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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

DAVID VINCENT CARSON,  
  
Plaintiff,  
  
v.  
  
F. MARTINEZ, et al.,  
  
Defendants.

Case No.: 16cv1736-JLS (BLM)

**REPORT AND RECOMMENDATION FOR  
ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

**[ECF No. 63]**

This Report and Recommendation is submitted to United States District Judge Janis L. Sammartino pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.3(f) of the United States District Court for the Southern District of California. For the following reasons, the Court **RECOMMENDS** that Defendants’ motion for summary judgment be **GRANTED IN PART AND DENIED IN PART.**

**PROCEDURAL BACKGROUND**

On November 2, 2017, Plaintiff filed his First Amended Complaint (“FAC”) alleging four claims for relief. FAC. Plaintiff alleges that (1) Defendants Martinez, Godinez, Silva, and LaRocca violated his First Amendment right to freedom of speech by retaliating against him for

1 complaining about their violations of his civil rights, (2) Defendants Silva and LaRocca violated  
2 his Eighth Amendment right to be free from cruel and unusual punishment when they assaulted  
3 him, (3) Defendant Garcia violated his Eighth Amendment rights when she failed to protect him  
4 from the use of excessive force by Defendants Silva and LaRocca, and (4) Defendant Casian  
5 violated his Eighth Amendment rights when she was deliberately indifferent to Plaintiff's medical  
6 needs. Id. at 3-8, 12-13.

7 On October 30, 2018, Defendants D. Garcia, F. Martinez, and G. Casian filed a motion for  
8 summary judgment arguing that (1) Defendant Garcia is "entitled to summary judgment as to  
9 Plaintiff's failure-to-protect claim because she did not witness or participate in the force  
10 incident[,]" (2) Defendant Martinez is entitled to summary judgment "because Plaintiff's  
11 retaliation claim is barred by the favorable determination doctrine[,]" and (3) Defendant Casian  
12 is entitled to summary judgment because "Plaintiff's constant and progressive medical care"  
13 does not demonstrate that she was deliberately indifferent to [Plaintiff's] medical needs. ECF  
14 No. 63-1 ("MSJ"). Plaintiff timely opposed the motion on January 31, 2019 [see ECF No. 77  
15 ("Oppo.")] and Defendants did not file a reply. See Docket.

## 16 **LEGAL STANDARDS**

### 17 **A. *Pro Se* Litigants**

18 When a plaintiff appears *pro se*, the court must be careful to construe the pleadings  
19 liberally and to afford the plaintiff any benefit of the doubt. See Erickson v. Pardus, 551 U.S.  
20 89, 94 (2007); Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002). This rule of liberal  
21 construction is "particularly important" in civil rights cases. Hendon v. Ramsey, 528 F. Supp. 2d  
22 1058, 1063 (S.D. Cal. 2007) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992));  
23 see also Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (stating that because "Iqbal  
24 incorporated the Twombly pleading standard and Twombly did not alter the courts' treatment  
25 of *pro se* filings; accordingly we continue to construe *pro se* filings liberally . . . ." This is  
26 particularly important where the petitioner is a *pro se* prisoner litigant in a civil matter).

### 27 **B. Summary Judgment**

28 Summary judgment is appropriate if there is no genuine issue as to any material fact,

1 and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a). A  
2 dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return  
3 a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).  
4 The moving party has the initial burden of demonstrating that summary judgment is proper.  
5 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the opposing  
6 party to provide admissible evidence beyond the pleadings to show that summary judgment is  
7 not appropriate. Id. at 322-24. The opposing party “may not rest upon mere allegation or  
8 denials of his pleading, but must set forth specific facts showing that there is a genuine issue  
9 for trial.” Anderson, 477 U.S. at 256 (citation omitted).

10 A court may not weigh evidence or make credibility determinations on a motion for  
11 summary judgment; rather, the inferences to be drawn from the underlying facts must be  
12 viewed in the light most favorable to the nonmoving party. Id. at 255. If direct evidence  
13 produced by the moving party conflicts with direct evidence produced by the nonmoving party,  
14 the judge must assume the truth of the evidence set forth by the nonmoving party with respect  
15 to that fact. Leslie v. Grupo ICA, 198 F.3d 1152, 1158 (9th Cir. 1999) (citing T.W. Elec. Serv.,  
16 Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 631 (9th Cir. 1987)). In addition, the  
17 “evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in  
18 his favor.” Anderson, 477 U.S. at 256 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-  
19 159 (1970)).

### 20 C. Section 1983

21 42 United States Code Section 1983 imposes two essential proof requirements upon a  
22 claimant: (1) that a person acting under color of state law committed the conduct at issue, and  
23 (2) that the conduct deprived the claimant of some right, privilege, or immunity protected by  
24 the Constitution or laws of the United States. See 42 U.S.C. § 1983; Marsh v. Cty. of San Diego,  
25 680 F.3d 1148, 1152 (9th Cir. 2012). A person acting under the color of law deprives another  
26 “of a constitutional right, within the meaning of § 1983, ‘if he does an affirmative act, participates  
27 in another’s affirmative act, or omits to perform an act which he is legally required to do that  
28 causes the deprivation of which [the plaintiff complains].” Preschooler II v. Clark County Sch.

1 Bd. of Trustees, 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740,  
2 743 (9th Cir. 1978)). “The inquiry into causation must be individualized and focus on the duties  
3 and responsibilities of each individual defendant whose acts or omissions are alleged to have  
4 caused a constitutional deprivation.” Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988).

5 **D. Evidence the Court May Consider on Summary Judgment**

6 In evaluating a motion for summary judgment, a court may only consider admissible  
7 evidence. See Orr v. Bank of America, 285 F.3d 764, 773 (9th Cir. 2002). A party may not  
8 create a triable issue of fact merely by presenting argument in its legal memoranda. See S.A.  
9 Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v. Walter Kidde & Co., 690 F.2d 1235,  
10 1238 (9th Cir. 1982); see also Estrella v. Brandt, 682 F.2d 814, 819–20 (9th Cir. 1982) (on  
11 summary judgment, statements in legal memoranda are not evidence and “do not create issues  
12 of fact capable of defeating an otherwise valid summary judgment motion”). However, if a *pro*  
13 *se* plaintiff submits a verified pleading, the court must consider the factual contents of the  
14 verified pleading. See Lopez v. Country Ins. & Fin. Serv., 252 Fed. App'x 142, 144 n. 2 (9th Cir.  
15 2007) (affirming summary judgment in favor of the defendant where the *pro se* plaintiff “failed  
16 to submit any admissible evidence in opposition to the defendants' motion for summary  
17 judgment ...,” although observing that “[b]ecause [the plaintiff] was representing himself *pro*  
18 *se*, had he signed his pleadings and/or motions under penalty of perjury, the district court would  
19 have been required to treat them as evidence for the purpose of summary judgment); see also;  
20 Jones v. Blanas, 393 F.3d 918, 923 (9th Cir. 2004) (considering plaintiff’s evidence where plaintiff  
21 “attested under penalty of perjury that the contents of the motions or pleadings are true and  
22 correct”); Harris v. Shelland, 2017 WL 2505287, at \*4 (S.D. Cal. June 9, 2017) (“neither an  
23 unverified complaint nor unsworn statements made in the parties' briefs can be considered as  
24 evidence at this [summary judgment] stage”); and Barragan v. Flynn, 2017 WL 5070037, at \*2  
25 (S.D. Cal. Nov. 3, 2017) (same).

26 In Fraser v. Goodale, 342 F.3d 1032, 1036-1037 (9th Cir. 2003), the court reversed a  
27 grant of summary judgment, holding that the district court should have considered unsworn,  
28 arguably inadmissible statements written by the plaintiff in a diary. The Ninth Circuit reasoned

1 that “[a]t the summary judgment stage, we do not focus on the admissibility of the evidence's  
2 form. We instead focus on the admissibility of its contents.” Id. at 1036-1037. The court opined  
3 that the contents of plaintiff’s diary “were mere recitations of events within [the plaintiff’s]  
4 personal knowledge and, depending on the circumstances, could be admitted into evidence at  
5 trial in a variety of ways,” including through plaintiff’s testimony. Id. Because the contents  
6 could be presented in an admissible form at trial, the court concluded that diary’s contents  
7 should have been considered as part of the summary judgment motion. Id.; see also Rosenfeld  
8 v. Mastin, 2013 WL 5705638, \*5 (C.D. Cal. Oct. 15, 2013) (considering plaintiff’s unsworn  
9 statements made in the third amended complaint and in the opposition because plaintiff “plainly  
10 has personal knowledge of the content of these statements and could present the statements  
11 in admissible form through his own testimony at trial,” but not considering plaintiff’s speculative  
12 statements regarding a particular claim where there was no indication plaintiff had personal  
13 knowledge of the claim); Wilson v. Med. Servs. Div., 2017 WL 1374281, at \*7 (S.D. Cal. Apr.  
14 13, 2017) (report and recommendation denied in part on other grounds) (finding that plaintiff  
15 failed to show a triable issue of material fact even after considering plaintiff’s opposition to the  
16 motion for summary judgment that was not signed under penalty of perjury) (citing Rosenfeld,  
17 2013 WL 5705638 at \*5).<sup>1</sup>

