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5 UNITED STATES DISTRICT COURT
6 SOUTHERN DISTRICT OF CALIFORNIA
7

8 LARRY SALAS,

9
10 Plaintiff,

11 v.

12 R.N. BURNS,

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14 Defendant.
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16
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Case No.: 16-cv-736 JAH (JLB)

**REPORT AND
RECOMMENDATION:**

**(1) GRANTING DEFENDANT’S
MOTION TO DISMISS CLAIMS
AGAINST DEFENDANT BURNS**

**(2) DENYING DEFENDANT’S
MOTION TO STRIKE CASE
CITATIONS AND LEGAL
ARGUMENT**

[ECF No. 16]

18
19 **I. INTRODUCTION**

20 Plaintiff Larry Salas, a state prisoner proceeding *pro se* and *in forma pauperis*, filed
21 a Second Amended Complaint on July 5, 2016, alleging civil rights violations pursuant to
22 42 U.S.C. § 1983 against Defendant Milissa Burns.¹ (ECF No. 6.) Presently before the
23 Court is Defendant’s Motion to Dismiss Second Amended Complaint and to Strike Case
24 Citations and Legal Argument from the Second Amended Complaint. (ECF No. 16.)
25

26
27 ¹ Plaintiff’s Second Amended Complaint asserts claims against Milissa Burns and John Doe.
28 (ECF No. 6.) Defendant John Doe was dismissed from this case by United States District Judge John A. Houston on July 25, 2016 (ECF No. 7), and Defendant Burns remains the only Defendant.

1 The Court submits this Report and Recommendation to United States District Judge
2 John A. Houston pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1 of the Local
3 Rules of Practice for the United States District Court for the Southern District of California.
4 After a thorough review of Plaintiff's Second Amended Complaint, the parties' motion and
5 opposition papers, and all supporting documents, and for the reasons discussed below, the
6 Court **RECOMMENDS** that Defendant's Motion to Dismiss (ECF No. 16) be
7 **GRANTED** and Defendant's Motion to Strike (ECF No. 16) be **DENIED**.

8 **II. FACTUAL BACKGROUND²**

9 Plaintiff is a state prisoner currently confined at the California State Prison, Solano
10 in Vacaville, California. (ECF No. 22.) Prior to arriving at Solano, Plaintiff was
11 temporarily confined at the San Diego Central Jail ("SDCJ"). (ECF No. 6 at 1.)³ On July
12 15, 2015, Plaintiff was seen by an unidentified registered nurse at the SDCJ. (*Id.* at 3.)
13 Plaintiff informed an unidentified nurse that he had an unstable right knee and that he came
14 into custody wearing a knee brace for stability. (*Id.*) A few days later, Plaintiff was
15 transferred to a cell on the fifth floor of the jail and assigned a top tier bunk. (*Id.*)

16 On October 3, 2015, Plaintiff fell down the stairs at the SDCJ while carrying his
17 mattress and belongings. (*Id.* at 6.) He sustained scrapes, bruises, lacerations, and swelling
18 to his right knee and was taken to an outside hospital for treatment. (*Id.*) Doctors
19 performed an x-ray and diagnosed Plaintiff with fluids and arthritis in the knee. (*Id.*)
20 Plaintiff was released from the hospital with pain medication and a knee brace that
21 prevented the knee from bending. (*Id.*) Plaintiff was also given instructions to not bend
22 his knee, to stay off his knee, and to keep his leg elevated. (*Id.*) Once Plaintiff was back
23 at the SDCJ, he met with Defendant Burns, a registered nurse. (*Id.*) Defendant Burns

25 ² Plaintiff's allegations contained in the Second Amended Complaint are accepted as true for
26 purposes of assessing Defendant's Motion to Dismiss only. In addition, this Report and Recommendation
27 does not provide a summary of all of the facts presented in Plaintiff's Second Amended Complaint but
28 only those that are relevant to Plaintiff's claims against Defendant Burns.

