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6 UNITED STATES DISTRICT COURT  
7 SOUTHERN DISTRICT OF CALIFORNIA  
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9 STEPHEN DRAGASITS,

10 Plaintiff,

11 v.

12 YU et al.,

13  
14 Defendants.

Case No.: 16-cv-01998-BAS-JLB

**REPORT AND  
RECOMMENDATION FOR  
ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS**

**[ECF No. 36]**

15  
16 Before the Court is Defendants' second Motion to Dismiss Plaintiff Stephen  
17 Dragasits' complaint brought under the Civil Rights Act, 42 U.S.C. § 1983. (ECF No. 36.)  
18 The Court submits this Report and Recommendation to United States District Judge  
19 Cynthia Bashant pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1 of the Local  
20 Rules of Practice for the United States District Court for the Southern District of California.  
21 After a thorough review of Plaintiff's amended complaint, the parties' motion and  
22 opposition papers, and all supporting documents, and for the reasons discussed below, the  
23 Court **RECOMMENDS** that the District Court **GRANT** Defendants' motion to dismiss  
24 (ECF No. 36) and dismiss Plaintiff's amended complaint.

25 **I. PROCEDURAL BACKGROUND**

26 Plaintiff Stephen Dragasits, a state prisoner proceeding *pro se* and *in forma pauperis*,  
27 initiated the present suit by filing a complaint in this Court on August 8, 2016. (ECF No.  
28 1.) Plaintiff alleged that the State of California, the Richard J. Donovan Correctional

1 Facility (“RJDCF”), several RJDCF health care officials, and a Deputy Director of the  
2 California Department of Corrections and Rehabilitation’s Health Care Services Appeals  
3 Branch denied his Eighth Amendment, Fourteenth Amendment, and California state law  
4 rights to proper medical treatment and due process while he was incarcerated at RJDCF.  
5 (*See id.* at 27–39.)<sup>1</sup>

6 On November 15, 2016, the Honorable Roger T. Benitez *sua sponte* dismissed  
7 Plaintiff’s claims against Defendants the State of California, RJDCF, and individual health  
8 care officials Gines, Guldseth, Kelso, and Van Buren. (ECF No. 5 at 10.) In addition,  
9 Judge Benitez *sua sponte* dismissed Plaintiff’s Fourteenth Amendment due process claim  
10 against all named Defendants. (*Id.*) Remaining Defendants Dr. Jin Yu, Dr. R. Walker, Dr.  
11 S. Roberts, Dr. M. Glynn, and California Department of Corrections and Rehabilitation  
12 (“CDCR”) Deputy Director J. Lewis filed a motion to dismiss the remaining claims in  
13 Plaintiff’s complaint. (ECF No. 12.)

14 On September 13, 2017, Judge Benitez adopted this Court’s Report and  
15 Recommendation and dismissed all of Plaintiff’s claims against Defendants. (ECF No.  
16 26.) The Court dismissed without leave to amend Plaintiff’s Eighth Amendment claims  
17 against Defendants Walker, Roberts, Glynn, and Lewis relating to their denial of his health  
18 care appeals. (*Id.* at 5.) The Court also dismissed without leave to amend Plaintiff’s Eighth  
19 Amendment claim against Defendant Roberts for deliberate indifference under a theory of  
20 supervisory liability. (*Id.*) Plaintiff was granted leave to amend his Eighth Amendment  
21 claims for deliberate indifference against Defendants Yu, Walker, Glynn, and Lewis and  
22 his state law claims for medical negligence and malpractice. (*Id.* at 6.)

23 On October 10, 2017, Plaintiff filed his First Amended Complaint (“amended  
24 complaint”). (ECF No. 27.) In his amended complaint, Plaintiff reasserts his Eighth  
25 Amendment and state law claims against Defendants Yu, Walker, Glynn, and Lewis. (*Id.*)  
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28 <sup>1</sup> Citations to documents filed on the public docket of this action refer to the pagination assigned by the  
CM/ECF system.

1 Plaintiff also reasserts his Eighth Amendment claims against Defendant Roberts, which  
2 had been dismissed with prejudice. (*Id.*) On November 7, 2017, Defendants filed the  
3 instant Motion to Dismiss the amended complaint (“motion to dismiss”). (ECF No. 36.)  
4 Plaintiff opposes Defendants’ motion to dismiss. (ECF No. 40.)<sup>2</sup>

## 5 **II. FACTUAL BACKGROUND<sup>3</sup>**

6 Plaintiff’s amended complaint largely contains the same factual allegations as his  
7 original complaint. A more detailed recitation of the facts was set forth in the Report and  
8 Recommendation issued on Defendants’ first motion to dismiss and will not be repeated  
9 here. (*See* ECF No. 21 at 1–11.) A summary of the most relevant facts is provided here.

10 Plaintiff is a state prisoner confined at RJDCF in San Diego, California. (ECF No.  
11 27 at 31.) Prior to arriving at RJDCF, Plaintiff was temporarily confined at the California  
12 Institution for Men. (*Id.* at 30–31.) He was transferred to RJDCF on or around December  
13 2, 2013. (ECF No. 1 at 86.)<sup>4</sup> Plaintiff alleges that he suffers from several arthritic ailments  
14 and degenerative diseases that involve chronic pain in his neck, back, elbows, knees, and  
15 feet. (ECF No. 27 at 31–38.) In addition, Plaintiff alleges that he has a history of syncope  
16 and dizziness dating back to 2012 and that he last suffered an episode of syncope in October  
17 2013. (*Id.*) Plaintiff asserts that on September 13, 2013, medical providers at the California  
18 Institution for Men issued him a lower bunk chrono due to his medical conditions. (*Id.* at  
19 30–31.) The crux of the instant case is that Defendants did not provide Plaintiff the same  
20 accommodation at RJDCF.

21 Defendant Yu was Plaintiff’s primary care physician at RJDCF and saw Plaintiff  
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24 <sup>2</sup> In his opposition, Plaintiff notes that he “may need the appointment of Counsel with the amendment of  
25 the Complaint to present his claims to this Court,” but does not request the appointment of counsel. (ECF  
26 No. 40 at 3.) The Court does not construe this statement as a motion for the appointment of counsel.

27 <sup>3</sup> The allegations contained in Plaintiff’s amended complaint are accepted as true for purposes of assessing  
28 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.

<sup>4</sup> The Court’s order granting Defendants’ first motion to dismiss incorporated the exhibits in Plaintiff’s  
initial complaint into the amended complaint. (ECF No. 26 at 6.)

1 approximately eight times between February 10, 2015 and August 21, 2015. (*See* ECF No.  
2 1 at 50, 253–86.) On May 13, 2015, Plaintiff asked Defendant Yu to renew his lower bunk  
3 chrono. (ECF No. 1 at 262.) After physically examining Plaintiff and reviewing his  
4 medical records, Defendant Yu found there was no medical indication that Plaintiff’s  
5 condition warranted a lower bunk. (*Id.*) However, Defendant Yu ordered an x-ray “to  
6 better understand the medical issues.” (*Id.*) On June 5, 2015, Defendant Yu again  
7 physically examined Plaintiff, observed Plaintiff playing basketball, and reviewed  
8 Plaintiff’s medical records and recent x-ray results. (*Id.* at 268–69.) Defendant Yu again  
9 declined to issue a lower bunk chrono for Plaintiff at that time as he saw no medical  
10 indication to do so, but offered to prescribe Plaintiff pain medication. (*Id.*) On June 22,  
11 2015, Defendant Yu physically examined Plaintiff and still saw no need for a lower bunk,  
12 but ordered x-rays of Plaintiff’s knee to determine if there were any abnormalities. (*Id.* at  
13 272.) Defendant Yu saw Plaintiff on July 20, 2015 and, after physically examining  
14 Plaintiff, once again found that a lower bunk was not necessary. (*Id.* at 276.) Defendant  
15 Yu instead ordered x-rays of Plaintiff’s elbow and referred him to a physical therapist. (*Id.*)

16 Plaintiff alleges that on August 3, 2015, he fell from his upper bunk for the first time.  
17 (ECF No. 27 at 41.) A registered nurse saw Plaintiff on August 5, 2015, one day after  
18 Plaintiff submitted a request for medical services. (ECF No. 1 at 229–31.) The nurse noted  
19 that Plaintiff requested a lower bunk during their visit, but did not refer Plaintiff to a doctor  
20 and instead recommended he walk instead of playing basketball for exercise. (*Id.*) Plaintiff  
21 does not allege that he saw Defendant Yu for evaluation as a result of this alleged fall or  
22 that he ever informed Defendant Yu of this fall. (*See generally* ECF No. 27.) Plaintiff saw  
23 Defendant Yu again on August 20, 2015. (ECF No. 1 at 281–82.) Nothing in Defendant  
24 Yu’s detailed medical notes indicates Plaintiff mentioned the fall (*id.*) and Plaintiff does  
25 not allege that he informed Defendant Yu of the alleged fall. (*See generally* ECF No. 27.)  
26 During this visit, Defendant Yu physically examined Plaintiff, noted that he had seen  
27 Plaintiff playing basketball, and once again found that Plaintiff’s medical condition did not  
28 merit a lower bunk. (*Id.*) Plaintiff communicated to Defendant Yu that he was “building

1 up my case” for a lower bunk. (*Id.*)

2 The next day, on August 21, 2015, Plaintiff alleges that he fell while trying to climb  
3 onto his upper bunk. (ECF No. 27 at 43.) Defendant Yu was onsite and saw Plaintiff the  
4 same day, but declined to issue a lower bunk chrono before reviewing the results of x-rays  
5 he ordered. (ECF No. 1 at 232–34.)<sup>5</sup> This was Plaintiff’s last visit with Defendant Yu,  
6 who subsequently left RJDCF. (*Id.* at 50, 253–86; ECF No. 21 at 22–23.)<sup>6</sup> Thereafter, Dr.  
7 Guldseth, who is not a named defendant, became Plaintiff’s primary care physician. (*See*  
8 ECF No. 1 at 287–307.) Defendant alleges that he fell off the upper bunk once more before  
9 Dr. Guldseth issued him a lower bunk chrono on December 28, 2015. (ECF No. 27 at 33,  
10 47.)

