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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MARCUS BOVARIE, )  
 )  
 Plaintiff, )  
 v. )  
 )  
 ARNOLD SCHWARZENEGGER, Governor; )  
 PRIVATE HEALTH CARE COMPANY, )  
 "Company X"; MATTHEW CATES, )  
 Secretary of Corrections; JAMES E. )  
 TILTON, Former Secretary of Corrections; )  
 MICHAEL SMELOSKY, Warden, Centinela )  
 State Prison; V.M. ALMAGER, Former )  
 Warden, Centinela Prison; G.J. GIURBINO, )  
 Former Warden, Centinela Prison; N. )  
 BARRERAS, M.D., L. CALDERON, Health )  
 Care Manager, Centinela Prison; D. )  
 KHATRI, M.D., SUMMER AYMAR, D.O.; )  
 MANAIG, R.N.; J. ROBINSON, R.N.; )  
 CANDI COOK, Medical Appeals Analyst; )  
 TETTEH, M.D.; KO, M.D.; HODGE, N.P.; )  
 C. HAMMOND, Staff Services Manager I; )  
 NAVAMANI, M.D.; Does 1-20, )  
 )  
 Defendants. )

Civil No.08cv1661 LAB (NLS)  
**REPORT AND RECOMMENDATION  
FOR ORDER:**  
**(1) GRANTING COOK’S MOTION TO  
DISMISS [Doc. No. 25];**  
**(2) GRANTING TETTEH’S MOTION  
TO DISMISS [Doc. No. 26];**  
**(3) GRANTING IN PART AND  
DENYING IN PART SUMMER  
AYMAR’S MOTION TO DISMISS [Doc.  
No. 27];**  
**(4) GRANTING C. HAMMOND’S  
MOTION TO DISMISS [Doc. No. 28];**  
**(5) GRANTING KO’S MOTION TO  
DISMISS [Doc. No. 29];**  
**(6) GRANTING IN PART AND  
DENYING IN PART BARRERAS,  
KHATRI, CALDERON AND  
MANAIG’S MOTION TO DISMISS  
[Doc. No. 30];**  
**(7) GRANTING HODGE’S MOTION  
TO DISMISS [Doc. No. 31];**  
**(8) GRANTING IN PART AND  
DENYING IN PART NAVAMANI’S  
MOTION TO DISMISS [Doc. No. 42];**  
**(9) GRANTING ROBINSON’S MOTION  
TO DISMISS [Doc. No. 51].**

1 INTRODUCTION

2 Marcus Bovarie (Plaintiff), a California prisoner proceeding pro se, and Wayne Wicken, also  
3 proceeding pro se, initially filed this 42 U.S.C. § 1983 civil rights action on September 10, 2008. [Doc.  
4 No. 1.] The court, after a sua sponte screening, dismissed the complaint without prejudice for failure to  
5 state a claim and dismissed plaintiff Wicken. [Doc. No. 3.] On December 8, 2008, Bovarie filed a first  
6 amended complaint (FAC) as a purported class action for violation of federal rights based on deliberate  
7 indifference to medical needs, and for state violations based on medical negligence, professional  
8 negligence and failure to provide immediate medical care. [Doc. No. 6.] On January 9, 2009, the court  
9 denied Bovarie’s motion for class certification, dismissed defendants Schwarzenegger, Cates, Tilton,  
10 Smelosky, Almager and Giurbino for failure to state a claim against them, and ordered service on the  
11 remaining defendants. [Doc. No. 8.] All Defendants except Robinson and Navamani were served. [Doc.  
12 Nos. 11, 12.] The served Defendants filed motions to dismiss. [Doc. Nos. 25, 26, 27, 28, 29, 30, 31.]

13 On April 20, 2009, Bovarie filed a motion for the U.S. Marshal to complete service on defendant  
14 Navamani. [Doc. No. 33.] The court ordered the U.S. Marshal to execute that service. [Doc. No. 34.] On  
15 July 10, 2009, Bovarie filed a motion for the U.S. Marshal to complete service on defendant Robinson.  
16 [Doc. No. 38.] That same day he also filed a single opposition to the seven already-filed motions to  
17 dismiss. [Doc. No. 40.] The court granted Bovarie’s motion to order the U.S. Marshal to execute service  
18 on defendant Robinson. [Doc. No. 41.] Then, defendant Navamani filed his motion to dismiss [Doc. No.  
19 42] and Bovarie filed an opposition to that motion [Doc. No. 46.] Defendant Robinson filed his motion  
20 to dismiss on November 3, 2009. [Doc. No. 51.]

21 The court now addresses all the motions to dismiss in this consolidated order because the  
22 allegations against all Defendants involve the same or similar facts and circumstances. While Bovarie  
23 has not filed a specific opposition against Robinson’s motion to dismiss, the court construes the other  
24 oppositions previously-filed to form the basis of his opposition to Robinson’s motion to dismiss. The  
25 court has reviewed all nine motions, oppositions, replies and the complete record in this case. For the  
26 following reasons the court **RECOMMENDS** that the defendants Aymar, Barreras, Khatri, Calderon,  
27 Manaig and Navamani’s motions to dismiss be **GRANTED in part and DENIED in part** and that the  
28 remaining motions be **GRANTED** in their entirety.