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19 <sup>1</sup> Several Ninth Circuit cases have interpreted Fraser to permit the consideration of unverified  
20 pleadings, unsworn memoranda, and other forms of inadmissible material at the summary  
21 judgment stage. See Jeffries v. Las Vegas Metro. Police Dep’t, 713 F. App’x 549, 549–51 (9th  
22 Cir. 2017) (affirming district court’s grant of summary judgment to defendant on plaintiff’s 42  
23 U.S.C. § 1983 claims and finding district court did not err in considering the exhibits attached to  
24 defendant’s motion for summary judgment even though some of the exhibits were not  
25 authenticated “because a competent witness with personal knowledge could authenticate the  
26 exhibits at trial”) (citing Fraser, 342 F.3d at 1036-37); see also Singleton v. Lopez, 577 F. App’x  
27 733, 736 (9th Cir. 2014) (noting that “[i]t is not controlling at the summary judgment phase that  
28 the evidence was hearsay, so long as the evidence could be presented in an admissible form at  
trial,” but finding that the magistrate judge did not abuse his discretion in refusing to admit a  
2011 prison report where the statements were not relevant to *pro se* plaintiff’s 42 U.S.C. § 1983  
claims.) (citing Fraser, 342 F.3d at 1037); Aholelei v. Hawaii, Dep’t of Pub. Safety, 220 F. App’x  
670, 672 (9th Cir. 2007) (finding that the district court abused its discretion in not considering  
any of plaintiff’s evidence when evaluating whether there had been a constitutional violation by  
prison officials because the evidence, which consisted primarily of litigation and administrative

1 Plaintiff's opposition was signed under penalty of perjury [see Oppo. at 23] so the Court  
2 will consider the relevant factual statements made by Plaintiff in the opposition in evaluating the  
3 pending motion. See Jones, 393 F.3d at 923 ("because Jones is *pro se*, we must consider as  
4 evidence in his opposition to summary judgment all of Jones's contentions offered in motions  
5 and pleadings, where such contentions are based on personal knowledge and set forth facts  
6 that would be admissible in evidence, and where Jones attested under penalty of perjury that  
7 the contents of the motions or pleadings are true and correct"). Plaintiff's FAC was not signed  
8 under penalty of perjury. FAC at 16. Plaintiff's unverified FAC contains factual statements  
9 regarding his claims of Eighth Amendment violations and retaliation about which Plaintiff has  
10 personal knowledge. FAC. Because Plaintiff could testify under oath at trial regarding his  
11 personal knowledge, the Court will consider those statements. See Fraser, 342 F.3d at 1036-  
12 1037. This conclusion is further supported by the fact that Defendants do not object to  
13 consideration of Plaintiff's unverified FAC or the evidence submitted in support of the complaint.  
14 See Torres v. Rite Aid Corp., 412 F. Supp. 2d 1025, 1028, n.2 (N.D. Cal. 2006) (accepting as  
15 competent evidence unsworn declarations not made under penalty of perjury where defendant  
16 did not object to the deficiencies) (citing United States ex rel. Austin v. W. Elec. Co., 337 F.2d  
17 568, 574-75 & n. 19 (9th Cir. 1964) (holding that court properly considered technically defective  
18 affidavits submitted in connection with summary judgment motion in light of opponent's failure  
19 to object); Scharf v. U.S. Attorney Gen., 597 F.2d 1240, 1243 (9th Cir. 1979) ("Generally ...  
20 formal defects [such as an affidavit not being based on personal knowledge] are waived absent  
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23 documents involving another prisoner and letters from other prisoners, "would be admissible at  
24 trial if the other inmates were called as witnesses.") (citing Fraser, 342 F.3d at 1036); and Santa  
25 Ana Police Officers Ass'n v. City of Santa Ana, 723 F. App'x 399, 402 (9th Cir. 2018) (affirming  
26 district court's granting of summary judgment on Plaintiffs-Appellants' 42 U.S.C. § 1983 claim  
27 and finding that the court did not improperly rely on Defendants' exhibits because they are not  
28 authenticated business records as that would "ignore[] the fact that evidence that is not  
currently in a form that is admissible at trial is 'admissible for summary judgment purposes [if  
it] 'could be presented in an admissible form at trial.'" (citing Fonseca v. Sysco Food Servs. of  
Ariz., Inc., 374 F.3d 840, 846 (9th Cir. 2004) (quoting Fraser, 342 F.3d at 1037)).

1 a motion to strike or other objection....”).

## 2 **DISCUSSION**

### 3 **A. First Amendment Retaliation Claim Against Defendant Martinez**

4 Plaintiff alleges that Defendants Martinez, Godinez, Silva, and LaRocco violated his First  
5 Amendment right to free speech by retaliating against him for filing complaints and that they  
6 conspired to chill Plaintiff’s free speech “through intimidation, harassment, retaliation, physical  
7 and verbal abuse and eventual assault.” FAC at 13. Plaintiff alleges that at the beginning of  
8 November 2013, he was harassed by Defendant Martinez who excessively searched Plaintiff’s  
9 person and cell and denied Plaintiff recreational activities, essentially confining Plaintiff to his  
10 cell. Id. at 3. When Plaintiff complained to Defendant Martinez’ supervisor, Defendant Martinez  
11 told Plaintiff “I’m going to get you.” Id. Three days later, on November 13, 2013, Defendant  
12 Martinez prepared a false Rules Violation Report (“RVR”) stating that Plaintiff refused to provide  
13 a urine sample for a drug test. Id. at 4. Plaintiff alleges the RVR was “false.” Id. Plaintiff  
14 alleges that after the RVR, Defendant Martinez continued to perform daily searches of Plaintiff’s  
15 cell and to deny Plaintiff recreational time which led Plaintiff to again complain to Defendant  
16 Martinez’ supervisors. Id. at 4. Plaintiff’s cell was later searched by Defendant Godinez who  
17 confiscated and destroyed some of Plaintiff’s property. Id. When Plaintiff requested that  
18 Defendant Godinez return his property, Defendant Godinez responded with “[a]re you going to  
19 tell on me too?” Oppo. at 9. Plaintiff alleges that Defendant Martinez conspired with Defendant  
20 Godinez and others to “silence [P]laintiff’s complaints.” Id.

21 Defendants contend that Plaintiff’s retaliation claim against Defendant Martinez is barred  
22 by the favorable-termination doctrine set forth in Heck v. Humphrey, 512 U.S. 477, 489 (1994)  
23 because the RVR upon which he bases his claim has not been invalidated or overturned.<sup>2</sup> MSJ

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24  
25 <sup>2</sup> Defendants state that “Plaintiff alleges a single claim for retaliation against Martinez.” MSJ at  
26 5. However, a careful review of the FAC shows that Plaintiff also is alleging a conspiracy claim  
27 against Defendant Martinez. See FAC at 13 (“Defendants Martinez, Godinez, Silva, and LaRocco  
28 violated plaintiff’s First Amendment right to Free Speech collectively through a conspiracy to chill  
the effects of plaintiff’s complaints through intimidation, harassment, retaliation, physical and  
verbal abuse and eventual assault”); see also Oppo. at 8 (“Plaintiff is challenging defendant

1 at 5-6. Plaintiff responds that the Heck bar does not apply to his retaliation claims against  
2 Defendant Martinez because Plaintiff is not attacking just the false disciplinary report; he is  
3 challenging all of the retaliation he suffered at the hand of Defendant Martinez as well as the  
4 conspiracy with other officers. *Oppo*. at 10.

5 1. Legal Standard

6 The Supreme Court announced the “favorable termination doctrine” by holding that  
7 in order to recover damages for allegedly unconstitutional conviction or  
8 imprisonment, or for other harm caused by actions whose unlawfulness could  
9 render a conviction or sentence invalid, a § 1983 plaintiff must prove that the  
10 conviction or sentence has been reversed on direct appeal, expunged by executive  
11 order, declared invalid by a state tribunal authorized to make such a determination,  
12 or called into question by a writ of habeas corpus.  
13 Heck, 512 U.S. at 486-87. “Thus, when a state prisoner seeks damages in a § 1983 suit, the  
14 district court must consider whether a judgment in favor of the plaintiff would necessarily imply  
15 the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless  
16 the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” *Id.*  
17 at 487. The favorable termination doctrine has been extended to prison disciplinary actions  
18 involving a loss of good-time credits. *See Edwards v. Balisok*, 520 U.S. 641, 643-44 (1997).  
19 However, the doctrine does not prohibit a civil rights claim if the claim does not necessarily  
20 implicate the underlying disciplinary action. *See Sevilla v. Maldonado*, 2017 WL 4325343, at \*2  
(S.D. Cal. Sept. 29, 2017) (citing Muhammad v. Close, 540 U.S. 749, 754-55 (2004)).

21 2. Analysis

22 Defendants argue that Plaintiff’s retaliation claim against Defendant Martinez is “*Heck*-  
23 barred because the rules violation report upon which his claim is based has not been invalidated  
24 or overturned.” MSJ at 6. The RVR was the result of a search that was conducted by Defendant

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25  
26 Martinez’s . . . retaliatory actions in their totality as a violation of free speech, which involved .  
27 . . . enlisting other officers in a conspiracy to retaliate against and punish plaintiff”), 9 (Martinez  
28 enlisted other officers to accomplish his goal to silence plaintiff’s complaints”), and 10 (Martinez  
is the linchpin in the retaliation because he began the retaliation and instigated others to do so  
as well on his behalf”).



