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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

PATRICIA A. GRANT,  
Plaintiff,  
v.  
CLAUDIO GABRIEL ALPEROVICH, et  
al.,  
Defendants.

Case No. C12-1045RSL

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT HORI'S  
MOTION FOR SUMMARY  
JUDGMENT

**I. INTRODUCTION**

This matter comes before the Court on “Defendant Michael K. Hori, M.D.’s Motion for Summary Judgment Dismissal.” Dkt. # 50. Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact that would preclude the entry of judgment as a matter of law. L.A. Printex Indus., Inc. v. Aeropostale, Inc., 676 F.3d 841, 846 (9th Cir. 2012). The party seeking summary dismissal of the case “bears the initial responsibility of informing the district court of the basis for its motion” (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and identifying those portions of the materials in the record that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)(1)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to identify specific factual disputes that

ORDER GRANTING IN PART DEFENDANT HORI'S  
MOTION FOR SUMMARY JUDGMENT - 1

1 must be resolved at trial. Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1059  
2 (9th Cir. 2012). The mere existence of a scintilla of evidence in support of the  
3 non-moving party’s position will not preclude summary judgment, however, unless a  
4 reasonable jury viewing the evidence in the light most favorable to the non-moving  
5 party could return a verdict in its favor. United States v. Arango, 670 F.3d 988, 992 (9th  
6 Cir. 2012).

7 Having reviewed the memoranda, declarations, and exhibits submitted by the  
8 parties, the Court finds as follows:<sup>1</sup>

## 9 II. DISCUSSION

### 10 A. Background Facts

11 In June 2009, Plaintiff underwent gastric bypass surgery. Dkt. # 50-1 at 10.  
12 Shortly after her surgery, Plaintiff was treated for an esophageal yeast infection with two  
13 prescription antifungal medications. Id. at 7, 10. In the following six weeks, Plaintiff  
14 sought care for nausea, vomiting, and abdominal pain several times. Id. at 10. She  
15 made several trips to the emergency room and was admitted at St. Francis Hospital for  
16 treatment related to these symptoms. Id. at 4. Even though an endoscopy revealed no  
17 indication of an ongoing esophageal yeast infection, Plaintiff remained concerned that  
18 this yeast infection was causing her pain. Id. at 7-8, 10.

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20 <sup>1</sup>After Defendant filed his reply memorandum, Plaintiff filed a “Reply to Defendant  
21 Michael K. Hori M.D.’s Motion to Dismiss Reply.” Dkt. # 99. Defendant filed a surreply  
22 seeking to strike Plaintiff’s 18-page memorandum, attached declaration and exhibits because  
23 Plaintiff did not comply with Local Civil Rule 7(g), which governs the procedure for filing a  
24 surreply, and her submission contains additional argument rather than a request to strike. Dkt.  
25 # 102. Because Defendant first moved for dismissal of Plaintiff’s Age Discrimination Act  
claim in his reply brief due to the timing of Plaintiff’s third amended complaint as described  
below, the Court accepts Plaintiff’s surreply to the extent it responds to Defendant’s arguments  
regarding that claim only. The Court therefore GRANTS IN PART Defendant’s motion to  
strike (Dkt. # 102) and STRIKES the portion of Plaintiff’s surreply that goes beyond the scope  
of her Age Discrimination Act claim.

1 After Plaintiff was hospitalized a second time with complaints of nausea and  
2 vomiting, the surgeon who performed the gastric bypass, Defendant Dr. Claudio  
3 Alperovich, asked Dr. Hori to provide an infectious disease consultation. Id. at 10. Dr.  
4 Hori performed a physical examination of Plaintiff on August 2, 2009. Id. at 11.  
5 During his exam, he noted the presence of a hematoma, but found no signs of an  
6 infection. Id. at 10. Nevertheless, Dr. Hori recommended blood and urine tests to rule  
7 out any possibility of infection. Id. In his report, Dr. Hori explained that even though  
8 there were no signs of an ongoing infection, “the patient is thoroughly convinced that  
9 this is the case, and a rational discussion could not dissuade her at this point, and I doubt  
10 it ever will.” Id. Dr. Hori examined Plaintiff again two days later and concluded that  
11 there was no evidence of an invasive infection, but an infection could not be ruled out  
12 definitively. Id. at 13. Based on this conclusion, he prescribed additional antifungal  
13 medicine.

