



1 Zamora,” and Does “for J. Lewis;” (2) deliberate indifference to a serious medical need in  
2 violation of the Eighth Amendment against Defendants Bingamon, Tate, Vu, Shiesha, Joaquin,  
3 Does “for L.D. Zamora,” Baniga, Longcrier and Does for “J. Lewis.” (ECF No. (hereinafter  
4 “Doc.”) 84.) On April 19, 2016, the Court granted Defendants’ motion for summary judgment  
5 for failure to exhaust in part and dismissed certain claims.<sup>1</sup> The motion related only to events  
6 prior to May 28, 2013, and the following claims survived: (1) Plaintiff’s deliberate indifference  
7 claim against Defendant Tate related to the December 2, 2010, visit; (2) Plaintiff’s deliberate  
8 indifference claim against Defendant Vu related to his refusals (prior to May 28, 2013) to send  
9 Plaintiff for an MRI; and (3) Eighth Amendment deliberate indifference claim and First  
10 Amendment retaliation claim for events post May 28, 2013. Plaintiff also asserted state law  
11 negligence claims against Defendants Vu, Tate, Shiesha, Baniga, Joaquin, and DOES.

12 On April 15, 2016, Defendants filed a motion to dismiss the claims in the FAC related to  
13 events after May 28, 2013. On June 6, 2016, Plaintiff filed an opposition to the motion to  
14 dismiss. (ECF No. 122.) In conjunction with his opposition, on June 6, 2016, Plaintiff filed a  
15 Motion to Amend his First Amended Prisoner Civil Rights Complaint, which Plaintiff later  
16 withdrew. (Doc. 123.) Then on August 15, 2016, Plaintiff filed a Second Motion to Supplement  
17 the First Amended Complaint (“Second Motion”). (Doc. 133.) The Court denied the Second  
18 Motion to Supplement the First Amended Complaint.<sup>2</sup>

19 Now pending is Defendants’ Motion to Dismiss. (Doc. 109.) Plaintiff opposed the motion  
20 and Defendants replied. (Doc. 122, 125.) On July 5, 2016, Plaintiff filed a further response to  
21 Defendants’ Motion to Dismiss. (Doc. 128.) Defendants then filed a Motion to Strike Plaintiff’s  
22 unauthorized surreply. The Motions to Dismiss and to Strike are submitted on the papers. Local  
23 Rule 230(1).

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26 <sup>1</sup> After Defendants had filed their motion for summary judgment for failure to exhaust, the Court granted Plaintiff  
27 leave to file an amended complaint asserting certain claims on August 25, 2015. Plaintiff filed his First Amended  
28 Complaint on October 19, 2015.

<sup>2</sup> That order denying Plaintiff’s Second Motion to amend the first amended complaint is filed concurrently with this order.

1 **II. Plaintiff's Surreply**

2 As noted above, Defendants filed a motion to dismiss the first amended complaint.  
3 Plaintiff responded (ECF No. (hereinafter "Doc.") 122.) and Defendant replied (Doc. 125.).  
4 Thereafter, on July 5, 2016, Plaintiff filed a response to Defendant's reply. (Doc. 128.)  
5 Defendants move the Court to strike Plaintiff's unauthorized surreply filed on July 5, 2016 (Doc.  
6 128) regarding Defendants' motion to dismiss Plaintiff's First Amended Complaint. This Court's  
7 Local Rules provide for a motion, an opposition, and a reply. Local Rule 230(1). Neither the  
8 Local Rules nor the Federal Rules of Civil Procedure provide the right to file a response to a  
9 reply. *See, e.g., Wyatt v. Zanchi*, No. 1:09-cv-01242 BAM PC, 2011 WL 5838438, at \*5 (E.D.  
10 Cal. Nov. 21, 2011). In this case, the Court neither requested a response to Defendants' reply nor  
11 granted a request on Plaintiff's behalf to file such a response. Accordingly, the Court will  
12 recommend that Plaintiff's response to Defendants' reply be stricken from the record and not  
13 considered for purposes of the motion to dismiss.

