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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DUWAYNE JACKSON,

Plaintiff,

v.

D.PARAMO, L. ROMERO, G. VALDOVINOS,
O. NAVARRO, L. CORONADO, T. GEISINGER,
D. CLAYTON, AND M. DEEL

Defendants.

Case No.: 17CV882-CAB (BLM)

REPORT AND RECOMMENDATION FOR ORDER:

GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AS TO DEFENDANT PARAMO

[ECF No. 42]

AND

GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AS TO DEFENDANTS CORONADO, CLAYTON, AND DEEL

[ECF No. 62]

AND

GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT AS TO DEFENDANT GEISINGER

[ECF No. 69]

1 This Report and Recommendation is submitted to United States District Judge Cathy Ann
2 Bencivengo pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(c) and 72.3(f) of the
3 United States District Court for the Southern District of California. For the following reasons,
4 the Court **RECOMMENDS** that Defendants' motion to dismiss the claims against Warden
5 Paramo be **GRANTED WITHOUT LEAVE TO AMEND**. The Court further **RECOMMENDS**
6 that Defendants' motion to dismiss the claims against Defendants Coronado, Clayton, and Deel
7 be **GRANTED WITH LEAVE TO AMEND**. Finally, the Court **RECOMMENDS** that Defendant's
8 motion to dismiss the claims against Defendant Geisinger be **GRANTED WITH LEAVE TO**
9 **AMEND**.

10 **PROCEDURAL BACKGROUND**

11 On May 2, 2017, Plaintiff Duwayne Jackson, a state prisoner proceeding *pro se* and *in*
12 *forma pauperis*, filed a complaint under the Civil Rights Act, 42 U.S.C. § 1983, against
13 Defendants Paramo, Romero, Valdovinos, and Navarro alleging claims under the Eighth and
14 Fourteenth Amendments. ECF No. 1 ("Comp."). That same day, Plaintiff filed a motion for
15 leave to proceed *in forma pauperis*. ECF No. 2.

16 On June 14, 2017, Plaintiff filed a First Amended Complaint under the Civil Rights Act, 42
17 U.S.C. § 1983, against Defendants Paramo, Romero, Valdovinos, and Navarro alleging claims
18 under the Eighth and Fourteenth Amendments. ECF No. 11 ("FAC") at 1-11. On June 19, 2017,
19 Plaintiff filed a motion for appointment of counsel and on July 5, 2017, Plaintiff filed a motion
20 for a temporary restraining order and preliminary injunction. ECF Nos. 9 and 13. On July 10,
21 2017, the Court issued an order granting Plaintiff's motion to proceed *in forma pauperis* and
22 denying Plaintiff's motions for appointment of counsel and for a temporary restraining order and
23 preliminary injunction. ECF No. 14.

24 On September 15, 2017, Plaintiff filed a motion for default judgment which was denied
25 on September 22, 2017. ECF Nos. 23-24. On September 25, 2017, Defendants filed a motion
26 to dismiss Plaintiff's FAC for failure to state a claim for which relief may be granted as to
27 Defendant Warden Paramo. ECF No. 25. Plaintiff opposed the motion on October 26, 2017.
28 ECF No. 28. Plaintiff filed a supplemental document to Exhibit B of his opposition on November

1 8, 2017. ECF No. 30. Defendants did not file a reply. See Docket. On January 26, 2018, the
2 Court issued a Report and Recommendation for Order Granting Defendants' motion to dismiss
3 Plaintiff's FAC with respect to Defendant Paramo. ECF No. 31. On March 28, 2018, District
4 Judge Cathy Anne Bencivengo issued an Order Adopting Report and Recommendation and
5 granting Plaintiff leave to amend his complaint. ECF No. 39.

6 On February 28, 2018, Plaintiff filed a Second Amended Complaint ("SAC") under the Civil
7 Rights Act, 42 U.S.C. § 1983, against Defendants Paramo, Romero, Valdovinos, Navarro,
8 Coronado, Geisinger, Clayton, and Deel alleging claims under the Eighth and Fourteenth
9 Amendments. ECF No. 37. On April 26, 2018, Defendants filed a motion to dismiss the SAC for
10 failure to state a claim for which relief may be granted as to Defendant Paramo and Plaintiff's
11 Due Process claim. ECF No. 42-1 ("MTD1"). On July 2, 2018, Plaintiff opposed Defendants'
12 motion to dismiss. ECF No. 58 ("Oppo.1"). Defendants did not file a reply. See Docket.

13 On July 9, 2018, Defendants filed a motion to dismiss Plaintiff's SAC for failure to state a
14 claim for which relief may be granted as to Defendants Clayton, Coronado, and Deel. ECF No.
15 62-1 ("MTD2"). Plaintiff opposed the motion on August 16, 2018. ECF No. 71 ("Oppo.2").
16 Defendants did not file a reply. See Docket.

17 On July 30, 2018, Defendant Geisinger filed a motion to dismiss Plaintiff's SAC for failure
18 to state a claim for which relief may be granted. ECF No. 69-1 ("MTD3"). Plaintiff opposed the
19 motion on August 16, 2018. ECF No. 72 ("Oppo.3"). Defendants filed a reply on September 24,
20 2018. See ECF No. 76 ("Reply").

21 **GENERAL COMPLAINT ALLEGATIONS**

22 Plaintiff alleges that he was denied procedural due process and suffered cruel and unusual
23 punishment in violation of his Eighth and Fourteenth Amendment rights. SAC. Plaintiff seeks
24 (1) an injunction requiring that "Richard J. Donovan Prison correctional staff research [i]nmates
25 returning from other [i]nstitutions case factors and unclassified inmates who [sic] case factors
26 warrant continued segregation not be placed into serious risk of harm," (2) injunctive relief
27 requiring Defendants to provide Plaintiff with narcotic pain relief medication, a cat scan, an
28 appointment with an orthopedic surgeon, and whatever treatment the orthopedic surgeon

1 recommends, (3) damages in the amount of \$400,000, (4) punitive damages in the amount of
2 \$350,000, (5) mental and emotional damages in the amount of \$300,000, and (6) declaratory
3 relief. Id. at 22-23.

4 Because this case comes before the Court on a motion to dismiss, the Court must accept
5 as true all material allegations in the complaint, and must construe the complaint and all
6 reasonable inferences drawn therefrom in the light most favorable to Plaintiff. See Thompson
7 v. Davis, 295 F.3d 890, 895 (9th Cir. 2002).

8 **LEGAL STANDARD**

9 Pursuant to Federal Rule of Civil Procedure 8(a), a complaint must contain "a short and
10 plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).
11 "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it
12 demands more than an unadorned, the-defendant-unlawfully-harmed-me-accusation." Ashcroft
13 v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555
14 (2007)).

15 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the plaintiff's claims.
16 See Fed. R. Civ. P. 12(b)(6). The issue is not whether the plaintiff ultimately will prevail, but
17 whether he has properly stated a claim upon which relief could be granted. Jackson v. Carey,
18 353 F.3d 750, 755 (9th Cir. 2003). In order to survive a motion to dismiss, the plaintiff must
19 set forth "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible
20 on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). If the facts alleged in
21 the complaint are "merely consistent with" the defendant's liability, the plaintiff has not satisfied
22 the plausibility standard. Id. (quoting Twombly, 550 U.S. at 557). Rather, "[a] claim has facial
23 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
24 inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly,
25 550 U.S. at 556).

26 When a plaintiff appears *pro se*, the court must be careful to construe the pleadings
27 liberally and to afford the plaintiff any benefit of the doubt. See Erickson v. Pardus, 551 U.S.
28 89, 94 (2007); Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002). This rule of liberal

1 construction is “particularly important” in civil rights cases. Hendon v. Ramsey, 528 F. Supp. 2d
2 1058, 1073 (S.D. Cal. 2007) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992));
3 see also Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (stating that because “Iqbal
4 incorporated the Twombly pleading standard and Twombly did not alter the courts’ treatment
5 of *pro se* filings; accordingly we continue to construe *pro se* filings liberally” This is
6 particularly important where the petitioner is a *pro se* prisoner litigant in a civil matter). When
7 giving liberal construction to a *pro se* civil rights complaint, however, the court is not permitted
8 to “supply essential elements of the claim[] that were not initially pled.” Easter v. CDC, 694 F.
9 Supp. 2d 1177, 1183 (S.D. Cal. 2010) (quoting Ivey v. Bd. of Regents of the Univ. of Alaska,
10 673 F.2d 266, 268 (9th Cir. 1982)). “Vague and conclusory allegations of official participation
11 in civil rights violations are not sufficient to withstand a motion to dismiss.” Id. (quoting Ivey,
12 673 F.2d at 268).

