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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DOYLE WAYNE DAVIS, CDCR
#34318,

Plaintiff,

v.

DANIEL PARAMO, Warden, et al.,

Defendants.

Case No.: 16cv689 BEN (JMA)

**REPORT AND
RECOMMENDATION RE
DEFENDANTS' MOTIONS TO
DISMISS PLAINTIFF'S
COMPLAINT
[ECF Nos. 22, 24, 46, 61]**

Plaintiff Doyle Wayne Davis is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff contends fourteen correctional and medical care officials at Richard J. Donovan Correctional Facility ("RJD") and two doctors from Alvarado Hospital acted with deliberate indifference to his serious medical needs and retaliated against him after he filed a San Diego Superior Court case and various inmate grievances challenging his medical care.

Presently before the Court are motions to dismiss filed by Defendant Zamudio (ECF No. 22), Defendant Butcher (ECF No. 24), Defendants Silva, Jackson, Pasha, Walker, Rodriguez, Self, Pool, Glynn, Sosa, Paramo, Roberts

1 and Stout (ECF No. 46), and Defendant Bedane (ECF No. 61).¹

2
3 **I. PLAINTIFF'S COMPLAINT²**

4 Plaintiff was transferred to RJD from the Substance Abuse Treatment
5 Facility in August 2013. (Compl., ECF No. 1 at 13.) He alleges that upon his
6 arrival at RJD, Defendant S. Pasha, Registered Nurse Practitioner, told him it
7 was RJD policy to discontinue all narcotic medications regardless of inmate
8 medical need. (Id.) In December 2013, prison physician Tamara Robinson, M.D.
9 noted that Plaintiff had been taking methadone, a narcotic used for pain relief
10 and drug addiction detoxification, since at least May 2013. (ECF No. 1-1 at 8.)
11 Dr. Robinson preliminarily determined that long term narcotic treatment was not
12 medically necessary, but planned to conduct a full pain assessment because
13 Plaintiff's previous medical providers had conflicting opinions regarding his need
14 for pain relief. (Id. at 8-9.) In early 2014, Plaintiff saw Defendant D. Clifton, a
15 physical therapist, for low back, left leg, and neck pain. (ECF No. 1-1 at 12-15.)

16 In April 2014, Defendant D. Paramo, the Warden of RJD, allegedly ordered
17 Defendant M. Stout, Correctional Captain, to house Plaintiff on B Facility, allow
18 Plaintiff to work in Prison Industry Authority, and to ensure that all stolen personal
19 property was returned to him. (ECF No. 1 at 14.) Defendant Stout allegedly
20 refused to allow Plaintiff to work even though he met all the California
21 Department of Corrections and Rehabilitation ("CDCR") guidelines. (Id.)

22 In July 2014, Plaintiff filed a Petition for Writ of Habeas Corpus in the
23 Superior Court of California, County of San Diego, in which he alleged he was
24

25 ¹ The sixteenth defendant, David Clifton, Physical Therapist, has not been served in this
26 matter. See ECF No. 20 (summons returned unexecuted).

27 ² Plaintiff's Complaint consists of a 39 page form complaint and attachments, docketed at ECF
28 No. 1, as well as 231 pages of exhibits, docketed at ECF Nos. 1-1 and 1-2. For ease of
reference, the Court will refer to the document and page numbers affixed by the Court's
Electronic Case Filing (ECF) system when citing to Plaintiff's Complaint.

1 being denied adequate pain mediation as well as the opportunity to consult with a
2 neurosurgeon for spinal injuries and/or degeneration. (Id. at 31-34.) In August
3 2014, the court found Plaintiff failed to make a prima facie showing that health
4 care officials were deliberately indifferent to his condition, and that Plaintiff had
5 failed to exhaust his administrative remedies on his claim that he was being
6 denied a consultation with a neurosurgeon. (Id.)

7 On August 14, 2014, Plaintiff had his first visit with Defendant J. Silva,
8 prison physician. (Id. at 14.) He complained of increasing exertional dyspnea
9 (shortness of breath) over the previous six months. (ECF No. 1-1 at 36.) After
10 listening to Plaintiff's heart and obtaining an EKG, Dr. Silva diagnosed Plaintiff
11 with atrial fibrillation (irregular heartbeat). Dr. Silva noted that while Plaintiff did
12 not have a history of atrial fibrillation, he did have a history of hypertension. (Id.)
13 Plaintiff admitted he never took his hypertensive medication, and would continue
14 to refuse to take any form of such medication because "he felt he was not being
15 treated completely from a medical standpoint and felt that if he was not going to
16 be treated completely then he does not want to be treated at all." (Id.) After
17 advising Plaintiff of the risks of refusing hypertensive medication, including the
18 possibility of death, Dr. Silva sent Plaintiff to the Triage and Treatment Area
19 ("TTA") to be transferred to the emergency room. (Id.)

20 Plaintiff was initially taken to Sharp Chula Vista, where a Cardizem
21 (calcium channel blocker used to treat hypertension) drip was started due to
22 atrial fibrillation, and was then transferred and admitted into Alvarado Hospital.
23 (ECF No. 1-1 at 39.) There, Plaintiff alleges that Defendant Richard O. Butcher,
24 M.D. told him he had spoken with RJD medical staff and "they told him what they
25 wanted him to do for me." (ECF No. 1 at 14.) Dr. Butcher confirmed the
26 diagnosis of atrial fibrillation, new onset, admitted Plaintiff to the telemetry floor,
27 and continued the drip started at Sharp. (ECF No. 1-1 at 40.) Defendant
28 Fernando A. Zamudio, M.D., cardiologist, examined Plaintiff at Alvarado on

1 August 15, 2014, the day after his admission. According to Plaintiff, Dr. Zamudio
2 told him his atrial fibrillation was mostly caused by the exercise program that
3 RJD's physical therapist, Defendant Clifton, had placed him on, combined with
4 methadone use, which medical staff at the CDCR had initiated. (ECF No. 1 at
5 14-15.) Plaintiff alleges that Dr. Zamudio told him that RJD medical staff had
6 been in contact with the hospital and wanted Plaintiff off methadone and all
7 narcotic medications. (Id. at 15.) Dr. Zamudio's consultation records indicate
8 that Plaintiff's cardiac history dated back to 2011, when he experienced chest
9 pain while incarcerated. (ECF No. 1-1 at 42.) He received a cardiac workup,
10 which came out well, and had no further problems until May 2014. (Id.) Around
11 that time, he noticed he was getting short of breath and his heart pounded with
12 exertion. (Id.) Dr. Zamudio's impression consisted of: (1) Probable congestive
13 cardiomyopathy with atrial fibrillation and severe impairment of left ventricular
14 systolic function with acute on chronic congestive heart failure, mild mitral
15 regurgitation, mild tricuspid regurgitation, and mild pulmonary hypertension;
16 (2) history of cigarette abuse (2 packs daily for 34 years, until 2005), history of
17 methamphetamines (10 months per year for 20 years, until 1991), and chronic
18 obstructive pulmonary disease; (3) history of hypertension; and (4) abnormal
19 prostate-specific antigen (PSA) test. (Id. at 42-43.)

20 Dr. Butcher prepared the following summary of Plaintiff's hospital course
21 upon his discharge on August 19, 2014:

22 The patient was placed on telemetry and did show atrial fibrillation,
23 which was controlled. The patient was seen by Dr. Zamudio and was
24 taken off Cardizem drip, placed on [oral] Cardizem, Coreg (beta
25 blocker used to treat heart failure and hypertension), and
26 Hydrochlorothiazide (diuretic). The patient seemed to improve;
27 however, felt that a Lexiscan was indicated, if it were positive, the
28 patient should have catheterization. The patient had the Lexiscan by
Dr. Camacho, read as negative. The patient then started on Lovenox
(blood thinner) as well as Coumadin (blood thinner) because of the
atrial fibrillation. The patient is stable otherwise It was felt that

1 the patient could be discharged back with cardiac workup being
2 negative The patient should lie in for the next week with no work
3 detail. He is ambulatory. He is on regular diet. The patient should
4 follow up in the med clinic in one to two days and have a repeat of his
5 INR [International Normalized Ratio, used to provide information
6 about the blood's tendency to clot] to keep it therapeutic between 2
7 and 3. The patient understands his illness, did request to be on DNR
8 [do not resuscitate] status, which was done. The patient was okay for
9 the general population. He should follow his medication reconciliation
10 list, which has him on [C]arvedilol (beta blocker) 3,125 mg twice a
11 day and Coumadin 60 mg total 120 mg every eight hours. He is on
12 HydroDIURIL (diuretic) 25 mg. He is on chlorpheniramine
13 (antihistamine) 4 mg four times a day [as needed for] allergies, he is
14 on methadone 10 mg. He was not given that during his stay here,
15 may be able to be discontinued. He is on one tablet two times a day.
16 He is being followed by pain management. He is also on Prilosec
17 (used to decrease stomach acid) 20 mg daily. The patient is
18 stabilized to talk with the physician at Donovan.

