

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

JOSEPH ALLEN TIDWELL,	)	NO. CV 14-5072-AG(E)
	)	
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION OF
	)	
PAUL GALLAGHER,	)	UNITED STATES MAGISTRATE JUDGE
	)	
	)	
Defendant.	)	
	)	

---

This Report and Recommendation is submitted to the Honorable Andrew J. Guilford, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

**PROCEEDINGS**

Plaintiff, a state prisoner incarcerated at the California Men's Colony ("CMC"), filed this pro se civil rights action on July 8, 2014, alleging that CMC prison doctors assertedly were deliberately indifferent to Plaintiff's medical needs in violation of the Eighth

1 Amendment. On August 13, 2014, the Court dismissed the Complaint with  
2 leave to amend.

3  
4 On September 5, 2014, Plaintiff filed a First Amended Complaint  
5 against only one Defendant, Plaintiff's alleged primary care physician  
6 Dr. Paul Gallagher. On February 23, 2015, Defendant Gallagher filed a  
7 motion to dismiss the First Amended Complaint. On September 7, 2015,  
8 the Court issued an "Order Dismissing First Amended Complaint with  
9 Leave to Amend." On September 29, 2015, Plaintiff filed a Second  
10 Amended Complaint.

11  
12 On December 14, 2015, Defendant filed a motion to dismiss the  
13 Second Amended Complaint. On January 4, 2016, Plaintiff filed an  
14 opposition to the motion to dismiss. On May 27, 2016, the Court  
15 issued an "Order re Motion to Dismiss Second Amended Complaint." This  
16 Order granted the motion to dismiss in part, dismissing without leave  
17 to amend and with prejudice Plaintiff's official capacity claim for  
18 damages and Plaintiff's claim of deliberate indifference based on  
19 Defendant's medical decisions regarding what treatments to give  
20 Plaintiff. The Court otherwise dismissed the Second Amended Complaint  
21 with leave to amend, inter alia deeming sufficient Plaintiff's claim  
22 of deliberate indifference based on the alleged delay in the proper  
23 diagnosis and treatment of Plaintiff's assertedly suspected, serious  
24 medical condition after March 5, 2013.

25  
26 On June 22, 2016, Plaintiff filed a Third Amended Complaint, the  
27 operative pleading. On July 13, 2016, Defendant filed an Answer.

28 ///

1 On March 10, 2017, Defendant filed a Motion for Summary Judgment.  
2 On the same date, the Court issued a Minute Order inter alia advising  
3 Plaintiff of the requirements of Rule 56 of the Federal Rules of Civil  
4 Procedure. See Rand v. Rowland, 154 F.3d 952, 957-58 (9th Cir. 1997)  
5 (en banc), cert. denied, 527 U.S. 1035 (1999). On April 10, 2017,  
6 Plaintiff filed a "Response to Defendant's Motion for Summary  
7 Judgment," constituting Plaintiff's Opposition to the Motion  
8 ("Opposition").

9  
10 **ALLEGATIONS OF THIRD AMENDED COMPLAINT**

11  
12 In the Third Amended Complaint ("TAC"), Plaintiff alleges:

13  
14 On November 22, 1996, a doctor diagnosed Plaintiff with  
15 osteomyelitis in his left clavicle (TAC, p. 5). On  
16 January 20, 1998, a doctor diagnosed Plaintiff's condition  
17 as chronic osteomyelitis, a life-long condition (id.).

18  
19 On November 8, 2012, Plaintiff saw Defendant Gallagher  
20 and explained to Defendant Plaintiff's history of chronic  
21 osteomyelitis (id., "D. Claims" attachment, p. 1).  
22 Plaintiff told Gallagher Plaintiff was in great pain from an  
23 infection and requested a low bunk chrono and a "no lift"  
24 chrono (id.). Defendant denied the requests (id.).

25  
26 On December 4, 2012, Defendant wrote a medical progress  
27 note stating that Plaintiff's condition did not require an  
28 MRI (id.).

1           After an emergency visit, another physician requested  
2 an MRI for Plaintiff (id.). The MRI was performed on  
3 February 11, 2013 and showed a sinonasal cyst and bone spurs  
4 (id.).  
5

6           On March 5, 2013, Defendant failed to intervene and  
7 left Plaintiff in debilitating pain, telling Plaintiff it  
8 was not acceptable to seek emergency treatment for  
9 Plaintiff's pain (id.). On May 29, 2013, Plaintiff saw Dr.  
10 Kowall, an off-site orthopedic surgeon (id.). Dr. Kowall  
11 was unable to evaluate Plaintiff because Defendant had not  
12 sent Dr. Kowall the MRI results (id.). On June 12, 2013,  
13 Plaintiff saw Dr. Kowall again, but once again Dr. Kowall  
14 was unable to evaluate Plaintiff because Defendant had not  
15 sent the MRI results (id.). In the meantime Plaintiff's  
16 pain was worsening and the infection spreading, making it  
17 hard for Plaintiff to breathe and to swallow (id.).  
18 Plaintiff could not move his arm and had to keep it in a  
19 sling for a year (id., pp. 1-2). Osteomyelitis can spread  
20 from one bone to another and can even cause death if left  
21 unchecked (id.).  
22

23           After making numerous medical requests, Plaintiff had a  
24 biopsy on September 5, 2015 (id., p. 2). The biopsy showed,  
25 as Plaintiff had been telling Defendant all along, that  
26 Plaintiff had osteomyelitis and a staph infection (id.).  
27 The delays in treatment attributable to Defendant caused  
28 Plaintiff unnecessary pain and further injury (id.).