1 **RELEVANT BACKGROUND**

2 **The Original Illness.**<sup>1</sup>

3 Bovarie is incarcerated at Centinela State Prison (Centinela). On June 14, 2007 Bovarie and  
4 several other inmates became suddenly and extremely ill. FAC ¶ 35. Bovarie experienced severe  
5 fatigue, exhaustion, weakness, loss of equilibrium, confusion and kidney pain and was bedridden for 10  
6 days. *Id.* Bovarie, in his mid to late thirties, had problems maintaining his equilibrium and cognitive  
7 skills for the first 30 days after the “original illness.” *Id.* While he made a medical request the day he  
8 began experiencing symptoms, he did not receive medical attention until June 25, 2007. FAC ¶ 36.

9 Defendant Manaig, a registered nurse, saw Bovarie. FAC ¶ 37. He conducted a dipstick  
10 urinalysis. FAC ¶ 39. The results were negative. *Id.* Manaig told Bovarie that he would be called back  
11 to medical in approximately two weeks. *Id.* Manaig then ordered a mental health screening of Bovarie  
12 for excessive medical requests. FAC ¶ 41. On July 6, 2007, Bovarie was taken for a mental health  
13 screening with Dr. Haskett. FAC ¶¶ 40-41; Ex. H. Dr. Haskett referred Bovarie back to medical. FAC  
14 ¶ 41.

15 On August 1, 2007, Bovarie was taken to see Dr. Khatri. FAC ¶ 42. Bovarie was still suffering  
16 from the same symptoms he had experienced back on June 14, 2007. FAC ¶ 43. Dr. Khatri ordered a  
17 blood test. *Id.* Blood was drawn on August 17 and September 19, 2007. FAC ¶ 44. The blood test  
18 results showed that Bovarie had an elevated level of bilirubin but that test results were essentially within  
19 normal limits. FAC ¶ 44; Exs. I, J.

20 Bovarie saw Dr. Aymar on September 19, 2007. FAC ¶ 45. Bovarie told her that he was still  
21 suffering from the same symptoms as from June and that he believed he had kidney damage. FAC ¶ 46.  
22 Dr. Aymar did not explain the blood results to Bovarie, and told him that he was probably suffering  
23 from depression. FAC ¶¶ 46-48. On October 25, 2007 Bovarie saw Dr. Aymar again. FAC ¶ 50.  
24 Bovarie again complained of kidney pain, noted that he had pain in his liver and that any kind of

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25  
26 <sup>1</sup>The court takes these facts from the allegations in the FAC. In a Rule 12(b)(6) motion to  
27 dismiss, the court must accept as true all material allegations in the complaint, and the reasonable  
28 inferences drawn from them, in the light most favorable to the plaintiff. *Thompson v. Davis*, 295 F.3d  
890, 895 (9th Cir. 2002). It will not, however, “accept as true allegations that contradict matters  
properly subject to judicial notice or by exhibit [to the complaint].” *Spewell v. Golden State Warriors*,  
266 F.3d 979, 988 (9th Cir. 2001).

1 physical exertion exacerbated the pain. *Id.* Dr. Aymar ordered a urinalysis. FAC ¶ 51.

2 On December 17, 2007 Bovarie attended another medical screening with nurse Manaig. FAC ¶  
3 52. Manaig referred him for a consult with a doctor. FAC ¶ 53. On January 25, 2008, Bovarie received  
4 his first medical exam since first complaining about his symptoms. FAC ¶ 54. After conducting a  
5 physical exam, Dr. Navamani ordered a CT scan for Bovarie. *Id.* Instead, Bovarie received an  
6 ultrasound of his abdominal area on July 7, 2008. FAC ¶ 57. Based on the ultrasound Bovarie learned  
7 that he had a damaged gall bladder with gall stones and blocked bile ducts. *Id.* On July 18, 2008  
8 Bovarie saw Dr. Navavani (not defendant Navamani) and learned that he also had a blocked right  
9 kidney and enlarged spleen. FAC ¶ 59. Later that day Bovarie received a CT scan at Pioneer Memorial  
10 Hospital. FAC ¶ 61. He learned that the spleen was actually not enlarged but that in addition to the gall  
11 stones, Bovarie had nephrosis and that his right kidney was swollen. *Id.*

## 12 **Administrative Grievances.**

13 Bovarie filed two administrative grievances at various levels regarding the alleged denials of  
14 medical care. FAC ¶ 78. The first grievance was for an attempt to receive medical care due to the  
15 “original illness.” FAC ¶ 79; Ex. D. In response, defendant Candi Cook, the medical appeals analyst,  
16 explained that Bovarie’s medical request was already granted, and that no further tests or treatment were  
17 indicated to be necessary. FAC ¶¶ 79-87; Ex. D. Dr. Khatri responded at the first formal level, saying  
18 that he did not identify any abnormal gastric symptoms in Bovarie. FAC ¶ 83; Ex. A. Defendant  
19 Calderon, Health Care Manager, added to the second level response that Bovarie may seek a private  
20 consultation at his own expense. FAC ¶ 85; Ex. A. In the director’s level decision, defendant  
21 Hammond, Staff Services Manager I, investigated the matter and noted Bovarie was receiving the  
22 treatment deemed medically necessary. FAC ¶ 87; Ex. A. Non-defendant Grannis, Chief of the Inmate  
23 Appeals Branch, signed the actual denial of the request. FAC Ex. A.

