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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JASON SMITH,  
Plaintiff,  
v.  
DR. JOHAL, et al.,  
Defendants.

**CASE No. 1:15-cv-01662-LJO-MJS (PC)**  
**FINDINGS AND RECOMMENDATION TO DISMISS ACTION FOR FAILURE TO STATE A CLAIM**

**(ECF NO. 19)**

**FOURTEEN (14) DAY OBJECTION DEADLINE**

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 42 U.S.C. § 1983. (ECF Nos. 1 & 5.)

The Court dismissed Plaintiff's complaint and first amended complaint for failure to state a claim, but gave leave to amend. (ECF Nos. 9, 17.) Plaintiff's second amended complaint is before the Court for screening.

**I. SCREENING REQUIREMENT**

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous, malicious," or that fail to state a claim upon which

1 relief may be granted, or that seek monetary relief from a defendant who is immune from  
2 such relief. 28 U.S.C. § 1915A(b)(1),(2). “Notwithstanding any filing fee, or any portion  
3 thereof, that may have been paid, the court shall dismiss the case at any time if the court  
4 determines that . . . the action or appeal . . . fails to state a claim upon which relief may  
5 be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii).

## 6 **II. PLEADING STANDARD**

7 Section 1983 “provides a cause of action for the deprivation of any rights,  
8 privileges, or immunities secured by the Constitution and laws of the United States.”  
9 Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983).  
10 Section 1983 is not itself a source of substantive rights, but merely provides a method for  
11 vindicating federal rights conferred elsewhere. Graham v. Connor, 490 U.S. 386, 393-94  
12 (1989).

13 To state a claim under § 1983, a plaintiff must allege two essential elements:  
14 (1) that a right secured by the Constitution or laws of the United States was violated and  
15 (2) that the alleged violation was committed by a person acting under the color of state  
16 law. See West v. Atkins, 487 U.S. 42, 48 (1988); Ketchum v. Alameda Cnty., 811 F.2d  
17 1243, 1245 (9th Cir. 1987).

18 A complaint must contain “a short and plain statement of the claim showing that  
19 the pleader is entitled to relief . . . .” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations  
20 are not required, but “[t]hreadbare recitals of the elements of a cause of action,  
21 supported by mere conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S.  
22 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).  
23 Plaintiff must set forth “sufficient factual matter, accepted as true, to state a claim to relief  
24 that is plausible on its face.” Id. Facial plausibility demands more than the mere  
25 possibility that a defendant committed misconduct and, while factual allegations are  
26 accepted as true, legal conclusions are not. Id. at 677-78.

1 **III. PLAINTIFF'S ALLEGATIONS**

2 Plaintiff is incarcerated at the Correctional Training Facility but complains of acts  
3 that occurred at Wasco State Prison. He names the following defendants in their  
4 individual capacities: (1) A. Johal, M.D., (2) Chief Physician A. Klang, (3) Chief Medical  
5 Executive A. Youssef, M.D., (4) Dr. Zepp.

6 Plaintiff's allegations may be summarized essentially as follows.

7 On October 28, 2014, Plaintiff submitted a Health Care Services Request Form  
8 complaining of pain in his right shoulder and limited movement after exercising. On  
9 October 31, 2014, he was examined by Defendant Johal. Plaintiff advised Johal of his  
10 complaints. Johal prescribed Naproxen for pain and ordered Plaintiff reassigned to a  
11 lower bunk and light duty work for three months.

12 On December 2, 2014, Plaintiff again was examined by Johal. Plaintiff complained  
13 of continued pain and inadequacy of the medication. Johal expressed disbelief that  
14 Plaintiff's injury was causing so much pain and speculated that Plaintiff was merely  
15 seeking morphine. She stated, "All you Blacks are drug addicts." She threatened to  
16 activate her security alarm if Plaintiff did not leave. Plaintiff left.

17 At some point during this time period, Defendant Johal told Plaintiff that he would  
18 be scheduled for an MRI.

19 On December 5, 2014, Plaintiff sent a request for interview to Defendant Klang  
20 requesting intervention in Plaintiff's medical concerns. Plaintiff advised Klang that Johal  
21 and Zepp had refused him adequate medication, and also advised Klang of Johal's  
22 derogatory statements. He advised Klang that Johal and Zepp allowed Plaintiff's  
23 prescription to expire and refused to renew it. Klang did not respond.