1 Plaintiff now has a permanent disability because he cannot  
2 lift more than 15 pounds (id.).

3  
4 Defendant's failure twice to send Dr. Kowall the MRI  
5 report contributed to a six-month delay in receiving the  
6 bone biopsy and antibiotic treatment for Plaintiff's  
7 condition (id.).

8  
9 **DEFENDANT'S CONTENTIONS**

10  
11 Defendant contends the undisputed facts show that:

12  
13 1. Defendant was not deliberately indifferent to Plaintiff's  
14 serious medical needs because inter alia: (1) there assertedly was no  
15 material delay in Plaintiff's treatment; and (2) Defendant did not  
16 deliberately fail to send the MRI report in order to impede or delay  
17 Plaintiff's medical treatment; rather, Defendant followed proper  
18 procedures and any delay was the fault of others;

19  
20 2. Plaintiff cannot base an Eighth Amendment deliberate  
21 indifference claim on a showing of negligence; and

22  
23 3. Defendant is entitled to qualified immunity.

24  
25 **STANDARDS GOVERNING MOTION FOR SUMMARY JUDGMENT**

26  
27 Summary judgment is appropriate if the evidence, viewed in the  
28 light most favorable to the nonmoving party, demonstrates that there

1 is no genuine issue of material fact and that the moving party is  
2 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The  
3 party moving for summary judgment bears the initial burden of offering  
4 proof of the absence of any genuine issue of material fact. Celotex  
5 Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party's  
6 burden is met, the party opposing the motion is required to go beyond  
7 the pleadings and, by the party's own affidavits or by other evidence,  
8 designate "specific facts showing that there is a genuine issue for  
9 trial." Fed. R. Civ. P. 56(e); Miller v. Glenn Miller Productions,  
10 Inc., 454 F.3d 975, 987 (9th Cir. 2006). The party opposing the  
11 motion must submit evidence sufficient to establish the elements that  
12 are essential to that party's case, and for which that party will bear  
13 the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. at  
14 322.

15  
16 The Court must "view the facts in the light most favorable to the  
17 non-moving party and draw reasonable inferences in favor of that  
18 party." Scheuring v. Traylor Bros., Inc., 476 F.3d 781, 784 (9th Cir.  
19 2007). Where different ultimate inferences reasonably can be drawn,  
20 summary judgment is inappropriate. Miller v. Glenn Miller  
21 Productions, Inc., 454 F.3d at 988. "At the summary judgment stage,  
22 the court does not make credibility determinations or weigh  
23 conflicting evidence." Porter v. California Dep't of Corrections, 419  
24 F.3d 885, 891 (9th Cir. 2005) (citation omitted).

25  
26 A factual dispute is "genuine" only if there is a sufficient  
27 evidentiary basis upon which a reasonable jury could return a verdict  
28 for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S.

1 242, 248 (1986). A factual dispute is "material" only if it might  
2 affect the outcome of the lawsuit under governing law. Id.

3  
4 "Evidence may be offered 'to support or dispute a fact' on  
5 summary judgment only if it could be presented in an admissible form  
6 at trial." Southern California Darts Ass'n v. Zaffina, 762 F.3d 921,  
7 925-26 (9th Cir. 2014) (citing Fraser v. Goodale, 342 F.3d 1032, 1036-  
8 37 (9th Cir. 2003), cert. denied, 541 U.S. 937 (2004)) (internal  
9 quotations omitted); see also Fonseca v. Sysco Food Servs. of Arizona,  
10 Inc., 374 F.3d 840, 846 (9th Cir. 2004) ("Even the declarations that  
11 do contain hearsay are admissible for summary judgment purposes  
12 because they 'could be presented in an admissible form at trial.'" )  
13 (citations omitted). Purported evidence which "sets out mere  
14 speculation for the critical facts, without a showing of foundation in  
15 personal knowledge[] for the facts claimed to be at issue" is  
16 insufficient. John M. Floyd & Assoc., Inc. v. Tapco Credit Union, 550  
17 Fed. App'x 359, 360 (9th Cir. 2013). Conclusory statements are  
18 insufficient to defeat summary judgment. Comite de Jornaleros de  
19 Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 950 n.9 (9th  
20 Cir. 2011) (en banc), cert. denied, 565 U.S. 1200 (2012).

## 21 22 **EVIDENCE**

### 23 24 **I. Evidentiary Issues**

25  
26 Both parties rely on medical records, including medical progress  
27 notes authored by Defendant. Defendant has submitted medical records  
28 authenticated by the CMC custodian of medical and health records (see

1 Declaration of Tania Daniel in Support of Defendant's Motion for  
2 Summary Judgment). Plaintiff has submitted many of the same records,  
3 and several other medical records, without authentication. Defendant  
4 has not objected to the lack of authentication of Plaintiff's  
5 submissions. The Court will consider all of the documentary evidence  
6 submitted by both parties. See Foster v. Statti, 2013 WL 5348098, at  
7 \*12 (E.D. Cal. Sept. 23, 2013), adopted, 2014 WL 931830 (E.D. Cal.  
8 Mar. 7, 2014) (considering unauthenticated prison medical records on  
9 summary judgment because the documents could be made admissible at  
10 trial); Fryman v. Traquina, 2009 WL 113590, at \*11 n.5 (E.D. Cal.  
11 2009) (overruling foundation objection to prison medical records,  
12 where "it cannot reasonably be disputed that the records in question  
13 are plaintiff's medical records from his prison file," or that "they  
14 are created and maintained by prison officials").