13 The court should allow a *pro se* plaintiff leave to amend his or her complaint, “unless the
14 pleading could not possibly be cured by the allegation of other facts.” Ramirez v. Galaza, 334
15 F.3d 850, 861 (9th Cir. 2003) (internal quotation marks and citations omitted). Moreover,
16 “before dismissing a *pro se* complaint the district court must provide the litigant with notice of
17 the deficiencies in his complaint in order to ensure that the litigant uses the opportunity to
18 amend effectively.” Ferdik, 963 F.2d at 1261.

19 To state a claim under § 1983, a plaintiff must allege facts sufficient to show that (1) a
20 person acting under color of state law committed the conduct at issue, and (2) the conduct
21 deprived the plaintiff of some “rights, privileges, or immunities” protected by the Constitution of
22 the laws of the United States. 42 U.S.C. § 1983. To prevail on a § 1983 claim, “a plaintiff must
23 demonstrate that he suffered a specific injury as a result of specific conduct of a defendant and
24 show an affirmative link between the injury and the conduct of the defendant.” Harris v. Schriro,
25 652 F. Supp. 2d 1024, 1034 (D. Ariz. 2009) (citation omitted). A particular defendant is liable
26 under § 1983 only when the plaintiff proves he participated in the alleged violation. Id.

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1 **I. MOTION TO DISMISS DEFENDANT PARAMO & DUE PROCESS CLAIM ECF No.**
2 **42**

3 Plaintiff alleges that Defendant Paramo denied him procedural due process and inflicted
4 cruel and unusual punishment in violation of Plaintiff's Eighth and Fourteenth Amendment rights.
5 SAC at 7-8, 13, 17. Defendants seek to dismiss Plaintiff's SAC for failure to state a claim for
6 which relief may be granted as to Defendant Paramo and Plaintiff's due process claim. MTD1.
7 Plaintiff's opposition is a summary of legal standards for motions to dismiss and *pro se* pleadings.
8 Oppo.1.

9 **A. Complaint Allegations Regarding Defendant Paramo**

10 Plaintiff claims that on July 26, 2016, while housed at the Richard J. Donovan Correctional
11 Facility ("RJDCF"), he covered his cell window in an attempt to get the attention of the Mental
12 Health Sergeant in charge of the Enhanced Outpatient Program ("EOP") in which he participated.
13 SAC at 4. Plaintiff did this because he wanted to speak with the Sergeant about the fact that
14 he was not receiving his one hot kosher meal each day as expected. Id. Instead, Defendant
15 Navarro entered Plaintiff's cell, pointed his M-K9 Oleoresin Capsicum spray at Plaintiff, and
16 ordered Plaintiff to be handcuffed. Id. Plaintiff explained to Defendant Navarro that he had a
17 medical condition that required waist restraints as opposed to handcuffs, but Defendant Navarro
18 responded by telling Plaintiff to "step out" or get sprayed. Id. Plaintiff complied and was led to
19 the shower where he was handcuffed and searched by Defendant Navarro while another officer
20 searched his cell. Id. Plaintiff eventually was returned to his cell where he discovered there
21 was missing property and his newly purchased television had been damaged. Id. at 5. Plaintiff
22 submitted a CDCR 602 form which was denied at all levels. Id. One week later, on August 2,
23 2016, Plaintiff threw another cold meal that he received on the ground and threw a trash can
24 about 30 to 40 feet away from where Defendant Navarro sat. Id. Plaintiff was handcuffed,
25 placed in a choke hold, and subjected to unnecessary force before being taken to the C-Yard
26 facility gym and ultimately charged with assault on a peace officer by means likely to cause
27 great bodily injury. Id. at 5-7.

28 When he was placed in the C-Yard on August 2, 2016, Plaintiff exhibited mental health

1 symptoms and became suicidal. Id. at 7. Shortly thereafter, Plaintiff was placed in a mental
2 health crisis bed in the Administrative Segregation Unit ("ASU") where he complained of the
3 incident with Defendant Navarro. Id. Plaintiff's complaint was videotaped by Sergeant Kang
4 who distributed the tape to the Institutional Executive Review Committee ("IERC"), a group of
5 staff who are tasked with reviewing all complaints of excessive force. Id. at 7. Defendant
6 Paramo, the Warden at RJDCF, was a member of the IERC at the time Plaintiff's complaint was
7 made. Id. at 7-8. Plaintiff alleges that Defendant Paramo violated his right to be free from cruel
8 and unusual punishment

9 by his failure to adequately train custody staff in the appropriate use of force in
10 the determination of an inmate's need for mental health crisis support and in the
11 appropriate manner to facility [sic] such support, by his failure to supervise the
12 other defendants and by his failure to investigate the incident or discipline the
defendant.

13 Id. at 8. Plaintiff alleges that Defendant Paramo was aware of Defendant Navarro's wrongful
14 behavior because Defendant Navarro was under investigation and that Defendant Paramo knew
15 or should have known that Defendant Navarro's "conduct, attitudes and actions created an
16 unreasonable risk of serious harm to Plaintiff." Id. Plaintiff also alleges that due to Defendant
17 Paramo's failure to ensure Plaintiff's right to be free from cruel and unusual punishment, Plaintiff
18 has suffered irreparable harm including "pain and suffering, shame, humiliation, degradation,
19 emotional distress, embarrassment, mental distress and other injuries." Id.

20 On August 31, 2016, Plaintiff was moved to the Medical Facility Department Mental
21 Hospital ("DMH") in Vacaville, California. Id. at 11. After a September 6, 2016 Classification
22 Committee Hearing, Plaintiff's Department of Health designation was reinstated, his custody
23 level was lowered from maximum to medium(A), and he was released from ASU. Id. at 11, Exh.
24 G. When he returned to RJDCF from the DMH on September 26, 2016, Plaintiff asserts that he
25 was placed back into the ASU in a mental health crisis bed alternative in the B Facility until
26 September 29, 2016 when he was served with an ASU placement notice stemming from his prior
27 incident with Defendant Navarro. Id. at 11, Exh. H. After receiving the notice, Plaintiff was
28 transferred to alternative housing for mental health treatment and then sent to the California

1 Men's Colony State Prison ("CMCSP") where he was given a mental health crisis bed. Id. at 11.
2 Plaintiff was discharged from the mental health crisis bed on October 4, 2016 and placed into
3 the CMCSP Enhanced Outpatient Program Hub Mental Health Patients ASU. Id. On October 13,
4 2016 Plaintiff attended a hearing before the ASU Classification Committee at CMCSP where
5 Plaintiff complained to the Associate Warden of CMCSP about being released from ASU while
6 placed at the DMH. Id. at 12. Warden D. Samuel informed Plaintiff that his previous ICC
7 proceedings had no bearing on the ICC at DMH which was only so that Plaintiff "could possibly
8 program at DMH." Id.