11 Plaintiff appealed Defendant Yu’s initial decision not to issue him a lower bunk  
12 chrono on or about May 12, 2015. (ECF No. 1 at 51–52.)<sup>7</sup> Plaintiff filed a second appeal  
13 of Defendant Yu’s decision not to issue him a lower bunk chrono on June 9, 2015. (*Id.* at  
14 59–60.) Defendants Walker, Glynn, Roberts, and Lewis denied both of Plaintiff’s appeals  
15 at every level of review up to the final, third level of review. (*Id.* at 53–58, 62–66.) Plaintiff  
16 filed a third appeal on September 19, 2015 contesting Defendant Yu’s decision not to issue  
17 Plaintiff a lower bunk chrono. (*Id.* at 48–49.) This appeal was screened out as duplicative  
18 of Plaintiff’s prior appeals and because Defendant Yu was no longer at RJDCF. (*Id.* at 50.)

### 19 III. DISCUSSION

#### 20 A. Legal Standards

##### 21 1. Motion to Dismiss for Failure to State a Claim

22 The Federal Rules of Civil Procedure require that a plaintiff’s complaint must  
23 provide a “short and plain statement of the claim showing that [he] is entitled to relief.”  
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26 <sup>5</sup> As per the treatment notes written by R.N. Gines. (ECF No. 1 at 232–34.)

27 <sup>6</sup> Plaintiff’s follow-up visit to evaluate his lower bunk request after the x-rays were available was with Dr.  
Deaton on September 3, 2015. (*Id.* at 309–10.) Dr. Deaton is not a named defendant.

28 <sup>7</sup> Plaintiff’s grievance is dated May 12, 2015 (*id.* at 51); however, Defendant Yu’s progress notes indicate  
that he examined Plaintiff and denied the request for a lower bunk on May 13, 2015. (*Id.* at 262.)

1 Fed. R. Civ. P. 8(a)(2). The pleading standard that Rule 8 announces does not require  
2 detailed factual allegations, and the statement need only “give the defendant fair notice of  
3 what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,  
4 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However,  
5 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
6 statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (citing *Twombly*,  
7 550 U.S. at 555).

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

21 In ruling on a Rule 12(b)(6) motion to dismiss, the court does not look at whether  
22 the plaintiff will “ultimately prevail but whether the [plaintiff] is entitled to offer evidence  
23 to support the claims.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The court may  
24 consider allegations contained in the pleadings, exhibits attached to the complaint, and  
25 documents and matters properly subject to judicial notice. *Outdoor Media Group, Inc. v.*  
26 *City of Beaumont*, 506 F.3d 895, 899 (9th Cir. 2007); *Roth v. Garcia Marquez*, 942 F.2d  
27 617, 625 n.1 (9th Cir. 1991). The court must assume the truth of the facts presented and  
28 construe all inferences from them in the light most favorable to the nonmoving party.

1 *Buckey v. Cty. of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). However, the court is  
2 “not required to accept legal conclusions cast in the form of factual allegations if those  
3 conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness*  
4 *Network*, 18 F.3d 752, 754–55 (9th Cir. 1994). Moreover, when an allegation in the  
5 complaint is refuted by an attached document, the Court need not accept the allegation as  
6 true. *Roth*, 942 F.2d at 625 n.1.

## 7 2. Standards Applicable to Pro Se Litigants

8 With respect to an inmate who proceeds *pro se*, his factual allegations, “however  
9 inartfully pleaded,” must be held “to less stringent standards than formal pleadings drafted  
10 by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Erickson v. Pardus*,  
11 551 U.S. 89, 94 (2007) (reaffirming that this standard applies to *pro se* pleadings post-  
12 *Twombly*). Thus, where a plaintiff appears *pro se* in a civil rights case, the Court must  
13 construe the pleadings liberally and afford plaintiff any benefit of the doubt. *Hebbe v.*  
14 *Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). However, in giving liberal interpretation to a  
15 *pro se* civil rights complaint, courts may not “supply essential elements of the claim that  
16 were not initially pled.” *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268  
17 (9th Cir. 1982). “The plaintiff must allege with at least some degree of particularity overt  
18 acts which defendants engaged in that support the plaintiff’s claim.” *Jones v. Cmty.*  
19 *Redevelopment Agency of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984) (internal  
20 quotation omitted).

## 21 **B. Analysis**

### 22 1. Eighth Amendment Claims

23 Plaintiff’s amended complaint alleges that Defendants violated his Eighth  
24 Amendment right to be free from cruel and unusual punishment when Defendants failed to  
25 issue him a lower bunk chrono, resulting in three falls from the upper bunk. (ECF No. 27  
26 at 8.) Defendants argue that Plaintiff’s amended complaint fails to cure the deficiencies of  
27 his original complaint and should be dismissed. (ECF No. 36-1 at 6.) The Court agrees.  
28 For the reasons set forth below, the Court finds that Plaintiff fails to state an Eighth

1 Amendment claim against any Defendant and recommends these claims be dismissed.

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

16 Here, Plaintiff alleges that he experienced chronic pain necessitating a lower bunk  
17 chrono. (ECF No. 27 at 31–38.) Defendants do not dispute that Plaintiff adequately alleges  
18 a serious medical need. (ECF No. 36-1 at 11.) Thus, for purposes of this motion to dismiss,  
19 the Court concludes that Plaintiff pleads sufficient facts to state the first component of an  
20 Eighth Amendment claim.

21 Second, the prison officials involved must have acted with deliberate indifference to  
22 the inmate’s serious medical needs. *See Wilson v. Seiter*, 501 U.S. 294, 302–04 (1991).  
23 This is a subjective requirement. *Farmer v. Brennan*, 511 U.S. 825, 839 (1994). To act  
24 with deliberate indifference, a prison official must know of and disregard an excessive risk  
25 to the inmate’s health and safety. *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2002)  
26 (citing *Gibson v. Cty. of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002)). “Under this  
27 standard, the prison official must not only ‘be aware of facts from which the inference  
28 could be drawn that a substantial risk of serious harm exists,’ but that person ‘must also



1 draw the inference.” *Id.* (quoting *Farmer*, 511 U.S. at 837). The court must focus on  
2 “what a defendant’s mental attitude actually was (or is), rather than what it should have  
3 been (or should be).” *Farmer*, 511 U.S. at 838–39. “Even if a prison official *should* have  
4 been aware of the risk, if he ‘was not, then he has not violated the Eighth Amendment, no  
5 matter how severe the risk.” *Peralta v. Dillard*, 744 F.3d 1076, 1086 (9th Cir. 2014)  
6 (quoting *Gibson*, 290 F.3d at 1188) (emphasis in original).

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

13 Furthermore, differences in judgment between a prisoner and a prison official  
14 regarding an appropriate medical diagnosis and course of treatment are not enough to  
15 establish a deliberate indifference claim. *See Estelle*, 429 U.S. at 107–08; *Sanchez v. Vild*,  
16 891 F.2d 240, 242 (9th Cir. 1989). To establish deliberate indifference, the prisoner “must  
17 show that the course of treatment the doctors chose was medically unacceptable under the  
18 circumstances . . . and . . . that they chose this course in conscious disregard of an excessive  
19 risk to plaintiff’s health.” *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). On the  
20 other hand, if the prison official responded reasonably to a risk to the prisoner’s health, he  
21 or she cannot be found liable, even if harm was not ultimately avoided. *Farmer*, 511 U.S.  
22 at 844.

23 For the reasons discussed below, Plaintiff’s amended complaint fails to state a claim  
24 that Defendants were deliberately indifferent to his serious medical needs.

25 *a. Failure to Provide, Or Delay in Providing, Medical Care*

26 As an initial matter, Plaintiff alleges that Defendants were deliberately indifferent to  
27 his medical needs when they failed to provide medical care, or only provided delayed  
28 medical care. Plaintiff alleges that as a result of Defendants “not taking any measures

1 during the first and second fall until after the third fall,” Plaintiff was seriously injured in  
2 his third fall from the upper bunk. (ECF No. 27 at 60.) Plaintiff further alleges that the  
3 “delay in treatment for medical accommodations was medically unacceptable” and his  
4 “serious medical needs was [sic] not timely treated and/or properly treated by each  
5 Defendant.” (*Id.* at 54–55.)