³ All page number citations in this Report and Recommendation refer to the page numbers
generated by the CM/ECF system.

1 replaced Plaintiff's knee brace with an ace bandage and refused to give him pain
2 medication. (*Id.*)

3 **III. PROCEDURAL BACKGROUND**

4 Plaintiff initiated the present suit by filing a complaint in this Court on March 28,
5 2016. (ECF No. 1.) Plaintiff filed his Second Amended Complaint on July 5, 2016, naming
6 R.N. Burns as a Defendant. (ECF No. 6.) Plaintiff alleges that Defendant Burns violated
7 his constitutional right to freedom from cruel and unusual punishment. (*Id.* at 6.)

8 On April 8, 2016, the Court granted Plaintiff's Motion for Leave to Proceed *in*
9 *Forma Pauperis*. (ECF No. 3.) On August 19, 2016, Plaintiff filed a Motion for
10 Appointment of Counsel (ECF No. 12), which the Court denied on September 7, 2016.
11 (ECF No. 17.) Plaintiff filed another Motion for Appointment of Counsel on September
12 22, 2016. (ECF No. 21.) On October 12, 2016, the Court required Plaintiff to submit
13 further evidence in support of his Motion for Appointment of Counsel. (ECF No. 25.) On
14 November 3, 2016, Plaintiff complied by filing further evidence in support of his Motion
15 for Appointment of Counsel. (ECF No. 28.) On November 21, 2016, the Court denied
16 Plaintiff's second Motion for Appointment of Counsel. (ECF No. 29.)

17 On September 7, 2016, Defendant Burns moved to dismiss the claims in Plaintiff's
18 Second Amended Complaint asserted against her. (ECF No. 16.) Defendant also moved
19 to strike all case citations and legal argument from the Second Amended Complaint. (*Id.*)
20 Plaintiff filed an Opposition to Defendant's Motions on December 5, 2016 (ECF No. 30),
21 and Defendant filed a Reply to Plaintiff's Opposition on December 13, 2016 (ECF No. 31).

22 **IV. DISCUSSION**

23 **A. Legal Standards**

24 **1. Motion to Dismiss for Failure to State a Claim**

25 The Federal Rules of Civil Procedure require that a plaintiff's complaint must
26 provide a "short and plain statement of the claim showing that [he] is entitled to relief."
27 Fed. R. Civ. P. 8(a)(2). The pleading standard that Rule 8 announces does not require
28 detailed factual allegations, and the statement need only "give the defendant fair notice of

1 what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,
2 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However,
3 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
4 statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (citing *Twombly*,
5 550 U.S. at 555).

6 A motion to dismiss for failure to state a claim upon which relief can be granted
7 pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the
8 claims in the complaint. See *Twombly*, 550 U.S. at 555. “To survive a motion to dismiss,
9 a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to
10 relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at
11 570). “A 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 misconduct
13 alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “[D]etermining whether a complaint states
14 a plausible claim for relief [is] a context-specific task that requires the reviewing court to
15 draw on its judicial experience and common sense.” *Cooney v. Rossiter*, 583 F.3d 967,
16 971 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679). The mere possibility of misconduct
17 falls short of meeting this plausibility standard. *Iqbal*, 556 U.S. at 678–79; see also *Moss*
18 *v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

19 In ruling on a Rule 12(b)(6) motion to dismiss, the court does not look at whether
20 the plaintiff will “ultimately prevail but whether the [plaintiff] is entitled to offer evidence
21 to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The court may
22 consider allegations contained in the pleadings, exhibits attached to the complaint, and
23 documents and matters properly subject to judicial notice. *Outdoor Media Group, Inc. v.*
24 *City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007). The court must assume the truth of
25 the facts presented and construe all inferences from them in the light most favorable to the
26 nonmoving party. *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992).
27 However, the court is “not required to accept legal conclusions cast in the form of factual
28

1 allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg*
2 *v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

3 2. Motion to Strike

4 Federal Rule of Civil Procedure 12(f) provides that a court “may strike from a
5 pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
6 matter.” Fed. R. Civ. P. 12(f). The function of a Rule 12(f) motion to strike is to “avoid
7 the expenditure of time and money that must arise from litigating spurious issues by
8 dispensing with those issues prior to trial.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d
9 970, 973 (9th Cir. 2010) (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir.
10 1993), *rev’d on other grounds*, 510 U.S. 517 (1994)).