19 (Id. at 46-47.)

20 On August 20, 2014, Plaintiff completed a Health Care Services Request
21 Form (CDC 7362) in which he stated: "I returned from Alvarado Hosp. yesterday
22 with heart and blood pressure meds with printed instructions. Transport staff and
23 TTA staff refused to give me those specific medication instructions SO I REFUSE
24 TO TAKE THOSE MEDS." (ECF No. 1-1 at 53 [emphasis in original].) In
25 response, the triage registered nurse advised Plaintiff the pharmacy had been
26 notified and Plaintiff's new medications would be processed "stat" and delivered
27 that day. Plaintiff informed the nurse he had a "Merck" book and had an
28 understanding of his new "A-fib" diagnosis. (Id.) On August 22, 2014, Plaintiff's
INR was subtherapeutic, most likely due to missing three days of warfarin (blood
thinner) as it was not available. (Id. at 55.) Plaintiff's INR was to be remeasured

1 in three days. (Id.)³

2 On August 26, 2014, Plaintiff was seen by Dr. Silva, who Plaintiff alleges
3 told him that his court case had been denied, that he could expect no outside
4 help in his medical care and treatment, and that he should not be on any pain
5 medication due to cost. (ECF No. 1 at 15.) Dr. Silva's treatment records indicate
6 that while Plaintiff was willing to take Coumadin, he refused Coreg and diltiazem
7 (calcium channel blocker used to treat hypertension) because "he was sent here
8 for issues with his prostate and kidneys and did not get the followup that he
9 wanted so he feels he is not getting the type of treatment that he needs and is
10 refusing to take the medication because of that." (ECF No. 1-1 at 58.) Dr. Silva
11 reviewed Plaintiff's urologic history, ordered another PSA, and requested a CT
12 urogram, referral to Urology for cystoscopy, and a urinalysis to evaluate for
13 hematuria. (Id.) With respect to Plaintiff's atrial fibrillation, Dr. Silva noted:

14 Atrial fibrillation appears now to be rate controlled; however, he
15 refuses to take his Coreg, diltiazem, hydrochlorothiazide, and any
16 other cardiac medication or blood pressure medication. I had a long
17 discussion with the patient about this and I discussed the risks of
18 noncompliance including the risk of possible [myocardial ischemia],
19 possible blood clot formation causing pulmonary embolism, possible
20 stroke, and even death. He is also at risk for worsening medical
21 condition which can increase pain and suffering. He stated he was
22 aware of this and signed a refusal for any form of cardiac medication.
23 He agrees to take the Coumadin, however.

24 (Id.) With respect to Plaintiff's chronic pain:

25 He has been on methadone 10 mg twice a day for chronic low back
26 pain and severe degenerative disk disease at L5/S1. We did not
27

28 ³ The INR of patients using Warfarin is regularly monitored in order to balance the risk of
excessive bleeding against the risk of clotting or thrombosis. When the INR is too high (over
4.5), the blood is too thin, whereas when the INR is too low (less than 2), the blood is too thick
and there is risk of thromboembolism and associated conditions such as heart attack and
stroke. See <https://www.myvmc.com/investigations/blood-clotting-international-normalised-ratio-inr/#C3> (as visited June 7, 2017).

1 have sufficient time to thoroughly review this; however, because of
2 his atrial fibrillation and the possibility that methadone can exacerbate
3 arrhythmias, risks of continued methadone use outweigh the benefits
4 and, therefore, this will be [dis]continued. He will be switched over to
5 morphine ER 15 mg [twice per day]. Therapeutic interchange as
6 calculated via opioid calculator calculated the morphine equivalent
7 dose to be 25 mg daily dose; therefore, 15 mg [twice per day] should
8 be sufficient. A pain contract was signed and the patient was given a
9 copy of the pain contract. The patient stated that he was
10 recommended to have some form of back surgery in the past. Will
11 plan to review his condition on the follow-up appointment regarding
12 this. He will be tested randomly and regularly.

13 (Id. at 59.) Two days later, after Plaintiff complained that Dr. Silva had lied to him
14 about his morphine dosage, Dr. Silva saw Plaintiff again and explained he had
15 checked the calculation through the opioid calculator after Plaintiff had left his
16 last appointment, and had determined the appropriate dose of morphine was 15
17 mg twice daily rather than 30 mg twice daily. (Id. at 61, 63.) Dr. Silva noted that
18 Plaintiff wanted to go back to methadone, but because of the risks, he would
19 refrain from prescribing this. (Id. at 63.) Plaintiff alleges Dr. Silva told him that if
20 Plaintiff wanted to file more grievances against medical staff, they would
21 discontinue all pain medication immediately. (ECF No. 1 at 16.) Plaintiff also
22 alleges that contrary to Dr. Silva's calculations, the CDCR's conversion chart
23 shows that methadone is four times stronger than morphine, and therefore Dr.
24 Silva had not prescribed a high enough dosage of morphine for Plaintiff. (Id.;
25 ECF No. 1-1 at 69.)

26 On September 3, 2014, Plaintiff had a telemedicine custody consultation
27 ("telemed") with Defendant Zamudio, the Alvarado cardiologist. (ECF No. 1-1 at
28 71-73.) Dr. Zamudio explained the importance of taking his medications,
including the risks of acute congestive heart failure or stroke, but Plaintiff
remained undecided at the end of the evaluation whether he would take them.
(Id. at 72-73.) Plaintiff reported feeling tired all the time, being short of breath

1 without exertion, and awakening due to shortness of breath. (Id. at 72.) Dr.
2 Zamudio felt Plaintiff should be taken to the clinic right away, but also explained
3 there was little value in him coming to the hospital unless he took his
4 medications. (Id. at 73.) Dr. Zamudio also explained the cardioversion
5 procedure (performed to restore a normal heart rhythm), and advised that an INR
6 of more than two was needed before the procedure could be considered. (Id.)
7 Plaintiff states this was the first time he was made aware that he was being
8 prepared for the procedure. (ECF No. 1 at 16.) RJD doctor Darryl Bates, M.D.
9 noted after the telemed that he spent 20-25 minutes discussing Plaintiff's
10 frustrations regarding his treatment, and that Plaintiff signed a refusal for his
11 cardiac medications despite Dr. Zamudio's recommendation to restart. Dr. Bates
12 reordered the medicines and explained to Plaintiff that he could restart at any
13 time. (ECF No. 1-1 at 74-75.)

14 Plaintiff saw Dr. Silva again on September 8, 2014. (ECF No. 1-1 at 79-
15 80.) The medical record reflects Plaintiff was upset that he had not been told
16 sooner that he was being prepared for defibrillation (cardioversion), and he
17 stated he did not want it done because he had looked up the risks and benefits of
18 the procedure in his Merck manual. (Id. at 79.) His INR on September 2, 2014
19 was 1.6, and 1.1 on August 21, 2014. (Id.) Plaintiff continued to refuse all
20 cardiac medication with the exception of Coumadin, and stated the only things he
21 wanted were to remain a DNR (do not resuscitate) and receive comfort care in
22 the form of pain medication. (Id.) In his Complaint, Plaintiff claims he refused
23 treatment due to reprisals by medical and custody staff and the mishandling of
24 his life-sustaining medications. (ECF No. 1 at 16.) Dr. Silva referred Plaintiff to
25 Mental Health for an evaluation to rule out a psychiatric condition contributing to
26 his decision-making. (ECF No. 1-1 at 79.)

27 Plaintiff alleges that Defendant Dr. K. Rodriguez, psychologist, told him
28 "she had gone out and purchased her own malpractice insurance because of her

1 fear of liability due to the situations such as mine where she knew illegal actions
2 were being taken.” (ECF No. 1 at 16.) He also alleges Dr. Rodriguez told him
3 that funds from inmates’ care were being diverted to construction so RJD could
4 receive American Correctional Association (ACA) accreditation in order to obtain
5 \$89 million in funding. (Id.; see also ECF No. 1-1 at 82-83.)

