

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Perkins v. Holmes

Perkins v. Holmes · No. 1:23-cv-01607-JLT-EPG (PC) · Decided June 12, 2025

SUMMARY

The document contains findings and recommendations in a prisoner civil-rights action under 42 U.S.C. § 1983. It recommends denying defendants’ motion to partially dismiss Gary Ronnell Perkins’s Eighth Amendment deliberate-indifference claim concerning the denial of orthotic footwear and referral to podiatry. The court concludes that the complaint sufficiently alleges a serious medical need and deliberate indifference, and that the defendants’ grievance materials should not be used at the pleading stage to resolve factual disputes about the care provided.

OPINION

(PC) Perkins v. Holmes

PER CURIAM.

1 2 3 4 5

6 UNITED STATES DISTRICT COURT

7 EASTERN DISTRICT OF CALIFORNIA

8 9 GARY RONNELL PERKINS, Case No. 1:23-cv-01607-JLT-EPG (PC) 10 Plaintiff,

FINDINGS AND RECOMMENDATIONS

11 RECOMMENDING THAT MOVING

v.

DEFENDANTS’ MOTION TO PARTIALLY

12 DISMISS PLAINTIFF’S COMPLAINT BE

JUDITH HOLMES, et al., 13 DENIED. Defendants. 14 (ECF No. 20) 15

OBJECTIONS, IF ANY, DUE WITHIN THIRTY

16

DAYS

17 18 Gary Ronnell Perkins (“Plaintiff”) is a prisoner proceeding pro se in this civil rights 19
action filed pursuant to 42 U.S.C. § 1983. Plaintiff’s complaint arises from his claim that 20
Defendants acted with deliberate indifference to his serious medical needs by denying him 21
orthotics and refusing to refer him to podiatry due to a change in the institution’s criteria for 22
providing such care, despite knowing Plaintiff had been prescribed orthotics since 2006 and 23
needed them as treatment for pain related to his bunions. (ECF No. 1). The Court previously 24
screened Plaintiff’s complaint and allowed his Eighth Amendment claim for deliberate 25

indifference to serious medical needs to proceed past screening. (ECF No 7). 26 On December 12, 2024, Defendants Holmes, Gu, Mevi, Gates, Johnson, Magana, 27 Sustaita, Longcor, and Longia (Moving Defendants) filed a motion to partially dismiss 28 Plaintiff's complaint arguing that Plaintiff fails to state a claim for deliberate indifference to 1 serious medical needs in violation of the Eighth Amendment because the grievance responses 2 indicate that Defendants provided sufficient care and because certain Defendants merely did 3 not intervene in response to Plaintiff's grievances or denied Plaintiff's request as part of a 4 panel. (ECF No. 20). 5 For the following reasons, the Court recommends denying Moving Defendants' motion 6 to dismiss.

7 I. BACKGROUND

8 A. Plaintiff's Complaint 9 Plaintiff's complaint (ECF No. 1) alleges as follows: 10 On or about January 25, 2006, Plaintiff was examined by a physician at Kern Valley 11 State Prison and referred to a podiatrist. On March 21, 2006, Plaintiff was examined by a 12 podiatrist who diagnosed Plaintiff with "Hallux Vaigus (bunions) bilateral feet" and ordered 13 Plaintiff orthotic shoes. On or about March 9, 2009, Plaintiff was transferred to Centinela State 14 Prison, and he continued to receive orthotic shoes until his transfer to Chuckawalla Valley State 15 Prison (CVSP). 16 While at CVSP, Plaintiff filed a health care grievance. On May 1, 2020, he received a 17 response to the grievance, which confirmed that he has previous referrals for orthotic visits 18 with specialty shoes, and that he had been approved for orthotics on multiple dates over several 19 years. The response also stated that new orthotics would be ordered. 20 In January of 2020, the CCHCS care guide was changed and instituted a new policy 21 denying prisoners orthotic/therapeutic footwear regardless of medical need. 22 On or about June 18, 2021, Plaintiff was examined by Defendant Dr. Judith Holmes via 23 video. Plaintiff informed Dr. Holmes that he was experiencing excruciating pain when walking 24 due to a bunion on his left big toe, and Plaintiff requested replacement orthotic shoes and 25 custom insoles. Plaintiff alleges Dr. Holmes lied to him by saying she could not see any 26 documentation in medical records that Plaintiff was ever prescribed orthotic shoes or custom 27 insoles. Plaintiff told Dr. Holmes he had been prescribed orthotics since 2006. Plaintiff tried 28 to tell her about the response to the Health Care Grievance that confirmed this. Defendant 1 Holmes refused to acknowledge the documentation and stated that based on the new policy 2 Plaintiff does not fit the criteria for a podiatrist consult. 3 On June 20, 2021, Plaintiff submitted a Health Care Grievance regarding the denial of 4 orthotic shoes. On August 17, 2021, Defendant J. Mevi reviewed the Health Care Grievance. 5 Plaintiff alleges that Defendant Mevi, as the Chief Physician and surgeon, had the authority and 6 opportunity to prevent the ongoing actions of Dr. Holmes but failed to intervene. 7 Plaintiff was seen several times by Dr. Holmes, and Plaintiff repeatedly told Dr. Holmes 8 of the pain he was suffering and requested orthotic shoes to relieve the pain. 9 On or about December 2, 2021, Defendant S. Gates reviewed Plaintiff's health care 10 grievance at the headquarters level. Gates failed to intervene to secure medical care for 11 Plaintiff. On or about February 1, 2022, Plaintiff saw Dr. Holmes regarding the pain and 12 discomfort he experienced while walking caused by the