11 Motions to strike are “generally disfavored and are not granted unless it is clear that
12 the matter sought to be stricken could have no possible bearing on the subject matter of the
13 litigation.” *Kosta v. Del Monte Corp.*, No. 12-cv-01772-YGR, 2013 WL 2147413, at *4
14 (N.D. Cal. May 15, 2013); *see Int’l Longshoremen’s Ass’n. v. Va. Int’l Terminals, Inc.*, 904
15 F. Supp. 500, 504 (E.D. Va. 1995) (“[E]ven a properly made motion to strike is a drastic
16 remedy which is disfavored by the courts and infrequently granted.”). When ruling on a
17 motion to strike, a court should view the pleading under attack in the light most favorable
18 to the nonmoving party. *Jones v. AIG Risk Mgmt., Inc.*, 726 F. Supp. 2d 1049, 1061 (N.D.
19 Cal. 2010). Courts are reluctant to grant motions to strike in the absence of a showing of
20 prejudice to the moving party. *Mattox v. Watson*, No. CV 07-5006-RGK RZx, 2007 WL
21 4200213, at *3 (C.D. Cal. Nov. 15, 2007).

22 3. Standards Applicable to Pro Se Litigants

23 With respect to an inmate who proceeds *pro se*, his factual allegations, “however
24 inartfully pleaded,” must be held “to less stringent standards than formal pleadings drafted
25 by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Erickson*, 551 U.S. at
26 94 (reaffirming that this standard applies to *pro se* pleadings post-*Twombly*). Thus, where
27 a plaintiff appears *pro se* in a civil rights case, the Court must construe the pleadings
28 liberally and afford plaintiff any benefit of the doubt. *Hebbe v. Pliler*, 627 F.3d 338, 342

(9th Cir. 2010). However, in giving liberal interpretation to a *pro se* civil rights complaint, courts may not “supply essential elements of the claim that were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “The plaintiff must allege with at least some degree of particularity overt acts which defendants engaged in that support the plaintiff’s claim.” *Jones v. Cmty. Redevelopment Agency of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (internal quotation omitted).

Before dismissing a *pro se* civil rights complaint for failure to state a claim, the plaintiff should be given a statement of the complaint’s deficiencies and an opportunity to cure. *Karim–Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624–25 (9th Cir.1988). Only if it is absolutely clear that the deficiencies cannot be cured by amendment should the complaint be dismissed without leave to amend. *Id.*; see also *James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000).

B. Analysis

1. Motion to Dismiss

Plaintiff’s Second Amended Complaint alleges that Defendant Burns: (1) replaced Plaintiff’s knee brace with an ace bandage; (2) refused to give Plaintiff pain medication; (3) failed to assign Plaintiff a bottom tier cell and bottom bunk; and (4) abused her discretion by not reevaluating the circumstances that caused Plaintiff harm. (ECF No. 6 at 6.) Plaintiff alleges that these acts violated his Eighth Amendment right to be free from cruel and unusual punishment. (*Id.*) Defendant argues Plaintiff’s constitutional claim against her should be dismissed because Plaintiff’s Second Amended Complaint fails to allege sufficient facts showing that Plaintiff had a serious medical need, that Defendant Burns’ conduct was medically unacceptable under the circumstances, or that Defendant Burns acted in conscious disregard of an excessive risk to Plaintiff’s health. (ECF No. 16-1 at 2.)

