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7 UNITED STATES DISTRICT COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
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10 GABRIEL M. KRUSE,

11 Plaintiff,

12 v.

13 BANSUAN, et al.,

14 Defendants.

Case No. 1:19-cv-00005-NONE-EPG (PC)

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING THAT DEFENDANT  
BANSUAN’S MOTION TO DISMISS BE  
GRANTED; AND THAT PLAINTIFF’S  
CLAIM FOR DELIBERATE INDIFFERENCE  
TO SERIOUS MEDICAL NEEDS AGAINST  
DOE DEFENDANTS BE DISMISSED

(ECF Nos. 1 & 18)

OBJECTIONS, IF ANY, DUE WITHIN  
TWENTY-ONE (21) DAYS

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18 Gabriel Kruse (“Plaintiff”) is a former state prisoner proceeding *pro se* and *in forma*  
19 *pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the  
20 complaint commencing this action on January 2, 2019. (ECF No. 1). Plaintiff’s complaint  
21 generally alleges that he has been positive for Hepatitis C for almost 20 years and should be  
22 receiving the “Harvoni Treatment” from prison officials.

23 On July 11, 2019, this Court screened Plaintiff’s complaint and found that Plaintiff’s  
24 Eighth Amendment claims for deliberate indifference to serious medical needs could proceed  
25 against Dr. Bansuan and certain unnamed Doe individuals. (ECF No. 7). On August 28, 2019,  
26 the assigned district judge adopted the undersigned’s findings and recommendations and  
27 ordered that “[a]ll claims and defendants are dismissed, except for Plaintiff’s Eighth  
28 Amendment claims for deliberate indifference to serious medical needs against Dr. Bansuan

1 and Doe Defendant(s).” (ECF No. 16, at p. 2).

2 On September 6, 2019, Defendant Bansuan filed a motion to dismiss. (ECF No. 18).  
3 Plaintiff filed an opposition to Defendant’s motion on January 15, 2020. (ECF No. 26).  
4 Defendant filed a reply on January 21, 2020. (ECF No. 27).

5 Defendant argues that he provided treatment to Plaintiff according to prison health  
6 services protocol, and that the regular consultations, monitoring, and services he provided  
7 consistent with that protocol cannot constitute a claim for deliberate indifference to serious  
8 medical needs under the appropriate legal standards.

9 For the reasons stated herein, the undersigned recommends granting Defendant’s  
10 motion to dismiss. Additionally, based on the reasoning in this order, the Court also  
11 reconsiders its screening order as to the unidentified Doe Defendants and recommends  
12 dismissing Plaintiff’s claims against them as well.

13 **I. SUMMARY OF PLAINTIFF’S COMPLAINT**

14 Plaintiff is an inmate at Valley State Prison (“VSP”).

15 Plaintiff was diagnosed with Hepatitis C almost twenty years ago. He was remanded  
16 into the custody of the California Department of Corrections and Rehabilitation (“CDCR”) on  
17 January 14, 2014. Since February 16, 2014, Plaintiff has continuously requested treatment for  
18 Hepatitis C, and his requests have continuously been denied.

19 The disease has progressed, and the symptoms have become progressively worse.  
20 Plaintiff is suffering fatigue, nausea, loss of appetite, upset stomach, and weight loss. The  
21 fatigue is so bad that Plaintiff is exhausted by the smallest exertion, such as showering and  
22 cleaning his bed area. Concentrating becomes a challenge at times. Plaintiff’s urine has  
23 become very dark, despite constant hydration throughout the day. Plaintiff has sleepless nights,  
24 and often wakes up drenched in sweat. Plaintiff’s weight often fluctuates, and most of the time  
25 he does not have much of an appetite. Plaintiff almost always has an upset stomach.

26 CDCR and Valley State Prison medical department/staff are fully aware that Plaintiff  
27 has a serious Hepatitis C condition and is in need of the Harvoni treatment. Plaintiff has  
28 increasing FIB 4 score levels, which are above the criteria limit for the treatment.

1 Any person infected with Hepatitis C can ultimately experience death if he or she is not  
2 effectively treated and/or their FIB 4 score levels continue to increase with escalating  
3 symptoms.

4 Medical staff shared crucial information with Plaintiff, as follows: “(1) Hepatitis C is  
5 monitored and managed by Hep C Clinic via telemedicine at headquarters run by Dr.  
6 Carmichael; (2) Patient has a history of Hep C, complains of feeling tired with no energy,  
7 fatigue, nausea, weight loss, dizziness, tender abdomen, joint weakness, instability in walking  
8 and daily concerns about Kruse’s health and welfare; (3) Unable to calculate most recent Fib 4  
9 score, because the platelet count is unknown; (4) patient agreed to have another set of blood  
10 work[]; (5) Patient is educated on risk of uncontrolled disease increasing up and including the  
11 possibility of death; and (6) Patient wants to be treated for Hepatitis C. Explained to the patient  
12 that everybody is going to be treated. However, because of the volume of patients or inmates  
13 with Hep C, providers can only do so much.”

