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**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

**ORDER ADOPTING REPORT AND
RECOMMENDATION AND
GRANTING MOTIONS TO DISMISS**

[ECF Nos. 37, 41, 71]

Plaintiff Raymond Alford Bradford filed a Complaint against Defendants Khamooshian and Zhang. (“Compl.,” ECF No. 1.) Both Defendants moved to dismiss the claim. (“Zhang MTD,” ECF No. 37; “Khamooshian MTD,” ECF No. 41.) Plaintiff filed a response in opposition, (“Opp’n,” ECF No. 61) and Defendant Khamooshian filed a reply, (“Reply,” ECF No. 65). Magistrate Judge Mitchell D. Dembin issued a Report and Recommendation (“R&R”) regarding the motions to dismiss. (“R&R,” ECF No. 71.) Plaintiff filed three sets of objections to the R&R. (ECF Nos. 75, 78, 83.)

1 **BACKGROUND¹**

2 Plaintiff is presently incarcerated at Richard J. Donovan Correctional Facility
3 (“RJDCF”). Defendant Zhang is a physician at RJDCF and Defendant Khamooshian is a
4 physician at Alvarado Hospital Medical Center. (Compl. 2, 3.) Plaintiff alleges
5 Defendants denied Plaintiff access to medical care and delayed his treatment. (*Id.*)

6 On August 30, 2017, Plaintiff was transferred to Alvarado Hospital Medical Center
7 because he was complaining of “excruciating rectal pain and active bleeding” and
8 experiencing “blood diarrhea, mucus-pus stools and pain in his penis area.” (*Id.* at 4.)
9 Plaintiff has a blood clotting disorder as well as ulcerative colitis, proctitis and
10 diverticulosis. (*Id.*) An unnamed physician at the hospital ordered a rectal exam, lab
11 studies, and an x-ray of Plaintiff’s abdomen. Plaintiff was given pain medication. (*Id.* at
12 5.) Defendant Khamooshian then met with Plaintiff and informed him the tests were
13 normal and there was “no active bleeding to support a finding of a ‘flare up’ of Plaintiff’s
14 ulcerative colitis.” (*Id.*) Plaintiff was discharged and was instructed that RJDCF would
15 follow up in two weeks. (*Id.* at 6.) Plaintiff returned to RJDCF and submitted an
16 emergency sick slip every day afterwards requesting to see a doctor about his pain and
17 active bleeding. (*Id.*)

18 On September 14, 2017, Plaintiff was transferred back to Alvarado Hospital,
19 complaining of the same pain. (*Id.*) A colonoscopy was performed on Plaintiff. Plaintiff
20 was discharged even though he was “still in pain and having up to 10 bowel movements
21 daily.” (*Id.*) On September 18, 2017, Defendant Zhang met with Plaintiff. Zhang informed
22 Plaintiff that Zhang would need to do a rectal exam “each visit to see if Plaintiff’s claim of
23 active bleeding was true.” (*Id.* at 7.) Plaintiff asserts there is no reason for a rectal exam
24 except to inflict unnecessary harm on Plaintiff. (*Id.*) Zhang informed Plaintiff that he
25 could not find Plaintiff’s colonoscopy results, his lab studies were normal, and Plaintiff
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¹ The following facts are taken from Plaintiff’s Complaint and are accepted as true for purposes of the
analysis of the motions to dismiss. See *Vasquez v. Los Angeles Cty.*, 487 F.3d 1246, 1249 (9th Cir. 2007).

1 was “not bleeding according to the test results.” (*Id.*) Zhang scheduled a follow up with a
2 gastroenterologist. Plaintiff’s request to be housed in the infirmary was denied. (*Id.*)
3 Plaintiff states he is still bleeding daily, and that Defendant Zhang is aware of Plaintiff’s
4 ulcerative colitis history and blood clotting disorder. (*Id.*)

5 Plaintiff’s first cause of action is for a violation of his Eighth Amendment rights to
6 be free from cruel and unusual punishment. His second cause of action is for “gross
7 negligence and malpractice” under Government Code section 844.6(d).

8 **LEGAL STANDARD**

9 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
10 court’s duties regarding a magistrate judge’s report and recommendation. The district court
11 “shall make a de novo determination of those portions of the report . . . to which objection
12 is made,” and “may accept, reject, or modify, in whole or in part, the findings or
13 recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(c); *see also*
14 *United States v. Raddatz*, 447 U.S. 667, 673–76 (1980). In the absence of a timely
15 objection, however, “the Court need only satisfy itself that there is no clear error on the
16 face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72 advisory
17 committee’s note (citing *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974)).