15  
16 The relevance of some of Plaintiff's evidence is limited or  
17 absent. Plaintiff declares that in July and November of 2012,  
18 Plaintiff complained to Defendant about pain and swelling due to  
19 Plaintiff's asserted osteomyelitis (Opposition, Ex. 2). Plaintiff  
20 alleges that, on November 8, 2012, Defendant purportedly called  
21 Plaintiff a liar and said Defendant thought Plaintiff was faking the  
22 pain (id.). Plaintiff alleges that, on March 5, 2013, Defendant told  
23 Plaintiff to stop seeking emergency treatment for the pain (id.). In  
24 his Opposition to the Motion for Summary Judgment, Plaintiff makes  
25 allegations concerning Defendant's asserted misconduct unrelated to  
26 Defendant's alleged failure to send the MRI report and images to Dr.  
27 Kowall, including allegations that Defendant refused to treat  
28 Plaintiff and disagreed with the advice of a specialist, Dr. Griffin



1 (Opposition, pp. 2, 4-5, 9-10, 13-14). These allegations primarily  
2 concern Plaintiff's claim for allegedly inadequate medical treatment  
3 which the Court previously dismissed with prejudice. At issue here is  
4 only the claim of alleged delay in the proper diagnosis and treatment  
5 of Plaintiff's condition after March 5, 2013. The above described  
6 evidence has little or no relevance to this issue.

7  
8 Plaintiff also purports to rely on Defendant's responses to  
9 requests for admissions. However, the responses generally do not  
10 provide probative evidence concerning the issues presented here, and  
11 the Court cannot consider responses purportedly admitting the  
12 genuineness of various documents because Plaintiff has not attached  
13 the referenced documents.

14  
15 A Court may consider a verified complaint to be an affidavit  
16 within the meaning of Fed. R. Civ. P. 56(e) to the extent that the  
17 pleading demonstrates the plaintiff's personal knowledge of factual  
18 matters stated therein. See Schroeder v. McDonald, 55 F.3d 454, 460  
19 (9th Cir. 1995). The Third Amended Complaint is not verified  
20 properly, however. The purported verification attached to the Third  
21 Amended Complaint states simply: "I Joseph Allen Tidwell declare that  
22 the facts are true and correct. June 7 - 16." Under 28 U.S.C.  
23 section 1746, a declaration filed in federal court is procedurally  
24 sufficient if the declaration is signed and subscribed in writing in  
25 substantially the following form: "I declare (or certify, verify, or  
26 state) under penalty of perjury under the laws of the United States of  
27 America that the foregoing is true and correct. Executed on (date)."  
28 Plaintiff's purported verification fails to state that the declaration

1 is made under penalty of perjury, a fatal defect. See In re World  
2 Trade Center Disaster Litigation, 722 F.3d 483, 488 (2d Cir. 2013)  
3 (omission of statement that declaration was made under penalty of  
4 perjury fatal; “[i]nclusion of the language ‘under penalty of perjury’  
5 is an integral requirement of the statute for the very reason that it  
6 impresses upon the declarant the specific punishment to which he or  
7 she is subjected for certifying to false statements”); Nissho-Iwai  
8 American Corp. v. Kline, 845 F.2d 1300, 1306-07 (5th Cir. 1988)  
9 (purported affidavit omitting statement that it was made under penalty  
10 of perjury and that the contents were true and correct insufficient  
11 under section 1746; as drafted, the purported affidavit “allows the  
12 affiant to circumvent the penalties for perjury”); Kersting v. United  
13 States, 865 F. Supp. 669, 676 (D. Haw. 1994) (declaration is  
14 sufficient under section 1746 if it “contains the phrase ‘under  
15 penalty of perjury’ and states that the document is true”).  
16 Nevertheless, the Court has considered the factual allegations in the  
17 Third Amended Complaint and in Plaintiff’s unsworn Opposition, to the  
18 extent it appears Plaintiff could present the factual allegations in  
19 admissible form at trial. See Southern California Darts Ass’n v.  
20 Zaffina, 762 F.3d at 925-26.

21  
22 **II. Summary of Undisputed Evidence Concerning Events Underlying**  
23 **Plaintiff’s Claim**

24  
25 This section consists of a chronological summary of the  
26 undisputed evidence concerning the events underlying Plaintiff’s  
27 claim. The Court also will discuss other evidence in the “Discussion”  
28 section, infra, to the extent other evidence is also pertinent to the

1 analysis.

2  
3 In November of 1996, a doctor diagnosed Plaintiff with  
4 osteomyelitis and prescribed antibiotics (Opposition Ex. U). In  
5 October of 2012, Plaintiff saw Dr. Griffin, a consulting provider, who  
6 recorded that Plaintiff suffered from "[p]ossible chronic  
7 osteomyelitis," but that this diagnosis was "doubtful" given a normal  
8 sedimentation rate and CRP (C-Reactive Protein) (Opposition, Ex. V).  
9 Dr. Griffin said X-rays showed only an old fracture (id.). However,  
10 Dr. Griffin suggested an MRI due to the chronic nature of the problem  
11 and the lack of imaging studies other than an X-ray (id.). Dr.  
12 Griffin suggested referral to an orthopedic surgeon if the MRI was  
13 abnormal (id.).  
14

15 On November 8, 2012, Plaintiff saw Defendant for left clavicle  
16 pain (Opposition, Ex. W). Defendant recorded Dr. Griffin's comments  
17 regarding Griffin's doubtful diagnosis of chronic osteomyelitis  
18 despite normal test results, and mentioned the MRI which Dr. Griffin  
19 "may or may not have ordered" (id.). Defendant declined Plaintiff's  
20 request for Tylenol No. 3 for a "15-year-old fracture," denied a low  
21 bunk chrono, and said no "intervention" was planned (id.). Defendant  
22 stated that he had nothing to offer Plaintiff except Tylenol and  
23 nonsteroidals, which Plaintiff declined because he said they did not  
24 help (id.).  
25

26 Sometime in November of 2012, Plaintiff underwent incision and  
27 debridement of the left clavicle area and received antibiotics (see  
28 Defendant's Ex. K).