24 On December 22, 2014, Plaintiff sent Defendant Youssef an inmate request form  
25 complaining that Klang had not responded to the request for interview. Plaintiff relayed  
26 that Johal and Zepp had refused him morphine and that his medication was inadequate.  
27 He requested an MRI and that Pain Management review his medication. Youssef did not  
28 respond.

1           On January 21, 2015, Plaintiff filed an administrative appeal. Plaintiff complained  
2 that Defendants Johal and Zepp did not adequately treat his torn rotator cuff and  
3 resulting pain. He requested the MRI that Johal had promised, effective pain medication,  
4 and to be placed on a waiting list for surgery.

5           On January 22, 2015, Plaintiff received an MRI. He was told that results would be  
6 available in two weeks.

7           On February 4, 2015, Defendant Johal interviewed Plaintiff in relation to his  
8 appeal. Plaintiff expressed his continued pain and his desire for morphine. Johal refused  
9 morphine. She refused Plaintiff surgery, stating that it was because he had filed an  
10 administrative appeal. She referred Plaintiff for an orthopedic consultation.

11           On February 23, 2015, Defendant Klang granted Plaintiff's appeal in part.  
12 Plaintiff's request for MRI was granted. His request to be referred to a general surgeon  
13 was denied. His request for morphine was denied. His appointment for an orthopedic  
14 consultation was approved and the appointment was pending.

15           At some point, Plaintiff was prescribed Tylenol #3 for pain.

16           On March 5, 2015, Plaintiff submitted his appeal to the second level. He  
17 complained of Johal's indifference and that Tylenol #3 was inadequate. He requested  
18 surgery.

19           Defendant Youssef denied Plaintiff's appeal at the second level. He stated,  
20 "Morphine cannot be prescribed based on current CCHCS guidelines. Your current  
21 recommended therapy is within current community standards." According to Plaintiff, this  
22 is a reference to the California Prison Health Care Services pain management  
23 guidelines. Plaintiff claims he was eligible for morphine under the guidelines. (The  
24 portion of the guidelines he quotes do not appear to support this assertion.)

25           On May 26, 2015, Plaintiff was seen by non-party Dr. Paik. Dr. Paik  
26 recommended surgery.

1 On June 2, 2015, Defendants Johal and Zepp "allowed" Plaintiff's pain medication  
2 to expire and refused to renew it. Plaintiff was without medication for the eight days  
3 leading up to his surgery.

4 On June 10, 2015, Plaintiff underwent surgery and was returned to the prison.  
5 Plaintiff claims that the delay in his treatment resulted in further unspecified injury to his  
6 shoulder and unnecessary pain.

7 On June 11, 2015, Defendant Johal denied Plaintiff's request for a temporary lay-  
8 in, which would have confined him to his living quarters and relieved him of his work  
9 duty. Johal also denied Plaintiff's request for light duty, and a lower bunk assignment.  
10 Defendants Johal and Zepp typically provide other inmates with similar injuries such  
11 accommodations.

12 Plaintiff informed Johal that his work supervisor was requiring him to perform full  
13 duty or face a serious rules violation report. Johal then approved light-duty, a lay-in, and  
14 a lower bunk accommodation.

15 From June 10, 2015 to August 6, 2015, Plaintiff did not receive physical therapy  
16 as ordered by his doctor. Defendants Johal and Zepp failed to follow up on why Plaintiff  
17 was not receiving therapy.

18 Records attached to Plaintiff's complaint reflect that he received morphine for  
19 three days following surgery. From June 13, 2015 to June 16, 2015, Plaintiff was without  
20 pain medication. Plaintiff states that Defendants Johal and Zepp refused to renew his  
21 medication. Plaintiff believes this was in retaliation for him having filed administrative  
22 appeals. (Records attached to Plaintiff's complaint reflect that, on June 17, 2015, he was  
23 prescribed a thirty day course of methadone pain.)

24 On June 17, 2015, Plaintiff saw Dr. Paik. Paik changed Plaintiff's bandage and  
25 recommended pain medication and urgent physical therapy. These recommendations  
26 were relayed to Defendant Youssef.