18 **ANALYSIS**

19 Plaintiff has filed three sets of objections to the R&R.

20 **I. Summary of Plaintiff’s Objections**

21 In his first objections, Plaintiff argues the Court has already screened his Complaint
22 and thus determined it states a claim and cannot be dismissed. (ECF No. 75, at 2.) This
23 argument fails. “[T]he sua sponte screening and dismissal procedure is cumulative of, and
24 not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to
25 bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007). Plaintiff also
26 argues Khamooshian “brought up Plaintiff’s Rule 9(b) fraud claim” in the motion to
27 dismiss but the R&R did not address the claim. (*Id.* at 3.)

28 In his second objections, Plaintiff requests the Court provide him with copies of

1 relevant documents. (ECF No. 78, at 2.) The Court directed the Clerk to send the requested
2 documents to Plaintiff and granted Plaintiff an extension of time in which to file objections.
3 (ECF No. 79.) Plaintiff then filed a third set of objections, which only refer to another
4 motion which Plaintiff had filed requesting extraordinary relief. (ECF No. 83 (citing ECF
5 No. 81).) The Court had denied the motion because it was unrelated to the allegations or
6 to the Defendants in the Complaint. (ECF No. 82.) The third objections do not refer to the
7 R&R or to any allegations relevant to this matter.

8 **II. Eighth Amendment Claim**

9 **A. Legal Standard**

10 To allege a violation of the Eighth Amendment for inadequate medical care, a
11 plaintiff must satisfy both an objective and a subjective standard. *Colwell v. Bannister*,
12 763 F.3d 1060, 1066 (9th Cir. 2014). The objective standard is satisfied by the allegation
13 of a “serious medical need.” *Id.* The subjective standard involves analysis of “the nature
14 of the defendant’s response to [the serious medical] need.” *McGuckin v. Smith*, 974 F.2d
15 1050, 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104
16 F.3d 1133 (9th Cir. 1997) (en banc). The element is met if the defendant “knows of and
17 disregards an excessive risk to inmate health and safety.” *Toguchi v. Chung*, 391 F.3d
18 1051, 1057 (9th Cir. 2004)

19 **B. Defendant Khamooshian**

20 Plaintiff alleges that Defendant Khamooshian was deliberately indifferent when
21 he “[lied] about Plaintiff’s condition . . . knowing that lie would punish Plaintiff unjustly,
22 cause him unnecessary harm, and deny, delay, and interfere with his access to adequate
23 and constitutionally acceptable medical care and treatment for his serious medical needs.”
24 (Compl. 8.) Khamooshian argues Plaintiff has not established deliberate indifference.
25 (Khamooshian MTD 15.) He also argues “Plaintiff’s deliberate indifference cause of
26 action appears to be predicated on the claim that Dr. Khamoosian ‘lied’ about Plaintiff’s
27 alleged medical conditions and test results” and Plaintiff cannot establish medical fraud.
28 (*Id.* at 16.) Judge Dembin recommends the Court grant Defendant’s motion to dismiss this

1 claim because Plaintiff has not asserted sufficient information of a constitutional violation.
2 (R&R 7–8.)² Judge Dembin notes Khamooshian only interacted with Plaintiff on one
3 occasion, where Khamooshian interpreted lab results, told Plaintiff they were normal, and
4 concluded Plaintiff did not need immediate treatment. Khamooshian then scheduled a
5 follow up. (*Id.* at 6–7.) In sum, “[b]y providing Plaintiff with the lab results and scheduling
6 a follow up appointment, Defendant Khamooshian did not disregard Plaintiff’s health, as
7 Plaintiff so claims.” (*Id.* at 7.)

