UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEPHEN DRAGASITS, Plaintiff, v. YU et al., Defendants.	Case No.: 16-cv-1998 BEN (JLB) **REPORT AND RECOMMENDATION FOR ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** **[ECF No. 12]**

Before the Court is Defendants' motion to dismiss Plaintiff Stephen Dragasits' complaint brought under the Civil Rights Act, 42 U.S.C. § 1983. (ECF No. 12.) The Court submits this Report and Recommendation to United States District Judge Roger T. Benitez pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1 of the Local Rules of Practice for the United States District Court for the Southern District of California. After a thorough review of Plaintiff's complaint, the parties' motion and opposition papers, and all supporting documents, and for the reasons discussed below, the Court **RECOMMENDS** that the District Court **GRANT** Defendants' motion to dismiss (ECF No. 12).

I. PROCEDURAL BACKGROUND

Plaintiff Stephen Dragasits, a state prisoner proceeding *pro se* and *in forma pauperis*, initiated the present suit by filing a complaint in this Court on August 8, 2016. (ECF No.

1.) Plaintiff alleges that the State of California, the Richard J. Donovan Correctional Facility ("RJDCF"), several RJDCF health care officials, and a Deputy Director of the California Department of Corrections and Rehabilitation's Health Care Services Appeals Branch denied his Eighth Amendment, Fourteenth Amendment, and California state law rights to proper medical treatment and due process while he was incarcerated at the RJDCF. (*See id.* at 27–39.)[1]

On November 15, 2016, the Honorable Roger T. Benitez *sua sponte* dismissed Plaintiff's claims against Defendants the State of California, the RJDCF, and individual health care officials Gines, Guldeth, Kelso, and Van Buren. (ECF No. 5.) In addition, Judge Benitez *sua sponte* dismissed Plaintiff's Fourteenth Amendment due process claim against all named Defendants. (*Id.*) Thus, only Plaintiff's Eighth Amendment and state law claims against Defendants Glynn, Lewis, Roberts, Walker, and Yu remain.

On February 13, 2017, Defendants moved to dismiss the remaining claims in Plaintiff's complaint. (ECF No. 12.) Plaintiff filed an opposition to Defendants' motion on May 1, 2017 (ECF No. 17), and Defendants filed a reply to Plaintiff's opposition on May 11, 2017 (ECF No. 18). On May 30, 2017, Plaintiff filed a sur-reply. (ECF No. 20.) Although Plaintiff did not obtain leave of court before filing his sur-reply, the Court has considered it in addressing Defendants' motion to dismiss.

II. FACTUAL BACKGROUND[2]

Plaintiff is a state prisoner confined at the RJDCF in San Diego, California. (ECF No. 1 at 1.) Prior to arriving at the RJDCF, Plaintiff was confined temporarily at the California Institution for Men. (*Id.* at 18.) He was transferred to the RJDCF on or around December 2, 2013. (*Id.*)

---

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

[2] The allegations contained in Plaintiff's complaint are accepted as true for purposes of assessing Defendants' motion to dismiss only. In addition, this Report and Recommendation does not provide a summary of all of the facts presented in the complaint but only those that are relevant to Plaintiff's claims against the remaining Defendants: Glynn, Lewis, Roberts, Walker, and Yu.

A. Plaintiff's Medical History

Plaintiff alleges that he suffers from several arthritic ailments and degenerative diseases that involve chronic pain in his neck, back, knees, and feet. (ECF No. 1 at 19–22, 29.) In addition, he alleges that he has a history of syncope and dizziness dating back to 2012 and that he has suffered seizures in the past. (*Id.* at 26–27, 29.) Plaintiff asserts that due to his medical conditions, he was issued a low bunk chrono on September 13, 2013, while incarcerated at the California Institution for Men. (*Id.* at 18.) The crux of the instant case is that Defendants did not provide Plaintiff the same accommodation at the RJDCF.

At the times relevant to this action, Defendant's primary care physician at the RJDCF was Defendant Yu, a Doctor of Osteopathy. (*See id.* at 10.) The medical records attached to Plaintiff's complaint indicate that Plaintiff saw Defendant Yu approximately eight times between February 10, 2015, and August 21, 2015. (*Id.* at 253–84.)

At his first appointment with Defendant Yu on February 10, 2015, Plaintiff complained of dull lower back pain and difficulty breathing deeply while lying down. (*Id.* at 256.) Defendant Yu examined Plaintiff and observed that his deep breathing problem was likely attributable to allergies and that his back pain was likely associated with his playing basketball for one hour a day, which Defendant Yu suspected was excessive for Plaintiff's age. (*Id.*) In addition, Defendant Yu noted that it appeared that Plaintiff had experienced an episode of syncope in the past. (*Id.*) However, he concluded that this was due to Plaintiff having taken several medications at a time, which can cause symptoms of lightheadedness and passing out. (*Id.* at 256–57.) He noted that Plaintiff had not suffered a syncope episode since he stopped taking those medications.[3] (*Id.*) Further, Defendant Yu noted that Plaintiff had had a cardiology loop study performed in the past and the results

[3] The medical records attached to Plaintiff's complaint indicate that Plaintiff suffered a syncope episode in October 2012. (ECF No. 1 at 152.) This episode caused him to lose consciousness and fall while trying to get out of bed. (*Id.*) Plaintiff was thereafter monitored for subsequent syncope events, and the medical records indicate that Plaintiff never suffered another episode. (*See, e.g.*, ECF No. 1 at 155, 159, 164–66.)

of the loop test, as well as Plaintiff's other medical records, showed no signs of arrhythmia.[4] (*Id.*)

Plaintiff next saw Defendant Yu on April 21, 2015, for a follow-up appointment after visiting the prison's cardiology department. (*Id.* at 260–61.) At this appointment, Defendant Yu reviewed Plaintiff's medical records and performed an examination of Plaintiff. (*Id.* at 260.) With respect to Plaintiff's syncope and cardiologic histories, Defendant Yu noted that Plaintiff was "doing fine." (*Id.*) He also noted that Plaintiff had recently submitted a "sick call slip" for a double mattress. (*Id.*) Plaintiff informed Defendant Yu that he had been provided a double mattress while he was incarcerated at the California Institution for Men and staff at the RJDCF told him that his double mattress would be taken away. (*Id.*) Defendant Yu searched Plaintiff's chrono history and found that Plaintiff had been issued low bunk and extra mattress chronos in 2013 but did not have an active chrono for a double mattress. (*Id.*) Defendant Yu explained that if Plaintiff wanted an extra mattress, he would need to place a request with the prison's custody department, as that department handles most double mattress requests. (*Id.*)

Plaintiff saw Defendant Yu for the third time on May 13, 2015. (*Id.* at 262–63.) Plaintiff requested that Defendant Yu renew his prior low bunk and double mattress chronos because he was experiencing neck and lower back pain. (*Id.* at 262.) Defendant Yu performed an examination of Plaintiff and found that Plaintiff was not in acute distress; could stand and walk erect and without limping; could get in and out of the examination chair multiple times without difficulty; could turn his body, reach for objects, and bend without difficulty; showed no signs of tenderness in his back; and showed no atrophy in his lower extremities. (*Id.*) Defendant Yu also noted that the cardiology department had

---

[4] The medical records attached to Plaintiff's complaint indicate that in response to Plaintiff's October 2012 syncope episode, an implantable loop recorder was implanted on October 28, 2012, to monitor Plaintiff's heart activity. (ECF No. 1 at 152.) As previously noted, the medical records show that Plaintiff never suffered another syncope episode or exhibited abnormal cardiac symptoms. (*See, e.g.*, *id.* at 155, 159, 164–66, 169.)

not observed an arrhythmia after monitoring Plaintiff's heart for over two years and Plaintiff had not suffered a syncope episode since he entered the RJDCF system. (*Id.*) Based on Plaintiff's medical history and his examination of Plaintiff that day, Defendant Yu concluded that Plaintiff had "no medical indication to get a[n extra] mattress, low bunk, or low tier." (*Id.*) However, Defendant Yu ordered x-rays of Plaintiff's neck and lumbar spine and noted that he "may reevaluate consideration" for the requested chronos after reviewing the x-ray results. (*Id.*)

On or around the same day, Plaintiff filed an administrative Health Care Appeal challenging Defendant Yu's decision not to renew Plaintiff's low bunk and double mattress chronos.[5] (*Id.* at 13, 51–52.) On June 5, 2015, Defendant Yu interviewed Plaintiff in response to the Appeal. (*Id.* at 53–54, 268–69.) Defendant Yu's June 5, 2015 medical notes indicate that Plaintiff's requests for low bunk and double mattress chronos were denied because Defendant Yu observed Plaintiff playing basketball on May 29, 2015, and when Defendant Yu subsequently examined Plaintiff, Plaintiff did not show signs of atrophy, was quick to get in and out of the examination chair, was walking erect and normally, and was not in acute distress. (*Id.* at 268.)