14 **III. Discussion**

15 **A. Legal Standard for Motion to Dismiss Under Fed. R. Civ. P. 12(b)(6)**

16 Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to dismiss for  
17 "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In  
18 considering a motion to dismiss under Rule 12(b)(6), the court must accept as true the allegations  
19 of the complaint in question, *Erickson v. Pardus*, 551 U.S. 89 (2007), and construe the pleading  
20 in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Meek*  
21 *v. County of Riverside*, 183 F.3d 962, 965 (9th Cir. 1999).

22 In general, pro se pleadings are held to a less stringent standard than those drafted by  
23 lawyers. *Haines v. Kerner*, 404 U.S. 519, 520 (1972). The court has an obligation to construe  
24 such pleadings liberally. *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (*en banc*).  
25 Nevertheless, to survive dismissal for failure to state a claim, a pro se complaint must contain  
26 more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements  
27 of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007). A claim upon  
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1 which the court can grant relief must have facial plausibility. *Id.* at 570. “A claim has facial  
2 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable  
3 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662,  
4 678 (2009).

5 **B. Summary of Relevant Allegations in First Amended Complaint**

6 Plaintiff injured his left shoulder in a fall in the shower on or about July 21, 2010. He felt  
7 a painful tear in his left shoulder when he fell. He reported the pain to several treating physicians  
8 at California Correctional Institution (“CCI”) where Plaintiff was housed at the time. As relevant  
9 to the allegations, Plaintiff repeatedly attempted to get treatment for the pain and injury. On or  
10 around December 2, 2010, Plaintiff saw Defendant Tate. Defendant Tate told Plaintiff that he  
11 hated whiners and inmates who told doctors what to do, and that an MRI wasn’t worth the five  
12 dollars that it would cost Plaintiff. He told Plaintiff that he should learn to live with the pain and  
13 that if he continued to complain, he would cancel the MRI. The response from Tate was similar  
14 from all defendants. Plaintiff could not get adequate and necessary treatment, and the care he did  
15 receive was more harmful than helpful. Plaintiff was seen by Defendant Vu on January 24, 2012,  
16 after he further injured his shoulder while performing the recommended exercises. He requested  
17 stronger pain medication and an MRI because the injections were making his shoulder worse.  
18 Defendant Vu told Plaintiff that he (Plaintiff) was not a doctor, and that he would continue to  
19 treat him pursuant to policy even if the injections were not working. Plaintiff continued to seek  
20 medical care for his shoulder injury and had been prescribed morphine but had difficulty  
21 functioning on the medication. All of the treatment he received was medically inadequate.  
22 Plaintiff submitted numerous health care appeals relating to interfering with medical care and  
23 inadequate medical care to Defendants Shiesha, Longcrier, Baniga and they refused to correct  
24 misconduct and provide adequate medical care for Plaintiff’s known shoulder injury. He was  
25 retaliated against for submitting numerous grievances. From May 2013 through 2014, Plaintiff  
26 continued to file numerous grievances seeking medical attention but the treatment was never  
27 provided and Plaintiff remained in pain with his shoulder atrophying. Plaintiff alleges state law  
28 negligence claims against Defendants Vu, Tate, Shiesha, Baniga, Jane Does 1-3, John Doe, L.D.

1 Zamora, J. Lewis. (Doc. 81 ¶ 228-232.)

2 **C. Defendants' Motion to Dismiss**

3 **1. Defendants' Arguments** (Doc. 109, 125)

4 Plaintiff's state claims must be dismissed because Plaintiff admits he failed to comply  
5 with the Government Claims Act. Plaintiff did not timely file a claim with the Victim  
6 Compensation and Government Claims Board ("VCGCB") and his petition to file a late claim  
7 was denied. State law claims must therefore be dismissed.

8 Defendants also argue the Plaintiff fails to state a claim for deliberate indifference. The  
9 relevant allegations to the pending claims are those acts after May 28, 2013. (Doc. 81 ¶188.)  
10 Plaintiff complains of a prescription of Naproxen as ineffectual for pain management. Pain  
11 prescription is not in conscious disregard of an excessive risk to Plaintiff's health. (Doc. 125  
12 p.3.)<sup>3</sup> Plaintiff further has not identified which of the many defendants he seeks to hold liable for  
13 prescribing Naproxen.