24 Bovarie filed his second grievance following his two consults with Dr. Aymar. He complained  
25 of Dr. Aymar’s actions and questioned her medical licensing. FAC ¶ 88; Ex. E. Defendant Cook  
26 responded that no further tests or treatment were indicated to be necessary and that all health care staff  
27 are currently licensed with the appropriate medical boards FAC ¶ 89-93; Ex. E. Bovarie also received a  
28 letter from the Osteopathic Medical Board of California explaining that Dr. Aymar is currently licensed

1 in California and is in good standing. FAC Ex. K. Dr. Khatri responded at the first formal level that Dr.  
2 Aymar noted the symptoms had resolved and the blood tests and urinalysis she ordered were within  
3 normal limits. FAC ¶ 91; Ex. B. In the second level response, Dr. Barreras noted that Bovarie also saw  
4 Dr. Navamani and that if further medical services were required based on the tests that Dr. Navamani  
5 ordered, Bovarie would be told. FAC ¶ 93; Ex. B. In the director's level decision, defendant Robinson,  
6 Appeals Examiner and Supervising Registered Nurse II, investigated the complaint and noted that  
7 Bovarie is receiving medical care commensurate with community standards and that all health care staff  
8 are properly licensed. FAC ¶ 95; Ex. B. Non-defendant Grannis signed the actual denial of the request.  
9 FAC Ex. B.

#### 10 **Relief Requested.**

11 Bovarie asserts that the Defendants should have provided at least the following services: referral  
12 to a nephrologist and other specialists, prompt abdominal ultrasound, CT scan and MRI, intravenous  
13 pyelogram, professional review of bloodwork, dialysis, prescriptions to address various issues, diet  
14 management and lithotripsy. FAC ¶ 112. He asserts that the failure to treat the original illness resulted  
15 in further significant injury, such as gall bladder disease, kidney stones, nephrosis, kidney damage,  
16 disease of the spleen, severe pain and other damage. FAC ¶ 172. Bovarie alleges that the Defendants  
17 acted intentionally with a deliberate indifference to his serious medical needs in violation of the eighth  
18 amendment and California law. FAC ¶¶ 173-175. He claims that he suffered and continues to suffer  
19 severe pain and suffering and emotional distress. FAC ¶ 176. Bovarie asks for general damages,  
20 special damages in the form of medical expenses and loss of income, exemplary and punitive damages,  
21 attorneys fees, costs, and injunctive relief in the form of medical care and new policies and procedures  
22 regarding health care for inmates. FAC ¶¶ 177-179.

### 23 **DISCUSSION**

#### 24 **I. Eleventh Amendment.**

25 Defendants Barreras, Calderon, Khatri, Manaig, Robinson, Cook, Ko, Hammond and Navamani  
26 move to dismiss the claims against them for monetary damages insofar as they are sued in their official  
27 capacities. They argue that the eleventh amendment bars Bovarie from seeking money damages against  
28 state employees in their official capacities. In his opposition, Bovarie states there is no eleventh

1 amendment conflict because he sues Defendants for monetary damages only in their individual  
2 capacities.

3 While the court appreciates that in the opposition, Bovarie states he does not seek money  
4 damages against Defendants in their official capacities, nothing in the FAC identifies that choice.  
5 Rather, Bovarie summarily asserts that at all times mentioned in the FAC the Defendants were acting  
6 under the color of state law, and that he sues the Defendants in their official and individual capacities.  
7 FAC ¶¶ 13 (Barreras), 16 (Calderon), 18 (Khatri), 21 (Manaig), 22 (Robinson), 23 (Cook), 25 (Ko), 27  
8 (Hammond), 30 (Navamani). Further, no facts show that Defendants waived immunity.

9 Finally, even though defendants Tetteh, Aymar and Hodge did not specifically move to dismiss  
10 the claims against them for monetary damages insofar as they are sued in their official capacities, the  
11 court finds that they are entitled to the same eleventh amendment immunity. Under the court's authority  
12 to review complaints by incarcerated individuals proceeding in forma pauperis under 28 U.S.C. §  
13 1915(e)(2), the court also recommends that Bovarie's claims for money damages against defendants  
14 Tetteh, Aymar and Hodge in their individual capacities be dismissed.