6 On September 22, 2014, Plaintiff had a follow-up visit for Warfarin
7 monitoring, including his INR measurement. (ECF No. 1-1 at 85.) The medical
8 record reflects that Plaintiff also underwent drug testing, which showed morphine
9 undetected in serum, notwithstanding Plaintiff’s claim that he complied with his
10 morphine dosage daily and did not skip doses, and his urine was positive for
11 opiates. (Id. at 87.) Plaintiff, in his Complaint, alleges he was ordered to the
12 TTA for a blood serum draw, instead of the B Facility Clinic area as had been
13 done in the past, and that a male lab technician, known to him only as Defendant
14 John Doe “Jose”, told him he could not draw blood samples as his license was
15 not valid, but that he supervised a female trainee who took the lab sample from
16 Plaintiff’s arm. The female allegedly questioned whether the amount of the
17 sample was sufficient, but “Jose” told her the worst that could happen was a
18 negative test result, in which case Plaintiff would be retested. (ECF No. 1 at 17.)

19 On October 2, 2014, Dr. Silva noted the following in Plaintiff’s medical records:

20 He claims to have pain and need for narcotics however serum testing
21 reveals no morphine in blood. Urine testing is positive for opiates.
22 This is strongly suggestive of diversion and a breach of the pain
23 contract. His reports of pain is not consistent with drug monitoring. . .
24 . Currently, there is no medical indication for continuation of narcotic
25 medication. . . . Presently, the risks of continued prescribing of
26 narcotics outweigh benefits due to the concern for diversion. I offered
27 to prescribe non-narcotic alternative medication for his pain such as
28 APAP, NSAIDS, SSRI and anticonvulsants[,] however[,] he stated
“don’t even bother because I won’t take them.” . . . [H]e will be
referred to Mental Health to assess for suicide risk prior to weaning
off morphine, and also for behavioral modalities for pain
management.

1 (ECF No. 1-1 at 87.) Plaintiff alleges Dr. Silva told him that had he not filed
2 grievances, perhaps he would still be receiving opioid medication. (ECF No. 1 at
3 17.) Plaintiff further alleges that notwithstanding Dr. Silva's statement to the
4 contrary, Plaintiff had undergone drug testing previously. (See id. at 17; ECF No.
5 1-1 at 89.) Plaintiff claims that each prior drug test was within the required range.
6 (ECF No. 1 at 17; ECF No. 1-1 at 91-93.) Plaintiff alleges he attempted to obtain
7 "Jose's" last name, but Defendants Bedane, Walker, Roberts, and Glynn refused
8 to provide it to him "in order to hide . . . illegal activity from myself in legal
9 redress." (ECF No. 1 at 22.)

10
11 On October 22, 2014, Plaintiff again signed a refusal for all medications.
12 (ECF No. 1 at 18; ECF No. 1-1 at 95.) He told the prison pharmacist that RJD
13 had an incompetent medical department and that he had had "enough" of the
14 medical system at the prison. (ECF No. 1-1 at 95.) The following day, Plaintiff
15 refused to leave his cell and come to a medical appointment, despite being
16 warned that continued refusal would result in the issuance of a CDC 115 rules
17 violations report. (ECF No. 1 at 18; ECF No. 1-1 at 97, 99-101.) Plaintiff alleges
18 that Defendant Rodriguez, the psychologist, came to his cell on multiple dates
19 and told him that medical and custody staff were attempting to make him seem
20 disruptive to avoid liability for their unlawful acts, and were trying to push him into
21 attempting suicide in order to rid themselves of the problems he had caused.
22 (ECF No. 1 at 18.)

23 On November 12, 2014, Dr. Silva presented Plaintiff's case in a "Mega
24 Huddle Multidisciplinary Patient Care Conference" due to his concerns about
25 Plaintiff's non-compliance with medications, refusal to attend medical
26 appointments, and cardiac risks. (ECF No. 1-1 at 103.) Dr. Rodriguez reported
27 that Plaintiff had refused to see her despite her efforts to see him weekly, but that
28 he had come in for a mental health appointment that day. (Id.) Plaintiff

1 reportedly told her that he blamed the phlebotomist for his negative serum
2 testing, in which no morphine was detected, blamed the CDCR for his cardiac
3 condition which he felt was caused by medication the CDCR had prescribed, and
4 planned to sue the CDCR. (Id.) Plaintiff had declined to be psychologically
5 assessed by a graduate student, but Dr. Rodriguez stated that based on her
6 observations, she did not believe Plaintiff was cognitively impaired or psychotic,
7 and that he understood the risks and consequences of his refusals. (Id.) The
8 Mega Huddle resulted in the following care plan: Plaintiff had a follow-up
9 scheduled with his Primary Care Provider (“PCP”) on November 24, 2014;
10 nursing would provide patient education regarding adherence; ongoing
11 collaboration between mental health, nursing, and the PCP; pharmacy would
12 attempt to follow up with Plaintiff for further counseling and education regarding
13 the risks and benefits of medication; and the Mega Huddle would reconvene in
14 one month’s time. (Id. at 103-04.) Plaintiff states he declined mental health
15 testing with the graduate student as he considered it Dr. Silva’s attempt at cost
16 saving and another example of RJD’s “inept” medical care. (ECF No. 1 at 18-
17 19.)

18 On November 24, 2014, custody staff, allegedly upon the orders of
19 Defendant Stout, brought Plaintiff to the clinic for his scheduled medical
20 appointment. (ECF No. 1 at 19; ECF No. 1-1 at 106.) Plaintiff refused treatment,
21 refused to sign the refusal form, cursed at Sgt. Strickland, Defendant Silva, and
22 Defendant Pool, a licensed vocational nurse, and stated he did not want to be
23 called for any medical appointments. (Id.)

24 The Mega Huddle reconvened on December 10, 2014. (ECF No. 1 at 19;
25 ECF No. 1-1 at 108.) Dr. Walker recommended that Plaintiff be scheduled with
26 his PCP every thirty days, even if Plaintiff refused these appointments. (ECF No.
27 1-1 at 108.) Despite the pharmacist having spoken with Plaintiff about the
28 importance of adhering to Coumadin, Plaintiff continued to refuse to take it, and

1 thus the medication was discontinued. (Id.) Dr. Rodriguez reported that she had
2 been seeing Plaintiff more frequently, but he told her this was causing him more
3 stress; therefore, the team decided that Plaintiff would be seen only for routine
4 mental health follow-up appointments every two or three months. (Id.) The team
5 also decided that a nursing wellness visit would be scheduled with Plaintiff to
6 discuss the outcome of the Mega Huddle and to ensure he understood that he
7 could request health care services by using the CDC 7362 form, and that mental
8 health, nursing, and the PCP would continue ongoing communication and
9 collaboration regarding Plaintiff. (Id. at 108-09.)

10 On January 26, 2015, Defendant Pasha, the nurse practitioner, noted in
11 Plaintiff's medical file that he had seen his PCP and was still refusing medication.
12 (Id. at 114.) Plaintiff makes two allegations regarding this appointment: first, that
13 only qualified high-risk providers, such as a PCP, can attend to high-risk medical
14 inmates such as himself, and second, that Nurse Pasha saw him at Dr. Silva's
15 behest, and falsified his medical record by stating treatment had been rendered
16 when there was no such treatment. (ECF No. 1 at 20; ECF No. 1-1 at 111-12.)
17 Plaintiff further alleges that Pasha falsified his records again the following day.
18 (ECF No. 1 at 20.) The progress note dated January 27, 2015, however,
19 indicates that it is a late entry for the prior day's appointment, and also clearly
20 notes that treatment was not rendered due to Plaintiff's refusal. (ECF No. 1-1 at
21 116.) Plaintiff was next seen on February 9, 2015, at which time it was noted
22 that Plaintiff continued to decline all medications and understood the risk of
23 stroke and death. (ECF No. 1-2 at 3.) Plaintiff points out that the progress note
24 includes a reference to his having suffered from low back pain for thirty years, for
25 which he alleges he received little to no treatment. (ECF No. 1 at 20.)