Plaintiff saw Defendant Yu again on June 22, 2015. (*Id.* at 272–73.) At this appointment, Plaintiff again requested that Defendant Yu renew his low bunk and extra mattress chronos. (*Id.* at 272.) Plaintiff complained, for the first time, of left knee pain and stated that he could not climb because of this pain. (*Id.*) Defendant Yu examined Plaintiff's knee and concluded that the examination was "basically . . . benign." (*Id.*) The examination showed that there was no atrophy in Plaintiff's lower extremity and no tenderness or swelling around Plaintiff's knee, and Plaintiff exhibited no difficulty bending his knee. (*Id.*) In addition, Defendant Yu observed Plaintiff walk erect, quickly, and without limping, and he also observed Plaintiff get in and out of a chair quickly and without

[5] Plaintiff's administrative Health Care Appeal is discussed in greater detail in the following section.

difficulty. (*Id.*) Dr. Yu then ordered x-rays of Plaintiff's left knee to see if any abnormalities could be observed. (*Id.*) He declined to renew Plaintiff's low bunk and extra mattress chronos based on the results of Plaintiff's neck and back x-rays (ordered after the May 13, 2015 appointment) and the fact that he had observed Plaintiff playing basketball. (*Id.*)

On July 20, 2015, Plaintiff saw Defendant Yu for, among other things, multiple complaints of pain. (*Id.* at 276–77.) Plaintiff complained that his left knee still hurt and that he could hear it crack. (*Id.* at 276.) Dr. Yu examined Plaintiff's knee and noted that there was no tenderness or swelling, that Plaintiff came into the clinic erect and not limping, that Plaintiff was able to sit on a chair slowly, and that Plaintiff hopped onto the examination table without difficulty. (*Id.*) Defendant Yu denied Plaintiff's renewed request for a low bunk chrono on the basis that he observed Plaintiff playing basketball, he observed no stiffness of the knee at this appointment, and Plaintiff was able to walk erect and hop onto the examination table without a problem. (*Id.*)

Plaintiff alleges that he fell from his top bunk and injured himself on August 3, 2015. (*Id.* at 32.) In a Health Care Services Request Form dated August 4, 2015, Plaintiff stated, "Yesterday my left knee gave out and I banged my right elbow on the bunk." (*Id.* at 250.) On August 5, 2015, Nurse R. Gines, a former Defendant in this case,[6] completed an Encounter Form for a non-traumatic musculoskeletal complaint, which indicated that Plaintiff had been experiencing joint stiffness for two days and requested to be on a lower bunk due to the stiffness. (*Id.* at 229–31.)

Plaintiff next saw Defendant Yu on August 20, 2015, for a Chronic Care Program follow up appointment. (*Id.* at 281–82.) At this appointment, Plaintiff complained of back pain, knee pain, and foot pain. (*Id.* at 281.) Plaintiff informed Defendant Yu that his feet are deformed due to old fractures and that as a result he wears special insoles. (*Id.*) He

[6] Nurse Gines was dismissed from this action by the Honorable Roger T. Benitez on November 15, 2016. (*See* ECF No. 5.)

communicated to Defendant Yu that he had had no falls as a result of his podiatric issues. (*Id.*) He also asked that Defendant Yu issue him low bunk and extra mattress chronos. (*Id.*)

Defendant Yu examined Plaintiff and observed that Plaintiff was not in acute distress, Plaintiff could walk erect and without limping, Plaintiff could get in and out of a chair without difficulty, Plaintiff hopped onto the examination table without difficulty, and there was no atrophy in Plaintiff's lower extremities. (*Id.*) With respect to Plaintiff's feet, Defendant Yu observed a small bunion and a bulging-type scar on Plaintiff's right foot. (*Id.*) He recommended that Plaintiff be provided new shoes and referred him to the podiatry department. (*Id.*) With respect to Plaintiff's knees, Defendant Yu found that the recently ordered x-ray of Plaintiff's left knee showed mild degenerative changes, and an earlier x-ray of Plaintiff's right knee[7] showed no foreign body in the knee. (*Id.* at 281–82.) Defendant Yu recommended that Plaintiff be sent to physical therapy to see if it would help with his knee pain. (*Id.* at 282.) He declined to issue Plaintiff a low bunk chrono at this time because Plaintiff continued to play basketball and therefore there was "no medical indication for [the chrono]." (*Id.*)

Plaintiff alleges that he fell from his top bunk and was injured again on August 21, 2015. (*Id.* at 32.) In a Health Care Services Request Form dated August 21, 2015, Plaintiff stated that he "fell to the floor getting off the top rack, banging [his] left knee, left side ribs and gouged [his] right hand with blood." (*Id.* at 251.) On the same day, Plaintiff communicated to Nurse Gines that his knee locked while descending from the top bunk and he lost balance and hit his left knee and left hip on a stool. (*Id.* at 232.) Defendant Yu, who was on site, was notified of the incident and immediately ordered x-rays of Plaintiff's knee and hip. (*Id.* at 232–34.) When Plaintiff requested a lower bunk, Defendant Yu asked that Plaintiff wait until his x-ray results came back. (*Id.* at 234.)

---

[7] Plaintiff's complaint states that Plaintiff received an x-ray of his right knee on June 29, 2015. (ECF No. 1 at 21.)

Defendant Yu then reviewed Plaintiff's x-rays. (*Id.* at 96–97.) With respect to Plaintiff's left knee, the x-rays showed "[n]o acute fracture or dislocation," [n]o joint effusion," and "minimal arthritis." (*Id.* at 96.) With respect to Plaintiff's left hip, the x-rays showed "[n]o acute fracture of dislocation," "[n]o soft tissue abnormalities," and "[m]ild to moderate arthritis." (*Id.* at 97.)

On September 3, 2015, at Plaintiff's first follow up appointment after his August 21, 2015 fall, Physician Assistant Scott Deaton reviewed Plaintiff's left knee and hip x-rays. (*Id.* at 309.) He encouraged Plaintiff to continue to try to remain active and to follow up with his physical therapist. (*Id.*) On September 28, 2015, Plaintiff's physical therapist recommended that, based on Plaintiff's radiology results and own complaints of knee, upper thoracic, and cervical pain, Plaintiff "be placed on a lower bunk to limit movements that may aggravate pain especially to bilateral knees." (*Id.* at 145.)

Plaintiff alleges that he fell from his top bunk for the third time on December 28, 2015. (*Id.* at 32.) Plaintiff alleges that he fell coming down from his bunk and fractured his right foot. (*See id.* at 23.) Thereafter, Plaintiff was issued a permanent low bunk chrono. (*Id.* at 19.)