15 Based on these facts, the court **RECOMMENDS** that Defendants' motion to dismiss Bovarie's  
16 federal and state claims for money damages against defendants Barreras, Calderon, Khatri, Manaig,  
17 Robinson, Cook, Ko, Hammond, and Navamani in their official capacities be **GRANTED** and that the  
18 these same claims be dismissed against defendants Tetteh, Aymar and Hodge. The court further  
19 recommends that dismissal be **with prejudice**. Bovarie cannot plead facts sufficient to overcome the  
20 eleventh amendment bar to these claims. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71  
21 n.10 (1989) (eleventh amendment prohibits damages actions against state officials acting in their official  
22 capacities).

23 **II. Rule 12(b)(6) Motion.**

24 **A. Legal Standard.**

25 A Federal Rule of Civil Procedure 12(b)(6) motion to dismiss tests the legal sufficiency of the  
26 plaintiff's claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). For the sake of deciding the  
27 motion, the court must accept as true all material allegations in the complaint, and the reasonable  
28 inferences drawn from them, in the light most favorable to the plaintiff. *Thompson v. Davis*, 295 F.3d

1 890, 895 (9th Cir. 2002); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996). This tenet  
2 does not extend, however, to legal conclusions cast as factual allegations. *Bell Atl. Corp. v. Twombly*,  
3 550 U.S. 544, 555 (2007); see *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, 129 S.Ct. 1937, 1949 (2009); see also  
4 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “Threadbare recitals of the  
5 elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S.  
6 \_\_\_, 129 S.Ct. at 1949-50 (citing *Twombly*, 550 U.S. at 555). “Where there are well-pleaded factual  
7 allegations, a court should assume their veracity and then determine whether they plausibly give rise to  
8 an entitlement of relief.” *Id.* at 1950.

9 Further, the court may consider exhibits attached to the complaint without converting the motion  
10 to dismiss into a motion for summary judgment. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003);  
11 *Walker v. Woodford*, 454 F.Supp.2d 1007, 1017 n.3 (S.D. Cal. 2006). Where an exhibit contradicts  
12 allegations in the complaint, the court cannot “accept as true allegations that contradict matters properly  
13 subject to judicial notice or by exhibit [to the complaint].” *Sprewell v. Golden State Warriors*, 266 F.3d  
14 979, 988 (9th Cir. 2001).

15 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to  
16 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S.  
17 \_\_\_, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). The plausibility standard requires showing  
18 “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads  
19 facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility  
20 and plausibility of entitlement to relief.” *Id.* (citing *Twombly*, 550 U.S. at 557) (internal quotations  
21 omitted).

## 22 **B. Pro Se Litigants.**

23 Where a plaintiff appears pro se in a civil rights case, the court must construe the pleadings  
24 liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los Angeles Police Dept.*,  
25 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is “particularly important in civil  
26 rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In giving liberal interpretation  
27 to a pro se civil rights complaint, however, the court may not “supply essential elements of [a] claim that  
28 w[ere] not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir.

1 1982). The court must give a pro se litigant leave to amend his complaint “unless it determines that the  
2 pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122,  
3 1127 (9th Cir. 2000) (en banc) (citing *Doe v. U.S.*, 58 F.3d 494, 497 (9th Cir. 1995)).

4 **C. Section 1983 Claims.**

5 A § 1983 claimant must allege: (1) a violation of rights protected by the Constitution or created  
6 by federal statute, (2) proximately caused (3) by conduct of a ‘person’ (4) acting under color of state  
7 law.” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). To prevail, a claimant must prove that a  
8 person acting under color of state law committed the conduct at issue, and the conduct deprived the  
9 claimant of some right, privilege, or immunity protected by the Constitution or laws of the United  
10 States. 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), overruled on other grounds by  
11 *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir.  
12 1985) (en banc).

13 A person subjects another to the deprivation of a constitutional right--within the meaning of §  
14 1983--if he does an affirmative act, participates in another’s affirmative acts, or omits to perform an act  
15 which he is legally required to do that causes the deprivation. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th  
16 Cir. 1978) (citations and quotations omitted). Anyone who causes any citizen to be subjected to a  
17 constitutional deprivation is also liable. *Id.* The requisite causal connection can be established not only  
18 by some kind of direct personal participation in the deprivation but also by setting in motion a series of  
19 acts by others that the actor knows or reasonably should know would cause others to inflict the  
20 constitutional injury. *Id.* at 743-744.

21 Liability, however, cannot be based upon respondeat superior or any other theory of vicarious  
22 liability. *Monell v. Dept. of Social Services*, 436 U.S. 658, 690-692 (1978). “The inquiry into causation  
23 must be individualized and focus on the duties and responsibilities of each individual defendant whose  
24 acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v. Murphy*, 844 F.2d  
25 628, 633 (9th Cir. 1988). The “touchstone” for determining when a plaintiff shows that a defendant  
26 proximately caused the alleged violation of the plaintiff’s rights is “foreseeability.” *Phillips v. Hust*,  
27 477 F.3d 1070, 1077 (9th Cir. 2007).

