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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 JOSE SANTANA,  
12 CDCR #AH-0190,

13 Plaintiff,

14 vs.

15 R. ZHANG, et al.,

16 Defendants.  
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Case No.: 3:16-cv-00105-GPC-JMA

**ORDER:**

**1) GRANTING DEFENDANT  
BUTERA’S AND HOOD’S MOTIONS  
TO DISMISS PURSUANT TO  
Fed. R. Civ. P. 12(b)(6)  
[ECF Nos. 8, 10]**

**AND**

**2) SUA SPONTE DISMISSING  
PLAINTIFF’S EIGHTH  
AMENDMENT CLAIMS AS TO ALL  
REMAINING DEFENDANTS  
PURSUANT TO  
28 U.S.C. § 1915(e)(2)(b)(ii)**

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**Introduction**

24 Jose Santana (“Plaintiff”), a prisoner at Richard J. Donovan Correctional Facility  
25 (“RJD”) in San Diego, California, proceeding pro se and in forma pauperis (“IFP”), has  
26 filed a complaint pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (ECF No. 1).  
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1 Plaintiff claims Defendants, all medical and medical appeals officials at RJD and  
2 Alvarado Medical Center (“AMC”) in San Diego, acted with deliberate indifference to his  
3 serious medical needs, specifically, a methicillin resistant staphylococcus aureas  
4 (“MRSA”) infection, which developed and recurred over the course of two years in  
5 violation of the Eighth Amendment. (ECF No. 1 at 21-37.) Plaintiff also alleges pendent  
6 state law claims of medical negligence and malpractice in violation of Cal. Govt. Code  
7 §§ 845.6 and 815.2, and the California Constitution, Art I, §§ 15, 17. (*Id.* at 37-48, 50-51.)  
8 He seeks declaratory and injunctive relief, as well as nominal, presumed, and punitive  
9 damages. (*Id.* at 52-53.)

10 Defendants Butera and Hood, both doctors employed by AMC, where Plaintiff was  
11 referred and admitted twice for emergency care, have filed Motions to Dismiss his first and  
12 third causes of action, as well as his request for punitive damages pursuant to FED. R. CIV.  
13 P. 12(b)(6). *See* Def. Hood’s Mot. to Dismiss (ECF No. 8); Def. Butera’s Mot. to Dismiss  
14 (ECF No. 10).<sup>1</sup> On June 16, 2016, the Court issued briefing schedules as to both Motions,  
15 determined that no proposed findings and recommendations by the magistrate judge  
16 pursuant to 28 U.S.C. § 636(b)(1)(A) and S.D. CAL. CIVLR 72.3(a) would be necessary,  
17 and permitted Plaintiff to file and serve his Opposition to both Motions no later than July  
18 15, 2016. (*See* ECF Nos. 9, 11.) No opposition has been filed.<sup>2</sup>

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21 <sup>1</sup> No other Defendants have yet to be served, although the U.S. Marshal has returned  
22 summonses as unexecuted as to Defendants Benitez, Steward, and Robinson (ECF Nos.  
23 12-14).

24 <sup>2</sup> While S.D. CAL. CIVLR 7.1(f)(3)(a) requires the non-moving party to file a written  
25 opposition, or statement of non-opposition, and S.D. CAL. CIVLR 7.1(f)(3)(c) further  
26 provides that the failure to file an opposition “may constitute a consent to the granting of  
27 [the] motion,” the Court declines to simply grant Defendants’ Motions because they are  
28 unopposed. *See Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam) (noting that  
while that a district court may properly grant a motion to dismiss as unopposed pursuant to  
a local rule, enforcement of the local rule is within the district court’s discretion); *see also*  
*Simmons v. Navajo Cty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010) (“District courts have

1 Having considered both Motions on the papers submitted, the Court finds that  
2 Plaintiff has failed to state a plausible claim upon which relief may be granted as to both  
3 Defendants Butera and Hood, and therefore GRANTS their Motions to Dismiss pursuant  
4 to FED. R. CIV. P. 12(b)(6). The Court further finds that Plaintiff has failed to state a  
5 plausible Eighth Amendment claim for relief as to any other named Defendant, and  
6 therefore DISMISSES the remainder of his Complaint sua sponte pursuant to 28 U.S.C.  
7 § 1915(e)(2)(b)(ii).

## 8 Plaintiff's Complaint

### 9 **I. Factual Allegations**

#### 10 **A. Left Leg Abscess – December 2013 to February 2014**

11 From October 2013 through January 2014, Plaintiff claims Defendants Robinson,  
12 Silva, and Cook, his primary care providers at RJD, “had actual knowledge of” and failed  
13 to adequately treat a “staph/MRSA” infection in his left leg. (ECF No. 1 at 24, 37-39.)

14 Specifically, Plaintiff contends Robinson “ordered an incision and drainage  
15 (“I&D”)” of fluid that had accumulated on his left leg on December 30, 2013, at RJD’s  
16 triage and treatment area (“TTA”), and that Defendant Cook “ordered a culture test” on  
17 January 6, 2014, and scheduled him for a “follow up after discovering MRSA.” (*Id.* at 24,  
18 38-39.)

19 Plaintiff’s exhibits show that he first complained of “a big red bump on [his] left leg  
20 – behind [his] thigh” on December 29, 2013 (ECF No. 1-1 at 16), and that Robinson  
21 examined him on December 30, 2013. (*Id.* at 17-18.) Robinson diagnosed Plaintiff with a  
22 left thigh skin abscess and cellulitis, prescribed Bactrim DS for seven days, Tylenol 3 “for  
23 one week to cover the discomfort,” and “contacted the doctor in the [TTA],” to schedule  
24 an “incision and drainage” in 1-2 days. (*Id.* at 18-21.) When Robinson examined him again  
25 on January 3, 2014, Plaintiff reported feeling better, but had not yet had the I&D, so

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28 broad discretion in interpreting and applying their local rules.”) (quoting *Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983)).

1 Robinson noted she would “contact the TTA” to “make sure that he ha[d] an appointment  
2 to prevent recurrence.” (*Id.* at 24.) Plaintiff’s CDC 7382 “Treatment Record,” signed by  
3 Dr. Cook, shows that Plaintiff reported to the daily RN line for wound care every day from  
4 January 6 through 10, 2014, and again on January 15, 2014, and notes that he was “healing  
5 progressively.” (*Id.* at 29, 31, 35-36.) Dr. Robinson’s Progress Notes dated January 10,  
6 2014, and February 10, 2014, indicate that the I&D procedure was performed sometime  
7 between January 3, 2014 and January 10, 2014, and that Plaintiff “had the blood test with  
8 MRSA on 01/06/2014; however the antibiotic resistance pattern stated there was only scant  
9 growth of MRSA.” (*Id.* at 41, 54.) Plaintiff also “had several comprehensive metabolic  
10 panels and CBCs from 01/06/2014 to 01/27/2014 and all were normal save very minor  
11 elevations in transaminases less than 2 times the upper limit of normal.” (*Id.* at 54.)  
12 Therefore, as of February 10, 2014, Robinson noted Plaintiff’s skin abscess had “resolved,”  
13 counseled him as to a “cosmetic” toenail fungus condition, noted he “fel[t] well,” was “not  
14 taking any medication,” and needed only a “well male” check up in one year. (*Id.* at 54,  
15 55.)

16 **B. Right Leg & Knee – March 2014 to August 2015**

17 Plaintiff further claims Dr. Robinson, as well as other RJD primary care providers,  
18 Defendants Chau, Suleiman, Newton, Casian, Zhang, Ghayouri, Wiley, and Newton, and  
19 AMC doctors Butera and Hood, all “had actual knowledge of [his] staph/MRSA infection,”  
20 knew that he was “in need of immediate medical care,” and failed to take “reasonable action  
21 to summon such medical care” in relation to his right leg and knee from March 2014  
22 through August 2015. (ECF No. 1 at 25.) Plaintiff contends their “deliberate indifferen[ce]”  
23 to his MRSA infection, caused him “to suffer prolonged and extreme pain,” “unnecessary  
24 complications,” and two hospitalizations at AMC – once in May 2014, and once again in  
25 September 2014, where he underwent surgery. (*Id.* at 25-26, 40-45.)

26 Plaintiff’s exhibits show that on March 24, 2014, he submitted a CDC 7362 Health  
27 Care Services Request Form, No. 0341064, in which he claimed to have “caught staph  
28 again,” and reported an “abscess in [his] right leg,” headaches, pain, and irritation. (ECF

1 No. 1-1 at 61; ECF No. 1 at 26.) Plaintiff was examined by an unidentified nurse on March  
2 26, 2016, who “consulted with PCP [primary care physician] on site.” (ECF No. 1-1 at 63.)  
3 Plaintiff was prescribed Bactrin and directed to follow up in 5 days. (*Id.* at 63-64.) His  
4 exhibits show he was next examined by RN Kaestner on April 1, 2014, who changed his  
5 dressings, instructed him on proper wound care, and discharged him back to housing. (*Id.*  
6 at 65.)

7 One month later, on May 2, 2014, Plaintiff submitted another CDC 7362, marked  
8 “emergency,” and designated No. 1735990 to RN Benitez. (ECF No. 1 at 28; ECF No. 1-  
9 1 at 66, 77.) Plaintiff reported swelling and “severe pain” in his right knee and difficulty  
10 walking. (ECF No. 1-1 at 28, 41-42.) Plaintiff was examined in the TTA by G. Wiley, NP  
11 and Dr. Karan.<sup>3</sup> Karan “attempted a tap[] at the sub patellar space,” but “no fluid was  
12 noted.” (*Id.* at 68; ECF No. 1 at 28.) Plaintiff’s May 2, 2014 Progress Notes further indicate  
13 that an “aseptic technique along with 1% lidocaine” was used, and his knee was x-rayed.  
14 (ECF No. 1-1 at 68, 70-71.) The x-rays showed “prepatellar soft tissue swelling,” but no  
15 fracture. (*Id.* at 70-71.) Plaintiff was diagnosed with prepatellar cellulitis<sup>4</sup> and bursitis,  
16 ordered to undergo a “CBC w/diff” and prescribed rocephin, Keflex, toradol,  
17 acetaminophen with codeine phosphate, and naproxyn.<sup>5</sup> (ECF No. 1 at 41; ECF No. 1-1 at  
18 67, 68, 73, 79.) Plaintiff was further advised to follow up in 5 days, advised to elevate his  
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21 <sup>3</sup> Dr. Karan is alleged to have treated Plaintiff’s right knee at RJD on May 2, 2014, (*id.* at  
22 28), but he is not included in the portion of Plaintiff’s pleading that identifies Defendants.  
23 (*Id.* at 9-17.) Consequently, Dr. Karan was not included in the summons which issued on  
24 March 22, 2016 (ECF No. 4), and has not been served.