B. Plaintiff's Health Care Appeals

On or around May 13, 2015, Plaintiff filed an Inmate Health Care Appeal (CDCR Form 602), Appeal No. 15053350, challenging Defendant Yu's May 13, 2015 decision not to renew Plaintiff's low bunk and double mattress chronos. (*Id.* at 13, 51–52.) Plaintiff complained in his Health Care Appeal that his "back and neck pain have severely increased since an extra mattress has been taken away" and that he did "not want to hurt [him]self getting up or down from a top bunk, due to past seizures, dizziness, and mangled feet where any or all can cause a fall." (*Id.* at 52.) He also noted that he did not want Defendant Yu to remain his doctor because he did not like Defendant Yu's evaluation. (*Id.*)

Plaintiff's Health Care Appeal was accepted at the first level of administrative review on May 21, 2015. (*Id.* at 53–54.) As discussed above, Defendant Yu interviewed Plaintiff about his Health Care Appeal on June 5, 2015. (*See id.* at 53–54, 268–69.)

Defendant Walker, the Chief Physician and Surgeon at the RJDCF, denied Plaintiff's Health Care Appeal at the first level on June 9, 2015. (*Id.*) In support of his denial, Defendant Walker explained that "[a]fter a thorough examination it has been determined that a lower bunk chrono and extra mattress chrono will not be approved [because t]hey are not medically indicated." (*Id.* at 53.)

Plaintiff then submitted his Health Care Appeal for second-level administrative review. (*See id.* at 55–56.) The Appeal was accepted at the second level on July 8, 2015. (*Id.* at 55.) It was reviewed by Defendant Roberts, Chief Medical Executive of the RJDCF, and Defendant Glynn, Chief Executive Officer of the RJDCF. (*Id.* at 55–56.) Defendants Roberts and Glynn denied Plaintiff's Appeal at the second level in a written response dated August 14, 2015. (*Id.*) The response stated, in relevant part:

> Denied based on the [First Level Response] letter dated 06/09/15. It has been determined that a lower bunk and double mattress are not medical indicated. Medical records (eUHR) shows [sic] that you are being evaluated, treated, monitored, and educated concerning your health issues consistent with the medical plan of care as determined by your Primary Care Providers (PCP). You are receiving treatment consistent with Title 15 and with recognized standards of care and your medical problems have clearly been acknowledged by professional health care staff familiar with your medical history, as well as a review of your medical records.

(*Id.* at 55.)

Plaintiff then submitted his Health Care Appeal for third-level administrative review. (*Id.* at 57–58.) The Appeal was reviewed at the third level by the staff of the Inmate Correspondence and Appeals Branch of the California Correctional Health Care Services. (*Id.* at 57.) Defendant Lewis, Deputy Director of the Policy and Risk Management Services of the California Correctional Health Care Services, denied Plaintiff's Appeal at the third level in a written decision dated October 12, 2015. (*Id.* at 57–58.) The decision stated:

- You have received ongoing PCP follow up evaluation and treatment to September 3, 2015, for your history of back, knee, hip, shoulder, elbow, and foot pain.

- The PCP completed multiple in-depth assessments, noted review of your history, current symptoms, and x-ray results, and determined you do not meet the Inmate Medical Services Policies and Procedures (IMSP&P), Volume 4, Chapter 23.1, criteria for a bottom bunk accommodation.

- The IMSP&P, Volume 4, Chapter 23.1, specifies that extra mattresses, extra pillows, and cotton blankets are not medically necessary accommodations and will not be ordered by health care staff.

- On September 28, 2015, you were evaluated by the physical therapist, and you are currently pending PCP follow up to review the recommendations.

- Your medical condition will continue to be monitored with care provided as determined medically indicated by the PCP, in accordance with appropriate policies and procedures.

. . . .

After review, no intervention at the Director's Level of Review is necessary as your medical condition has been evaluated and you are receiving treatment deemed medically necessary.

(*Id.*)

In addition, during the pendency of Health Care Appeal No. 15053350, Plaintiff filed two other Health Care Appeals challenging Defendant Yu's denial of his requests for low bunk and double mattress chronos. (*Id.* at 48–49, 59–60.) The first subsequent appeal, Appeal No. 15053456, was filed on June 9, 2015. (*Id.* at 59–60.) This appeal was denied at the first level of review on June 26, 2015 (*id.* at 62), at the second level of review on August 13, 2015 (*id.* at 63–64), and at the third level of review on October 12, 2015 (*id.* at 65–66), on the basis that it was duplicative of Health Care Appeal No. 15053350, which was still pending at the time. The second subsequent appeal, Appeal No. 15053969, was filed on September 19, 2015. (*Id.* at 48–49.) This appeal was cancelled on October 24, 2015, on the bases that it was duplicative of Health Care Appeal No. 15053350, Defendant

Yu no longer worked at the RJDCF, and the installation of ladders is a custody issue over which the California Correctional Health Care Services does not have jurisdiction. (*Id.* at 50.)

III. DISCUSSION

A. Legal Standards

1. Motion to Dismiss for Failure to State a Claim

The Federal Rules of Civil Procedure require that a plaintiff's complaint must provide a "short and plain statement of the claim showing that [he] is entitled to relief." Fed. R. Civ. P. 8(a)(2). The pleading standard that Rule 8 announces does not require detailed factual allegations, and the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (citing *Twombly*, 550 U.S. at 555).

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint. *See Twombly*, 550 U.S. at 555. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Cooney v. Rossiter*, 583 F.3d 967, 971 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 679). The mere possibility of misconduct falls short of meeting this plausibility standard. *Iqbal*, 556 U.S. at 678–79; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009).

In ruling on a Rule 12(b)(6) motion to dismiss, the court does not look at whether the plaintiff will "ultimately prevail but whether the [plaintiff] is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The court may consider allegations contained in the pleadings, exhibits attached to the complaint, and documents and matters properly subject to judicial notice. *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007); *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991). The court must assume the truth of the facts presented and construe all inferences from them in the light most favorable to the nonmoving party. *Buckey v. Cty. of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). However, the court is "not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

2. Standards Applicable to *Pro Se* Litigants

With respect to an inmate who proceeds *pro se*, his factual allegations, "however inartfully pleaded," must be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (reaffirming that this standard applies to *pro se* pleadings post-*Twombly*). Thus, where a plaintiff appears *pro se* in a civil rights case, the Court must construe the pleadings 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 Dep't*, 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. Eighth Amendment Claims

Plaintiff's complaint alleges that Defendants violated his Eighth Amendment right to be free from cruel and unusual punishment when they failed to issue him a low bunk chrono. (ECF No. 1 at 27–34.) Specifically, Plaintiff asserts that Defendants "kn[ew] of the substantial risk of serious harm by falling from the top bunk" and "fail[ed] to protect Plaintiff from injury." (*Id.* at 28.) He further alleges that "[f]rom 2014 and now [he] either directly informed the Defendants named, or they otherwise gained actual knowledge of his numerous health problems or were knowledgeable of [his] health problems from numerous prior contact with [him]." (*Id.* at 29.) Defendants argue that Plaintiff's Eighth Amendment claim should be dismissed for Plaintiff's failure to state a claim of deliberate indifference. (ECF No. 12-1 at 9–12.)

Prison officials violate the Eighth Amendment's proscription against cruel and unusual punishment when they act with deliberate indifference to an inmate's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). For a prisoner to demonstrate an Eighth Amendment violation, two components must be satisfied. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). First, the deprivation alleged must be sufficiently serious. *Id.* at 1059–60. A "serious" medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.* (citing *Estelle*, 429 U.S. at 104). The existence of "any injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain" are examples of

indications that a prisoner has a "serious" need for medical treatment. *Id.*; *accord Lopez v. Smith*, 203 F.3d 1122, 1131–32 (9th Cir. 2000).