6 To the extent Plaintiff argues that Defendants failed to provide any medical care or  
7 only provided delayed medical care after Plaintiff’s alleged falls, the record reflects  
8 otherwise. Plaintiff’s medical records indicate that he was provided prompt medical care  
9 after he submitted health care services request forms and after each alleged fall. Nurse  
10 Gines examined Plaintiff on August 5, 2015, the day after Plaintiff submitted a health  
11 services request form seeking medical attention and two days after his first alleged fall  
12 from the upper bunk. (ECF No. 1 at 229–31.) Nurse Gines and Defendant Yu examined  
13 Plaintiff on the same day as the alleged second fall. (*Id.* at 96–97, 232–34.) The day after  
14 Plaintiff’s third alleged fall, two physicians, Drs. Deel and Guldseth, both examined  
15 Plaintiff and provided medical treatment. (*Id.* at 135, 294–95.) Although Defendants may  
16 not have provided Plaintiff with the specific care he desired—a lower bunk  
17 accommodation—Plaintiff was promptly provided with medical care.

18 *b. Defendant Yu*

19 As stated above, Defendant Yu was a doctor at RJDCF and Plaintiff’s primary care  
20 physician. (ECF No. 1 at 256.) Plaintiff alleges that Defendant Yu’s decision not to issue  
21 Plaintiff a lower bunk chrono was medically unreasonable and made in conscious disregard  
22 of an excessive risk to Plaintiff’s health. (ECF No. 27 at 38–42, 62–63.) The Court  
23 previously dismissed Plaintiff’s Eighth Amendment claims against Defendant Yu because  
24 the original complaint failed to allege sufficient facts to state a claim of deliberate  
25 indifference. (ECF No. 21 at 23.) After a careful analysis of Plaintiff’s 75-page amended  
26 complaint, 647 pages of exhibits attached to the amended complaint, and 353 pages of  
27 exhibits attached to the original complaint, the Court finds that Plaintiff’s amended  
28 complaint fails to remedy the shortcomings of his original complaint. In sum, Plaintiff’s

1 allegations amount to no more than a difference of opinion between himself and Defendant  
2 Yu regarding the proper course of medical treatment. Accordingly, the Court recommends  
3 dismissal of Plaintiff's Eighth Amendment claims against Defendant Yu.

4 *i. Medical History and Complaints of Pain*

5 Plaintiff alleges that Defendant Yu was aware of Plaintiff's medical history and  
6 complaints of pain, but nonetheless consciously disregarded the excessive risk that Plaintiff  
7 would fall while climbing down from his upper bunk when he refused to issue Plaintiff a  
8 lower bunk chrono. (ECF No. 27 at 14, 57.) Plaintiff alleges over sixty medical  
9 appointments with various medical personnel and complaints of pain between January 9,  
10 2014 and December 31, 2015.<sup>8</sup> Plaintiff communicated complaints of neck, back, knee,  
11 elbow, shoulder, and foot pain to Defendant Yu during the course of his six appointments  
12 between February and August 2015. (*Id.* at 36–43.) Plaintiff alleges that Defendant Yu  
13 examined Plaintiff's medical history on multiple occasions and knew of Plaintiff's latest  
14 episode of syncope in October 2013, but unreasonably declined to provide Plaintiff with a  
15 lower bunk in light of this history. (*Id.* at 36–43.)

16 After careful analysis of Plaintiff's detailed medical records, this Court previously  
17 ruled that Defendant Yu was not deliberately indifferent to Plaintiff's complaints of neck,  
18 back, knee, or foot pain, or any combination thereof, when he declined to issue a lower  
19 bunk chrono. (ECF No. 21 at 16–19.) This Court found that Defendant Yu's response to  
20 Plaintiff's complaints of pain was prompt and was not unreasonable. (*Id.*) This Court also  
21 found that Defendant Yu's treatment was not unreasonable in light of Plaintiff's syncope  
22 and cardiologic histories. (*Id.* at 19–20.) Plaintiff fails to plead any new, relevant factual  
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25 <sup>8</sup> Between January 2014 and December 2015, Plaintiff reported knee locking, degeneration, and pain to  
26 medical providers. (*Id.* at 32–49.) Between April 2014 and October 2015, Plaintiff experienced chronic  
27 and severe foot pain and ankle issues. (*Id.* at 34–45.) Plaintiff complained of back and neck pain between  
28 June 2014 and October 2015. (*Id.* at 35–46.) Between June 2015 and October 2015, Plaintiff complained  
of elbow and shoulder pain. (*Id.* at 39–46.) Plaintiff also has a medical history of hypertension, chest  
pain, Hepatitis C, neck pain, back pain, and arthritis, and experienced a syncope episode in October 2013.  
(*Id.* at 34–36.)

1 allegations relating to his complaints of neck, back, knee, or foot pain that the Court has  
2 not already considered and found insufficient to state a claim against Defendant Yu. Nor  
3 does Plaintiff plead any new, relevant factual allegations relating to Defendant Yu's  
4 knowledge of Plaintiff's medical history and his chosen course of treatment in light of this  
5 history. Accordingly, for the same reasons as set forth in the Court's prior Report and  
6 Recommendation,<sup>9</sup> these allegations are insufficient to state a claim of deliberate  
7 indifference. (*Id.* at 16–20.)

8 Plaintiff's allegations regarding his complaints of shoulder and elbow pain are  
9 insufficient to state a claim of deliberate indifference against Defendant Yu. Plaintiff's  
10 medical records indicate that on June 22, 2015, Plaintiff complained to Defendant Yu of a  
11 sharp pain in his right elbow, which Plaintiff claimed made him unable to climb. (ECF  
12 No. 1 at 272.) Defendant Yu physically examined Plaintiff and found that he could lift his  
13 right elbow high, could flex and extend his elbow without any difficulty, and did not have  
14 any tenderness. (*Id.*) Defendant Yu concluded that Plaintiff's right elbow pain was  
15 "benign." (*Id.*) On July 20, 2015, Plaintiff again complained to Defendant Yu of elbow  
16 pain and also complained of right shoulder pain. (*Id.* at 276.) Plaintiff complained that he  
17 was experiencing pain predominantly in his right shoulder blade, which made it difficult  
18 for him to do pushups. (*Id.*) Defendant Yu noted that Plaintiff reported no trauma to either  
19 his elbow or shoulder. (*Id.*) Defendant Yu performed a physical examination of Plaintiff  
20 and found that he had a full range of motion in his shoulder, could rotate and lift his arm  
21 high, but complained of tenderness to touch. (*Id.*) Defendant Yu found that Plaintiff was  
22 able to flex and extend his elbow and had "good pulses, good sensation." (*Id.*) He noted  
23 that Plaintiff had been prescribed Tylenol for his complaints of pain and further referred  
24 Plaintiff to a physical therapist and ordered an x-ray of Plaintiff's elbow. (*Id.* at 276, 279.)  
25 On August 20, 2015, Defendant Yu adjusted Plaintiff's pain medication to treat his joint  
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28 <sup>9</sup> As stated above, the Honorable Roger T. Benitez adopted in full the Court's Report and Recommendation  
on September 13, 2017. (ECF No. 26.)

1 pain. (*Id.* at 282.)

2 Plaintiff's medical records indicate that Defendant Yu's response to Plaintiff's  
3 complaints of elbow and shoulder pain was not unreasonable under the circumstances. The  
4 complaint does not allege any facts that contradict Plaintiff's medical records or that would  
5 otherwise allow the Court to draw the reasonable inference that Defendant Yu purposefully  
6 ignored or failed to respond to Plaintiff's possible need for a lower bunk chrono based on  
7 his complaints of elbow and shoulder pain. *See Toguchi*, 391 F.3d at 1058. Thus, the  
8 allegations regarding Defendant Yu's responses to Plaintiff's complaints of elbow and  
9 shoulder pain are insufficient to state a claim of deliberate indifference.

10 Accordingly, the factual allegations in Plaintiff's amended complaint fail to state a  
11 claim that the course of treatment Defendant Yu chose was medically unacceptable and  
12 made in conscious disregard of an excessive risk to Plaintiff's health in light of Plaintiff's  
13 medical history and complaints of pain.

14 *ii. Knowledge of Prior Falls*

15 Plaintiff alleges that Defendant Yu<sup>10</sup> "knew that [sic] at least three falls off the top  
16 bunk in August and December 2015 involving Plaintiff"; "knew or should have known of  
17 the conditions that caused Plaintiff to fall off the top bunk"; "made a conscious choice to  
18 disregard the consequences of Plaintiff falling off the top bunk . . . by failing to act"; and  
19 "had knowledge of Plaintiff [sic] severe pain and suffering that resulted from falling off  
20 the top bunk." (ECF No. 27 at 10, 56–57.) Plaintiff alleges that Nurse Gines admitted in  
21 her August 21, 2015 report that Plaintiff had fallen off the top bunk. (*Id.* at 43.) Plaintiff  
22 further alleges that Dr. Deaton's September 3, 2015 progress report admits that Plaintiff  
23 reported he fell while attempting to step down from the top bunk. (*Id.*)

24 Plaintiff fails to support his conclusory statement that Defendant Yu had knowledge  
25 of his three alleged falls with any factual allegations. This Court previously found that  
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28 <sup>10</sup> Some of Plaintiff's allegations refer generally to all Defendants. Plaintiff's allegations against  
supervisory Defendants are addressed below.

