

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

RAYMOND ALFORD BRADFORD,  
Plaintiff,  
v.  
K. KHAMOOSHIAN, ET AL.,  
Defendants.

Case No.: 17-cv-02053-BAS (MDD)

**REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE  
RE: DEFENDANTS’ MOTIONS TO  
DISMISS**

**[ECF Nos. 37, 41]**

This Report and Recommendation is submitted to United States Judge Cynthia Bashant pursuant to 28 U.S.C. § 636(b)(1) and Local Civil Rule 72.1(c) of the United States District Court for the Southern District of California.

For the reasons set forth herein, it is **RECOMMENDED** that Defendants’ Motions to Dismiss be **GRANTED**.

**I. PROCEDURAL HISTORY**

Plaintiff Raymond Alford Bradford (“Plaintiff”) is a state prisoner at Richard J. Donovan Correctional Facility (“Donovan”) proceeding *pro se* and *in forma pauperis*. (ECF No. 5, 21). On September 25, 2017, Plaintiff filed a

1 complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1). Plaintiff's complaint  
2 sets forth various claims against Doctor Kourosh Khamooshian, M.D.,  
3 physician and surgeon at Alvarado Hospital Medical Center ("Alvarado"); and  
4 Doctor Ronald Zhang, M.D., physician and surgeon at Donovan. Plaintiff  
5 alleges that the Defendants violated his Eighth Amendment rights by: (1)  
6 acting with deliberate indifference to his medical needs; (2) negligently and  
7 intentionally inflicting unnecessary pain; and (3) committing medical  
8 malpractice by failing to provide medical care, worsening Plaintiff's condition.  
9 (*Id.*).

10 On May 14, 2018, Defendant Zhang filed a Motion to Dismiss Plaintiff's  
11 Complaint. (ECF No. 37). Defendant Zhang contends that Plaintiff: (1) failed  
12 to allege facts sufficient to state a cause of action for deliberate indifference;  
13 and (2) failed to allege facts sufficient to state a cause of action for gross  
14 negligence or medical malpractice. (*Id.*).

15 On May 23, 2018, Defendant Khamooshian also filed a Motion to  
16 Dismiss the Complaint. (ECF No. 41). Defendant Khamooshian contends  
17 that Plaintiff: (1) failed to sufficiently allege Defendant was deliberately  
18 indifferent to his serious medical needs; (2) failed to sufficiently allege  
19 Defendant Khamooshian was grossly negligent; and (3) failed to sufficiently  
20 allege Defendant Khamooshian committed medical malpractice. (*Id.*).

21 Plaintiff's opposition to these motions argue that Defendant  
22 Khamooshian's Motion did not include a dated proof of service and that  
23 Plaintiff's papers were initially stolen from him by the prison sergeant, law  
24 librarian, and the assistant, and were withheld for eight days to deter him  
25 from filing. (ECF Nos. 65, 63).

## 26 **II. BACKGROUND FACTS**

27 The facts as presented are taken from Plaintiff's Complaint and are not

1 to be construed as findings of fact by the Court.

2 Plaintiff's claims arise from a series of events beginning August 29,  
3 2017. Plaintiff has a history of medical illness including: deficiencies of  
4 protein C and S, ulcerative colitis, proctitis, and diverticulosis. (ECF No. 1 at  
5 5).

6 On August 29, 2017, Plaintiff began experiencing pain in his rectal and  
7 groin areas, bleeding, bloody diarrhea, and "mucus-pus stool." (*Id.* at 5).  
8 That same day, Plaintiff was transferred from his holding cell to Alvarado,  
9 where he received a rectal exam, lab testing, abdominal x-rays, and was  
10 given pain medication. (*Id.* at 4-5).

11 On September 1, 2017, Plaintiff had his first and only interaction with  
12 Defendant Khamooshian. (*Id.* at 5). Defendant Khamooshian explained to  
13 Plaintiff that the August 29 lab findings were normal, that there was no  
14 active bleeding, and that there was no finding of an ulcerative colitis flare up.  
15 (*Id.* at 5). Defendant Khamooshian notified Plaintiff that the prison would  
16 follow up in two weeks and he was discharged from the hospital. (*Id.* at 6).  
17 Plaintiff does not allege that Defendant Khamooshian treated him further.