1 On December 4, 2012, Plaintiff saw Defendant to discuss the  
2 denial of an MRI (Opposition, Ex. X). Defendant said Plaintiff did  
3 not meet the criteria for an MRI due to tests showing a normal  
4 sedimentation rate, normal C-reactive protein, normal white count and  
5 no evidence of "any chronic inflammation per se" (id.). Defendant  
6 noted that x-rays had been done (id.). Defendant told Plaintiff that  
7 the tests "pretty much ruled out osteomyelitis" and said nothing  
8 further needed to be done, although Defendant did change Plaintiff's  
9 pain medication (id.).

10  
11 Sometime in January 2013, Plaintiff received another course of  
12 antibiotics (see Defendant's Ex. K).

13  
14 On February 11 or 12, 2013 Plaintiff received an MRI, which  
15 apparently had been ordered by a Dr. Campbell (Defendant's Exs. A, C).  
16 The MRI did not exclude osteomyelitis, but did suggest possible  
17 Paget's disease (id.).

18  
19 On February 13, 2013, Plaintiff saw Defendant for a followup  
20 (Defendant's Ex. B). Defendant did not yet have the MRI report and  
21 told Plaintiff that, if Plaintiff had not heard from Defendant by the  
22 next Monday, Plaintiff should make an appointment to see Triage (id.).  
23 Defendant indicated that he was not going to prescribe narcotics  
24 unless the MRI showed an abnormality, in which case an orthopedic  
25 referral "probably would be appropriate" (id.).

26  
27 On February 22, 2013, Plaintiff saw Defendant to discuss the MRI  
28 results (Defendant's Ex. C). After reviewing the MRI report,

1 Defendant recorded that the cause of Plaintiff's pain could not be  
2 determined definitively based solely on the MRI results (Defendant's  
3 Ex. C; Declaration of Paul S. Gallagher in Support of Motion for  
4 Summary Judgment ["Defendant's Dec.," ¶ 5). Defendant believed at  
5 the time that, although the MRI results did not rule out  
6 osteomyelitis, the cause of Plaintiff's pain was likely not  
7 osteomyelitis (Defendant's Dec., ¶ 5). After consultation with Dr.  
8 Barber, an internist, Defendant ordered a bone scan (Defendant's Ex.  
9 C). Defendant concluded that the MRI was unlikely to show a possible  
10 infection but that a bone scan might identify an infection as the  
11 possible cause of Plaintiff's pain (Defendant's Dec., ¶ 5). Defendant  
12 denied Plaintiff's request for narcotics (Defendant's Ex. C). On the  
13 same day, Defendant completed a Physician Request for Services ("RFS")  
14 form requesting a bone scan (Defendant's Ex. D; Defendant's Dec., ¶  
15 6). This request was approved on February 25, 2013 (Defendant's Ex.  
16 D).

17  
18 On March 5, 2013, Plaintiff saw Defendant again (TAC, Ex. F;  
19 Defendant's Ex. E). Defendant explained his assessment of the MRI  
20 report, which indicated cystic-type changes (Defendant's Dec., ¶ 7).  
21 Defendant stated the MRI showed that osteomyelitis could not be ruled  
22 out although Defendant believed osteomyelitis "was not likely" (*id.*).  
23 Defendant reported that a bone scan had been ordered and "should be  
24 done sometime within the next few weeks to 1 month" (Defendant's Ex.  
25 E).

26  
27 On April 3, 2013, Defendant completed another RFS form, again  
28 requesting a bone scan (Defendant's Ex. F). This request was approved

1 on April 4, 2013 (id.). The record does not indicate why the bone  
2 scan initially requested on February 22, 2013 (and approved on  
3 February 25, 2013) had not been performed as of April 3, 2013.  
4

5 The bone scan was performed on April 18, 2013 (Defendant's Ex.  
6 G). The bone scan showed "[m]ild increased activity in the medial  
7 left clavicle" and stated that "[i]n the right setting this could  
8 represent osteomyelitis although is nonspecific [sic]" (id.).  
9

10 On April 29, 2013, Defendant completed an RFS form requesting  
11 consultation with an orthopedist in light of the bone scan results  
12 (Defendant's Ex. H; Defendant's Dec., ¶ 9). This request was approved  
13 on April 30, 2013 (Defendant's Ex. H).  
14

15 Around that time, infectious disease specialist Dr. Daniel Park  
16 began working on Plaintiff's case in order to assist with the  
17 diagnosis of a possible infection (Defendant's Dec., ¶ 11).  
18