28 ///



1           **D.     Eighth Amendment Claim: Deliberate Indifference to Medical Needs.**

2           Deliberate indifference to an inmate’s serious medical needs violates the eighth amendment’s  
3           proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).  
4           Deliberate indifference includes denial, delay, or intentional interference with a prisoner’s medical  
5           treatment. *Id.* at 104-105; *see Broughton v. Cutter Labs.*, 622 F.2d 458, 459-60 (9th Cir. 1980) (delay of  
6           six days in treating hepatitis was sufficient to state a claim of deliberate indifference); *Jones v. Johnson*,  
7           781 F.2d 769, 770-771 (9th Cir. 1986) (allegation that jail medical staff would not treat plaintiff’s  
8           painful hernia until it became strangulated stated a claim against medical personnel). Deliberate  
9           indifference lies somewhere between negligence and “conduct engaged in for the very purposes of  
10          causing harm or with the knowledge that harm will result.” *Farmer v. Brennan*, 511 U.S. 825, 836  
11          (1994); *see Redman v. County of San Diego*, 942 F.2d 1435, 1440 (9th Cir. 1991).

12          Claims of deliberate indifference involve an objective and a subjective component. The  
13          objective inquiry addresses the seriousness of the inmate’s medical need. *Clement v. Gomez*, 298 F.3d  
14          898, 904 (9th Cir. 2002). A serious medical need exists if the “failure to treat a prisoner’s condition  
15          could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’ ” *McGuckin*  
16          *v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by *WMX Technologies, Inc. v.*  
17          *Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (quoting *Estelle*, 429 U.S. at 104).

18          The subjective inquiry examines whether the prison official acted with a sufficiently culpable  
19          state of mind. *Id.* An official must (1) be actually aware of facts from which an inference could be  
20          drawn that a substantial risk of harm exists, (2) actually draw the inference, but (3) nevertheless  
21          disregard the risk to the inmate’s health. *Farmer*, 511 U.S. at 837-838.

22                   **I.     Defendants Tetteh, Ko and Hodge.**

23          Bovarie alleges facts on behalf of dismissed plaintiff Wayne Wicken. He alleges that defendants  
24          Hodge, Tetteh and Ko conducted medical examinations of Wicken and that their care fell below eighth  
25          amendment standards. FAC ¶¶ 99-104. He explains the steps Wicken took to file an administrative  
26          grievance. FAC ¶¶ 105-109. He alleges that Tetteh, Ko and Hodge knew or should have known of  
27          Wicken’s medical needs and were negligent. FAC ¶¶ 162-163. In his opposition, Bovarie  
28          acknowledges that Wicken was dismissed from this action “due to his failure to pay the initial filing fee

1 and because Bovarie, filing on his behalf, is not an attorney and cannot legally represent Wicken.”  
2 Opp’n, p.5.

3 The allegations against defendants Tetteh, Ko and Hodge refer only to their alleged respective  
4 roles in the care of dismissed plaintiff Wicken. Bovarie does not allege that any of these defendants  
5 dealt with Bovarie at any point during the alleged acts. The court dismissed Wicken from this action on  
6 October 24, 2008 and denied Bovarie’s motion for class certification on January 9, 2009. [Doc. Nos. 3,  
7 8.] In dismissing Wicken, the court noted that Bovarie does not have the authority to represent the legal  
8 interest of any other party. Oct. 28 Order, p.3; *see Cato v. U.S.*, 70 F.3d 1103, 1105, n.1 (9th Cir. 1995).  
9 Bovarie acknowledges that Wicken is not a party to this lawsuit. *See* Opp’n, p.5.

10 Because Bovarie’s allegations regarding Tetteh, Ko and Hodge only deal with dismissed-  
11 plaintiff Wicken, those allegations do not and cannot state a claim for deliberate indifference toward  
12 Bovarie. Therefore, the court **RECOMMENDS** that the motions to dismiss filed by defendants Tetteh,  
13 Ko and Hodge be **GRANTED** and that the dismissal be **with prejudice**. Bovarie cannot plead facts  
14 sufficient to overcome the bar to these claims.

15 **2. Defendants Cook, Hammond and Robinson.**

16 Bovarie alleges the following facts regarding defendants Cook, Hammond and Robinson. Cook  
17 is the Health Care Appeals Coordinator at Centinela and that as the coordinator, she is responsible for  
18 all medical appeals. FAC ¶ 23. She is the “gatekeeper” to medical care for inmates in that she  
19 personally diagnoses them to decide whether to grant or deny the appeal. *Id.* Cook participated at  
20 various levels of the appeals for both Bovarie’s grievances. FAC ¶¶ 78-87, 91-93. In the first  
21 grievance, Cook partially granted the appeal at the informal level and noted that Bovarie went to triage  
22 and had a urinalysis, and that no further treatment was indicated. FAC Ex. D. At the next level, Cook  
23 submitted a medical request form on Bovarie’s behalf so that a physician could see him. *Id.* As a result,  
24 Bovarie had a consult with Dr. Khatri. FAC ¶ 82. Regarding the second grievance, while Cook denied  
25 the different appeal levels for his complaint about Dr. Aymar, she based those denials on her reliance on  
26 the judgment of the trained medical providers. FAC Ex. A.