i. Applicable Law

Prison officials violate the Eighth Amendment’s proscription against cruel and unusual punishment when they act with deliberate indifference to an inmate’s serious

1 medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104–106 (1976). For a prisoner to
2 demonstrate an Eighth Amendment violation, two components must be satisfied.
3 *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by*
4 *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the deprivation
5 alleged must be objectively sufficiently serious. *Id.* at 1059–60. A “serious” medical need
6 exists if the failure to treat a prisoner’s condition could result in further significant injury
7 or the “unnecessary and wanton infliction of pain.” *Id.* (citing *Estelle*, 429 U.S. at 104).
8 The “existence of any injury that a reasonable doctor or patient would find important and
9 worthy of comment or treatment; the presence of a medical condition that significantly
10 affects an individual’s daily activities; or the existence of chronic and substantial pain” are
11 examples of the existence of a serious medical need. *Id.*; accord *Lopez v. Smith*, 203 F.3d
12 1122, 1131–32 (9th Cir. 2000); *Doty v. Cnty. of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994).

13 Second, the prison official involved must have acted with deliberate indifference to
14 the inmate’s serious medical needs. See *Wilson*, 501 U.S. at 302–04. This is a subjective
15 requirement. *Farmer v. Brennan*, 511 U.S. 825, 839 (1994). The indifference must be
16 substantial; inadequate treatment due to malpractice, or even gross negligence, does not
17 amount to a constitutional violation. *Estelle*, 429 U.S. at 106; *Toguchi v. Chung*, 391 F.3d
18 1051, 1060 (9th Cir. 2002). To act with deliberate indifference, the prison official must
19 know of and disregard an excessive risk to the inmate’s health and safety. *Toguchi*, 391
20 F.3d at 1057 (quoting *Gibson v. City of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002)).
21 “Under this standard, the prison official must not only ‘be aware of facts from which the
22 inference could be drawn that a substantial risk of serious harm exists,’ but that person
23 ‘must also draw the inference.’” *Id.* (quoting *Farmer*, 511 U.S. at 837). The court must
24 focus on “what a defendant’s mental attitude actually was (or is), rather than what it should
25 have been (or should be).” *Farmer*, 511 U.S. at 838–39. “Even if a prison official *should*
26 have been aware of the risk, if he ‘was not, then he has not violated the Eighth Amendment,
27 no matter how severe the risk.’” *Peralta v. Dillard*, 744 F.3d 1076, 1086 (9th Cir. 2014),
28 *cert. denied*, 135 S. Ct. 946 (2015) (quoting *Gibson*, 290 F.3d at 1188). Differences in

1 judgment between a prisoner and a prison official regarding appropriate medical diagnosis
2 and treatment are not enough to establish a deliberate indifference claim. *See Estelle*, 429
3 U.S. at 107–08; *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

4 ii. *Existence of a Serious Medical Condition*

5 To withstand Defendant’s Motion to Dismiss, Plaintiff must first satisfy the
6 objective component of an existence of a serious medical condition. Plaintiff must show
7 that a failure to treat his alleged medical condition could result in further significant injury
8 or the “unnecessary and wanton infliction of pain.” *McGuckin*, 974 F.2d at 1059–60.
9 Defendant argues that Plaintiff’s allegation of having a pre-existing knee injury and his
10 knee being swollen is not enough to constitute a serious medical condition. (ECF No. 16-
11 1 at 4.)