19 On May 29, 2013, Plaintiff had an initial consultation with Dr.  
20 Kowall, an orthopedic surgeon (Defendant's Ex. I; Declaration of Mark  
21 Kowall, M.D., in Support of Defendant's Motion for Summary Judgment  
22 ["Kowall Dec."], ¶ 4). Dr. Kowall formed three "preliminary possible  
23 diagnoses: (1) left proximal clavicle closed fracture; (2) subsequent  
24 reported osteomyelitis; and (3) chronic osteomyelitis/sternoclavicular  
25 joint infection" (Kowall Dec., ¶ 4). However, Dr. Kowall recorded  
26 that, because no radiology films were available, he could not evaluate  
27 Plaintiff properly (Defendant's Ex. I). Dr. Kowall requested that CMC  
28 send Plaintiff's MRI images, bone scan images, X-rays and recent

1 culture results to Dr. Kowall for review (Defendant's Ex. J; Kowall  
2 Dec., ¶ 4). Dr. Kowall also requested an infectious disease  
3 consultation with Dr. Park (Kowall Dec., ¶ 4).  
4

5 On June 12, 2013, Dr. Kowall conducted a follow up examination of  
6 Plaintiff (Kowall Dec., ¶ 5). By that time, Dr. Kowall had received  
7 copies of the MRI report and the bone scan report (id.). Even so, Dr.  
8 Kowall made a second request to CMC for the MRI images, bone scan  
9 images, X-rays and culture results (id.; Defendant's Ex. J).  
10

11 By June 25, 2013, Dr. Kowall had reviewed the bone scan images  
12 (Kowall Dec., ¶ 6). Dr. Kowall concluded that the cause of  
13 Plaintiff's pain could not be determined definitively from the MRI and  
14 bone scan, and that a bone biopsy was appropriate to determine whether  
15 the pain was related to a bacterial infection or a non-bacterial  
16 orthopedic problem (id.).  
17

18 On June 28, 2013, at Defendant's request, Plaintiff saw Dr. Park  
19 concerning Plaintiff's "Suspected osteomyelitis" (Defendant's Exs. K,  
20 L; Defendant's Dec., ¶ 11). Dr. Park noted that the MRI had not  
21 excluded a diagnosis of osteomyelitis (Defendant's Ex. K). Dr. Park  
22 diagnosed "possible osteomyelitis of the left clavicle" but said that  
23 the work-up had been complicated by several courses of antibiotics in  
24 the past which could have suppressed infection (id.). However,  
25 Plaintiff reportedly had been off antibiotics for four to five months  
26 and had not suffered any "obvious recurrent infection" (id.). Dr.  
27 Park said that the examination that day was "pretty unremarkable" and  
28 that the MRI and bone scan were "not strongly supportive of infection"

1 (id.). Dr. Park stated that Plaintiff would be monitored clinically  
2 and "we will expedite a work-up for osteomyelitis" (id.). Dr. Park  
3 recorded that it would be better to get cultures and "perhaps even a  
4 bone biopsy" prior to starting antibiotics, and advised Plaintiff not  
5 to start a course of antibiotics without consulting Dr. Park (id.).  
6 Dr. Park also stated that he would try to discuss the case further  
7 with Dr. Kowall, who reportedly had given Plaintiff a "thorough  
8 examination," but who reportedly had not had access to all of  
9 Plaintiff's records or the actual imaging studies (id.).  
10

11 On July 10, 2013, Plaintiff had a follow up appointment with  
12 Defendant (Defendant's Ex. L; Defendant's Dec., ¶ 12). Defendant  
13 recorded that Dr. Kowall had been "unable to make decisions because of  
14 lack of information with none of the imaging studies available to him"  
15 (Defendant's Ex. L). Dr. Kowall reportedly had made suggestions  
16 "which have all been followed up on," one of which had been a  
17 consultation with Dr. Park (id.). Defendant recorded that Dr. Park  
18 "felt that the possibility of an osteomyelitis was there but the  
19 likelihood not high" (id.). Defendant recorded that, on July 1, 2013,  
20 Plaintiff had presented with a draining wound just below the area of  
21 swelling and inflammation of the clavicle that was positive for staph,  
22 and that Plaintiff had started a two-week course of antibiotics (id.).  
23 Defendant said he had asked Dr. Park to see Plaintiff in approximately  
24 two weeks (id.). Defendant assessed Plaintiff as having possible  
25 osteomyelitis and a recurrent staph infection and set a follow up date  
26 of July 23, after Plaintiff had finished the course of antibiotics  
27 (id.).  
28 ///



1 The next day, July 11, 2013, Defendant completed a "Comprehensive  
2 Accommodation Chrono" specifying that Plaintiff should have a bottom  
3 bunk and a left arm sling and stating that Plaintiff had limited use  
4 of his left arm and a 15 pound lifting limit (Defendant's Ex. M;  
5 Defendant's Dec., ¶ 13).

6  
7 On July 24, 2013, Plaintiff saw Dr. Park, after having finished  
8 the course of antibiotics (Defendant's Ex. N). Dr. Park recorded that  
9 Plaintiff would have a bone biopsy performed by Dr. Kowall, and that  
10 Plaintiff would have to stay off antibiotics so that "optimal  
11 cultures" could be obtained from the bone biopsy (id.). On that same  
12 date, Dr. Park completed an RFS form requesting a bone biopsy, noting  
13 that Plaintiff would have to be "off antibiotics" for six weeks prior  
14 to the procedure and that Dr. Park and Dr. Kowall had agreed on this  
15 plan (Defendant's Ex. O). The request was approved the same day  
16 (id.). Dr. Park also told Dr. Kowall that Dr. Park had requested  
17 authorization for a bone biopsy but that, because Plaintiff had  
18 experienced a recurrence of drainage and was taking antibiotics, the  
19 biopsy had to wait until Plaintiff was off antibiotics for six weeks  
20 (id., ¶ 7).