14 In 2018, Plaintiff continued to seek treatment, but to no avail. He had lots of  
15 communication with Valley State Prison’s medical department, many RN appointments, and  
16 many labs were taken, but he has not gotten closer to getting the Harvoni treatment.

17 On January 31, 2018, Plaintiff wrote to the Prison Law Office (“PLO”). He sent copies  
18 of documents showing two years of delays and denials, a lack of treatment, and progressive  
19 Hepatitis C symptoms.

20 On March 10, 2018, Plaintiff received a form letter and note from the PLO to the  
21 California Correctional Health Care Services (“CCHCS”) & Receiver’s Office of Legal Affairs,  
22 requesting Plaintiff’s treatment level and asking when Plaintiff would be treated.

23 On or about April 20, 2018, Plaintiff received a response from the PLO regarding the  
24 PLO’s request to the CCHCS & Receiver’s Office of Legal Affairs. Enclosed was a memo  
25 dated April 16, 2018, stating that Plaintiff would be treated if he filed a CDC 7362 Medial  
26 Request. The memo was cced to: defendant Kyle Lewis, Deputy Attorney General/CDCR  
27 Health Care; T. Gilevich, Attorney V, CCHCS Office of Legal Affairs; Mae Ackerman-  
28 Brimberg, Prison Law Office; and defendant Dr. Virk, Chief Medical Executive of VSP.

1 On or about April 26, 2018, Plaintiff was seen by Nurse Godina. Plaintiff explained all  
2 his symptoms, requested Hepatitis C treatment, and provided her with a copy of the memo.  
3 Plaintiff's condition was serious enough that she called defendant Dr. Bansuan, a primary care  
4 physician, for instructions. Dr. Bansuan instructed her to order labs and make Plaintiff a  
5 primary care physician appointment.

6 The labs were done April 30, 2018.

7 On May 15, 2018, Plaintiff had a tele-med appointment with Dr. Bansuan. Plaintiff  
8 explained his symptoms and that they have become progressively worse. Plaintiff discussed  
9 the seriousness of his condition with Dr. Bansuan and told him about the memo. Dr. Bansuan  
10 attempted to direct LVN Brenes on how to perform an abdominal check. LVN Brenes told him  
11 that she did not know how to do it, but Dr. Bansuan said "don't worry I'm watching. Push on  
12 the upper right Quadrant – does it feel tight or overally [sic] firm[?]" LVN Brenes said "it[']s a  
13 little tight." Dr. Bansuan asked "how tight," to which LVN Brenes responded "I don't know,  
14 I'm not comfortable doing this." Dr. Bansuan stated "don't worry, he's fine, if it was overly  
15 firm you would know." Dr. Bansuan then told Plaintiff that he was ok, and could go.

16 Plaintiff asked about the Treatment Selection Request ("TSR"), which was referred to  
17 in the memo. Dr. Bansuan then checked Plaintiff's FIB 4 score. He stated "you don't qualify  
18 for treatment; Yes, that[']s what I'm going by, so I didn't order all the labs, so I don't have  
19 your C.B.C. levels; so I can't recalculate them now." Plaintiff asked what was going to be  
20 done, and Dr. Bansuan said he would reorder the labs and see Plaintiff again in thirty days.

21 Plaintiff was seen by Dr. Bansuan again on June 19, 2018. Plaintiff discussed his  
22 symptoms with Dr. Bansuan. Plaintiff also requested that Dr. Bansuan file a TSR, and asked  
23 what his FIB 4 score was. Dr. Bansuan first stated .90, then stated 1.59 (he had concerns  
24 regarding whether he was calculating it correctly). Then, he said that he would see Plaintiff in  
25 thirty days and ordered another set of labs. He said he would speak with and consult with his  
26 colleagues, and stated that he wanted to start the Harvoni treatment.

27 On August 1, 2018, Plaintiff was seen again by Dr. Bansuan. Dr. Bansuan stated that  
28 his boss, Dr. Virk, would not allow him to file a TSR unless Plaintiff's FIB 4 score met the

1 treatment protocol, which was set forth by the Hep C committee in Sacramento.

2 On August 17, 2018, Plaintiff had an appointment with Nurse Thao. Nurse Thao stated  
3 that there was “really nothing I can do; but, hopefully your labs will get so much worse and  
4 then you can possibly be treated.”