8 First, the Court finds Plaintiff has pled the existence of an objectively serious
9 medical need because Plaintiff has pled daily and substantial pain. *See McGuckin*, 974
10 F.2d at 1059–60 (“The existence of an injury that a reasonable doctor or patient would find
11 important and worthy of comment or treatment; the presence of a medical condition that
12 significantly affects an individual’s daily activities; or the existence of chronic and
13 substantial pain are examples of indications that a prisoner has a ‘serious’ need for medical
14 treatment.”). The issue then becomes whether Plaintiff alleges that Khamooshian acted
15 with deliberate indifference to Plaintiff’s needs by “knowing of and disregarding an
16 excessive risk to his health and safety.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
17 “Deliberate indifference is a high legal standard.” *Hamby v. Hammond*, 821 F.3d 1085,
18 1092 (9th Cir. 2016) (citing *Toguchi*, 391 F.3d at 1060). Inadvertent failures to provide
19 adequate medical care, mere negligence or medical malpractice, delays in providing care
20 (without more), and differences of opinion over what medical treatment or course of care
21 is proper, are all insufficient to constitute an Eighth Amendment violation. *Estelle*, 429
22 U.S. at 105–07.

23 Plaintiff states he has been actively bleeding daily since August 29, 2017. (Compl.
24 4–5.) After he received a rectal exam and an x-ray, Plaintiff met with Dr. Khamooshian
25 on September 1, 2017. (*Id.* at 5.) Khamooshian told Plaintiff his tests were normal and
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27 ² As Plaintiff points out, Judge Dembin did not address the alleged “fraud” claim referenced in
28 Khamooshian’s motion to dismiss. Plaintiff did not allege a fraud claim, thus there was no need for
Khamooshian to move to dismiss it and no need for Judge Dembin to address it.

1 “there was no active bleeding to support a finding of a ‘flare up’ of Plaintiff’s ulcerative
2 colitis.” (*Id.*) Then, “as an after-thought,” Khamooshian said RJDCF would follow up in
3 two weeks. (*Id.* at 6.)

4 Plaintiff broadly alleges Khamooshian lied in interpreting the results. Plaintiff
5 provides no detail supporting this conclusory allegation. *Oklevueha Native Am. Church of*
6 *Haw., Inc. v. Holder*, 676 F.3d 829, 834 (9th Cir. 2012). (“[C]onclusory allegations and
7 unwarranted inferences are insufficient to defeat a motion to dismiss.”). For example,
8 Plaintiff provides no detail why Khamooshian’s reading of the tests was a lie or what tests
9 were run and why Plaintiff believes the tests were not normal. Khamooshian is unable to
10 defend against Plaintiff’s broad claim of a lie without any supporting information behind
11 the allegation. Further, it is unclear exactly how Khamooshian disregarded Plaintiff’s
12 safety. Plaintiff admits Khamooshian scheduled him for a follow up appointment two
13 weeks later. Khamooshian did not disregard Plaintiff’s safety if there was no harm that
14 resulted from the alleged lie. Therefore, the Court agrees with Judge Dembin that Plaintiff
15 has not sufficiently pled an Eighth Amendment violation. The Court **ADOPTS** the R&R,
16 **GRANTS** Khamooshian’s motion to dismiss this claim, and **GRANTS** Plaintiff leave to
17 amend the claim.

18 **C. Defendant Zhang**

19 Plaintiff alleges Zhang determined Plaintiff’s lab studies were normal and informed
20 Plaintiff the test results showed Plaintiff was not bleeding. (Compl. 7.) Zhang scheduled
21 a follow up and denied Plaintiff’s request to be housed in infirmary. (*Id.*)

22 Plaintiff complains that Zhang withheld treatment until Zhang had reviewed the
23 colonoscopy results, which caused Plaintiff’s illness to worsen. (*Id.*) Plaintiff underwent
24 a colonoscopy on September 14, 2017 and met with Zhang on September 18, 2017. (*Id.* at
25 6, 7.) A four-day delay to review results is not evidence of “withholding” treatment.
26 Further, after Zhang met with Plaintiff, Zhang scheduled Plaintiff for a follow up with a
27 gastroenterologist. (*Id.* at 9.) Plaintiff complains that the follow up appointment was
28 “weeks” away. The fact that the follow up appointment was not immediate does not show

1 deliberate indifference, but possibly only a busy doctor’s schedule. The dates of Plaintiff’s
2 treatment do not support his allegation that Zhang “denied, delayed, and interfered with
3 treatment.” (*See id.*)

4 Further, Plaintiff takes issue with Zhang’s decision to “do [a] rectal exam each visit
5 to see if Plaintiff’s claim of active bleeding is true.” (*Id.* at 7.) There is no deliberate
6 indifference in this medical decision; there are many logical reasons why Zhang could
7 determine a rectal exam was necessary. *See Toguchi*, 391 F.3d at 1059–60 (holding a mere
8 disagreement between an inmate and medical staff over the course of treatment does not
9 suffice to show deliberate indifference); *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir.
10 1996) (holding to prevail on a claim involving choices between alternative courses of
11 treatment, a prisoner must show that the chosen course of treatment “was medically
12 unacceptable under the circumstances,” and was chosen “in conscious disregard of an
13 excessive risk to [the prisoner’s] health”). There is no evidence that Zhang’s medical
14 decision was unacceptable or even unreasonable.