### 13 **B. Procedural History**

14 On June 15, 2012, Plaintiff sued Dr. Hori and the other named defendants for  
15 negligence and medical malpractice in King County Superior Court. Dkt. # 53-1 at 4-  
16 14. The state court granted Dr. Hori’s motion for summary judgment on November 9,  
17 2012. Dkt. # 50-1 at 15-16.

18 Plaintiff filed this lawsuit against defendants the same day that she filed her state  
19 court action. Dkt. # 1. On February 21, 2013, all but two defendants filed dispositive  
20 motions in this case. Dkt. # 50; Dkt. # 53, Dkt. # 54, Dkt. # 55, Dkt. # 59, Dkt. # 61.  
21 Recognizing that “[r]esponding to six dispositive motions on the same day would be a  
22 daunting task for a licensed attorney, much less a plaintiff appearing pro se,” the Court  
23 granted Plaintiff’s request for additional time in which to respond to the motions and  
24 renoted defendants’ dispositive motions. Dkt. # 82.

1 One week after defendants filed their dispositive motions, Plaintiff sought leave  
2 to file a third amended complaint. Dkt. # 62. In her third amended complaint, Plaintiff  
3 asserts that defendants violated (1) Title II and Title III of the Americans with  
4 Disabilities Act (“ADA”); (2) Title II, Title VI, and Title XI of the Civil Rights Act; (3)  
5 the Age Discrimination Act of 1975; (4) the Health Insurance Portability and  
6 Accountability Act of 1996 (“HIPAA”); and (5) the Mental Health Bill of Rights, 42  
7 U.S.C. § 9501. *Id.* at 3-4. Under the liberal pleading standard afforded pro se plaintiffs,  
8 Haines v. Kerner, 404 U.S. 519, 520-21 (1972), Plaintiff’s third amended complaint also  
9 appears to assert claims under 42 U.S.C. § 1983, 42 U.S.C. § 1985, as well as claims of  
10 libel, slander, defamation, and health care fraud. Dkt. # 62. The Court granted  
11 Plaintiff’s motion to amend in part, accepting Plaintiff’s third amended complaint as the  
12 operative pleading, but dismissing the claim asserted under the Mental Health Bill of  
13 Rights. Dkt. # 92 at 2-3.

### 13 **C. Civil Rights Act**

14 Defendant argues that Plaintiff’s claim under 42 U.S.C. § 1983 must be dismissed  
15 because there is no evidence of state action. Dkt. # 50 at 7. The Court agrees. To  
16 prevail on a §1983 claim Plaintiff must show that she suffered a violation of rights  
17 protected by the Constitution or created by federal statute and that the violation was  
18 proximately caused by a person acting under color of state law. Crumpton v. Gates, 947  
19 F.2d 1418, 1420 (9th Cir. 1991). Plaintiff has not shown that Dr. Hori was acting under  
20 color of state law when he treated her in August 2009 and therefore any claim against  
21 him arising under § 1983 against him fails as a matter of law.

22 Defendant also claims that there are no genuine issues of material fact regarding  
23 Plaintiff’s § 1985 claim and therefore summary judgment is warranted. To succeed on a  
24 claim under 42 U.S.C. § 1985(3), Plaintiff must prove (1) conspiracy, (2) for the  
25

1 purpose of depriving her of the equal protection of the laws or equal privileges and  
2 immunities under the laws, (3) an act in furtherance of the conspiracy, and (4) an injury  
3 to her or her property or a deprivation of any right or privilege of a citizen of the United  
4 States. Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992). The second  
5 element requires that Plaintiff show that the deprivation of a legally protected right was  
6 motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory  
7 animus behind conspirators’ action.” Id. (quoting Griffith v. Breckenridge, 403 U.S. 88,  
8 102 (1971)).