5 On August 29, 2018, Dr. Bansuan said he spoke to Dr. Virk, and that “I was told not to  
6 file RFS Order or a (T.S.R.), order to Sacramento; on the ‘Memo.’”

7 On October 29, 2018, Plaintiff had another appointment with Dr. Bransaun. Dr.  
8 Bransaun told Plaintiff that he “spoke with the Hep C Panel @ Sacramento, and I made them  
9 aware of your situation. Now, they are fully aware of the ‘NEED’ for treatment. Per your labs;  
10 your treatment level is 3, and everyone is going to be treated; but, they’ll treat the level 1’s, the  
11 level 2’s; then the level 3’s, like yourself.” Plaintiff was not given a definitive date that he  
12 would be treated.

13 As of the date Plaintiff signed his complaint, Plaintiff still had not received the Harvoni  
14 treatment.

15 Plaintiff alleges that delayed or denied treatment is an act of deliberate indifference, as  
16 was having an LVN perform an abdominal examination.

17 Additionally, Plaintiff alleges that the medical department at Valley State Prison has  
18 failed to follow medical protocols and the mandate to ensure that all inmates receive adequate  
19 care and treatment. CDCR is aware of Plaintiff’s need for the Harvoni treatment and care of  
20 his Hepatitis C, and has collected medical data and information determining that treatment of  
21 his Hepatitis C is medically necessary. However, Plaintiff is denied the necessary Hepatitis C  
22 treatment, which puts Plaintiff’s life at risk.

23 Plaintiff alleges that disorganization and dysfunction in a medical program can amount  
24 to deliberate indifference, as it has in this case. Plaintiff’s condition and symptoms are visible  
25 and getting worse, but Plaintiff is not being provided with the Harvoni treatment.

26 Moreover, Defendants knowingly allowed factors unrelated to Plaintiff’s medical needs  
27 to interfere with his treatment. This includes staffing so inadequate that medical staff lacks the  
28 time to effectively tend to inmates’ medical needs. There are procedures that do not allow

1 proper diagnosis and treatment, which prevents care providers from being able to make a  
2 professional judgment. There is failure to inquire into essential facts that are necessary to make  
3 a professional judgment. There is a persistent backlog for appointments to see a primary care  
4 physicians, and serious access to care issues. There is a severe shortage of primary care  
5 physicians and nurses. The medical record keeping borders on non-existent. Treatment is  
6 restricted or denied based on cost.

7 Prison officials often ignored or delayed treatment, making Plaintiff unable to make his  
8 medical problems known to medical staff without being humiliated or belittled.

9 There are policies in place restricting necessary treatment and care, that are initiated by  
10 medical supervisors and staff. Therefore, they should be held liable.

## 11 **II. LEGAL STANDARDS**

### 12 **A. Deliberate Indifference to Serious Medical Needs**

13 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an  
14 inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d  
15 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This requires  
16 Plaintiff to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat a  
17 prisoner’s condition could result in further significant injury or the unnecessary and wanton  
18 infliction of pain,’” and (2) that “the defendant's response to the need was deliberately  
19 indifferent.” Id. (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992) (citation  
20 and internal quotations marks omitted), overruled on other grounds by WMX Technologies v.  
21 Miller, 104 F.3d 1133 (9th Cir. 1997) (*en banc*)).

22 Deliberate indifference is established only where the defendant *subjectively* “knows of  
23 and disregards an *excessive risk* to inmate health and safety.” Toguchi v. Chung, 391 F.3d  
24 1051, 1057 (9th Cir. 2004) (emphasis added) (citation and internal quotation marks omitted).  
25 Deliberate indifference can be established “by showing (a) a purposeful act or failure to  
26 respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.”  
27 Jett, 439 F.3d at 1096 (citation omitted). Civil recklessness (failure “to act in the face of an  
28 unjustifiably high risk of harm that is either known or so obvious that it should be known”) is

1 insufficient to establish an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825,  
2 836-37 & n.5 (1994) (citations omitted).