27 On June 22, 2015, Plaintiff saw Dr. Paik who again recommended urgent physical  
28 therapy. Paik advised Plaintiff that he suffered major cartilage damage between his right

1 shoulder joints. Plaintiff attributes the damage to the treatment deficiencies by Johal,  
2 Zepp, Klang, and Youssef.

3 On June 24, 2015, the physical therapist at Plaintiff's institution quit working  
4 and/or quit providing therapy to patients as recommended by Defendant Youssef.

5 On July 8, 2015, Plaintiff submitted a health care services request form to  
6 Defendant Zepp. He complained of pain and stiffness and lack of physical therapy.

7 On July 30, 2015, and August 5, 2015, Plaintiff's physical therapy sessions were  
8 cancelled.

9 On August 10, 2015, Plaintiff saw Dr. Paik. Upon return to the prison, he saw  
10 Defendant Zepp. Zepp renewed Plaintiff's medication and recommended physical  
11 therapy. Plaintiff advised Zepp that Tylenol #3 was not working and he was in severe  
12 pain. On this date, Plaintiff underwent his first physical therapy session.

13 Thereafter, several physical therapy sessions were cancelled. Defendant Youssef  
14 refused to allow Plaintiff to take a therapy band to his cell to perform therapy. According  
15 to Plaintiff, therapy bands are permitted at other institutions.

16 On August 31, 2015, Plaintiff saw Dr. Paik. Paik assured Plaintiff he would advise  
17 Youssef of the need for therapy to avoid further surgery.

18 As a result of the lack of therapy, Plaintiff had poor healing. He believes all of the  
19 defendants retaliated against him for filing his January 21, 2015 grievance against Johal.

20 Plaintiff claims violation of his First and Eighth Amendment rights. He seeks  
21 monetary relief and a declaratory judgment.

## 22 **IV. ANALYSIS**

### 23 **A. Medical Indifference**

24 The Eighth Amendment's Cruel and Unusual Punishments Clause prohibits  
25 deliberate indifference to the serious medical needs of prisoners. McGuckin v. Smith,  
26 974 F.2d 1050, 1059 (9th Cir. 1992). A claim of medical indifference requires (1) a  
27 serious medical need, and (2) a deliberately indifferent response by defendant. Jett v.  
28 Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). The deliberate indifference standard is met

1 by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible  
2 medical need and (b) harm caused by the indifference. Id. Where a prisoner alleges  
3 deliberate indifference based on a delay in medical treatment, the prisoner must show  
4 that the delay led to further injury. See Hallett v. Morgan, 296 F.3d 732, 745-46 (9th Cir.  
5 2002); McGuckin, 974 F.2d at 1060a; Shapley v. Nevada Bd. Of State Prison Comm'rs,  
6 766 F.2d 404, 407 (9th Cir. 1985) (per curiam). Delay which does not cause harm is  
7 insufficient to state a claim of deliberate medical indifference. Shapley, 766 F.2d at 407  
8 (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

9 “Deliberate indifference is a high legal standard.” Toguchi v. Chung, 391 F.3d  
10 1051, 1060 (9th Cir. 2004). “Under this standard, the prison official must not only ‘be  
11 aware of the facts from which the inference could be drawn that a substantial risk of  
12 serious harm exists,’ but that person ‘must also draw the inference.’” Id. at 1057 (quoting  
13 Farmer v. Brennan, 511 U.S. 825, 837 (1994)). “If a prison official should have been  
14 aware of the risk, but was not, then the official has not violated the Eighth Amendment,  
15 no matter how severe the risk.” Id. (brackets omitted) (quoting Gibson, 290 F.3d at  
16 1188). Mere indifference, negligence, or medical malpractice is not sufficient to support  
17 the claim. Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle v.  
18 Gamble, 429 U.S. 87, 105-06 (1976)). A prisoner can establish deliberate indifference by  
19 showing that officials intentionally interfered with his medical treatment for reasons  
20 unrelated to the prisoner’s medical needs. See Hamilton v. Endell, 981 F.2d 1062, 1066  
21 (9th Cir. 1992); Estelle, 429 U.S. at 105.

22 An allegation that prison officials deliberately ignored a prisoner’s complaint about  
23 the ineffective nature of prescribed pain medication and the pain being suffered as a  
24 result can, in some circumstances, give rise to a constitutional claim. See Chess v.  
25 Dovey, No. CIV S-07-1767 LKK DAD P., 2011 WL 567375, at \*21 (E.D. Cal. Feb. 15,  
26 2011) (denying summary judgment on Eighth Amendment claim where the doctor  
27 “ignored plaintiff’s complaint about the ineffective nature of the Tylenol, aspirin and other  
28 medications he was being given and the pain being suffered as a result”); Franklin v.