21  
22 On August 20, 2013, Plaintiff saw Dr. Park again (Defendant's Ex.  
23 P). Dr. Park recorded that the doctors were "waiting for the 6-week  
24 timeframe to pass so we can have a bone biopsy that would optimal  
25 yield [sic] and we will follow up with Scheduling to ensure this will  
26 be done" (id.). The six week waiting period reportedly would expire  
27 in two weeks from August 20, 2013 (id.).

28 ///

1 On September 6, 2013, Plaintiff underwent the bone biopsy, which  
2 showed a "light growth" of staph which could have been an contaminant,  
3 but no Paget's disease (Defendant's Ex. Q; Defendant's Dec., ¶ 14).  
4 Plaintiff thereafter was treated "presumptively" with a six-week  
5 course of antibiotics to cover the possibility that he suffered from  
6 mild osteomyelitis or a staph infection (Defendant's Dec., ¶ 14).

7  
8 On September 11, 2013, Plaintiff saw Dr. Park for a follow up  
9 visit (Defendant's Ex. R). Dr. Park recorded that the infection would  
10 be treated with high dose oral antibiotics for eight weeks (id.).

11  
12 On September 18, 2013, Dr. Kowall emailed Dr. Park regarding the  
13 biopsy (Kowall Dec., ¶ 8). The result of the biopsy was consistent  
14 with degenerative subluxation of sternoclavical joint (id.). There  
15 was also some bacteria in the specimen, revealing a potential  
16 bacterial infection (id.).

17  
18 Plaintiff saw Dr. Park again on September 19, 2013 (Defendant's  
19 Ex. S). Dr. Park had communicated with Dr. Kowall and the two doctors  
20 agreed there was "no indication for orthopedic intervention with  
21 debridement" (id.). Dr. Park opined that Plaintiff had "a high  
22 likelihood of cure with oral antibiotics" (id.).

23  
24 On October 9, 2013, Plaintiff saw Dr. Park again (Defendant's Ex.  
25 T). Plaintiff's CRP had normalized and the swelling had resolved,  
26 although Plaintiff reported some pain and clicking around the  
27 sternoclavicular joint (id.). Dr. Park said he would order an X-ray  
28 to make sure there was no dislocation (id.).

1 Plaintiff saw Defendant again on December 2, 2013 (TAC, Ex. J).  
2 By that time, Plaintiff had finished his full course of antibiotic  
3 therapy (id.). Plaintiff did not have a sling, but complained about  
4 pain and wanted surgery to "clean out" the shoulder area of bone spurs  
5 and other debris (id.). Defendant referred Plaintiff for physical  
6 therapy (id.).  
7

## 8 DISCUSSION

9

10 Prison officials can violate the Constitution if they are  
11 "deliberately indifferent" to an inmate's serious medical needs. See  
12 Farmer v. Brennan, 511 U.S. 825, 834 (1994); Estelle v. Gamble, 429  
13 U.S. 97, 104 (1976). To be liable for "deliberate indifference," a  
14 jail official must "both be aware of facts from which the inference  
15 could be drawn that a substantial risk of serious harm exists, and he  
16 must also draw the inference." Farmer v. Brennan, 511 U.S. at 837.  
17 "[A]n official's failure to alleviate a significant risk that he  
18 should have perceived but did not, while no cause for commendation,  
19 cannot . . . be condemned as the infliction of punishment." Id. at  
20 838. Allegations of negligence do not suffice. Estelle v. Gamble,  
21 429 U.S. at 105-06; Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir.  
22 2000) (en banc). Thus, inadequate treatment due to accident, mistake,  
23 inadvertence, or even gross negligence does not amount to a  
24 constitutional violation. Estelle v. Gamble, 429 U.S. at 105-06;  
25 Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004). "[A]n  
26 official's failure to alleviate a significant risk that he should have  
27 perceived but did not, while no cause for commendation, cannot . . .  
28 be condemned as the infliction of punishment." Farmer v. Brennan, 511

1 U.S. at 838.

2  
3 Defendant does not dispute that Plaintiff's condition presented a  
4 serious medical need. See McGuckin v. Smith, 974 F.2d 1050, 1059 (9th  
5 Cir. 1992) ("A 'serious' medical need exists if the failure to treat a  
6 prisoner's condition could result in further significant injury or the  
7 'unnecessary and wanton infliction of pain.'"), overruled on other  
8 grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133 (9th Cir.  
9 1997) (citation omitted); Lopez v. Smith, 203 F.3d at 1131 (examples  
10 of "serious medical needs" include "a medical condition that  
11 significantly affects an individual's daily activities," and "the  
12 existence of chronic and substantial pain"; citation and internal  
13 quotations omitted); Conroy v. Avalos, 2010 WL 1268150, at \*4 (D.  
14 Ariz. Mar. 30, 2010) (finding that reasonable jury could conclude  
15 osteomyelitis is a "serious medical need"); Osbey v. Health  
16 Professionals Ltd., 2009 WL 175041, at \*10 (C.D. Ill. Jan. 22, 2009)  
17 ("Plaintiff's osteomyelitis is clearly a serious medical need").  
18

19 Prison officials may demonstrate deliberate indifference when  
20 they "deny, delay, or intentionally interfere with medical treatment."  
21 Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir. 2014) (citation  
22 omitted). However, negligent delays do not violate the Constitution.  
23 Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1988) (negligent delays  
24 in administering pain medication do not violate the Constitution).  
25 Furthermore, a deliberate indifference claim based on alleged delay in  
26 medical treatment is not cognizable unless the delay caused harm to  
27 the plaintiff. See Berry v. Bunnell, 39 F.3d 1056, 1057 (9th Cir.  
28 1994); Shapley v. Nevada Bd. of State Prison Commissioners, 766 F.2d

1 404, 407 (9th Cir. 1985). Plaintiff must show that Defendant's act or  
2 omission caused the alleged constitutional deprivation. See Redman v.  
3 County of San Diego, 942 F.2d 1435, 1454 (9th Cir. 1991) (en banc),  
4 cert. denied, 502 U.S. 1074 (1992), abrogated in part on other  
5 grounds, Farmer v. Brennan, 511 U.S. 825 (1994); Leer v. Murphy, 844  
6 F.2d 628, 633 (9th Cir. 1988).