14 Plaintiff cannot state a claim based upon his prison grievances. The remainder of events  
15 after May 28, 2103 in the first amended complaint is related to Plaintiff's prison grievances.  
16 Interviewing and examination an inmate in response to a medical grievance is not deliberate  
17 indifference. Plaintiff cannot state a claim for retaliation because defendants partially granted  
18 and/or denied his prison grievances. A failure to grant a grievance to the inmate's satisfaction  
19 cannot form the basis of a constitutional claim.

20 Defendants also argue that they are entitled to qualified immunity. Defendants would not  
21 have been on notice that changing Plaintiff's pain medication to Naproxen to accommodate his  
22 requirement to not take morphine would subject them to liability. (Doc. 125 p.7:18-20.) Also,  
23 Defendants would not have believed that reviewing and evaluating grievances would subject  
24 them to violation of Eighth Amendment rights.

25 **2. Plaintiff's Opposition**

26 Plaintiff argues that the Court must accept the material facts alleged in the complaint as  
27 true. Plaintiff states that from the exhibits attached to the complaint, the Court "can draw on all

28 <sup>3</sup> Page references to filed documents reflect the court's electronic pagination when docketed in the court's Case Management/Electronic Case Files (CM/ECF) system, not the original pagination of the filed documents.

1 or some to decide whether Plaintiff has sufficiently stated a claim.” (Doc. 122 p. 11.) Defendants  
2 Shiesha and Longcrier ignored evidence in the 602 (CCI-HC-14035914) which shows their  
3 deliberate indifference. (Doc. 122 p. 12.) Plaintiff alleges that Defendant U. Baniga was  
4 deliberately indifferent when he reviewed Plaintiff’s file and appeal and ignored the evidence  
5 attached to the appeal; chose to accept the statement of Defendant Tate; and failed to correct  
6 known misconduct of others. (Doc. 122 p. 12.)

7 Plaintiff’s allegations are sufficient for retaliation. The Court has screened the FAC and  
8 found cognizable claims for retaliation. Defendants’ medical treatment of Plaintiff did not  
9 change, no matter how bad Plaintiff’s pain, how worse his condition got, they retaliated for  
10 Plaintiff filing numerous grievances to “deny diagnosis, refusal to change their course of  
11 treatment; the more medical slips and grievances [plaintiff] submitted, the more opposed to  
12 investigating the cause of his pain defendants were.” (Doc. 122 p. 15-16.) Plaintiff argues that  
13 the reviewers (Shiesha, Joaquin, Baniga and Longcrier) of his grievances, medical slips, and  
14 forms retaliated against him by refusing to perform their duties of investigation and acting on the  
15 evidence, making them equally responsible. (Doc. 122 p.17-18.)

16 Plaintiff states that “government officials’ act under ‘color of law’ (like custody staff)  
17 medical staff do not.”<sup>4</sup> (Doc. 122 p. 19) Officials are not entitled to immunity for inadequate  
18 medical care and refusal to provide care. Plaintiff recites how the care was inadequate over 29  
19 months. (Doc. 122 p. 19-21.)

20 Plaintiff opposes dismissal of this state law claims because he contends he complied with  
21 the Government Claims Act. Plaintiff submitted his claim to the Board based upon the continual  
22 violations doctrine as the violations continue and are ongoing. (Doc. 122 p. 25.)

#### 23 **D. Dismissal of State Law Claims**

24 The Court addressed the timeliness of Plaintiff’s state law claims in an order denying  
25 Plaintiff’s second motion to amend. Under the Government Claims Act, set forth in California

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26 <sup>4</sup> Plaintiff states that medical staff was not acting “under color of law.” However, a plaintiff must show that a  
27 defendant “acted under color of law” to present a viable §1983 claims. *West v. Atkins*, 487 U.S. 42, 48 (1988) (To  
28 state a claim under § 1983, a plaintiff “must allege a violation of a right secured by the Constitution and laws of the  
United States, and must show that the alleged deprivation was committed by a person acting under color of state  
law.”) The Court disregards Plaintiff’s statement in his opposition that medical staff was not acting under color of  
law, because it is clear that the FAC seeks to assert a §1983 claim against medical staff.