25 <sup>4</sup> Plaintiff claims cellulitis is a bacterial infection of the skin and underlying tissue that is  
26 treated with antibiotics. (ECF No. 1 at 28 n.1.)

27 <sup>5</sup> According to Plaintiff, Keflex is the brand name for the antibiotic cephalexin which “is  
28 used to treat pneumonia and bone, ear[,] skin and urinary tract infections.” (ECF No. 1 at  
41.) “Naproxyn is a nonsteroidal anti-inflammatory drug or NSAID, used to relieve pain,  
inflammation, fever, or stiffness.” (*Id.* at 41-42.)

1 knee, apply cool compress[es], rest, and “take meds as prescribed.” (*Id.* at 68.) On the  
2 following day, May 3, 2014, Plaintiff’s wound was checked and he was advised to “f/u  
3 [with] PCP Monday.” (*Id.* at 75.)

4 On May 4, 2014, however, when Plaintiff “walk[ed] in TTA for wound check,” he  
5 was referred to Dr. Casian by RN Garcia. (ECF No. 1 at 29, ECF No. 1-1 at 80-84.) Plaintiff  
6 claims his “whole right leg was swollen” and he was authorized for outpatient care “via  
7 state vehicle” to AMC. (ECF No. 1 at 42, ECF No. 1-1 at 80-84, 96.)

8 Once he arrived at AMC on May 4, 2014, Plaintiff was examined by Defendant Dr.  
9 Hood, diagnosed with “cellulitis of the right knee and leg,” prescribed “IV antibiotics,”  
10 admitted to the “Med/Surg floor,” and referred to Defendant Dr. Butera, an infectious  
11 disease specialist. (ECF No. 1 at 29-30, 42; ECF No. 1-1 at 85-86, 92-93.) Dr. Hood’s  
12 History and Physical notes indicate Plaintiff had been previously treated “for some type of  
13 infected lesion in his right leg that recurred three months [prior],” and which was “treated  
14 with oral antibiotics.” (ECF No. 1-1 at 85.) Dr. Hood also noted Plaintiff was currently  
15 taking Tylenol with codeine, cephalexin, and naprosyn, but that he had swelling of the right  
16 knee around the patella, a “raised erythematous area measuring about 2 cm,” an area that  
17 “appeared to be purulent,” and “some erythema, several centimeters above and below the  
18 knee,” but an X-ray of the knee “showed no acute findings.” (*Id.* at 86.)

19 Plaintiff admits he was “hospitalized and treated for staph infection with IV  
20 antibiotics (vancomycin<sup>6</sup> and Zosyn)” while at AMC. (ECF No. 1 at 29.)

21 Dr. Hood’s discharge notes, dated May 7, 2014, further indicate that “[a]ttempts to  
22 aspirate fluid from the joint were unsuccessful,” and that an x-ray of Plaintiff’s knee  
23 “showed no evidence of fluid or osteoarthritis.” (ECF No. 1-1 at 93.) Dr. Hood’s notes  
24 further confirm Plaintiff was “empirically placed on IV vancomycin and Zosyn,” in consult

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28 <sup>6</sup> Plaintiff contends that vancomycin “is an antibiotic” and “the only drug that deals with MRSA.” (ECF No. 1 at 29 n.2.)

1 with Dr. Butera, who recommended at least two days of IV antibiotics, which Plaintiff  
2 completed during his stay at AMC. (*Id.*)

3 Dr. Butera's consultation notes indicate that "two sets of [Plaintiff's] blood cultures"  
4 were "negative and nares MRSA screen [was] in progress with a preliminary negative."  
5 (ECF No. 1-1 at 105.) Dr. Butera assessed Plaintiff with:

6 Probable acute prepatellar septic bursitis of the right knee in the  
7 setting of a small knee abrasion and scab. These are almost  
8 always Staphylococcus aureus. The patient's nares methicillin-  
9 resistant Staphylococcus aureus screen is negative. Though he  
10 was actually getting worse on Keflex, it may be we just were not  
getting adequate drug levels into the bursa with the Keflex.

11 (*Id.*)

12 Dr. Butera "discontinue[d] the broad-spectrum Zosyn" on May 6, 2014, and  
13 "switched [him] to Ancef along with vancomycin" in order "observe at least another day  
14 before considering changing to p.o." (ECF No. 1-1 at 105.) Butera noted that "[g]enerally  
15 a two-week course of therapy of antibiotics appropriate to cover the pathogen is necessary,"  
16 and that it is "sometimes necessary to incise and drain the bursa," however, Plaintiff was  
17 "rapidly improving on IV therapy with no definite drainable fluid collection." (*Id.*)

18 Therefore, on May 7, 2014, Dr. Hood discharged Plaintiff with "acute  
19 bursitis/cellulitis, right knee," which had "markedly improved" and "started [him] on oral  
20 antibiotics." (*Id.* at 93.) "Infectious disease recommended Keflex 500 mg q.i.d. for 10 days  
21 and doxycycline 100 mg b.i.d. for 10 days," together with Tylenol with codeine for pain  
22 and naprosyn. (*Id.*)

23 Plaintiff returned to RJD "on the night of May 7, 2014," and admits he was given  
24 "antibiotic pills." (ECF No. 1 at 29.) Plaintiff was examined by RN Stewart and Dr. Chau,  
25 and ordered to follow up with his PCP in 5 days. (ECF No. 1-1 at 107.) A "Medication  
26 Reconciliation" sheet dated May 9, 2014 indicates Dr. Chau discontinued Plaintiff's  
27 prescription for naproxen, renewed his prescription for acetaminophen with codeine, and  
28 prescribed a ten-day course of cephalexin and doxycycline hyclate. (ECF No. 1-1 at 108.)

1 Plaintiff claims after May 7, 2014 his “condition made a turn for the worse.” (ECF  
2 No. 1 at 29.) His exhibits show that he was examined by Dr. Ghayouri, his PCP, on May  
3 9, 2014, and again on May 16, 2014. (*Id.* at 112; ECF Doc. No. 1-2 at 1-4.) Both times, Dr.  
4 Ghayouri noted Plaintiff’s “right knee cellulitis [was] improving,” that Plaintiff “report[ed]  
5 significant improvement in pain, redness, and swelling,” and “den[ied] any complaint.” Dr.  
6 Ghayouri continued his acetaminophen, cephalexin, and doxycycline prescriptions, as well  
7 as his prescription for naproxen “as needed for pain.” (ECF No. 1-1 at 112-13; ECF No. 1-  
8 2 at 4.)

9 Approximately one month later, on July 15, 2014, Plaintiff “submitted a medical slip  
10 (CDC 7362) complaining again of pain in his right knee,” inflammation, and trouble  
11 walking. (ECF No. 1 at 29; ECF No. 1-2 at 6.) Plaintiff “called to the clinic” and was  
12 evaluated by Defendant Paule, RN on July 17, 2014. (ECF No. 1 at 30). Plaintiff claims to  
13 have “explained his severe pain and swelling,” to have informed Paule of his “prior history  
14 of infection” and to have told Paule “it was urgent” that he see a doctor. (ECF No. 1 at 30.)  
15 The “Encounter Form” completed by Paule and dated July 17, 2014, reflects Plaintiff’s  
16 complaints of pain and swelling in his right knee, as well as his history of “septic pre-  
17 patellar bursitis.” (ECF No. 1-2 at 12.) Paule noted that Plaintiff requested “possible  
18 ultrasound of MRI,” because he was “worried about last incident of right knee bursitis,”  
19 and claimed Ibuprofen gave him “no symptomatic relief,” therefore “he would rather wait  
20 to see PCP before taking anything.” (*Id.*) Paule further noted Plaintiff’s knees appeared  
21 symmetrical, “both lower extremities [were] within normal limits,” that he was “able to  
22 walk without difficulty,” and was “given instructions of signs and symptoms to ... monitor.”  
23 (*Id.* at 13.) Plaintiff claims Paule “intentionally and unjustifiably failed to summon medical  
24 care” on this occasion, but he also admits, and his exhibits show that Paule “scheduled [him  
25 for] an appointment with the doctor.” (ECF No. 1 at 30; ECF No. 1-2 at 13.)

26 Plaintiff claims he was “finally called and seen by Defendant Zhang” on September  
27 15, 2014. (ECF No. 1 at 30.) Plaintiff claims he “communicated ... his whole medical  
28 history,” and requested a “cat scan or MRI to see if the infection had developed.” (*Id.* at

1 31.) Plaintiff admits Zhang ordered an x-ray and “inspected” his knee, but “told [him] he  
2 was fine,” and only recommended resting and weight loss. (*Id.*)

3 Dr. Zhang’s Progress Notes dated September 15, 2014, include Plaintiff’s previous  
4 diagnosis of “right knee cellulitis” and his complaints of “intermittent right knee pain.”  
5 (ECF No. 1-2 at 7.) Zhang further noted Plaintiff “ambulat[ed] to the room ... without any  
6 signs of difficulty or any signs of pain,” but he ordered a “repeat x-ray of the right knee,”  
7 a “CBC and ESR,” a “trial of etodolac 300 mg,” and recommended Plaintiff “follow up “in  
8 90 days or earlier if needed.” (*Id.* at 7-11, 14.)