7  
8 The undisputed evidence shows that Plaintiff received the MRI on  
9 February 11, 2013, and that Defendant had the MRI report, at least, by  
10 February 22, 2013. On that date, Defendant ordered the bone scan,  
11 which Defendant thought would occur within a few weeks to a month.  
12 When the bone scan apparently did not occur during that time period,  
13 Defendant sent another RFS for a bone scan on April 3. As indicated  
14 above, the record does not indicate why the bone scan initially  
15 requested on February 22 had not been performed as of April 3.  
16 Plaintiff has produced no evidence to show that this delay was the  
17 fault of Defendant.

18  
19 In his Third Amended Complaint, Plaintiff asserts in conclusory  
20 fashion that Defendant purportedly delayed providing the MRI results  
21 to Dr. Kowall (see TAC, "D. Claims" attachment, pp. 1-2). In his  
22 Opposition, Plaintiff adds allegations that Defendant purportedly also  
23 delayed sending "other reports" to Dr. Kowall, including the results  
24 of the bone scan (Opposition, pp. 3, 6, 8). Because these new  
25 allegations, which concern other delays in sending other reports, are  
26 not pleaded in the Third Amended Complaint, the Court need not  
27 consider the allegations. See Ward v. Clark County, 285 Fed. App'x  
28 412, 413 (9th Cir. 2008) (district court did not err in granting

1 summary judgment on claim which plaintiff did not allege in her  
2 pleading but only in her opposition to summary judgment; “[a] party  
3 may not circumvent [Federal Rule of Civil Procedure] Rule 8’s pleading  
4 requirements by asserting a new allegation in response to a motion for  
5 summary judgment”). In any event, as discussed below, Plaintiff has  
6 failed to submit evidence that any alleged delay in sending the bone  
7 scan results to Dr. Kowall caused any harm to Plaintiff.

8  
9 Defendant contends he did not intentionally fail to send the MRI  
10 report or other documents to Dr. Kowall or prevent the documents from  
11 reaching Dr. Kowall. Defendant has submitted the declaration of  
12 Christine Britton, a CMC Senior Radiologic Technician who assertedly  
13 has knowledge of the policies and procedures concerning the processing  
14 of RFS forms at CMC (see Declaration of Christine Britton in Support  
15 of Motion for Summary Judgment). According to Britton, after an  
16 institutional physician issues an RFS, the Utilization Management  
17 Department enters the RFS into the computer for review by “Sacramento”  
18 (id., ¶ 5). Upon approval, the RFS is processed for review and  
19 approval by either the CMC Chief Medical Officer or the Chief  
20 Physician and Surgeon (id.). Once approved, the RFS is forwarded to  
21 an “offsite handler” for handling and the coordination of logistics  
22 necessary to carry out the requested medical service, including  
23 arrangement for transportation to an off-site medical provider if  
24 requested (id., ¶¶ 6-7). The “out to medical nurse” reviews the  
25 medical record and requests that any of the patient’s relevant  
26 documents, such as medical records, test results, radiological images  
27 and reports be sent to the off-site provider (id., ¶ 8). The  
28 “scheduler” makes that request to the California Department of

1 Corrections and Rehabilitation Images and Records Center located in  
2 Sacramento or directly to the medical facility or laboratory where the  
3 images or documents initially were generated (id.). Thus, Defendant  
4 contends that any delay in the provision of the MRI report or other  
5 documents to Dr. Kowall was attributable to CMC staff, and not to  
6 Defendant.

7  
8 Nothing submitted by Plaintiff conflicts with Defendant's  
9 contention that any delay in the provision of documents to Dr. Kowall  
10 was attributable to persons other than Defendant. Plaintiff submitted  
11 pages purportedly from a "Patient Health Care Education Policy" of  
12 California Correctional Health Care Services concerning "Outpatient -  
13 Specialty Services" (Opposition, Ex. 1). Plaintiff has marked the  
14 sections providing that: (1) the primary care physician shall inform a  
15 patient of the plan for specialty services including "a general time  
16 frame" of expected service delivery; (2) if a speciality service is  
17 rescheduled the primary care physician must notify the patient;  
18 (3) with exceptions, the primary care physician should review a  
19 consultant's report of a routine consult within three business days;  
20 (4) follow up appointments with the speciality provider may occur  
21 according to the indicated time frame only with the approval of the  
22 primary care physician unless that physician documents a reason for  
23 another time; (5) at the follow up appointment with the primary care  
24 physician, the physician shall discuss the specialty provider's  
25 findings and recommendations and complete an RFS for each service  
26 recommended by the specialty provider; (6) for follow up visits  
27 requested by the specialist, the primary care physician is responsible  
28 to determine the need for such a visit and must document a reason for

1 using an alternative strategy; and (7) the primary care physician  
2 shall write orders for follow up with the speciality and diagnostic or  
3 other testing (Opposition, Ex. 1). None of Plaintiff's evidence  
4 controverts Defendant's evidence that: (1) the RFS is forwarded to an  
5 off-site handler for coordination of logistics necessary to carry out  
6 the requested medical service; (2) an "out to medical nurse" reviews  
7 the medical record and sends a request to have documents such as  
8 medical records, test results and radiological images sent to the off-  
9 site provider; and (3) a "scheduler" makes the actual request to the  
10 Sacramento Images and Records Center or to the facility which  
11 generated the documents.