bunion. Dr. Holmes examined Plaintiff 13 and stated that she saw redness, inflammation, and abnormal positioning of the toe, but she 14 stated she did not see a bunion. Dr. Holmes refused Plaintiff's request for an order for 15 examination and consult by a podiatrist. 16 On February 2, 2022, Plaintiff submitted a second Health Care Grievance against Dr. 17 Holmes. On April 1, 2022, Dr. Mevi reviewed the Health Care Grievance and indicated no 18 intervention despite acknowledging that Dr. Johnson had noted the presence of a bunion. On 19 May 26, 2022, Defendant Gates reviewed the grievance at the headquarters level and indicated 20 no intervention despite acknowledging that Plaintiff suffered from a painful bunion. 21 On January 27, 2023, Plaintiff had an appointment with Dr. Gu. Plaintiff told Dr. Gu 22 about his foot pain and need for orthotic shoes and requested referral to a podiatrist. Defendant 23 Gu refused to put in an order for orthotic shoes or refer Plaintiff to a podiatrist. On January 29, 24 2023, Plaintiff was seen by an unknown RN for pain in his foot and knee. On or about 25 February 15, 2023, Plaintiff was seen by Dr. Gu and again explained his pain and need for 26 orthotic shoes to relieve his pain when walking. 27 On or about March 2, 2023, Plaintiff had an appointment with Dr. Gu and explained to 28 him that due to the "HC grievance," "VSP ADA said medical was supposed to supply 1 orthotics/custom insoles." Plaintiff showed Defendant Gu a "chrono" that indicated current 2 issued "Therapeutic shoes/orthotics permanent." Defendant Gu refused to acknowledge 3 Plaintiff's document. 4 On or about March 8, 2023, Plaintiff had another appointment with Dr. Gu, who refused 5 to put in a referral due to headquarters and because pain is not a reason to issue orthotics. 6 Plaintiff explained that his pain was often excruciating due to the pressure on his toe when 7 walking. Dr. Gu responded, "write headquarters up." 8 On or about March 16, 2023, Defendants K.D. Johnson, A. Magana, J. Sustaita, H. 9 Longcor, and H. Longia as the Reasonable Accommodation Panel (RAP) declined to provide 10 Plaintiff with orthotic shoes, stating: "The RAP considered all information provided and 11 determined your reasonable accommodation request for orthotic shoes has been denied." 12 On March 23, 2023, Plaintiff submitted a health care grievance against each RAP 13 member, CCHCS, and Dr. Gu. On or about April 13, 2023, Plaintiff was again seen by Dr. Gu. 14 Dr. Gu again refused to refer Plaintiff to a podiatrist. On May 18, 2023, Dr. Mevi reviewed the 15 grievance at the institutional level and failed to intervene. 16 On August 15, 2023, Plaintiff was seen by Dr. J. Chau, who examined Plaintiff's feet 17 and observed a bunion and redness. Plaintiff told Dr. Chau that he has been enduring pain in 18 both left foot and knee and requires orthotic shoes. Dr. Chau refused to make a referral to a 19 podiatrist. On August 15, 2023, Plaintiff submitted a grievance based on Dr. Chau's refusal. 20 On September 13, 2023, the health care grievance office refused to process Plaintiff's 21 grievance because it was a duplicate of earlier grievances. 22 B. Screening Order 23 On June 21, 2024, this Court issued a screening order finding that Plaintiff's claim for 24 deliberate indifference to serious medical needs against Defendants Dr. Judith Holmes, Dr. Wei 25 Gu, Dr. J. Mevi, Dr. J. Chau, K.D. Johnson, A. Magana, J. Sustaita, H. Longcor, Dr. H. Longia, 26 and S. Gates should proceed past screening.