3 A difference of opinion between an inmate and prison medical personnel—or between  
4 medical professionals—regarding appropriate medical diagnosis and treatment is not enough to  
5 establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989);  
6 Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004). Additionally, “a complaint that a  
7 physician has been negligent in diagnosing or treating a medical condition does not state a valid  
8 claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not  
9 become a constitutional violation merely because the victim is a prisoner.” Estelle, 429 U.S. at  
10 106. To establish a difference of opinion rising to the level of deliberate indifference, a  
11 “plaintiff must show that the course of treatment the doctors chose was medically unacceptable  
12 under the circumstances.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

### 13 **B. Motions to Dismiss**

14 In considering a motion to dismiss, the Court must accept all allegations of material fact  
15 in the complaint as true. Erickson v. Pardus, 551 U.S. 89, 93-94 (2007); Hosp. Bldg. Co. v.  
16 Rex Hosp. Trustees, 425 U.S. 738, 740 (1976). The Court must also construe the alleged facts  
17 in the light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974),  
18 abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982); Barnett v. Centoni,  
19 31 F.3d 813, 816 (9th Cir.1994) (per curiam). All ambiguities or doubts must also be resolved  
20 in the plaintiff’s favor. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969). In addition, *pro*  
21 *se* pleadings “must be held to less stringent standards than formal pleadings drafted by  
22 lawyers.” Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (holding that *pro se* complaints  
23 should continue to be liberally construed after Ashcroft v. Iqbal, 556 U.S. 662 (2009)).

24 A motion to dismiss pursuant to Rule 12(b)(6) operates to test the sufficiency of the  
25 complaint. See Iqbal, 556 U.S. at 679. “Federal Rule of Civil Procedure 8(a)(2) requires only  
26 ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order  
27 to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’”  
28 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (alteration in original) (quoting

1 Conley v. Gibson, 355 U.S. 41, 47 (1957)). “The issue is not whether a plaintiff will ultimately  
2 prevail but whether the claimant is entitled to offer evidence to support the claims.” Scheuer,  
3 416 U.S. at 236 (1974).

4 The first step in testing the sufficiency of the complaint is to identify any conclusory  
5 allegations. Iqbal, 556 U.S. at 679. “Threadbare recitals of the elements of a cause of action,  
6 supported by mere conclusory statements, do not suffice.” Id. at 678 (citing Twombly, 550  
7 U.S. at 555). “[A] plaintiff’s obligation to provide the grounds of his entitlement to relief  
8 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause  
9 of action will not do.” Twombly, 550 U.S. at 555 (citations and internal quotation marks  
10 omitted).

11 After assuming the veracity of all well-pleaded factual allegations, the second step is for  
12 the court to determine whether the complaint pleads “‘a claim to relief that is plausible on its  
13 face.’” Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). “A claim has facial  
14 plausibility when the plaintiff pleads factual content that allows the court to draw the  
15 reasonable inference that the defendant is liable for the misconduct alleged. The plausibility  
16 standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility  
17 that a defendant has acted unlawfully.” Iqbal, 556 U.S. 662 at 678 (citations omitted).  
18 “Determining whether a complaint states a plausible claim for relief ... [is] a context-specific  
19 task that requires the reviewing court to draw on its judicial experience and common  
20 sense.” Id. at 679.

### 21 **III. SCREENING ORDER**

22 The Court’s screening order allowed Plaintiff’s claims for deliberate indifference to  
23 serious medical needs against Dr. Bansuan and unnamed prison officials to proceed past  
24 screening. (ECF No. 7). The Court reviewed the legal standards, and then applied them to Dr.  
25 Bansuan as follows:

26 Finally, Plaintiff sues Dr. Bansuan. Plaintiff alleged that he received a memo  
27 from CCHCS and the Receiver’s Office of Legal Affairs, stating that Plaintiff  
28 would be treated if he appropriately requested it. Plaintiff attempted to request  
the treatment, but instead of providing it Dr. Bansuan had an unqualified  
individual conduct an abdominal exam and then told Plaintiff he was “fine.”



1 Construing Plaintiff's complaint liberally, the Court finds that Plaintiff has  
2 stated a claim against Dr. Bansuan sufficient to proceed past screening.

3 (Id. at 11).

4 In the screening order, the Court also allowed a claim against certain Doe Defendants as  
5 follows:

6 [T]he Court finds that Plaintiff has also sufficiently alleged a claim against  
7 certain unnamed individuals. According to Plaintiff's allegations, it was  
8 determined that he has a serious medical need, the Harvoni treatment can meet  
9 that need, and Plaintiff is supposed to get the Harvoni treatment. However, for  
10 non-medical reasons, Plaintiff was not provided with the treatment. Plaintiff  
11 refers to persons giving directions to medical professionals regarding such  
12 treatment, who did not allow Plaintiff to receive the treatment, but does not state  
13 their names and titles.

14 As Plaintiff has sufficiently alleged that these unnamed prison official  
15 defendants decided that Plaintiff would not be treated (or that, for non-medical  
16 reasons, the treatment would be delayed), despite the fact that they knew  
17 Plaintiff had a serious medical need for treatment (he was placed on a list for  
18 treatment because he needed treatment), the Court finds that Plaintiff has stated  
19 an Eighth Amendment deliberate indifference claim against those persons within  
20 the prison system who were responsible for approving or allowing such  
21 treatment and who gave directions preventing Plaintiff from receiving such  
22 treatment.