9 On December 2, 2016, Plaintiff was released from ASU and his work and privilege group
10 custody level were reinstated. Id. at 12-13, Exh. K. On January 13, 2017, Plaintiff returned to
11 RJDCF where he was terrified of returning to Facility C. Id. at 13, 15. After being sent to Facility
12 C, on January 16, 2017, Plaintiff alleges that he was "brutaly [sic] beaten due to exercising his
13 constitutional rights against Defendant Navarro by Defendants Romero [and] Valdovinos." Id.
14 at 13. Plaintiff alleges that Defendant Paramo violated his right to be free from cruel and unusual
15 punishment by failing to "adequately train custody staff in the appropriate use of California Code
16 of Regulations Title 15 administrative Segregation Section 3355" and that Defendant Paramo's
17 "reckless disregard of training his subordinates lead to procedural due process violations when
18 Plaintiff complained he was fearful for his health and safety which created an unreasonable risk
19 of serious harm to Plaintiff." Id. Plaintiff alleges that Defendant Paramo was on notice about
20 the abusive conduct of Defendants Navarro, Romero, and Valdovinos because there were
21 numerous complaints and grievances filed against them, but Defendant Paramo failed to take
22 proper disciplinary action against them or otherwise control their behavior. Id. at 14. After his
23 beating and pepper spraying, Plaintiff alleges that he repeatedly requested decontamination
24 from the pepper spray and water to drink, but was denied both for several hours and was
25 refused medical attention. Id. at 17. Plaintiff alleges that Defendant Paramo violated his right
26 to be free from cruel and unusual punishment by failing

27 to adequately train custody staff in the appropriate use of force, [r]ights and
28 respect of others to be treated respectfully, impartially and fairly by employees

1 support and in the appropriate manner to facilitate such support, by his failure to
2 supervise the other defendants and his failure to properly investigate the incident
3 or discipline the other defendants.

4 Id.

5 Finally, Plaintiff alleges that Defendant Paramo
6 [k]new or should have known that his conduct, attitudes, and actions created an
7 unreasonable risk of serious harm to Plaintiff. Despite this knowledge Defendant
8 Paramo, failed to take reasonable steps to protect Plaintiff to ensure his
9 Constitutional right to be free from cruel and unusual punishment while he was in
defendants['] care and custody at Richard J. Donovan Correctional facility.

10 Id. at 20.

11 **B. Analysis**

12 Plaintiff alleges that Defendant Paramo violated his right to due process and his right to
13 be free from cruel and unusual punishment by failing to adequately supervise his subordinates.
14 SAC at 9, 10, 13. Defendants contend that Plaintiff's SAC against Defendant Paramo should be
15 dismissed because "Plaintiff improperly seeks to hold [Defendant Paramo] liable under a theory
16 of respondeat superior." MTD1 at 9. Defendants also contend that Plaintiff's SAC fails to
17 demonstrate personal involvement on the part of Defendant Paramo in the alleged use of
18 excessive force against Plaintiff in August 2016 and January 2017. Id. Plaintiff's opposition is
19 a summary of legal standards for motions to dismiss and *pro se* pleadings. Oppo.1.

20 A prisoner may state a section 1983 claim under the Eighth Amendment against prison
21 officials where the officials acted with "deliberate indifference" to the threat of serious harm.
22 Leach v. Drew, 385 F. App'x. 699, 699-701 (9th Cir. 2010) (citing Berg v. Kincheloe, 794 F.2d
23 457, 459, 460-61 (9th Cir. 1986); Robins v. Prunty, 249 F.3d 862, 866 (9th Cir. 2001)). To
24 assert an Eighth Amendment claim based on failure to prevent harm, a prisoner must satisfy
25 two requirements: one objective and one subjective. See Farmer v. Brennan, 511 U.S. 825, 834
26 (1994). Under the objective requirement, the inmate must show that he was incarcerated under
27 conditions posing a substantial risk of serious harm. Id. A substantial risk of serious harm exists
28 only when a "prison official's act or omission ... result[s] in denial of 'the minimal civilized

1 measure of life's necessities.” Id. “To meet the objective element of an Eighth Amendment
2 claim, [a] [p]laintiff must allege that he is actually at a substantial risk of harm, not simply that
3 he believes he is at risk.” Becker v. Cowan, 2008 WL 802933, at *11 (S.D. Cal. Mar. 21, 2008).
4 Under the subjective requirement, the prisoner must allege facts which demonstrate that “the
5 official knows of and disregards an excessive risk to inmate health or safety; the official must
6 both be aware of the facts from which the inference could be drawn that a substantial risk of
7 serious harm exists, and he must also draw the inference.” Farmer, 511 U.S. at 837. To prove
8 knowledge of the risk, the prisoner may rely on circumstantial evidence; in fact, the very
9 obviousness of the risk may be sufficient to establish knowledge. Id. at 842.

10 1. Objective Prong

11 In the Court’s first Report and Recommendation, the Court provided a lengthy summary
12 of the law governing Plaintiff’s claim against Defendant Paramo. See ECF No. 31 at 8-16. That
13 law continues to govern Plaintiff’s current claim against Defendant Paramo. In the first Report
14 and Recommendation, the Court found that Plaintiff had satisfied the objective requirement of
15 alleging that he was incarcerated under conditions posing a substantial risk of serious harm and
16 denied of “the minimal civilized measure of life's necessities.” Id. at 12; see also Farmer, 511
17 U.S. at 834.

18 Plaintiff’s allegations in the SAC continue to satisfy the objective requirement as he alleges
19 that his placement in Facility C posed a substantial risk of serious harm because the officers in
20 Facility C are known to engage in staff misconduct and have previously subjected him to
21 excessive force. SAC at 10-11, 13. Plaintiff further alleges that when he was placed in Facility
22 C, he was assaulted by Defendants Romero and Valdovinos and left with a broken pinky finger
23 and injured ankle, eye, and hand. Id. at 13, 18-19; see also Farmer, 511 U.S. at 834. These
24 facts, if properly alleged, could satisfy the objective prong of an Eighth Amendment claim. See
25 Becker, 2008 WL 802933 at *11 (“[a] substantial risk of being physically attacked, beaten, or
26 raped is sufficiently serious to satisfy the objective element of an Eighth Amendment claim”)
27 (citing Farmer, 511 U.S. at 832)).

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1 2. Subjective Prong

2 In the Court's first Report and Recommendation, the Court explained to Plaintiff that he
3 failed to satisfy the subjective prong of a deliberate indifference to safety claim against
4 Defendant Paramo because (1) "Plaintiff does not allege that Defendant Paramo was personally
5 involved in either assault or in the use of excessive force," (2) "even if Defendant Paramo
6 suspected that there was a possibility of a problem occurring if Plaintiff was housed in Facility
7 C, theoretical risk of harm is insufficient to establish deliberate indifference," (3) "Plaintiff [] does
8 not state facts that indicate that Defendant Paramo was involved in the decision to house Plaintiff
9 in Facility C on January 13, 2017," (4) "the asserted facts do not support an inference that
10 Defendant Paramo [] 'set in motion' acts that resulted in others assaulting Plaintiff, [] refused
11 to terminate acts that he knew or reasonably should have known would cause others to assault
12 Plaintiff, or [] demonstrated 'conduct that showed a reckless or callous indifference to the rights
13 of others,'" (5) "Plaintiff does not identify any specific training or supervision by Defendant
14 Paramo that indicated an acquiescence in the alleged constitutional deprivation or was otherwise
15 unconstitutional," and (6) "Plaintiff does not allege any facts indicating that Defendant Paramo
16 implemented a 'policy so deficient that the policy itself is a repudiation of constitutional rights
17 and is the moving force of the constitutional violation.'" ECF No. 31 at 14-16. Judge Bencivengo
18 noted that there were no objections to the Report and Recommendation, found "the Report to
19 be thorough, complete, and an accurate analysis of the legal issues presented in the motion to
20 dismiss[,] and gave Plaintiff an opportunity to amend his complaint as to the Eighth and
21 Fourteenth Amendment claims with respect to Defendant Paramo. ECF No. 39 at 2.

22 Plaintiff's SAC does not fix any of the inadequacies identified by the Court in the FAC.
23 The SAC does not state facts that indicate that Defendant Paramo (1) was personally involved
24 in Plaintiff's constitutional deprivation, (2) set in motion a series of unconstitutional acts by
25 others, (3) exhibited "conduct that showed a reckless or callous indifference to the rights of
26 others," or (4) implemented a "policy so deficient that the policy itself is a repudiation of
27 constitutional rights and is the moving force of the constitutional violation." Starr, 652 F.3d at
28 1207-1208. Nor does the SAC allege a causal connection between Defendant Paramo's conduct

1 and the alleged constitutional violation either by showing that Defendant Paramo “knowingly
2 refused to terminate a series of acts by others which [he] knew or reasonably should have
3 known would cause others to inflict a constitutional injury” or that Defendant Paramo’s “culpable
4 action or inaction in the training, supervision, or control of his subordinates [demonstrated] his
5 acquiescence in the constitutional deprivation.” Id.