9 Plaintiff’s x-ray results, dated September 18, 2014, showed “no acute fracture or  
10 dislocation,” no “significant degenerative changes,” and “no large joint effusion,” but  
11 “[s]oft tissue swelling [wa]s present.” (*Id.* at 15.) Plaintiff claims that because this x-ray  
12 indicated “everything seem[ed] to be fine,” he “assumed” Dr. Zhang “thought that he was  
13 lying, and [he] never heard from him again.” (ECF No. 1 at 31.)

14 On September 25, 2014, Plaintiff claims he experienced “major headaches, fever,  
15 chills, and excruciating pain,” but unidentified medical staff “refused to see [him] unless  
16 he had a life-threatening problem.” (ECF No. 1 at 31.) Three days later, on September 28,  
17 2014, when he “could not take the pain or hang on any longer,” Plaintiff’s celly, Ray  
18 Maldonado, called a “man down.” (*Id.* at 32.) Plaintiff claims RJD Officer De La Cruz  
19 responded and two unidentified nurses “finally attended [to his] medical needs.” (*Id.*)

20 Plaintiff’s exhibits show he was examined by RN Wenzel at 8:40 am, and  
21 complained of both chest and right knee pain. Wenzel noted Plaintiff’s history of  
22 cellulitis/bursitis, his May 2015 hospitalization, that he previously “d[id] well” on  
23 antibiotics, and was “last seen by PCP two weeks ago and was doing well.” (ECF No. 1-2  
24 at 17.) Wenzel noted “obvious prepatellar swelling.” (*Id.*) At 9:15 am, Wenzel’s notes  
25 indicate Plaintiff was examined by Dr. Suleiman. (*Id.*) Suleiman noted Plaintiff’s “history  
26 of knee cellulitis” and noted he “might have a subcutaneous abscess versus developing  
27 septic arthritis,” and therefore authorized Plaintiff’s transfer to the ER at AMC “for further

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1 evaluation and possible arthrocentesis or incision and drainage of that area.” Dr. Suleiman  
2 further noted Plaintiff would “need IV antibiotics initially.” (ECF No. 1-2 at 16, 21-23.)

3 At 11:15 am, on September 28, 2014, Dr. Christopher Dewar<sup>7</sup> diagnosed Plaintiff  
4 with prepatellar bursitis after evaluating him in the ER at AMC. (ECF No. 1-2 at 26-17.)  
5 Dr. Dewar’s encounter notes state:

6 Basically, the patient is a 23-year-old male who is presenting  
7 with right knee infection. I feel he is extremely low risk of septic  
8 arthritis. He has full range of motion. He has no fever. He has a  
9 normal white count. His sedimentation rate and CRP are not  
10 dramatically elevated. We consulted Dr. Butera from infectious  
11 disease. He agrees with this. We will start him on vancomycin. I  
12 did use ChloroPrep to cleanse the knee and used an 18-gauge  
13 needle deroof this abscess and a clean pus was taken from the  
14 wound site. It was not a large abscess that was able to be drained.

15 (*Id.*)

16 AMC Dr. Richard O. Butcher’s<sup>8</sup> History and Physical Notes, also dated September  
17 28, 2014, describe Plaintiff’s previous admission in May 2014, his 2-day course of IV  
18 antibiotics, his May 2014 consultation with Dr. Butera, and his continuation of oral  
19 medications for 2 weeks post-discharge. (ECF No. 1-2 at 29.) Plaintiff told Butcher “he  
20 has done well for a while” and suffered no trauma to the knee, but that “all of a sudden,” it  
21 began being painful and swollen. (*Id.*) Butcher noted Plaintiff “was on etodolac 300 mg”  
22 for pain prior to admission, and was given a dose of vancomycin “after cultures were taken”  
23 from the wound site in ER. (*Id.* at 30.) Butcher then noted “Infectious Disease will ask  
24 Orthopedics to check the patient because if alleged septic arthritis,” but Butcher “d[id] not  
25 feel that he ha[d] this,” because Plaintiff was “stable otherwise.” (*Id.*) Butcher also  
26 prescribed Motrin and Norco, found Plaintiff “stable for admission,” and ordered a “repeat  
27 [of Plaintiff’s] labs in the morning.” (*Id.*)

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28 <sup>7</sup> Dr. Dewar is not named as a Defendant.

<sup>8</sup> Dr. Butcher is not named as a Defendant.

1 Dr. Butera's consultation assessment, also dated September 28, 2014, recounts  
2 Plaintiff's May 2014 admission, Butera's prior diagnosis of "acute prepatellar bursitis to  
3 the right knee in the setting of a small skin abrasion and scab," which he felt "was almost  
4 always due to Staphylococcus aureus," as well as Plaintiff's "negative nares MRSA  
5 screen." (ECF No. 1-2 at 36.) Butera noted that in May "there was no definite drainable  
6 fluid," and therefore, "no surgical cultures," but Plaintiff's "cellutitic component improved  
7 dramatically" due to a 4-day course of IV antibiotic therapy, followed by 10 days of Keflex  
8 and doxycycline. (*Id.*) Plaintiff admitted to Butera that "the pain in his knees as well as the  
9 induration and erythema did resolve completely," but that he had "over the past two  
10 weeks," developed discomfort in the right knee again. (*Id.*) Plaintiff further reported "no  
11 fever, chills or rigors," but "over the last few days, [] developed new induration, erythema,  
12 and possibly some early fluctuance over the right knee without any pustule or breaks in the  
13 skin, or other trauma." (*Id.*) Butera noted that Plaintiff "was sent to the ER again as a  
14 possible septic arthritis," and that [h]e had a similar episode back in January, which would  
15 make this as third recurrence." (*Id.*)

16 Dr. Butera assessed Plaintiff with "[r]ecurring inflammation in the soft tissues over  
17 the right patella" which "probably represent[ed] a relapsing prepatellar septic bursitis,"  
18 which "are almost always due to Staphylococcus aureus." (*Id.* at 37.) Butera further noted  
19 however, that "previous MRSA screenings ha[d] been negative" and "blood cultures done  
20 during [Plaintiff's] last admission were negative," but "repeat blood cultures done during  
21 this admission [we]re pending," and it appeared Plaintiff was "developing [a] subcutaneous  
22 fluctuant area that may be evolving into a drainable fluid collection or at least, the fluid  
23 collection can be aspirated for culture." (*Id.*) Because it was Plaintiff's "third relapse with  
24 the similar presentation," Butera noted "at some point, proper incision and drainage or  
25 bursectomy may need to be considered." But because Plaintiff did "not appear to be septic  
26 with no fever and normal white count," Dr. Butera recommended Plaintiff be

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1 observed, that warm compresses be applied, that he continue on vacomycin IV,<sup>9</sup> and  
2 referred for an orthopedic consult. (*Id.*)

3 Plaintiff remained on IV vancomycin and on September 30, 2014, he was evaluated  
4 by Dr. Roman B. Cham, an AMC surgeon and orthopedist.<sup>10</sup> (ECF No. 1 at 45; ECF No.  
5 1-2 at 40.) Dr. Cham's consultation notes indicate that Plaintiff's infection "look[ed]  
6 better," but Dr. Butera "recommended excision of the septic bursitis in part because of the  
7 previous failed treatment." (ECF No. 1-2 at 40.) Dr. Cham's notes also show that Plaintiff's  
8 "wound culture from 09/28/2104 [wa]s positive for MRSA." (*Id.*) Plaintiff gave "full  
9 informed consent for the surgery." (*Id.*)

10 Dr. Cham performed an excision of Plaintiff's right knee at AMC on October 1,  
11 2014. (ECF No. 1 at 32-33; ECF No. 1-2 at 41.) Cham's Operative Report shows Plaintiff  
12 was anesthetized, "all questionable tissue down to [Plaintiff's] patellar tendon" was  
13 removed, and the "wound was irrigated with triple antibiotic solution, which included  
14 gentamicin and vancomycin." (ECF No. 1-2 at 41.) "The conclusion appeared to be [a]  
15 very clean wound." (*Id.*)

16 Plaintiff was discharged from AMC and returned to RJD "late at night" on October  
17 2, 2014. (ECF No. 1 at 33; ECF No. 1-2 at 48.) AMC Dr. Butcher noted Plaintiff had done  
18 well postoperatively, and noted he was ambulatory but "should lie [i]n for two weeks."  
19 (ECF No. 1-2 at 48.) Plaintiff's discharge medications included Tylenol, Tylenol with  
20 codeine, a seven day course of doxycycline, bactroban, and rifampin, Motrin, and Prilosec.  
21 (*Id.* at 48-49.)

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26 <sup>9</sup> Dr. Butera also considered ceftaroline, but "preferred not to use [it]" because it "is  
27 basically too broad spectrum similar to Rocephin, [and] covers many enteric gram-negative  
28 rods and other pathogens" that did "not need to [be] cover[ed] in this setting." (ECF No.  
1-2 at 37.)

<sup>10</sup> Dr. Cham is not named as a Defendant.

1 Plaintiff claims that when he returned to RJD, he was given antibiotics, but no pain  
2 medication. (ECF No. 1 at 33.) He later admits, however, that Drs. Zhang and Newton  
3 “prescribed medication for [him]” “from October 2-6, 2014.” (*Id.* at 45.)

4 The CDC 7230 Interdisciplinary Progress Notes, CDC 7221 Physician’s Orders  
5 attached to his Complaint, however, show that Plaintiff’s prescriptions for doxycycline,  
6 rifampin, and Tylenol #3 were ordered by M. Garikaparathi, M.D.<sup>11</sup> upon his return to  
7 custody on October 2, 2104, and that he was treated by RNs Janasco, Paule, and Wallace  
8 for wound care and dressing changes on October 3, 2014, October 4, 2014, and October 5,  
9 2014. When Plaintiff appeared at his 5-day follow-up on October 6, 2014, he reported he  
10 was “taking antibiotics,” complained of pain, was given “T#3 bid for 3 days,” assigned to  
11 a temporary bottom bunk, authorized to use a wooden cane for 3 months, told to continue  
12 daily dressing changes “per RN line,” advised his sutures would be removed in 2 weeks,  
13 that he’d have a telemed follow-up appointment with AMC Dr. Cham in 3 weeks, and  
14 another follow up with his PCP in 30 days. (ECF No. No. 1 at 45-46; ECF No. 1-2 at 65-  
15 68.)