12  
13 Therefore, the uncontroverted facts show that Defendant was not  
14 responsible for the delay in Dr. Kowall's receipt of the MRI results  
15 or other documents, and hence cannot be deemed to have been  
16 deliberately indifferent in the manner alleged by Plaintiff. See  
17 McGuckin v. Smith, 974 F.2d at 1062 (affirming summary judgment for  
18 defendant doctors where there was no evidence that either doctor was  
19 responsible for the failure promptly to perform a CT scan on plaintiff  
20 or to schedule diagnostic examinations; rather, the evidence suggested  
21 that other prison personnel scheduled surgical treatments and were  
22 charged with ensuring that surgeries occurred promptly); see also  
23 Wright v. Swingle, 482 Fed. App'x 294, 295 (9th Cir. 2012) (affirming  
24 summary judgment for defendant, where plaintiff "failed to raise a  
25 genuine issue of material fact as to whether defendants were involved  
26 in or had any control over ordering and stocking prescription  
27 medication and thus were responsible for its delay") (citations  
28 omitted);



1 Furthermore, Defendant has presented uncontradicted evidence that  
2 any delay in providing the MRI results to Dr. Kowall did not delay the  
3 biopsy or the subsequent antibiotic treatment. The medical evidence  
4 shows that Defendant requested consultation with an orthopedist on  
5 April 29, 2013, that a request approved on April 30, 2013, and that  
6 Dr. Kowall examined Plaintiff a month later, on May 29, 2013. The  
7 record does not indicate the reason for the month-long delay before  
8 Plaintiff saw Dr. Kowall, but Plaintiff has submitted no evidence  
9 suggesting that this delay was attributable to any act or omission by  
10 Defendant.

11  
12 Dr. Kowall did not have the MRI report or films when he examined  
13 Plaintiff on May 29. However, the undisputed evidence shows that Dr.  
14 Kowall did have the MRI report and the bone scan report (if not the  
15 films) without significant delay. Dr. Kowall had these reports by the  
16 time of the June 12, 2013 examination of Plaintiff.

17  
18 It is true that the bone scan, first ordered by Defendant on  
19 February 22, did not occur until April 18. However, Plaintiff has  
20 produced no evidence from which it could be reasonably inferred that  
21 Defendant was responsible for this delay. Although Defendant ordered  
22 the bone biopsy on July 24 and the biopsy did not occur until  
23 September 6, the evidence shows that the bone biopsy was delayed for a  
24 medically legitimate reason: Plaintiff needed to finish a course of  
25 antibiotics and wait for six weeks thereafter before the biopsy could  
26 occur. Thus, there is no evidence from which it could be reasonably  
27 inferred that Defendant was responsible for the delay in Plaintiff's  
28 receipt of either the bone scan or the bone biopsy.

1           Moreover, according to Dr. Kowall, while MRI images and reports  
2 generally are helpful in the diagnosis of orthopedic conditions and  
3 injuries, an MRI does not provide a definitive diagnosis of a  
4 bacterial bone infection (Kowall Dec., ¶ 9). Dr. Kowall states that,  
5 as the bone biopsy revealed, Plaintiff had a bacterial infection, for  
6 which a course of oral antibiotics was the appropriate treatment, not  
7 surgical intervention (id.). Dr. Kowall states that, even if Dr.  
8 Kowall had received the actual MRI images to review during his initial  
9 evaluations of Plaintiff, Dr. Kowall would not have been able to  
10 diagnose the bacterial infection and recommend an appropriate course  
11 of treatment without the bone biopsy (id.). Therefore, Dr. Kowall's  
12 inability to review the MRI images and report during his first  
13 evaluation of Plaintiff, and his inability to review the MRI images  
14 during his second evaluation of Plaintiff, did not delay Plaintiff's  
15 diagnosis or the treatment of the bacterial infection (id.).  
16 According to Dr. Kowall, the definitive diagnosis, and the treatment,  
17 had to await the results of the bone biopsy (id.). Plaintiff has not  
18 submitted any evidence to controvert the content of Dr. Kowall's  
19 declaration.

20  
21           In sum, Plaintiff has failed to produce evidence sufficient to  
22 raise a genuine issue of fact concerning his allegation that  
23 Defendant, with deliberate indifference, materially delayed the  
24 transmittal to Dr. Kowall of the MRI results or other medical records.  
25 Plaintiff also has failed to produce evidence sufficient to raise a  
26 genuine issue of fact regarding whether Plaintiff suffered any harm as  
27 a result of any such delay. Any evidence purportedly showing medical  
28 negligence committed by Defendant is insufficient to show



1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of  
3 Appeals, but may be subject to the right of any party to file  
4 objections as provided in the Local Rules Governing the Duties of  
5 Magistrate Judges and review by the District Judge whose initials  
6 appear in the docket number. No notice of appeal pursuant to the  
7 Federal Rules of Appellate Procedure should be filed until entry of  
8 the judgment of the District Court.

9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28