(ECF No. 7). In the order, this Court stated: 27 Based on the allegations in Plaintiff's complaint, the Court finds that Plaintiff has sufficiently alleged a claim for deliberate indifference to serious medical needs to 28 proceed past screening. Plaintiff alleges that he has a serious medical need for orthotics, which is causing him pain and limiting his ability to walk properly. He 1 has alleged that he was previously diagnosed with a condition requiring orthotics. However, he alleges that Defendants refused to provide the medical care or refer 2 him to a podiatrist without justification. 3 Plaintiff has sufficiently asserted this claim against all Defendants except for CCHCS. Plaintiff has alleged that each individual Defendant either directly 4 denied him care or refused to intervene as part of the appeals process. Additionally, Plaintiff has alleged that the supervisory Defendants are responsible 5 for a policy that led to the denial of care. 6 (ECF No. 7 at p. 9).

7 II. MOVING DEFENDANTS' MOTION TO DISMISS

8 A. Moving Defendants' Motion 9 Moving Defendants filed a motion to dismiss on December 12, 2024.¹ (ECF No. 20). 10 Moving Defendants first argue that Plaintiff's allegations against Dr. Holmes and Dr. Gu are 11 insufficient because they amount to a difference in medical opinion and do not rise to the level 12 of deliberate indifference. In support, Moving Defendants rely primarily on summaries of 13 medical records set forth in various responses to Plaintiff's grievances, which are not included 14 in the complaint. Moving Defendants argue that the Court should consider those grievances in 15 connection with the motion to dismiss and find that they establish that Defendants provided 16 appropriate medical care. 17 Specifically, Moving Defendants argue that the grievance responses show that Dr. 18 Holmes examined Plaintiff, ordered x-rays, and concluded that Plaintiff did not meet the 19 criteria under the new prison policy to receive orthotics or for referral to podiatry. Dr. Holmes 20 also recommended Plaintiff request wider shoes. Moving Defendants similarly argue that Dr. 21 Gu examined Plaintiff, reviewed the x-rays, and determined Plaintiff did not meet the criteria 22 under the new policy for orthotic footwear. Dr. Gu also recommended Plaintiff request wider 23 shoes. 24 Next, Moving Parties argue that individual Defendants who merely declined to 25 intervene in response to Plaintiff's grievance or were part of a panel that denied Plaintiff's 26 27 1 Defendants concede that Plaintiff's complaint alleges a cognizable claim for deliberate 28 indifference to serious medical needs against Dr. Chau, and Dr. Chau is not a moving party in this motion. 1 request for accommodation cannot be found to be deliberately indifferent. Moving Defendants 2 assert that Plaintiff's claim against Defendants Mevi and Gates fails because Plaintiff's 3 allegations are "based solely on their involvement in responding to grievances at the 4 institutional and headquarters levels." (ECF No. 20-1 at p. 11). Moving Defendants also argue 5 that Dr. Mevi and Gates relied on the opinions of Plaintiff's treating doctors finding that 6 Plaintiff did not meet the criteria for orthotics under the new prison policy. 7 Moving Defendants also argue that Plaintiff fails to state a claim against Defendants 8 Johnson, Magana, Sustaita, Longcor, and Longia because they were merely part of a panel that 9 jointly denied Plaintiff's requests. Because they were part of a panel, Plaintiff fails to allege 10 personal participation by any individual member of that panel. 11 Moving Defendants