16 On October 7, 2014, Plaintiff filed a CDCR 602 HC Appeal, Log No. 14052082,  
17 complaining of “negligence” and “deliberate indifference” to his right knee infection. (ECF  
18 No. 1-1 at 2-5.) On October 9, 2014, Plaintiff was informed that his lab work results were  
19 “essentially within normal limits.” (ECF No. 1-2 at 75). On October 16, 2014, his sutures  
20 were removed. Plaintiff tolerated the procedure well and his incision appeared to be healing  
21 well with no redness or swelling noted. (ECF No. 1-2 at 72.)

22 On October 17, 2014, Plaintiff had a follow-up appointment with Dr. Zhang, his PCP  
23 (*Id.* at 72, 74, 77.) Dr. Zhang’s Progress Notes include reference to Plaintiff’s “Medical  
24 602” requesting “stronger pain medication,” but otherwise document his “unremarkable”  
25 lab work, completed course of doxycycline, and improvement of the infection. (*Id.* at 77.)  
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28 <sup>11</sup> Dr. Garikaparathi is not named as a Defendant.

1 Zhang further noted that Plaintiff was ambulating with the use of his cane, able to move  
2 his right knee freely, and that there did not appear to be any sign of decrease in his range  
3 of motion. (*Id.*) Zhang advised Plaintiff to “continue ibuprofen 600 mg” and added a  
4 “Tylenol No. 3 x5 days one p.o. at bedtime.” Zhang also started Plaintiff “on nortriptyline  
5 25 mg one p.o. at bedtime for adjunct pain control.” (*Id.*) Plaintiff was “concerned about  
6 recurrence of infection,” and advised to alert medical staff if his knee became warm, red,  
7 or swollen, or if he had a fever. Zhang also cautioned that Plaintiff “will continue to have  
8 intermittent pain; however, that d[id] not mean he ha[d] an active infection. (*Id.*)

9 On October 21, 2014, Plaintiff “present[ed] to telemedicine” for his post-operative  
10 follow-up with Dr. Cham at AMC. (ECF No. 1 at 46; ECF No. 1-2 at 78-79.) Dr. Cham  
11 noted Plaintiff “was doing quite well,” “[h]is incision and knee look[ed] completely  
12 benign,” and he “had no complaints.” (ECF No. 1-2 at 79.) Cham noted Plaintiff’s “yard  
13 doctor want[ed] to keep him on the antibiotics for an additional two weeks,” but Cham  
14 concluded “no additional orthopedic follow[-]up [wa]s needed.” (*Id.*)

15 Plaintiff was next examined on November 4, 2014 by Dr. Zhang for his “PCP follow-  
16 up from [his] recent visit with orthopedic surgeon.” (ECF No. 1 at 46-47; ECF No. 1-2 at  
17 82.) Zhang noted Plaintiff’s “septic arthritis of the right knee currently resolved,” that he  
18 was doing well and ambulated without any signs of limping. Plaintiff was advised to alert  
19 medical immediately if redness or pain returned. (ECF No. 1-2 at 82.)

20 Two months later, on January 4, 2015, Plaintiff “submitted a medical slip number  
21 1037871 because of constant pain to his right knee.” (ECF No. 1 at 47; ECF No. 1-2 at 87.)  
22 Plaintiff was examined by RN Calderon on January 6, 2015, whom he claims “intentionally  
23 and unjustifiably failed to summon medical care for [his] excruciating pain.” (ECF No. 1  
24 at 47.) The CDC 7362 attached to his pleading, however, indicates Calderon recorded  
25 Plaintiff’s complaints, noted he was ambulating with a steady gait, and did not appear to  
26 need a cane. She prescribed Naproxen 220 mg, instructed him to follow-up in RN clinic if  
27 symptoms persisted, and referred him for a routine PCP follow-up. (ECF No. 1-2 at 87-  
28 90.)

1 On January 20, 2015, Plaintiff was again examined by his PCP, Dr. Zhang. (ECF  
2 No. 1 at 47; ECF No. 1-2 at 92.) Zhang noted Plaintiff's reports of pain in his right knee  
3 which was "worse if he plac[ed] pressure on it," but no increase in temperature, signs of  
4 limp, slowness, or any functional impairment. (ECF No. 1-2 at 92.) Zhang noted no signs  
5 of active infection, but that Plaintiff complained of pain "despite trial of Tylenol, Motrin,  
6 and Naprosyn." (*Id.*) Zhang therefore prescribed a "trial of Voltaren gel," and advised  
7 Plaintiff to "avoid jumping" or putting pressure on his right knee whenever possible. (*Id.*  
8 at 92-96.) Plaintiff admits Zhang also approved him for a bottom bunk, but claims he  
9 "failed to prescribe effective pain medication or summon medical care for [his] pain." (ECF  
10 No. 1 at 47.)

11 Plaintiff next claims to have seen Dr. Wiley on May 20, 2015, and reported that he  
12 "was unable to bear total weight on his right leg." (ECF No. 48.) The CDCR 7230-M  
13 attached to his complaint, however, shows that Plaintiff reported to Wiley on that day, and  
14 complained of a history of pain and swelling that "never actually resolved" but which had  
15 been exacerbated by his "playing soccer." (ECF No. 1-2 at 99.) Dr. Wiley ordered Tylenol  
16 for pain, and that a large permanent neoprene knee support brace be "expedited" for  
17 Plaintiff's use. (*Id.* at 99-100.)

18 Finally, on August 3, 2015, Plaintiff submitted yet another CDC 7362, No. 2121359,  
19 requesting that he "talk to [his] prime physician regarding [his] medication and treatment."  
20 (ECF No. 1 at 48; ECF No. 1-2 at 101.) RN Gines<sup>12</sup> assessed Plaintiff's complaints of  
21 "chronic knee pain" on August 6, 2015, prescribed Naproxen, and advised him to notify  
22 staff "asap" if swelling or redness returned. (ECF No. 1-2 at 102-04.) Plaintiff's knee pain  
23 was next evaluated by an unidentified doctor on August 14, 2105. (ECF No. 1 at 48; ECF  
24 No. 1-2 at 105.) Plaintiff complained that Tylenol did not alleviate his "dull and aching"  
25 knee pain, but reported to "playing sports every day." (ECF No. 1-2 at 105.) The doctor  
26  
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28 <sup>12</sup> RN Gines is not named as a Defendant.

1 recommended trying Motrin and sulindac, weight loss, and explained that Plaintiff’s right  
2 knee “will never be equal to the left” due to his past infection. (*Id.*) Plaintiff “was not happy  
3 with his explanation because he requested ... medical care [on] numerous occasions before  
4 the infection became out of control.” (ECF No. 1 at 48.)

### 5 **C. Supervisory and/or Administrative Medical Officials**

6 In addition to the doctors and nurses who are alleged to have treated him between  
7 2013 and 2015, Plaintiff also contends Defendants Walker, RJD’s Chief Physician and  
8 Surgeon, Roberts, a Chief Medical Executive, and Glynn, a Chief Executive Officer,  
9 “failed to instruct” the other RJD medical officials “on how to treat or identify MRSA  
10 infection,” (ECF No. 1 at 2, 27), and “negligently failed to monitor and supervise the  
11 inadequate and untimely medical care” he received, by reviewing and denying, together  
12 with Defendant Zhang, his CDCR-602 HC Inmate/Parolee Health Care Appeal Log No.  
13 14052082 (*Id.* at 10-14, 40-41; *see also* ECF No. 1-1 at 2-11).

### 14 **D. RNs**

15 Finally, as to the RNs who are alleged to have assessed and examined him on various  
16 occasions, Plaintiff claims Defendants Paule, Janasco, Calderon, Kaestner, Benitez,  
17 Garcia, Wallace, Wenzel, Manning, and Steward “were responsible for providing [him]  
18 health care” from 2013 through 2015, but he “does not know the level of injury and/or  
19 damages” they caused. (*Id.* at 15.)

## 20 **II. Causes of Action**

21 Plaintiff divides his pleading into three separate causes of action. First, he claims all  
22 Defendants acted with deliberate indifference to his serious medical needs in violation of  
23 the Eighth Amendment of the U.S. Constitution. (“First Cause of Action”). (ECF No. 1 at  
24 21-37.) Second, Plaintiff claims all Defendants committed “medical negligence” and  
25 “malpractice” in violation of CAL. GOVT. CODE §§ 845.6 and 815.2 (“Second Cause of  
26 Action”). (*Id.* at 37-50.) Third, Plaintiff claims Defendants violated his rights to due  
27 process and to be free from cruel and unusual punishment in violation of CAL. CONST. Art.  
28 I. §§ 15, 17 (“Third Cause of Action”). (*Id.* at 50-51.)

1 **III. Prayer for Relief**

2 Plaintiff seeks a declaratory and injunctive relief, as well as nominal, presumed,  
3 punitive, and “mental and emotional” damages against each Defendant “jointly or  
4 severally.” (ECF No. 1 at 51-53.)

