 (citing *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988); and *Ramirez v. Galaza*, 334  
3 F.3d 850, 860 (9th Cir. 2003)). “[P]rison officials are not required under federal law to  
4 process inmate grievances in a specific way or to respond to them in a favorable manner. . . .  
5 [a] plaintiff cannot state a cognizable civil rights claim for a violation of his due process  
6 rights based on allegations that prison officials ignored or failed to properly process  
7 grievances.” *Id.* (citations omitted). Because there is no due process right to a grievance  
8 process, Plaintiff must allege sufficient facts that Defendants Roberts, Glynn, and Lewis  
9 were deliberately indifferent to his serious medical need.

10 Plaintiff alleges that Defendants, as appeal administrators, were aware Plaintiff had  
11 a serious medical need and they ignored that need. (SAC 9.) Plaintiff alleges that  
12 Defendants’ awareness arose from reading Plaintiff’s grievances and his medical records.  
13 (*Id.*) Yet, the factual allegations do not show that the Defendants knew and disregarded  
14 Plaintiff’s serious medical need. *Thompson v. Vidurria*, No. 14-cv-1896-LJO-SAB (PC),  
15 2015 WL 5146852, at \*3 (E.D. Cal. Sept. 1, 2015), illustrates the type of factual allegation  
16 required to state a claim in a similar circumstance. There, a defendant appeal administrator  
17 denied an inmate grievance. The court determined that the prisoner had alleged sufficient  
18 facts to support deliberate indifference because the defendant interviewed the plaintiff and  
19 the defendant told the prisoner he was not going to do anything to the corrections officer  
20 in question, and asked the prisoner to drop his appeal. *See id.*

21 Here, there are no factual allegations that Defendants were personally involved in  
22 Plaintiff’s treatment, only that Plaintiff filed grievances describing his medical conditions.  
23 Unlike *Thompson*, Plaintiff alleges no interaction with Defendants other than the fact that  
24 Plaintiff submitted grievances to them. There are no facts that Defendants both knew and  
25 disregarded his serious medical needs—Plaintiff’s allegations only assume Defendants  
26 knew and disregarded from the nature of the grievance process itself. For example,  
27 Plaintiff alleges that Defendants knew, from the grievance process alone, that Plaintiff was  
28 suffering from a serious medical need. (SAC 9.) Yet, he does not allege he has had any



1 personal interaction with these Defendants or otherwise know they subjectively ignored  
2 his issues. Instead, Plaintiff's allegations are entirely predicated on his assumptions and  
3 conclusions regarding Defendants' role in the administrative appeals process. The Court  
4 need not credit such conclusory allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–79  
5 (2009). Therefore, the Court **OVERRULES** Plaintiff's second Objection and **ADOPTS**  
6 the R&R as to these Defendants.

7 Finally, Plaintiff objects to Judge Burkhardt's finding he was discriminated against  
8 under a "class of one" equal protection theory. The Supreme Court has recognized a  
9 deprivation of the equal protection of the laws "brought by a 'class of one,' where the  
10 plaintiff alleges that [he] has been intentionally treated differently from others similarly  
11 situated and that there is no rational basis for the difference in treatment." *Vill. of*  
12 *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also Engquist v. Or. Dep't of Agric.*,  
13 553 U.S. 591, 602 (2008) ("What seems to have been significant in *Olech* and the cases on  
14 which it relied was the existence of a clear standard against which departures, even for a  
15 single plaintiff, could be readily assessed."). "A class of one plaintiff must show that the  
16 discriminatory treatment 'was intentionally directed just at him, as opposed to being an  
17 accident or a random act.'" *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir.  
18 2008) (quoting *Jackson v. Burke*, 256 F.3d 93, 96 (2d Cir. 2001)). "The class-of-one  
19 doctrine does not apply to forms of state action that 'by their nature involve discretionary  
20 decisionmaking based on a vast array of subjective, individualized assessments.'" *Towery*  
21 *v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) (quoting *Engquist*, 553 U.S. at 603).

22 Here, Plaintiff does not allege facts to demonstrate that he was treated differently  
23 from all other prisoners at Richard J. Donovan Correctional Facility who had neuropathy.  
24 Plaintiff's objection states that Defendant Dean agreed that he had neuropathy and she  
25 denied his shoe prescription because the requested shoes "cost money to [the] institution."  
26 (SAC 10.) Accepting that statement as true, such a statement does not demonstrate that  
27 Plaintiff was treated differently than others similarly situated. Indeed, medical treatment  
28 options involve a variety of subjective, individualized assessments and therefore fall into

1 the category of discretionary decision-making rather than non-discretionary state action.  
2 Without more, Plaintiff's allegations of different treatment are not sufficient to state an  
3 equal protection claim. Thus, the Court **OVERRULES** Plaintiff's third Objection.

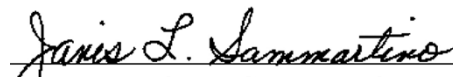
4 Accordingly, the Court **ADOPTS IN PART** Judge Burkhardt's R&R and **GRANTS**  
5 **IN PART AND DENIES IN PART** Defendants' Motions to Dismiss, (ECF Nos. 23, 32).  
6 To summarize, the Court grants the motion to dismiss as to Defendants Roberts, Glynn,  
7 and Lewis on the deliberate indifference claim and grants it as to the equal protection claim  
8 in its entirety. The Court denies the motion as to Defendants Dean and Pasha on the  
9 deliberate indifference claim.

### 10 **CONCLUSION**

11 For the reasons stated above, the Court **SUSTAINS IN PART AND OVERRULES**  
12 **IN PART** Plaintiff's Objections; **ADOPTS IN PART** Judge Burkhardt's R&R, (ECF No.  
13 46), and (3) **GRANTS IN PART AND DENIES IN PART** Defendants' Motions to  
14 Dismiss, (ECF Nos. 23, 32), to the extent discussed above. If Plaintiff wishes to re-allege  
15 his claims against Defendants Roberts, Glynn, and Lewis or his equal protection claims,  
16 Plaintiff may file an amended complaint on or before forty (40) days from the date which  
17 this Order is electronically filed. Plaintiff is cautioned that should he choose to file a Third  
18 Amended Complaint, it must be complete by itself, comply with Federal Rule of Civil  
19 Procedure 8(a), and that any claim, against any defendant, not re-alleged will be considered  
20 waived. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting that claims  
21 dismissed with leave to amend which are not re-alleged in an amended pleading may be  
22 "considered waived if not repled"). If Plaintiff does not file an amended complaint then  
23 the case will proceed against Defendants Dean and Pasha as pled.

24 **IT IS SO ORDERED.**

25 Dated: March 12, 2018

26   
27 Hon. Janis L. Sammartino  
28 United States District Judge