27 Hammond is an Appeals Examiner. FAC ¶ 27. He is responsible for providing medical care to  
28 all CDCR inmates and diagnoses for them. *Id.* Hammond, too, works as a “gatekeeper” for inmate

1 medical care. *Id.* Hammond reviewed Bovarie’s director’s level appeal for his first grievance. He  
2 noted that Bovarie “is receiving the treatment deemed medically necessary by . . . members of the  
3 [Centinela] medical staff.” FAC ¶ 87; Ex. A. Robinson is a Supervising Registered Nurse who provides  
4 medical care to inmates as both a nurse and a medical appeals examiner at the director’s level. FAC ¶  
5 22. She reviewed Bovarie’s director’s level appeal for his second grievance. FAC ¶ 95; Ex. B. She  
6 noted that “all health care staff are licensed properly” and that Bovarie “is receiving medical care  
7 commensurate with community standards.” *Id.*

8 For the director’s level appeals neither Hammond nor Robinson actually denied the appeals.  
9 FAC Ex. A. Grannis, Chief of the Inmate Appeals Branch, actually denied the appeals. *Id.* In denying  
10 the appeals Grannis relied on the investigations and reviews of Hammond and Robinson. *Id.*

11 **a. Vicarious liability.**

12 Bovarie claims that Cook, Hammond and Robinson became responsible for the medical  
13 providers’ alleged deliberate indifference solely through their roles as investigators for an administrative  
14 appeals agency. This claim is akin to charging these Defendants with vicarious liability for the actions  
15 of the medical staff. Liability, however, cannot be based upon respondeat superior or any other theory  
16 of vicarious liability. *Monell v. Dept. of Social Services*, 436 U.S. 658, 690-692 (1978). Further, to  
17 have deprived Bovarie of any constitutional right, these Defendants would have had to engage in  
18 affirmative acts of deprivation, or participate in others’ affirmative acts, to cause the deprivation.  
19 *Johnson*, 588 F.2d at 743.

20 Here, Cook, Hammond and Robinson investigated the facts and reviewed the opinions of the  
21 medical practitioners. This is not the type of direct participation in Bovarie’s medical care that warrants  
22 imposition of section 1983 liability. Because these Defendants did not provide medical care to Bovarie,  
23 and did not otherwise directly participate in the medical providers’ alleged acts, they cannot be the  
24 source of the alleged constitutional deprivation. Neither can they be held vicariously liable for the acts  
25 of the medical providers.

26 **b. Inference of substantial risk.**

27 Bovarie argues that Cook, Hammond and Robinson actively participated in the deprivation of  
28 medical care because they should have, among other things, consulted with medical professionals before

1 denying the appeals. Opp'n, pp.12-16. But to be liable for deliberate indifference to medical needs,  
2 these Defendants would had to have been aware of the facts and actually draw the inference that a  
3 substantial risk of harm existed. *Farmer*, 511 U.S. at 837-838. Here, Cook, Hammond and Robinson  
4 relied on the documentation and opinions of medically trained professionals to determine whether to  
5 grant the administrative grievances.

6 In the first grievance, Bovarie attempted to receive medical care due to the "original illness."  
7 FAC ¶ 79; Ex. D. Cook reviewed his health record, and in the first instance concluded the appeal was  
8 partially granted because Bovarie had received a nursing triage and had a urinalysis that turned up  
9 negative results. FAC Ex. D. When Bovarie appealed to the next level, Cook requested that Bovarie be  
10 seen by a doctor, and a doctor then saw Bovarie. *Id.*; FAC ¶ 82. In the next level of appeal, Cook relied  
11 on Dr. Khatri's assessment and responded that a doctor did see Bovarie and that he did not identify an  
12 abnormal gastric symptoms. FAC Ex. A. In sum, the FAC and exhibits show that Cook, a fact-  
13 gathering employee with no medical training, relied on the opinions of trained medical professionals to  
14 determine Bovarie's medical appeals regarding the first grievance. Based on the information in the  
15 exhibits to the FAC, Cook could not have drawn the inference, and did not actually draw the inference,  
16 that a substantial risk of harm existed as to Bovarie.