5 **Discussion**

6 **IV. Legal Standards**

7 **A. Rule 12(b)(6) Motion to Dismiss**

8 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal  
9 sufficiency of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Because Rule  
10 12(b)(6) focuses on the “sufficiency” of a claim rather than the claim’s substantive merits,  
11 “a court may [ordinarily] look only at the face of the complaint to decide a motion to  
12 dismiss.” *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002).  
13 However, courts may consider exhibits that are attached to the complaint. *See* FED. R. CIV.  
14 P. 10(c) (“A copy of a written instrument that is an exhibit to a pleading is a part of the  
15 pleading for all purposes.”); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896  
16 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe,*  
17 *Inc.*, 583 F.2d 426 (9th Cir. 1978) (“[M]aterial which is properly submitted as part of the  
18 complaint may be considered” in ruling on a Rule 12(b)(6) motion to dismiss.) However,  
19 exhibits that contradict the allegations of a complaint may fatally undermine the  
20 complaint’s allegations. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th  
21 Cir. 2001) (a plaintiff can “plead himself out of a claim by including . . . details contrary  
22 to his claims.” (citing *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir.  
23 1998) (courts “are not required to accept as true conclusory allegations which are  
24 contradicted by documents referred to in the complaint.”))); *see also Nat’l Assoc. for the*  
25 *Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th  
26 Cir.2000) (courts “may consider facts contained in documents attached to the complaint”  
27 to determining whether the complaint states a claim for relief).

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1           “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
2 accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial  
3 plausibility when the plaintiff pleads factual content that allows the court to draw the  
4 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*  
5 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556,  
6 570 (2007)).

7           “All allegations of material fact are taken as true and construed in the light most  
8 favorable to the nonmoving party.” *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38  
9 (9th Cir. 1996) (citing *Nat’l Wildlife Fed. v. Espy*, 45 F.3d 1337, 1340 (9th Cir. 1995)).  
10 The Court need not, however, “accept as true allegations that are merely conclusory,  
11 unwarranted deductions of fact, or unreasonable inferences.” *Sprewell*, 266 F.3d at 988  
12 (citing *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994)); *see also*  
13 *Iqbal*, 556 U.S. at 678 (“Threadbare recitals of the elements of a cause of action, supported  
14 by mere conclusory statements, do not suffice.”); *Papasan v. Allain*, 478 U.S. 265, 286  
15 (1986) (on motion to dismiss, court is “not bound to accept as true a legal conclusion  
16 couched as a factual allegation.”). “[T]he pleading standard Rule 8 announces does not  
17 require ‘detailed factual allegations,’ but it demands more than an unadorned, the  
18 defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*,  
19 550 U.S. at 555).

20           Thus, “[w]hile legal conclusions can provide the framework of a complaint, they  
21 must be supported by factual allegations. When there are well-pleaded factual allegations,  
22 a court should assume their veracity and then determine whether they plausibly give rise  
23 to an entitlement to relief.” *Id.* at 679. “The plausibility standard is not akin to a ‘probability  
24 requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
25 unlawfully.” *Id.* at 678. “Where a complaint pleads facts that are ‘merely consistent with’  
26 a defendant’s liability, it ‘stops short of the line between possibility and plausibility of  
27 ‘entitlement to relief.’”” *Id.* (quoting *Twombly*, 550 U.S. at 570 (when a plaintiff has not

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1 “nudged [his] claims across the line from conceivable to plausible, [his] complaint must be  
2 dismissed.”)).

3 “In sum, for a complaint to survive a motion to dismiss, the non-conclusory ‘factual  
4 content,’ and reasonable inferences [drawn] from that content, must be plausibly suggestive  
5 of a claim entitling the plaintiff to relief.” *Moss v. United States Secret Serv.*, 572 F.3d 962,  
6 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

### 7 **B. Pro Se Litigants**

8 “In civil rights cases where the plaintiff appears pro se, the court must construe the  
9 pleadings liberally and must afford [the] plaintiff the benefit of any doubt.” *Karim-Panahi*  
10 *v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction is  
11 “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th  
12 Cir. 1992). The rule, however, “applies only to a plaintiff’s factual allegations.” *Neitzke v.*  
13 *Williams*, 490 U.S. 319, 330 n.9 (1989). In giving liberal interpretation to a *pro se* civil  
14 rights complaint, courts may not “supply essential elements of claims that were not initially  
15 pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).  
16 “Vague and conclusory allegations of official participation in civil rights violations are not  
17 sufficient to withstand a motion to dismiss.” *Id.*; *see also Jones v. Cmty. Redev. Agency*,  
18 733 F.2d 646, 649 (9th Cir. 1984) (finding conclusory allegations unsupported by facts  
19 insufficient to state a claim under § 1983).

### 20 **V. Defendants’ Motions**

21 Both AMC Doctors Hood and Butera move to dismiss Plaintiff’s first cause of action  
22 alleging deliberate indifference to his serious medical needs in violation of the Eighth  
23 Amendment, (ECF No. 8-1 at 4-6; ECF No. 10-1 at 4-6), his third cause of action alleging  
24 violations of the California Constitution’s Articles 15 and 17, (ECF No. 8-1 at 6-8; ECF  
25 No. 10-1 at 7), and to strike his request for punitive damages pursuant to Fed. R. Civ. P.  
26 12(b)(6) (ECF No. 8-1 at 8-9; ECF No. 10-1 at 7-8.)

27 As noted above, Plaintiff has filed no Opposition.

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1           **A. Eighth Amendment Inadequate Medical Care Claims**

2                   **1. Standard of Review**

3           Only “deliberate indifference to serious medical needs of prisoners constitutes the  
4 unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment.”  
5 *Estelle v. Gamble*, 429 U.S. 97, 103, 104 (1976) (citation and internal quotation marks  
6 omitted). “A determination of ‘deliberate indifference’ involves an examination of two  
7 elements: (1) the seriousness of the prisoner’s medical need and (2) the nature of the  
8 defendant’s response to that need.” *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.  
9 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir.  
10 1997) (en banc) (quoting *Estelle*, 429 U.S. at 104); *see also Wilhelm v. Rotman*, 680 F.3d  
11 1108, 1113 (9th Cir. 2012); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

12           First, “[b]ecause society does not expect that prisoners will have unqualified access  
13 to health care, deliberate indifference to medical needs amounts to an Eighth Amendment  
14 violation only if those needs are ‘serious.’” *Hudson v. McMillian*, 503 U.S. 1, 9 (1992),  
15 citing *Estelle*, 429 U.S. at 103-104. “A ‘serious’ medical need exists if the failure to treat  
16 a prisoner’s condition could result in further significant injury or the ‘unnecessary and  
17 wanton infliction of pain.’” *McGuckin*, 914 F.2d at 1059 (quoting *Estelle*, 429 U.S. at 104).  
18 “The existence of an injury that a reasonable doctor or patient would find important and  
19 worthy of comment or treatment; the presence of a medical condition that significantly  
20 affects an individual’s daily activities; or the existence of chronic and substantial pain are  
21 examples of indications that a prisoner has a ‘serious’ need for medical treatment.” *Id.*,  
22 citing *Wood v. Housewright*, 900 F.2d 1332, 1337-41 (9th Cir. 1990); *Hunt v. Dental Dept.*,  
23 865 F.2d 198, 200-01 (9th Cir. 1989).

24           Here, neither Dr. Hood nor Dr. Butera argue that Plaintiff has failed to allege facts  
25 to plausibly show that his medical needs were ‘serious,’ and the Court finds Plaintiff’s  
26 Complaint is sufficiently pleaded in this regard. *See e.g., Sansome v. Lopez*, No. CV 1-07-  
27 1086-FRZ, 2013 WL 3198594, at \*4 (E.D. Cal. June 21, 2013) (finding prisoner’s claims  
28 of having developed “(staph) MRSA infections” to be serious medical needs because “an

1 infection, if not properly treated, ‘could result in further significant injury or the  
2 unnecessary and wanton infliction of pain.’”) (citing *Wilhelm*, 680 F.3d at 1122; *Jett*, 439  
3 F.3d at 1096)); *Amason v. Wedell*, No. 2:12-CV-0388 KJN P, 2014 WL 2987695, at \*3  
4 (E.D. Cal. July 1, 2014) (assuming prisoner’s “cellulitis, neuropathy, leg, foot, and ankle  
5 swelling and pain” were sufficiently serious medical needs under the Eighth Amendment).

6 Therefore, the Court must next decide whether Plaintiff’s Complaint further contains  
7 sufficient “factual content” to show that both Drs. Hood and Butera acted with “deliberate  
8 indifference” to his needs. *McGuckin*, 914 F.2d. at 1060; *see also Jett*, 439 F.3d at 1096;  
9 *Iqbal*, 556 U.S. at 678. “Deliberate indifference is a high legal standard.” *Toguchi v. Chung*,  
10 391 F.3d 1051, 1060 (9th Cir. 2004).

11 While Plaintiff claims Drs. Hood and Butera, as well as *all* his RJD doctors, “had  
12 actual knowledge of [his] staph/MRSA infection,” knew that he was “in need of immediate  
13 medical care,” and failed to take “reasonable action to summon such medical care” in  
14 relation to his right leg and knee from March 2014 through August 2015, (ECF No. 1 at  
15 25), his pleading lacks the “further factual enhancement” which demonstrates either Hood  
16 or Butera’s “purposeful act[s] or failure[s] to respond to [his] pain or possible medical  
17 need,” or any “harm caused by [this] indifference.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*,  
18 550 U.S. at 557); *Wilhelm*, 680 F.3d at 1122 (citing *Jett*, 439 F.3d at 1096). Indeed,  
19 Plaintiff’s pleading offers only the type of “labels and conclusions” or “formulaic  
20 recitation[s] of the elements of a[n] [Eighth Amendment] cause of action that will not do.”  
21 *Iqbal*, 662 U.S. at 678 (citing *Twombly*, 550 U.S. at 555.)

22 Moreover, as discussed below, the voluminous exhibits and medical records Plaintiff  
23 offers in support of his Complaint show that both Drs. Hood and Butera acted promptly,  
24 carefully, and responsibly when they both treated him at AMC on May 4-7, 2014, and when  
25 Dr. Butera again treated him upon re-admission to AMC on September 28, 2014. Plaintiff’s  
26 exhibits belie any plausible claims of deliberate indifference. *Id.*; *see also Sprewell*, 266  
27 F.3d at 988; *Nat’l Assoc. for the Advancement of Psychoanalysis*, 228 F.3d at 1049 (noting  
28 ///

1 that court “may consider facts contained in documents attached to the complaint” to  
2 determine whether a complaint states a claim for relief).