18 On September 2, 2017, Plaintiff submitted an emergency sick call slip,  
19 and claims he continued to do so every day after, requesting to see a doctor  
20 about his continued symptoms. (*Id.* at 6.). Roughly two weeks later, Plaintiff  
21 was transferred to Alvarado for a colonoscopy, and then returned back to  
22 Donovan. (*Id.* at 6.)

23 On September 18, 2017, after complaining of continuous pain, Plaintiff  
24 was examined by Defendant Zhang. (*Id.* at 7). Defendant Zhang explained to  
25 Plaintiff that in order to check for active bleeding, he would need to perform a  
26 rectal exam each time Plaintiff visited the office. (*Id.*). Plaintiff claims that  
27 Defendant Zhang stated, in a frustrated voice, "we cannot find your

1 colonoscopy results, so without it, I cannot give you anything. Your lab  
2 studies are normal. You are not bleeding according to the test results. And  
3 your follow-up with the gastroenterologist will be scheduled within a few  
4 weeks.” (*Id.*).

5 Plaintiff alleges that Defendant Zhang withheld, delayed, and  
6 interfered with Plaintiff’s access to treatment. (*Id.* at 8.) Plaintiff further  
7 argues that “had [Defendant Zhang] not lied about the colonoscopy results,  
8 Plaintiff’s ailment would not have worsen[ed].” (*Id.* at 10).

### 9 III. LEGAL STANDARD

10 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency  
11 of a claim. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “Under  
12 Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a short and  
13 plain statement of the claim showing that the pleader is entitled to relief.”  
14 *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009) (internal quotations omitted).  
15 The pleader must provide the Court with “more than an un-adorned, ‘the-  
16 defendant-unlawfully-harmed-me’ accusation.” *Id.* at 678 (citing *Bell Atl.*  
17 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). “Threadbare recitals of the  
18 elements of a cause of action, supported by mere conclusory statements will  
19 not suffice.” *Id.* The court must assume the truth of the facts which are  
20 presented and construe all inferences from them in the light most favorable  
21 to the non-moving party. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir.  
22 2002).

23 A *pro se* pleading is construed liberally on a defendant’s motion to  
24 dismiss for failure to state a claim. *Thompson v. Davis*, 295 F.3d 890, 895  
25 (9th Cir. 2002) (citing *Ortez v. Washington Cnty.*, 88 F.3d 804, 807 (9th Cir.  
26 1996)). The *pro se* pleader must still set out facts in his complaint that bring  
27 his claims “across the line from conceivable to plausible.” *Twombly*, 550 U.S.

1 at 570.

2 A *pro se* litigant is entitled to notice of deficiencies in the complaint and  
3 an opportunity to amend, unless the complaint's deficiencies cannot be cured  
4 by amendment. See *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).  
5 Thus, the court is not required to "accept as true allegations that are merely  
6 conclusory, unwarranted deductions of fact, or unreasonable inferences."  
7 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (internal  
8 citation omitted). Furthermore, the court may not "supply essential elements  
9 of the claim that were not initially pled." *Ivey v. Bd. of Regents of the*  
10 *University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

#### 11 IV. DISCUSSION

##### 12 A. Deliberate Indifference

13 Plaintiff alleges that Defendants violated his Eighth Amendment right  
14 to be free from cruel and unusual punishment when Defendants deliberately  
15 misdiagnosed Plaintiff's ailments, delayed treatment, and denied him access  
16 to treatment. (ECF No. 1 at 2-3.) Defendants contend that Plaintiff's claim  
17 fails as a matter of law because he has not pled facts sufficient to show that  
18 either Defendant acted with deliberate indifference to Plaintiff's medical  
19 needs. (ECF Nos. 37 at 2; 41 at 2.)

20 The Eighth Amendment is violated when prison officials demonstrate  
21 "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429  
22 U.S. 97, 104 (1976); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). In  
23 order to state a claim for deliberate indifference under the Eighth  
24 Amendment, an inmate must plead facts sufficient to show both an objective  
25 and a subjective requirement. *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th  
26 Cir. 2014).