23 (Id.).

#### 24 **IV. DEFENDANT'S MOTION TO DISMISS**

##### 25 **A. Defendant's Motion**

26 In his motion to dismiss, Defendant argues:

27 Plaintiff's claim is that he requested Hepatitis C treatment, but instead of issuing  
28 Plaintiff the requested treatment, an unqualified nurse was allowed to conduct an  
abdominal examination resulting in a determination that Plaintiff was "fine."  
(Screening Order, ECF No. 7 at 11.) As an initial matter, there are no facts pled  
that demonstrate Plaintiff was permitted to bypass all preliminary examinations,  
and receive the TSR for Hepatitis C treatment. Instead, as intended and set forth  
by protocol, Plaintiff received continual monitoring for his symptoms. (*See*  
ECF No. 1 at 26, 27.) And, based on his metrics—and the protocols attached to  
the complaint—he was placed in the corresponding group for Hepatitis C  
treatment. (*Id.* at 12.) This is not deliberate indifference.

Plaintiff's complaint is devoid of facts indicating that Dr. Bansuan based his  
treatment plan on the May 2018 examination by the nurse and the complaint

1 does not demonstrate that Dr. Bansuan ceased following up with Plaintiff based  
2 on the allegedly deficient examination. Indeed, Plaintiff’s pleadings  
3 demonstrate the *opposite*. Following the examination by the nurse and the  
4 guided assessment from Dr. Bansuan, Dr. Bansuan reviewed Plaintiff’s  
5 treatment plan four more times in the following five months, and updated  
6 Plaintiff on his lab work. (ECF No. 1 at 27.) At the same May 2018  
7 appointment, Plaintiff was notified of his FIB-4 score (*id.*), and the documents  
8 attached to the complaint demonstrate that a FIB-4 score above 1.45 was  
9 necessary to elevate Plaintiff’s care to the next step—a Fibroscan or liver biopsy  
10 (*id.* at 11). Without pleading that Dr. Bansuan’s care was compromised  
11 following the nurse’s examination, the delegation of an abdominal examination  
12 to a supporting nurse is insufficient to state a deliberate indifference claim. *See*  
13 *McLennan v. Oregon Dept. of Corrections*, No. 2:14-CV-755-SL, 2015 WL  
14 4488151, at \*6 (D.Or., 2015) (finding no deliberate indifference where plaintiff  
15 alleged nurses performed duties of doctor and plaintiff faced further irreparable  
16 injury).

17 Similarly, the complaint lacks facts demonstrating that a physical examination  
18 of the patient’s abdomen is determinative of the Hepatitis C treatment plan. And  
19 it would be beyond the purview of the Eighth Amendment for Plaintiff to plead  
20 that a difference in the choice of care states a claim. *See Toguchi*, 391 F.3d at  
21 1058. The documents attached to the complaint indicate that labs and objective  
22 metrics determine the category of care a patient is to receive. (*See* ECF No. 1 at  
23 8-22.) Indeed, Plaintiff’s FIB-4 score was 1.36 on May 15, 2018 (ECF No. 1 at  
24 26), which placed Plaintiff in the lowest risk group (*see id.* at 12). Based on  
25 information relayed to Plaintiff at the same appointment, Dr. Bansuan advised  
26 him that he was simply not a candidate for immediate intervention according to  
27 CDCR treatment protocols. (*Id.* at 26, 27.) Plaintiff’s repetitive pleading of the  
28 FIB-4 score undermines any credible assertion that the abdominal examination  
was determinative of his treatment regimen. As it stands, the abdominal  
examination was a superfluous review of Plaintiff’s liver condition which had  
no bearing on Plaintiff’s ensuing course of care. Plaintiff falls short of pleading  
a deliberate-indifference claim.

(ECF No. 18-1, at pgs. 4-5) (footnotes omitted). Defendant also argues, in the alternative, that  
he is entitled to qualified immunity. (*Id.* at 5-8).

### **B. Plaintiff’s Opposition**

Plaintiff argues in his response that officials disregarded a risk to his health (Hepatitis C  
is a serious disease) that was known and obvious. (ECF No. 26, at p. 2). Failure to treat  
Hepatitis C has been a repeated pattern of conduct. (*Id.* at 3). Many inmates were denied due  
to economic or monetary reasons, while CDCR set unrealistic criteria for an inmate to  
“qualify” for the treatment. (*Id.*).