3 Specifically, Plaintiff claims that “from May 4, 2014 through May 7, 2014, both Drs.  
4 Hood and Butera were “responsible” to provide him medical care by diagnosing,  
5 evaluating, and exercising their medical judgments as to “the medical care needed.” (ECF  
6 No. 1 at 15.) Plaintiff’s exhibits show both Dr. Hood and Dr. Butera, an infectious disease  
7 specialist, examined Plaintiff, reviewed an x-ray of his knee and his current course of oral  
8 antibiotics, diagnosed him with cellulitis of the right knee and leg, admitted him to AMC,  
9 and in consultation “empirically placed [him] on IV vancomycin and Zosyn.” (ECF No. 1  
10 at 29-30; ECF No. 1-1 at 85-86, 92-93.) Only after Plaintiff had “markedly improved” after  
11 3 days of IV antibiotics, did both Drs. Hood and Butera clear him for discharge back to  
12 RJD, and prescribe a continued course of oral antibiotic, pain, and inflammation therapy,  
13 including Keflex, doxycycline, Tylenol with codeine and Naprosyn, noting that  
14 “[g]enerally, a two week course of therapy of antibiotics appropriate to cover the pathogen  
15 is necessary.” (ECF No. 1-1 at 105.) While Plaintiff concludes both Drs. Hood and Butera  
16 were “deliberate[ly] indifferent” because they “failed to identify and treat [his] MRSA  
17 infection” in May 2014 (ECF No. 1 at 25), his exhibits show a “nares methicillin-resistant  
18 Staphylococcus aureus screen [was] negative” when he was admitted to AMC on May 4,  
19 2014, (ECF No. 1-1 at 105), *and* that both Drs. Hood and Butera aggressively treated his  
20 infection with IV Zosyn and vacomycin, the “only drug” he claims that “deals with  
21 MRSA.” (ECF No. 1 at 29 n.2.)

22 As to his subsequent admission to AMC on September 28, 2014, Plaintiff again  
23 claims Dr. Butera was one of several doctors who were “responsible for [his] medical care.”  
24 (ECF No. 1 at 25-26.) He also admits Butera “treated [him] with strong antibiotics due to  
25 the resistance” of his infection during this hospitalization, (ECF No. 1 at 32, 45), but claims  
26 the “MRSA infection was in an advanced stage” requiring surgery. (*Id.* at 26.) Plaintiff’s  
27 exhibits show that in fact, Dr. Butera did in fact place Plaintiff back on vancomycin IV on  
28 September 28, 2014, and noted that Plaintiff’s “previous MRSA screenings ha[d] been

1 negative,” but recommended that Plaintiff be observed until his “repeat[ed] blood cultures”  
2 could be evaluated, an orthopedist could be consulted to evaluate whether a “proper  
3 incision and drainage or bursectomy” was necessary due to Plaintiff’s relapse. (ECF No.  
4 1-2 at 36-37, 40.) Plaintiff’s exhibits further show that it was not until his September 28,  
5 2014 wound culture that Plaintiff tested “positive for MRSA,” and he consented to surgery.  
6 (ECF No. 1 at 45; ECF No. 1-2 at 40.)

7 Plaintiff contends all Defendants, including Drs. Hood and Butera, violated his  
8 Eighth Amendment rights because he “believes surgery could have been prevented if he  
9 had been treated with adequate medical care since the beginning.” (ECF No. 1 at 33.) But,  
10 to support a claim of deliberate indifference, Plaintiff must plead facts that demonstrate  
11 something more than an ordinary lack of due care. *Snow v. McDaniel*, 681 F.3d 978, 985  
12 (9th Cir. 2012) (citation and quotation marks omitted); *Wilhelm*, 680 F.3d at 1122. “A  
13 difference of opinion between a physician and the prisoner—or between medical  
14 professionals—concerning what medical care is appropriate does not amount to deliberate  
15 indifference.” *Snow*, 681 F.3d at 987 (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.  
16 1989)); *Wilhelm*, 680 F.3d at 1122-23. Instead, Plaintiff must allege facts sufficient to  
17 “show that the course of treatment the [defendants] chose was medically unacceptable  
18 under the circumstances and that the defendants chose this course in conscious disregard  
19 of an excessive risk to [his] health.” *Snow*, 681 F.3d at 988 (citation and internal quotations  
20 omitted). “Mere negligence in diagnosing or treating a medical condition, without more,  
21 does not violate a prisoner’s Eighth Amendment rights.” *Toguchi*, 391 F.3d at 1057  
22 (citation omitted).

23 Plaintiff’s Complaint, together with his exhibits however, contain no facts sufficient  
24 to show that either Dr. Hood or Dr. Butera acted with deliberate indifference to his plight  
25 by “knowing of and disregarding an[y] excessive risk to his health and safety,” or choosing  
26 any “medically unacceptable” course of treating his infection in conscious disregard to his  
27 health, on either occasion he was admitted to AMC and treated by them. *Farmer*, 511 U.S.  
28 at 837; *Snow*, 681 F.3d at 988.

1 Accordingly, the Court GRANTS both Dr. Hood's and Dr. Butera's Motions to  
2 Dismiss Plaintiff's first cause of action based on the Eighth Amendment.

3 **B. Cal. Const. Art I §§ 15 & 17 Claims**

4 In his third cause of action, Plaintiff incorporates by reference all factual allegations  
5 made in support of his Eighth Amendment claim, and asserts pendent state law claims  
6 against all Defendants pursuant to Cal. Const., Art. 1 §§ 15, 17. (ECF No. 1 at 50.) Both  
7 Dr. Hood and Dr. Butera also move to dismiss this cause of action pursuant to Fed. R. Civ.  
8 P. 12(b)(6). (ECF No. 8-1 at 6-8; ECF No. 10-1 at 7.)

9 First, section 15 of Article I of the California Constitution provides:

10 [t]he defendant in a criminal cause has the right to a speedy  
11 public trial, to compel attendance of witnesses in the defendant's  
12 behalf, to have the assistance of counsel for the defendant's  
13 defense, to be personally present with counsel, and to be  
14 confronted with the witnesses against the defendant. The  
Legislature may provide for the deposition of a witness in the  
presence of the defendant and the defendant's counsel.

15 Persons may not twice be put in jeopardy for the same offense,  
16 be compelled in a criminal cause to be a witness against  
17 themselves, or be deprived of life, liberty, or property without  
due process of law.

18 CAL. CONST., art 1 § 15. Thus, by its own terms, § 15 is applicable only in criminal cases.  
19 *See County of Sutter v. Davis*, 234 Cal.App.3d 319, 324 n.2 (1991).

20 Second, section 17 of the California Constitution, like the Eighth Amendment of the  
21 U.S. Constitution, prohibits cruel and unusual punishment. CAL. CONST. art. I § 17.  
22 However, there is no private cause of action for money damages under Article I, section  
23 17. *Giraldo v. California Dep't of Corr. and Rehab.*, 168 Cal.App.4th 231, 257, 85  
24 Cal.Rptr.3d 371 (2008) (citing *Katzberg v. Regents of the University of California*, 29  
25 Cal.4th 300, 329, 127 Cal.Rptr.2d 482, 58 P.3d 339 (2002)); *see also Davis v. Kissinger*,  
26 2009 WL 256574, at \*12 n. 4 (E.D. Cal. Feb. 3, 2009), *adopted*, 2009 WL 647350 (Mar.  
27 10, 2009). Even though California's cruel or unusual punishment clause represents a  
28 significant right, alternative remedies are available to prisoners in the form of a negligence

1 action or an action for damages under the federal cruel and unusual punishment clause.  
2 *Giraldo*, 168 Cal. App. 4th at 257; 85 Cal.Rptr.3d 371. Thus, Plaintiff is precluded from  
3 bringing a claim under section 17 of the California Constitution for money damages.

4 And while relief for violations of Article I, section 17 is not limited to injunctive and  
5 declaratory relief, those remedies must be premised on a valid and on-going cruel and  
6 unusual punishments violation. *See id.* Because the Court has dismissed Plaintiff's Eighth  
7 Amendment cruel and unusual punishments claims as to both Dr. Hood and Dr. Butera, *see*  
8 *In re Alva*, 33 Cal. 4th 254, 291 (2004) (“[W]e have never suggested that article I, section  
9 17 employs a different or broader definition of ‘punishment’ itself than applies under the  
10 Eighth Amendment.”), no grounds for injunctive or declaratory relief based on those claims  
11 remain. *See e.g., Mwasi v. Corcoran State Prison*, No. 1:13-CV-00695-AWI, 2015 WL  
12 3419203, at \*7 (E.D. Cal. May 27, 2015).

13 Accordingly, the Court GRANTS both Dr. Hood's and Dr. Butera's Motions to  
14 Dismiss Plaintiff's third cause of action pursuant to Cal. Const., art 1 §§ 15, 17.

### 15 **C. Punitive Damages**

16 Finally, Dr. Hood and Dr. Butera both move to dismiss Plaintiff's request for  
17 punitive damages pursuant to FED. R. CIV. P. 12(b)(6) because he has failed to allege facts  
18 sufficient to show that either of them acted with the requisite culpability. (ECF No. 8-1 at  
19 8-9; ECF No. 10-1 at 7-8.) Punitive damages may be assessed in § 1983 actions “when the  
20 defendant's conduct is shown to be motivated by evil motive or intent, or when it involves  
21 reckless or callous indifference to the federally protected rights of others.” *Smith v. Wade*,  
22 461 U.S. 30, 56 (1983).

23 Because the Court has found Plaintiff's Complaint fails to state facts sufficient to  
24 show that either Dr. Hood or Dr. Butera acted with deliberate indifference to his serious  
25 medical needs, let alone any “evil motive or intent,” it DENIES their Motions to dismiss  
26 Plaintiff's claims for punitive damages based on his Eighth Amendment claims as moot.

