UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

FABIAN NAVA,
CDCR #AH-0190,

Plaintiff,

vs.

P. VELARDI; J. SILVA; AVELINO CANLAS; M. MELLON; ROGELIO ORTEGA; S. ROBERTS; KYLE SEELEY; J. WALKER; ROBERT WALKER; DAVID CLIFTON ,

Defendants.

Case No.: 3:15-cv-01156-AJB-BLM

ORDER:

1) GRANTING IN PART AND DENYING IN PART DEFENDANTS MOTION TO DISMISS PURSUANT TO Fed. R. Civ. P. 12(b)(6) [ECF No. 28]

AND

2) ISSUING AN ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE DISMISSED FOR FAILING TO PROSECUTE

Introduction

Fabian Nava ("Plaintiff"), a prisoner at Richard J. Donovan Correctional Facility ("RJD") in San Diego, California, proceeding pro se and in forma pauperis ("IFP"), is proceeding with a First Amended Complaint ("FAC") filed pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (ECF No. 13).

Defendants Seeley, Rogelio Ortega, Robert Walker and Jason Silva have filed a Motion to Dismiss all claims against them alleged in Plaintiff's FAC pursuant to FED. R. CIV. P. 12(b)(6). *See* Defs. Mot. to Dismiss (ECF No. 28).[1] The Court issued a briefing schedule, determined that no proposed findings and recommendations by the magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(A) and S.D. CAL. CIVLR 72.3(a) would be necessary, and permitted Plaintiff an opportunity to file an Opposition. On October 27, 2016, Plaintiff filed his Opposition but Defendants have not filed a Reply. (ECF No. 35.)

Having considered the Motion on the papers submitted, the Court GRANTS in part, and DENIES in part, Defendants' Motions to Dismiss pursuant to FED. R. CIV. P. 12(b)(6).

Plaintiff's First Amended Complaint

I. Factual Allegations

On February 18, 2010, Plaintiff was "sent to an orthopedic specialist" by prison officials. (FAC at 11.) At that time, Plaintiff claims he was informed that he "had no option (for life) but to wear a pair of orthopedic shoes/boots, or plaintiff would suffer physical harm." (*Id*. at 11; Ex. 1, CDCR Comprehensive Accommodation Chrono dated February 22, 2010.) Approximately two years later on January 31, 2012, Plaintiff had an x-ray of his right knee and claims that it "confirmed a 3mm metallic fragment" in his right knee which was "causing plaintiff severe pain." (*Id.* at 11.) However, Plaintiff alleges Dr. Kyle Seeley "refused to provide him with adequate footwear and pain management" on the grounds that it was "too costly for the [CDCR or RJD] to worry about fixing." (*Id.*)

On March 16, 2012, Plaintiff was examined by Nurse Practitioner Pamela Velardi who then rescinded Plaintiff's chrono for orthopedic shoes. (*Id.*) Plaintiff claims Defendant Velardi made a note in his chart that Plaintiff indicated he would file a grievance

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[1] No other Defendants have yet to be served, although the U.S. Marshal has returned summonses as unexecuted as to Defendants Velardi, Mellon, Clifton and Canlas (ECF Nos. 22-25). No summons has been returned for Defendants S. Roberts and J. Walker nor have these Defendants joined in the Motion currently pending before the Court.

and further claims Defendant Velardi commented that filing a grievance "would be a mistake." (*Id.*) Instead of providing Plaintiff with his orthopedic shoes, Defendant Velardi issued Plaintiff "a pair of shoe insoles because it was 'much less expensive than the footwear.'" (*Id*. Ex. 4, Comprehensive Accommodation Chrono dated April 17, 2012.)

Plaintiff was "performing his assigned duties as a Housing Unit Porter" on January 25, 2013 when his "right leg/knee/ankle caused him to suffer pain and he lost his balance then fell down a flight of stairs." (*Id.* at 11.) He alleges that his supervisor, Correctional Officer McGee[2] witnessed the fall. (*Id.*) Plaintiff was examined by Dr. M. Mellon whom he claims was already aware of Plaintiff's knee condition but refused to provide him treatment. (*Id.* at 11-12.) Plaintiff further alleges that Defendant Mellon "falsified the record" by indicating that no one had witnessed his fall. (*Id.* at 12.)