12 Upon a thorough review of Plaintiff’s Second Amended Complaint and the
13 documents attached thereto, the Court finds that Plaintiff successfully pleads sufficient
14 facts showing the existence of a serious medical condition. Plaintiff’s Second Amended
15 Complaint alleges that the injuries Plaintiff sustained to his already unstable right knee
16 after falling down the stairs at the SDCJ on October 3, 2015, resulted in “unnecessary pain
17 and suffering” to Plaintiff. (ECF No. 6 at 6.) Plaintiff alleges that as a result of his fall he
18 sustained scrapes, bruises, lacerations, and swelling to his knee. (*Id.*) Plaintiff was taken
19 to an outside hospital where doctors performed an x-ray and diagnosed Plaintiff with fluids
20 and arthritis in his knee. (*Id.*) Plaintiff was then released from the hospital back to the
21 SDCJ with prescribed pain medication, a knee brace that prevented his knee from bending,
22 and instructions to not bend his knee, to stay off his knee, and to keep his leg elevated.
23 (*Id.*) The court finds Plaintiff’s Second Amended Complaint sufficiently alleges that he
24 had an objectively serious medical need. *See, e.g., Peralta*, 744 F.3d at 1086 (“We’ve held
25 that the ‘existence of chronic and substantial pain’ indicates that a prisoner’s medical needs
26 are serious.” (citing *McGuckin*, 974 F.2d at 1060)); *Bryant v. Thomas*, No. 09CV1334–
27 WQH (MDD), 2012 WL 5943654, at *8 (S.D. Cal. Sep. 7, 2012) (finding that plaintiff’s
28 injuries including joint pain, cuts, bruises, and scrapes, and that plaintiff was prescribed

1 pain killers were sufficient to support the inference that the plaintiff had an objectively
2 serious medical need).

3 Accordingly, Plaintiff's Second Amended Complaint sufficiently pleads the
4 objective component of a serious medical condition.

5 *iii. Deliberate Indifference*

6 Although Plaintiff has adequately alleged the objective component of an existence
7 of a serious medical condition, the Second Amended Complaint fails to sufficiently allege
8 the subjective component of deliberate indifference to that serious medical condition. To
9 survive Defendant's Motion to Dismiss, the Second Amended Complaint must allege facts
10 to show that Defendant Burns purposefully acted or failed to act in such a way that she
11 denied, delayed, or interfered with Plaintiff's medical care. *McGuckin*, 974 F.2d at 1060.
12 Plaintiff alleges that Defendant Burns was deliberately indifferent to his medical needs
13 when she replaced Plaintiff's knee brace with an ace bandage, refused to give Plaintiff pain
14 medication, failed to assign Plaintiff a bottom tier and a bottom bunk, and did not
15 reevaluate the circumstances that caused Plaintiff harm. (ECF No. 6 at 6.) In support of
16 this claim, Plaintiff alleges that after his fall down the stairs, the doctors at the hospital
17 provided him with pain medication, a knee brace, and instructions to not bend his knee, to
18 stay off his knee, and to keep his leg elevated. (*Id.*) Plaintiff alleges that Defendant Burns
19 was deliberately indifferent to Plaintiff's medical condition because she knew or should
20 have known that her actions would result in the unnecessary and wanton infliction of pain
21 to Plaintiff. (*Id.*) Defendant argues that Plaintiff's deliberate indifference claim fails
22 because there is no allegation that she knew of and disregarded an excessive risk to
23 Plaintiff's health and safety based on the existence of a serious medical condition. (ECF
24 No. 16-1 at 5.)

25 Upon a thorough review of Plaintiff's Second Amended Complaint and the
26 documents attached thereto, the Court finds that Plaintiff fails to plead sufficient facts
27 supporting a plausible deliberate indifference claim against Defendant Burns. To
28 sufficiently plead deliberate indifference, the Second Amended Complaint must allege

1 facts that support a reasonable inference that Defendant Burns not only knew of a serious
2 risk but also *purposefully* disregarded it. *See Farmer*, 511 U.S. at 837. The allegations in
3 the Second Amended Complaint fail to demonstrate that Defendant Burns purposefully
4 disregarded any risk of harm to Plaintiff's health. First, with regard to Defendant Burns'
5 replacement of Plaintiff's knee brace with an ace bandage, this act does not sufficiently
6 support the inference that she purposefully disregarded or failed to respond to Plaintiff's
7 medical need. In fact, it supports the inference that she continued to provide care to
8 Plaintiff. While Plaintiff may believe it was inappropriate to replace his brace with an ace
9 bandage, a difference in judgment between a prisoner and a prison official regarding
10 appropriate medical treatment is not enough to establish a deliberate indifference claim.
11 *See Estelle*, 429 U.S. at 107–08.