1 Martinez after he smelled marijuana coming from Plaintiff's cell. ECF No. 63-2, Declaration of  
2 John P. Walters in Support of Defendants' Motion for Summary Judgment ("Walters Decl.") at  
3 Exh. B. While the search did not end with Defendant Martinez finding any marijuana, he did  
4 find ashes in the toilet. Id. When Defendant Martinez ordered Plaintiff and his cellmate to  
5 submit to a urinalysis test, Plaintiff refused. Id. After a review of his RVR, Plaintiff was found  
6 guilty of refusing a urinalysis. Id. He was then

7 Assessed 30 days of Parole Credit forfeiture for a Division "F" offense a 1st offense.

8 Assessed 30 days of Loss of Privileges (LOP), to include the following : Minimum  
9 canteen only, no quarterly packages, no telephone privileges, and no night-time  
10 yard/dayroom privileges, pursuant to 3315(f)(5)(B) as a 1st offense, to commence  
on 11/29/2013 and terminate 12/28/2013.

11 Place[d] on one (1) year Mandatory Random Drug Testing (MRDT) with a minimum  
12 of 1 test per month, effective 11/29/2013 through 11/28/2014, per CCR 3315(f)(4)  
13 as a 1st offense, and is hereby informed of the requirements pursuant to  
3315(f)(4)(D).

14 Assessed 90 days of Loss of Visits effective 11/29/2013 through 2/28/2014, to be  
15 followed by 90 days of Non-Contact Visiting effective 2/29/2014 through  
16 5/29/2014, pursuant to CCR 3315( £ ) (5)(1) as a 1st offense.

17 Refer[red] to Classification for placement in "Narcotics Anonymous" or related  
18 program to the extent that such a program is available and the inmate meets all  
eligibility requirements, pursuant to CCR 3315(f)(5)(J) , as a 1st offense.

19 Id. Plaintiff does not allege that this RVR conviction has been invalidated, seek to overturn the  
20 disciplinary findings, seek to shorten his sentence or seek expungement. Oppo. at 8.  
21 Accordingly, to the extent Plaintiff's retaliation claim against Defendant Martinez is based on the  
22 November 13, 2013 RVR and conduct alleged therein, the Court **RECOMMENDS** that  
23 Defendants' summary judgment be **GRANTED** based on the Heck doctrine. However, Plaintiff's  
24 retaliation claim is not based only on the RVR. Plaintiff also alleges that beginning around  
25 November 5, 2013, eight days prior to the issuance of the RVR, Defendant Martinez "conducted  
26 multiple daily excessive and unnecessary searches of plaintiff's persona [sic] and cell with no  
27 legitimate penological interests, calculated to harass and intimidate plaintiff into stopping his  
28 complaints" and restricted Plaintiff to his cell, depriving him of activities and programs. Oppo.

1 at 9; see also FAC at 3. Plaintiff further contends that the retaliation continued after the RVR  
2 was issued when Defendant Martinez enlisted Defendant Godinez to also search Plaintiff's cell.  
3 Id. Finally, Plaintiff explicitly states that his "claims against Martinez are clearly not attacking  
4 the false disciplinary report as it is only incidental to the main issue, retaliation against free  
5 speech." Id. at 10. Defendants do not argue that Plaintiff's retaliation claims regarding the  
6 searches that took place of his person and his cell unrelated to the search described in the RVR  
7 are barred by Heck. A finding that the non-RVR related searches that Plaintiff experienced were  
8 retaliatory in nature would not necessarily invalidate his loss of good time credits for the RVR  
9 violation. Accordingly, to the extent Plaintiff's retaliation claim against Defendant Martinez is  
10 based upon conduct unrelated to the conduct underlying the RVR, the Court **RECOMMENDS**  
11 that Defendants' motion be **DENIED**. Defendants do not move for summary judgment on  
12 Plaintiff's retaliation claims against any of the other Defendants or on any basis other than a  
13 Heck bar. MSJ. Accordingly, those claims will move forward.

14 **C. Eighth Amendment Claim - Failure to Protect**

15 Plaintiff alleges that he was subjected to cruel and unusual punishment when Defendant  
16 Garcia "fail[ed] to intervene and stop defendants Silva and LaRocco from physically assaulting  
17 plaintiff and by her failure to report her observations to her superiors or write a report as a  
18 witness to plaintiff's assault." FAC at 13. Defendants argue that Defendant Garcia is entitled to  
19 summary judgment "because she did not witness the incident, and even if she did, there is no  
20 evidence that she could have prevented it." MSJ at 3-5. Plaintiff responds that Defendant Garcia  
21 is not entitled to summary judgment because "conflicting evidence exists that creates a genuine  
22 issue of material fact." Oppo. at 3. Plaintiff notes that several witnesses have provided  
23 declarations contradicting Defendant Garcia's position that she did not witness Plaintiff's assault  
24 and that Defendant Garcia presents no evidence apart from "her own self-serving statements."  
25 Id.

26 1. Legal Standard

27 Under the Eighth Amendment, prison officials must "take reasonable measures to  
28 guarantee the safety of the inmates." Lemons v. A. Camarillo, 2017 WL 3492146, at \*5 (S.D.

1 Cal. Aug. 15, 2017) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984); (citing DeShaney  
2 v. Winnebago County Dep't of Social Services, 489 U.S. 189, 199-200 (1989) (“[W]hen the State  
3 takes a person into its custody and holds him there against his will, the Constitution imposes  
4 upon it a corresponding duty to assume some responsibility for his safety and general well-  
5 being.”)). To establish a violation of this duty, an inmate “must show that he is incarcerated  
6 under conditions posing a substantial risk of serious harm” and that the prison official acted with  
7 “deliberate indifference” to the inmate's health or safety. Farmer v. Brennan, 511 U.S. 825, 833  
8 (1994). Additionally, because “only the unnecessary and wanton infliction of pain implicates the  
9 Eighth Amendment,” evidence must exist to show the defendant acted with a “sufficiently  
10 culpable state of mind.” Lemons, 2017 WL 3492146, at \*5 (quoting Wilson v. Seiter, 501 U.S.  
11 294, 297 (1991) (internal quotation marks, emphasis and citations omitted)) and (citing Hudson,  
12 503 U.S. at 5, 8)).

13 In a failure to protect case, a sufficiently culpable state of mind “is one of ‘deliberate  
14 indifference’ to inmate health or safety.” Lemons, 2017 WL 3492146, at \*5 (quoting Farmer,  
15 511 U.S. at 834). Deliberate indifference to an inmate’s well-being is shown when prison officials  
16 know of and consciously disregard an excessive risk of harm to an inmate’s health or safety.  
17 Farmer, 511 U.S. at 837. “[T]he official must both be aware of facts from which the inference  
18 could be drawn that a substantial risk of serious harm exists, and he must also draw the  
19 inference.” Id. An inmate is not required to show that prison officials believed the serious harm  
20 would occur. Id. at 842. “[I]t is enough that the official acted or failed to act despite his  
21 knowledge of a substantial risk of serious harm.” Id. A prison official's knowledge of the risk  
22 “can be proven through circumstantial evidence, such as by showing that the risk was so obvious  
23 that the official must have known about it.” Stone v. Nielsen, 2018 WL 1512592, at \*5–6 (D.  
24 Idaho Mar. 27, 2018) (quoting Johnson v. Johnson, 385 F.3d 503, 524 (5th Cir. 2004)). Mere  
25 negligent failure to protect a prisoner from assault does not comprise a constitutional violation.  
26 See Davidson v. Cannon, 474 U.S. 344, 347-48 (1986).

27 “A prison official can violate a prisoner's Eighth Amendment rights by failing to intervene.”  
28 Robins v. Meecham, 60 F.3d 1436, 1442 (9th Cir.1995). “[H]owever, officers can be held liable

1 for failing to intercede only if they had an opportunity to intercede.” Campbell v. Murrietta,  
2 2015 WL 5997169, at \*3 (C.D. Cal. May 22, 2015) (quoting Cunningham v. Gates, 229 F.3d  
3 1271, 1289 (9th Cir.2000), as amended (Oct. 31, 2000); see also Richards v. Foutch, 2014 WL  
4 4449822 at \*7 (C.D. Cal. Sept. 9, 2014). (“A prison official may be held liable for such failure to  
5 intervene, however, only if the official was aware that the inmate faced a specific risk of harm  
6 from the other prison official's use of excessive force and had a reasonable opportunity to  
7 intervene to stop it.”)).

## 8 2. Analysis

9 Defendants argue that Defendant Garcia is entitled to summary judgment because she  
10 did not witness the alleged assault and, even if she did, there is no evidence that she could have  
11 prevented it from occurring. MSJ at 3. Defendants cite to Defendant Garcia’s declaration to  
12 support their position. Id. at 4. In the declaration, which was signed under penalty of perjury,  
13 Defendant Garcia states that after opening the door of the dining hall and ordering Inmate  
14 Florence to keep walking, she went back inside the dining hall where she was working and did  
15 not see the incident that Plaintiff alleges followed. ECF No. 63-3, Declaration of Defendant D.  
16 Garcia (“Garcia Decl.”) at ¶ 3-¶ 4; see also Oppo. at 37-38. She further declares that she did  
17 not complete a CDCR 837 Crime/Incident Report because she did not witness or participate in  
18 the alleged incident. Id. at ¶ 5.

19 The Crime/Incident Reports from Defendants Arguilez, LaRocco, Silva, and Nevarez and  
20 Security Patrol Officer Cruz also support Defendants’ argument that Defendant Garcia did not  
21 witness the incident. FAC at 43-56. In the reports, the officers provide their accounts of the  
22 Crime/Incident and identify all witnesses to the Crime/Incident. Id. The Crime/Incident Reports  
23 completed by Officer Cruz and Defendants Arguilez, LaRocco, Silva, and Nevarez do not list  
24 Defendant Garcia as a witness to the alleged incident. Id. at 48-57; see also Oppo. at 40-41.  
25 Additionally, none of the narratives in the Crime/Incident Reports completed by Officer Cruz and  
26 Defendants Arguilez, LaRocco, Silva, and Nevarez mention Defendant Garcia in any way. FAC  
27 at 43-56.