1 Plaintiff failed to allege that Defendant Yu was ever made aware of any of Plaintiff's  
2 alleged falls from the top bunk. (ECF No. 21 at 33.) Plaintiff's amended complaint does  
3 not remedy this failure. Plaintiff does not allege that he communicated his alleged falls to  
4 Defendant Yu. Plaintiff also does not allege that Nurse Gines, Doctor Deaton, or any other  
5 person ever communicated to Defendant Yu that Plaintiff had fallen off the top bunk. (*See*  
6 ECF No. 27 at 10, 43, 56–57.) Nor does Plaintiff allege that Defendant Yu ever read Nurse  
7 Gines' or Dr. Deaton's reports. (*See id.*)<sup>11</sup> As the Court previously noted, to the contrary,  
8 Plaintiff's medical records indicate that after the alleged August 21, 2015 fall, Plaintiff  
9 represented to Defendant Yu that he "has had no falls." (ECF No. 1 at 281.)<sup>12</sup> Furthermore,  
10 Defendant Yu could not have had knowledge of Plaintiff's alleged December 2015 fall  
11 because Defendant Yu last treated Plaintiff on August 21, 2015, after which Dr. Guldseth  
12 became Plaintiff's primary care physician. (*Id.* at 50.)<sup>13</sup> Plaintiff's amended complaint  
13 merely repeats conclusory statements that all Defendants at some unspecified time and  
14 through an unspecified manner knew of Plaintiff's falls off the top bunk. As this Court  
15 previously found, such conclusory allegations are insufficient to establish that Defendant  
16 Yu had knowledge of Plaintiff's alleged falls.

17 Even if the Court were to assume that Defendant Yu had knowledge of Plaintiff's  
18 alleged August 21, 2015 fall, the factual allegations in Plaintiff's complaint are insufficient  
19 to state a claim of deliberate indifference. Deliberate indifference requires not only  
20 knowledge of a serious risk, but also a purposeful disregard of that risk. Plaintiff "must  
21 show that the course of treatment [Defendant Yu] chose was medically unacceptable under  
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24 <sup>11</sup>The reports themselves do not indicate that they were reviewed by Defendant Yu. (*See* ECF No. 1 at  
25 232–34, 309–10.)

26 <sup>12</sup> Granted, Plaintiff made this statement in the context of discussing his foot problems. It seems unlikely,  
27 however, that that Plaintiff's general representation that he "has had no falls" would apply only in this  
28 context.

<sup>13</sup> In his opposition to Defendants' motion to dismiss, Plaintiff states that Defendant Yu prescribed  
Plaintiff medication through 2016. (ECF No. 40 at 29.) Plaintiff's medical records indicate that Defendant  
Yu only prescribed Plaintiff medication in 2015, but the prescriptions for some of these medications did  
not expire until 2016. (ECF No. 27-3 at 40, 59, 71, 76, 90, 91, 94, 110, 116; ECF No. 27-4 at 5, 52.)

1 the circumstances . . . and . . . that [he] chose this course in conscious disregard of an  
2 excessive risk to plaintiff’s health.” *Jackson*, 90 F.3d at 332. After Plaintiff’s alleged  
3 second fall, Defendant Yu examined Plaintiff and ordered x-rays. (ECF No. 1 at 232–34.)  
4 Defendant Yu declined to issue Plaintiff a lower bunk chrono until after the x-ray results  
5 were examined. (*Id.*) On September 3, 2015, Dr. Deaton saw Plaintiff for a follow up  
6 appointment and reviewed the x-ray results. (*Id.* at 309–10.) The x-rays showed that  
7 Plaintiff had mild to moderate arthritis and no acute fracture in his hip and pelvis, and  
8 minimal arthritis and no fracture, dislocation, or effusion in his left knee. (*Id.* at 309.)  
9 Plaintiff does not allege facts that would allow the Court to reasonably infer that Defendant  
10 Yu’s decision to order x-rays and examine the results prior to providing Plaintiff with a  
11 lower bunk chrono was medically unacceptable under the circumstances, or that Defendant  
12 Yu chose this course of treatment in conscious disregard for Plaintiff’s health.

13 *iii. Knowledge of No Ladder in Plaintiff’s Cell*

14 Plaintiff alleges that Defendant Yu was deliberately indifferent to the risk Plaintiff  
15 would fall from the upper bunk because Defendant Yu knew that Plaintiff’s bunk did not  
16 have a ladder. (*See* ECF No. 27 at 40, 63.) Plaintiff alleges that his knee and elbow pain  
17 “effected [sic] his mobility to climb because there is not a ladder for access to the top bunk  
18 at any cell in RJDCF.” (*Id.* at 40.) Plaintiff does not allege that he communicated that his  
19 cell did not have a ladder to assist him in accessing the upper bunk to Defendant Yu. (*See*  
20 *id.*) Nor does Plaintiff allege that Defendant Yu was otherwise made aware of the fact that  
21 Plaintiff’s cell did not contain a ladder. The amended complaint fails to allege any facts  
22 from which the Court could draw the reasonable inference that Defendant Yu was aware  
23 that Plaintiff’s cell did not contain a ladder to assist Plaintiff in climbing to the upper bunk.  
24 Plaintiff’s original complaint suffered from the same absence of allegations to suggest that  
25 Defendant Yu was aware that Plaintiff’s cell did not contain a ladder. (ECF No. 21 at 21–  
26 22.) Thus, Plaintiff fails to allege that Defendant Yu knew of, let alone purposefully  
27 disregarded, the fact that Plaintiff was required to climb to his upper bunk using furniture  
28 instead of a ladder.

1                   iv.     *Prescription of Medication With Potential Side Effects*

2           Plaintiff alleges that Defendant Yu had knowledge of, and deliberately disregarded,  
3 the risk that the potential side effects of medication Plaintiff was prescribed would cause  
4 him to fall off the top bunk. (ECF No. 27 at 58.)<sup>14</sup> Among other medications, Plaintiff  
5 was prescribed hydrochlorothiazide (ECF No. 27-3 at 117; ECF No. 27-4 at 5, 62),  
6 ribavirin (ECF No. 27-4 at 39),<sup>15</sup> lisinopril (ECF No. 27-3 at 116; ECF No. 27-4 at 5, 32),  
7 and amlodipine (ECF No. 27-3 at 116; ECF No. 27-4 at 5, 62) during his time at RJDCF.<sup>16</sup>  
8 Plaintiff alleges that these medications can cause dizziness, lightheadedness, and fainting.  
9 (ECF No. 27 at 28–29; ECF No. 27-1 at 56, 99, 103, 108, 114.)<sup>17</sup> Plaintiff alleges that  
10 Defendant Yu knew that Plaintiff had a history of lightheadedness and syncope because on  
11 February 10, 2015, Defendant Yu indicated that some of the medications Plaintiff was  
12 prescribed in 2013 likely caused a syncope episode. (ECF No. 27 at 36–37.) Plaintiff  
13 further alleges that Defendant Yu knew Plaintiff experienced dizziness. Specifically, he  
14 alleges that on April 8, 2015, Defendant Yu reviewed a report indicating that Plaintiff has  
15 occasional dizziness and lightheadedness. (*Id.* at 37.)<sup>18</sup> On August 20, 2015, Plaintiff  
16 alleges that he communicated to Defendant Yu that he was feeling drowsy and Defendant  
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21 <sup>14</sup> Plaintiff alleges that all Defendants were deliberately indifferent in prescribing medications with these  
22 side effects, but only alleges that Defendant Yu, of the named Defendants, prescribed him any of these  
23 medications. Accordingly, the Court only considers Defendant Yu’s actions here. Liability of other  
24 named Defendants in their supervisory capacity is considered below.

25 <sup>15</sup> Plaintiff’s medical records indicate that Dr. Jayasundara prescribed Plaintiff ribavirin for twelve weeks  
26 on October 26, 2015. (ECF No. 27-4 at 39.)

27 <sup>16</sup> Plaintiff also attaches an informational sheet indicating that antipsychotic medications may result in  
28 lightheadedness or dizziness (*id.* at 114), but fails to identify which, if any, antipsychotic medications he  
was prescribed during the period in which he allegedly fell from the top bunk.

<sup>17</sup> Specifically, Plaintiff attaches as exhibits to his amended complaint informational sheets representing  
the following: Hydrochlorothiazide may result in “feeling faint or lightheaded, falls” (ECF No. 27-1 at  
103); Ribavirin may cause “dizziness or lightheadedness” (*id.* at 108); Lisinopril may cause “dizziness,  
faintness, or lightheadedness when getting up suddenly from a lying or sitting position” (*id.* at 55–56);  
and Amlodipine Besylate, Atorvastatin Calcium may result in feeling faint or lightheaded, or falls (*id.* at  
99).