15 Plaintiff also alleges Zhang lied about the results of the colonoscopy result. (*Id.* at
16 8.) But Plaintiff also says Zhang “could not find” the colonoscopy results, so it is illogical
17 that Zhang lied in interpreting the results if he did not have the results in the first place.
18 Plaintiff’s allegations do not support the claim that Zhang lied, thus, Plaintiff has not pled
19 deliberate indifference.

20 In sum, Zhang’s medical decisions do not show deliberate indifference. The Court
21 **ADOPTS** the R&R, **GRANTS** Zhang’s motion to dismiss this claim, and **GRANTS**
22 Plaintiff leave to amend the claim.

23 **III. Gross Negligence and Medical Malpractice Claim**

24 Judge Dembin divided Plaintiff’s second claim into two separate claims, one of gross
25 negligence and one of medical malpractice. There is no separate, recognized cause of
26 action for “gross negligence.” *Allen v. Woodford*, No. 05-cv-1104, 2006 WL 3762053, at
27 *15 (E.D. Cal. 2006) (citing *Cont’l Ins. Co. v. Am. Prot. Indus.*, 197 Cal. App. 3d 322, 329
28 (1987)). Accordingly, the action is treated as one for medical malpractice.

1 To prove medical malpractice, a plaintiff must demonstrate: (1) a duty to exercise
2 that degree of skill, knowledge and care ordinarily possessed and exercised by members of
3 their profession under similar circumstances; (2) a breach of the duty to exercise such skill,
4 prudence, and diligence; (3) proximate causal connection between the conduct and the
5 injury; and (4) resulting loss or damage. *Chakalis v. Elevator Sols., Inc.*, 205 Cal. App.
6 4th 1557, 1571 (2012) (citing *Johnson v. Superior Court*, 143 Cal. App. 4th 297, 305
7 (2006)).

8 Plaintiff alleges that both Defendants “negligently misdiagnosed” Plaintiff’s
9 symptoms of active bleeding, rectal pain, penis pain, bloody diarrhea, and colitis flare up.
10 (Compl. 10.) He alleges this misdiagnosis caused his injury and illness to worsen, and
11 Plaintiff “suffers unnecessary pain daily.” (*Id.*) The analysis here is the same as the above
12 analysis for deliberate indifference: Plaintiff’s broad allegation of a lie, or misdiagnosis, is
13 conclusory and without supporting allegations. Without support, Plaintiff’s allegation that
14 both Defendants breached their duties is not plausible. Further, Plaintiff has not alleged
15 how Defendants’ actions caused him harm or further injury. Plaintiff’s broad, conclusory
16 allegation that he “suffers unnecessary pain daily” is insufficient because it is not alleged
17 how the pain was caused by Defendants’ actions.

18 The Court **ADOPTS** the R&R, **GRANTS** Khamooshian’s and Zhang’s motions to
19 dismiss this claim, and **GRANTS** Plaintiff leave to amend the claim.


20 **CONCLUSION**

21 For the foregoing reasons, the Court **ADOPTS** the R&R, (ECF No. 71), and
22 **GRANTS** Khamooshian’s and Zhang’s Motions to Dismiss, (ECF Nos. 37, 41). The Court
23 **GRANTS** Plaintiff leave to amend his Complaint. Plaintiff may file an amended complaint
24 on or before February 28, 2019. Plaintiff is cautioned that should he choose to file a First
25 Amended Complaint, it must be complete by itself, comply with Federal Rule of Civil
26 Procedure 8(a), and that any claim, against any and all defendant not re-alleged will be
27 considered waived. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012) (noting
28 that claims dismissed with leave to amend which are not re-alleged in an amended pleading

1 may be “considered waived if not replied”).

2 **IT IS SO ORDERED.**

3 **DATED: January 28, 2019**

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5 **Hon. Cynthia Bashant**
6 **United States District Judge**

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