6 Plaintiff’s SAC does include some new allegations regarding Defendant Paramo, however
7 those allegations fall short of satisfying the subjective prong. Plaintiff claims that Defendant
8 Paramo violated his rights by failing to investigate the alleged incidents, however, this claim is
9 undercut by his exhibits¹ and SAC which show that Plaintiff’s allegations were investigated and
10 found to be meritless. SAC at 8 (“Defendant Navarro was undergoing investigation prior to both
11 incidents”), 10 (Plaintiff noting that he was interviewed on video after complaining about the
12 excessive use of force and that the tape was reviewed by the Institutional Executive Review
13 Committee), 12 (“Defendant Paramo, attended the “IERC” [during] which he viewed the video
14 recording of Plaintiff”), Exh. D at 44-45 (“A review of the allegation of staff misconduct presented
15 in the written complaint has been completed . . . your appeal is being processed as an Appeal
16 Inquiry”), and Exh. K at 79-80 (“The Appeal Inquiry is complete/ has been reviewed and all
17 issues were addressed. You have failed to provide corroborative evidence/documentation to
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19
20 ¹See Easter, 694 F. Supp. 2d at 1183 (“[w]hen a plaintiff has attached various exhibits to the
21 complaint, those exhibits may be considered in determining whether dismissal [i]s proper”)
22 (quoting Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995) (citing Cooper
23 v. Bell, 628 F.2d 1208, 1210 n. 2 (9th Cir.1980))); see also Givens v. Miller, 2017 WL 840658,
24 at *2 (S.D. Cal. Mar. 3, 2017) (a “court may ‘consider certain materials–documents attached to
25 the complaint, documents incorporated by reference in the complaint, or matters of judicial
26 notice–without converting the motion to dismiss into a motion for summary judgment” and
27 “Materials submitted as part of the complaint are not considered ‘outside’ the complaint and
28 may be considered” on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6))
(quoting United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)) and (quoting Butler v. Los
Angeles County, 617 F. Supp. 2d 994, 999 (C.D. Cal. 2008) (citing Lee v. City of Los Angeles,
250 F.3d 668, 688 (9th Cir. 2001); and Hal Roach Studios, Inc. v. Richard Feiner & Co., 896
F.2d 1542, 1555 n. 19 (9th Cir. 1990) (material properly submitted as part of the complaint may
be considered))).

1 substantiate your claims regarding Officer Romero assaulted you and caused you harm” and
2 “The following witnesses were questioned on February 16, 2017: Correctional Officers Romero
3 and Valdovinos. You have failed to identify any inmate witnesses.”).

4 Plaintiff again argues that Defendant Paramo should have known that Plaintiff faced an
5 excessive risk to his health and safety because Defendant Paramo failed to adequately train his
6 staff and because his staff had a history of complaints and grievances filed against them. SAC.
7 However, as was explained in the Court’s January 26, 2018 Report and Recommendation, the
8 fact that complaints or grievances were filed against Defendants Navarro, Romero, and
9 Valdovinos does not establish that

10 (1) Defendant Paramo read the complaints, (2) the information in the complaints
11 was an accurate account of what occurred, or (3) Defendant Paramo knew that
12 housing Plaintiff in Facility C would create an excessive risk to Plaintiff’s health or
13 safety.

14 ECF No. 31 at 14. Plaintiff does not include any new facts in his SAC that change this conclusion.
15 SAC. Plaintiff references the exhibits attached to his SAC, however, a review of the exhibits
16 reveals that they do not support Plaintiff’s allegations. The first document is an Inmate/Parolee
17 Appeal form signed by Defendant Paramo on November 7, 2016. SAC at Exh. D at 42-43. The
18 form is acknowledging that Plaintiff’s appeal regarding his confrontation with Defendant Navarro
19 is being accepted at the second level of review. Id. Plaintiff also submitted a Staff Complaint
20 Response – Appeal dated November 7, 2016 that was reviewed and signed by Defendant Paramo
21 on November 15, 2016. SAC at Exh. D at 44-45. The appeal was regarding Plaintiff’s allegations
22 against Defendant Navarro and was partially granted, but the result of the investigation was a
23 finding that Defendant Navarro did not violate CDCR policy. Id. Given that the appeal and
24 response were submitted and signed by Defendant Paramo after Plaintiff was allegedly abused
25 at the hands of Defendant Navarro, it does not support Plaintiff’s claim that Defendant Paramo
26 knew or should have known that Defendant Navarro posed a serious risk to Plaintiff before the
27 alleged confrontation occurred. Additionally, the documents do not mention Defendant Romero
28 and Valdovinos and, therefore, in no way support Plaintiff’s claim that Defendant Paramo knew

1 or should have known that Plaintiff would later be assaulted by Defendants Romero and
2 Valdovinos if placed in Facility C.

3 Plaintiff also attaches a Classification Committee Chrono signed by Defendant Paramo on
4 January 26, 2017, ten days after Plaintiff's alleged assault in Facility C. Id. at Exh. M at 84. The
5 document notes the ICC's conclusion that Plaintiff be "[r]etain[ed] [in] ASU MAX CUSTODY
6 WG/PG D2/D Effective 1/16/17." Id. at 85. Next, Plaintiff attaches a Staff Complaint Response
7 – Appeal that is dated February 17, 2017 and was signed by Defendant Paramo on March 3,
8 2017. SAC at Exh. K at 79-80; see also Exh. M at 99-100; and Exh. Q at 133-134. The response
9 notes Plaintiff's allegations regarding Defendants Romero and Valdovinos' behavior in January
10 2017. Id. It further notes that Plaintiff's allegations "completely changed" from his January 18,
11 2017 interview to his January 22, 2017 CDCR 602 submission and accordingly finds that
12 Defendants Romero and Valdovinos "did not [] violate CDCR policy." Id. Finally, Plaintiff
13 attaches an October 30, 2017 Second Level Appeal Response Log signed by Defendant Paramo.
14 The log only considers if Plaintiff's previous appeal was properly cancelled and does not discuss
15 anything substantive about Plaintiff's claims. Exh. Q at 120-122. These attachments all postdate
16 Plaintiff's alleged assault at the hands of Defendants Romero and Valdovinos. Accordingly, the
17 attachments do not address either Defendant Paramo's alleged knowledge prior to Plaintiff being
18 placed in Facility C or Defendant Paramo's knowledge concerning Defendant Navarro.

19 For the reasons set forth above, Plaintiff's SAC does not state an Eighth Amendment claim
20 against Defendant Paramo. Because Plaintiff has twice unsuccessfully attempted to state a
21 constitutional claim against Defendant Paramo, the Court **RECOMMENDS** that Defendants'
22 motion to dismiss Plaintiff's Eighth Amendment claim with respect to Defendant Paramo be
23 **GRANTED WITHOUT LEAVE TO AMEND.** See Ramirez, 334 F.3d at 861 (court may dismiss
24 without leave to amend if the pleading cannot be cured by the addition of other facts).

25 **C. Procedural Dues Process Claim**

26 In the Court's first Report and Recommendation, the Court also recommended "that
27 Defendants' motion to dismiss the Fourteenth Amendment claims against Defendant Paramo be
28 GRANTED WITH LEAVE TO AMEND." ECF No. 31 at 16 (emphasis omitted). In the SAC, Plaintiff

1 alleges that Warden Paramo's "reckless disregard of training his subordinates lead to procedural
2 due process violations when Plaintiff complained he was fearful for his health and safety which
3 created an unreasonable risk of serious harm to Plaintiff as he complained to Sergeant Kang
4 that he did not want to go to" Facility C. SAC at 13. Defendants contend that Plaintiff's claim
5 should be dismissed because it "is based upon the same factual allegations as his Eighth
6 Amendment claim, and constitutes a classic case of "doubling up" of constitutional claims" and
7 because "Plaintiff's claims must be analyzed under the Eighth Amendment, and not the
8 Fourteenth Amendment." MTD1. at 13. Defendants cite to Albright v. Oliver, 510 U.S. 266, 273
9 (1994) in support. Id.