<sup>18</sup> Dr. Birgersdotter-Green’s April 7, 2015 progress notes indicate that Plaintiff reported occasional  
“dizzy/lightheaded with exertion, but no syncopal episodes.” (ECF No. 1 at 169.)



1 Yu admitted that some of the medication Plaintiff was taking could make him feel drowsy.  
2 (*Id.* at 42.) Plaintiff alleges that “Defendant Yu admit [sic] he knows medication makes  
3 Plaintiff lightheaded, drowsy. Defendant Yu admit [sic] he knew of the substantial risk of  
4 serious harm to Plaintiff’s health and safety.” (*Id.*)<sup>19</sup> Plaintiff argues that Defendant Yu’s  
5 failure to provide him with a lower bunk accommodation while prescribing him medication  
6 with the potential side effects of lightheadedness, dizziness, and fainting represented a  
7 deliberate indifference to the risk that Plaintiff would fall off the top bunk. (*Id.* at 58, 60.)

8 To establish deliberate indifference, Plaintiff must do more than allege Defendant  
9 Yu knew of a substantial risk of serious harm to Plaintiff’s health or safety. *McGuckin*,  
10 974 F.2d at 1060. Plaintiff must allege that Defendant Yu purposefully ignored or failed  
11 to respond to his pain or possible medical needs. *Id.* Plaintiff fails to make this showing.

12 First, Plaintiff fails to allege facts that would allow the Court to infer that Defendant  
13 Yu purposefully ignored or failed to respond to Plaintiff’s complaints of drowsiness and  
14 dizziness and his history of syncope. Plaintiff’s medical records indicate that Defendant  
15 Yu repeatedly and carefully examined Plaintiff, reviewed his medical records, and altered  
16 Plaintiff’s medication in response to his findings.

17 On February 10, 2015, Defendant Yu reviewed Plaintiff’s medical history, which  
18 indicated that Plaintiff had felt lightheaded and experienced a syncope episode in October  
19 2013. (ECF No. 1 at 256.)<sup>20</sup> Defendant Yu concluded, and communicated to Plaintiff, that  
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22 <sup>19</sup> In light of Plaintiff’s use of the word “admit” and his pattern of bookending factual allegations with  
23 legal conclusions throughout the amended complaint, the Court does not construe Plaintiff’s statement  
24 that “Defendant Yu admit [sic] he knew of the substantial risk of serious harm to Plaintiff’s health and  
25 safety” as an allegation that Defendant Yu stated that he acknowledged Plaintiff’s prescribed medication  
26 represented a serious risk of harm. (*See* ECF No. 27 at 42.) However, even if the Court were to construe  
27 this statement as an acknowledgement by Defendant Yu that Plaintiff’s medication presented a serious  
28 risk of harm, for the reasons stated in this section, Plaintiff fails to allege facts that would allow the Court  
to reasonably infer that Defendant Yu’s chosen course of treatment was medically unacceptable under the  
circumstances and chosen in conscious disregard of an excessive risk to Plaintiff’s safety. *See Jackson*,  
90 F.3d at 332.

<sup>20</sup> As this Court previously noted, the medical records attached to Plaintiff’s original complaint indicate  
that Plaintiff suffered a syncope episode in October 2013. (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

1 at the time Plaintiff experienced the syncope episode “[h]e was taking a lot of tramadol,  
2 Vicodin, Neurontin, Ambien, other medication Paxil,” which can cause “lightheadedness  
3 or passing out because overload [sic] his body by medication can depress mentally” and  
4 “can cause a syncope-like episode.” (*Id.* at 257.) Defendant Yu found that “[s]ince he  
5 stopped those medications and cut down the lisinopril from 40 to 20 mg, he has had no  
6 syncope episodes, no feeling of arrhythmias.” (*Id.*) On April 21, 2015, Plaintiff saw  
7 Defendant Yu again for a follow-up appointment. (*Id.* at 260–61.) At this appointment,  
8 Defendant Yu performed an examination of Plaintiff and reviewed his medical records.  
9 (*Id.* at 260.) Defendant Yu noted that the doctor that saw Plaintiff for his syncope and  
10 cardiac history after their last appointment also concluded that Plaintiff was “doing fine”  
11 in these regards. (*Id.*) Plaintiff saw Defendant Yu again on May 13, 2015. (*Id.* at 262–  
12 63.) In his progress notes, Defendant Yu indicated that Plaintiff “has been evaluated as  
13 being syncopal . . . [and] has a recording device on the chest to see any arrhythmias . . . but  
14 since he has been in the prison system, he has not had syncope.” (*Id.* at 262.) Defendant  
15 Yu also noted that a cardiologist is monitoring Plaintiff’s loop recording but there has been  
16 no arrhythmia. (*Id.* at 262–63.)

17 Plaintiff alleges that on August 20, 2015, he communicated to Defendant Yu that he  
18 felt drowsy in the morning. (ECF No. 27 at 42.) During this appointment, Plaintiff also  
19 requested an increase in his Trileptal medication to treat his back and joint pain. (ECF No.  
20 1 at 282.) After an examination of Plaintiff and his medical records, Defendant Yu found  
21 that “a couple of medications he is taking can make him drowsy,” including Vistaril and  
22 Trileptal. (*Id.* at 281.) Defendant Yu concluded that it was more likely that the Vistaril  
23 was causing Plaintiff’s drowsiness, but that it could also be the Trileptal. (*Id.* at 282.)  
24 Defendant Yu decided to continue the prescription of Vistaril and not to prescribe Trileptal  
25 for one week to see if there was a change in Plaintiff’s feelings of drowsiness. (*Id.*) If  
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27  
28 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.)

1 Plaintiff's drowsiness did not change, Defendant Yu indicated that he would increase the  
2 Trileptal, as Plaintiff had requested, because this medication was unlikely to be the cause  
3 of Plaintiff's drowsiness. (*Id.*) At this appointment, Defendant Yu again denied Plaintiff's  
4 request for a lower bunk chrono as there was no medical indication that Plaintiff required  
5 this accommodation. (*Id.*) As previously stated, Defendant Yu saw Plaintiff for the last  
6 time on August 21, 2015. Plaintiff does not allege any facts that contradict his medical  
7 records or that would otherwise allow the Court to infer that Defendant Yu acted with  
8 deliberate indifference in his response to Plaintiff's history of syncope and complaints of  
9 dizziness or drowsiness.

10 Second, Plaintiff merely alleges that the hydrochlorothiazide, ribavirin, lisinopril,  
11 antipsychotic medication, and amlodipine he was prescribed *may* cause dizziness,  
12 lightheadedness, or fainting. Aside from the dizziness addressed above,<sup>21</sup> Plaintiff does  
13 not allege that he actually experienced any of these side effects at RJDCF; much less, that  
14 he communicated to Defendant Yu that he was experiencing these side effects. In fact,  
15 Plaintiff does not allege that he fell off the top bunk because he was experiencing dizziness,  
16 lightheadedness, or fainting.<sup>22</sup>

17 At most, Plaintiff's allegations amount to no more than a difference of opinion  
18 regarding the specific medications Defendant Yu should have prescribed. However,  
19 differing opinions on medical treatment, without more, do not amount to a violation of the  
20 Eighth Amendment. *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citing  
21 *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)). Plaintiff has alleged no facts indicating  
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24 <sup>21</sup> Plaintiff's history of dizziness prior to 2014 and dizziness with exertion reported on April 7, 2015.

25 <sup>22</sup> Plaintiff alleges that his first fall occurred when "his left knee gave out." (ECF No. 27 at 41.) Nurse  
26 Gines' August 21, 2015 encounter form indicates that Plaintiff stated the second fall occurred when his  
27 knee locked while he was climbing down from the top bunk (ECF No. 1 at 232); Dr. Deaton's September  
28 3, 2015 progress notes state that Plaintiff reported that "he slipped on the stool" while stepping down from  
his top bunk on the second fall (*id.* at 309). Lastly, Dr. Guldseth's progress notes indicate that Plaintiff  
reported after the third fall that he twisted his ankle when he "stepped off his bunk onto a stool wrong and  
twisted his right leg." (*Id.* at 298.) Plaintiff's original complaint also failed to allege that he fell from the  
upper bunk due to an episode of syncope or lightheadedness. (ECF No. 1; ECF No. 21 at 20.)

1 that Defendant Yu’s chosen course of treatment was medically unacceptable under the  
2 circumstances. *See id.* To the contrary, the medical records indicate that Defendant Yu’s  
3 evaluation of Plaintiff’s medications was not unreasonable. *See Farmer*, 511 U.S. at 844.  
4 Accordingly, Plaintiff fails to allege facts sufficient to state a claim that Defendant Yu’s  
5 course of treatment was medically unacceptable and that he deliberately disregarded an  
6 excessive risk that the medications he prescribed would make Plaintiff feel dizzy,  
7 lightheaded, or faint and then cause him to fall off the top bunk.

8 *v. Disregard of Lower Bunk Policy*

9 Plaintiff alleges that Volume 4, Chapter 23 of the California Correctional Health  
10 Care Service (“CCHCS”) procedures provides that “[a]dvance age [sic] of 60 automatically  
11 qualify for lower tier lower bunk,” and that all Defendants purposefully ignored this policy.  
12 (ECF No. 27 at 25.) The language of CCHCS policies and procedures directly contradict  
13 this allegation.