28 Plaintiff opposes Defendants’ motion and argues that genuine issues of material fact exist.

1 Oppo. at 2-7. In support of his position, Plaintiff submitted evidence, including five inmate  
2 declarations that were signed under the penalty of perjury, that he argues demonstrate that  
3 Defendant Garcia was present during the incident and witnessed his alleged assault. FAC at 58-  
4 63. Inmate Brown's declaration states that Defendant LaRocco ordered Plaintiff to stop walking,  
5 at which point Defendant Garcia exited the chow hall and followed Defendant LaRocco towards  
6 Plaintiff. Id. at 58; see also Oppo. at 45. Immediately thereafter, Defendant LaRocco ordered  
7 Plaintiff to get down, the prison PA system ordered everyone to get down, and Defendant Silva  
8 charged at Plaintiff who was kneeling on the ground. Id. Inmate Burns declares that after  
9 Plaintiff was slammed to the ground by a correctional officer who yanked Plaintiff's arm and  
10 bounced on his back, a Sergeant came over to see what was going on and was informed by a  
11 correctional officer that Plaintiff was resisting and that Inmate Florence said "Get the fuck out  
12 of my way to Garcia," which Inmate Florence denied. Id. at 60; see also Oppo. at 48. Inmate  
13 Burns does not state that he heard the comment or saw Defendant Garcia. Id. Inmate Houston  
14 declares that after the prison PA system ordered everyone to get down, "[a] female officer, who  
15 was standing several feet from them stepped aside" and Defendant Silva slammed Plaintiff into  
16 the ground. Id. at 61; see also Oppo. at 43. Another female officer then ordered Houston to  
17 sit on the ground. Id. Inmate Florence declares that he was exiting the chow hall with other  
18 inmates when he noticed Defendant Silva holding Inmate Houston against the wall. Oppo. at  
19 50. Inmate Florence stopped to watch and Defendant Garcia told Inmate Florence and the  
20 others to keep walking. Id. As they complied, Inmate Florence heard Defendant Silva tell  
21 Defendants Garcia and LaRocco to get Plaintiff. Id. Defendants LaRocco and Garcia then passed  
22 Inmate Florence. Id. Inmate Florence next declares that Defendant Garcia stopped suddenly  
23 in front of him and ordered him and others to stop. Id. Defendant Garcia refused to move out  
24 of Inmate Florence's way when he asked her to do so. Id. Shortly thereafter, Defendant  
25 LaRocco ordered Plaintiff to get down and Defendant Silva came over to Plaintiff and began  
26 yanking his arms and forcing Plaintiff to the ground. Id. Inmate Florence notes that he filed an  
27 Inmate Appeal because the officers involved filed false reports and attempted to cover up the  
28 fact that Defendant Garcia was present during the incident. Id. at 51.

1 Finally, Plaintiff's declaration states that after he exited the chow hall, he saw Inmate  
2 Houston "being accosted" and slowed down to watch. Oppo. at 29. Defendant Garcia then  
3 exited the chow hall and ordered Plaintiff and others to keep walking. Id. Defendants Garcia  
4 and LaRocco began following Plaintiff, eventually ordering him to stop. Id. At that point,  
5 Defendant LaRocco ordered Plaintiff to get down as Defendant Garcia stood several feet away  
6 watching the exchange. Id. Plaintiff was then blindsided and assaulted. Id. at 30. While he  
7 lost track of Defendant Garcia during the assault, once it was over and Plaintiff was handcuffed,  
8 he noticed Defendant Garcia in the same position she had been before the assault. Id.

9 Here, the evidence submitted by Defendants conflicts with the evidence submitted by  
10 Plaintiff creating triable issues of material fact as to whether Defendant Garcia was present  
11 during the alleged assault, had the opportunity to intervene, and deliberately failed to do so.  
12 Accordingly, the Court **RECOMMENDS** that Defendants' motion for summary judgment on this  
13 issue be **DENIED**.

14 **D. Eighth Amendment Claim – Deliberate Indifference to Medical Needs**

15 Plaintiff alleges that he was denied adequate medical care in violation of his Eighth  
16 Amendments rights by Defendant Casian. FAC at 8. Specifically, Plaintiff alleges that after  
17 submitting requests for medical care, he met with Defendant Casian who refused to examine  
18 him or provide him with medical treatment, and who improperly cancelled all of his permanent  
19 medical accommodation chronos and denied him an MRI despite a recommendation that one be  
20 performed. Id. at 8-10.

21 Defendants contend that Defendant Casian is entitled to summary judgment. MSJ at 6-  
22 9. Defendants note that the medical records show that Plaintiff received professional and  
23 responsive medical care from Defendant Casian. Id. at 7.

24 Plaintiff argues that Defendant Casian is not entitled to summary judgment as she denied  
25 him appropriate treatment for months and only provided treatment after Plaintiff filed numerous  
26 grievances. Oppo. at 12. Additionally, Plaintiff argues that Defendant Casian arbitrarily revoked  
27 his medical chronos despite the "unrefutable" fact that the chronos were intended to be  
28 permanent. Id. at 22-23. Plaintiff further argues that Defendant Casian's treatment of Plaintiff

1 extended well beyond negligence and was clearly deliberate indifference. Id. at 20-21.

2 1. Legal Standard

3 "Prisoners can establish an Eighth Amendment violation with respect to medical care if  
4 they can prove there has been deliberate indifference to their serious medical needs." Hunt v.  
5 Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989) (citing Estelle v. Gamble, 429 U.S. 97, 104  
6 (1976)). Such a claim has two elements: "First, the plaintiff must show a serious medical need  
7 by demonstrating that failure to treat a prisoner's condition could result in further significant  
8 injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the  
9 defendant[s'] response to the need was deliberately indifferent." Wilhelm v. Rotman, 680 F.3d  
10 1113, 1122 (9th Cir. 2012) (quoting Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006)); see  
11 also McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on other grounds by  
12 WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997) ("[t]he existence of an injury that a  
13 reasonable doctor or patient would find important and worthy of comment or treatment; the  
14 presence of a medical condition that significantly affects an individual's daily activities; or the  
15 existence of chronic and substantial pain are examples of indications that a prisoner has a  
16 'serious' need for medical treatment."). By demonstrating the existence of a serious medical  
17 need, a prisoner satisfies the objective requirement for proving an Eighth Amendment violation.  
18 See Farmer, 511 U.S. at 834.

19 If a prisoner establishes the existence of a serious medical need, he must then show that  
20 prison officials responded to the serious medical need with deliberate indifference. See id. Proof  
21 that a defendant acted with deliberate indifference is required to satisfy the subjective prong of  
22 an Eighth Amendment claim. See id. Deliberate indifference requires proof of facts sufficient  
23 to demonstrate that a prison official acted with a culpable state of mind. Wilson v. Seiter,  
24 501 U.S. 294, 298-99 (1991). "Under the Eighth Amendment's standard of deliberate  
25 indifference, a person is liable for denying a prisoner needed medical care only if the person  
26 'knows of and disregards an excessive risk to inmate health and safety.'" Gibson v. Cty of  
27 Washoe, Nev., 290 F.3d 1175, 1187-88 (9th Cir. 2002) (quoting Farmer, 511 U.S. at 837),  
28 overruled on other grounds by Castro v. Cty. of Los Angeles, 833 F.3d 1060 (9th Cir. 2016).

1 Deliberate indifference to serious medical needs of prisoners “may appear when prison  
2 officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the  
3 way in which prison physicians provide medical care.” Colwell v. Bannister, 763 F.3d 1060, 1066  
4 (9th Cir. 2014) (quoting Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988)).  
5 However, not “every claim by a prisoner that he has not received adequate medical treatment  
6 states a violation of the Eighth Amendment.” Estelle, 429 U.S. at 105. “[I]n the medical context,  
7 an inadvertent failure to provide adequate medical care cannot be said to constitute ‘an  
8 unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of mankind.’”  
9 Id. at 105-06. The indifference to medical needs must be substantial; inadequate treatment  
10 due to “mere malpractice, or even gross negligence, does not suffice” for a constitutional  
11 violation. Bennett v. Dhaliwal, 721 F. App’x 577, 579 (9th Cir. 2017) (quoting Wood v.  
12 Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990)); see also Estelle, 429 U.S. at 106 (“Medical  
13 malpractice does not become a constitutional violation merely because the victim is a prisoner.”).  
14 Accordingly, a mere delay in medical treatment, without a showing of resulting harm, is  
15 insufficient to support a deliberate indifference violation. See Edwards v. High Desert State  
16 Prison, 615 F. App’x 457 (9th Cir. 2015) (citing Wood, 900 F.2d at 1335); see also Colwell, 763  
17 F.3d at 1081. “In determining deliberate indifference, we scrutinize the particular facts and look  
18 for substantial indifference in the individual case, indicating more than mere negligence or  
19 isolated occurrences of neglect.” Wood, 900 F.2d at 1334 (citation omitted).