include a declaration from Joseph J. Raily, which authenticates and 12 attaches 87 pages of exhibits, consisting of Plaintiff's grievances and responses related to his 13 requests for orthotics and related care. (ECF No. 20-2). 14 Lastly, Moving Defendants argue that qualified immunity bars Plaintiff's claims. 15 B. Plaintiff's Opposition 16 Plaintiff filed his opposition on January 15, 2025. (ECF No. 21). Plaintiff argues that 17 Dr. Holmes and Dr. Gu examined Plaintiff but were deliberately indifferent to his chronic pain 18 and failed to provide him with prescribed orthotics he has used since 2006. Plaintiff also 19 argues that Moving Defendants do not contest that Plaintiff suffers pain because of his 20 condition and that he will continue to suffer pain when walking. 21 Plaintiff contends that the complaint details "who he complained to about his footwear 22 needs, when he complained, and how each defendant responded to his reported symptoms of 23 pain." (ECF No. 21 at p. 3). Plaintiff argues that he put Defendants Gates and Mevi on notice 24 through the appeals process that he was being subjected to unconstitutional conditions, but 25 Defendants Gates and Mevi failed to remedy the alleged violations despite their ability to do so. 26 Plaintiff similarly argues that Defendants Johnson, Magana, Sustaita, Longcor, and Longia 27 knew Plaintiff had a "medical need for orthotic shoes" and that he was suffering pain but failed 28 to intervene or provide him with orthotic shoes. 1 C. Moving Defendants' Reply 2 Moving Defendants filed a reply brief on January 29, 2025. (ECF No. 22). Moving 3 Defendants reiterate their argument that the grievance logs demonstrate Dr. Holmes and Dr. Gu 4 provided Plaintiff with medically appropriate treatment for his feet. Moving Defendants also 5 argue that Dr. Mevi, Gates, Johnson, Magana, Sustaita, Longcor, and Longia were not 6 deliberately indifferent because they were not aware of the alleged unconstitutional condition, 7 and each Moving Defendant acted without deliberate indifference because they concurred with 8 the providing doctors' determination that Plaintiff did not meet the prison's new criteria for 9 orthotics.

10 III. LEGAL STANDARD

11 A. Motion to Dismiss 12 Federal Rule of Civil Procedure 12 permits a party to file a motion to dismiss a claim 13 for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A 14 Rule 12(b)(6) motion tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 15 732 (9th Cir. 2001). 16 "To survive a motion to dismiss, a complaint must contain sufficient factual matter, 17 accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 18 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In 19 considering a motion to dismiss, the Court must accept all allegations of material fact in the 20 complaint as true. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). "At the motion to dismiss 21 phase, the trial court must accept as true all facts alleged in the complaint and draw all 22 reasonable inferences in favor of the plaintiff." *In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 23 (9th Cir. 2016). "However, the trial court does not have to accept as true conclusory 24 allegations in a complaint or legal claims asserted in the form of factual allegations." *Id.* In 25 addition, pro se

pleadings “must be held to less stringent standards than formal pleadings drafted by lawyers.” *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. 1 at 678; see also *Whittaker Corp. v. United States*, 825 F.3d 1002, 1006 (9th Cir. 2016) (“Dismissal is proper when the complaint does not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal theory.”).

B. Deliberate Indifference to Serious Medical Needs

“Under 42 U.S.C. § 1983, to maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show ‘deliberate indifference to serious medical needs.’” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). “This includes ‘both an objective standard—that the deprivation was serious enough to constitute cruel and unusual punishment—and a subjective standard—deliberate indifference.’” *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014). “First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain.” *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citation omitted); see also *Colwell*, 763 F.3d at 1066 (“Indications that a plaintiff has a serious medical need include “[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual’s daily activities; or the existence of chronic and substantial pain.”). The Ninth Circuit has held that the “‘existence of chronic and substantial pain’ indicates that a prisoner’s medical needs are serious.” *Peralta v. Dillard*, 744 F.3d 1076, 1086 (9th Cir. 2014) (citation omitted). “Second, the plaintiff must show the defendant’s response to the need was deliberately indifferent.” *Wilhelm*, 680 F.3d at 1122. “A prison official is deliberately indifferent under the subjective element of the test only if the official ‘knows of and disregards an excessive risk to inmate health and safety.’” *Colwell v. Bannister*, 763 F.3d at 1066. “[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). “Deliberate indifference ‘may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.’” *Colwell v. Bannister*, 763 F.3d at 1066. “‘Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner’s Eighth Amendment rights.’” *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004) (citation omitted). “Typically, ‘[a] difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.’” *Edmo v. Corizon, Inc.*, 935 F.3d 757, 786 (9th Cir. 2019) (citation omitted). “But that is true only if the dueling opinions are medically acceptable under the circumstances.” *Id.*