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1 **VI. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2)**

2 Plaintiff is proceeding IFP in this case pursuant to 28 U.S.C. § 1915(a) (ECF No. 3).  
3 On March 22, 2016, the Court conducted a sua sponte review of Plaintiff’s Complaint soon  
4 after filing, and found it contained Eighth Amendment medical care claims sufficient to  
5 overcome the “low threshold” for surviving the initial sua sponte screening required by 28  
6 U.S.C. §§ 1915(e)(2) and 1915A(b), (*id.* at 5 (citing *Wilhelm*, 680 F.3d at 1123)), and  
7 directed the U.S. Marshal to effect service upon Defendants on Plaintiff’s behalf. *Id.* at 5-  
8 7. Plaintiff was cautioned, however, that “the sua sponte screening and dismissal procedure  
9 is cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a  
10 defendant] may choose to bring.” (*Id.* at 5 n.1 (citing *Teahan v. Wilhelm*, 481 F. Supp. 2d  
11 1115, 1119 (S.D. Cal. 2007)).

12 As noted previously, no Defendants named in Plaintiff’s Complaint, other than Dr.  
13 Hood and Dr. Butera, have yet to be served. *See supra* n.1. As a result of having since  
14 carefully considered all the allegations in Plaintiff’s Complaint, together with all the  
15 medical records he has attached as exhibits as the result of Dr. Hood and Dr. Butera’s  
16 Motions to Dismiss, the Court now finds that it must also sua sponte dismiss the remainder  
17 of Plaintiff’s claims as to all other named, but yet-to-be-served Defendants pursuant to 28  
18 U.S.C. § 1915(e)(2)(b)(ii) for failing to state a claim upon which relief may be granted. *See*  
19 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“It is also clear that section  
20 1915(e) not only permits but *requires* a district court to [sua sponte] dismiss an in forma  
21 pauperis complaint” “at any time” if the court determines that it fails to state a claim) (citing  
22 28 U.S.C. § 1915(e)(2)(B)(ii); *see also Chavez v. Robinson*, 817 F.3d 1162, 1167 (9th Cir.  
23 2016) (“The statute governing IFP filings requires a court to dismiss an action ‘at any time’  
24 if it determines that the complaint ‘seeks monetary relief against a defendant who is  
25 immune from such relief.’”) (citing 28 U.S.C. § 1915(e)(2)(B)(iii)), and even “before the  
26 defendants have been served and affirmatively raised the issue in a responsive pleading.”).

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1           **A. Standard of Review**

2           “The standard for determining whether a plaintiff has failed to state a claim upon  
3 which relief can be granted under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of  
4 Civil Procedure 12(b)(6) standard for failure to state a claim.” *Watison v. Carter*, 668 F.3d  
5 1108, 1112 (9th Cir. 2012).

6           To state an Eighth Amendment claim based on allegations of inadequate medical  
7 care, Plaintiff’s Complaint must contain sufficient factual content to show that *all* the RJD  
8 medical officials he has named as Defendants, just like AMC Drs. Hood and Butera, acted  
9 with deliberate indifference to his serious medical needs. *Estelle*, 429 U.S. at 104; *Peralta*  
10 *v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) (en banc).

11           **B. Remaining Claims against Unserved Defendants**

12           Plaintiff’s Eighth Amendment claims as to the named RJD Defendants can be  
13 classified into three separate chronological incidents: 1) his December 2013 through  
14 February 2014 left leg abscess, for which he alleges to have been treated by RJD Drs.  
15 Robinson, Silva, and Cook; 2) his May through September 2014 pre- and post- AMC  
16 admission for right knee and leg care, for which he alleges to have been treated by RJD  
17 Drs. Casian, Chau, Ghayori, Wiley, and Zhang, and RNs Paule, Kaestner, Benitez, Garcia,  
18 and Steward; and 3) his pre- and post-September 28, 2014 re-admission to AMC for  
19 recurrent pain and swelling in his right knee and leg, for which he alleges to have been  
20 treated by RJD Drs. Zhang, Newton, Suleiman and Wiley and RNs Wenzel, Paule, Janasco,  
21 Wallace, and Calderon.<sup>13</sup> As to the remaining named Defendants, RJD’s Chief Medical  
22

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23  
24 <sup>13</sup> Plaintiff includes B. Manning in a list of RNs he names as Defendants, (ECF No. 1 at  
25 15), and alleges he/she “was responsible for providing [him] health care,” (*id.*) but nowhere  
26 else in his Complaint, or in the exhibits attached, does Plaintiff allege or show when he  
27 was actually treated by Manning. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)  
28 (“Liability under [§] 1983 arises only upon a showing of personal participation by the  
defendant.”). A person deprives another of a constitutional right, “within the meaning of  
§ 1983 ‘if he does an affirmative act, participates in another’s affirmative act, or omits to  
perform an act which he is legally required to do that causes the deprivation of which

1 Executive S. Roberts, Chief Executive Officer M. Glynn, and Chief Physician and Surgeon  
2 R. Walker, Plaintiff alleges they are responsible for failing to “oversee” and/or supervise  
3 his attending RJD physicians and nurses, and for “reviewing” his administrative medical  
4 appeal, CDC 602 Log. No. RJD HC 14052082. (ECF No. 1 at 11-14; ECF No. 1-1 at 1-  
5 11.)

### 6 **1. RJD Treating Physicians and Nurses**

7 As to Plaintiff’s Eighth Amendment claims as to Drs. Robinson, Silva, and Cook,  
8 the Court finds he has failed to allege facts sufficient to show that any of them acted with  
9 deliberate indifference to his left thigh abscess in December 2013. *See Lopez*, 203 F.3d at  
10 1126-27; *Peralta*, 744 F.3d at 1081-82.

11 While Plaintiff claims Robinson, Silva, and Cook “failed to adequately treat” his  
12 infection at the time (ECF No. 1 at 24, 37-39), he also admits they examined him, diagnosed  
13 him with cellulitis, performed an I&D, prescribed oral antibiotics and pain relievers, and  
14 ordered blood tests. (ECF No. 1 at 24, 38-39; ECF No. 1-1 at 16-60.) None of these facts  
15 “allow the court to draw the reasonable inference” that Robinson, Silva, or Cook chose a  
16 course of treatment that was “medically unacceptable under the circumstances” and in  
17 “conscious disregard of an excessive risk” to Plaintiff’s health. *Iqbal*, 556 U.S. at 676;  
18 *Snow*, 681 F.3d at 988; *Farmer*, 511 U.S. at 837. Indeed, Plaintiff’s left leg abscess was  
19 “resolved” by February 10, 2014. (ECF No. 1-1 at 54-55.)

20 As to Plaintiff’s claims that Drs. Casian, Chau, Ghayori, Wiley, and Zhang, and RNs  
21 Paule, Kaestner, Benitez, Garcia, and Steward “failed to take reasonable action to summon  
22 ... medical care” (ECF No. 1 at 25), for his right leg and knee infection both before and  
23 after his May 7, 2014 admission to AMC, the Court also finds he has failed to allege facts  
24 sufficient to show the deliberate indifference required to support an Eighth Amendment  
25 claim. *See Lopez*, 203 F.3d at 1126-27; *Peralta*, 744 F.3d at 1081-82.

26 \_\_\_\_\_  
27  
28 complaint is made.” *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183  
(9th Cir. 2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)).

1 Plaintiff claims to have first requested medical attention for his right knee on March  
2 24, 2014, but admits he was examined by an unidentified nurse who consulted with the  
3 “PCP on site” who prescribed Bactrim, and directed him to follow up in 5 days. (ECF No.  
4 1 at 26; ECF No. 1-1 at 63-64). On April 1, 2014, Plaintiff was examined by RN Kaestner  
5 for a wound check. (ECF No. 1-1 at 65.) Plaintiff does not again complain about his right  
6 leg and knee until a month later, when on May 2, 2014, he filed an emergency request due  
7 to pain and swelling in his right knee, and was examined by RN Benitez (ECF No. 1-1 at  
8 66, 76-77). Defendant Wiley examined him, and Dr. Karan ordered an x-ray, which showed  
9 swelling, but no fracture, and attempted to tap fluid from his sub-patellar space for testing.  
10 (*Id.* at 68, 70-71.) Plaintiff was diagnosed with prepatellar cellulitis and bursitis, placed on  
11 oral antibiotics, anti-inflammatories and pain killers. (ECF No. 1 at 41; ECF No. 1-1 at 67,  
12 68, 73, 79.) Two days later, Defendants Casian and Garcia noted his swelling had  
13 increased, and referred him to AMC for outpatient care. (ECF No. 1 at 29, 42; ECF No. 1-  
14 1 at 80-84, 96.) Following his return to RJD on May 7, 2014, Plaintiff admits being placed  
15 on oral antibiotics, anti-inflammatories, and pain medication. (ECF No. 1-1 at 107-108,  
16 112-13), to have received a subsequent x-ray, and to have been examined no fewer than  
17 five times by Defendants Chau, Stewart, Ghayouri, Paule, and Zhang on May 7, 9, 16,  
18 2014, July 17, 2014, and September 15, 2014. (ECF No. 1 at 29-31; ECF No. 1-1 at 108,  
19 112-13; ECF No. 1-2 at 1-4, 6, 7-15.) Based on these facts, the Court finds Plaintiff has  
20 failed to plead facts that allow it to draw a reasonable inference that Drs. Casian, Chau,  
21 Ghayori, Wiley, and Zhang, and RNs Paule, Kaestner, Benitez, Garcia, and Steward may  
22 be held liable for violating Plaintiff’s Eighth Amendment rights. *See Iqbal*, 556 U.S. at  
23 678.