1 Plaintiff claims that one test met CDCRs standards, showing a FIB-4 metric of 1.59,  
2 well above the treatment limits. (Id. at 4). Defendant had actual knowledge of the 1.59, yet  
3 failed to provide treatment. (Id.).

4 Plaintiff concludes that because CDCR officials and staff, including but not limited to  
5 Defendant Bansuan, knew of Plaintiff’s Hepatitis C (a serious medical condition), with a FIB-4  
6 score of 1.59 (well above the level that qualifies for elevated care, or any care for that matter),  
7 and acted without care or regard to the condition, Defendant’s motion to dismiss must be  
8 defeated. (Id. at 5).

9 **V. ANALYSIS**

10 As an initial matter, the Court agrees that supervising a nurse for an abdominal  
11 examination does not itself establish deliberate indifference to serious medical needs. The  
12 Court appreciates that, even according to Plaintiff’s complaint, Defendant Dr. Bansuan engaged  
13 in a much more thorough evaluation of Plaintiff’s risk factors, including multiple lab results,  
14 and did not base his opinion on the abdominal examination alone, if at all.

15 The more difficult question is whether Plaintiff’s complaint established, as the Court  
16 found in its screening order, that Defendant Bansuan or any Doe defendant disregarded  
17 direction that Plaintiff was qualified for the Harvoni treatment based on non-medical reasons.

18 With this in mind, the Court has reviewed Plaintiff’s allegations against Defendant  
19 Bansuan and the Doe defendants in detail, which are quoted verbatim below:

20 On/or about 4/20/18, received response from the P.L.O., about their request for  
21 review of medical treatment by (CCHCS) California Correctional Health Care  
22 Service. Enclosed was a “MEMO” dated April 16, 2018,” stating I would be  
treated, if I filed a CDC 7362 Medical Request-requesting it.

23 On 4/26/18, Seen by Nurse Godina, explained all symptoms.... Provided her  
24 with copy of memo dated 4/16/18, I requested Hep C treatment; condition was  
25 severe enough that she called (PCP) Primary Care Physician - Dr. Bansuan, for  
26 instructions. He instructed her to order labs and make Plaintiff, a (PCP)  
appointment.

27 On 4/30/18, Labs were done.

28 On 5/15/18, (PCP) appointment with Dr. Bansuan, explined [sic] symptoms of

1 over a year and that they've become progressively worse. Discussed the  
2 seriousness of my condition and after seeking legal action to receive treatment, I  
3 had received a 'Memo' dated 4/16/18, from (CCHCS) Office, stating that  
4 "should you desire treatment, you should initiate a request for the process at this  
appointment and this would allow for him to file a (T.S.R) Treatment Selection  
Request to Headquarters for review....

5 Continueing [sic] at appointment on "Tele-Med" ... I ask about the (T.S.R.). He  
6 then said "let me check your Fib 4 score". As Dr. Bansuan, checked for my FIB  
7 4 Score, on the computer, then he says "its 1.36. He then stated "you don't  
8 qualify for treatment; Yes, that's what I'm going by, so I didn't order all the  
9 labs, so I don't have your C.B.C. levels; so I can't recalculate them now". I  
asked what was going to be done? He responded saying [] he would reorder the  
labs and see me again 30 days.

10 On 6/17/18, filed CDC 7362 Medical Request, #5469203, as symptoms were  
11 still getting worser [sic] and 30 days, had passed.

12 On 6/18/18, On RN appointment; I was told that I would see the Doctor  
13 Tomorrow.

14 On 6/19/18, Seen Dr. Bansuan, discussed symptoms and Kruse, requested that  
15 Bansuan file a (T.S.R.); and asked what my FIB 4 Score was? Dr. Bansuan, at  
16 first stated .90; then he stated 1.59. He had concerns on whether he was  
17 calculating it correctly. Then, he said that he would see me in 30 days and  
ordered another set of labs. He said he would speak with and consult with his  
colleagues and what the Hep C Treatment Protocol was; then he stated that he  
wanted to start 'Harvoni' Treatment.

18 On 8/1/18, seen by Dr. Bansuan, who stated "his boss, Dr. Virk, would not allow  
19 him to file a (T.S.R.); unless my FIB 4 Score meet the treatment Protocol, set  
20 forth by the Hep C Committee in Sacramento.

21 ...

22 On 8/29/18, Banuan, said he spoke to Dr. Virk, saying "I was told not to file  
23 RFS Order or a (T.S.R.), order to Sacramento; on the "memo".