10 As Defendants correctly note, "a plaintiff may not advance a substantive due process
11 claim if a particular Amendment 'provides an explicit textual source of constitutional protection'
12 against government misconduct." Loftis v. Vasquez, 2017 WL 2472845, at *8 (S.D. Cal. June 8,
13 2017) (quoting Albright, 510 U.S. at 273(Rehnquist, C.J., for plurality) (quoting Graham v.
14 Connor, 490 U.S. 386, 395 (1989))). Here, however, Plaintiff is alleging a procedural due
15 process claim and not a substantive due process claim. Id. (noting that because it was unclear
16 if plaintiff's due process claim was substantive or procedural, the court would evaluate both
17 possibilities and only applying Albright to the substantive due process claim analysis, not the
18 procedural due process analysis); see also SAC at 13 (stating that Defendant Paramo's actions
19 "lead to [p]rocedural due process violations").

20 "States may under certain circumstances create liberty interests which are protected by
21 the Due Process Clause." Id. (quoting Sandin v. Conner, 515 U.S. 472, 483-84 (1995) (citing
22 Bd. of Pardons v. Allen, 482 U.S. 369 (1987))). "To plead a procedural due process violation,
23 an inmate must allege that the challenged conduct 'present[s] the type of atypical, significant
24 deprivation in which a State might conceivably create a liberty interest.'" Id. (quoting Sandin,
25 515 U.S. at 486). Here, Plaintiff argues that Defendant Paramo's conduct deprived him of his
26 right to be free of an unreasonable risk of serious harm to his health and safety because he was
27 forced into Facility C even though he informed Defendant Paramo's subordinates that he was
28 afraid for his safety in Facility C. SAC at 13. This allegation does not state a procedural due

1 process claim as prisoners “generally have no liberty interest in a particular cell assignment.”
2 Knox v. Castaneda, 2016 WL 11281161, at *10 (S.D. Cal. Nov. 17, 2016) (report and
3 recommendation rejected in part on other grounds) (quoting Samonte v. Frank, 2007 WL
4 496775, at *10 (D. Haw. Feb. 13, 2007) (citing Pratt v. Rowland, 65 F.3d at 806 (9th Cir. 1995);
5 Williams v. Faulkner, 837 F.2d 304, 309 (7th Cir. 1988) (“Williams has not relied on any Indiana
6 statute or regulation limiting the prison officials' discretion to transfer him to a different
7 cellhouse. Because we are not aware of any such limitation, we hold that Williams cannot make
8 any rational argument in law or fact to support his due process claim.”), aff'd sub nom. Neitzke
9 v. Williams, 490 U.S. 319 (1989))). Accordingly, the Court **RECOMMENDS** that Plaintiff's claim
10 that his procedural due process rights were violated when he was placed in Facility C be
11 **DISMISSED WITHOUT LEAVE TO AMEND.**² See Id. (citing Luedtke v. Gudmanson, 971 F.
12 Supp. 1263, 1271 (E.D. Wis. 1997) (internal citation omitted) (“[I]n count 12 the plaintiff alleges
13 that he was moved from a regular unit to the ‘r-unit’ in violation of his federal rights. Prisoners
14 do not have a liberty interest in remaining in a particular cell block or wing of the prison. This
15 claim is frivolous.”)).

16 **II. MOTION TO DISMISS DEFENDANTS CORONADO, CLAYTON, & DEEL ECF No. 62**

17 Plaintiff alleges that Defendants Coronado, Clayton, and Deel were deliberately indifferent
18 to his medical needs and refused to provide him with medical treatment. SAC at 18-20.
19 “Defendants Coronado, Clayton, and Deel move to dismiss the [SAC] because Plaintiff has not
20 alleged that these Defendants were deliberately indifferent to his medical needs.” MTD2 at 2.
21 Plaintiff's opposition is a summary of legal standards for motions to dismiss and *pro se* pleadings.
22 Oppo.2.

23 **A. Complaint Allegations Regarding Defendants Coronado, Clayton, & Deel**

24 Plaintiff alleges that on January 17, 2017, he was in ASU and submitted a sick call slip to
25

26 ² While not entirely clear, Plaintiff's Due Process claim appears to implicate only Defendant
27 Paramo. SAC at 10 and 13. To the extent Plaintiff is trying to assert this procedural due process
28 claim against other Defendants, the Court **RECOMMENDS** that the claim be **DISMISSED**
WITHOUT PREJUDICE as to all Defendants.

1 see the nurse. SAC at 18. Plaintiff saw Nurse Coronado to seek treatment for his eye which
2 was swollen shut and impacting his vision, broken pinky finger that was swollen and permanently
3 disfigured, injured left hand, and right ankle, all of which were injured as a result of his January
4 16, 2017 beating. Id. at 18-19. Defendant Coronado noted that Plaintiff had old injuries and
5 ordered Plaintiff to get x-rays at the triage center. Id. at 18. Plaintiff alleges that Defendant
6 Coronado was deliberately indifferent to his medical care because she failed to provide adequate
7 treatment and she did not refer Plaintiff to a physician until three months later in March 2017.
8 Id. at 19.

9 Plaintiff was examined by Defendant Clayton, a physician, on March 23, 2017 as a follow-
10 up to a 602 form submitted by Plaintiff. Id. at 19 and Exh. S at 147. Plaintiff alleges that
11 Defendant Clayton failed to provide adequate medical care and that after assessing Plaintiff's
12 pinky finger and wrist, provided "absolutely no treatment" for Plaintiff's injuries. Id. at 19.

13 After submitting numerous additional sick call slips, Plaintiff was examined by Defendant
14 Deel, a medical doctor, who also failed to provide adequate medical care. Id. at 19-20. Plaintiff
15 alleges that he informed Defendant Deel on April 26, 2017, that Plaintiff would be transferred
16 to California State Prison in Sacramento, that Plaintiff had not received medical care for his
17 injuries suffered at RJD, and that a medical hold should be put in place due to the pain and
18 suffering from Plaintiff's left pinky finger, left hand, loss of vision, and right ankle. Id. at 19-20.
19 Defendant Deel "failed to provide adequate medical treatment." Id. at 20.

20 Due to the lack of adequate medical care, Plaintiff alleges that he continues to suffer pain
21 shame, humiliation, degradation, emotional distress, embarrassment, and mental distress. Id.
22 at 19-20.

23 **B. Analysis**

24 A prison official's "deliberate indifference to a prisoner's serious illness or injury" violates
25 the Eighth Amendment's proscription against cruel and unusual punishment. See Clement v.
26 Gomez, 298 F.3d 898, 904 (9th Cir. 2002) (quoting Estelle v. Gamble, 429 U.S. 97, 105 (1976)).
27 A prisoner must satisfy an objective and a subjective requirement to assert an Eighth
28 Amendment violation. Id. The objective requirement is satisfied so long as the prisoner alleges

1 facts to show that his medical need is sufficiently "serious" such that the "failure to treat [the]
2 condition could result in further significant injury or the unnecessary and wanton infliction of
3 pain." Id. (internal quotation marks and citation omitted); Lopez v. Smith, 203 F.3d 1122, 1131-
4 32 (9th Cir. 2000) (en banc). The subjective component requires the prisoner to allege facts
5 showing a culpable mental state, specifically, "deliberate indifference to a substantial risk of
6 serious harm." Farmer, 511 U.S. at 836. The indifference must be substantial, and inadequate
7 treatment due to malpractice, or even gross negligence does not rise to the level of a
8 constitutional violation. Estelle, 429 U.S. at 106. Indifference "may appear when prison officials
9 deny, delay, or intentionally interfere with medical treatment, or it may be shown by the way in
10 which prison physicians provide medical care." Tracey v. Sacramento Cnty. Sheriff, 2008 WL
11 154607, at *2 (E.D. Cal. Jan. 15, 2008) (quoting Hutchinson v. U.S., 838 F.2d 390, 392 (9th Cir.
12 1988)).