9 Plaintiff has not responded to Defendant’s arguments regarding her § 1985 claim.  
10 Based on its review of the record, the Court finds no evidence indicating “an agreement  
11 or meeting of the minds,” Ward v. E.E.O.C., 719 F.2d 311, 314 (9th Cir. 1983) or  
12 supporting Plaintiff’s theory that Dr. Hori was motivated by discriminatory animus,  
13 Sever, 978 F.2d at 1536. The Court therefore GRANTS Defendant’s motion for  
14 summary dismissal of Plaintiff’s § 1985 claim.<sup>2</sup>

#### 14 **D. ADA**

15 Plaintiff contends that Dr. Hori failed to accommodate her communication needs  
16 and denied her the right to be involved in her treatment in violation of Titles II and III of  
17 the ADA. Defendant argues that there is no evidence that Plaintiff was denied medical  
18 treatment, access to medical facilities, or an accommodation, or that any such denial was  
19 based on a disability. Dkt. # 50 at 10.

20 Title II of the ADA prohibits discrimination in programs offered by a public  
21 entity and discrimination by any such entity. 42 U.S.C. § 12132 (“no qualified  
22 individual with a disability shall, by reason of such disability, be excluded from

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23 <sup>2</sup> Although Defendant moved for summary dismissal of all of Plaintiff’s claims as they  
24 were alleged in her second amended complaint, Defendant has not moved for summary  
25 judgment on Plaintiff’s claims under 42 U.S.C. §§ 2000a, 2000d, or 2000h, which Plaintiff  
26 identified in the third amended complaint filed after Defendant’s motion for summary  
judgment. See Dkt. # 62 at 3. Defendant may file a motion seeking dismissal of these claims.

1 participation in or be denied the benefits of the services, programs, or activities of a  
2 public entity, or be subjected to discrimination by any such entity.”). To succeed on a  
3 claim under Title II, Plaintiff must demonstrate that (1) she is a qualified individual with  
4 a disability, (2) she was excluded from participation in or denied the benefits of a public  
5 entity’s services, programs or activities, or was otherwise discriminated against by the  
6 public entity, and (3) the exclusion, denial of benefits, or discrimination was by reason  
7 of her disability. Weinrich v. L.A. Cnty. Metro. Transp. Auth., 114 F.3d 976, 978 (9th  
8 Cir. 1997).

9 Similarly, Title III prohibits discrimination “on the basis of disability in the full  
10 and equal enjoyment of the goods, services, facilities, privileges, advantages, or  
11 accommodations of any place of public accommodation by any person who owns, leases  
12 (or leases to), or operates a place of public accommodation.” 42 U.S.C. § 12182(a). To  
13 establish a prima facie case of discrimination under Title III, Plaintiff must show (1) she  
14 has a disability, (2) Defendant is a private entity that owns, leases, or operates a place of  
15 public accommodation, and (3) she was denied public accommodations by Defendant  
16 because of her disability. Molski v. M.J. Cable, Inc., 481 F.3d 724, 730 (9th Cir. 2007).

17 Even assuming that Plaintiff is a qualified individual with a disability, Plaintiff  
18 has not shown that she was denied the benefits of a public entity’s services (Title II) or  
19 public accommodations by a private entity (Title III) by reason of her disability.  
20 Although somewhat unclear, Plaintiff’s claim appears to be based on her allegation that  
21 Dr. Hori did not tell her he was actually conducting a psychological examination of her,  
22 and he did not ensure that she understood his findings related to her mental and  
23 emotional state. Dkt. # 93 at 15.