24 On 10/29/18, an appointment with Dr. Bansuan, stated "I spoke with the Hep C  
25 Panel @ Sacramento and I made them aware of your situation. Now, they are  
26 fully award of the "NEED" for treatment. Per your labs; your treatment level is  
27 3, and everyone is going to be treated; but, they'll treat the level 1's, the level  
2's, then the level 3's, like yourself." Plaintiff was not given a definitive time or  
date that he would be treated.

28 ...

1 As of today's date, Plaintiff Kruse, is no closer to receiving 'Harvoni  
2 Treatment" for his on-going and continuous pain and suffering - Hep C disease,  
3 which can be fatal without effective treatment.

4 (ECF No. 1, at pgs. 25-28).

5 Plaintiff also attached as exhibits some documents related to how patients are selected  
6 for treatment. According to one document, if the FIB4 score is less than 1.45: "Unlikely to  
7 have significant liver fibrosis," and "Do not order FibroScan[] or liver biopsy." (Id. at 11). If  
8 FIB4 is greater or equal to 1.45, but less than 3.25: "*Cannot accurately predict level of liver*  
9 *fibrosis,*" and "Order FibroScan[] or liver biopsy." (Id.). Based on that scan, "Patient is  
10 eligible for HCV treatment if Fibrosis Stage 0-3, or if Fibrosis Stage 4 but patient does not have  
11 decompensated cirrhosis." (Id. at 11). There is also a document regarding HCV Treatment  
12 Prioritization, explaining "Due to the significant number of patients eligible for treatment,  
13 patients at highest risk for complication or death if they remain untreated will be prioritized to  
14 receive HCV treatment first." (Id. at 12). Level 1 is the highest risk group, with various  
15 clinical examples. Level 2 is Medium risk group. Level 3 is lowest, which includes "Any  
16 previous Fibroscan or liver biopsy demonstrating stage 0-1 fibrosis" and "Does not meet any  
17 priority group 1 or 2 criteria." (Id.).

18 It is also worth noting, as Defendant emphasized, that elsewhere in the document it  
19 states: "Hepatitis C treatment is not an emergency. The liver damages/scar tissue happens over  
20 many years, and some people never get much damage or scarring." (Id. at 22).

21 Based on a careful reading of Plaintiff's complaint, the Court agrees with Defendant  
22 that Plaintiff's complaint has failed to state a claim for deliberate indifference to serious  
23 medical needs against Defendant Bansuan. Although the Court's screening order held a claim  
24 based on Defendant Bansuan's delegated abdominal inspection and saying Plaintiff was "fine,"  
25 a closer review of Plaintiff's complaint, with explanation from the documents, shows that  
26 Defendant Bansuan followed the protocols set forth in the CDCR documentation. He  
27 repeatedly ordered lab tests, which are the first set of criteria to evaluate. Those lab scores  
28 initially showed a score of 1.36, which according to the protocols indicate "Unlikely to have  
significant liver fibrosis," and "Do not order Fibroscan or liver biopsy." According to

1 Plaintiff's complaint, when asked about his score at a later date, "Dr. Bansuan, at first stated  
2 .90; then he stated 1.59. He had concerns on whether he was calculating it correctly." He  
3 ordered further labs, and also consulted with "his boss, Dr. Virk, [who] would not allow him to  
4 file a (T.S.R.); unless [Plaintiff's] FIB 4 Score meet the treatment Protocol, set forth by the Hep  
5 C Committee in Sacramento." Then, at a later appointment, Defendant Bansuan stated "I spoke  
6 with the Hep C Panel @ Sacramento and I made them aware of your situation. Now, they are  
7 fully award of the 'NEED' for treatment. Per your labs; your treatment level is 3, and everyone  
8 is going to be treated; but, they'll treat the level 1's, the level 2's, then the level 3's, like  
9 yourself." This last note shows that Defendant Bansuan again took action based on Plaintiff's  
10 health concerns.

11       Upon re-reading this complaint in connection with the parties' briefs, it appears that  
12 Plaintiff is not claiming that some higher CDCR official told Plaintiff that he qualified for  
13 Harvoni treatment, but that Dr. Bansuan failed to provide it. Rather, Plaintiff contends that Dr.  
14 Bansuan complied with CDCR's protocols for providing Harvoni treatment, but Plaintiff  
15 disagrees with those protocols. Plaintiff concedes that he fit the criteria for a "Level 3" patient,  
16 which is the lowest risk group, but nevertheless insists on Harvoni treatment immediately. In  
17 other words, Plaintiff contends that the prison health care system should not be permitted to  
18 prioritize patients at all, and everyone who would benefit from Harvoni treatment should  
19 receive it immediately.