26 On March 29, 2015, Plaintiff submitted a CDCR 22 form to request a copy
27 of the CDCR 128 form that Sgt. Strickland indicated Plaintiff would receive if
28 Plaintiff refused to write the word "forever" on his refusal of medical treatment

1 form on November 24, 2014, when Strickland accompanied Plaintiff to the B
2 Facility Clinic. (ECF No. 1 at 20.) Sgt. Strickland denied Plaintiff's version of
3 events and responded that he did not prepare a 128 form. (ECF No. 1-2 at 6.)
4 Plaintiff submitted another CDCR 22 form on April 3, 2015 to find out who had
5 incorrectly summoned him to B Clinic the prior day, and alleged prison staff had
6 been harassing him by falsely paging him for medical appointments. (ECF No. 1
7 at 20; ECF No. 1-2 at 8.) Correctional Officer Ponce replied that Correctional
8 Officer Hampton had received a call to send Plaintiff to the clinic, but could not
9 remember who called, and Ponce was unable to find out who had summoned
10 Plaintiff. (ECF No. 1-2 at 8.)

11 On March 29, 2015, Plaintiff completed a Patient-Inmate Health Care
12 Appeal Form (CDCR 602). (ECF No. 1 at 20; ECF No. 1-2 at 13.) He alleged
13 unlawful conspiracy, ongoing retaliation, deliberate indifference to a severe
14 condition, and falsification of documents. (ECF No. 1-2 at 13.) From his
15 perspective, in 2013/2014, prison staff had attempted to discontinue his pain
16 medication, methadone, by falsely alleging abuse of medications, so he promptly
17 filed a court case (presumably, his habeas petition in July 2014). (Id.)
18 Thereafter, he suffered a heart condition due to being forced to take methadone.
19 (Id.) Plaintiff was then placed on morphine due to his atrial fibrillation (in August
20 2014). (ECF No. 1-2 at 15.) All of Plaintiff's drug testing showed his drug levels
21 were appropriate, except when an undertrained phlebotomist did not draw
22 sufficient blood for testing (in September 2014). (Id.) Plaintiff alleges his
23 morphine was discontinued in retaliation for having filed a court action, and he
24 "likewise refused all further meds. & medical treatment." (Id.) The action sought
25 by Plaintiff included: immediate removal of Defendants Silva, Pasha, and Pool
26 from the B Clinic; immediate reinstatement of all previous medication, including
27 morphine at the "appropriate" level of 30 milligrams three times per day for
28 treatment of his severe back pain and chronic health issues; immediate transfer

1 to Tri-City Medical Center to be examined by Dr. Matthews; permanent housing
2 in a single cell due to the risk of him “bleeding out” if he restarted medication for
3 atrial defibrillation; immediate investigation into the custody and medical staffs’
4 illegal conspiracy to deprive him of adequate medical care; compensatory
5 damages from all named parties of \$1.00 each; punitive damages as determined
6 by a jury; and the full names and titles of the phlebotomists referred to in his
7 appeal. (Id.) Plaintiff’s appeal culminated in a Director’s Level Decision on
8 October 12, 2015 in which Plaintiff’s appeal was denied and his administrative
9 remedies were exhausted. (ECF No. 1-2 at 10-12.)

10 On July 24, 2015, Defendant Sosa issued a CDC 128-A counseling chrono
11 to document the following language contained in an appeal filed by Plaintiff on
12 June 30, 2015: “Fire these incompetent medical and custody staff. Or in the
13 alternative, place each and every one of them into a job where they cannot
14 violate inmate rights, namely in a supply closet.” (Id. at 28.) Plaintiff alleges
15 Sosa issued the chrono in order to “chill redress” and “thwart exhaustion” of his
16 grievances. (ECF No. 1 at 21.)

17 On August 6, 2015, Plaintiff engaged in a hunger strike to protest not being
18 placed on an appropriate workers list, the loss of \$546.08 worth of property, and
19 not being treated for all of his medical ailments. (ECF No. 1 at 21; ECF No. 1-2
20 at 49.) Defendant Paramo, the Warden, ordered Defendant J. Jackson to
21 intervene. (ECF No. 1 at 21.) On August 28, 2015, the Victims Compensation
22 and Government Claims Board denied Plaintiff’s application for leave to present
23 a late claim and rejected the claim itself. (ECF No. 1-2 at 51.) Plaintiff alleges
24 this occurred because appeals staff at RJD refused to allow the timely filing of his
25 CDCR Form 602 grievances. (ECF No. 1 at 22.) On September 3, 2015,
26 Plaintiff presented a CDCR Form 22 to complain that RJD staff—specifically,
27 Defendant Sosa—were incompetent because another inmate’s confidential
28 paperwork was attached to a Screen Out form responding to his Form CDCR

1 602 appeal. (ECF No. 1-2 at 53-54.)

2 On September 3, 2015, Plaintiff received x-rays of his lumbar spine,
3 referred by Dr. Silva, which showed mild to moderate lumbar arthrosis. (Id. at
4 101.) Plaintiff alleges on November 25 and 28, 2015, he was given unlawful
5 direct orders via Defendants Paramo and Jackson to perform work that he should
6 not have undertaken due to his medical restrictions. (ECF No. 1 at 22; ECF No.
7 1-2 at 57, 58.) On November 25 and December 10, 2015, Plaintiff filled out
8 health care services request forms to report injuries he had sustained while
9 working. (ECF No. 1 at 23; ECF Nos. 1-2 at 61, 62.) Plaintiff alleges he was told
10 by an unnamed nurse that “medical” could not and would not do anything for him
11 because he had filed previous grievances. (ECF No. 1 at 23.)

12 Plaintiff alleges his CDC 602 Inmate/Parolee Appeal Forms were unlawfully
13 screened out by Defendants Sosa and/or Self, Appeals Coordinators, on five
14 occasions. (Id. at 23; ECF No. 1-2 at 65-69.) On December 15, 2015, Plaintiff
15 submitted a request for mental health services, stating, “I am having an
16 extremely difficult time dealing with staff which is causing me a great deal of
17 depression.” (ECF No. 1-2 at 81.) Plaintiff alleges that his assigned mental
18 health clinician told him to “just stop filing paperwork and kiss some ass by doing
19 whatever staff wanted [him] to do.” (ECF No. 1 at 23.)

20 On December 1, 2015, Plaintiff underwent MRIs of his spine. (ECF No. 1-2
21 at 103, 105, 107.) On December 24, 2015, he saw Dr. Peyman Shakiba and
22 complained of chronic neck and back pain. (Id. at 84-84.) Dr. Shakiba advised
23 Plaintiff that his cervical MRI showed degenerative changes at T3 to C5 and C6
24 to C7, mild central canal narrowing at C3 to C4 and C4 to C5, and bilateral neural
25 foraminal narrowing at C3 to C5; his thoracic MRI showed mild degenerative
26 changes, and mild central canal narrowing at T11 to T12; and his lumbar MRI
27 showed moderate central canal narrowing at L4 to L5 and mild narrowing at L2 to
28 L4. (Id.) Dr. Shikiba noted:

1 After I reviewed these results with the patient, he became very upset,
2 feeling that these images are showing that he is better than his
3 previous imaging and he feels this is because these MRIs did not
4 have contrast. So he insists that these MRI readings are inaccurate
5 because he should be worse, not better, than his previous MRI. I
6 tried to explain to him that, if they were [not] good visualizations of the
7 nerves and the spine, the radiologist would have requested an MRI
8 with contrast. The patient again repeated his demand to have fusion
9 of his lumbar spine because he feels this will control his pain. I
[asked] him if he would be interested in trying physical therapy; he
said he has had physical therapy in the past and epidural and they
have never helped him. The patient then stood up and walked out of
the examination room.

10
11 (Id.) Plaintiff alleges RJD “dummied” his MRI results and that images taken
12 inside prison vary from images taken outside prison; prior MRI and x-ray results
13 from 1998, 2004, 2006, and 2013 are attached to his Complaint. (ECF No. 1 at
14 24; ECF No. 1-2 at 86-99.) Plaintiff alleges, “[I]t is clear that RJD fraudulently
15 had these [test] results prepared and that CDCR/RJD were involved in an illegal,
16 unconstitutional “shopping around” of medical tests until they could
17 obtain/fabricate test results that mirrored [their] desire to prove cost-effective
18 (none) medical care to my severe known medical conditions.” (ECF No. 1 at 25.)