Plaintiff filed an administrative grievance on May 7, 2012. (*See* FAC, Ex. 6, Patient/Inmate Health Care Appeal dated May 7, 2012.) Plaintiff claims both Defendants Velardi and Seeley continued to refuse Plaintiff "adequate medical care because of cost and due to plaintiff filing medical grievance(s)." (*Id.* at 12.) Plaintiff then sought assistance from the "Prison Law Office" who then contacted Defendant Seeley regarding Plaintiff's medical care. (*Id.*) However, Plaintiff claims Defendant Seeley provided the Prison Law Offices with "falsehoods." (*Id.*)

On September 20, 2013, Plaintiff was seen by Dr. Rogelio Ortega who was Plaintiff's primary care physician. (*Id.*) Plaintiff alleges that Defendant Ortega informed him that he was "working on getting plaintiff surgery." (*Id.*) Plaintiff filed another grievance claiming that RJD medical staff was refusing Plaintiff adequate medical care based on Defendant Velardi's previous actions. (*Id.* at 11, Ex. 12, Patient/Inmate Health Care Appeal dated December 16, 2013.)

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[2] Correctional Officer McGee is not a named Defendant.

Plaintiff claims Defendant Ortega prescribed physical therapy for him. (*Id.*) However, when Plaintiff was taken to see the physical therapist, David Clifton, he refused to provide Plaintiff with treatment "based on [Clifton's] opinion that Plaintiff needed surgery first." (*Id.* at 13.) Defendant Clifton also believed that Plaintiff should take a different pain medication but allegedly told Plaintiff that "he doubted plaintiff would get proper pain medication or surgery as it was very expensive and therefore, RJD would not approve it as a matter of policy." (*Id.*)

On February 13, 2014, Plaintiff claims that Defendant Ortega subscribed "Lyrica" for his "severe pain" despite the fact that a narcotic would be more effective. (*Id.*) Defendant Ortega informed Plaintiff that the reason he provided this medication was because the RJD "medical staff were fed up with plaintiff filing grievances." (*Id.*) Plaintiff claims that Dr. R. Walker denied the request for Lyrica "even though it was proven that plaintiff was in severe pain and required medication." (*Id.*)

Plaintiff was seen a few weeks later by Dr. Avenilo Canlas who became is primary care physician. (*Id.*) Plaintiff requested pain medication for his "severe ongoing pain." (*Id.*) However, Plaintiff claims Defendant Canlas, following the previous denial by Defendant Walker, refused Plaintiff's request and informed him that he would not order it for Plaintiff "especially since you continue to file grievance(s)." (*Id.*)

On July 14, 2014, Plaintiff was seen by Dr. Jason Silva. (*Id.* at 14.) Plaintiff alleges Defendant Silva "acknowledged plaintiff's severe medical conditions" but based on Plaintiff's history of filing medical grievances "decided not to order any treatment not already ordered previously, regardless of plaintiff's pain, injury level or need." (*Id.*) Plaintiff claims that Defendant Silva told him that RJD was "strapped for money right now due to all the construction on every medical facility at RJD." (*Id.*)

After his examination with Defendant Silva, Plaintiff filed another administrative grievance requesting pain medication and medical care for his "knee/ankle/leg injuries." (*Id.* at 14-15.) While Plaintiff alleges Defendant Silva must respond to the initial level of this grievance, he has not responded to date. (*Id.* at 15.) On September 5, 2014, Plaintiff

claims "Dr. Silva finally ordered plaintiff pain medication of Lyrica." (*Id.*) However, he alleges that he was "forced" to sign a "contract stating he could discontinue the medication for any reason." (*Id.*) Plaintiff claims that RJD staff "shopped around" to obtain new medical test results for Plaintiff's condition which they used to show that there was "no damage than previously known to be present in Plaintiff." (*Id.*) Plaintiff claims that he continues to suffer "irreparable harm" as a result of Defendants' actions. (*Id.* at 16.)

Discussion

II. Legal Standards

A. Rule 12(b)(6) Motion to Dismiss

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule 12(b)(6) focuses on the "sufficiency" of a claim rather than the claim's substantive merits, "a court may [ordinarily] look only at the face of the complaint to decide a motion to dismiss." *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002). However, courts may consider exhibits that are attached to the complaint. *See* FED. R. CIV. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d 426 (9th Cir. 1978) ("[M]aterial which is properly submitted as part of the complaint may be considered" in ruling on a Rule 12(b)(6) motion to dismiss.) However, exhibits that contradict the allegations of a complaint may fatally undermine the complaint's allegations. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (a plaintiff can "plead himself out of a claim by including . . . details contrary to his claims." (citing *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) (courts "are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint."))); *see also Nat'l Assoc. for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir.2000) (courts "may consider facts contained in documents attached to the complaint"

to determining whether the complaint states a claim for relief).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)).