1 Government Code sections 810 et seq., a plaintiff may not bring a suit for monetary damages  
2 against a public employee or entity unless the plaintiff first presented the claim to the California  
3 Victim Compensation and Government Claims Board (“VCGCB” or “Board”), and the Board  
4 acted on the claim, or the time for doing so expired. Failure to demonstrate such compliance  
5 constitutes a failure to state a cause of action and will result in the dismissal of state law claims.  
6 *State of California v. Superior Court (Bodde)*, 32 Cal.4th 1234, 1240 (2004).

7 As stated in the Court’s Order Denying Plaintiff’s Second Motion to Amend, Plaintiff has  
8 failed to comply with the California Government Claims Act. Failure to file a claim within the  
9 statute of limitations provided by the Government Claims Act is grounds for dismissal of the  
10 claims. Gov’t. Code § 945.6. Claims filed beyond the six-month period to be time-barred.

11 Plaintiff did not timely comply with the Government Claims Act. As also noted in the  
12 Order Denying Plaintiff’s Second Motion to Amend, the Court took judicial notice of the certified  
13 copies of Plaintiff’s VCGCB claim file. (See Doc. 110, p. 4-18.)<sup>5</sup> The judicially noticed  
14 documents show that Plaintiff failed to file a timely claim, and the Board also rejected Plaintiff’s  
15 request to file a late claim. Accordingly, Plaintiff has failed to comply with the Government  
16 Claims Act. Therefore, the state law claims must be dismissed.

17 **E. Motion to Dismiss Deliberate Indifference Claims based on the Allegation of**  
18 **“Naproxen” treatment and Plaintiff’s Prison Grievances**

19 **1. Naproxen Medication**

20 Defendants argue the allegations do not support a deliberate indifference claim for  
21 changing Plaintiff’s pain medication to Naproxen.

22 Having screened the complaint, and partially granting summary judgment and  
23 recommending dismissal of the state law claims, the Court is disinclined to tax its overburdened  
24 resources to address isolated attacks to allegations. (Defendant’s Motion, Doc. 125 p. 3.)

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25 <sup>5</sup> The documents consist of the following. A Government Claim Form, stamped received by the State of California  
26 Government Claims Program, on May 19, 2015. The claim form was given number 624711 and bears a signature,  
27 with a printed name adjacent, of “Michael J. Payan.” (Doc. 110, p.12-13.) A letter from the Victim Compensation  
28 and Government Claims Board dated June 2, 2015 stating that the “Claim G624711 for Michael J. Payan, T08858” is  
untimely. (Doc. 110 p. 10.) A letter from VCGCB dated July 21, 2015 rejecting Michael Payan’s application for  
leave to present a late claim. (Doc. 110, p.7.) That rejection was affirmed at Board meeting on August 20, 2015 and  
Michael Payan was notified by letter dated August 28, 2015. (Doc. 110 p.6.)

1 Accordingly, the Court declines to rule on the single allegation found at ¶188 of Plaintiff's FAC:  
2 "Plaintiff continued to seek medical care for the severe shoulder pain during this time submitting  
3 request CDC 7362 (11-14-13) #773891, CDC 7362 #0051772 as Defendants refusal to provide  
4 adequate pain medication and prescribed medications (Naproxen) which had proved to be  
5 ineffective to manage Plaintiff's pain as they had previously been prescribed initially." The Court  
6 reads this allegation as not seeking to independently establish deliberate indifference, but to show  
7 the course of conduct that medical treatment was ineffective for a prolonged period of time. The  
8 Court recommends the motion to dismiss on this allegation be denied.