19 Plaintiff saw Dr. Silva on January 12, 2016 and complained of severe,
20 chronic pain. (ECF No. 1-2 at 108-09.) Dr. Silva noted that Plaintiff continued to
21 refuse treatment for his atrial fibrillation, but appeared well notwithstanding his
22 complaints of severe pain. (Id.) Plaintiff refused neuropathic pain medication
23 other than narcotics, which Dr. Silva indicated were not medically indicated
24 because narcotics were not the best form of treatment for chronic back pain, and
25 because of Plaintiff’s prior inconsistent drug testing. (Id. at 109.) Dr. Silva also
26 wrote, “Dr. Matthews has recommended that [Plaintiff] be kept in atrial fibrillation
27 rather than rate control for cost-effective [treatment].” (Id. at 108). Plaintiff points
28 to this as evidence of the CDCR’s opinion that it was better for him to “suffer in

1 pain and die” of his medical conditions because appropriate treatment was not
2 cost-effective. (ECF No. 1 at 25.) Dr. Silva continued in his note, “Dr. Matthews
3 thinks that [Plaintiff’s] condition is worsening due to the development of
4 cardiomyopathy and feels his condition will only get worse without [treatment]. I
5 relayed this to [Plaintiff] who stated he understood but still refused any
6 treatment.” (ECF No. 1-2 at 108.)

7 Plaintiff asserts the following claims: (1) retaliation in violation of the First
8 Amendment; (2) conspiracy under 42 U.S.C. § 1986 in violation of the First
9 Amendment; (3) deliberate indifference to severe medical condition in violation of
10 the Eighth Amendment; and (4) deliberate indifference to severe medical
11 condition and falsification of medical reports due to cost considerations in
12 violation of the Eighth Amendment. (ECF No. 1 at 26-27.)

13 14 **II. LEGAL STANDARDS**

15 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests
16 the legal sufficiency of a claim.” Navarro v. Block, 250 F.3d 729, 732 (9th Cir.
17 2001). Because Rule 12(b)(6) focuses on the “sufficiency” of a claim rather than
18 the claim’s substantive merits, “a court may [ordinarily] look only at the face of
19 the complaint to decide a motion to dismiss.” Van Buskirk v. Cable News
20 Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). However, courts may consider
21 exhibits that are attached to the complaint. See Fed. R. Civ. P. 10(c) (“A copy of
22 a written instrument that is an exhibit to a pleading is a part of the pleading for all
23 purposes.”); Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d
24 1542, 1555 n.19 (9th Cir. 1990) (citing Amfac Mortg. Corp. v. Ariz. Mall of
25 Tempe, Inc., 583 F.2d 426 (9th Cir. 1978) (“[M]aterial which is properly submitted
26 as part of the complaint may be considered” in ruling on a Rule 12(b)(6) motion
27 to dismiss.) Exhibits that contradict the allegations of a complaint may fatally
28 undermine the complaint’s allegations. See Sprewell v. Golden State Warriors,

1 266 F.3d 979, 988 (9th Cir. 2001) (a plaintiff can “plead himself out of a claim by
2 including . . . details contrary to his claims” (citing Steckman v. Hart Brewing,
3 Inc., 143 F.3d 1293, 1295-96 (9th Cir. 1998) (courts “are not required to accept
4 as true conclusory allegations which are contradicted by documents referred to in
5 the complaint.”)); see also Nat’l Assoc. for the Advancement of Psychoanalysis
6 v. Cal. Bd. of Psychology, 228 F.3d 1043, 1049 (9th Cir. 2000) (courts “may
7 consider facts contained in documents attached to the complaint” to determine
8 whether the complaint states a claim for relief).

9 “To survive a motion to dismiss, a complaint must contain sufficient factual
10 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A
11 claim has facial plausibility when the plaintiff pleads factual content that allows
12 the court to draw the reasonable inference that the defendant is liable for the
13 conduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl.
14 Corp. v. Twombly, 550 U.S. 544, 556, 570 (2007)). “All allegations of material
15 fact are taken as true and construed in the light most favorable to the nonmoving
16 party.” Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)
17 (citation omitted). The court need not, however, “accept as true allegations that
18 are merely conclusory, unwarranted deductions of fact, or unreasonable
19 inferences.” Sprewell, 266 F.3d at 988; see also Iqbal, 556 U.S. at 678
20 (“Threadbare recitals of the elements of a cause of action, supported by mere
21 conclusory statements, do not suffice.”). “[T]he pleading standard Rule 8
22 announces does not require ‘detailed factual allegations,’ but it demands more
23 than an unadorned, the defendant-unlawfully-harmed me accusation.” Iqbal, 556
24 U.S. at 678 (quoting Twombly, 550 U.S. at 555). For a complaint to survive a
25 motion to dismiss, “the non-conclusory ‘factual content,’ and reasonable
26 inferences [drawn] from that content, must be plausibly suggestive of a claim
27 entitling the plaintiff to relief.” Moss v. United States Secret Serv., 572 F.3d 962,
28 969 (9th Cir. 2009) (quoting Iqbal, 556 U.S. at 678). “Vague and conclusory

1 allegations of official participation in civil rights violations are not sufficient to
2 withstand a motion to dismiss.” Ivey v. Bd. of Regents of the Univ. of Alaska, 673
3 F.2d 266, 268 (9th Cir. 1982).

4 5 **III. DEFENDANTS’ MOTIONS**

6 **A. Claim Preclusion (CDCR Defendants)**

7 Defendants Silva, Jackson, Pasha, Walker, Rodriguez, Self, Pool, Glynn,
8 Sosa, Paramo, Roberts, Stout, and Bedane (hereafter collectively the “CDCR
9 Defendants”), relying on Furnace v. Giurbino, 838 F.3d 1019 (9th Cir. 2016),
10 move to dismiss all of Plaintiff’s claims as barred by claim preclusion. In
11 Furnace, the Ninth Circuit held that a petition for writ of habeas corpus filed in
12 California state court can have a claim preclusive effect on a subsequent § 1983
13 action if the second suit involves: (1) the same cause of action (2) between the
14 same parties or parties in privity with them (3) after a final judgment on the merits
15 in the first suit. Furnace, 838 F.3d at 1023.

16 Under the Full Faith and Credit Statute, 28 U.S.C. § 1738, federal courts
17 must give the same preclusive effect to state court judgments, including
18 “reasoned” habeas judgments, as the rendering state court would. Id. Under
19 California law, two suits will be found to involve the same cause of action when
20 they involve the same “primary right.” Id. at 1024 (citing Brodheim v. Cry, 584
21 F.3d 1262, 1268 (9th Cir. 2009)). Under the primary rights theory, “a cause of
22 action is (1) a primary right possessed by the plaintiff, (2) a corresponding
23 primary duty devolving upon the defendant, and (3) a harm done by the
24 defendant which consists in a breach of such primary right and duty.” Brodheim,
25 584 F.3d at 1268.

26 The causes of action in the instant case and the state habeas petition are
27 distinct. In his state habeas petition, filed on July 21, 2014, Plaintiff complained,
28 among other things, that he was being denied adequate pain medication as his

1 request that his medication be increased to three doses per day had been denied
2 by prison medical staff. (ECF No. 1 at 31-34.) The allegations in this case are
3 much more expansive than those in his habeas petition, and go beyond Plaintiff's
4 allegation of not being provided opiate medication. Plaintiff's Complaint in the
5 instant case includes allegations that Defendants caused Plaintiff's atrial
6 fibrillation heart condition, improperly diagnosed and treated him (including by not
7 providing him adequate pain medication), and conspired to retaliate, and
8 retaliated, against him for filing grievances and a previous lawsuit. Moreover,
9 Plaintiff's federal complaint largely relates to events occurring after the filing of
10 Plaintiff's state habeas petition, and the majority of the defendants named in this
11 action were not named as respondents in his habeas petition, nor did they have
12 any connection to the inadequate pain medication allegation raised therein.⁴
13 "The critical focus of primary rights analysis is the harm suffered." Brodheim, 584
14 F.3d at 1268. The alleged harms in Plaintiff's state habeas petition and this
15 federal case are distinct, and "were caused at different times, by different acts,
16 and by different actors." See id. at 1268-69. Although Plaintiff's current
17 allegation that he was denied adequate pain medication bears some similarity to
18 the contentions in his habeas petition, Plaintiff's habeas petition is based upon a
19 different set of circumstances and a different time frame than those set forth in
20 his § 1983 complaint. Accordingly, the Court recommends that this action not be
21 found to be barred by the state court's decision on Plaintiff's state habeas
22
23

24 ⁴ The CDCR Defendants' request for judicial notice of Plaintiff's July 21, 2014 state habeas
25 petition is granted. See Rosales-Martinez v. Palmer, 753 F.3d 890, 891 (9th Cir. 2014) (court
26 may take judicial notice of the records and filings of other courts); Knievel v. ESPN, 393 F.3d
27 1068, 1076 (9th Cir. 2005) (court may consider any documents attached to the complaint or
28 incorporated by reference into the complaint). Plaintiff named the following parties as
respondents in his state habeas petition: Edmund G. Brown, Jr., Governor; M.D. Stainer; J.
Lewis; Daniel Paramo, Warden; S. Roberts, M.D.; M. Glynn; Tamara S. Robinson, M.D.; and
K. Dean, M.D. (ECF No. 46-2 at 10-11.)