20 “A defendant must purposefully ignore or fail to respond to a prisoner’s pain or possible  
21 medical need in order for deliberate indifference to be established.” McGuckin, 974 F.2d at  
22 1060. Facts indicating that the official “sat idly by as [the prisoner] was seriously injured despite  
23 the defendant’s ability to prevent the injury” or that the official “repeatedly failed to treat an  
24 inmate properly or that a single failure was egregious strongly suggests that the defendant’s  
25 actions were motivated by ‘deliberate indifference’ to the prisoner’s medical needs.” Id.  
26 at 1060-61. “In sum, the more serious the medical needs of the prisoner, and the more  
27 unwarranted the defendant’s actions in light of those needs, the more likely it is that a plaintiff  
28 has established ‘deliberate indifference’ on the part of the defendant.” Id. at 1061. Isolated



1 incidents relative to a plaintiff's overall treatment suggests no deliberate indifference. Id. at  
2 1060. "Deliberate indifference is a high legal standard." Toguchi v. Chung, 391 F.3d 1051,  
3 1060 (9th Cir. 2004).

4 Because Defendants are the moving parties, they "bear[] the initial responsibility" of  
5 identifying those portions of the record which they believe "demonstrate the absence of a  
6 genuine issue of material fact." Celotex, 477 U.S. at 323.

7 2. Failure to Treat, Provide Pain Relief, and Order an MRI

8 Plaintiff alleges that Defendant Casian was deliberately indifferent to his serious medical  
9 needs by refusing to provide treatment or adequate pain management and by refusing to order  
10 an MRI. FAC at 8-12.

11 a. Medical Appointments and Procedures

12 The undisputed medical records reveal the following treatment.

13 On January 21, 2014, Dr. Casian examined Plaintiff as part of his chronic care follow-up.  
14 Walters Decl. at Exh. C at 16. Dr. Casian found that Plaintiff's blood pressure was well controlled  
15 and noted that she would continue to monitor Plaintiff's urolithiasis. Id. Dr. Casian provided  
16 Plaintiff with a cervical pillow and updated his Comprehensive Accommodation Chrono. Id. at  
17 16 and 76.

18 On February 9, 2014, Plaintiff submitted a Health Care Service Request Form seeking  
19 help for a sharp shooting pain in his neck that radiated down his left arm, numbness, and a pins  
20 and needles" sensation. FAC at 113; see also Walters Decl. at Exh. C. at 19. Plaintiff stated  
21 that the injury was due to the use of excessive force against him on February 7, 2014. Id.  
22 Nurse T. Stephenson met with Plaintiff on February 12, 2014 to discuss his concerns. She did  
23 not refer Plaintiff for additional care.<sup>3</sup> Id.

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24  
25  
26 <sup>3</sup> On February 13, 2014, Plaintiff submitted an Inmate/Parolee Appeal seeking \$500,000 in  
27 damages for being assaulted and hurt along with physical therapy for his neck. FAC at 71.  
28 Plaintiff wrote that he had severe pain in his neck, left arm resulting in a limited range of motion  
and also experienced dizziness, headaches, and numbness in his arms and fingers after being  
assaulted by staff. Id.

1 On February 24, 2014, Plaintiff submitted a Health Care Service Request Form seeking  
2 help for extreme pain in his neck, left arm, and hand along with numbness and tingling pain.  
3 FAC at 114; see also Walters Decl. at Exh. C. at 23. Plaintiff stated that the pain was due to the  
4 use of excessive force against him. Id. Plaintiff also complained that he had headaches,  
5 difficulty sleeping or sitting in certain positions, lightheadedness, dizziness, and difficulty  
6 showering due to limited mobility. Id. A nurse met with Plaintiff two days later to discuss his  
7 concerns and referred him to a primary care provider in two weeks. Walters Decl. at Exh. C. at  
8 24-26. The nurse also told Plaintiff to ice or heat as appropriate, continue with his Naproxen,  
9 and to let the staff know if his dizziness and lightheadedness returned. Id.

10 On March 12, 2014, Plaintiff was examined by Defendant Casian in response to the two  
11 requests for medical care that he submitted on February 9 and 24, 2014 due to sharp shooting  
12 pains in his neck which radiated down his left arm and resulted in intermittent numbness and  
13 pins and needles sensations, headaches, dizziness, feeling lightheaded, and decreased mobility  
14 [see FAC at 113-114], all of which Plaintiff alleged was the result of being beaten by other  
15 Defendants. Walters Decl. at Exh. C at 28-30; see also Oppo. at 93. Defendant Casian noted  
16 that Plaintiff was referred for follow-up care after complaining of neck pain to an RN after a  
17 confrontation with a correctional officer on February 7, 2014. Walters Decl. at Exh. C at 28; see  
18 also Oppo. at 93. Defendant Casian examined Plaintiff and noted that Plaintiff was able to  
19 perform his daily activities, ambulate without assistance, and that his physical examination was  
20 unremarkable. Id. Defendant Casian wrote that Plaintiff became uncooperative during the exam  
21 and stated that he would submit a 602. Id. Defendant Casian provided Plaintiff with a temporary  
22 low bunk order for two months. Walters Decl. at Exh. C at 77. Dr. Casian also limited Plaintiff  
23 to "no strenuous activity" and ordered x-rays and a cervical pillow for Plaintiff.<sup>4</sup> FAC at 109; see

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24  
25 <sup>4</sup> On March 18, 2014, Plaintiff submitted an Inmate/Parolee Request. FAC at 91. Plaintiff again  
26 requested that his permanent chronos be reinstated and that he be assigned a new primary care  
27 provider since Dr. Casian "arbitrarily & capriciously cancelled [his] chronos" and refused to  
28 answer him in violation of CCR 3086. Id. On March 19, 2014, Plaintiff submitted a  
Patient/Inmate Health Care Appeal seeking permanent reinstatement of his medical chronos,  
specifically, a lower bunk placement, a nineteen-pound lifting restriction and no manual labor or

1 also Oppo. at 96; Walters Decl. at Exh. C at 77.

2 On March 23, 2014, Plaintiff submitted two requests for medical care seeking physical  
3 therapy, pain medication, the reinstatement of his medical chronos, and refills on his Naproxen  
4 and ibuprofen. Walters Decl. at Exh. C at 31; see also FAC at 115 and 118. Plaintiff alleged  
5 that he was experiencing pain, pins and needles, numbness, and shooting pains, and could not  
6 use his left arm or rotate his neck. Walters Decl. at Exh. C at 31; see also FAC at 115. Plaintiff  
7 met with a nurse to discuss these concerns on March 25, 2014. Walters Decl. at Exh. C at 32-  
8 34. Plaintiff was referred to meet with his primary care provider in two weeks, told to heat or  
9 ice as appropriate, and to take Naproxen while symptoms persisted. Id. The nurse noted that  
10 Plaintiff was stable when he left. Id.

11 Plaintiff was examined by NP Wiley on April 17, 2014 to follow-up on one of his 602  
12 appeals for chronic pain in his neck and back. Id. at 40. NP Wiley ordered trigger point injections  
13 to assist with pain relief and noted a negative straight leg test, that Plaintiff was unable to bend  
14 his knees to his chest and claimed to be unable to heel walk, or bend and touch his toes or  
15 knees.<sup>5</sup> Id.

16 On May 5, 2014, Plaintiff submitted another health services request form complaining of  
17 tingling in his arm and difficulty sleeping, lifting things, and showering. FAC at 116. Plaintiff  
18 requested an MRI of his neck and back in light of his x-ray results. Id. Plaintiff was seen by a  
19 nurse that day who told Plaintiff to ice or heat as appropriate. Walters Decl. at Exh. C at 44-46.  
20 The nurse noted that Plaintiff had a prescription for Naproxen and that he was stable upon  
21 release. Id.

22 On May 13, 2014, Plaintiff submitted a Patient/Inmate Health Care Appeal seeking proper  
23 medical treatment including a neck and back MRI, pain management medications, physical

24 \_\_\_\_\_  
25 work requiring lifting or brief stooping. Id. at 89-90; see also Oppo. at 98, 101.

26 <sup>5</sup> On April 30, 2014, Plaintiff submitted an Inmate/Parolee Request for Interview, Item, or Service  
27 claiming that he had been "refused chronic medical care services" and seeking assistance. Oppo.  
28 at 112.

1 therapy, permanent chronic for a lower bunk and nineteen-pound lifting restriction, for injuries  
2 he received on February 7, 2014 when Defendant Silva use excessive force on Plaintiff and hurt  
3 Plaintiff's neck, left arm, shoulder, and back. FAC at 111; see also Oppo. at 114. Plaintiff states  
4 that he submitted four requests for medical care for diagnosis and treatment and was twice  
5 interviewed by nurses but kicked out of his appointment with his primary care provider, Dr.  
6 Casian, who accused Plaintiff of faking his injuries and had Plaintiff escorted from her office  
7 without providing any medical treatment. Id. at 112; see also Oppo. at 116.

8 On May 19, 2014, Plaintiff was evaluated by Defendant Casian after an RN referral for  
9 neck pain. Oppo. at 121. Dr. Casian wrote that Plaintiff represented that he was independent  
10 with his activities of daily living and able to ambulate without assistive devices despite having  
11 pain radiate down his left shoulder, intermittent cervicgia with upper extremity numbness and  
12 headache. Id. Plaintiff reported pain relief with naproxen and a cervical pillow. Id. Plaintiff  
13 also reported worsening vision and requested eyeglasses. Id. Defendant Casian found that  
14 Plaintiff had no significant limitation in functional capacity or red flag symptoms and she referred  
15 Plaintiff to physical therapy, education for home exercises, and trigger point therapy. Id. She  
16 also submitted a referral for optometry. Id.