13 "Mere delay of medical treatment, without more, is insufficient to state a claim of
14 deliberate medical indifference." Robinson v. Catlett, 725 F. Supp. 2d 1203, 1208 (S.D. Cal. July
15 19, 2012) (quoting Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir.
16 1985)). To state a claim for deliberate indifference arising from a delay in treatment, a prisoner
17 must allege that the delay was harmful, although an allegation of substantial harm is not
18 required. McGuckin v. Smith, 974 F.2d 1050, 1060 (9th Cir. 1991), overruled on other grounds
19 by, WMX Techs., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997). Factual allegations indicating that
20 the official "sat idly by as [the prisoner] was seriously injured despite the defendant's ability to
21 prevent the injury" or that the official "repeatedly failed to treat an inmate properly . . . strongly
22 suggests that the defendant's actions were motivated by 'deliberate indifference' to the
23 prisoner's medical needs." Id. at 1060-61. "In sum, the more serious the medical needs of the
24 prisoner, and the more unwarranted the defendant's actions in light of those needs, the more
25 likely it is that a plaintiff has established 'deliberate indifference' on the part of the defendant."
26 Id. at 1061. Isolated incidents relative to a plaintiff's overall treatment suggest no deliberate
27 indifference. Id. at 1060.

28 ///

1 1. Objective Prong

2 Plaintiff satisfies the objective prong of the test for an Eighth Amendment violation. A
3 "serious" medical need exists if the failure to treat a prisoner's condition could result in further
4 significant injury or the "unnecessary and wanton infliction of pain." Nawabi v. Wyatt, 2009 WL
5 3514849, at *7 (C.D. Cal., Oct. 26, 2009) (citing Estelle, 429 U.S. 97 at 104). In considering
6 the seriousness of an alleged medical need, courts should consider whether (1) a reasonable
7 doctor would think that the condition is worthy of comment or treatment; (2) the condition
8 significantly affects the prisoner's daily activities; and (3) the condition is chronic and
9 accompanied by substantial pain. Id. (citing Doty v. County of Lassen, 37 F.3d 540 at 546 n.3)
10 (9th Cir. 1994).

11 Here, the Court must accept as true that Plaintiff's eye was swollen shut and that he
12 suffered a loss of vision as well as a broken and permanently disfigured left pinky finger, and
13 damage to his left hand and right ankle. SAC at 18-20. A reasonable doctor would likely think
14 that a loss of vision and a broken and disfigured finger would be worthy of comment or
15 treatment. While Plaintiff does not discuss the impact of his injuries on his activities of daily
16 living in his complaint, he does allege that his finger has caused him great pain since it was
17 injured and continues to do so.³ Id. at 20.

18 2. Subjective Prong

19 Plaintiff has failed to allege that Defendants Coronado, Clayton, and Deel were
20 deliberately indifferent to a substantial risk of serious harm to Plaintiff.

21 a. Defendant Coronado

22 Plaintiff alleges that he sought treatment from Defendant Coronado after being assaulted
23 and injured, but that Defendant Coronado was "biased" against him from the start as evidenced
24 by her comment that Plaintiff suffered from "old injuries" and that she failed to provide adequate
25 medical care or a timely referral. SAC at 18-19.

26
27
28 ³ The exhibits to Plaintiff's SAC do show that Plaintiff has reported that his injuries affect his
activities of daily living. See SAC at Exh. S at 149 and Exh. U at 168, 174, and 177.

1 The exhibits submitted with Plaintiff's SAC show that Plaintiff initially sought medical care
2 on January 17, 2017 for complaints of hand and foot pain, difficulty sleeping, lack of appetite,
3 and eye drainage. Id. at Exh. U at 163 (Health Care Services Request Form). However, when
4 Plaintiff was called for his appointment on January 17, 2017, he refused treatment. Id. at 163
5 and 165 (Nurses Progress Notes). Despite this, Defendant Coronado ordered x-rays from the
6 radiology department and the x-rays were scheduled for January 19, 2017. Id. at 165.
7 Defendant Coronado noted that Plaintiff showed no signs of distress and was speaking with
8 mental health staff. Id.

9 Plaintiff had another appointment with Defendant Coronado on January 20, 2017
10 regarding complaints of eye pain and a possible eye infection. Id. at 164. Defendant Coronado
11 noted that Plaintiff had an "eye [i]njury/ [i]rritation." Id. It is unclear what happened at this
12 appointment as the record indicates "Duplicate 7362 please see 7362 #5825285 for details."
13 Id.

14 Defendant Coronado examined Plaintiff on March 13, 2017 for hand and finger pain. Id.
15 at 170 (Health Care Services Request Form). Id. Plaintiff requested a left knee brace and two
16 soft wrist braces. Defendant Coronado gave Plaintiff Naproxen. Id. Plaintiff had appointments
17 with Defendant Coronado on March 30, 2017 and April 11, 2017, for hand, finger, and ankle
18 pain, however, Plaintiff refused treatment on both occasions. Id. at 172, 173 (Health Care
19 Services Request Form).

20 Defendant Coronado started to examine Plaintiff on April 4, 2017 for severe hand and
21 pinky finger pain impacting Plaintiff's activities of daily living. Id. at 168 (Health Care Services
22 Request Form). Plaintiff also complained that his medication was not helping with the pain. Id.
23 Defendant Coronado noted that she was "unable to assess for complete nursing process due to
24 lack of cooperation" and stated that during the appointment, Plaintiff began to raise his voice
25 and threatened to "602" her before eventually being escorted out of the exam room. Id.
26 Defendant Coronado noted that at no time did Plaintiff appear to be in distress. Id. Plaintiff
27 returned to Defendant Coronado on April 5, 2017 for hand, finger, and ankle pain and to request
28 replacement braces, but was again uncooperative. Id. at 169 ((Health Care Services Request

1 Form).

2 Defendant Coronado saw Plaintiff again on April 22, 2017 for complaints of hand, finger,
3 and ankle pain. Id. at 176 (Health Care Services Request Form). Plaintiff noted that he wants
4 to see a doctor and receive an unbiased appointment. Id. Defendant Coronado referred Plaintiff
5 to a primary care provider for a routine appointment. Id.

6 The SAC does not set forth sufficient facts to state a claim for an Eighth Amendment
7 violation against Defendant Coronado as it does not allege facts supporting Plaintiff's claim that
8 Defendant Coronado was deliberately indifferent to Plaintiff's serious medical needs. Iqbal, 556
9 U.S. at 678 ("unadorned, the-defendant-unlawfully-harmed-me-accusation" is insufficient).
10 Plaintiff's statements in the SAC that Defendant Coronado was biased because she called his
11 injuries "old" and that she failed to provide adequate treatment are too conclusory to state a
12 constitutional violation. Moreover, the few facts stated by Plaintiff indicate that Defendant
13 Coronado referred Plaintiff for x-rays and further treatment [see SAC at 18] and do not support
14 a claim of deliberate indifference. Finally, the exhibits attached to the SAC undercut Plaintiff's
15 claim that Defendant Coronado was deliberately indifferent to a substantial risk of serious harm.
16 The attached medical records show that Defendant Coronado examined or attempted to
17 examine Plaintiff on eight different occasions following his alleged assault. Id. at 168-170, 172,
18 173, 176. For three of those visits, Plaintiff refused medical treatment. Id. at 163, 165, 172,
19 173. For two of the visits, Plaintiff was uncooperative and had to be escorted out. Id. at 168-
20 169. During the remaining three visits, Defendant Coronado noted Plaintiff's eye irritation,
21 referred Plaintiff to a visit with his primary care provider, and treated Plaintiff with Naproxen.
22 Id. at 164, 170, 176. After one of the visits during which Plaintiff was uncooperative, Defendant
23 Coronado still ordered x-rays for Plaintiff. Id. at 165. This activity does not support a claim that
24 Defendant Coronado denied, delayed, or intentionally interfered with Plaintiff's medical
25 treatment. In addition, the fact that Defendant Coronado did not refer Plaintiff to his primary
26 care physician until his April 22, 2017 appointment, despite having seen him initially in January,
27 does not support an allegation that she "sat idly by as [the prisoner] was seriously injured
28 despite the defendant's ability to prevent the injury" as Defendant Coronado continued to treat

1 Plaintiff between January and April and referred Plaintiff for x-rays prior to referring him to his
2 primary care provider. McGuckin, 974 F.2d at 1060-1061.