12 Second, with regard to Plaintiff's allegations that Defendant Burns violated
13 Plaintiff's constitutional right when she refused to provide Plaintiff with pain medication
14 and failed to assign Plaintiff to a bottom tier and a bottom bunk, these allegations are
15 conclusory and not factually supported. There are no facts in the Second Amended
16 Complaint that allege that Defendant Burns intentionally denied, delayed, or interfered
17 with Plaintiff's receipt of medication. Plaintiff alleges that doctors released him from the
18 hospital with pain medication. (ECF No. 6 at 6.) Plaintiff also alleges that upon his return
19 to the SDCJ his pain medication was taken away. (*Id.* at 18.) Plaintiff does not allege that
20 Defendant Burns was the person who took away his medication, much less that she did so
21 to intentionally deny or interfere with Plaintiff's medical care. He also does not allege that
22 he had a prescription from any doctor to refill the pain medication and that Defendant Burns
23 refused to comply with that doctor's orders. In Plaintiff's medication profile, which
24 Plaintiff attached to his Second Amended Complaint, there is no entry for a pain medication
25 prescription for October 3, 2015, or any date soon after until October 23, 2015. (*Id.* at 28.)
26 The Court agrees with Defendant that not giving Plaintiff medication at his demand and
27 without a doctor's prescription is consistent with the professional limitations to which
28 Defendant Burns, as a registered nurse, is subject. Cal. Bus. & Prof. Code §§ 2725.1,

1 4170(c) (stating that a registered nurse is not an authorized prescriber and can only dispense
2 drugs on order of a licensed physician).

3 As to Plaintiff's allegations with respect to bunk and tier assignment, Plaintiff
4 provides no facts that indicate that he requested that Defendant Burns assign him a lower
5 tier cell or a lower bunk or that she was responsible for Plaintiff's tier or bunk assignment.⁴
6 Even if Plaintiff had sufficiently alleged Defendant Burns assigned Plaintiff to an upper
7 tier or an upper bunk against his request, Plaintiff fails to adequately allege that Defendant
8 Burns did so while purposefully disregarding an excessive risk to Plaintiff's health.
9 Indifference to an inmate's medical needs must be substantial; inadequate treatment due to
10 malpractice, or even gross negligence, does not amount to a constitutional violation.
11 *Estelle*, 429 U.S. at 106; *Chung*, 391 F.3d at 1060.

12 Third, with regard to Plaintiff's allegation that Defendant Burns abused her
13 discretion by not reevaluating the circumstances that caused Plaintiff harm, Plaintiff
14 provides no factual support for this contention, and the Court cannot discern what Plaintiff
15 intends to convey. Accordingly, the Court finds this claim vague, conclusory, and
16 insufficient to withstand Defendant's Motion to Dismiss.

17 Finally, in Plaintiff's Opposition to Defendant's Motion to Dismiss, Plaintiff argues
18 that Defendant Burns was deliberately indifferent to his serious medical needs because she
19 "deviated from clearly-established medical protocol established by Government Code
20 §845.6, which states in pertinent part: ' . . . a public employee . . is liable if the employee
21 knows or has reason to know that the prisoner is in need of immediate medical care and he
22 fails to take reasonable action to summon such medical care.'" (ECF No. 30 at 4.) The
23 Court finds this argument inapposite and unpersuasive because the statute relates to a
24 failure to summon medical care, a duty which is not implicated by Plaintiff's claim.