17 On June 11, 2014, Plaintiff had an appointment with Dr. Bates regarding his complaints  
18 of left neck pain. Walters Decl. at Exh. C at 48. Dr. Bates discussed left neck prolotherapy with  
19 Plaintiff who agreed to try it. Id. Dr. Bates warned Plaintiff that there would be two days of  
20 discomfort before any improvement and performed the procedure which Plaintiff tolerated well.  
21 Id.

22 On July 3, 2014, physical therapist David Clifton recommended referring Plaintiff back to  
23 his primary care doctor and providing an MRI or injection therapy. FAC at 127.

24 On July 23, 2014, Plaintiff had an appointment with Dr. Bates regarding his complaints  
25 of left neck pain. Oppo. at 126. Dr. Bates provided another left neck prolotherapy to Plaintiff.  
26 Id. Dr. Bates noted that Plaintiff had been seeing the physical therapist with good results. Id.

27 On July 28, 2014, Defendant Casian examined Plaintiff as part of his chronic care follow-  
28 up and in response to his form 602 log # 14051135. Walters Decl. at Exh. C at 52. At the

1 appointment, Plaintiff requested an MRI of his neck, back, and shoulder along with pain  
2 medication, physical therapy, and lifting restrictions. Id. Dr. Casian noted that Plaintiff was  
3 enrolled in physical therapy and reported significant improvement of symptoms. Id. Plaintiff  
4 also received trigger point injections on June 11, 2014 and July 23, 2014. Id. Dr. Casian updated  
5 Plaintiff's temporary lower bunk restriction and lifting restrictions and determined that an MRI  
6 was not medically necessary at that time but noted that she would consider an imagining  
7 evaluation for persistent or worsening symptomology. Id. at 52 and 78.

8 On August 22, 2014, Dr. Kristen Dean evaluated Plaintiff for a thirty-day follow-up.  
9 Walters Decl. at Exh. C at 56-57. Dr. Dean noted that Plaintiff complained that his range of  
10 motion had decreased since beginning the injections and that he requested an MRI. Id. Dr.  
11 Dean found no red flag symptoms and recommended that Plaintiff continue physical therapy,  
12 treatments with Dr. Bates, and pain management with Tylenol with the addition of amitriptyline.  
13 Id. Dr. Dean found that no MRI was indicated at the time and to follow up with the primary  
14 care provider in four weeks. Id.

15 Plaintiff followed up with Dr. Gysler on September 12, 2014. Walters Decl. at Exh. C at  
16 58. Dr. Gysler noted that Plaintiff had recently completed physical therapy and that Plaintiff  
17 stated he was "doing very well and that the pain is well controlled the best it has been yet." Id.  
18 Plaintiff's only complaint was that the amitriptyline made him drowsy. Id. Plaintiff opted to  
19 continue the medicine however to see if his reaction to it would improve. Id. Plaintiff also  
20 decided to continue prolotherapy. Id.

21 On November 24, 2014, Plaintiff had an appointment with Dr. Bates regarding his  
22 complaints of left neck pain. Walters Decl. at Exh. C at 63. Dr. Bates noted that Plaintiff stated  
23 that overall, he was better than on previous visits and noted that Plaintiff's range of motion had  
24 improved since his last appointment. Id. Dr. Bates gave Plaintiff a trigger point injection and  
25 set another visit for 120-180 days. Id. at 64.

26 Plaintiff had a follow-up appointment with Dr. Gysler on November 25, 2014. Id. at 65.  
27 Dr. Gysler updated Plaintiff's chrono to reflect glasses and cotton bedding. Id. He also noted  
28 his concern with atrophy and that he would request an MRI, increase Plaintiff's amitriptyline,

1 and follow up in sixty days. Id. On November 26, 2014, Dr. Gysler ordered an MRI of the C-  
2 Spine for Plaintiff and noted a principle diagnosis of cervicgia. FAC at 132; see also Oppo. at  
3 135. Dr. Gysler further noted that Plaintiff was undergoing injections and physical therapy and  
4 had right paracervical musculature atrophy along with c/o radiculopathy and that Plaintiff should  
5 be assessed for cord compression. Id. The MRI results were compared to Plaintiff's March 14,  
6 2014 x-rays and showed a spinal cord that appeared normal in size, shape, and signal intensity  
7 with no tonsillar ectopia seen. Id. at 134; see also Oppo. at 137. The MRI impression stated  
8 "moderate multilevel cervical spondylosis." Id.

9 b. Analysis

10 Plaintiff argues that Defendant Casian was deliberately indifferent to his medical needs  
11 because she denied him medical treatment for several months, refused to order an MRI, and  
12 only treated him after he filed various medical grievances. FAC at 8-10; see also Opp. at 12-13.  
13 The undisputed medical evidence shows that Defendant Casian (1) examined Plaintiff on multiple  
14 occasions before and after his alleged assault, (2) provided Plaintiff with a cervical pillow  
15 accommodation, (3) provided Plaintiff with a low bunk accommodation, (4) limited Plaintiff to  
16 no strenuous activity, (5) referred Plaintiff to physical therapy and to be educated about home  
17 exercises, (6) referred Plaintiff for trigger point injections, (7) referred Plaintiff to optometry, (8)  
18 ordered x-rays for Plaintiff and (9) twice extended Plaintiff's low bunk accommodation. Walters  
19 Decl. at Exh. D. at 77-78; see also Oppo. at 121. Plaintiff does not dispute that Defendant  
20 Casian performed the listed activities.

21 Plaintiff claims that Defendant Casian was deliberately indifferent to his serious medical  
22 needs because she denied him medical treatment for several months. Specifically, he suffered  
23 without "medical intervention, treatment, and pain-relieving services . . . for over 120 days" and  
24 did not receive physical therapy or steroid injections for months after complaining and  
25 prescription pain medication, an MRI, and an outside consult for almost a year after his assault.  
26 Oppo. at 20. Plaintiff does not present any evidence to support his claim that Defendant Casian  
27 denied him treatment. Rather, the undisputed evidence is that while Defendant Casian only saw  
28 Plaintiff every couple of months, a number of other medical providers examined Plaintiff in the

1 interim. For example, while Plaintiff did not see Defendant Casian immediately after his alleged  
2 assault, he was not left untreated and had medical appointments with Nurse Stephenson who  
3 did not feel it necessary to refer Plaintiff for additional care and another nurse who referred  
4 Plaintiff to a primary care doctor within two weeks, which is when he was examined by  
5 Defendant Casian on March 12, 2014. FAC at 113-114. In addition, between his March 12,  
6 2014 and May 19, 2014 appointments with Defendant Casian, Plaintiff was seen by a nurse on  
7 March 24, 2014, NP Wiley on April 17, 2014, and another nurse on May 5, 2014, and received  
8 various accommodations, prescriptions for Naproxen and ibuprofen, and instructions to ice and  
9 heat as appropriate. Walters Decl. at Exh. C at 32-34, 40, 44-46. In between his May 19, 2014  
10 and July 28, 2014 appointments with Defendant Casian, Plaintiff was seen by Dr. Bates (July 23,  
11 2014) and physical therapist David Clifton (July 3, 2014). Walters Decl. at Exh. C at 48; see  
12 also FAC at 127. Dr. Bates began prolotherapy treatments with Plaintiff and his notes state that  
13 Plaintiff had "been seeing PT with good results." FAC at 129. David Clifton recommended that  
14 Plaintiff get an MRI and/or injection therapy which he received from Dr. Bates. Id. at 127. In  
15 September 2014, Plaintiff reported to Dr. Gysler that his pain was well controlled and the best  
16 it had ever been. Walters Decl. at Exh. C at 58. As such, Plaintiff has not presented any evidence  
17 creating a triable issue of fact to support his claim that Defendant Casian denied Plaintiff medical  
18 treatment for several months or only treated him because he filed a grievance. The evidence  
19 shows that Plaintiff was consistently examined and treated in the months following his assault.  
20 While he was denied an MRI initially because medical staff found that it was not indicated at the  
21 time, Plaintiff was x-rayed, and provided with various forms of treatment from the beginning.  
22 The fact that Plaintiff had to wait longer than he would have preferred for treatment does not  
23 mean that Defendant Casian was deliberately indifferent to his medical care. Even if Defendant  
24 Casian did not get it "right" the first time she examined Plaintiff, inadequate treatment,  
25 negligence, and even gross negligence are not ground for a constitutional violation. See Wood,  
26 900 F.2d at 1334. Plaintiff's disagreement with the type and timing of care does not create a  
27 triable issue of fact. See Kelly, 2018 WL 2106486, at \*2 (E.D. al. May 7, 2018) and Evans v.  
28 Cty. of San Diego, 2009 WL 3709183, at \*12 (S.D. Cal. Nov. 3, 2009) .