"All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996) (citing *Nat'l Wildlife Fed. v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995)). The Court need not, however, "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell*, 266 F.3d at 988 (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)); *see also Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (on motion to dismiss, court is "not bound to accept as true a legal conclusion couched as a factual allegation."). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

Thus, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 570 (when a plaintiff has not

"nudged [his] claims across the line from conceivable to plausible, [his] complaint must be dismissed.")).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences [drawn] from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

B. *Pro Se* Litigants

"In civil rights cases where the plaintiff appears pro se, the court must construe the pleadings liberally and must afford [the] plaintiff the benefit of any doubt." *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). The rule, however, "applies only to a plaintiff's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 330 n.9 (1989). In giving liberal interpretation to a *pro se* civil rights complaint, courts may not "supply essential elements of claims that were not initially pled." *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss." *Id.*; *see also Jones v. Cmty. Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (finding conclusory allegations unsupported by facts insufficient to state a claim under § 1983).

III. Defendants' Motion

Defendants Seeley, Ortega, Walker and Silva move to dismiss all claims against them found in Plaintiff's FAC. (Defs. Mot. at 2.) Specifically, they claim Plaintiff has failed to alleges facts sufficient to state a claim "under the First, Eighth, and Fourteenth Amendments to the United States Constitution." (*Id.*) As stated above, Plaintiff has filed an Opposition. The Court has reviewed Plaintiff's FAC and finds that there is no attempt to allege a Fourteenth Amendment claim and Defendants have not addressed Plaintiff's conspiracy claims brought pursuant to 42 U.S.C. § 1986. (*See* FAC at 8, 18.) Therefore, the conspiracy claims remain in the action.

A. Eighth Amendment Inadequate Medical Care Claims

1. Standard of Review

Only "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 103, 104 (1976) (citation and internal quotation marks omitted). "A determination of 'deliberate indifference' involves an examination of two elements: (1) the seriousness of the prisoner's medical need and (2) the nature of the defendant's response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc) (quoting *Estelle*, 429 U.S. at 104); *see also Wilhelm v. Rotman*, 680 F.3d 1108, 1113 (9th Cir. 2012); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

First, "[b]ecause society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.'" *Hudson v. McMillian*, 503 U.S. 1, 9 (1992), citing *Estelle*, 429 U.S. at 103-104. "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin*, 914 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104). "The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a 'serious' need for medical treatment." *Id.*, citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir. 1990); *Hunt v. Dental Dept.*, 865 F.2d 198, 200-01 (9th Cir. 1989).

Here, none of the Defendants argue that Plaintiff has failed to allege facts to plausibly show that his medical needs were 'serious,' and thus, the Court finds Plaintiff's FAC is sufficiently pleaded in this regard.

Therefore, the Court must next decide whether Plaintiff's FAC further contains sufficient "factual content" to show that Defendants acted with "deliberate indifference" to

his needs. *McGuckin*, 914 F.2d. at 1060; *see also Jett*, 439 F.3d at 1096; *Iqbal*, 556 U.S. at 678. "Deliberate indifference is a high legal standard." *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004).

2. Claims against Defendant Seeley

Plaintiff alleges Defendant Seeley, the Chief Medical Officer, was deliberately indifferent to his serious medical needs when he refused to supply Plaintiff with orthotic shoes which were a form of treatment for his medical condition. (*See* FAC at 11-12.) Plaintiff claims that Defendant Seeley denied Plaintiff this treatment due to their expense. (*Id.*) In support of his showing for the need of these orthotic shoes, Plaintiff supplied a "Comprehensive Accommodation Chrono" dated February 22, 2010. (*Id.*, Ex. 1.) In this "chrono" it is noted that "the treatment of [Plaintiff's] condition mandates the exclusive use of this footwear to prevent physical harm." (*Id.*) At the top portion of this form, it informs the prescribing physician to "[c]ircle P if the accommodation is to be permanent, or T if the accommodation is to be temporary." (*Id.*) The "P" is circled next to the indication that orthotic footwear is to be provided to Plaintiff. (*Id.*)