Here, Defendants do not dispute that Plaintiff adequately alleges a serious medical need. (ECF No. 12-1 at 9.) Thus, for purposes of a motion to dismiss, the Court concludes that Plaintiff pleads sufficient facts to state the first component of an Eighth Amendment claim.

Second, the prison officials involved must have acted with deliberate indifference to the inmate's serious medical needs. *See Wilson v. Seiter*, 501 U.S. 294, 302–04 (1991). This is a subjective requirement. *Farmer v. Brennan,* 511 U.S. 825, 839 (1994). To act with deliberate indifference, a prison official must know of and disregard an excessive risk to the inmate's health and safety. *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2002) (quoting *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002)). "Under this standard, the prison official must not only 'be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists,' but that person 'must also draw the inference.'" *Id.* (quoting *Farmer*, 511 U.S. at 837). The court must focus on "what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be)." *Farmer*, 511 U.S. at 838–39. "Even if a prison official *should* have been aware of the risk, if he 'was not, then he has not violated the Eighth Amendment, no matter how severe the risk.'" *Peralta v. Dillard*, 744 F.3d 1076, 1086 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 946 (2015) (quoting *Gibson*, 290 F.3d at 1188).

To amount to an Eighth Amendment violation, deliberate indifference to an inmate's serious medical needs must be substantial; inadequate treatment due to malpractice, or even gross negligence, does not amount to a constitutional violation. *Estelle*, 429 U.S. at 106; *Toguchi*, 391 F.3d at 1060. A defendant must purposefully ignore or fail to respond to a prisoner's pain or possible medical need in order for deliberate indifference to be established. *McGuckin*, 974 F.2d at 1060.

Furthermore, differences in judgment between a prisoner and a prison official regarding an appropriate medical diagnosis and course of treatment are not enough to

establish a deliberate indifference claim. *See Estelle*, 429 U.S. at 107–08; *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). To establish deliberate indifference, the prisoner "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances . . . and . . . that they chose this course in conscious disregard of an excessive risk to plaintiff's health." *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). On the other hand, if the prison official responded reasonably to a risk to the prisoner's health, he or she cannot be found liable, even if harm was not ultimately avoided. *Farmer*, 511 U.S. at 844.

For the reasons below, Plaintiff's complaint fails to state a claim that Defendants were deliberately indifferent to Plaintiff's serious medical needs.

i. Defendant Yu

As stated above, Defendant Yu is a doctor at the RJDCF. (*See* ECF No. 1 at 256.) At all times relevant to this action, Defendant Yu was Plaintiff's primary care physician. (*See id.* at 10.) Plaintiff asserts that he informed Defendant Yu that he required a low bunk chrono due to pain in his neck, back, knees, and feet, and because he had experienced episodes of syncope in the past. (*See id.* at 27, 29–31.) Plaintiff contends that Defendant Yu acted with deliberate indifference to his serious medical needs because Defendant Yu was "knowledgeable of Plaintiff's health problems" and "the substantial risk of serious harm by falling from the top bunk" and "he fail[ed] to protect Plaintiff from injury." (*Id.* at 28.)

Plaintiff attached as exhibits to his complaint Defendant Yu's medical notes from each of Plaintiff's appointments. (*See id.* at 253–82.) The Court may consider these exhibits for purposes of the motion to dismiss to determine whether Plaintiff can prove any set of facts in support of his claims. *Roth*, 942 F.2d at 625 n.1. Moreover, when an allegation in the complaint is refuted by an attached document, the Court need not accept the allegation as true. *Id.* (citing *Ott v. Home Savings & Loan Ass'n*, 265 F.2d 643, 646 n.1 (9th Cir. 1958)).

///

The allegations about Defendant Yu in Plaintiff's complaints are insufficient to plead a deliberate indifference claim. This is because to establish deliberate indifference, Plaintiff must do more than allege that Defendant Yu knew of a substantial risk of serious harm to Plaintiff's health or safety. Plaintiff must allege that Defendant Yu purposefully ignored or failed to respond to his pain or possible medical needs. *McGuckin*, 974 F.2d at 1060. The complaint fails to make this showing.

With respect to Plaintiff's alleged neck and back pain, the medical records attached to the complaint show that Plaintiff first requested a low bunk chrono due to this pain on May 13, 2015. (ECF No. 1 at 262–63.) The medical records also show that in response to Plaintiff's complaints of neck and back pain, Defendant Yu performed a complete physical examination of Plaintiff and ordered x-rays of Plaintiff's neck and lumbar spine. (*Id.* at 262.) While Defendant Yu concluded that, at that time, Plaintiff exhibited "no medical indication to get a . . . low bunk," he did not foreclose the possibility of revisiting Plaintiff's request for a low bunk chrono after he had the opportunity to review Plaintiff's x-rays. (*Id.*)

The medical records attached to the complaint show that Defendant Yu revisited Plaintiff's request for a low bunk chrono on June 22, 2015. (*Id.* at 272–73.) Based on Plaintiff's x-ray results and the fact that he observed Plaintiff playing basketball on May 29, 2015, Defendant Yu concluded that Plaintiff did not medically qualify for a low bunk chrono. (*Id.* at 272.)

The medical records attached to the complaint establish that Defendant Yu responded promptly and reasonably to Plaintiff's request for a low bunk chrono based on his complaints of neck and back pain. The complaint does not allege any facts that contradict Plaintiff's medical records or that would otherwise allow the Court to draw the reasonable inference that Defendant Yu purposefully ignored or failed to respond to Plaintiff's possible need for a low bunk chrono based on his complaints of neck and back pain. Thus, the allegations regarding Defendant Yu's responses to Plaintiff's complaints of neck and back pain are insufficient to state a claim of deliberate indifference.

With respect to Plaintiff's alleged knee pain, Plaintiff alleges that he "explained his difficulties in detail about getting up and down from the top bunk with his chronic medical history of knee problems" to Defendant Yu on June 5, 2015. (*Id.* at 31.) In addition, the medical records attached to the complaint show that Plaintiff communicated to Defendant Yu on June 22, 2015, that he cannot climb because of his knee pain. (*Id.* at 272.) In response to Plaintiff's complaints of left knee pain, on June 22, 2015, Defendant Yu performed an examination of Plaintiff's knee and concluded the examination was "basically . . . benign." (*Id.*) He also ordered x-rays of Plaintiff's left knee to determine whether any abnormalities could be observed. (*Id.*)

On July 20, 2015, when Plaintiff complained of left knee pain again, Defendant Yu performed another examination of Plaintiff's left knee and concluded that Plaintiff did not qualify for a low bunk chrono because he was observed play basketball without any deficit, there was no stiffness in Plaintiff's knee, and Plaintiff was able to walk and hop on his knee without difficulty. (*Id.* at 276.)

On August 20, 2015, when Plaintiff complained of pain in both his left and right knees, Defendant Yu performed another examination of Plaintiff's knees and reviewed recent x-rays of both knees. (*Id.* at 281.) Defendant Yu concluded that the x-ray of the left knee showed only mild degenerative changes and the x-ray of the right knee showed no signs of a foreign body, which Plaintiff had suspected. (*Id.* at 281–82.) Defendant Yu also referred Plaintiff to physical therapy in hopes that that would help resolve Plaintiff's alleged knee pain. (*Id.* at 282.)