1 Plaintiff also argues that Defendant Casian's statements establish that she denied him  
2 medical treatment. Plaintiff alleges that on March 12, 2014, Defendant Casian told Plaintiff that  
3 she thought he was "lying and trying to get narcotic pain medication, don't expect anything from  
4 me." FAC at 8. Plaintiff also alleges that he was forced to leave the appointment without any  
5 treatment and was escorted out of the office when Defendant Casian became "upset and  
6 belligerent." Oppo. at 15. Even assuming the truth of Plaintiff's allegations, the evidence does  
7 not create a triable issue of fact regarding deliberate indifference because despite the alleged  
8 comments and removal from the examination room, it is undisputed that Defendant Casian  
9 interviewed Plaintiff, observed that Plaintiff was able to ambulate without difficulty or assistance  
10 and that his motor strength was 5/5, ordered x-rays, adjusted his chronos including providing a  
11 low bunk, and advised him to continue taking his NSAIDs as needed. FAC at 8; see also Walters  
12 Decl. at Exh. C at 28, Exh. D at 77. The fact that Plaintiff believed that Defendant Casian should  
13 have provided other treatments to alleviate his pain does not mean that she was deliberately  
14 indifferent. See Colwell, 763 F.3d at 1068 ("A difference of opinion between a physician and  
15 the prisoner—or between medical professionals—concerning what medical care is appropriate  
16 does not amount to deliberate indifference.") (quoting Snow v. McDaniel, 681 F.3d 978, 987  
17 (9th Cir. 2012)); see also Kelly, 2018 WL 2106486, at \*2 (same); Evans, 2009 WL 3709183, at  
18 \*12 (Report and Recommendation stating that at "most, Plaintiff has shown a difference of  
19 medical opinion among his treating doctors or a difference in opinion between him and medical  
20 personnel. This is not deliberate indifference, and mere negligence is not sufficient to survive a  
21 motion for summary judgment.") (citing Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996)).  
22 This disagreement also does not create a triable issue of fact regarding the constitutionality of  
23 Defendant Casian's care. Estelle, 429 U.S. at 105. Similarly, while Plaintiff argues that during  
24 his May 19, 2014 appointment with Defendant Casian she informed him that she was only  
25 ordering treatment for Plaintiff because she was "tired of [Plaintiff's] complaints[,]" the  
26 undisputed evidence shows that she examined Plaintiff, and referred him to physical therapy,  
27 home exercise education, trigger point therapy, and optometry. FAC at 10; see also Oppo. at  
28 17, 121. Defendant Casian's comments, even if true, do not create a triable issue of fact as to



1 deliberate indifference.

2 Plaintiff argues that Defendant Casian was deliberately indifferent to his medical needs  
3 when she unreasonably denied his request for an MRI. FAC at 10; see also Oppo. at 19-20. At  
4 the July 28, 2014 appointment, Defendant Casian examined Plaintiff and found that there was  
5 no edema, no masses or deformities in his neck examination, and that he had 5/5 for motor  
6 strength in all four extremities. Walters Decl. at Exh. C at 52. Defendant Casian also noted that  
7 Plaintiff was enrolled in physical therapy and reported significant improvement of symptoms and  
8 was satisfied with the results of his trigger point injections. Id. After considering all of the  
9 information, Defendant Casian noted that “[a]n MRI of the cervical spine, lumbar spine and  
10 shoulder is not medically necessary at this time.” Id. This sentiment was shared by Dr. Dean  
11 who examined Plaintiff less than a month later on August 22, 2014 and concluded “[no] MRI  
12 indicated at this time.” Id. at 56. The fact that another doctor had a different opinion four  
13 months later (November 25, 2014) and ordered an MRI [see id. at 65] does not mean that  
14 Defendant Casian’s decision to not order an MRI in July was wrong, let alone deliberately  
15 indifferent.

16 Plaintiff argues that an MRI was recommended before his July 2014 appointment with  
17 Defendant Casian by physical therapist David Clifton. FAC at 10. However, the evidence shows  
18 that David Clifton recommended an “MRI and/or injection therapy” and Plaintiff already was  
19 receiving steroid injections for pain. Id. at 10, 127 (emphasis added). As such, Mr. Clifton’s  
20 alternative recommendation does not create a triable issue of fact as to deliberate indifference;  
21 at most, it could create a slight difference of medical opinion. See Singleton, 577 F. App’x at  
22 735 (“[a]lthough officials at another California state prison had granted some of these  
23 accommodations, a difference of opinion on medical treatment is not enough to establish  
24 deliberate indifference so long as the care provided was medically acceptable.”).

25 Plaintiff further argues that Defendant Casian’s interrogatory responses demonstrate her  
26 deliberate indifference with regard to failing to order an MRI. Oppo. at 22. Interrogatory No.  
27 6 asks Defendant Casian to describe in detail her to decision to not order an MRI on Plaintiff’s  
28 neck, lumbar spine, and shoulder after his July 28, 2014 visit. Id. at 146-147. Defendant Casian

1 responded that she did not order an MRI that day because Plaintiff “reported symptomatic relief  
2 with conservative medical care (physical therapy and trigger point injection), and physical  
3 examination was normal – history and physical examination did not show evidence of  
4 neurological deficit, and the patient did not complain of difficulty performing ADL’s (grooming,  
5 feeding, transfer.)” Oppo. at 147; see also Walters Decl. at Exh. C at 52. Defendant Casian  
6 concluded that an MRI was not indicated at that time and that she would “consider imaging  
7 evaluation for persistent worsening symptomology.” Walters Decl. at Exh. C at 52. Plaintiff has  
8 not submitted any evidence indicating that Defendant Casian’s assessment was inappropriate  
9 Similarly, Plaintiff’s interrogatory No. 13 asked for the most widely accepted form of technology  
10 for detecting “blood clots or other vascular occlusions, spinal or nerve impingement, soft tissue  
11 or nerve damage[,]” and Defendant Casian responded

12 While x-rays are valuable diagnostic tools, in general, conditions such as these  
13 are not diagnosed solely with an x-ray. Vascular/arterial Doppler ultrasound or  
14 CT angiography are used to diagnose blood clots or vascular occlusions. Soft  
15 tissue damage is mostly a clinical diagnosis, occasionally requires imaging studies  
16 (CT, MRI). If a patient fails the initial approach with conservative medical care,  
and continues to experience neck pain with radiculopathy that affects ADL's, an  
MRI is indicated.

17 Id. at 149. Neither of these responses support Plaintiff’s argument that Defendant Casian  
18 provided unconstitutional care to Plaintiff.<sup>6</sup> Even viewing all of the evidence in the light most  
19 favorable to Plaintiff, Plaintiff has not presented evidence creating a triable issue of fact as to  
20 whether Defendant Casian was deliberately indifferent to Plaintiff’s serious medical needs when  
21 she denied his request for an MRI. At most, the evidence shows a difference in opinion between  
22 Plaintiff and Defendant Casian. To the extent the care was different than what Plaintiff wanted  
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25 <sup>6</sup> Plaintiff spends a significant portion of his opposition arguing that Defendant Casian’s  
26 interrogatory responses establish that she acted with deliberate indifference in providing medical  
27 care. Oppo. at 20-22. The Court has carefully reviewed all of the interrogatory responses and  
28 considered Plaintiff’s arguments and finds that the responses do not create a triable issue of fact  
as to Plaintiff’s deliberate indifference claim against Defendant Casian. At most, they illustrate  
the disagreement between the care Plaintiff wanted and the treatment Defendant Casian  
believed was medically appropriate.

1 or less than ideal, such care does not support a finding of deliberate indifference. See Estelle,  
2 429 U.S. at 106 (“[m]edical malpractice does not become a constitutional violation merely  
3 because the victim is a prisoner.”); see also Wood, 900 F.2d at 1334 (noting that even gross  
4 negligence is insufficient to establish deliberate indifference to serious medical needs); and  
5 Johnson v. Fortune, 2016 WL 1461516, at \*2 (E.D. Cal. April 4, 2016) (“a difference of opinion  
6 between a prisoner-patient and prison medical authorities regarding treatment does not give  
7 rise to a [§] 1983 claim.”) (quoting Franklin v. Oregon, 662 F.2d 1337, 1344) (9th Cir. 1981).

### 8 3. Revocation of Accommodation Chronos

9 Plaintiff’s final argument is that Defendant Casian displayed her deliberate indifference to  
10 Plaintiff’s medical needs by arbitrarily terminating all of his permanent medical accommodation  
11 chronos. FAC at 9. Plaintiff argues that in 2012, his accommodation chronos were reinstated  
12 “permanently in perpetuity at all future CDC institutions.” Id. In support, Plaintiff cites to an  
13 April 23, 2012 Institution Response for First Level HC Appeal. Id. at 94. The response, which  
14 was written to address Plaintiff’s request that his nineteen-pound lifting restriction and low bunk  
15 placement accommodations be made permanent and honored at North Kern State Prison, states  
16 that “Dr. Flores completed a CDC 7410 Comprehensive Accommodation Chrono for permanent  
17 lower bunk and for [Plaintiff] not to lift anything more than or equal to 20 pounds.” Id.

18 Defendants contend that Plaintiff’s claim “is refuted by the undisputed evidence.” MSJ at  
19 7. Defendants note that Plaintiff’s chronos were not permanent and consistent before February  
20 2014 and that they were often updated and modified throughout Plaintiff’s treatment by  
21 Defendant Casian. Id. at 8.

22 The parties submitted uncontested evidence establishing that the following  
23 accommodation chronos were issued for Plaintiff:

- 24 • February 2003. Plaintiff was given a medical chrono while at R.J. Donovan  
25 Correctional Facility noting that he was to receive cotton bedding, a lower/bottom  
26 bunk, and that he was not to lift more than “19 pounds PERMANENT 04-05-2013  
27 Months.” Oppo. at 78; see also FAC at 99.
- 28 • May 18, 2010. Plaintiff received a Comprehensive Accommodation Chrono calling

1 for placement on the bottom bunk and cotton bedding. FAC at 100; see also Oppo.  
2 at 74. The accommodations were written as permanent and the form noted that  
3 “[c]hronos indicating permanent accommodations shall be reviewed annually. This  
4 form shall be honored as a permanent chrono at all institutions.” Id.