Plaintiff argues that this demonstrates "deliberate indifference" on the part of Defendant Seeley when he removed this accommodation for Plaintiff. (Pl.'s Opp'n at 6.) In response, Defendants argue that a decision to review a chrono is to be made annually, as also stated on the form. (Defs.' Mot. at 23-24.) In addition, Defendants argue that the decision to deny Plaintiff's "is supported by multiple examinations showing normal stance and gait, ability to walk unassisted, full range of motion in the ankle, ability to tiptoe well, ability to work, absence of atrophy in the lower extremities, ability to squat, normal muscle strength, and apparent ability to accommodate the ankle pain with the insoles." (*Id.* at 24.) Defendants then refer to a number of medical documents Plaintiff has attached to his FAC as exhibits. (*Id.*)

However, Plaintiff argues that the annual review of a permanent "chrono" is to review the inmate's information and not a review of the necessity for the permanent chrono itself. Moreover, as Plaintiff notes in his Opposition, he alleges in his FAC that the decision

by Seeley to deny Plaintiff the orthotic shoes was based on their cost, along with claims of retaliation for filing grievances, and not on the medical examinations or tests that came after Defendant Seeley's treatment of Plaintiff. (*See* Pl.'s Opp'n at 7; *see also* FAC at 12.) Defendants argument would have this Court interpret many medical records and arrive at conclusions that are outside the allegations found in Plaintiff's FAC. In order to show "deliberate indifference," a Plaintiff must demonstrate that "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference." *Wilhelm*, 680 F.3d at 1122 (citing *Jett*, 439 F.3d at 1096.) Here, the Court finds that Plaintiff has alleged facts sufficient to state an Eighth Amendment claim against Defendant Seeley.

3. Defendants Ortega and Silva

Plaintiff alleges that in 2013 Defendant Ortega was his primary physician. (*See* FAC at 10.) Plaintiff also acknowledges that Defendant Ortega informed him that he was "working on getting plaintiff surgery" and prescribed physical therapy. (*Id.* at 11.) He also acknowledges that Defendant Ortega prescribed the medication Plaintiff wanted even though Defendant Ortega expressed doubts that it would be approved due to cost. (*Id.*)

Defendants argue that Plaintiff received several examinations from Defendant Ortega and Silva, was provided different pain medications and their "progress notes recited comprehensive examinations, diagnostic testing, and treatment." (Defs.' Mot. at 25.) Plaintiff argues that multiple "meaningless medical procedures" is not indicative of adequate medical care. (Pl.'s Opp'n at 15.)

The Court agrees with Defendant Ortega that Plaintiff has not alleged facts to show that he was deliberately indifferent to Plaintiff's serious medical needs. Plaintiff alleges that Defendant Ortega prescribed physical therapy, medication and informed Plaintiff that he was seeking to get authorization for Plaintiff to receive surgery. None of these allegations rise to the level of "deliberate indifference."

However, with respect to Defendant Silva, Plaintiff alleges that Defendant Silva told Plaintiff that based on Plaintiff's history of filing medical grievances he "decided not to

order any treatment not already ordered previously, regardless of plaintiff's pain, injury level or need." (*See* FAC at 14.) Plaintiff claims that Defendant Silva waited two months to prescribe medication and he suffered severe pain as a result. (*Id.*) The Court finds that Plaintiff's claims that Defendant Silva allegedly refused to provide treatment as a result of Plaintiff's grievance history does sufficiently allege an Eighth Amendment inadequate medical care claim.

4. Defendant Walker

Defendants maintain that Defendant Walker was not Plaintiff's primary care physician and was only involved in Plaintiff's care when he "denied a non-formulary request for Mr. Nava to receive Lyrica." (Defs.' Mot. at 26.) Plaintiff argues it is irrelevant that Defendant Walker was not his primary care physician but instead, he argues that Defendant Walker denied the Lyrica as a matter of prison policy rather than an individual review of Plaintiff's medical condition and medical needs. (Pl.'s Opp'n at 16.) In furtherance of that argument, Plaintiff argues that he was given Lyrica several months later but his medical records do not reflect a change in his medical condition so there is no valid reason why he was denied this medication for over six months. (*Id.*) Moreover, Plaintiff claims that when the decision was made to allow him to take this drug, there is no documentation to show how the "change of denial of pain medication into an approval" took place. (*Id.*)

Throughout the Defendants' Motion, they point to evidence in the record that requires interpretation that is beyond the scope of a motion to dismiss. At this stage of the proceedings, the Court finds that Plaintiff has alleged facts sufficient to state an Eighth Amendment claim against Defendant Walker.