C. Qualified Immunity

“Qualified immunity balances two important interests—the need to hold public officials accountable when they

exercise power irresponsibly and the need to shield officials from 14 harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. 15 Callahan*, 555 U.S. 223, 231 (2009). “Determining whether officials are owed qualified 16 immunity involves two inquiries: (1) whether, taken in the light most favorable to the party 17 asserting the injury, the facts alleged show the official's conduct violated a constitutional right; 18 and (2) if so, whether the right was clearly established in light of the specific context of the 19 case.” *Robinson v. York*, 566 F.3d 817, 821 (9th Cir. 2009). 20 “‘A clearly established right is one that is sufficiently clear that every reasonable 21 official would have understood that what he is doing violates that right.’” *Horton by Horton v. 22 City of Santa Maria*, 915 F.3d 592, 599 (9th Cir. 2019). “Although the Supreme Court ‘does 23 not require a case directly on point for a right to be clearly established, existing precedent must 24 have placed the statutory or constitutional question beyond debate.’” *Evans v. Skolnik*, 997 25 F.3d 1060, 1066 (9th Cir. 2021) (citing *Kisela v. Hughes*, 584 U.S. 100, 104 (2018)). 26 “[C]learly established law should not be defined at a high level of generality.” *Martinez 27 v. City of Clovis*, 943 F.3d 1260, 1275 (9th Cir. 2019) (citation and internal quotation marks 28 omitted). However, “[i]t is not necessary to have a case involving a heart attack, a case 1 involving appendicitis, or a case involving a bowel obstruction for a § 1983 claim based on one 2 of those conditions to survive qualified immunity.” *Russell v. Lumitap*, 31 F.4th 729, 737–38 3 (9th Cir. 2022). “If the operative complaint ‘contains even one allegation of a harmful act that 4 would constitute a violation of a clearly established constitutional right,’ then plaintiffs are 5 ‘entitled to go forward’ with their claims.” *Keates v. Koile*, 883 F.3d 1228, 1235 (9th Cir. 6 2018).

7 IV. ANALYSIS

8 A. Moving Defendants’ Motion to Dismiss Claims Against Holmes and Gu 9 Moving Defendants first argue that Plaintiff’s claim against Defendants Holmes and Gu 10 should be dismissed because the grievance documents, which are attached to Defendants’ 11 motion to dismiss, demonstrate that Holmes and Gu provided medically appropriate care and 12 merely disagreed with Plaintiff about the proper course of treatment. 13 1. Incorporation by Reference 14 As an initial matter, the Court must consider whether it is appropriate to consider the 15 documents that Moving Defendants rely on in their motion to dismiss, and if so for what 16 purpose. 17 In support of their motion to dismiss, Moving Defendants attach over 80 pages of 18 exhibits, comprising of Plaintiff’s grievances about his medical issues and the institution’s 19 responses to those grievances. (ECF No. 20-2, Bailey Decl. ¶¶ 3-9, Exhibits A-E). Moving 20 Defendants claim that the Court may consider this evidence in connection with their motion to 21 dismiss under the incorporation-by-reference doctrine because Plaintiff’s complaint references 22 the grievances and responses and quotes from some of them. 23 “Generally, a court may not consider material beyond the complaint in ruling on a 24 Fed.R.Civ.P. 12(b)(6) motion.” *Intri-Plex Techs., Inc. v. Crest Group., Inc.*, 499 F.3d 1048, 25 1052 (9th Cir. 2007) (footnote and citation omitted). “There are two exceptions to this rule: the 26 incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201.” 27 *Khoja v. Orexigen Therapeutics, Inc.*, 899