- 5 • November 24, 2010. A Medical Classification Chrono signed by Zaed Norman noted  
6 that the level of care Plaintiff required was “OP” and that he had no particular need  
7 for “proximity to consult”, was capable of vigorous activity, at low medical risk,  
8 and needed basic nursing. Walters Decl. at Exh. D at 69.
- 9 • March 11, 2011. A chrono limiting Plaintiff to no lifting over forty pounds and  
10 recommending low bunk placement for one year signed by Dr. B. Ree at California  
11 Men’s Colony. Oppo. at 75.
- 12 • July 12, 2011. A Chrono restricting Plaintiff to no lifting over 19 pounds was  
13 completed at California Men’s Colony by Dr. S.P. Oppo. at 76. The accommodation  
14 was listed as permanent. Id.
- 15 • January 23, 2012. Dr. Flores completed a medical chrono noting that the level of  
16 care Plaintiff required was “OP” and that he had no particular need for “proximity  
17 to consult[,]” was capable of full duty, at low medical risk, and needed low-  
18 intensity nursing. Walters Decl. at Exh. D at 70.
- 19 • February 17, 2012. Comprehensive Accommodation Chrono completed by Dr.  
20 Flores noted that Plaintiff should be temporarily placed on the bottom bunk (until  
21 July 31, 2012), be given cotton blankets permanently, and should not lift more  
22 than nineteen pounds. Id. at Exh. D. at 71.
- 23 • April 6, 2012. Comprehensive Accommodation Chrono from Dr. Flores called for  
24 a permanent bottom bunk placement, permanent cotton bedding, and a lifting  
25 restriction of 19 pounds. Id. at Exh D. at 72; see also FAC at 103 and Oppo. at  
26 77.
- 27 • May 15, 2013. Medical Classification Chrono completed by Defendant Casian noted  
28 that the level of care Plaintiff required was “OP” and that he needed infrequent

1 basic consultation for "proximity to consult", was capable of full duty, at low  
2 medical risk, and needed low-intensity nursing. Walters Decl. at Exh. D. at 73. In  
3 the comments section, Defendant Casian noted "LBP."<sup>7</sup> Id.

- 4 • October 18, 2013. Medical Classification Chrono signed by PA J. Lee noted that  
5 Plaintiff needed infrequent basic consultation for "proximity to consult", was  
6 capable of full duty, at low medical risk, and needed low-intensity nursing. Id. at  
7 74. It further noted "CLBP", that Plaintiff could ambulate on his own, needed a  
8 cotton blanket, and could not lift more than nineteen pounds. Id. Plaintiff was  
9 restricted to "Cocci Area 2" and see CDCR 1845 and 7410 was checked. Id.
- 10 • January 21, 2014. Comprehensive Accommodation Chrono completed by  
11 Defendant Casian called for a permanent cervical pillow accommodation and no  
12 strenuous activity. Id. at 76.
- 13 • January 29, 2014. Medical Classification Chrono signed by NP Velardi noted that  
14 the level of care Plaintiff required was "OP" and that he needed infrequent basic  
15 consultation for "proximity to consult", was capable of limited duty, at medium  
16 medical risk, and needed basic nursing. Id. at 75. It also noted "no 1845," no  
17 strenuous activity, and authorized a cervical pillow. Id. Plaintiff was restricted to  
18 "Cocci Area 2" and noted as having durable medical equipment. Id.
- 19 • March 12, 2014. Comprehensive Accommodation Chrono completed by Defendant  
20 Casian called for a temporary sixty-day low bunk placement, a permanent cervical  
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22 <sup>7</sup> Plaintiff argues that LBP stands for lower bunk permanent [see Oppo. at n.6], however, the  
23 Court notes that LBP or CLBP is typically used as an acronym for low back pain or chronic low  
24 back pain. See Papenfus v. Oregon Dep't of Corr., 2006 WL 2795102, at \*1 (D. Or. Sept. 26,  
25 2006) ("Plaintiff followed sick call procedure for complaints of low back pain (LBP)"); see also  
26 Hoffman v. Khatri, 2010 WL 3063293, at \*2 (S.D. Cal. Aug. 3, 2010) ("Plaintiff was advised to  
27 "continue gentle stretching," and engaged in an 'extensive discuss[ion] re: chronic nature of his  
28 LBP (lower back pain)."); <https://www.medilexicon.com/about>, and  
[https://www.medicinenet.com/common\\_medical\\_abbreviations\\_and\\_terms/article.htm](https://www.medicinenet.com/common_medical_abbreviations_and_terms/article.htm).

1 pillow accommodation and no strenuous activity. Id. at 77.

- 2 • July 28, 2014. Comprehensive Accommodation Chrono completed by Defendant  
3 Casian provides Plaintiff with a temporary low bunk accommodation until January  
4 28, 2015, a permanent cervical pillow accommodation, and notes no strenuous  
5 activity or lifting more than twenty pounds. Id. at 78.
- 6 • November 26, 2014. Comprehensive Accommodation Chrono signed by Dr. Gysler  
7 renewed the temporary low bunk placement until February 28, 2015 and provided  
8 a cervical pillow (permanent), one pair of glasses, and cotton bedding  
9 (permanent). Id. at 79. It also called for no strenuous activity or lifting over 20  
10 pounds. Id.
- 11 • September 28, 2015. Comprehensive Accommodation Chrono signed by Robert  
12 Walker noted a permanent bottom bunk accommodation and stated that "Pt has  
13 mod to severe spinal stenosis and decreased range of motion in cervical spine and  
14 not surgical candidate and requesting lower bunk because jumping off bunk is  
15 causing significant pain and paresthesias and worsening." Id. at 80.

16 As set forth above, there is ample uncontested evidence that Plaintiff was provided  
17 numerous accommodation chronos, including chronos issued by Defendant Casian, and there is  
18 no evidence to support Plaintiff's claim that Defendant Casian terminated all of Plaintiff's  
19 accommodation chronos. Rather, the evidence establishes that throughout the time Defendant  
20 Casian treated Plaintiff, she signed off on accommodations for low bunk placement [see Walters  
21 Decl. at Ex. D at 77], cervical pillows [id. at 76-77], no strenuous activity [id.], and weight  
22 lifting restrictions [id. at 78]. To the extent Plaintiff is arguing that Defendant Casian's March  
23 12, 2014 chronos limiting Plaintiff's lower bunk placement to sixty days or July 28, 2014 chrono  
24 limiting Plaintiff's lower bunk placement to six months constitute a termination of Plaintiff's  
25 permanent accommodations and, therefore, a violation of the Eighth Amendment, the argument  
26 is without merit. First, Defendant Casian's chronos do not terminate Plaintiff's lower bunk status;  
27 they extend it. Second, while Plaintiff claims his accommodations were "permanently in  
28 perpetuity[,]" the evidence clearly shows that in this context, permanent does not mean forever.

1 The duty limitation form from California Men’s Colony specifies that permanent can mean  
2 anything from six months to a year or more. Oppo. at 76. The CDCR 7410 Comprehensive  
3 Accommodation Chrono Form clearly states that permanent accommodations which shall be  
4 honored at all institutions, “shall be reviewed annually.” Walters Decl. at Exh. D at 72, 76-79;  
5 see also Oppo. at 74; FAC at 100; Raul Alvarez v. Dr. Hashemi, 2019 WL 1099838, at \*3 (E.D.  
6 Cal. Mar. 8, 2019) (noting that Defendant’s list of undisputed facts stated that a CDCR  
7 permanent chrono “is to be reviewed at least annually by a medical professional to determine  
8 its continued medical necessity”); and Hanna v. Chudy, 2014 WL 4629064, at \*2 (N.D. Cal. Sept.  
9 16, 2014) (citing the Inmate Medical Services Policies & Procedures manual which contains the  
10 policies and procedures governing the delivery of medical care to patient-inmates for California  
11 Correctional Health Care Services and noting that it states “[f]or accommodations that are  
12 designated as permanent, the accommodation must be reviewed annually”). Third, Plaintiff  
13 presents no evidence to support his claim that Defendant Casian’s decision to limit the lower  
14 bunk restriction to sixty days followed by an additional six months constitutes deliberate  
15 indifference. Rather, at most, it could be considered a difference of opinion between Plaintiff  
16 and Defendant Casian as to the appropriate length of the limitation. This is not sufficient to  
17 establish deliberate indifference. See Singleton, 577 F. App’x at 735 (“[a]lthough officials at  
18 another California state prison had granted some of these accommodations, a difference of  
19 opinion on medical treatment is not enough to establish deliberate indifference so long as the  
20 care provided was medically acceptable.”) (citing Jackson v. McIntosh, 90 F.3d 330, 332 (9th  
21 Cir. 1996)).

22 For the above-stated reasons, this Court **RECOMMENDS** that Defendants' motion for  
23 summary judgment be **GRANTED** as to Plaintiff’s deliberate indifference claim against  
24 Defendant Casian.

### 25 **CONCLUSION**


26 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue  
27 an order: (1) approving and adopting this Report and Recommendation, (2) granting in part and  
28 denying in part Defendants’ Motion for Summary Judgment.

1           **IT IS HEREBY ORDERED** that any written objections to this Report must be filed with  
2 the Court and served on all parties **no later than May 9, 2019**. The document should be  
3 captioned "Objections to Report and Recommendation."

4           **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with this Court  
5 and served on all parties **no later than June 6, 2019**. The parties are advised that failure to  
6 file objections within the specified time may waive the right to raise those objections on appeal  
7 of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

8           **IT IS SO ORDERED.**

9 Dated: 4/11/2019

  
Hon. Barbara L. Major  
United States Magistrate Judge

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