14 Although Plaintiff does not attach Chapter 23, the Court may *sua sponte* take judicial  
15 notice of this chapter. *See Fed. R. Evid.* 201(c). The CCHCS website contains an index  
16 of Volume 4, Chapter 23 inmate medical services policies and procedures, including  
17 CHCS’s Comprehensive Accommodation Policy and Procedure. *Cal. Comprehensive*  
18 *Accommodation Policy*, Volume 4, Chapter 23 (last revised 05/2017); *Cal. Comprehensive*  
19 *Accommodation Procedure*, Volume 4, Chapter 23.1 (last revised 05/2017),  
20 <https://cchcs.ca.gov/imspp/>.<sup>23</sup> The Court may take judicial notice of the Chapter 23  
21 materials as the content can be accurately and readily determined from a governmental  
22 agency’s website whose accuracy cannot reasonably be questioned. *See Fed. R. Evid.*  
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24  
25 <sup>23</sup> Plaintiff refers to “Chapter 23 Health Care Service Accommodation Chrono IV 23-2” in his amended  
26 complaint. (ECF No. 27 at 25.) The master CCHCS index of policies and procedures indicates that a  
27 Volume 4, Chapter 23.2 does not exist, and has not previously existed. *See* [https://cchcs.ca.gov/wp-](https://cchcs.ca.gov/wp-content/uploads/sites/60/2018/06/IMSPP-Contents.pdf)  
28 [content/uploads/sites/60/2018/06/IMSPP-Contents.pdf](https://cchcs.ca.gov/wp-content/uploads/sites/60/2018/06/IMSPP-Contents.pdf). Chapter 23 consists of a Chapter 23 policy,  
entitled “Comprehensive Accommodation Policy,” and a Chapter 23.1 procedure, entitled  
“Comprehensive Accommodation Procedure.” *See* <https://cchcs.ca.gov/imspp/>. The Court construes  
Plaintiff’s citation as a reference to both the Chapter 23 Policy and Procedure.

1 201(b). *See also Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998–99 (9th Cir. 2010);  
2 *Karkanen v. Family Court Servs. of Contra Costa Cty.*, No. 17-CV-00999-HSG, 2017 WL  
3 2730227, at \*1 (N.D. Cal. June 26, 2017) (taking *sua sponte* judicial notice of content of  
4 governmental agency’s website).

5 CCHCS’s Volume 4, Chapter 23 Comprehensive Accommodation Policy and  
6 Procedure provide that CCHCS “shall provide medically necessary accommodations to  
7 patients to ensure equal access to prison services, programs, and activities.” *Cal.*  
8 *Comprehensive Accommodation Policy*, Volume 4, Chapter 23, at 1; *Cal. Comprehensive*  
9 *Accommodation Procedure*, Volume 4, Chapter 23.1, at 1. “Accommodation decisions  
10 shall be based on guidance provided in the Comprehensive Accommodation Formulary  
11 and clinical judgment, or may be ordered as a nonformulary accommodation as medically  
12 necessary.” *Id.* A nonformulary accommodation is defined as an “accommodation not  
13 listed in the formulary or a formulary accommodation based on medical necessity.” *Id.*  
14 Plaintiff attaches to his amended complaint the Comprehensive Accommodation  
15 Formulary contained in RJDCF’s Operational Plan. (ECF No. 27-1 at 92–95.) The  
16 Comprehensive Accommodation Formulary provides a list of indications that may  
17 establish a lower bunk is medically necessary. (*Id.* at 95.) None of these indications  
18 include being over the age of sixty (or over any specified age). (*See id.*) Thus, the fact that  
19 Plaintiff is over the age of sixty does not mean that he “automatically qualif[ies]” for a  
20 lower bunk under CCHCS policies and procedures. (*See* ECF No. 27 at 25.) Instead, the  
21 policies and procedures provide that if Plaintiff does not meet one of the medical  
22 indications for a lower bunk listed in the Comprehensive Accommodation Formulary, a  
23 nonformulary accommodation based on medical necessity may be ordered. *Cal.*  
24 *Comprehensive Accommodation Policy*, Volume 4, Chapter 23, at 1; *Cal. Comprehensive*  
25 *Accommodation Procedure*, Volume 4, Chapter 23.1, at 1.

26 *vi. Prior Medical Opinions*

27 Plaintiff alleges that Defendant Yu acted with deliberate indifference when he  
28 disregarded the opinions of other health care providers who recommended a lower bunk.

1 (ECF No. 27 at 53, 56.) Plaintiff alleges that Defendants “deliberately ignored the express  
2 lower bunk accommodations order of Plaintiffs[’] prior physicians’ [sic] for reasons  
3 unrelated to the medical needs and/or substantial risk of serious harm or safety measures.”  
4 (*Id.* at 56.) He alleges, “[f]rom 2012-2017 and now doctors found pre and post falls of the  
5 bunk that significantly impacted Plaintiff’s daily activities that there was a significant need  
6 for a permanent medical lower bunk chrono.” (*Id.* at 58.)

7 As to Plaintiff’s prior physicians, Plaintiff alleges that on September 10, 2013, Dr.  
8 Daniel issued Plaintiff a lower bunk chrono. (*Id.* at 30; ECF No. 1 at 129.) Plaintiff alleges  
9 that when he was transferred to RJDCF on December 2, 2013, he was transferred with a  
10 permanent lower bunk chrono. (ECF No. 27 at 31; ECF No. 1 at 86.) On December 5,  
11 2013, Plaintiff alleges that Dr. Pasha “saw a need to update Plaintiffs’ computer medical  
12 chrono . . . bottom bunk.” (ECF No. 27 at 31.)<sup>24</sup> On June 7, 2014, Plaintiff alleges that  
13 Dr. Garikaparthi stated that Plaintiff could get a lower bunk chrono because he was over  
14 sixty years old. (*Id.* at 31.) Plaintiff alleges that his need for lower bunk was “obvious”  
15 and that other doctors “for years saw a need for a medical lower bunk chrono.” (*Id.* at 53.)

16 As to Plaintiff’s medical providers that saw Plaintiff after Defendant Yu, Plaintiff  
17 alleges that on September 28, 2015, physical therapist T. Domingo “saw a need to  
18 recommend that Plaintiff be placed on a lower bunk to limit movement that may aggravate  
19 pain especially to bilateral knees.” (ECF No. 27 at 32.) Plaintiff also alleges that in late  
20 2015, Drs. Deel and Guldseth both saw a need for a lower bunk chrono. (*Id.* at 32–33.)  
21 On October 16, 2015, Dr. Guldseth recommended a temporary lower bunk chrono, noting  
22 that he “explained to the patient that the lower bunk might be removed depending on future  
23 workup.” (ECF No. 27-4 at 33.) On December 8, 2015, Plaintiff alleges that he submitted  
24 a health care services request form as he had not received a lower bunk chrono. (ECF No.  
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26  
27 <sup>24</sup> Plaintiff’s medical records indicate that Dr. Pasha issued a permanent chrono on December 5, 2013 that  
28 designates Plaintiff for outpatient care, having full duty functional capacity, as high medical risk, and for  
uncomplicated nursing, but does not specifically recommend placing Plaintiff on a lower bunk. (ECF No.  
1 at 132.)

1 27 at 47; ECF No. 1 at 293.) On December 28, 2015, after Plaintiff’s alleged third fall  
2 from the upper bunk, Dr. Guldseth issued Plaintiff a permanent lower bunk chrono. (*Id.* at  
3 33; ECF No. 1 at 137–38.) That same day, Dr. Deel issued a temporary lower bunk chrono.  
4 (*Id.* at 32; ECF No. 1 at 135–36.)

5 Plaintiff’s allegations relating to *prior* medical providers’ opinions fail to state a  
6 claim of deliberate indifference. A “mere difference of medical opinion . . . is insufficient,  
7 as a matter of law, to establish deliberate indifference.” *Toguchi*, 391 F.3d at 1058 (quoting  
8 *Jackson*, 90 F.3d at 332). Here, Plaintiff alleges only that Defendant Yu should have  
9 followed prior medical providers’ opinions. Without more, these allegations are  
10 insufficient to state a claim of deliberate indifference. As discussed above, Plaintiff fails  
11 to show that Defendant Yu’s chosen course of treatment “‘was medically unacceptable  
12 under the circumstances,’ and was chosen ‘in conscious disregard of an excessive risk to  
13 the prisoner’s health.’” *Id.* (quoting *Jackson*, 90 F.3d at 332).

14 To the extent Plaintiff alleges Defendant Yu’s disregard of his *physical therapist’s*  
15 lower bunk recommendation, made on September 28, 2015, amounts to deliberate  
16 indifference, this allegation is contradicted by Plaintiff’s medical records. As this Court  
17 previously found, Plaintiff’s medical records establish that Defendant Yu did not treat  
18 Plaintiff after August 21, 2015. (ECF No. 21 at 23; ECF No. 1 at 50.) Accordingly, the  
19 Court cannot reasonably infer that the physical therapist’s recommendation was available  
20 to Defendant Yu at the time he declined to issue Plaintiff a lower bunk chrono.