24 To support this allegation, Plaintiff points to the statement in Dr. Hori’s  
25 consultation report that “[the patient] is convinced that this is related to some form of  
26 yeast infection. . . the patient is thoroughly convinced that this is the case, and rational

1 discussion could not dissuade her at this point, and I doubt it ever will.” Dkt. # 50-1 at  
2 10. Contrary to Plaintiff’s characterization, Dr. Hori’s impression of Plaintiff does not  
3 support her contention that Dr. Hori performed a psychological analysis of Plaintiff  
4 without her knowledge. Id. at 10-11. There is no suggestion in the record that Dr. Hori  
5 provided anything more or less than an infectious disease consultation to determine the  
6 cause of her ongoing nausea and vomiting. Rather, the evidence indicates that Dr. Hori  
7 examined Plaintiff’s physical symptoms, discussed her concerns with her, and  
8 recommended additional testing and treatment targeting Plaintiff’s ongoing nausea and  
9 pain. Id. In the absence of evidence supporting Plaintiff’s allegations, the Court is not  
10 persuaded by Plaintiff’s conclusory accusations. See British Airways Bd. v. Boeing  
11 Co., 585 F.2d 946, 954-55 (9th Cir. 1978). Furthermore, there is no indication that any  
12 denial of communication or accommodation was based on Plaintiff’s alleged disability.  
13 Plaintiff has not provided even a scintilla of evidence supporting her claim that she was  
14 discriminated against on the basis of disability. Because there are no genuine issues of  
15 material fact regarding Dr. Hori’s treatment of Plaintiff, the Court GRANTS  
16 Defendant’s motion for summary judgment on Plaintiff’s ADA claims.

17 **E. Age Discrimination Act of 1975**

18 The Age Discrimination Act of 1975 provides that “no person in the United  
19 States shall, on the basis of age, be excluded from participation in, be denied the benefits  
20 of, or be subjected to discrimination under, any program or activity receiving Federal  
21 financial assistance.” 42 U.S.C. § 6102. The Act contains an administrative exhaustion  
22 requirement. Id. § 6104(e)(2). To exhaust her administrative remedies, Plaintiff was  
23 required to file a complaint with the United States Department of Education, Office for  
24 Civil Rights (“OCR”), within 180 days from the date she first became aware of the  
25 discrimination. 34 C.F.R. § 110.3; 34 C.F.R. § 110.31(a). Plaintiff could then file a  
26 complaint in federal district court if, 180 days after filing her complaint, OCR had not

1 made a finding or OCR issued a finding in favor of the recipient of funds. 34 C.F.R. §  
2 110.39(a).

3 Defendant contends that Plaintiff's claim must be dismissed because she has not  
4 exhausted her administrative remedies. Dkt. # 95 at 7-9.<sup>3</sup> Plaintiff responds that she  
5 filed a complaint with the U.S. Department of Health and Human Services, Office for  
6 Civil Rights ("HHS"). Dkt. # 99 at 14 (citing Dkt. # 98-2 at 11, 13-14). Although  
7 Plaintiff presents evidence that she did in fact file a complaint with HHS, this evidence  
8 indicates that she failed to file her complaint within the 180 day time limit set by the  
9 regulations and she did not file it with the proper agency. Dkt. # 98-2 at 11, 13-4.  
10 Furthermore, there is no indication that Plaintiff gave notice to the Secretary of Health  
11 and Human Services, the United States Attorney General, or Dr. Hori at least 30 days  
12 prior to filing her this action as required by the statute. 42 U.S.C. § 6104(e)(1); see 34  
13 C.F.R. § 110.39(b)(3)(iii). Because there is nothing in the record that suggests that  
14 Plaintiff has complied with the notice or exhaustion requirements set forth in the statute  
and implementing regulations, her claim under the Act is dismissed with prejudice.