1 petition.

2 **B. State Actor (Defendant Butcher)**

3 Defendant Butcher argues that Plaintiff's Complaint fails to plead sufficient
4 facts showing he is a state actor. "Section 1983 creates a private right of action
5 against individuals who, acting under color of state law, violate federal
6 constitutional or statutory rights." Devereaux v. Abbey, 263 F.3d 1070, 1074 (9th
7 Cir. 2001). To establish § 1983 liability, a plaintiff must show both (1) deprivation
8 of a right secured by the Constitution and laws of the United States, and (2) that
9 the deprivation was committed by a person acting under color of state law. Tsao
10 v. Desert Palace, Inc., 698 F.2d 1128, 1138 (9th Cir. 2012). As a general matter,
11 private hospitals and doctors are not state actors and therefore cannot be sued
12 under § 1983. See Briley v. California, 564 F.2d 849, 855-56 (9th Cir. 1977).
13 However, an inmate plaintiff may be able to hold a private hospital or doctor
14 liable if either contracted directly with the state to provide medical services to
15 inmates. West v. Atkins, 487 U.S. 42, 54 (1988); see also McIlwain v. Prince
16 William Hosp., 774 F. Supp. 986, 989-90 (E.D. Va. 1991).

17 Plaintiff alleges that Defendant Butcher is or was "a contract medical doctor
18 with CDC-R/RJD." See ECF No. 1 at 6. The Court finds Plaintiff has sufficiently
19 alleged that Defendant Butcher is a state actor.

20 **C. Statute of Limitations (Defendant Butcher)**

21 Defendant Butcher contends Plaintiff's first, third, and fourth claims are
22 time-barred based on California's one-year statute of limitations for actions
23 involving professional negligence against a healthcare provider, set forth in
24 California Code of Civil Procedure § 340.5. Plaintiff contends a two-year statute
25 of limitations applies. Opp'n to Butcher Mot., ECF No. 39 at 21.

26 Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) based on a statute of
27 limitations defense is only appropriate where the running of the statute of
28 limitations is apparent "on the face of a complaint." Von Saher v. Norton Simon

1 Museum of Art at Pasadena, 592 F.3d 954, 969 (9th Cir. 2010). However, Rule
2 12(b)(6) permits consideration of any matters of which judicial notice may be
3 taken, and any exhibits attached to the complaint. United States v. Ritchie, 342
4 F.3d 903, 908 (9th Cir. 2003). As § 1983 contains no specific statute of
5 limitations, federal courts borrow state statutes of limitations for personal injury
6 actions in suits brought pursuant to § 1983. See Wallace v. Kato, 549 U.S. 684,
7 387 (2007); Lukovsky v. City of San Francisco, 535 F.3d 1044, 1048 (9th Cir.
8 2008). In California, the statute of limitations for an action for a personal injury
9 caused by the wrongful or negligence act of another is two years from the date of
10 accrual. See Cal. Code Civ. Proc. § 335.1; see also McGee v. Chamberlain,
11 2014 WL 1028695, *2 (S.D. Cal. Mar. 13, 2014) (applying two-year statute of
12 limitations pursuant to § 335.1 to California prisoner's allegations that he was
13 denied adequate medical care); Bradley v. Jameson, 2013 WL 6504800, *2 (S.D.
14 Cal. Dec. 10, 2013) (same); Calloway v. Scribner, 2013 WL 943229, *2 (E.D. Cal.
15 Mar. 11, 2013) (applying two-year statute of limitations pursuant to § 335.1 to
16 California prisoner's allegations of deliberate indifference to a serious medical
17 need in violation of the Eighth Amendment). Therefore, Defendant Butcher's
18 reliance on California Code of Civil Procedure § 340.5 is misplaced.

19 Federal law determines when a cause of action accrues and begins to run
20 for a § 1983 claim. Lukovsky, 535 F.3d at 1048. A federal claim accrues when
21 the plaintiff knows or has reason to know of the injury which is the basis of the
22 action. Id. at 1051. Here, Plaintiff alleges he was seen by Defendant Butcher on
23 or between August 14, 2014 and August 19, 2014. (ECF No. 1 at 14-15; ECF
24 No. 1-1 at 39-40, 46-47.) Assuming for the sake of argument that his cause of
25 action against Defendant Butcher accrued upon these visits, the two-year statute
26 of limitations ran in August 2016. As Plaintiff's Complaint was filed before this,
27 on March 21, 2016, the Court recommends that it not be found to be barred by
28 the statute of limitations.

1 **D. Plaintiff's First Claim – Retaliation**

2 Plaintiff asserts a claim of retaliation against all defendants in violation of
3 the First Amendment right to petition the government for redress of grievances.
4 All CDCR Defendants, excluding Silva and Pasha, and Defendants Zamudio and
5 Butcher seek dismissal of this claim pursuant to Fed. R. Civ. P. 12(b)(6) on
6 grounds that Plaintiff fails to state a claim upon which relief can be granted.

7 Retaliation against a prisoner for exercising his rights to speech or to
8 petition the government may violate the First Amendment. See Rizzo v. Dawson,
9 778 F.2d 527, 532 (9th Cir. 1985); see also Rhodes v. Robinson, 408 F.3d 559,
10 597 (9th Cir. 2005) (providing that prisoners have a First Amendment right to file
11 prison grievances and to pursue civil litigation in court and to be free from
12 retaliation from doing so). A claim of First Amendment retaliation requires:
13 (1) “the retaliated-against conduct is protected,” (2) the “defendant took adverse
14 action against the plaintiff,” (3) there is a “causal connection between the adverse
15 action and the protected conduct,” (4) the act “would chill or silence a person of
16 ordinary firmness,” and (5) the conduct does not further a legitimate penological
17 interest. See Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012). A plaintiff
18 can allege retaliatory intent (factor three) with a time line of events from which
19 retaliation can be inferred. Id. If the plaintiff’s exercise of his constitutional rights
20 was not chilled (factor four), he must allege the defendant’s actions caused him
21 to suffer more than minimal harm. Rhodes, 408 F.3d at 567-68 n.11. Retaliation
22 claims are reviewed with particular care as they are prone to abuse by prisoners.
23 Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996).

24 Plaintiff alleges he engaged in protected conduct—the filing of his state
25 habeas petition and prison grievances. He claims he was retaliated against after
26 engaging in his protected activity by being deemed a “troublemaker,” and
27 contends prison staff threatened him, fired him from his assigned job, moved his
28 housing, made false statements about him, directed other inmates to beat him,

1 placed false documents into his medical file stating he was diverting medication,
2 stole his personal property, placed him in Administrative Segregation, and
3 threatened him with transfer to a higher security prison if he did not cease filing
4 grievances. (ECF No. 1 at 14.) He also alleges his pain medication was
5 discontinued in retaliation for having filed a court action. (ECF No. 1-2 at 15.)
6 Notwithstanding Plaintiff's extensive list of alleged adverse actions, Plaintiff
7 makes very few specific allegations of such actions against any moving
8 defendant; rather, he alleges only generally that "staff" took adverse action
9 against him. See ECF No. 1 at 13-14. This, by itself, is insufficient to state a
10 claim against any defendant. See Taylor v. List, 880 F.2d 1040 (9th Cir. 1989)
11 ("Liability under section 1983 arises only upon a showing of personal
12 participation by the defendant.").