## 9 **2. Grievance Review**

10 Defendants seek to dismiss the prison grievance claims as not supporting a claim for  
11 deliberate indifference.

12 The allegations concerning defendants' actions in reviewing and/or denying grievance do  
13 not typically state a claim of deliberate indifference. *See Ramirez v. Galaza*, 334 F.3d 850, 861  
14 (9th Cir. 2003) ("Inmates lack a separate constitutional entitlement to a specific prison grievance  
15 procedure."). Prison grievance procedure is procedural right that does not give rise to protected  
16 liberty interest. *Id.*

17 Plaintiff has not merely complained that the Defendants reviewed or denied his inmate  
18 appeal. Rather, plaintiff has alleged that he put the reviewing defendants on notice through the  
19 inmate appeals process, establishing knowledge, that Plaintiff had ongoing serious medical  
20 conditions and was not receiving proper care. *See Jett v. Penner*, 439 F.3d 1091, 1098 (9th Cir.  
21 2006) (prisoner's letter to administrator alerting him to constitutional violation sufficient to  
22 generate genuine issue of material fact as to whether administrator was aware of violation):  
23 *Edwards v. Hsieh*, 2016 WL 1604762, at \*2 (E.D. Cal. Apr. 22, 2016), report and  
24 recommendation adopted, 2016 WL 3356279 (E.D. Cal. June 16, 2016) (These allegations are  
25 sufficient to state a claim against this defendant because plaintiff alleges that the defendant's  
26 response to his inmate appeal amounted to a refusal to provide him with adequate medical care in  
27 keeping with Eighth Amendment standards). Plaintiff argues (Doc. 122) Defendant Shiesha,  
28 Bingamon, Longcrier, Baniga, J. Lewis purposely ignored evidence in the 602s, failed to review

1 evidence and the medical file, and misrepresented the medical history. Plaintiff is not seeking  
2 liability for deliberate indifference in the handling of the grievances but to show that these  
3 defendants had knowledge of a serious medical risk for which they were indifferent. Plaintiff  
4 states sufficient facts at the pleading stage.<sup>6</sup>

#### 5 F. Retaliation

6 Defendants argue that whether Vu, Bingamon, Shiesha, Joaquin, Baniga, and Longcrier  
7 partially granted or denied Plaintiff's prison grievances for alternative forms of treatment or  
8 testing fails to state a claim for retaliation.

9 Defendants are correct that there is no protected interest in a grievance process. *Mann v.*  
10 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988); *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003).  
11 However, Prisoners have a First Amendment right to pursue civil rights litigation in the court.  
12 *Rhodes v. Robinson*, 408 F.3d 559, 567 (9<sup>th</sup> Cir. 2005). Prisoners may not be retaliated against for  
13 exercising their right of access to the courts, and this extends to established prison grievance  
14 procedures. *Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir.1995), *overruled on other grounds by*  
15 *Shaw v. Murphy*, 532 U.S. 223, 230 n. 2, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001)).

16 “Within the prison context, a viable claim of First Amendment retaliation entails five  
17 basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2)  
18 because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's  
19 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate  
20 correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *accord Watison v.*  
21 *Carter*, 668 F.3d 1108, 1114-15 (9th Cir. 2012); *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir.  
22 2009).

23 Defendants argue that the FAC fails to allege any adverse action taken against Plaintiff or  
24 that any action was taken because of his grievances. (Doc. 109-1 p. 19-20.) Defendants also  
25 argue that the FAC fails to allege that Plaintiff was chilled in his rights or that the actions taken  
26 by Defendants were not for a legitimate correctional purpose. Defendants Drs. Shiesha, Joaquin,

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27 <sup>6</sup> The Court does not address whether Plaintiff will be able to prove these facts at trial. In determining whether  
28 dismissal is proper under Rule 12(b)(6), the Court may properly consider documents attached to the complaint,  
without converting the motion to one for summary judgment. *Parks School of Bus., Inc. v. Symington*, 51 F.3d 1480  
1484 (9th Cir. 1995).