27 First, to satisfy the objective prong, the inmate must show that he

1 suffered a deprivation or injury that was “objectively, sufficiently serious.”  
2 *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A serious medical need is  
3 shown if a failure to provide adequate treatment results in wanton or  
4 unnecessary infliction of pain. *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th  
5 Cir. 1992).

6 Next, to satisfy the subjective prong, the inmate must demonstrate that  
7 “the official [knew] of and disregard[ed] an excessive risk to inmate health or  
8 safety...” *Farmer*, 511 U.S. at 837. The official must have been aware of  
9 facts or factual circumstances that would allow him to draw the inference  
10 that a substantial risk of serious harm to the inmate’s health and safety  
11 exists, and he must *also* draw that inference. *Id.*

12 “It is not enough that the plaintiff merely disagree with the course of  
13 treatment provided. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004).  
14 A difference in medical opinion is “insufficient, as a matter of law, to  
15 establish deliberate indifference.” *Id.* (citing *Jackson v. McIntosh*, 90 F.3d  
16 330, 332 (9th Cir. 1996).

### 17 **1. Defendant Khamooshian**

18 Plaintiff alleges that Defendant Khamooshian was deliberately  
19 indifferent when he “[lied] about Plaintiff’s condition... knowing that lie would  
20 punish Plaintiff unjustly, cause him unnecessary harm, and deny, delay, and  
21 interfere with his access to adequate and constitutionally acceptable medical  
22 care and treatment for his serious medical needs.” (ECF No. 1 at 8).

23 However, the complaint only alleges that that Defendant Khamooshian  
24 interviewed Plaintiff on one occasion, where the doctor interpreted lab  
25 results, and explained to Plaintiff that the findings were normal.

26 Dr. Khamooshian concluded that Plaintiff’s symptoms did not require  
27 immediate treatment. Plaintiff fails to provide any documentation or

1 information which objectively shows that a serious injury was present that  
2 impeded Plaintiff's ability to continue ordinary daily activities. Even though  
3 Defendant Khamooshian was confident that the lab results yielded no  
4 abnormalities, he explained to Plaintiff that the prison would follow up in two  
5 weeks. By providing Plaintiff with the lab results and scheduling a follow up  
6 appointment, Defendant Khamooshian did not disregard Plaintiff's health, as  
7 Plaintiff so claims.

8 Further, Plaintiff alleges that Defendant Khamooshian lied when he  
9 interpreted the lab results. This claim is unsupported by any factual  
10 information. Plaintiff fails to support his contention that Defendant  
11 Khamooshian lied or that proper treatment was wrongfully withheld.

12 Plaintiff's disagreement with lab results and his unsupported claim of  
13 inadequate treatment are not sufficient to constitute a constitutional  
14 violation. *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004). Plaintiff  
15 has asserted insufficient information to ask the court to cross the line from  
16 conceivability to plausibly of the claim, and has therefore failed to meet his  
17 burden.

## 18 **2. Defendant Zhang**

19 Plaintiff alleges that Defendant Zhang was deliberately indifferent to  
20 Plaintiff's medical needs because he was aware of and failed to treat the  
21 symptoms associated with Plaintiff's history of ulcerative colitis flare ups.  
22 Plaintiff argues that Defendant Zhang's recommended course of treatment  
23 was cruel and unusual, intended only to inflict pain on Plaintiff. (ECF No. 1  
24 at 9).

25 During Plaintiff's appointment with Defendant Zhang, the doctor  
26 found no active bleeding and explained the need to check for bleeding at each  
27 visit. Defendant Zhang also scheduled a follow up gastroenterologist

1 appointment. There is no objective showing of a serious medical need, no  
2 showing of a deprivation of treatment, and no showing of sufficiently serious  
3 pain that a doctor would have otherwise found worthy of additional  
4 treatment.

5 Plaintiff asserts that he exhibited symptoms indicative of an ulcerative  
6 colitis flare up, however, his test results and assessment at Alvarado showed  
7 no symptoms. Plaintiff has failed to demonstrate that Defendant Zhang  
8 knew of and disregarded an excessive risk to Plaintiff's health. No inference  
9 can be drawn in favor of a substantial risk of serious harm.

