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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MORIANO MILLARE,
12 CDCR #J-19886,

13 Plaintiff,

14 vs.

15 G. WILEY,

16 Defendant.
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Case No.: 3:16-cv-0487-MMA-NLS

**ORDER GRANTING DEFENDANT
G. WILEY'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT;**

[Doc. No. 134]

**DENYING AS MOOT DEFENDANT
G. WILEY'S MOTION TO STRIKE
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

[Doc. No. 135]

23 Plaintiff Moriano Millare, a California state prisoner proceeding *pro se*, instituted
24 this civil rights action against correctional, medical, and inmate appeals officials at
25 Richard J. Donovan Correctional Facility ("RJD"). *See* Doc. No. 1. Plaintiff's only
26 remaining claim in this action is against Defendant G. Wiley, a nurse practitioner at RJD,
27 for violation of his Eighth Amendment right to adequate medical care. *See* Doc. No. 132.
28 Defendant Wiley moves to dismiss Plaintiff's claim pursuant to Federal Rule of Civil

1 Procedure 12(b)(6), *see* Doc. No. 134, and to strike various portions of Plaintiff’s First
2 Amended Complaint (“FAC”) pursuant to Rule 12(f), *see* Doc. No. 135. Plaintiff filed
3 responses in opposition to Wiley’s motions, to which Wiley replied. *See* Doc. Nos. 139,
4 140, 148, 149. The Court took Wiley’s motions under submission on the written briefs
5 and without oral argument pursuant to Civil Local Rule 7.1.d.1. *See* Doc. No. 151. For
6 the reasons set forth below, the Court **GRANTS** Wiley’s motion to dismiss and **DENIES**
7 **AS MOOT** Wiley’s motion to strike.

8 BACKGROUND¹

9 On June 11, 2014, Plaintiff filed an inmate health care appeal against former-
10 defendant Dr. G. Casian. Plaintiff requested to be seen by another physician and asked
11 for an MRI or CT scan, a dermatology appointment, braces for his back, neck, and ankle,
12 as well as a step ladder for use accessing his upper bunk, or in the alternative, a lower
13 bunk assignment. Plaintiff’s appeal bypassed the first level of review, and on July 23,
14 2014, Defendant Wiley interviewed Plaintiff regarding his health care appeal against Dr.
15 Casian. As a result of the interview, Defendant Wiley prescribed a topical medication to
16 treat Plaintiff’s skin condition, ordered a follow-up X-ray of Plaintiff’s lower back to
17 determine whether any degeneration had occurred which would require a back brace or
18 other accommodation, and submitted a request for a CT scan.

19 Plaintiff was dissatisfied with the interview and its outcome. On August 13, 2014,
20 Plaintiff filed a health care appeal against Defendant Wiley regarding her alleged
21 misconduct during the July 23, 2014 interview. Plaintiff claimed in his appeal that Wiley
22 treated him poorly, told him he had bad breath, told him to change his religion, and asked
23 him to perform odd physical feats for no purpose. Plaintiff also claimed that Defendant
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26 ¹ This description of events is taken from Plaintiff’s First Amended Complaint and the attached exhibits,
27 and is not to be construed as findings of fact by the Court. However, because this case comes before the
28 Court on a motion to dismiss, the Court must accept as true all material allegations in the complaint and
must also construe the complaint, and all reasonable inferences drawn therefrom, in the light most
favorable to Plaintiff. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

1 Wiley shoved him in the back and threatened to cancel his appeal if he did not cooperate
2 with her instructions.

3 Based on these events, Plaintiff brings an Eighth Amendment claim against
4 Defendant Wiley alleging deliberate indifference to his serious medical needs. Defendant
5 Wiley moves to dismiss Plaintiff's claim with prejudice pursuant to Federal Rule of
6 Criminal Procedure 12(b)(6), arguing that he cannot state a plausible Eighth Amendment
7 claim against her. Defendant Wiley also moves to strike portions of Plaintiff's FAC
8 pursuant to Rule 12(f), as immaterial or impertinent.