13 Additionally, none of Plaintiff's factual allegations, detailed above, shows
14 that any of the moving defendants retaliated against Plaintiff. With respect to
15 Defendants Jackson and Paramo, Plaintiff alleges only that Jackson intervened
16 in Plaintiff's hunger strike upon Paramo's orders, and that both ordered Plaintiff
17 to perform work that he should not have undertaken due to his medical
18 restrictions. Even if these could be considered adverse actions, Plaintiff makes
19 no allegation of a causal connection between these actions and his protected
20 conduct, nor does he allege such conduct would chill a person of ordinary
21 firmness or that it lacked legitimate penological interests. A similar analysis
22 applies to Defendants Walker, Glynn, Roberts, and Bedane, against whom
23 Plaintiff alleges only their refusal to provide him with John Doe "Jose's" last
24 name, and to Defendant Stout, whom Plaintiff alleges refused to allow him to
25 work, and ordered him brought to the medical clinic. Plaintiff alleges no facts at
26 all showing that Defendants Rodriguez or Pool retaliated against him.

27 With respect to Defendants Sosa and Self, Plaintiff alleges Defendant Sosa
28 issued a CDC 128-A custodial counseling chrono in retaliation for Plaintiff's

1 grievances, and that both Sosa and Self unlawfully screened out his appeals.
2 Courts have found that administrative chronos, such as CDC 128-A chronos,
3 which are informational in nature and do not have any disciplinary ramifications,
4 are not a sufficient adverse action to support a retaliation claim. See, e.g.,
5 Williams v. Woodford, 2009 WL 3823916, *3 (E.D. Cal. 2009). Plaintiff, in his
6 opposition, contends the CDC 128-A chrono will impact his opportunity to be
7 released on parole. Opp'n to CDCR Mot., ECF No. 56 at 27. However,
8 assuming *arguendo* Plaintiff has adequately pleaded the first four factors of a
9 retaliation claim, including the adverse action factor, he has not alleged the
10 preparation of the chrono, which Sosa used to document incendiary language
11 used by Plaintiff about placing prison staff in a supply closet, was not undertaken
12 to advance legitimate penological purposes, and therefore does not sufficiently
13 state a claim. As for Sosa's and Self's alleged unlawful screening out of
14 Plaintiff's appeals, Plaintiff has not asserted facts establishing a causal
15 connection between his protected conduct and the claimed adverse action. The
16 exhibits attached to Plaintiff's complaint indicate his appeals were screened out
17 because they were missing documentation, failed to state facts supporting his
18 allegations, and raised multiple issues which were required to be appealed
19 separately. (ECF No. 1-2 at 65-69.) Having been presented only with the appeal
20 screening forms and Plaintiff's conclusory allegations that the denial of his
21 appeals was retaliatory, the Court does not find Plaintiff has pled facts sufficient
22 to allow for a plausible inference of retaliatory motive in light of the more likely
23 explanations available. See Iqbal, 556 U.S. at 681.

24 Plaintiff also fails to state a retaliation claim against Drs. Butcher and
25 Zamudio, the Alvarado Hospital physicians. Plaintiff contends in his opposition
26 papers that Butcher and Zamudio, at the behest of RJD medical staff, refused to
27 provide him pain medication. See Opp'n to Butcher Mot., ECF No. 39 at 13;
28 Opp'n to Zamudio Mot., ECF No. 38 at 10-11. Plaintiff, however, has alleged no

1 facts demonstrating that Drs. Butcher and Zamudio even knew about his
2 protected conduct, i.e., the filing of his state habeas petition and prison
3 grievances, let alone that their decision to not provide him with pain medication
4 was motivated by retaliation for Plaintiff having exercised his First Amendment
5 rights. See, e.g., Corales v. Bennett, 567 F.3d 554, 568 (9th Cir. 2009) (stating
6 that plaintiff must demonstrate that defendant knew of the protected activity);
7 Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989) (a plaintiff
8 must show that his protected conduct was a “substantial” or “motivating” factor
9 behind the defendant’s conduct). Indeed, Plaintiff himself alleges he was denied
10 pain medication at Alvarado Hospital “due to the stated risk of further heart
11 damage.” See Compl., ECF No. 1 at 15. Plaintiff also makes no allegations that
12 the physicians prevented him from filing any grievances. In short, Plaintiff has
13 not alleged facts sufficient to allow for a plausible inference of retaliatory motive
14 by Drs. Butcher and Zamudio. See Iqbal, 556 U.S. at 681.

15 Plaintiff fails to state a claim for retaliation against any of the moving
16 defendants. The Court accordingly recommends the moving defendants’
17 motions to dismiss Plaintiff’s first claim be granted.

18 **E. Plaintiff’s Second Claim – Conspiracy**

19 Plaintiff alleges that all defendants unlawfully conspired against him in
20 violation of 42 U.S.C. § 1986 in relation to his First Amendment right to petition
21 the government for redress of grievance. All CDCR Defendants, excluding Silva
22 and Pasha, and Defendants Butcher and Zamudio seek dismissal of this claim
23 pursuant to Fed. R. Civ. P. 12(b)(6) on grounds that Plaintiff fails to state a claim
24 upon which relief can be granted.

25 Section 1986 “authorizes a remedy against state actors who have
26 negligently failed to prevent a conspiracy that would be actionable under [42
27 U.S.C.] § 1985.” Cerrato v. San Francisco Cmty Coll. Dist., 26 F.3d 968, 971 n.7
28 (9th Cir. 1994). Under section 1985(3), “a complaint must allege (1) a

1 conspiracy, (2) to deprive any person . . . of the equal protection of the laws, or of
2 equal privileges and immunities under the laws, (3) an act by one of the
3 conspirators in furtherance of the conspiracy, and (4) a personal injury, property
4 damage, or deprivation of any right or privilege of a citizen of the United States.”
5 Gillespie v. Civiletti, 629 F.2d 637, 641 (9th Cir. 1980); see also Griffin v.
6 Breckenridge, 403 U.S. 88, 102-03 (1971). “The language requiring intent to
7 deprive of equal protection, or equal privileges and immunities, means that there
8 must be some racial, or perhaps otherwise class-based, invidiously
9 discriminatory animus behind the conspirators’ action.” Griffin, 403 U.S. at 102.

10 Here, Plaintiff’s Complaint contains no facts that any of the alleged
11 constitutional violations were based on any “racial, or perhaps otherwise class-
12 based, invidiously discriminatory animus.” RK Ventures, Inc. v. City of Seattle,
13 307 F.3d 1045, 1056 (9th Cir. 2002) (citing Sever v. Alaska Pulp Corp., 978 F.2d
14 1529, 1536 (9th Cir. 1992)). Therefore, the Court recommends the moving
15 defendants’ motions to dismiss Plaintiff’s second claim be granted due to the
16 failure to state a claim pursuant to either 42 U.S.C. § 1985 or § 1986 upon which
17 relief can be granted.

18 **F. Plaintiff’s Third and Fourth Claims – Deliberate Indifference**

19 Plaintiff’s third and fourth claims assert that Defendants conspired with
20 each other to act with deliberate indifference to his severe medical condition and
21 falsified medical reports due to cost considerations in violation of the Eighth
22 Amendment prohibition against cruel and unusual punishment. All CDCR
23 Defendants, excluding Silva and Pasha, and Defendants Zamudio and Butcher
24 seek dismissal of this claim pursuant to Fed. R. Civ. P. 12(b)(6) on grounds that
25 Plaintiff fails to state a claim upon which relief can be granted.

26 A claim of medical indifference requires (1) a serious medical need and (2)
27 a deliberately indifferent response by the defendant. Jett v. Penner, 439 F.3d
28 1091. 1096 (9th Cir. 2006). The required showing of deliberate indifference is

1 satisfied when it is established “the official knew of and disregarded a substantial
2 risk of serious harm to [the prisoner’s] health or safety.” Johnson v. Meltzer, 134
3 F.3d 1393, 1398 (9th Cir. 1998) (citing Farmer v. Brennan, 511 U.S. 825, 837
4 (1994)). Negligence, inadvertence, or differences in medical judgment or opinion
5 do not rise to the level of a constitutional violation. Jackson v. McIntosh, 90 F.3d
6 330, 331 (9th Cir. 1996). “Deliberate indifference is a high legal standard.”
7 Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004). The indifference must
8 be substantial and must rise to a level of “unnecessary and wanton infliction of
9 pain.” Estelle v. Gamble, 429 U.S. 97, 105-06 (1976).