1 and Baniga, and CEO Longcrier argue they should be dismissed because the FAC merely alleges  
2 they “equally responsible” for retaliation by failing to intervene and remedy Plaintiff’s medical  
3 issues. (Doc. 109-1 p. 21.)

4 Plaintiff argues that his treatment remained the same no matter how much his condition  
5 worsened and for four years. The more he filed “the multitude of grievances,” the more the  
6 defendants were opposed to investigating the cause of Plaintiff’s pain and the more unwilling to  
7 change the course of harmful steroid injections and inadequate medical care. (Doc. 122 p. 15-16.)  
8 Plaintiff alleges that because of his 602 grievances all medical care was withheld, denied or  
9 cancelled.

10 Regarding Plaintiff’s failure to plead a specific adverse action, “[t]he adverse action need  
11 not be an independent constitutional violation.” *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir.  
12 2012). For instance, an allegation by an inmate that he was transferred to another prison or  
13 placement because he engaged in protected conduct may state a cause of action for retaliation,  
14 even though the prisoner has no constitutionally-protected liberty interest in being held at or  
15 remaining at a particular facility. *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Other  
16 actions include: arbitrarily confiscating and destroying an inmate’s property and initiating a  
17 transfer to another prison (*Rhodes v. Robinson*, 408 F.3d 559, 568 (9th Cir. 2005)); placing an  
18 inmate as a gang member based on evidence previously deemed insufficient (*Bruce v. Ylst*, 351  
19 F.3d 1283, 1287–1288 (9th Cir. 2003)); filing a false disciplinary report (*Hines v. Gomez*, 108  
20 F.3d 265, 267–268 (9th Cir. 1997)); and labeling an inmate a “snitch” in order to subject him to  
21 retribution by other inmates (*Valandingham v. Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989)).

22 Plaintiff has alleged an adverse action. Plaintiff has alleged throughout the FAC, that the  
23 more grievances he filed, the more entrenched his inadequate medical care became. See e.g.,  
24 FAC ¶ 208 (Defendant Shiesha was presented with the MRI, confronted with evidence that  
25 contradicted CDCR (MD) Defendant Tate’s report, Plaintiff pleads with reviewer to do their duty  
26 and defendants chose to accept CDCR (MD) Tate’s report that intentionally diminished the  
27 facts.”) Plaintiff alleges that because of filing grievances as to the worsening of his medical  
28 condition, his medical care was not changed. This sufficiently alleges adverse actions.

1 Next defendants argue that his First Amendment rights were not chilled, because he  
2 continued to file grievances.

3 Plaintiff has sufficiently alleged a chilling effect. *Rhodes v. Robinson*, 408 F.3d 559, 568  
4 (9th Cir. 2005) (at the pleading stage, we have never required a litigant, per impossible, to  
5 demonstrate a total chilling of his First Amendment rights to file grievances and to pursue civil  
6 rights litigation in order to perfect a retaliation claim.) Direct and tangible harm will support a  
7 retaliation claim even without demonstration of a chilling effect on the further exercise of a  
8 prisoner's First Amendment rights. *Id.* at 568 n. 11. “[A] plaintiff who fails to allege a chilling  
9 effect may still state a claim if he alleges he suffered some other harm” as a retaliatory adverse  
10 action. *Brodheim v. Cry*, 584 F.3d at 1269 (considering the number of grievances filed as  
11 permitting claims to go forward) (citing *Rhodes*, 408 F.3d at 568 n. 11). Here, the number of  
12 grievances filed by Plaintiff does not warrant dismissal of his retaliation claim. Plaintiff has  
13 alleged he was harmed by defendants by the mere fact that he was filing his grievances.

14 Defendants argue that “the attachments to the FAC establish that their actions reasonably  
15 advanced legitimate correctional goals.” The Court declines to dismiss the retaliation claims  
16 based on this argument which is a factual issue subject to proof. Plaintiff has alleged throughout  
17 his FAC that there was no investigation into his claims of pain, denial of medical care, inadequate  
18 pain medication, and no accommodation to ease his pain. These allegations, spattered throughout  
19 the FAC, are sufficient to allege no legitimate correctional goals. In evaluating the sufficiency of  
20 a complaint, courts must accept all factual allegations as true. *Iqbal*, 556 U.S. at 678, 129 S.Ct. at  
21 1949 (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. at 1964).