9 DISCUSSION

10 ***1. Legal Standard***

11 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
12 sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).
13 Plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face."
14 Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The
15 plausibility standard thus demands more than a formulaic recitation of the elements of a
16 cause of action, or naked assertions devoid of further factual enhancement. *Ashcroft v.*
17 *Iqbal*, 556 U.S. 662, 678 (2009). Instead, the complaint "must contain allegations of
18 underlying facts sufficient to give fair notice and to enable the opposing party to defend
19 itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

20 In reviewing a motion to dismiss under Rule 12(b)(6), courts must accept as true
21 all material allegations in the complaint, as well as reasonable inferences to be drawn
22 from them, and must construe the complaint in the light most favorable to the plaintiff.
23 *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004), *citing Karam v. City*
24 *of Burbank*, 352 F.3d 1188, 1192 (9th Cir. 2003). The court need not take legal
25 conclusions as true merely because they are cast in the form of factual allegations.
26 *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Similarly, "conclusory
27 allegations of law and unwarranted inferences are not sufficient to defeat a motion to
28 dismiss." *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

1 Where a plaintiff appears *pro se* in a civil rights case, the court must construe the
2 pleadings liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los*
3 *Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988). The rule of liberal construction
4 is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261
5 (9th Cir. 1992). Where amendment of a *pro se* litigant’s complaint would be futile,
6 denial of leave to amend is appropriate. *See James v. Giles*, 221 F.3d 1074, 1077 (9th
7 Cir. 2000).

8 **2. Analysis**

9 Plaintiff alleges that Defendant Wiley violated his Eighth Amendment right to
10 adequate medical care by acting deliberately indifferent to Plaintiff’s serious medical
11 needs, to wit, a contagious skin infection and a pre-existing injury to his left hip, thigh,
12 knee, shin, and ankle, as well as right shoulder and cervical spine conditions.

13 The Eighth Amendment prohibits the imposition of cruel and unusual punishment
14 and “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity
15 and decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*,
16 404 F.2d 571, 579 (8th Cir. 1968)). “[D]eliberate indifference to a prisoner’s serious
17 illness or injury states a cause of action under § 1983.” *Id.* at 105. A prison official
18 violates the Eighth Amendment only when two requirements are met: (1) the objective
19 requirement that the deprivation is “sufficiently serious,” *Farmer v. Brennan*, 511 U.S.
20 825, 834 (1994) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); and (2) the
21 subjective requirement that the prison official has a “sufficiently culpable state of mind.”
22 *Id.* (quoting *Wilson*, 501 U.S. at 298).

23 Even assuming Plaintiff’s allegations establish the objective component of an
24 Eighth Amendment claim, Plaintiff has failed to allege sufficient facts to establish that
25 Defendant Wiley acted with “deliberate indifference” to Plaintiff’s health or safety.
26 *Farmer*, 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 302-303). To the contrary,
27 Plaintiff’s FAC and the attached exhibits demonstrate that Defendant Wiley interviewed
28 Plaintiff as part of the appeals process, prescribed topical skin medication, and ordered

1 follow-up X-rays and scans of Plaintiff’s lower back and left ankle. The Constitution
2 does not require that prisoners be given every medical treatment they desire. *See Jackson*
3 *v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). And based on these facts, Plaintiff once
4 again fails to “show that the course of treatment [Defendant] chose was medically
5 unacceptable under the circumstances . . . and . . . that [she] chose this course in
6 conscious disregard of an excessive risk to plaintiff’s health.” *Id.*

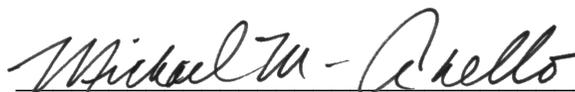
7 In sum, Plaintiff has not alleged facts demonstrating that Defendant Wiley acted
8 with deliberate indifference to his serious medical needs. The Court previously identified
9 the deficiencies of Plaintiff’s claim, but he has failed to cure those deficiencies. As such,
10 the Court finds that amendment under the circumstances would be futile, and therefore
11 unwarranted. *See Vasquez v. Los Angeles County*, 487 F.3d 1246, 1258 (9th Cir. 2007)
12 (citing *Schmier v. U.S. Court of Appeals for the Ninth Circuit*, 279 F.3d 817, 824 (9th
13 Cir. 2002) (recognizing “[f]utility of amendment” as a proper basis for dismissal without
14 leave to amend)).

15 **CONCLUSION**

16 Based on the foregoing, the Court **GRANTS** Defendant Wiley’s motion to dismiss
17 and **DENIES AS MOOT** Defendant Wiley’s motion to strike. The Court **DISMISSES**
18 Plaintiff’s remaining Eighth Amendment claim against Defendant Wiley with prejudice.
19 The Court **DIRECTS** the Clerk of Court to enter judgment in favor of Defendant Wiley
20 and close the case.

21 **IT IS SO ORDERED.**

22 DATE: April 11, 2018



23 HON. MICHAEL M. ANELLO
24 United States District Judge
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