F.3d 988, 998 (9th Cir. 2018). 28 1 A document may be incorporated by reference “if the plaintiff refers extensively to the 2 document or the document forms the basis of the plaintiff's claim.” United States v. Ritchie, 3 342 F.3d 903, 908 (9th Cir. 2003). “But the mere mention of the existence of a document is 4 insufficient to incorporate the contents of a document.” Coto Settlement v. Eisenberg, 593 5 F.3d 1031, 1038 (9th Cir. 2010); see also Orellana v. Mayorkas, 6 F.4th 1034, 1043 (9th Cir. 6 2021). (“Although mere mention of the existence of a document is insufficient to incorporate 7 the contents of a document, the document is incorporated when its contents are described and 8 the document is integral to the complaint.”). 9 The Ninth Circuit has consistently recognized that courts “may” but are “not required to 10 incorporate documents by reference.” Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1159 11 (9th Cir. 2012) (citations omitted). 12 A court may treat a document incorporated by reference “as part of the complaint, and 13 thus may assume that its contents are true for purposes of a motion to dismiss under Rule 14 12(b)(6).” Ritchie, 342 F.3d at 908. However, the Ninth Circuit expressly warned that “it is 15 improper to assume the truth of an incorporated document if such assumptions only serve to 16 dispute facts stated in a well-pleaded complaint.” Khoja, 899 F.3d at 1003. “The 17 incorporation-by-reference doctrine does not override the fundamental rule that courts must 18 interpret the allegations and factual disputes in favor of the plaintiff at the pleading stage.” Id. 19 at 1014. 20 In this case, it is true that Plaintiff’s complaint references a number of grievances and 21 responses to grievances, and at times quotes their contents. See, e.g., ECF No. 1, at 9 (“While 22 at CVSP Plaintiff filed the following: Tracking No: CVSP HC 20000082 Health Care 23 Grievance. . . . On May 01, 2020 CCHS gave a response to Plaintiff grievance [sic] (CVSP HC 24 20000082) stating”). Thus, the Court agrees that it can consider those grievances under 25 the incorporation-by-reference doctrine as to what they state, such as when they were dated, 26 who wrote them, or what they said. 27 However, Moving Defendants’ motion to dismiss does not rely on those documents for 28 this purpose. Instead, Moving Defendants rely on these documents as evidence as to what care 1 Plaintiff actually received and ask that Plaintiff’s complaint be dismissed because those 2 documents show that Plaintiff received adequate medical care. For example, Moving 3 Defendants cite to several pages of grievance documents generally and claim that they 4 “establish that Defendant Holmes examined Plaintiff’s feet on at least three occasions and 5 ordered x-rays of Plaintiff’s feet,” and that “Plaintiff was also able to stand without difficult 6 [sic],” and thus that they show “a doctor working to find a treatment that would alleviate 7 Plaintiff’s symptoms that was within CDCR policy.” (ECF No. 20-1, at p. 16). 8 The Court finds that Moving Defendants’ argument goes beyond the permissible scope 9 of the incorporation-by-reference doctrine. Rather than relying on the exhibits for what they 10 are or state on the document, Moving Defendants seek to improperly admit them as evidence of 11 the treatment that was actually provided and of the defendant doctors’ state of mind during that 12 treatment. This goes beyond the scope of the incorporation-by-reference doctrine explained 13 above and improperly seeks to admit evidence to dispute facts stated in Plaintiff’s complaint 14 regarding the

care he received or failed to receive. Moreover, it asks the Court to consider such 15 evidence without providing Plaintiff with an opportunity to take discovery and present his own 16 evidence regarding his medical care. 17 Moving Defendants' request for dismissal of the complaint based on these records is 18 also improper because the grievance responses merely provide a general summary of other 19 records and are not themselves direct evidence of the treatment that was provided. See, e.g., 20 ECF No. 20-2, at p. 23 ("Your health care grievances and health record, and all pertinent 21 policies and procedures were reviewed. These records indicate . . ."). They are thus hearsay, 22 which is generally not admissible for the purpose of establishing the truth of what is stated. 23 Fed. R. Evid. 801, 802 ("Hearsay is not admissible unless any of the following provide 24 otherwise . . ."). Moving Defendants' motion to dismiss does not address this issue or provide 25 any basis for permitting their use as substantive evidence of what care Plaintiff actually 26 received. While it is possible that Moving Defendants might provide some legal basis and 27 authentication allowing the Court or jury to consider such evidence in the future, such as at 28 summary judgment or trial, they have not done so now. It would thus be improper at the motion 1 to dismiss stage to find that Moving Defendants provided constitutionally adequate care based 2 on the description of medical care provided in those exhibits. 3 The Court thus recommends denying Moving Defendants' motion to dismiss to the 4 extent it argues that grievance documents referred to in Plaintiff's complaint establish that 5 Defendants Holmes and Gu provided medically adequate care. 6