#### 15 **F. HIPAA**

16 Dr. Hori argues that Plaintiff's HIPAA claim must be dismissed because HIPAA  
17 does not provide a cause of action for a private litigant. Dkt. # 50 at 11-12. This Court  
18 agrees. Webb v. Smart Document Solutions, LLC, 499 F.3d 1078, 1082 (9th Cir. 2007)  
19 ("HIPAA itself does not provide for a private right of action") (citing 65 Fed. Reg.  
20 82601 (Dec. 28, 2000)). Because HIPAA provides no private right of action, the Court  
21 GRANTS Dr. Hori's motion for summary dismissal of Plaintiff's HIPAA claim.

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22  
23 <sup>3</sup>Defendant first requested dismissal of Plaintiff's Age Discrimination Act claim in his  
24 reply memorandum. Dkt. # 95 at 7. However, because Plaintiff filed an amended complaint  
25 adding this claim after Dr. Hori filed his motion for summary judgment and Plaintiff responded  
to Dr. Hori's arguments in her surreply, which the Court has considered, dkt. # 99, the Court  
finds Dr. Hori's request for dismissal ripe for consideration.



1 **G. Defamation, Libel and Slander**

2 In both her second amended complaint and her third amended complaint, Plaintiff  
3 makes fleeting references to defamation, libel, and slander, Dkt. # 15 at 2, 4-5; Dkt. #  
4 62 at 5. In seeking dismissal of these claims, Defendant argues that the Court should  
5 decline to exercise supplemental jurisdiction over these claims after dismissal of  
6 Plaintiff’s federal claims.

7 In any civil action where a district court has original jurisdiction, the district court  
8 has supplemental jurisdiction over all other claims that form part of the same case or  
9 controversy. 28 U.S.C. § 1367(a). If the federal claims are dismissed before trial, the  
10 state law claims “should” be dismissed. United Mine Workers v. Gibbs, 383 U.S. 715,  
11 726 (1966). The Supreme Court has stated that “in the usual case in which all federal-  
12 law claims are eliminated before trial, the balance of factors . . . will point toward  
13 declining to exercise jurisdiction over the remaining state-law claims.” Carnegie-  
Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988).

14 As the Court noted earlier, Defendant has not yet sought dismissal of Plaintiff’s  
15 claims under Titles II, VI, and XI of the Civil Rights Act. See Dkt. # 62; Dkt. # 50.  
16 Because the Court has not dismissed all claims over which it has original jurisdiction,  
17 the Court DENIES Defendant’s motion for summary dismissal of Plaintiff’s state law  
18 claims.

19 **H. Health Care Fraud**

20 Finally, Defendant seeks summary dismissal of Plaintiff’s claim under 18 U.S.C.  
21 § 1349 because that statute does not provide a private cause of action. Dkt. # 50 at 12.  
22 The federal health care fraud statute imposes criminal penalties on persons who  
23 knowingly and willfully execute a scheme to defraud a health care benefit program, 18  
24 U.S.C. § 1347, and 18 U.S.C. § 1349 imposes the same penalties on persons who  
25 attempt or conspire to commit health care fraud, id. § 1349. Because neither 18 U.S.C.

1 § 1347 or 18 U.S.C. § 1349 provides a private right of action, Plaintiff's claim that  
2 Defendant committed health care fraud fails as a matter of law.

3 **III. CONCLUSION**

4 For all of the foregoing reasons, the Court GRANTS IN PART and DENIES IN  
5 PART Defendant Michael Hori's motion for summary judgment (Dkt. # 50). Plaintiff's  
6 claims against Dr. Hori arising under 42 U.S.C. § 1983, 42 U.S.C. § 1985, the ADA, the  
7 Age Discrimination Act of 1975, and HIPAA are dismissed with prejudice. Plaintiff's  
8 libel, slander, and defamation claims as well as her claims arising under Titles II, VI,  
9 and XI of the Civil Rights Act remain.

10 DATED this 10th day of December, 2013.

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12 

13 Robert S. Lasnik  
14 United States District Judge