1 Dudley, No. 2:07-cv-2259 FCD KJN P., 2010 WL 5477693, at \*6 (E.D. Cal. Dec. 29,  
2 2010) (existence of triable issue of fact as to whether defendant violated Eighth  
3 Amendment precluded the granting of summary judgment where plaintiff was previously  
4 prescribed narcotic pain medication but now was given only Motrin, Naprosyn, and  
5 Tylenol under prison's no-narcotic policy). However, a prisoner does not have a  
6 constitutional right to the medication of his choice, and a mere difference of opinion  
7 regarding appropriate treatment and pain medication is insufficient to give rise to a  
8 constitutional claim. Toguchi, 391 F.3d at 1058; Wilson v. Borg, No. 95-15720, 1995 WL  
9 571481, at \*2 (9th Cir. Sept. 27, 1995); Smith v. Norrish, No. 94-16906, 1995 WL  
10 267126, at \*1 (9th Cir. May 5, 1995); McMican v. Lewis, No. 94-16676, 1995 WL  
11 247177, at \*2 (9th Cir. Apr. 27, 1995).

12 Plaintiff's allegation of a torn rotator cuff is sufficient to state a serious medical  
13 need. Jett, 439 F.3d at 1096 (a "serious medical need" may be shown by demonstrating  
14 that "failure to treat a prisoner's condition could result in further significant injury or the  
15 'unnecessary and wanton infliction of pain'"); McGuckin, 974 F.2d at 1059-60 ("The  
16 existence of an injury that a reasonable doctor or patient would find important and  
17 worthy of comment or treatment; the presence of a medical condition that significantly  
18 affects an individual's daily activities; or the existence of chronic and substantial pain are  
19 examples of indications that a prisoner has a 'serious' need for medical treatment.").

20 However, the facts alleged regarding the time period leading up to Plaintiff's  
21 surgery do not reflect deliberate indifference. According to Plaintiff, he was prescribed  
22 Naproxen and, later, Tylenol #3. He was assigned to a lower bunk and light duty work.  
23 He was referred for an MRI and a consultation with an orthopedic surgeon. The surgeon  
24 recommended surgery, which Plaintiff received. Thus, Plaintiff was not denied treatment  
25 or pain medication. Although he desired to proceed to surgery more quickly, the facts do  
26 not suggest that the delay is attributable to any of the defendants, or that they could  
27 have scheduled Plaintiff for surgery absent input from the surgeon.



1           It is clear that Plaintiff would have preferred a different medication than that which  
2 he was offered; however, the facts alleged do not suggest that his pre-surgical pain was  
3 managed with deliberate indifference. He was prescribed one medication and, when it  
4 was insufficient, was given another. He was told that he did not meet the clinical criteria  
5 for morphine. Although Defendant Johal allegedly made disparaging remarks regarding  
6 Plaintiff's supposed drug-seeking behavior, she nonetheless offered him treatment.  
7 Plaintiff's complaints appear to reflect a mere difference of opinion that does not give rise  
8 to a constitutional claim. And, although Plaintiff alleges his prescription was "allowed" to  
9 expire eight days prior to his surgery, leaving him without medication during this time,  
10 there are no facts to suggest that Defendants were aware Plaintiff was without  
11 medication or purposefully denied him medication.

12           Plaintiff raises various allegations regarding the care he received following  
13 surgery. Again, he complains of the insufficiency of pain medication. Plaintiff initially was  
14 given morphine for pain, then methadone, then at some point Tylenol #3. There was a  
15 three day interval between morphine and methadone when Plaintiff was without pain  
16 medication. He attributes the denial to Defendants Johal and Zepp; however, he does  
17 not state that he saw these Defendants during that interval or otherwise explain how  
18 they were involved in denying his medication. He further states that he advised  
19 Defendant Zepp on August 10, 2015 that Tylenol #3 was inadequate. He does not  
20 describe her response to that request or any reasons given for denying a change in  
21 medication. However, Plaintiff also underwent physical therapy on that date. Based on  
22 the facts alleged, it is plausible that Defendant Zepp wished to await the results of  
23 physical therapy before considering a change in medication. In any event, the facts  
24 alleged by Plaintiff are insufficient to allege deliberate indifference to his complaints of  
25 pain.