10 Plaintiff's complaint asserts he disagreed with Defendant Zhang's  
11 findings and treatment plan, but a mere disagreement is not enough to  
12 demonstrate deliberate indifference. *Toguchi v. Chung*, 391 F.3d 1051, 1058  
13 (9th Cir. 2004). The facts as pled by Plaintiff lack detail sufficient to  
14 overcome the high burden of demonstrating deliberate indifference.

15 Accordingly, the Court **RECOMMENDS** that Defendants' Motions to  
16 Dismiss Plaintiff's claims for Deliberate Indifference be **GRANTED** and that  
17 Claim 1 be **DISMISSED WITHOUT PREJUDICE**.

### 18 **B. Gross Negligence**

19 Plaintiff alleges that Defendant Khamooshian "negligently  
20 misdiagnosed Plaintiff [']s symptoms [of] active bleeding, rectal pain, penis  
21 pain, bloody diarrhea, [and] colitis flare up." (ECF No. 1 at 10). Plaintiff also  
22 asserts that Defendant Zhang's assessment of the lab results and decision to  
23 conduct rectal exams were grossly negligent. Defendants contend that, as a  
24 result, Claim 2 for gross negligence cannot survive. (ECF Nos. 37 at 8; 41 at  
25 17).

26 Gross negligence is "the want of even scant care" or an "extreme  
27 departure from the ordinary standard of conduct." *Van Meter v. Bent*



1 *Construction Co.*, 46 Cal.2d 588, 594 (1956). As indicated in *Van Meter*, gross  
2 negligence may consist of *either* “want of even scant care” or “extreme  
3 departure from the ordinary standard of conduct,” but not necessarily both.  
4 *Gore v. Board of Medical Quality Assurance*, 110 Cal. App. 3d 184, 197  
5 (1980).

6 **Defendant Khamooshian**

7 During Defendant Khamooshian’s one interaction with Plaintiff, he  
8 interviewed Plaintiff and reviewed test results. Defendant Khamooshian  
9 discussed the normalcy of the findings and Plaintiff was discharged. Plaintiff  
10 has not indicated how or why this patient-client interaction constitutes a  
11 “want of even scant care” toward Plaintiff.

12 Therefore, due to the lack of detail alleged in the complaint, Plaintiff  
13 has not demonstrated that Defendant Khamooshian’s conduct constituted an  
14 extreme departure from the ordinary standard.

15 **Defendant Zhang**

16 Defendant Zhang reviewed Plaintiff’s lab reports, was aware of  
17 Plaintiff’s medical history and alleged pain, and explained to Plaintiff why  
18 rectal exams were necessary. Plaintiff disagreed, and claims that frequent  
19 rectal exams would constitute cruel and unusual punishment.

20 Plaintiff has not demonstrated how Defendant Zhang’s assessment and  
21 determination of the course of treatment was a departure from the ordinary  
22 standard, or that he exhibited a “want of even scant care” toward Plaintiff.  
23 Rather, Plaintiff has provided facts showing that Defendant Zhang took  
24 multiple steps to treat him, and that Plaintiff disagreed with the course of  
25 action. Plaintiff’s threadbare assertion of the elements is insufficient to infer  
26 a claim of gross negligence.

27 Accordingly, it is **RECOMMENDED** that Defendants’ Motions to Dismiss

1 Plaintiff's claim for gross negligence be **GRANTED** and Claim 2 be  
2 **DISMISSED WITHOUT PREJUDICE.**

3 **C. Medical Malpractice**

4 Plaintiff alleges that by “deliberately misdiagnos[ing] Plaintiff’s  
5 ailments” and “denying [him] treatment,” Defendants have committed  
6 medical malpractice. (ECF No. 1 at 10).

7 In order to demonstrate medical malpractice, Plaintiff must  
8 demonstrate: (1) a duty to exercise that degree of skill, knowledge and care  
9 ordinarily possessed and exercised by members of their profession under  
10 similar circumstances; (2) a breach of the duty to exercise such skill,  
11 prudence, and diligence; (3) proximate causal connection between the conduct  
12 and the injury; and (4) resulting loss or damage. *Hanson v. Grode*, 76  
13 Cal.App.4th 601, 606 (1999).