10 Plaintiff has alleged facts that plausibly show he had serious medical
11 needs. Taking the allegations in the Complaint as true, he has alleged serious
12 health issues, including atrial fibrillation and neck and back pain. He has not,
13 however, alleged facts plausibly demonstrating the moving defendants acted with
14 deliberate indifference to his serious medical needs. While Plaintiff indicates in
15 his opposition that he successfully controlled his high blood pressure condition
16 for over five years, prior to being housed at RJD, and it was not until he allowed
17 RJD staff and their “contract” medical doctors to treat him that he experienced
18 the “dire” effects that he had been warned of (see Opp’n to CDCR Mot., ECF No.
19 56 at 7-8), his pleading lacks factual allegations necessary to show deliberate
20 indifference. Plaintiff makes no allegations relating to the denial of medical care
21 or deliberate indifference against Defendants Walker, Self, Pool, Glynn, Sosa,
22 Roberts, or Bedane. Although Plaintiff argues in his opposition that Roberts,
23 Walker and Glynn are medical executives at RJD and that “[n]o medical action is
24 taken, nor denied, save by permission . . . of these defendants” (id. at 10),
25 Plaintiff does not allege this in his Complaint. See Schneider v. California Dep’t
26 of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (providing that new allegations
27 contained in an opposition are irrelevant for Rule 12(b)(6) purposes). As to
28 Defendants Paramo and Jackson, Plaintiff alleges only that Jackson intervened

1 in Plaintiff's hunger strike upon Paramo's orders, and that both ordered Plaintiff
2 to perform work that he should not have undertaken due to his medical
3 restrictions. These allegations are insufficient to allow for a plausible inference of
4 the requisite state of mind required to establish deliberate indifference to
5 Plaintiff's serious medical needs. See Iqbal, 556 U.S. at 681. As to Defendant
6 Rodriguez, the psychologist, Plaintiff alleges she told him she had purchased
7 malpractice insurance, that funds for inmate care were being diverted to
8 construction efforts at the prison, and that prison staff were attempting to push
9 Plaintiff into suicide. Even if true, none of these show that Rodriguez was
10 deliberately indifferent to Plaintiff's serious medical needs. The only allegation
11 regarding medical care relating to Defendant Stout is that Stout ordered Plaintiff
12 to be brought to the medical clinic. This does not lend any factual support to a
13 deliberate indifference claim.

14 Plaintiff argues that Defendants denied him adequate medical care in
15 retaliation for filing grievances and court actions, and because it was not cost-
16 effective to treat his condition. Opp'n to CDCR Mot., ECF No. 56 at 21. He
17 contends in his opposition that Defendants knew of his back, heart, kidney, and
18 chronic pain, yet refused anything but aspirin for treatment, and although
19 Defendants knew of his new onset atrial fibrillation, they failed to treat Plaintiff
20 until it became chronic atrial fibrillation requiring multiple painful surgeries to
21 treat. He argues Defendants knew of his immediate need for medical treatment,
22 but allowed him to suffer in order to allow the contracted doctors, Drs. Butcher
23 and Zamudio, to "bilk the State of California" and "earn more medical fees" once
24 his condition worsened because he needed multiple procedures, not a single
25 procedure. Id. at 22-25. These contentions, however, go beyond the allegations
26 in the Complaint (see Schneider, 151 F.3d at 1197 n.1), and are not supported
27 by the medical records attached to the Complaint.

28 Plaintiff's medical records show that although he is a difficult patient who

1 declines to take his prescribed medications and who regularly refuses to
2 cooperate with medical staff, which Plaintiff himself acknowledges, he has been
3 seen frequently by medical staff at RJD, and was seen on an emergency basis
4 by Drs. Butcher and Zamudio upon discovery of his atrial fibrillation. The
5 voluminous exhibits and medical records offered by Plaintiff in support of his
6 Complaint show that RJD medical staff and Drs. Butcher and Zamudio acted
7 promptly, carefully, and responsibly when he was treated at both RJD as well as
8 Alvarado Hospital. See Steckman, 143 F.3d at 1295-96 (stating that courts “are
9 not required to accept as true conclusory allegations which are contradicted by
10 documents referred to in the complaint”). In short, Plaintiff’s exhibits belie any
11 plausible claims of deliberate indifference as to any of the moving defendants.
12 Iqbal, 662 U.S. at 678; see also Sprewell, 266 F.3d at 988. Moreover, although
13 Plaintiff claims falsification of his medical records, he offers no facts supporting
14 why and how his medical records were false. Plaintiff does not have an
15 independent right to an accurate prison record. See Hernandez v. Johnston, 833
16 F.2d 1316, 1319 (9th Cir. 1987).

17 Finally, a claim of conspiracy requires the existence of an agreement or a
18 meeting of the minds to violate the plaintiff’s constitutional rights, and an actual
19 deprivation of those constitutional rights. Avalos v. Baca, 596 F.3d 583, 592 (9th
20 Cir. 2010). Plaintiff alleges no facts suggesting an agreement or common
21 objective among Defendants to violate his rights. See Zemsky v. City of New
22 York, 821 F.2d 148, 151 (2d Cir. 1987) (pro se complaint containing only
23 conclusory, vague, or general allegations of conspiracy to deprive a person of
24 constitutional rights will not withstand a motion to dismiss); Franklin v. Fox, 312
25 F.3d 423, 441 (9th Cir. 2001) (quoting United Steel Workers of Am. v. Phelps
26 Dodge Corp., 865 F.2d 1539, 1541 (9th Cir. 1989)) (“To be liable, each
27 participant in the conspiracy need not know the exact details of the plan, but
28 each participant must at least share the common objective of the conspiracy.”).

1 A plaintiff must state specific facts, not mere conclusory statements, to support
2 the existence of an alleged conspiracy. Burns v. County of King, 883 F.2d 819,
3 821 (9th Cir. 1989). Although pro se pleadings are liberally construed, a liberal
4 interpretation of a civil rights complaint may not supply essential elements of the
5 claim that were not initially pled. Ivey v. Board of Regents of Univ. of Alaska, 673
6 F.2d 819, 821 (9th Cir. 1989). While Plaintiff makes a variety of vague and
7 conclusory allegations of conspiracy, his Complaint fails to set forth the essential
8 facts as to the specific acts of each defendant that support the existence of the
9 claimed conspiracy. Burns, 883 F.2d at 821. Claims based on vague and
10 conclusory allegations, which fail to specify each defendant's role in the alleged
11 conspiracy, are subject to dismissal. Pena v. Gardner, 976 F.2d 469, 471 (9th
12 Cir. 1992).

13 Accordingly, the Court recommends the moving defendants' motions to
14 dismiss the third and fourth claims be granted.

16 **IV. CONCLUSION**

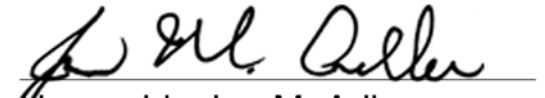
17 For the reasons set forth above, the Court recommends:

- 18 1. Defendant Zamudio's motion to dismiss (ECF No. 22) be GRANTED;
- 19 2. Defendant Butcher's motion to dismiss (ECF No. 24) be DENIED with
20 respect to his arguments that he is not a state actor and that Plaintiff's first, third,
21 and fourth claims are time-barred by the statute of limitations, but GRANTED in
22 all other respects; and
- 23 3. The motions to dismiss filed by CDCR Defendants Silva, Jackson,
24 Pasha, Walker, Rodriguez, Self, Pool, Glynn, Sosa, Paramo, Roberts and Stout
25 (ECF No. 46), and Defendant Bedane (ECF No. 61) be DENIED as to their
26 argument that Plaintiff's Complaint is barred by claim preclusion; but GRANTED
27 in all other respects as to moving CDCR Defendants (Jackson, Walker,
28 Rodriguez, Self, Pool, Glynn, Sosa, Paramo, Roberts, Stout, and Bedane).

1 This report and recommendation will be submitted to the Honorable Roger
2 T. Benitez, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Any party may file
3 written objections with the Court and serve a copy on all parties on or before July
4 5, 2017. The document should be captioned "Objections to Report and
5 Recommendation." Any reply to the Objections shall be served and filed on or
6 before July 19, 2017. The parties are advised that failure to file objections within
7 the specified time may waive the right to appeal the district court's order.
8 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 **IT IS SO ORDERED.**

10 Dated: June 13, 2017

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12 Honorable Jan M. Adler
13 United States Magistrate Judge
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