3 Plaintiff has not alleged facts establishing the subjective prong of an Eighth Amendment
4 deliberate indifference to medical care claim. Because this is the first motion to dismiss filed by
5 Defendant Coronado and it is not clear that Plaintiff cannot allege additional facts to support a
6 deliberate indifference claim, the Court **RECOMMENDS** that Defendants' motion to dismiss
7 Plaintiff's Eighth Amendment claim of deliberate indifference to his medical needs against
8 Defendant Coronado be **GRANTED WITH LEAVE TO AMEND**. See Ramirez, 334 F.3d at 861
9 (court must grant a *pro se* plaintiff leave to amend his complaint "unless the pleading could not
10 possibly be cured by the allegation of other facts") (citing Lopez v. Smith, 203 F.3d 1122, 1130-
11 31 (9th Cir. 2000) (en banc)); see also Tucker v. City of Santa Monica, 2012 WL 2970587, at *1
12 (C.D. Cal. July 20, 2012) ("If a complaint is dismissed, a pro se litigant must be given leave to amend
13 unless it is absolutely clear that the deficiencies of the complaint cannot be cured by
14 amendment.")(citing Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir.1988)
15 and Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir.1987)); Morris v. Barra, 2013 WL 1190820, at *12
16 (S.D. Cal. Feb. 1, 2013) ("before a pro se civil rights complaint may be dismissed, the court must
17 provide the plaintiff with a statement of the complaint's deficiencies.") (citing Karim-Panahi, 839
18 F.2d at 623-24).

19 b. Defendant Clayton

20 Plaintiff alleges that he saw Defendant Clayton after submitting another 602 grievance
21 and that Defendant Clayton failed to provide adequate medical care. SAC at 19. Defendant
22 Clayton assessed Plaintiff's pinky finger and left wrist, and "[p]rovided absolutely no treatment"
23 even though he is in charge of general medical care and responsible for arranging specialized
24 medical care outside of the prison. Id. at 19.

25 The exhibits submitted with Plaintiff's SAC show that Plaintiff was examined by Defendant
26 Clayton on March 23, 2017 to follow-up on complaints made by Plaintiff in a 602 appeal. Id. at
27 Exh. S at 147 (Medical Progress Note). The appeal sought orthopedic boots, a left and right
28 hand brace, a knee brace, an optometry appointment for eyeglasses, a thumb spica brace, and

1 orthopedic shoes. Id. During the appointment, Plaintiff complained about chronic left wrist
2 pain, his injured pinky finger, and his knee brace that was too large. Id. Defendant Clayton
3 conducted a thorough examination including Plaintiff's left knee, right and left wrists, and right
4 and left hand and digits. Id. at 147-148. Defendant Clayton found that Plaintiff's left knee was
5 unremarkable, but noted that his exam was "hindered by [Plaintiff's] lack of participation." Id.
6 at 147. He concluded that there were no abnormalities in Plaintiff's right hand, "no joint swelling
7 or effusions" and a "good range of motion with the digits and wrist." Id. While there was some
8 "unlar deviation of the second through fifth digits," there were no signs of arthritis or synovitis.
9 Id. at 147-148. Defendant Clayton noted that the examination of the left wrist was
10 unremarkable, but that the left hand showed swelling, redness, and tenderness of the fifth
11 proximal interphalangeal joint. Id. Defendant Clayton addressed all of Plaintiff's complaints.
12 Id. at 148. He submitted a request to get Plaintiff a correctly sized knee brace, orthopedic boots,
13 and a left hand brace.⁴ Defendant Clayton did not find any indication for a right wrist brace so
14 did not order one but suggested that Plaintiff "may benefit from a target workup for
15 arthropathy." Id. He also noted that Plaintiff has an optometry appointment scheduled for April
16 5, 2017. Id. Finally, Defendant Clayton opined on an issue not raised in Plaintiff's 602, noting
17 that the x-rays from March 16, 2017 showed there was no fracture of Plaintiff's left pinky, but
18 advising Plaintiff to continue wearing his splint when active and that the finger would be
19 reevaluated during Plaintiff's follow-up in MedSATS in about six weeks or during his orthopedics
20 appointment. Id.

21 As with Defendant Coronado, Plaintiff's allegations in the SAC against Defendant Clayton
22 are conclusory and fail to state facts supporting Plaintiff's claim that Defendant Clayton acted
23 with deliberate indifference. Moreover, the attached medical records dramatically undermine
24 Plaintiff's claim that Defendant Clayton provided unconstitutional care. Plaintiff was examined
25 by Defendant Clayton one time several months after his alleged assault, and contrary to his
26

27
28 ⁴ Defendant Clayton noted that Plaintiff had been approved for an orthopedic follow-up which
would allow for further evaluation of his left hand. SAC at Exh. S at 148.

1 allegation that he was provided “absolutely no treatment” from Defendant Clayton, the records
2 show that Defendant Clayton thoroughly examined Plaintiff and ordered additional treatment for
3 Plaintiff based upon the results of that examination. Id. at 147-148. Because this is the first
4 motion to dismiss the claim filed against Defendant Clayton and it is not clear that Plaintiff cannot
5 allege facts to support a deliberate indifference claim, the Court **RECOMMENDS** that
6 Defendants' motion to dismiss Plaintiff’s Eighth Amendment claim of deliberate indifference to
7 his medical needs against Defendant Clayton be **GRANTED WITH LEAVE TO AMEND**. See
8 Ramirez, 334 F.3d at 861; see also Tucker, 2012 WL 2970587, at *1 (citing Karim–Panahi, 839
9 F.2d at 623 and Noll, 809 F.2d at 1448); Morris, 2013 WL 1190820, at *12 (citing Karim–Panahi,
10 839 F.2d at 623–24).

11 c. Defendant Deel

12 Plaintiff alleges that Defendant Deel was informed on April 26, 2017 that Plaintiff was
13 going to be transferred to CSP Sacramento, that Plaintiff had not received “any medical
14 treatment” for his injuries sustained at RJD, and that Plaintiff wanted a “medical hold” placed
15 on him to prevent that transfer “due to the pain and suffering from his left pinky finger, left
16 hand, and loss of vision and right ankle.” SAC at 19-20. Plaintiff concludes that Defendant Deel
17 failed to provide adequate medical treatment.” Id. at 20.

18 The exhibits submitted with Plaintiff’s SAC show that Plaintiff was examined by Defendant
19 Deel on April 26, 2017 for his chief complaints of left pinky finger pain, right ankle pain, and a
20 polypharmacy review. Id. at Exh. S. at 149 (Medical Progress Note). Defendant Deel noted that
21 Plaintiff had a 2015 surgery on his left hand and that Plaintiff reported he was told that he
22 needed an additional surgery. Defendant Deel also noted that Plaintiff had an orthopedic
23 appointment waiting to be scheduled and that the compliance date was June 8, 2017. Id.
24 Plaintiff reports that his pain was not controlled by Aspirin, Tylenol, non-steroidal medication, or
25 gabapentin and that he was seeking Tylenol 3 or and morphine. Defendant Deel noted that
26 Plaintiff’s right ankle was swollen and reportedly interfering with his activities of daily living, but
27 that x-rays taken after his January 2017 altercation showed no evidence of fracture. Id.
28 Defendant Deel’s examination revealed that Plaintiff had difficulty putting weigh on his ankle

1 and that he had limited range of motion of the pinky with 3/5 for strength. Id. Defendant Deel
2 increased Plaintiff's gabapentin, discussed Plaintiff's orthopedic appointment, and ordered a
3 repeat x-ray of Plaintiff's right ankle in case the initial x-ray missed evidence of a fracture due
4 to swelling. Id. at 150. Defendant Deel told Plaintiff to follow-up in four weeks to discuss his
5 pain level and new x-rays. Id.