21 For the same reason, Plaintiff’s allegations relating to *physicians’* opinions after  
22 August 2015 also fail to state a claim of deliberate indifference. The Court cannot  
23 reasonably infer that Dr. Deel’s and Dr. Guldseth’s recommendations that Plaintiff be  
24 provided a lower bunk, both made on December 28, 2015, were available to Defendant Yu  
25 at the time he declined to issue Plaintiff a lower bunk chrono. Furthermore, as discussed  
26 above, a mere difference in medical opinion between providers does not amount to  
27 deliberate indifference. *Toguchi*, 391 F.3d at 1058. Accordingly, Plaintiff fails to state an  
28 Eighth Amendment claim against Defendant Yu on the ground that he impermissibly

1 ignored other medical providers' opinions.

2 For the reasons discussed above, the Court **RECOMMENDS** dismissal of  
3 Plaintiff's Eighth Amendment claims against Defendant Yu for failure to state a claim.

4 *c. Supervisory Defendants*

5 Plaintiff alleges that Defendants' collective failure to provide Plaintiff with a lower  
6 bunk chrono, resulting in three alleged falls from the upper bunk, constituted deliberate  
7 indifference to his serious medical needs. Plaintiff alleges that Defendant Yu's  
8 supervisors, Defendants Walker, Glynn, Lewis, and Roberts, acted with deliberate  
9 indifference when they (1) personally participated in provision of medical care to Plaintiff;  
10 (2) denied Plaintiff's health care appeals; (3) failed to properly train subordinates; and (4)  
11 implemented a constitutionally deficient policy.

12 *i. Direct Medical Services Provided By Walker and Roberts*

13 Plaintiff alleges that Defendants Walker and Roberts directly provided him with  
14 medical care, and thus, were personally involved in the alleged Eighth Amendment  
15 violations.<sup>25</sup> Plaintiff fails to support his conclusory allegations with well-pled facts from  
16 which the Court could reasonably infer that Defendants Walker and Roberts provided  
17 medical care in a manner that amounted to deliberate indifference to Plaintiff's serious  
18 medical needs.

19 Plaintiff alleges that Defendant Walker was personally involved in Plaintiff's  
20 medical care when Defendant Walker ordered x-rays of Plaintiff's left hip and left knee  
21 after the second alleged fall on August 21, 2015. (ECF No. 27 at 43.) Defendant Walker's  
22 tangential involvement in Plaintiff's medical care by once ordering an x-ray fails to  
23 establish that Defendant Walker personally participated in a constitutional violation.

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26 <sup>25</sup> Plaintiff makes conclusory allegations that all Defendants were personally involved in his medical care  
27 (*see, e.g.*, ECF No. 27 at 53), but fails to support these conclusory statements with any factual allegations  
28 that Defendants Lewis and Glynn ever personally participated in his medical care. Therefore, the Court  
analyzes the allegations of liability as to Defendants Lewis and Glynn in the section addressing  
supervisory liability below.



1 Plaintiff fails to tie Defendant Walker’s action to his allegation that Defendants were  
2 deliberately indifferent when they refused to provide him with a lower bunk chrono.  
3 Plaintiff does not allege that Defendant Walker ever physically examined him or treated  
4 him; much less that Defendant Walker’s actions constituted participation in the decision of  
5 not to issue a lower bunk chrono. Nor does Plaintiff allege that Defendant Walker was  
6 deliberately indifferent when he ordered the x-ray for any other reason. Plaintiff fails to  
7 support his conclusory statement that Defendant Walker personally participated in a  
8 constitutional violation with well-pled facts.

9 Plaintiff alleges that Defendant Roberts was personally involved in his medical care  
10 because he prescribed Plaintiff “vallaren gel” on two occasions. (ECF No. 27 at 50.) As  
11 above, Plaintiff does not attempt to explain how the fact that Defendant Roberts prescribed  
12 Plaintiff vallaren gel on two occasions is in any way connected to the decision not to issue  
13 Plaintiff a lower bunk chrono. Nor does Plaintiff allege that Defendant Robert’s  
14 prescription amounted to deliberate indifference for some other reason. Accordingly,  
15 Plaintiff fails to support his conclusory statement that Defendant Roberts personally  
16 participated in a constitutional violation with well-pled facts.

17 *ii. Allegations Against Defendants in Their Supervisory Roles*

18 Plaintiff’s remaining allegations against Defendants Walker, Glynn, Lewis, and  
19 Roberts relate to their actions as supervisors, instead of as direct providers of medical  
20 services. Plaintiff alleges that there is a “sufficient causal connection between [the  
21 supervisory Defendants’] wrongful conduct to not issue a medical lower bunk chrono in  
22 2015, and [the] Eighth Amendment violation.” (ECF No. 27 at 59.) Specifically, Plaintiff  
23 argues that a causal connection exists because Defendants Roberts, Glynn, Walker, and  
24 Lewis (1) promulgated and/or enforced “medical lower bunk policies so deficient that the  
25 policy itself participated in the Eighth Amendment violation”; (2) failed in their “training,  
26 supervision, or control of subordinates in not providing a medical lower bunk  
27 accommodations when the medical need existed”; and (3) had knowledge of the underlying  
28 constitutional violation by virtue of their review of Plaintiff’s healthcare appeals, approval

1 of medical providers’ requests for services, and as members of a reasonable  
2 accommodation panel, but impermissibly ignored the violation. (*Id.* at 11–13, 45–46, 50–  
3 51, 57–62.) All four supervisory Defendants—Walker, Glynn, Lewis, and Roberts—  
4 denied Plaintiff’s health care appeals of Defendant Yu’s decision that Plaintiff’s condition  
5 did not merit a lower bunk. (ECF No. 1 at 50, 53–58, 62–66.)

6 The United States Supreme Court has held that there is no vicarious liability for civil  
7 rights violations. *Iqbal*, 556 U.S. at 676–77; *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir.  
8 2002). Thus, under § 1983, “[a] supervisor may be liable only if (1) he or she is personally  
9 involved in the constitutional deprivation, or (2) there is a ‘sufficient causal connection  
10 between the supervisor’s wrongful conduct and the constitutional violation.’” *Crowley v.*  
11 *Bannister*, 734 F.3d 967, 977 (9th Cir. 2013) (quoting *Hansen v. Black*, 885 F.2d 642, 646  
12 (9th Cir. 1989)); *see also Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011). To  
13 demonstrate a sufficient causal connection, “a plaintiff must show the supervisor breached  
14 a duty to plaintiff which was the proximate cause of the injury.” *Starr*, 652 F.3d at 1207  
15 (quoting *Redman v. Cty. of San Diego*, 942 F.2d 1435, 1447 (9th Cir. 1991)). “The  
16 requisite causal connection can be established by setting in motion a series of acts by  
17 others’ . . . or by ‘knowingly refusing to terminate a series of acts by others, which the  
18 supervisor knew or reasonably should have known would cause others to inflict a  
19 constitutional injury.’” *Id.* at 1207–08 (quoting *Redman*, 942 F.2d at 1447, then *Dubner v.*  
20 *City & Cty. Of San Francisco*, 266 F.3d 959, 968 (9th Cir. 2001)). “A supervisor can be  
21 liable in his individual capacity for his own culpable action or inaction in the training,  
22 supervision, or control of his subordinates; for his acquiescence in the constitutional  
23 deprivation; or for conduct that showed a reckless or callous indifference to the rights of  
24 others.” *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998).

25 First, as to Defendant Roberts, Judge Benitez previously dismissed *without leave to*  
26 *amend* Plaintiff’s Eighth Amendment claim against Defendant Roberts for deliberate  
27 indifference under a theory of supervisory liability. (ECF No. 26 at 5.) Therefore, the  
28 Court recommends dismissal of those claims without further analysis.

1 Next, with respect to Defendants Walker, Glynn, and Lewis, Plaintiff cannot  
2 establish a causal connection between the supervisory Defendants' conduct and a  
3 constitutional violation because he fails to state an underlying constitutional violation. *See*  
4 *Hallman v. Cate*, 483 F. App'x 381, 381 (9th Cir. 2012); *Roman v. Knowles*, 07-cv-1343  
5 JLS (POR), 2009 WL 1675863, at \*4 (S.D. Cal. June 15, 2009). For the reasons stated  
6 above, Plaintiff fails to state a claim that the medical care provided by Defendants Yu,  
7 Walker, or Roberts was constitutionally deficient. The Honorable Roger T. Benitez  
8 previously found the same with respect to Doctor Guldseth, Plaintiff's other primary care  
9 physician. (ECF No. 5 at 8–9.)<sup>26</sup> Plaintiff does not allege that Defendants' subordinates  
10 committed any other constitutional violation. Accordingly, Plaintiff fails to state a claim  
11 against Defendants Glynn, Walker, and Lewis for actions taken in their supervisory  
12 capacity.