17 In the second grievance, Bovarie complained that Dr. Aymar provided inadequate treatment and  
18 raised questions regarding her medical licensing, asked that she be removed from her position, and  
19 requested that all medical practitioners be screened for complaints and malpractice suits. FAC ¶ 88; Ex.  
20 E. At the informal level, Cook denied the appeal and explained that all Centinela health care providers  
21 are licensed and in good standing and covered by malpractice insurance. FAC Ex. E. At the first formal  
22 level, Cook reiterated that all medical practitioners, including Dr. Aymar, are licensed and in good  
23 standing. FAC Ex. B. She partially granted that appeal, and noted that Dr. Aymar recorded Bovarie's  
24 symptoms, extensively reviewed his health records, ordered a urinalysis, and found the blood work and  
25 urinalysis yielded results within normal limits. FAC Ex. B. Cook said that following all that work by  
26 Dr. Aymar, Bovarie received a nursing triage referral to a second doctor's assessment. *Id.* At the next  
27 level of appeal, Cook again partially granted the appeal, and noted that Bovarie had received a nursing  
28 triage, saw a doctor and received medications and diagnostic tests. *Id.* She explained that following the

1 further test results, if further medical services were necessary, Bovarie would be notified. *Id.* This court  
2 finds that based on the exhibits to the FAC, Cook reasonably relied on the opinions of the medical  
3 practitioners. She could not have drawn the inference, and did not actually draw the inference, that a  
4 substantial risk of harm existed to as Bovarie.

5 Hammond also relied on the evidence and opinions of medical practitioners to advise Grannis  
6 that Bovarie was receiving proper medical care. In the first grievance, Hammond noted the history of  
7 Bovarie's treatment, and explained that under the relevant regulations only qualified medical personnel  
8 can diagnose illness and prescribe treatment, and that self-diagnosis is not appropriate. FAC Ex. A. He  
9 highlighted the medical records and opinions of the medical staff familiar with Bovarie's medical  
10 history, and that no compelling evidence warranted intervention, as Bovarie was receiving the treatment  
11 deemed medically necessary by the Centinela medical staff. *Id.* The FAC and exhibits show that  
12 Hammond, a fact-gathering employee with no medical training, reasonably relied on the opinions of  
13 trained medical professionals. Based on that reliance, he could not have drawn the inference, and did  
14 not actually draw the inference, that a substantial risk of harm existed as to Bovarie.

15 In the second grievance, Robinson noted that Bovarie was being treated and monitored for his  
16 medical condition, as he had received laboratory tests, multiple doctor evaluations and additional  
17 referrals. She also explained that all CDCR physicians, nurses, dentists, physician's assistants and nurse  
18 practitioners must complete a background investigation and be licensed in California to practice their  
19 professions, so there was no need to request a screening of those professionals. FAC Ex. B. Robinson  
20 encouraged Bovarie to participate in his treatment plan and ask questions when being evaluated or  
21 treated. *Id.* She said Bovarie could not dictate his own treatment because he lacked the requisite  
22 medical credentials, knowledge and expertise. *Id.* Robinson relied on the documentation in Bovarie's  
23 health records to find that Bovarie is receiving medical care commensurate with community standards.  
24 *Id.* The exhibits to the FAC show that Robinson could not have drawn the inference, and did not  
25 actually draw the inference, that a substantial risk of harm existed as to Bovarie.

26 Accordingly, the court **RECOMMENDS** that the motions to dismiss filed by defendants Cook,  
27 Hammond and Robinson be **GRANTED**. The court further recommends that the dismissal be **with**  
28 **prejudice** because Bovarie cannot plead facts sufficient to overcome the issues of vicarious liability and

1 the appeals examiners' abilities to draw and actually draw an inference of substantial risk.

2 **3. Defendant Aymar.**

3 Defendant Aymar moves to dismiss the eighth amendment claim and pendent state law claims  
4 against her. She argues that Bovarie's difference of opinion regarding his medical condition and course  
5 of treatment is insufficient to create liability under the eighth amendment. Further, insofar as Bovarie  
6 questions her license and ability to practice medicine, Dr. Aymar argues that her ability to practice is not  
7 at issue in this case and cannot serve as a basis for liability. She moves to dismiss the state law claims,  
8 arguing that if the court dismisses the federal claim, it will not have jurisdiction to hear the state law  
9 claims.

10 Dr. Aymar was the fourth medical professional to consult with Bovarie. She saw him on  
11 September 19 and October 25, 2007. FAC ¶¶ 45-48. Bovarie alleges that when he complained of  
12 kidney and liver-related symptoms to her, she told him he was probably suffering from depression. *Id.*  
13 He says she should have ordered a MRI but did not. FAC Ex. E. It was only after the second visit,  
14 when Bovarie repeated his complaints of pain, that Dr. Aymar ordered a urinalysis. FAC ¶ 51. Bovarie  
15 alleges that Dr. Aymar did not examine him or ask questions regarding his complaints, and made it clear  
16 to him that no care would be provided. FAC Ex. B.

17 Dr. Aymar noted that she saw Bovarie in September to review his laboratory results, which were  
18 within normal limits. *Id.* She noted that the fatigue symptoms from June had resolved and that there  
19 were no gastrointestinal changes. *Id.* After the October visit, Dr. Aymar said she reviewed Bovarie's  
20 health record and ordered a urinalysis, which was also essentially within normal limits, so she did not  
21 order further medical treatment. *Id.*

22 Several months later, in July 2008, Bovarie learned that he had a damaged gall bladder with gall  
23 stones and blocked bile ducts, nephrosis and a blocked and swollen right kidney. FAC ¶¶ 57, 59, 61.