26           Plaintiff complains that Defendant Johal initially denied him various  
27 accommodations following his surgery. However, Johal granted the accommodations  
28 upon being advised that Plaintiff was told he was required to perform his regular work.

1 Thus, Johal took action upon being apprised of Plaintiff's circumstances. This does not  
2 support a finding of deliberate indifference.

3 Plaintiff complains that he was denied physical therapy. The the lack of physical  
4 therapy as recommended by Plaintiff's surgeon is troubling. However, it is unclear that  
5 this deficiency is attributable to any of the Defendants. Dr. Paik recommended therapy  
6 on June 17, 2015. On June 24, 2015, the physical therapist at the institution quit, or quit  
7 providing treatment to certain patients. Plaintiff eventually underwent therapy on August  
8 10, 2015, only to have subsequent sessions cancelled without explanation. There are no  
9 facts to suggest that these circumstances were within the Defendants' control. Plaintiff  
10 also contends that Defendant Youssef denied Plaintiff's request for use of a therapy  
11 band in his cell. However, Plaintiff presents no facts regarding the information contained  
12 in his request or any reasons for its denial. These facts are insufficient to state deliberate  
13 indifference.

14 Lastly, Plaintiff appears to attribute liability to Defendants Klang and Youssef  
15 based on their failure to respond to requests for interview and their responses to  
16 Plaintiff's administrative appeal. The failure to respond to a request for interview does  
17 not, in itself, reflect deliberate indifference. There are no facts to suggest that  
18 Defendants Klang and Youssef received these requests. Even if they did, Plaintiff has  
19 not stated a viable claim against any defendant for denying him medical care. Absent the  
20 presentation of facts sufficient to show that an Eighth Amendment violation occurred in  
21 the first place, Plaintiff cannot pursue a claim against those to whom he complained  
22 about the alleged denial.

23 Similarly, Plaintiff's claims regarding the review of his administrative appeal are  
24 insufficient to state a claim. As Plaintiff already was advised, denying a prisoner's  
25 administrative appeal generally does not cause or contribute to the underlying violation.  
26 George v. Smith, 507 F.3d 605, 609 (7th Cir. 2007). However, prison administrators  
27 cannot willfully turn a blind eye to constitutional violations being committed by  
28 subordinates. Jett v. Penner, 439 F.3d 1091, 1098 (9th Cir. 2006). Thus, there may be

1 limited circumstances in which those involved in reviewing an inmate appeal can be held  
2 liable under section 1983. Those circumstances are not presented here. Moreover,  
3 Defendant Klang referred Plaintiff for an orthopedic consultation with the doctor who  
4 eventually recommended and performed Plaintiff's surgery; Klang's denial of Plaintiff's  
5 request for referral to a general surgeon therefore does not reflect deliberate indifference  
6 but a difference of opinion as to appropriate care. And, although both Klang and Youssef  
7 denied Plaintiff's requests for morphine, allegations in that regard fail to state a claim for  
8 the reasons already stated.

9 This is Plaintiff's third attempt to state a cognizable medical indifference claim. He  
10 has been advised of the legal standard and pleading deficiencies on two prior occasions.  
11 He nonetheless has failed to allege facts to state a cognizable Eighth Amendment claim.  
12 Leave to amend should be denied.

### 13 **B. First Amendment Retaliation**

14 Plaintiff now claims that certain defendants retaliated against him by providing  
15 inadequate medical care because Plaintiff filed an administrative grievance.

16 "Within the prison context, a viable claim of First Amendment retaliation entails  
17 five basic elements: (1) An assertion that a state actor took some adverse action against  
18 an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4)  
19 chilled the inmate's exercise of his First Amendment rights, and (5) the action did not  
20 reasonably advance a legitimate correctional goal." Rhodes v. Robinson, 408 F.3d 559,  
21 567-68 (9th Cir. 2005).