On August 21 2015, when Plaintiff allegedly fell from his top bunk and injured his knee, Defendant Yu immediately sent Plaintiff for x-rays. (*Id.* at 234.) When Plaintiff asked if he could have a low bunk chrono, Defendant Yu instructed Plaintiff to wait until the x-ray results were received because Plaintiff was observed bending his knees while outside the clinic. (*Id.*) Defendant Yu reviewed Plaintiff's August 21, 2015 left knee and left hip x-ray results the same day the x-rays were taken. (*Id.* at 96–97.) With respect to Plaintiff's left knee, the x-rays showed "[n]o acute fracture or dislocation," [n]o joint

effusion," and "minimal arthritis." (*Id.* at 96.) In response to these results, Defendant Yu notified Plaintiff that his "test results are essentially within normal limits or are unchanged and no other provider follow-up is required." (*Id.* at 99.) With respect to Plaintiff's left hip, the x-rays showed "[n]o acute fracture of dislocation," "[n]o soft tissue abnormalities," and "[m]ild to moderate arthritis." (*Id.* at 97.) In response to these results, Defendant Yu scheduled a follow up appointment for Plaintiff, (*id.* at 98), which was completed by Physician Assistant Scott Deaton on September 3, 2015 (*see id.* at 309–10).[8]

The medical records attached to the complaint establish that Defendant Yu responded promptly and reasonably to Plaintiff's request for a low bunk chrono based on his complaints of knee pain. The complaint does not allege any facts that contradict Plaintiff's medical records or that would otherwise allow the Court to draw the reasonable inference that Defendant Yu purposefully ignored or failed to respond to Plaintiff's possible need for a low bunk chrono based on his complaints of knee pain. Thus, the allegations regarding Defendant Yu's responses to Plaintiff's complaints of knee pain are insufficient to state a claim of deliberate indifference.

With respect to Plaintiff's alleged foot pain, Plaintiff alleges that he "explained his difficulties in detail about getting up and down from the top bunk with his chronic medical history of . . . feet [problems]" to Defendant Yu on June 5, 2015. (*Id.* at 31.) In addition, the medical records attached to the complaint establish that Plaintiff requested a low bunk chrono due to his foot pain at his last official appointment with Defendant Yu on August 20, 2015. (*Id.* at 281–82.) The medical records show that in response to Plaintiff's complaint of foot pain, Defendant Yu confirmed that Plaintiff had received special insoles and referred Plaintiff to the podiatry department so that he could be measured for new shoes. (*Id.* at 282.) In addition, Defendant Yu addressed Plaintiff's request that he be

---

[8] Based upon the records attached to Plaintiff's complaint, it appears Defendant Yu had no more contact with Plaintiff after August 21, 2015, and no more responsibility for Plaintiff's medical care by, at the latest, October 5, 2015, when Plaintiff began being treated by Dr. Guldseth. (*See* ECF No. 1 at 287–307.) By October 24, 2015, Defendant Yu was no longer working at the RJDCF. (*See id.* at 50.)

issued a low bunk chrono by explaining to Plaintiff that there was no medical indication for such a chrono because Plaintiff continued to play basketball. (*Id.*)

The medical records attached to the complaint establish that Defendant Yu responded reasonably to Plaintiff's request for a low bunk chrono based on his complaints of foot pain. The complaint does not allege any facts that contradict Plaintiff's medical records or that would otherwise allow the Court to draw the reasonable inference that Defendant Yu purposefully ignored or failed to respond to Plaintiff's possible need for a low bunk chrono based on his complaints of foot pain. Thus, the allegations regarding Defendant Yu's responses to Plaintiff's complaints of foot pain are insufficient to state a claim of deliberate indifference.

Additionally, neither the complaint nor the medical records attached thereto allege any set of facts that would allow the Court to infer that Defendant Yu acted with deliberate indifference with respect to a combination of Plaintiff's alleged knee and foot pain. Plaintiff complained of both knee and foot pain at his August 20, 2015 appointment with Defendant Yu, and he requested a low bunk chrono because of this pain. (*See id.* at 281–82.) In response to Plaintiff's complaints, Defendant Yu not only addressed Plaintiff's knee and foot pain individually, as discussed above, but also performed a complete physical examination of Plaintiff's musculoskeletal system. He assessed that Plaintiff could walk erect and without limping, could get in and out of a chair without difficulty, could hop onto the examining table without difficulty, and showed no signs of atrophy in any of his upper and lower extremities. (*Id.* at 281.) Defendant Yu also explained to Plaintiff that there was no medical indication for his low bunk chrono because, despite Plaintiff's multiple complaints of pain, he was able to play basketball. (*Id.* at 282.) Thus, any allegations regarding Defendant Yu's responses to Plaintiff's complaints of knee and foot pain, when considered in combination with each other, are insufficient to state a claim of deliberate indifference.

With respect to Plaintiff's syncope and cardiologic histories, Plaintiff alleges that he spoke to Defendant Yu about his "history of syncope" on February 10, 2015, about his

"cardiology" on April 21, 2015, and about the fact that "he had a seizure in the County Jail" on May 13, 2015. (*Id.* at 27.) Plaintiff also alleges that his medical records indicate that in October 2013, he fell and lost consciousness due to an episode of syncope. (*Id.*)

The medical records attached to Plaintiff's complaint indicate that on February 10, 2015, Defendant Yu reviewed Plaintiff's past medical records and found that Plaintiff did experience episodes of syncope in the past, which caused him to become lightheaded, almost pass out, and be taken to the hospital. (*Id.* at 256.) The medical records additionally show that Defendant Yu found that there were no records indicating that Plaintiff has an arrhythmia or that Plaintiff experienced an episode of syncope since entering the RJDCF in late 2013. (*Id.* at 256, 262.) Furthermore, the medical records show that Defendant Yu continued to monitor Plaintiff's cardiac health by reviewing the notes from his recent appointments with the prisoner's cardiology department and found that the recent records showed no abnormalities. (*Id.* at 262.)

The medical records attached to the complaint establish that Defendant Yu responded promptly and reasonably to Plaintiff's request for a low bunk chrono based on his syncope and cardiologic histories. The complaint does not allege any facts that contradict Plaintiff's medical records or that would otherwise allow the Court to draw the reasonable inference that Defendant Yu purposefully ignored or failed to respond to Plaintiff's possible need for a low bunk chrono based on his syncope and cardiologic histories. Thus, the allegations regarding Defendant Yu's responses to Plaintiff's history of syncope are insufficient to state a claim of deliberate indifference.[9]

In addition, the complaint fails to allege any additional facts that establish that Defendant Yu otherwise was aware of, and purposefully ignored or failed to respond to, a risk that Plaintiff could fall while climbing to or from his top bunk. First, while the complaint repeatedly alleges that Defendants were deliberately indifferent for failing to

[9] Plaintiff does not allege that he fell from his bunk due to syncope or lightheadedness, nor that he has ever suffered from syncope or lightheadedness, since being housed at RJDCF.

protect Plaintiff after he fell from his top bunk on August 3, 2015 (*see, e.g.*, *id.* at 32), the complaint does not allege that Defendant Yu was made aware that Plaintiff fell from his top bunk on that date. Plaintiff does not allege, and the documents attached to the complaint do not establish, that Plaintiff ever told Defendant Yu that he fell from the top bunk on August 3, 2015. The next time that Plaintiff saw Defendant Yu after his alleged fall was on August 20, 2015. (*See id.* at 281–82.) The medical records for that appointment do not indicate that Plaintiff mentioned his fall to Defendant, and, on the contrary, they show that Plaintiff represented to Defendant that he had "had no falls." (*Id.* at 281.)

Nor does the complaint allege that someone else told Defendant Yu that Plaintiff fell from the top bunk on August 3, 2015. While the complaint alleges that "[o]n August 4, 2015 Plaintiff spoke to Defendant R. Gines regarding joint stiffness, and the left knee giving out that his right elbow was banged on the bunk" and that "[o]n August 5, 2015 Plaintiff spoke to Defendant Gines regarding joint stiffness to right elbow and knees pain due to chronic knee stiffness" (*id.* at 24–25), it does not allege that Plaintiff told Nurse Gines, and that Nurse Gines then told Defendant Yu, that Plaintiff fell from his top bunk on August 3, 2015. Thus, the complaint fails to establish that Defendant Yu knew of, let alone purposefully disregarded, the fact that Plaintiff had fallen from his top bunk on August 3, 2015, when Defendant Yu declined to issue a low bunk chrono to Plaintiff on August 20 and 21, 2015.[10]

Second, the complaint fails to allege that Defendant Yu was aware that Plaintiff's cell lacked a ladder that would allow Plaintiff to climb more easily to and from his top bunk. Plaintiff describes in detail in his sur-reply to Defendants' motion to dismiss that he was

> assigned to the upper bunk of a double cell at RJDCF San Diego that is originally designed to hold only one prisoner, which is the reason that the cells

[10] The Court need not address whether Defendant Yu was aware of, but purposefully ignored, the fact that Plaintiff allegedly fell from his top bunk on December 28, 2015, as the letter response to Plaintiff's Health Care Appeal No. 15053969 indicates that as of October 24, 2015, Defendant Yu no longer worked at the RJDCF. (*See* ECF No. 1 at 50.)