### 22 **G. Qualified Immunity**

23 Defendants seek qualified immunity. The doctrine of qualified immunity protects  
24 government officials from liability for civil damages insofar as their conduct does not violate  
25 clearly established statutory or constitutional rights of which a reasonable person would have  
26 known. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). A  
27 court considering a claim of qualified immunity makes a two-pronged inquiry: (1) whether the  
28 plaintiff has alleged the deprivation of an actual constitutional right and (2) whether such right

1 was clearly established at the time of the defendant's alleged misconduct. *See Pearson v.*  
2 *Callahan*, 555 U.S. 223, 232 (2009) (quoting *Saucier v. Katz*, 535 U.S. 194, 201 (2001)).

3 It has long been established that denial of medical treatment to prisoners is a violation of  
4 the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L.Ed. 2d 251  
5 (1976) (establishing that officers cannot intentionally deny or delay access to medical care); *see*  
6 *also Albers v. Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984) (holding that prison officials who  
7 deliberately ignore the serious medical needs of inmates cannot claim that it was not apparent to a  
8 reasonable person that such actions violated the law) (*rev'd on other grounds*, 475 U.S. 312, 106  
9 S.Ct. 1078, 89 L.Ed.2d 251 (1986)).

10 First Amendment claims for retaliation for chilling of a prisoner's speech are similarly  
11 well established. *See Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2004); *see also*  
12 *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009) (“Retaliation against prisoners for their  
13 exercise of this [First Amendment right to file grievances] is itself a constitutional violation, and  
14 prohibited as a matter of clearly established law.”)

15 Defendants argue that qualified immunity applies to the claim for deliberate indifference  
16 based upon the Naproxen prescription for pain medication. (Doc. 125 p. 7.) As the court  
17 previously noted, the allegation regarding Naproxen is not seeking to independently establish  
18 deliberate indifference, but to show the course of conduct that medical treatment was ineffective  
19 for a prolonged period of time.

20 Defendants also argue that qualified immunity applies because there is no constitutional  
21 right to a grievance procedure. Defendants inaccurately characterize Plaintiff's legal claims.  
22 Plaintiff does not claim that Defendants violated his right to a grievance procedure, to have his  
23 grievances decided in a certain manner. Rather, Plaintiff alleges that he was denied the medical  
24 care required for his condition which violated his Eighth Amendment rights and his first  
25 Amendment Rights for pursuing his right to proper medical care. These rights are clearly  
26 established. As Plaintiff's right to be free from the denial of medical treatment and retaliation for  
27 the filing of grievances is well established, Defendants are not entitled to qualified immunity as to  
28 Plaintiffs' First and Eighth Amendment claims. The Court will recommend denial of the motion

1 to dismiss on these claims.

2 **IV. Conclusion**

3 For the foregoing reasons, the Court RECOMMENDS:

- 4 1. Plaintiff's unauthorized surreply (ECF No. 128) be stricken from the record;  
5 2. Defendants' motion to dismiss (Doc. 109) be GRANTED IN PART and DENIED IN  
6 PART:

7 a. The Court DISMISS all of Plaintiff's state law claims for failure to comply with  
8 the Government Claims Act.

9 b. The Court DENY Defendants' Motion to Dismiss in all other respects.

10 These Findings and Recommendations will be submitted to the United States District  
11 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within  
12 **fourteen (14) days** after being served with these Findings and Recommendations, the parties may  
13 file written objections with the court. The document should be captioned "Objections to  
14 Magistrate Judge's Findings and Recommendation." The parties are advised that failure to file  
15 objections within the specified time may result in the waiver of the "right to challenge the  
16 magistrate's factual findings" on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.  
17 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

18  
19 IT IS SO ORDERED.

20 Dated: March 5, 2017

21 /s/ Barbara A. McAuliffe  
22 UNITED STATES MAGISTRATE JUDGE  
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