22 The second element of a prisoner retaliation claim focuses on causation and  
23 motive. See Brodheim v. Cry, 584 F.3d 1262, 1271 (9th Cir. 2009). A plaintiff must show  
24 that his protected conduct was a "substantial" or "motivating" factor behind the  
25 defendant's conduct." Id. (quoting Sorrano's Gasco. Inc. v. Morgan, 874 F.2d 1310, 1314  
26 (9th Cir. 1989). Although it can be difficult to establish the motive or intent of the  
27 defendant, a plaintiff may rely on circumstantial evidence. Bruce v. Ylst, 351 F.3d 1283,  
28 1288-89 (9th Cir. 2003) (finding that a prisoner establishes a triable issue of fact

1 regarding prison officials' retaliatory motives by raising issues of suspect timing,  
2 evidence, and statements); Hines v. Gomez, 108 F.3d 265, 267-68 (9th Cir. 1997); Pratt  
3 v. Rowland, 65 F.3d 802, 808 (9th Cir. 1995) ("timing can properly be considered as  
4 circumstantial evidence of retaliatory intent").

5 The third prong can be satisfied by various activities. Filing a grievance is a  
6 protected action under the First Amendment. Valandingham v. Bojorquez, 866 F.2d  
7 1135, 1138 (9th Cir. 1989). Pursuing a civil rights litigation similarly is protected under  
8 the First Amendment. Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).

9 With respect to the fourth prong, "[it] would be unjust to allow a defendant to  
10 escape liability for a First Amendment violation merely because an unusually determined  
11 plaintiff persists in his protected activity . . . ." Mendocino Envtl. Ctr. v. Mendocino Cnty.,  
12 192 F.3d 1283, 1300 (9th Cir. 1999). The correct inquiry is to determine whether an  
13 official's acts would chill or silence a person of ordinary firmness from future First  
14 Amendment activities. Rhodes, 408 F.3d at 568-69 (citing Mendocino Envtl. Ctr., 192  
15 F.3d at 1300).

16 With respect to the fifth prong, a prisoner must affirmatively show that "the prison  
17 authorities' retaliatory action did not advance legitimate goals of the correctional  
18 institution or was not tailored narrowly enough to achieve such goals." Rizzo, 778 F.2d at  
19 532.

20 Plaintiff filed a single administrative grievance complaining of care by Johal and  
21 Zepp. According to Plaintiff, Johal stated in relation to the administrative appeal that she  
22 was denying Plaintiff morphine because he had filed the grievance. At the same time,  
23 however, Johal referred Plaintiff for an orthopedic consultation. She also later prescribed  
24 him Tylenol #3 and, after his surgery, granted him various accommodations. Likewise,  
25 Zepp offered Plaintiff pain medication, although not his preferred medication. This course  
26 of conduct does not reflect a retaliatory animus stemming from Plaintiff's grievance.  
27 Furthermore, Plaintiff has not alleged facts to suggest that the decision to deny Plaintiff  
28 morphine is unsupported by legitimate correctional goals; to the contrary, the facts

1 presented suggest that the decision was supported by clinical standards applied within  
2 the institution.

3 Plaintiff fails to state a cognizable retaliation claim, and it does not appear he  
4 could do so if given leave to amend. Further leave to amend should be denied.

5 **V. CONCLUSION AND RECOMMENDATION**

6 Plaintiff's second amended complaint does not state a cognizable claim for relief.  
7 He previously was advised of pleading deficiencies and afforded the opportunity to  
8 correct them. He failed to do so. Any further leave to amend reasonably appears futile  
9 and should be denied.

10 The undersigned recommends that the action be dismissed with prejudice, that  
11 dismissal count as a strike pursuant to 28 U.S.C. § 1915(g), and that the Clerk of the  
12 Court terminate any and all pending motions and close the case.

13 The findings and recommendation will be submitted to the United States District  
14 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1).  
15 Within fourteen (14) days after being served with the findings and recommendation, the  
16 parties may file written objections with the Court. The document should be captioned  
17 "Objections to Magistrate Judge's Findings and Recommendation." A party may respond  
18 to another party's objections by filing a response within fourteen (14) days after being  
19 served with a copy of that party's objections. The parties are advised that failure to file  
20 objections within the specified time may result in the waiver of rights on appeal.  
21 Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923  
22 F.2d 1391, 1394 (9th Cir. 1991)).

23  
24 IT IS SO ORDERED.

25 Dated: October 31, 2016

26 1st Michael J. Seng  
27 UNITED STATES MAGISTRATE JUDGE  
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