> do not have ladders. The upper bunk is placed approximately 5.5 feet above the floor. Prisoners ascend to and descend from the upper bunk by means of a metal desk or stool on the back wall. The stool is 3/4 feet away from the bunk and is about 1.5 feet above the ground. According to Plaintiff, to get to the upper bunk, a prisoner must jump or step onto the stool and then move or jump three feet across, or four feet up onto the upper bunk. On the way down, an inmate must jump four feet down onto the metal steel table.

(ECF No. 20 at 5.) Plaintiff argues in his opposition to Defendants' motion to dismiss that

> [a] reasonable person in the Defendants position would have understood that the continued condition of confinement of Plaintiff on the top bunk without a ladder to get down, or jumping five foot up and down onto a stool or table surface pose a substantial risk of falling off the top bunk because of his chronic medical condition would cause him to be injuried [sic].

(ECF No. 17 at 33.) Importantly to this analysis, however, the complaint does not contain any allegations from which the Court could draw the reasonable inference that Defendant Yu was aware that Plaintiff's cell did not contain a ladder for Plaintiff to use to climb to and from his top bunk. Thus, the complaint fails to establish that, at the times Defendant Yu declined to issue Plaintiff a low bunk chrono, he knew of, let alone purposefully disregarded, the fact that Plaintiff was required to jump and climb on furniture to get to and from his top bunk.

Third, the complaint fails to allege that Defendant Yu was aware of, and purposefully ignored, the recommendation from Plaintiff's physical therapist that Plaintiff be assigned to a lower bunk. Plaintiff alleges, and the medical records show, that the physical therapist's low bunk recommendation was made on September 28, 2015. (ECF No. 1 at 22–23, 144–45.) However, the complaint and the attached medical records establish that Plaintiff did not have any further contact with Defendant Yu after August 21, 2015. Specifically, the complaint alleges that Plaintiff's last conversation with Defendant Yu regarding his request for a low bunk chrono occurred on August 20, 2015. (*See id.* at 31.) In addition, the documents attached to the complaint indicate that Plaintiff's medical records with respect to Defendant Yu do not extend beyond August 21, 2015. (*See id.* at 253–86.) The medical records also show that after Plaintiff's August 21, 2015 fall, he was

next seen for a follow up appointment on September 3, 2015, by Physician Assistant Scott Deaton. (*See id.* at 309–10.) Thereafter, he was seen by Dr. Guldseth beginning October 5, 2015 at the latest. (*See id.* at 287–307.) Accordingly, based on the facts alleged in the complaint, the Court cannot reasonably infer that the physical therapist's recommendation that Plaintiff be provided a low bunk was available to Defendant Yu during the time he was actively providing medical care to Plaintiff.

Finally, the fact that Plaintiff disagrees with Defendant Yu's medical opinion regarding Plaintiff's qualification for a low bunk chrono is insufficient to give rise to an Eighth Amendment claim under § 1983. *See Jackson*, 90 F.3d at 332. To establish deliberate indifference, Plaintiff "must show that the course of treatment [Defendant Yu] chose was medically unacceptable under the circumstances . . . and . . . that [he] chose this course in conscious disregard of an excessive risk to plaintiff's health." *Id.* While Plaintiff disagrees with Defendant Yu's conclusion that Plaintiff did not medically qualify for a low bunk chrono, Plaintiff does not allege that Defendants' offered course of treatment for Plaintiff's neck, back, knee, and foot pain—light exercise, physical therapy, and new shoes—were medically unacceptable under the circumstances. Thus, Plaintiff does not state a viable claim for deliberate indifference.

For the reasons discussed above, the complaint fails to allege sufficient facts to state a claim of deliberate indifference with respect to Defendant Yu. Accordingly, the Court recommends that Defendants' motion to dismiss with respect to Plaintiff's Eighth Amendment claim against Defendant Yu be **GRANTED**. However, because it is not clear that the complaint's deficiencies with respect to this claim cannot be cured by amendment, the Court recommends that Plaintiff's Eighth Amendment claim against Defendant Yu be dismissed **without prejudice and with leave to amend**.

ii. Defendant Walker

Defendant Walker is the Chief Physician and Surgeon at the RJDCF. (*See* ECF No. 1 at 54.) Plaintiff does not allege that Defendant Walker provided medical care to Plaintiff. Rather, Plaintiff appears to rely on a theory of supervisory liability to assert his claims

against Defendant Walker. Plaintiff alleges that Defendant Walker had "personal knowledge" of Plaintiff's medical situation by virtue of approving Defendant Yu's and Dr. Guldseth's requests to refer Plaintiff to physical therapy and for an orthopedic consultation and yet failed to protect Plaintiff from injury. (*Id.* at 32–34.) In addition, Plaintiff contends that Defendant Walker acted with deliberate indifference when he denied Plaintiff's Health Care Appeal No. 15053350 at the first level of administrative review on June 9, 2015. (*See id.* at 14, 28.)

The United States Supreme Court has held that there is no vicarious liability for civil rights violations. *Iqbal*, 556 U.S. at 676–77; *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Thus, under § 1983, "[a] supervisor may be liable only if (1) he or she is personally involved in the constitutional deprivation, or (2) there is a 'sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989)); *see also Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011). To demonstrate a sufficient causal connection, "a plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of the injury." *Starr*, 652 F.3d at 1207 (quoting *Redman v. Cty. of San Diego*, 942 F.2d 1435, 1447 (9th Cir. 1991)). "'The requisite causal connection can be established by setting in motion a series of acts by others' . . . or by 'knowingly refusing to terminate a series of acts by others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury.'" *Id.* at 1207–08 (quoting *Redman*, 942 F.2d at 1447, then *Dubner v. City & Cty. Of San Francisco*, 266 F.3d 959, 968 (9th Cir. 2001)). "A supervisor can be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others." *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998).

As noted above, Plaintiff does not allege that Defendant Walker was personally involved in the alleged violation of Plaintiff's Eighth Amendment rights. Thus, to state an

Eighth Amendment claim against Defendant Walker, Plaintiff must demonstrate that there is a "sufficient causal connection" between Defendant Walker's alleged wrongful conduct and a constitutional violation committed by someone else. *See Crowley*, 734 F.3d at 977. Plaintiff attempts to draw this connection by alleging that Defendant Walker, by virtue of his approving Defendant Yu's and Doctor Guldseth's medical referral requests, had "personal knowledge" of the allegedly unconstitutional medical care provided to Plaintiff by those actors and failed to protect Plaintiff from injury. However, for the reasons discussed above, the complaint does not allege sufficient facts to demonstrate that Defendant Yu's medical care inflicted a constitutional injury on Plaintiff, and the Honorable Roger T. Benitez found the same with respect to Doctor Guldseth. (*See* ECF No. 5 at 8–9.) In the absence of an underlying constitutional violation by Defendant Yu or Doctor Guldseth, Plaintiff cannot allege a causal connection between Defendant Walker's conduct and a constitutional violation committed by one of Defendant Walker's subordinates. *See Hallman v. Cate*, 483 F. App'x 381, 381 (9th Cir. 2012); *Roman v. Knowles*, 07cv1343 JLS (POR), 2009 WL 1675863, at *4 (S.D. Cal. June 15, 2009). Thus, based on the facts alleged in the complaint, Plaintiff's Eighth Amendment claim against Defendant Walker under a *respondeat superior* theory of liability is subject to dismissal.