13 Finally, as to allegations that these supervisory defendants had liability due to their  
14 review of Plaintiff's health care appeals, Judge Benitez previously dismissed these claims  
15 *with prejudice*. (ECF No. 26 at 5.) Plaintiff's reasserted claims against Defendants for  
16 their review of Plaintiff's health care appeals should also be dismissed for this reason. (*See*  
17 *id.*)

18 *d. Leave to Amend*

19 Pursuant to Federal Rule of Civil Procedure 15(a)(2), a court should grant leave to  
20 amend when justice so requires “even if no request to amend the pleading was made, unless  
21 it determines that the pleading could not possibly be cured by the allegation of other facts.”  
22 *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc) (citation omitted). “Futility  
23 of amendment can, by itself, justify the denial of a motion for leave to amend.” *Bonin v.*  
24 *Calderon*, 59 F.3d 815, 845 (9th Cir. 1995). *See also Carvalho v. Equifax Info. Servs.,*  
25 *LLC*, 629 F.3d 876, 893 (9th Cir. 2010). A court may properly deny leave to amend where  
26 a plaintiff has already amended the complaint and does not correct the deficiencies that

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28 <sup>26</sup> As previously noted, Plaintiff does not name Dr. Guldseth as a defendant in his amended complaint.

1 caused the original complaint to fail to state a claim on which relief can be granted.  
2 *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 809–10 (9th Cir. 1988) (“Repeated failure to  
3 cure deficiencies by amendments previously allowed is [a] valid reason for a district court  
4 to deny a party leave to amend.”) (citation omitted). The “district court’s discretion over  
5 amendments is especially broad where the court has already given a plaintiff one or more  
6 opportunities to amend his complaint.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,  
7 186 n.3 (9th Cir. 1987) (citations omitted).

8 In his opposition to Defendants’ motion to dismiss, Plaintiff asserts for the first time  
9 that “Dr. Yu seemed mad that Plaintiff put in an appeal against him as staff misconduct,  
10 and was taking away Plaintiff’s lower bunk chrono in retaliation.” (ECF No. 40 at 26.)  
11 Plaintiff asserts that after he filed a grievance for Defendant Yu’s initial refusal to renew  
12 Plaintiff’s lower bunk chrono, “Defendant Yu would no longer discuss or report anything  
13 Plaintiff had to say, and began to dismiss him from his office and ignored Plaintiff from  
14 anything else he had to say.” (*Id.*) The Court cannot say with certainty that any attempt to  
15 amend Plaintiff’s claims against Defendant Yu would be futile as Plaintiff appears to argue  
16 that Defendant Yu denied him a lower bunk accommodation in retaliation for Plaintiff’s  
17 filing of a grievance and not for a valid medical reason. *See Lopez*, 203 F.3d at 1130.  
18 Accordingly, the Court **RECOMMENDS** that Plaintiff’s Eighth Amendment claim  
19 against Defendant Yu be **dismissed without prejudice**.<sup>27</sup>

20 Amendment of Plaintiff’s claims against Defendants Walker, Glynn, Roberts, and  
21 Lewis, however, would be futile for two reasons. First, the Court previously provided  
22 Plaintiff with a detailed statement of the deficiencies of his original complaint and allowed  
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24 <sup>27</sup> Any amended complaint must comply with the requirements of Local Civil Rule 8.2 governing  
25 complaints filed by prisoners under § 1983, which provides: “Additional pages not to exceed fifteen (15)  
26 in number may be included with the court approved form complaint, provided the form is completely  
27 filled in to the extent applicable in the particular case. The court approved form and any additional pages  
28 submitted must be written or typed on only one side of a page and the writing or typewriting must be no  
smaller in size than standard elite type. **Complaints tendered to the clerk for filing which do not  
comply with this rule may be returned by the clerk, together with a copy of this rule, to the person  
tendering said complaint.**” Civ.LR 8.2 (emphasis added).

1 Plaintiff an opportunity to amend. (See ECF Nos. 21, 26.) Plaintiff’s amended complaint  
2 fails to remedy any of the deficiencies identified by the Court. See *McGlinchy*, 845 F.2d  
3 at 809–10. Second, it is clear from the extensive medical records, grievance forms, and  
4 appeal decisions attached to Plaintiff’s complaints that he cannot allege any set of facts that  
5 would constitute a valid and sufficient claim against Defendants Walker, Glynn, Roberts,  
6 and Lewis. Plaintiff attaches 647 pages of exhibits to his amended complaint. (See ECF  
7 Nos. 27-1, 27-2, 27-3, 27-4, and 27-5.) In addition, 312 pages of exhibits were incorporated  
8 from Plaintiff’s original complaint into his amended complaint. (See ECF Nos. 1, 21.)  
9 Among the 959 pages of exhibits are Plaintiff’s medical records for the years of 2013  
10 through 2017, which provide support and context for the factual allegations contained in  
11 Plaintiff’s amended complaint. The Court has now analyzed Plaintiff’s allegations and  
12 medical records in exhausting detail on several occasions. (See ECF Nos. 5, 21.) The  
13 Court’s careful analysis of Plaintiff’s voluminous medical records and factual allegations  
14 supports the conclusion that it is impossible for Plaintiff to correct the defects of his claims  
15 against Defendants Walker, Glynn, Roberts, and Lewis by amendment. Plaintiff’s claims  
16 must be dismissed, not because he fails to allege an adequate amount of facts, but because  
17 he fails to allege facts that could possibly state a claim against any of these Defendants.  
18 The defects in Plaintiff’s claims against Defendants Walker, Glynn, Roberts, and Lewis  
19 are not ones of error or omission, but instead are the result of a set of facts that simply fails  
20 to give rise to liability under § 1983. Accordingly, the Court **RECOMMENDS** Plaintiff’s  
21 Eighth Amendment claims against Defendants Walker, Glynn, Roberts, and Lewis be  
22 **dismissed with prejudice.**

23           2.     Qualified Immunity

24           Defendants argue that they are entitled to qualified immunity as to all of Plaintiff’s  
25 claims. (ECF No. 36-1 at 15.) Qualified immunity entitles government officials to “*an*  
26 *immunity from suit* rather than a mere defense to liability; and like an absolute immunity,  
27 it is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*,  
28 472 U.S. 511, 526 (1985) (emphasis in original). “The doctrine of qualified immunity

1 protects government officials ‘from liability for civil damages insofar as their conduct does  
2 not violate clearly established statutory or constitutional rights of which a reasonable  
3 person would have known.’” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting  
4 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The purpose of qualified immunity is to  
5 strike a balance between the competing “need to hold public officials accountable when  
6 they exercise power irresponsibly and the need to shield officials from harassment,  
7 distraction, and liability when they perform their duties reasonably.” *Id.* The driving force  
8 behind creation of the qualified immunity doctrine was a resolution to resolve unwarranted  
9 claims against government officials at the earliest possible stage of litigation. *Id.*

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

19 In this case, as discussed above, the alleged facts fail to show that Defendants  
20 violated Plaintiff’s Eighth Amendment right to be free from cruel and unusual punishment  
21 when they declined to issue Plaintiff a lower bunk chrono. As no constitutional right was  
22 violated under the facts alleged in Plaintiff’s complaint, Defendants are entitled to qualified  
23 immunity.

### 24 3. State Law Claims

25 Plaintiff’s complaint raises several California state law claims: medical negligence  
26 and malpractice in violation of California Government Code § 845.6, failure to provide  
27 adequate personnel and failure to diagnose under California Government Code § 855, and  
28 violation of Article 1, Sections 15 and 17 of the California Constitution. (ECF No. 27 at

1 65-71.) The Honorable Roger T. Benitez previously adopted this Court’s Recommendation  
2 stating that in the event Plaintiff fails to amend his complaint to sufficiently state an Eighth  
3 Amendment claim against any Defendant, the Court should decline to exercise  
4 supplemental jurisdiction over Plaintiff’s remaining state law claims. (ECF No. 21 at 33;  
5 ECF No. 26.) As discussed above, Plaintiff failed to amend his complaint to state an Eighth  
6 Amendment claim, or any other federal claim, against any Defendant. Accordingly, the  
7 Court **RECOMMENDS that the District Court decline to exercise supplemental**  
8 **jurisdiction over Plaintiff’s remaining state law claims.**

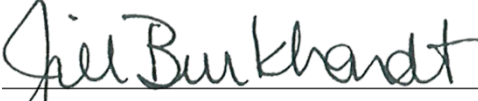
#### 9 **IV. CONCLUSION**

10 For the reasons discussed above, **IT IS HEREBY RECOMMENDED** that the  
11 District Court issue an Order: (1) accepting this Report and Recommendation; and  
12 (2) **GRANTING** Defendants’ Motion to Dismiss (ECF No. 36).

13 **IT IS ORDERED** that no later than **July 19, 2018**, any party to this action may file  
14 written objections with the Court and serve a copy on all parties. The document should be  
15 captioned “Objections to Report and Recommendation.”

16 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with  
17 the Court and served on all parties no later than **August 2, 2018**. The parties are advised  
18 that failure to file objections within the specified time may waive the right to raise those  
19 objections on appeal of the Court’s order. *See Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th  
20 Cir. 1991).

21 Dated: June 21, 2018

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Hon. Jill L. Burkhardt  
24 United States Magistrate Judge  
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