B. Retaliation claims

Defendants also move to dismiss Plaintiff's claims of retaliation in violation of his First Amendment rights. (*See* Defs.' Mot. at 27-28.) In order to state a retaliation claim, Plaintiff must allege facts to support the following five factors: "(1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's

protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment right, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 566 (9th Cir. 2005); *see also Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam), *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997).

Defendants only argue that Plaintiff has failed to state a retaliation claim because he has not alleged facts supporting the first element of the claim in that there are no facts to show that Defendants took any "adverse action" against him. (*See* Defs.' Mot. at 27-28.) However, throughout his FAC, Plaintiff claims he was denied medical treatment because he was filing multiple administrative grievances. Of fundamental import to prisoners are their First Amendment "right[s] to file prison grievances," *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003), and to "pursue civil rights litigation in the courts." *Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995).

Plaintiff alleges Defendant Seeley refused "Plaintiff adequate medical treatment care because of cost and due to Plaintiff filing medical grievances." (FAC at 12.) Plaintiff alleges Defendant Ortega provided Plaintiff with a less costly, less effective pain medication because "medical staff were fed up with Plaintiff filing grievances." (*Id.* at 13.) Plaintiff claims that Defendant Silva, due to Plaintiff filing medical grievances, "decided not to order any treatment not already ordered previously, regardless of Plaintiff's pain, injury level or need." (*Id.* at 14.) Based on these allegations, the Court finds that Plaintiff has stated a retaliation claim against these Defendants.

However, as to Defendant Walker, the Court finds that Plaintiff has failed to state a retaliation claim. While Defendant Walker did deny Plaintiff's request for pain medication, he did so through the grievance process. There are no allegations that Walker was aware of any of Plaintiff's prior grievances, nor is there an allegation that Walker denied Plaintiff's grievance because of his past history. Therefore, the Court finds that Plaintiff has not stated a retaliation claim against Defendant Walker.

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IV. Remaining Defendants

A review of the Court's docket indicates that Plaintiff has failed to properly serve Defendants Velardi, Canlas, Mellon, S. Roberts, J. Walker and Clifton. *See Walker v. Sumner*, 14 F.3d 1415, 1421-22 (9th Cir. 1994) (where a pro se plaintiff fails to provide the Marshal with sufficient information to effect service, the court's sua sponte dismissal of those unserved defendants is appropriate under Fed.R.Civ.P. 4(m)).

Accordingly, this Court ORDERS Plaintiff to show cause no later than thirty days (30) after this Order is filed, why the claims against these Defendants should not be dismissed for want of prosecution pursuant to Fed.R.Civ.P. 4(m). If Plaintiff wishes to proceed with his claims against these Defendants he must provide the Court with proof of proper service within thirty (30) days from the date this Order is filed. Otherwise, Defendants Velardi, Canlas, Mellon, S. Roberts, J. Walker and Clifton will be dismissed from this action without prejudice.

Conclusion

For all the reasons discussed, the Court:

1) **GRANTS** Defendant Ortega's Motion to Dismiss Plaintiff's Eighth Amendment claims;

2) **DENIES** Defendants Silva, Seeley. and Walker's Motion to Dismiss Plaintiff's Eighth Amendment claims;

3) **DENIES** Defendants Silva Seeley or Ortega's Motion to Dismiss Plaintiff's retaliation claims;

4) **GRANTS** Defendant Walker's Motion to Dismiss Plaintiff's retaliation claims.

5) Defendants will serve and file an Answer to Plaintiff's FAC within the time set forth in Fed.R.Civ.P. 12(a)(4)(A) to the remaining claims.

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It is further ordered that:

6) Plaintiff must show cause no later than thirty (30) days from the date this Order is filed why the claims against Defendants Velardi, Canlas, Mellon, S. Roberts, J. Walker and Clifton should not be dismissed for want of prosecution pursuant to Fed.R.Civ.P. 4(m). If Plaintiff fails to provide the Court with documentation demonstrating proper service on these Defendants within thirty (30) days from the date this Order is filed, the claims against them in this action will be dismissed without prejudice.

IT IS SO ORDERED.

Dated: January 11, 2017

Hon. Anthony J. Battaglia
United States District Judge