In addition, in reliance on the Ninth Circuit's holding in *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003), this Court has held that a prison official's mere administrative review of a prisoner's Health Care Appeal cannot serve as the basis of the official's liability under § 1983. *See Bell v. Cal. Dep't of Corr. & Rehab.*, No. 14-cv-1397-BEN-PCL, 2016 WL 8736865, at *7 (S.D. Cal. Mar. 29, 2016); *Esposito v. Khatri*, 08cv742-H (WMc), 2009 WL 702218, at *12 (S.D. Cal. Mar. 16, 2009); *accord Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (dismissing § 1983 claims against several prison officials whose only alleged misconduct involved the denial of the inmate's administrative grievances and holding that "the denial of administrative grievances or the failure to act" cannot be the basis of liability under § 1983); *Wright v. Shapirshteyn*, CV 1-06-0927-MHM, 2009 WL 361951, at *3 (E.D. Cal. Feb. 12, 2009) ("[W]here a defendant's only involvement in the

allegedly unconstitutional conduct is the denial of administrative grievances, the failure to intervene on a prisoner's behalf to remedy alleged unconstitutional behavior does not amount to active unconstitutional behavior for purposes of § 1983." (citing *Shehee*, 199 F.3d at 300)). For this reason, Plaintiff's complaint fails to state an Eighth Amendment claim against Defendant Walker based on his administrative review of Plaintiff's Health Care Appeal.

Accordingly, the Court recommends that Defendants' motion to dismiss with respect to Plaintiff's Eighth Amendment claim against Defendant Walker be **GRANTED**. To the extent the complaint alleges that Defendant Walker violated Plaintiff's Eighth Amendment rights by denying Plaintiff's Health Care Appeal, the Court recommends that this claim by dismissed **with prejudice and without leave to amend**. However, because it is not entirely clear that the complaint's deficiencies with respect to the theory of supervisory liability cannot be cured by amendment, the Court recommends that that claim be dismissed **without prejudice and with leave to amend**.

iii. Defendant Roberts

Defendant Roberts is the Chief Medical Executive of the RJDCF. (*See* ECF No. 1 at 56.) As with Defendant Walker, Plaintiff does not allege that Defendant Roberts provided medical care to Plaintiff. Rather, Plaintiff appears to rely on a theory of supervisory liability to assert his claims against Defendant Roberts. Plaintiff alleges that Defendant Roberts acted with deliberate indifference to Plaintiff's medical needs because he had "personal knowledge" of Plaintiff's allegedly unconstitutional medical care by virtue of approving and denying two of Dr. Guldseth's requests to refer Plaintiff for orthopedic consultations and he failed to protect Plaintiff from injury. (*Id.* at 21, 33.) In addition, Plaintiff contends that Defendant Roberts acted with deliberate indifference when he signed the second-level denial of Plaintiff's Health Care Appeal No. 15053350, dated August 14, 2015. (*See* ECF No. 1 at 14, 28.)

As with Defendant Walker, Plaintiff does not allege that Defendant Roberts was personally involved in the alleged deprivation of Plaintiff's Eighth Amendment rights.

Thus, to state an Eighth Amendment claim against Defendant Roberts, Plaintiff must demonstrate that there is a "sufficient causal connection" between Defendant Roberts' alleged wrongful conduct and a constitutional violation committed by someone else. *See Crowley*, 734 F.3d at 977. Plaintiff attempts to draw this connection by alleging that Defendant Roberts had personal knowledge of the allegedly unconstitutional medical care provided to Plaintiff by Doctor Guldseth by virtue of his he denying and approving two of Doctor Guldseth's medical referral requests and failed to protect Plaintiff from injury. However, as discussed above, the Honorable Roger T. Benitez found that Doctor Guldseth did not engage in any conduct that resulted in a violation of Plaintiff's constitutional rights. (*See* ECF No. 5 at 8–9.) Absent an underlying constitutional violation by Doctor Guldseth, Plaintiff cannot allege a causal connection between Defendant Roberts' conduct and a constitutional violation by one of Defendant Roberts' subordinates. *See Hallman*, 483 F. App'x at 381. Thus, based on the facts alleged in the complaint, Plaintiff's Eighth Amendment claim against Defendant Roberts under a *respondeat superior* theory of liability is subject to dismissal.

In addition, as discussed above, courts have held that a prison official's mere administrative review of a prisoner's Health Care Appeal cannot serve as the basis of the official's liability under § 1983. *See, e.g.*, *Bell*, 2016 WL 8736865, at *7. Thus, for this reason, the complaint fails to state an Eighth Amendment claim against Defendant Roberts based on his administrative review of Plaintiff's Health Care Appeal.

Accordingly, the Court recommends that Defendants' motion to dismiss with respect to Plaintiff's Eighth Amendment claim against Defendant Roberts be **GRANTED**. Because Plaintiff's claims based upon alleged constitutional violations by Doctor Guldseth were previously dismissed with prejudice, the Court recommends that Plaintiffs claims against Defendant Roberts—whether based upon his supervision of Dr. Guldseth or his denial of Plaintiff's Health Care Appeal—be dismissed **with prejudice and without leave to amend**.

///

iv. Defendants Glynn and Lewis

Defendant Glynn is the Chief Executive Officer of the RJDCF. (*See* ECF No. 1 at 56.) Defendant Lewis is the Deputy Director of the Policy and Risk Management Services of the California Correctional Health Care Services. (*See id.* at 58.) As with Defendants Walker and Roberts, Plaintiff does not allege that Defendants Glynn or Lewis provided medical care to Plaintiff. Rather, Plaintiff appears to rely on a theory of supervisory liability to assert his claims against these Defendants. It appears that Plaintiff contends that Defendants Glynn and Lewis acted with deliberate indifference when they "failed to monitor and supervise RJDCF Doctor Yu and Guldseth, Supervisor Dr. R. Walker, and Dr. S. Roberts that caused unnecessary infliction of pain, and disregard of substantial risk of injury to Plaintiff."[11] (*Id.* at 34.) In addition, Plaintiff alleges that Defendant Glynn acted with deliberate indifference when she denied Plaintiff's Health Care Appeal No. 15053350 at the second level on August 14, 2015. (*See id.* at 28.) Similarly, Plaintiff alleges that Defendant Lewis acted with deliberate indifference when she denied Plaintiff's Health Care Appeal No. 15053350 at the third level on October 12, 2015. (*See id.* at 28.)

As with Defendants Walker and Roberts, the complaint does not allege that Defendants Glynn or Lewis were personally involved in the alleged violation of Plaintiff's Eighth Amendment rights. Thus, to state an Eighth Amendment claim against Defendants Glynn and Lewis, Plaintiff must demonstrate that there is a "sufficient causal connection" between their alleged wrongful conduct and a constitutional violation committed by someone else. *See Crowley*, 734 F.3d at 977. Plaintiff attempts to draw this connection by alleging that Defendants Glynn and Lewis "failed to monitor and supervise RJDCF Doctor Yu and Guldseth, Supervisor Dr. R. Walker, and Dr. S. Roberts that caused

---

[11] With respect to this allegation, the Court notes that Plaintiff does not name Defendants Glynn and Lewis by name. Plaintiff merely states, "*Defendants* failed to monitor and supervise RJDCF Doctor Yu and Guldseth, Supervisor Dr. R. Walker, and Dr. S. Roberts." (ECF No. 1 at 34 (emphasis added).) As Defendants Glynn and Lewis are the only remaining Defendants not named in this sentence, the Court assumes that Plaintiff's vague reference to "Defendants" refers to Defendants Glynn and Lewis.

unnecessary infliction of pain, and disregard of substantial risk of injury to Plaintiff." However, as discussed above, the complaint fails to allege that any medical care provided by Defendants Yu, Walker, or Roberts or Doctor Guldseth amounted to a violation of Plaintiff's constitutional rights. In the absence of an underlying constitutional violation by any of these actors, Plaintiff cannot allege a causal connection between Defendant Glynn's or Defendant Lewis's conduct and a constitutional violation by one of their subordinates. *See Hallman*, 483 F. App'x at 381. Thus, based on the facts alleged in the complaint, Plaintiff's Eighth Amendment claims against Defendants Glynn and Lewis under a *respondeat superior* theory of liability are subject to dismissal.