14 However, since “an inadvertent failure to provide adequate medical care  
15 cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or  
16 to be repugnant to the conscience of mankind, a complaint that a physician  
17 has been negligent in dispersing or treating a medical condition [is  
18 insufficient to] state a valid claim of medical mistreatment under the Eighth  
19 Amendment. Medical malpractice does not become a constitutional violation  
20 merely because the victim is a prisoner.” *Estelle v. Gamble*, 429 U.S. 97, 106,  
21 97 S. Ct. 285, 292, 50 L. Ed. 2d 251 (1976).

22 Under California law, “mere error of judgment, in the absence of a want  
23 of reasonable care and skill in the application of his medical learning...will  
24 not render a doctor responsible for untoward consequences in the treatment  
25 of his patient.” *Huffman v. Lindquist*, 37 Cal. 2d 465, 475 (1951).

26 **Defendant Khamooshian**

27 Plaintiff alleges that Defendant Khamooshian committed medical

1 malpractice when he failed to provide medical care to Plaintiff. (ECF No. 1 at  
2 10). Plaintiff claims that he suffers pain daily. (*Id.*).

3 When Defendant Khamooshian interviewed Plaintiff at the hospital, he  
4 interpreted lab results and discussed a future appointment. He had a duty to  
5 exercise diligence, care, and skill such as is ordinarily possessed by other  
6 members of the profession.

7 Although Plaintiff disagreed with Defendant Khamooshian's  
8 interpretation of the labs, he has not alleged facts sufficient to show that  
9 Defendant Khamooshian's assessment and interpretation of the medical labs  
10 breached his duty. Further, Plaintiff has not shown that Defendant  
11 Khamooshian's assessment and evaluation contributed to Plaintiff's injury.  
12 Plaintiff has failed to show that Defendant's interpretation of the lab results  
13 caused further injury.

14 Plaintiff alleges scant facts by which he concludes he was damaged by  
15 Defendant Khamooshian's conduct. He asserts that "he suffers unnecessary  
16 pain daily," but fails to provide further detail. (ECF No. 1 at 10). Plaintiff  
17 does not relate his pain to improper lab interpretations, yet that  
18 interpretation was the only service Defendant Khamooshian provided to  
19 Plaintiff. Therefore, the claim of medical malpractice is insufficiently pled  
20 with regard to Defendant Khamooshian.

### 21 **Defendant Zhang**

22 Plaintiff alleges that Defendant Zhang committed medical malpractice  
23 because, although Defendant Zhang was aware of Plaintiff's medical history,  
24 he lied and failed to treat Plaintiff's ailments. (ECF No. 1 at 10). Plaintiff  
25 alleges, but does not support the contention, that the misdiagnosis was  
26 deliberate. (*Id.*)

27 Without including facts demonstrating how Defendant Zhang breached

1 his duty as a medical professional, or how that breach is the proximate cause  
2 of Plaintiff's damages, the Court cannot plausibly infer medical malpractice.  
3 Therefore, the claim of medical malpractice against Defendant Zhang has  
4 been insufficiently pled.

5 Accordingly, it is **RECOMMENDED** that Defendant's Motion to Dismiss  
6 Plaintiff's claim for medical malpractice be **GRANTED** and Claim 3 be  
7 **DISMISSED WITHOUT PREJUDICE**.

8 **V. CONCLUSION**

9 Based on the foregoing, it is **RECOMMENDED** that:

10 Defendants' Motions be **GRANTED** and all claims in the Complaint be  
11 **DISMISSED WITHOUT PREJUDICE**.

12 This Report and Recommendation will be submitted to the United  
13 States District Judge assigned to this case, pursuant to the provisions of 28  
14 U.S.C. § 636(b)(1). Any party may file written objections with the court and  
15 serve a copy on all parties by **November 23, 2018**. The document shall be  
16 captioned "Objections to Report and Recommendation." Any reply to the  
17 objections shall be served and filed by **November 30, 2018**.

18 The parties are advised that failure to file objections within the  
19 specified time may waive the right to raise those objections on appeal of the  
20 court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

21 **IT IS SO ORDERED.**

22 Dated: November 8, 2018



23 Hon. Mitchell D. Dembin  
24 United States Magistrate Judge