6 The exhibits attached to the SAC undercut Plaintiff's claim that Defendant Deel was
7 deliberately indifferent to a substantial risk of serious harm. The records do not support
8 Plaintiff's claim that he did not receive any medical treatment at RJD for his injuries or that he
9 requested a medical hold. More importantly, the medical records establish that Defendant Deel
10 had one appointment with Plaintiff where she thoroughly examined Plaintiff, increased his pain
11 medication, ordered a second x-ray of his right ankle, and advised Plaintiff to follow-up in four
12 weeks. Id. at Exh. S. at 150. There is no allegation or support in the record for the idea that
13 Defendant Deel delayed Plaintiff's treatment or acted with a culpable mental state. Moreover,
14 Plaintiff's conclusory allegation that Defendant Deel "failed to provide adequate medical
15 treatment" fails to state a claim of deliberate indifference. Accordingly, the Court
16 **RECOMMENDS** that Defendants' motion to dismiss Plaintiff's Eighth Amendment claim of
17 deliberate indifference to his medical needs against Defendant Deel be **GRANTED WITH**
18 **LEAVE TO AMEND.** See Ramirez, 334 F.3d at 861; see also Tucker, 2012 WL 2970587, at *1
19 (citing Karim-Panahi, 839 F.2d at 623 and Noll, 809 F.2d at 1448); Morris, 2013 WL 1190820, at
20 *12 (citing Karim-Panahi, 839 F.2d at 623-24).

21 **III. MOTION TO DISMISS DEFENDANT GEISINGER ECF No. 69**

22 Plaintiff alleges that Defendant Geisinger was deliberately indifferent to his medical care.
23 SAC at 19. Defendant Geisinger seeks to dismiss the claims against her as Plaintiff's allegations
24 of "deliberate indifference" against her do not state a cause of action under 42 U.S.C. Section
25 1983. MTD3 at 9; see also Reply. Defendant Geisinger contends that Plaintiff's undisputed
26 medical records support a dismissal of the SAC without leave to amend "as the records establish
27 there is no set of facts which Plaintiff may allege upon which relief may be granted." Reply at
28 3.

1 **A. Complaint Allegations Regarding Defendant Geisinger**

2 Plaintiff alleges that he saw Defendant Geisinger, a Physician’s Assistant, on March 10,
3 2017 in response to his submission of a Health Care Appeal. SAC at 19. Plaintiff alleges that
4 Defendant Geisinger “was more concerned about Plaintiff utilizing the CDCR HC 602 SYSTEM
5 [sic] instead of providing any treatment” and that her “failure to provide adequate treatment to
6 help Plaintiff control the pain shows deliberate indifference.” Id.

7 **B. Analysis**

8 As with the previous Defendants, Plaintiff’s conclusory allegations against Defendant
9 Geisinger are insufficient to state a claim for a constitutional violation. Plaintiff does not state
10 any facts supporting a claim that Defendant Geisinger acted with deliberate indifference.
11 Moreover, the medical records attached as exhibits to the SAC undercut Plaintiff’s claim that
12 Defendant Geisinger acted with deliberate indifference.

13 Plaintiff’s exhibits to the SAC show that he saw Defendant Geisinger on March 10, 2017
14 for a follow-up on his polypharmacy review, his return from the Mental Health Crisis Bed, and
15 his 602 appeal. SAC at Exh. S at 142. Defendant Geisinger reported that Plaintiff (1) discussed
16 his desire for an optometry appointment, (2) requested a CT scan of his finger that was injured
17 on January 16, 2017, (3) requested a medical hold until surgery and physical therapy are
18 completed (although he had not yet seen orthopedics for his wrist which he claimed needed
19 surgery), (4) requested expedited surgery, (5) sought a referral to pain management for
20 narcotics, and (6) requested monetary compensation for his medical issues. Id. Defendant
21 Geisinger discussed the 7362 form with Plaintiff and noted that he had not submitted the form
22 for his requests concerning optometry and a CT scan or any 7362 form at all in the past thirty
23 days since returning to RJDC. Id. Plaintiff was agitated during the appointment with Defendant
24 Geisinger and frequently raised his voice and cursed. Id. Defendant Geisinger examined Plaintiff
25 and noted no abnormalities other than swelling and decreased range of motion in his left pinky
26 and decreased range of motion in his left wrist. Id. at 143. Defendant Geisinger reviewed
27 Plaintiff’s Medication Administration Record and completed and documented a polypharmacy
28 review. Id. at 143. Defendant Geisinger reviewed Plaintiff’s left wrist x-ray from January 19,

1 2017 and determined that narcotic pain medication would not provide significant benefit for
2 Plaintiff, but recommended increasing his gabapentin. Id. She also referred Plaintiff to
3 Optometry and to Orthopedics for further evaluation of his finger pain, prescribed Ibuprofen
4 “600 mg t.i.d. p.r.n. pain” Id. Defendant Geisinger also ordered lab work to test Plaintiff’s
5 Vitamin D levels, discussed all of Plaintiff’s 602 issues with him and advised him that the results
6 of his follow-up appointments with Orthopedics and Optometry would govern whether he
7 needed surgery or a medical hold. Id. at 144. A Primary Care Provider Note from March 17,
8 2017 signed by Defendant Geisinger shows that Plaintiff was not seen that day due to time
9 restraints. Id. at 145

10 The exhibits attached to the SAC do not support Plaintiff’s claim that Defendant Geisinger
11 was deliberately indifferent to a substantial risk of serious harm. Defendant Geisinger had one
12 appointment with Plaintiff where she thoroughly examined Plaintiff, reviewed his previous x-ray,
13 increased his pain medication, referred Plaintiff to Orthopedics and Optometry, and ordered lab
14 tests for further assessment. Id. at 143-144. There is no allegation or support in the record for
15 a finding that Plaintiff has stated a claim that Defendant Geisinger delayed Plaintiff’s treatment
16 or acted with a culpable mental state. Plaintiff’s conclusory allegation that Defendant Geisinger’s
17 “failure to provide adequate treatment to help Plaintiff control the pain shows deliberate
18 indifference” fails to state facts supporting a claim of deliberate indifference. Accordingly, the
19 Court **RECOMMENDS** that Defendant’s motion to dismiss Plaintiff’s Eighth Amendment claim
20 of deliberate indifference to his medical needs against Defendant Geisinger be **GRANTED WITH**
21 **LEAVE TO AMEND.** See Ramirez, 334 F.3d at 861; see also Tucker, 2012 WL 2970587, at *1
22 (citing Karim–Panahi, 839 F.2d at 623 and Noll, 809 F.2d at 1448); Morris, 2013 WL 1190820, at
23 *12 (citing Karim–Panahi, 839 F.2d at 623–24).

24 **IV. CONCLUSION**

25 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue
26 an order: (1) approving and adopting this Report and Recommendation, (2) granting
27 Defendants’ Motion to Dismiss Defendant Paramo without leave to amend, (3) granting
28 Defendants’ Motion to Dismiss Plaintiff’s Procedural Due Process claim without leave to amend,

1 (4) granting Defendants' Motion to Dismiss Defendants Coronado, Clayton, and Deel with leave
2 to amend, and (5) granting Defendant's Motion to Dismiss Defendant Geisinger with leave to
3 amend.

4 **IT IS HEREBY ORDERED** that any written objections to this Report must be filed with
5 the Court and served on all parties **no later than November 7, 2018**. The document should
6 be captioned "Objections to Report and Recommendation."

7 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with this Court
8 and served on all parties **no later than November 28, 2018**. The parties are advised that
9 failure to file objections within the specified time may waive the right to raise those objections
10 on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

11
12 Dated: 10/12/2018


13 Hon. Barbara L. Major
14 United States Magistrate Judge