In addition, as discussed above, courts have held that a prison official's mere administrative review of a prisoner's Health Care Appeal cannot serve as the basis of the official's liability under § 1983. *See, e.g.*, *Bell*, 2016 WL 8736865, at *7. Thus, for this reason, the complaint fails to state Eighth Amendment claims against Defendants Glynn and Lewis based on their administrative reviews of Plaintiff's Health Care Appeal.

For the reasons discussed above, the complaint fails to allege sufficient facts to state Eighth Amendment claims with respect to Defendants Glynn and Lewis. Accordingly, the Court recommends that Defendants' motion to dismiss with respect to Plaintiff's Eighth Amendment claims against these Defendants be **GRANTED**. To the extent the complaint alleges that Defendants Glynn and Lewis violated Plaintiff's Eighth Amendment rights by denying Plaintiff's Health Care Appeal, the Court recommends that these claims be dismissed **with prejudice and without leave to amend**. However, because it is not entirely clear that the complaint's deficiencies with respect to the theory of supervisory liability cannot be cured by amendment, the Court recommends that those claims be dismissed **without prejudice and with leave to amend**.

2. Qualified Immunity

Defendants argue in their motion to dismiss that they are entitled to qualified immunity as to all of Plaintiff's claims. (ECF No. 12-1 at 14–16.) Qualified immunity entitles government officials to "*an immunity from suit* rather than a mere defense to

liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original). "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The purpose of qualified immunity is to strike a balance between the competing "need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* The driving force behind creation of the qualified immunity doctrine was a resolution to resolve unwarranted claims against government officials at the earliest possible stage of litigation. *Id.*

The courts conduct a two-prong analysis to determine whether a government official is entitled to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001). First, examining the alleged facts in favor of the plaintiff, the court must consider whether the alleged facts show the government official's actions violated the plaintiff's constitutional rights. *Id.* at 201. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Id.* On the other hand, if a violation could be made out on a favorable view of the plaintiff's facts, then the court must next determine whether the constitutional right purportedly violated was clearly established in the specific context of the case at hand. *Id.*

In this case, as discussed above, the undisputed evidence attached to the complaint demonstrates that Defendants did not violate Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment when they declined to issue Plaintiff a low bunk chrono. As no constitutional right was violated under the facts alleged in Plaintiff's complaint, Defendants are entitled to qualified immunity.

///

///

3. State Law Claims

Plaintiff's complaint raises three California state law claims, the first of medical negligence and malpractice in violation of California Government Code § 845.6, the second of inadequate medical care, and the third of a violation of Article 1, Sections 15 and 17 of the California Constitution. (ECF No. 1 at 35–39.) Defendants argue that the state law claims should be dismissed on the basis that the complaint fails to allege compliance with the claims presentation requirement of California's Government Claims Act. (ECF No. 12-1 at 13–14.) The Court agrees.

The California Tort Claims Act, commonly referred to as the California Government Claims Act, requires a person asserting a tort claim against a California governmental entity or employee to present his claim to the California Victim Compensation and Government Claims Board before filing an action for damages against that entity or employee. *See* Cal. Gov't Code §§ 905.2, 911.2, 945.4, 950–950.2. The California Government Claims Act has strict time limits for both presenting a claim to the Claims Board and filing a court action after the Claims Board rejects the claim. First, a person must present his tort claim to the Claims Board within six months of the accrual of the claim. Cal. Gov't Code § 911.2. Presentation of a written claim, and action on or rejection of the claim by the Claims Board, are conditions precedent to filing a suit. *Shirk v. Vista Unified Sch. Dist.*, 42 Cal. 4th 201, 208–09 (2007). Thereafter, any suit based on the claim presented to the Claims Board must be commenced within six months from the date the Claims Board's written notice of rejection is deposited in the mail. Cal. Gov't Code § 945.6(a)(1); *Clark v. Upton*, 703 F. Supp. 2d 1037, 1043 (E.D. Cal. 2010). "Compliance with the Government Claims Act is an element of the cause of action, is required, and a failure to file a claim is fatal to a cause of action." *King v. Chokatos*, No. 1:12-cv-01936-LJO-GSA-PC, 2014 WL 3362237, at *5 (E.D. Cal. July 9, 2014) (internal citations omitted). A plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. *Id.* (citing *State v. Superior Court of King Cty. (Bodde)*, 32 Cal. 4th 1234, 1243 (2004)).

After a thorough review of Plaintiff's complaint, the Court finds that the complaint fails to allege facts demonstrating or excusing compliance with the claim presentation requirement of the California Government Claims Act. Because noncompliance with the Government Claims Act is fatal to a plaintiff's state law claims, Plaintiff's state claims against Defendants must be dismissed for failure to state a claim. However, it appears from Plaintiff's opposition that Plaintiff may be able to allege facts showing compliance with the claims presentation of the Government Claims Act.[12] (*See* ECF No. 17 at 39.) Thus, the Court recommends that Plaintiff's state law claims be **DISMISSED without prejudice and with leave to amend**.

In addition, the Court notes that in light of the dismissal of Plaintiff's sole federal law claim, there may be an additional ground to dismiss Plaintiff's state law claims, regardless of whether Plaintiff complied with the claim presentation requirement of the California Government Claims Act. Because the parties in this case are non-diverse, the now-dismissed federal law claim provides the only basis for federal subject matter jurisdiction in this case. While a federal court may exercise supplemental jurisdiction over state law claims "that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution," 28 U.S.C. § 1367(a), a court may decline to exercise supplemental jurisdiction where it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). When considering whether to retain supplemental jurisdiction over state law claims, a court should consider factors such as "economy, convenience, fairness, and comity." *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (en banc). The U.S. Supreme Court has stated that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward

---

[12] Plaintiff asserts in his opposition that he did present his state law claims to the Government Claims Board, but he never received a response to his claims. (ECF No. 17 at 39.)

declining to exercise jurisdiction over the remaining state law claims." *Id.* (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)).

Here, the Court finds that the balance of factors weighs in favor of dismissing Plaintiff's state law claims. This case has yet to proceed beyond the initial pleadings, and thus few judicial resources have been expended at this stage. In addition, dismissal promotes comity by allowing the California courts to interpret their own state law concerning state law claims in the first instance. Thus, in the event that Plaintiff fails to amend his complaint to sufficiently state an Eighth Amendment claim against any Defendant, or if the Honorable Roger T. Benitez determines it is appropriate to dismiss all of Plaintiff's Eighth Amendment claims with prejudice and without leave to amend, the Court recommends that the District Court **decline to exercise supplemental jurisdiction** over Plaintiff's remaining state law claims.

IV. CONCLUSION

For the reasons discussed above, **IT IS HEREBY RECOMMENDED** that the District Court issue an Order: (1) accepting this Report and Recommendation; and (2) **GRANTING** Defendants' Motion to Dismiss (ECF No. 12).

IT IS ORDERED that no later than **August 15, 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 **August 22, 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: July 24, 2017

Jill Burkhardt

Hon. Jill L. Burkhardt
United States Magistrate Judge