20       Plaintiff's allegations not state a claim against Defendant Bansuan. Defendant  
21 Bansuan, according to Plaintiff's complaint, sought the necessary lab work, applied the criteria  
22 given by CDCR, consulted with multiple health professionals, and followed their  
23 recommendations. This care was not deliberately indifferent. Instead, even taking all  
24 Plaintiff's facts as true, this care shows deliberate and careful treatment according to  
25 established protocols. Thus, Defendant's motion should be granted because Plaintiff's  
26 complaint, even if true, does not establish a constitutional claim for deliberate indifference to  
27 serious medical against Defendant Bansuan.

28       Although Defendant Bansuan did not request dismissal of the claim against the

1 remaining Doe Defendants, the Court’s reasoning in this order also calls into question the  
2 Court’s similar reasoning in its screening order as to those Defendants.<sup>1</sup> Again, in the Court’s  
3 screening order, the Court allowed a claim against certain Doe Defendants based on finding  
4 that “Plaintiff has sufficiently alleged that these unnamed prison official defendants decided  
5 that Plaintiff would not be treated (or that, for non-medical reasons, the treatment would be  
6 delayed), despite the fact that they knew Plaintiff had a serious medical need for treatment (he  
7 was placed on a list for treatment because he needed treatment).” (ECF No. 7, at p. 11). In  
8 other words, the Court found a claim against certain Doe individuals based on the Court’s  
9 understanding that Plaintiff had alleged he had qualified for Harvoni treatment, yet was being  
10 denied for non-medical reasons.

11       Upon a closer examination in connection with this motion, the Court realizes that it  
12 misunderstood Plaintiff’s allegations in his complaint. Plaintiff was not being denied treatment  
13 for non-medical reasons: he was being delayed treatment based on a medical evaluation of his  
14 symptoms and prioritization of those needing care according to CDCR protocols. Plaintiff’s  
15 allegations concede that he was assigned the lowest level of risk based on his lab results. His  
16 symptoms were being monitored according to established CDCR protocols. He was never told  
17 that he qualified for immediate treatment yet failed to receive directed treatment. Rather, his  
18 symptoms qualified him for a lower priority of treatment.

19       Plaintiff argues that even prioritizing patients shows deliberate indifference because  
20 every patient who could benefit from Harvoni treatment should receive it, and to not  
21 immediately provide such treatment for all is deliberate indifference. The Court disagrees. A  
22 constitutional claim of deliberate indifference to serious medical needs requires Plaintiff to  
23 establish that a person *subjectively* “knows of and disregards an *excessive risk* to inmate health  
24 and safety.” Toguchi, 391 F.3d at 1057 (emphasis added) (citation and internal quotation  
25 marks omitted). Plaintiff’s allegations and the attached documents show that CDCR health  
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28 <sup>1</sup> Under 28 U.S.C. § 1915, “[n]otwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case *at any time* if the court determines that the action or appeal fails to state a claim upon which relief may be granted.” 28 U.S.C. § 1915(e)(2)(B)(ii) (emphasis added).

1 services does not believe that there is an excessive risk to the health and safety of level 3  
2 patients, like Plaintiff. Again, the protocols explain that “Hepatitis C treatment is not an  
3 emergency. The liver damage/scar tissue happens over many years, and some people never get  
4 much damage or scarring.” (ECF No. 1, at p. 22). The fact that Plaintiff has had Hepatitis C  
5 for approximately 20 years confirms this. CDCR health services has adopted complicated  
6 review, monitoring, and treatment procedures to care for such patients. While Plaintiff may  
7 disagree with that care, the Court cannot find that Plaintiff’s allegations regarding the treatment  
8 protocols sufficiently shows deliberate indifference to his serious medical needs.

9 **VI. RECOMMENDATIONS**

10 Based on the foregoing, the undersigned HEREBY RECOMMENDS that:

- 11 1. Defendant Bansuan’s motion to dismiss (ECF No. 18) be granted;
- 12 2. Plaintiff’s Eighth Amendment claims for deliberate indifference to  
13 serious medical needs against Defendant Bansuan and Doe Defendant(s) be  
14 dismissed; and
- 15 3. The Clerk of Court be directed to close this case.

16 These findings and recommendations are submitted to the United States district judge  
17 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within twenty-  
18 one (21) days after being served with these findings and recommendations, any party may file  
19 written objections with the court. Such a document should be captioned “Objections to  
20 Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be  
21 served and filed within seven (7) days after service of the objections.

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1 The parties are advised that failure to file objections within the specified time may  
2 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.  
3 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).  
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5 IT IS SO ORDERED.

6 Dated: April 27, 2020

7 /s/ Eric P. Groj  
8 UNITED STATES MAGISTRATE JUDGE  
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