24 Based on the above allegations, this court finds that Bovarie has adequately pled that he had a  
25 serious medical need. Further, in alleging that he complained to Dr. Aymar on two occasions about his  
26 pain, Bovarie has adequately pled facts to show that he told Dr. Aymar of facts from which she could  
27 possibly draw an inference and that she actually drew an inference that a substantial risk of harm  
28 existed. By alleging that in response to his complaints of physical pain Dr. Aymar told Bovarie that he

1 was depressed--and did not take further action other than a urinalysis--Bovarie has adequately pled that  
2 Dr. Aymar disregarded the risk to his health. While the exhibits show that Dr. Aymar noted that  
3 Bovarie's blood work and urinalysis had normal results, they do not refute his allegations that Bovarie  
4 complained to Dr. Aymar about his physical pain and that those complaints went unaddressed. This  
5 court, therefore, finds that Bovarie has alleged enough facts to plead an eighth amendment claim against  
6 Dr. Aymar. Whether that claim has merit will be determined through this litigation.

7 To the extent Bovarie bases his eighth amendment claim on Dr. Aymar's ability to practice and  
8 her medical licensing, the court recommends denying that claim. The exhibits show that all health care  
9 staff are currently licensed with the appropriate medical boards FAC Ex. E. Also, Dr. Aymar is  
10 currently licensed in California and is in good standing with the Osteopathic Medical Board of  
11 California. FAC Ex. K. Dr. Aymar's ability to practice medicine is not in question and cannot be a  
12 basis for eighth amendment liability. No amendment of the pleadings will be able to cure that  
13 deficiency.

14 Based on the foregoing, the court **RECOMMENDS** that Aymar's motion to dismiss be  
15 **GRANTED in part** and **DENIED in part**. The motion should be granted to the extent that Bovarie  
16 alleges liability based on Dr. Aymar's ability to practice medicine, and the dismissal should be **with**  
17 **prejudice**. It should be denied with respect to Bovarie's other allegations regarding the eighth  
18 amendment claim, and denied as to the request to dismiss the pendent state law claims.

19 **E. Injunctive Relief Claims.**

20 Defendants Ko, Barreras, Khatri, Calderon, Manaig and Navamani move to dismiss the  
21 injunctive relief claims because they are matters subject to the jurisdiction of the federal district court  
22 handling the class action *Plata v. Schwarzenegger*, N.D. Cal. Civ. Case No. C-01-1351. These  
23 Defendants ask this court to take judicial notice of the *Plata* class action. Bovarie argues that his  
24 injunctive relief claims should not be dismissed because the requests in this case and the requests in  
25 *Plata* cannot be exactly alike, and, even if they are, the outcomes of the two cases may vary.

26 Federal Rule of Evidence 201 allows a court to take judicial notice of a fact "not subject to  
27 reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial  
28 court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot

1 reasonably be questioned.” “A court shall take judicial notice if requested by a party and supplied with  
2 the necessary information. Fed. R. Evid. 201(d). A court may take judicial notice of court records. *See*  
3 *U.S. v. Author Services, Inc.*, 804 F.2d 1520, 1523 (9th Cir. 1986).

4 Here, Defendants ask the court to “take judicial notice of this well-known class action lawsuit  
5 and of the fact that it governs all of the injunctive relief claims pressed by Plaintiff in this case.” Other  
6 than the name and case number, Defendants did not supply the court with the necessary information to  
7 take judicial notice. At a minimum, they should have included a copy of the docket sheet and operative  
8 complaint that shows the injunctive relief requested. While the court is aware of the *Plata* class action,  
9 without the necessary information that specifies the relief sought in *Plata*, the court cannot compare the  
10 relief sought in that case to the relief Bovarie requests here. Once that information is provided, the court  
11 can then determine if the *Plata* class action actually involves the same subject matter and relief sought  
12 in this case.

13 For these reasons, this court **RECOMMENDS to DENY without prejudice the request for**  
14 **judicial notice**, and consequently **DENY without prejudice the motions to dismiss the injunctive**  
15 **relief claims**.

#### 16 CONCLUSION

17 For all of the above reasons, the court **RECOMMENDS** the following disposition with regard to  
18 Defendants’ motions to dismiss:

- 19 1. **GRANTED** as to Bovarie’s claims for money damages to the extent defendants Barreras,  
20 Calderon, Khatri, Manaig, Robinson, Cook, Ko, Hammond, Navamani, Tetteh, Aymar  
21 and Hodge are sued in their official capacities and that these claims be **DISMISSED**  
22 **with prejudice**.
- 23 2. **GRANTED** as to defendants Tetteh, Ko and Hodge be and that these claims and these  
24 defendants be **DISMISSED with prejudice**.
- 25 3. **GRANTED** as to defendants Cook, Hammond and Robinson and that these claims and  
26 these defendants be **DISMISSED with prejudice**.
- 27 4. **GRANTED in part** in part as to defendant Aymar, insofar as Bovarie alleges an eighth  
28 amendment claim based on Dr. Aymar’s ability to practice and that the dismissal be **with**