24 Plaintiff’s additional allegations that Drs. Zhang, Newton, Suleiman, Wiley and RNs  
25 Wenzel, Paule, Janasco, Wallace, and Calderon failed to “pay attention” to his medical  
26 needs (ECF No. 1 at 31), “intentionally and unjustifiably failed to summon medical care,”  
27 (*id.* at 43, 47), and either failed to “prevent” his surgery and/or “intentionally delayed”

28 ///

1 treatment (*id.* at 32-34), also fails to state a plausible claim for relief. *Iqbal*, 556 U.S. at  
2 679.

3 “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for  
4 more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678 (quoting  
5 *Twombly*, 550 U.S. at 556). Here, nothing in either Plaintiff’s Complaint or the exhibits he  
6 has attached supports his claims of deliberate indifference as to these Defendants’  
7 treatment of his right knee infection either prior to or following his September 28, 2014 re-  
8 admission to AMC. Specifically, Plaintiff admits to have been examined by Dr. Zhang on  
9 September 15, 2014 complaining of pain, and to have undergone an x-ray three days later,  
10 which showed swelling, but no fracture, and to have been prescribed etodolac. (ECF No. 1  
11 at 30-31; ECF No. 1-2 at 7-11, 14.) Ten days later, Plaintiff alleges to have developed a  
12 fever, was evaluated by RN Wenzel and Dr. Suleiman, and on that same day authorized for  
13 immediate transfer and admitted to AMC. (ECF No. 1 at 25-26, 32, 44-45; ECF No. 1-2 at  
14 16, 21-23.) Upon his discharge from AMC on October 2, 2014, Plaintiff admits Drs. Zhang,  
15 Newton and Garikaparathi all prescribed a continued course of oral antibiotics and pain  
16 medication, as recommended by his AMC physicians upon discharge. (ECF No. 1 at 45;  
17 ECF No. 1-2 at 48-49, 53, 63-68.) RNs Paule, Janasco, and Wallace treated his surgical  
18 wound and changed his dressings on at least three separate occasions between October 2-  
19 5, 2014 (ECF No. 1-2 at 54-55, 59, 61, 62), and when Dr. Zhang examined him again on  
20 October 17, 2014, and again on November 4, 2014, Plaintiff’s infection had resolved, he  
21 had completed his course of antibiotics, was able to move his right knee freely, and  
22 continued to use pain medication. (ECF No. 1-2 at 72, 74, 77, 82). Plaintiff complained  
23 again of knee pain in January 2015, but was evaluated by RN Calderon, prescribed  
24 Naproxen and scheduled for a follow-up appointment with his PCP. (ECF No. 1 at 47; ECF  
25 No. 1-2 at 87-90). Plaintiff next alleges to have been evaluated by Dr. Zhang on January  
26 20, 2015, who prescribed Voltaren gel, and approved him for a bottom bunk, (ECF No. 1  
27 at 47; ECF No. 1-2 at 92-96), and to have only again reported knee pain on May 20, 2015,  
28 when he was examined by D. Wiley, prescribed more pain medication, and given a

1 neoprene knee brace after he exacerbated his knee injury playing soccer. (ECF No. 1 at 48;  
2 ECF No. 1-2 at 99-100.)

3 Based on the facts as Plaintiff himself has alleged, the Court finds he has failed to  
4 “nudge[] [his] claims” of deliberate indifference as to *any* named Defendant “across the  
5 line from conceivable to plausible.” *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at  
6 570). Therefore, his remaining Eighth Amendment claims must be dismissed sua sponte  
7 pursuant to 28 U.S.C. § 1915(e)(2). *Lopez*, 203 F.3d at 1126-27; *Watison*, 668 F.3d at 1112.

## 8 **2. RJD Supervisory Defendants**

9 As to Defendants Walker, Roberts, and Glynn, none of whom are alleged to have  
10 treated Plaintiff personally, but instead are alleged to have negligently supervised or  
11 instructed Plaintiff’s treating doctors and nurses “on how to treat or identify MRSA,” (ECF  
12 No. 1 at 2, 27), and to have reviewed his CDCR 602 Inmate/Parolee Health Care Appeal,  
13 Log No. 14052082, (*id.* at 10-14, 40-41; ECF No. 1-1 at 2-11), the Court also finds Plaintiff  
14 has failed to state a claim upon which relief can be granted. *Lopez*, 203 F.3d at 1126-27.

15 To state a claim, Plaintiff must demonstrate that each defendant personally  
16 participated in the deprivation of his constitutional rights. *Iqbal*, 556 U.S. at 673; *Colwell*  
17 *v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014). Liability may not be imposed on  
18 supervisory personnel for the acts or omissions of their subordinates under the theory of  
19 respondeat superior. *Iqbal*, 556 U.S. at 672-673; *Jones v. Williams*, 297 F.3d 930, 934 (9th  
20 Cir. 2002). Instead, supervisors may be held liable only if they “participated in or directed  
21 the violations, or knew of the violations and failed to act to prevent them.” *Taylor v. List*,  
22 880 F.2d 1040, 1045 (9th Cir. 1989); *accord Starr v. Baca*, 625 F.3d 1202, 1205-06 (9th  
23 Cir. 2011).

24 Here, Plaintiff alleges no facts to show how or to what extent Defendants Walker,  
25 Walker, or Glynn personally violated his Eighth Amendment rights, directed the other  
26 Defendants to violate his rights, or knew of their subordinates’ violations and failed to  
27 prevent them. *Id.* And while Defendants Walker, Roberts, and Glynn are alleged to have  
28 reviewed Plaintiff’s CDCR 602 Inmate/Parolee Health Care Appeal, (ECF No. 1 at 12-4)

1 this, by itself, is insufficient to support any independent constitutional violation. *See*  
2 *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (finding it well-established that  
3 “inmates lack a separate constitutional entitlement to a specific prison grievance  
4 procedure.”) (citing *Mann v. Adams*, 855 F.2d 639, 640 (9th Cir. 1988)); *Randall v. Arnold*,  
5 No. 2:15-CV-1711-EFB P, 2016 WL 4399391, at \*4 (E.D. Cal. Aug. 18, 2016) (finding  
6 that a prisoner “may not impose liability on defendants simply because they played a role  
7 in processing [his] inmate appeals.”) (citing *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir.  
8 1993)); *Archini v. Sanders*, No. 2:14-CV-1392-CMK-P, 2015 WL 5698384, at \*3 (E.D.  
9 Cal. Sept. 28, 2015) (sua sponte dismissing prisoner’s claims against officials who denied  
10 his 602 inmate grievance for failing to state a claim pursuant to 28 U.S.C. § 1915A); *Smith*  
11 *v. Calderon*, No. C 99-2036 MJJ PR, 1999 WL 1051947 at \*3 (N.D. Cal. 1999) (finding  
12 “the defendants’ alleged failure to properly process and decide [plaintiff’s] administrative  
13 grievance and appeals did not violate any constitutional right”).

#### 14 **VII. Supplemental Jurisdiction**

15 All that remains is Plaintiff’s “Second Cause of Action” alleging pendent state law  
16 violations against all Defendants for “medical negligence and malpractice” in violation of  
17 CAL. GOVT. CODE § 845.6 and 815.2 (ECF No. 1 at 37).

18 Federal courts should refrain from exercising their pendent jurisdiction over state  
19 law claims when the federal claims are dismissed before trial. *United Mine Workers v.*  
20 *Gibbs*, 383 U.S. 715, 726 (1966). Because the Court has found that Plaintiff has failed to  
21 state an Eighth Amendment claim as to *any* named Defendant, it declines to exercise  
22 supplemental jurisdiction over Plaintiff’s state law negligence and malpractice claims  
23 pursuant to 28 U.S.C. § 1367(c)(3). *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S.  
24 635, 639 (2009) (district court retains discretion over whether to exercise supplemental  
25 jurisdiction over state law claims after all federal claims are dismissed); *see also* 28 U.S.C.  
26 § 1367(c)(3) (“The district courts may decline to exercise supplemental jurisdiction over a  
27 claim ... if ... the district court has dismissed all claims over which it has original  
28 jurisdiction.”); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 940 (9th Cir. 2012) (accord).

1 **Conclusion**

2 For all the reasons discussed, the Court:

3 1) **GRANTS** Defendant Hood and Defendant Butera’s Motions to Dismiss  
4 pursuant to FED. R. CIV. P. 12(b)(6) (ECF Nos. 8, 10);

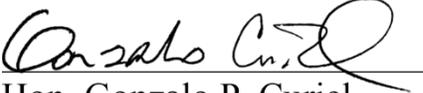
5 2) **DISMISSES** Plaintiff’s Eighth Amendment claims as to all remaining  
6 Defendants sua sponte for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(b)(ii);

7 3) **DECLINES** to exercise supplemental jurisdiction over Plaintiff’s  
8 supplemental state law claims pursuant to 28 U.S.C. § 1367(c)(3); and

9 4) **GRANTS** Plaintiff forty-five (45) days leave in which to file an Amended  
10 Complaint that addresses the pleading deficiencies identified in this Order. Plaintiff is  
11 cautioned, however, that should he choose to file an Amended Complaint, it must be  
12 complete by itself, comply with Federal Rule of Civil Procedure 8(a), and that any claim  
13 not re-alleged will be considered waived. *See* S.D. CAL. CIVLR 15.1; *Hal Roach Studios,*  
14 *Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546 (9th Cir. 1989) (“[A]n amended  
15 pleading supersedes the original.”); *Lacey*, 693 F.3d at 928 (noting that claims dismissed  
16 with leave to amend which are not re-alleged in an amended pleading may be “considered  
17 waived if not repled.”). If Plaintiff fails to follow these instructions and/or files an  
18 Amended Complaint that still fails to state a claim, his case will be dismissed without  
19 further leave to amend. *See Lira v. Herrera*, 427 F.3d 1164, 1169 (9th Cir. 2005) (“If a  
20 plaintiff does not take advantage of the opportunity to fix his complaint, a district court  
21 may convert the dismissal of the complaint into dismissal of the entire action.”).

22 **IT IS SO ORDERED.**

23 Dated: September 15, 2016

24   
25 Hon. Gonzalo P. Curiel  
26 United States District Judge  
27  
28