25
26
27 ⁴ Plaintiff may have intended to allege that Defendant Burns failed to issue a medical chrono
28 regarding Plaintiff's tier or bunk assignment, but that is not what Plaintiff alleged in his complaint and
the Court is limited to considering the allegations of the complaint.

1 Accordingly, the Court finds that Plaintiff's Second Amended Complaint fails to
2 sufficiently plead that Defendant Burns was deliberately indifferent to Plaintiff's serious
3 medical need. For this reason, the Court recommends that Defendant's Motion to Dismiss
4 (ECF No. 16) be **GRANTED** and Plaintiff's Eighth Amendment claim against Defendant
5 Burns be **DISMISSED**. However, because it is not absolutely clear the deficiencies in
6 Plaintiff's Second Amended Complaint with respect to this claim cannot be cured by
7 amendment, the Court recommends Plaintiff's Eighth Amendment claim against
8 Defendant Burns be **DISMISSED without prejudice and with leave to amend**.

9 2. Motion to Strike Case Citations and Legal Arguments

10 Defendant also moves the Court to strike case citations and legal argument from the
11 Second Amended Complaint. (ECF No. 16.) Defendant argues that case citations
12 constitute legal argument and conclusions that are improper and immaterial as factual
13 allegations and should be stricken from the Second Amended Complaint. (ECF No. 16-1
14 at 8–9.)

15 In support of the Motion to Strike, Defendant cites to several cases that the Court
16 finds unpersuasive in the context of the present case. In *Fantasy, Inc. v. Fogerty*, none of
17 the parties were *pro se*, and the court upheld the motion to strike as to allegations that
18 consisted of stale and barred charges that had already been extensively litigated and would
19 have unnecessarily complicated the trial of a copyright claim. 984 F.2d 1524, 1528 (9th
20 Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994). In *Jones v. Kern High School*
21 *District*, the Court ordered the Plaintiff to delete all case citations and allegations in
22 Plaintiff's amended complaint because the previous complaint was 79 pages long and it
23 made reading and analyzing the pleading difficult. No. CV-F-07-1628 OWW/TAG, 2008
24 WL 3850802, at *2 (E.D. Cal. Aug. 14, 2008).

25 Here, the Court is not persuaded that Plaintiff's citations to legal authority are unduly
26 prejudicial to the Defendant. Plaintiff's citation to legal authority is not extensively
27 complicated. In addition, as Defendant points out, all of Plaintiff's citations to case law
28 and legal arguments are grouped from the bottom of page 3 through page 5, and from the

bottom of page 6 through page 8. Therefore, the inclusion of this material in the Second Amended Complaint does not make reading the pleading difficult. Plaintiff's legal citations are not immaterial as Plaintiff is proceeding *pro se* and his citations to legal authority correctly point out that his pleadings must be held to less stringent standards than formal pleadings drafted by lawyers. *See Haines*, 404 U.S. at 520. Moreover, striking Plaintiff's legal citations would not help save the Court or the parties any time or resources.

Accordingly, the Court recommends that Defendant's Motion to Strike case citations and legal argument (ECF No. 16) be **DENIED**.

V. CONCLUSION

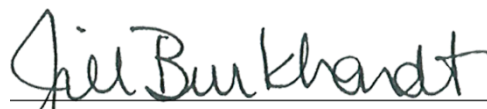
For the reasons discussed above, **IT IS HEREBY RECOMMENDED** that the District Court issue an Order: (1) Accepting this Report and Recommendation; (2) **GRANTING** Defendant's Motion to Dismiss (ECF No. 16); (3) **DISMISSING without prejudice and with leave to amend** Plaintiff's Eighth Amendment claim against Defendant Burns; and (4) **DENYING** Defendant's Motion to Strike case citations and legal argument (ECF No. 16).

IT IS ORDERED that no later than May 1, 2017, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties no later than May 15, 2017. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *See Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: April 7, 2017


Hon. Jill L. Burkhardt
United States Magistrate Judge