2. Sufficiency of Plaintiff's Allegations that Holmes and Gu Acted with Deliberate Indifference 7 8 Moving Defendants also generally assert that Plaintiff has failed to sufficiently allege 9 that Defendants Holmes and Gu acted with deliberate indifference to Plaintiff's serious medical 10 needs. (ECF No. 20-1, at p. 16-17). 11 Again, in his complaint, Plaintiff alleges he was diagnosed with bunions and has been 12 prescribed orthotic shoes since 2006. (ECF No. 1 at p. 9). Plaintiff alleges that records 13 indicate he has repeatedly been found to qualify for orthotics and provided referrals to podiatry 14 "for foot bunion and deformity." (Id.) Plaintiff further alleges he experiences "excruciating 15 pain when walking" because of his "painful bunion." (Id. at p. 10). Plaintiff alleges he 16 experiences pain in his left foot and knee without orthotics. 17 Plaintiff alleges that Dr. Holmes refused to provide him with orthotic shoes, refused to 18 refer him to podiatry despite his complaints of excruciating pain, and refused to acknowledge 19 documentation indicating Plaintiff had a previous prescription for orthotics, merely because 20 Plaintiff did not fit the new institutional criteria for such care. (ECF No. 1 at p. 10). Plaintiff 21 alleges that Dr. Gu also refused to provide him with orthotics or refer him to podiatry despite 22 his repeated complaints of pain while walking. Plaintiff also alleges he attempted to show Dr. 23 Gu a document stating Plaintiff was supposed to be supplied orthotics, but Dr. Gu refused to 24 acknowledge the document. (Id. at p. 12). 25 As this Court previously found in its screening order, the Court finds that Plaintiff's 26 allegations are sufficient to state a claim against Defendants Holmes and Gu for deliberate 27 indifference to Plaintiff's serious medical needs. Taking Plaintiff's allegations as true, as the 28 Court must in considering a motion

to dismiss, Plaintiff has adequately alleged that he had a 1 serious medical need for orthotics, that a failure to provide orthotics could result in unnecessary 2 and wanton infliction of pain, and that Defendants Holmes and Gu knew of and disregarded 3 this serious medical need. 4 Moreover, the Ninth Circuit has held that a denial of a medically necessary treatment 5 solely on the basis of institutional policy constitutes deliberate indifference to serious medical 6 needs. The Ninth Circuit addressed this issue in *Colwell v. Bannister*, 763 F.3d 1060 (9th Cir. 7 2014), when it reversed a district court's grant of summary judgment where prison defendants 8 had denied an inmate's request for cataract surgery solely based on the institution's policy 9 against providing inmates with cataract surgery if an inmate can manage to function in prison 10 with one eye. The Ninth Circuit stated "We also hold that the blanket, categorical denial of 11 medically indicated surgery solely on the basis of an administrative policy . . . is the paradigm 12 of deliberate indifference." *Id.* at 1063. In that case, multiple medical providers had 13 recommended surgery for Plaintiff's right eye cataract, but the prison's Utilization Review 14 Panel denied the requests for surgery. Plaintiff was told that surgery was denied due to 15 department policy that "one eye only" was needed. All of Plaintiff's grievances were denied by 16 the appeals department and the review panel because the prison's policies considered such 17 surgery to be elective. The district court found that Plaintiff had a serious medical need for 18 cataract surgery, but nevertheless granted summary judgment in favor of defendants because 19 "the Panel's decision to refuse surgery amounted to a difference of opinion over the best course 20 of treatment, and that Colwell had not shown that the NDOC's course of action was 'medically 21 unacceptable' or 'made in conscious disregard of an excessive risk to his health.'" *Id.* at 1065. 22 The Ninth Circuit reversed, stating: 23 [T]he evidence is undisputed that Colwell was denied treatment for his 24 monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that 25 Colwell was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have 26 helped him, but because the policy of the NDOC is to require an inmate to 27 endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference. . . . 28 The record supports a conclusion that the specialists' recommendations for 1 surgery were overridden not because of conflicting medical opinions about the 2 proper course of treatment, but because officials enforced the "one eye only" policy. The NDOC's formal cataract-treatment policy, Medical Directive 106, 3 mandates "case by case" consideration of cataract treatment requests taking into account an inmate's "ability to function," but the evidence here shows that the 4 NDOC denies cataract surgery as long as a prisoner has one "good" eye. Colwell 5 was told on multiple occasions that he would not receive treatment because he had a healthy left eye, which made surgery unnecessary despite the examining 6 specialists' opinions. 7 *Id.* at 1068; see also *Guy v. Bick*, No. 221CV00823WBSJDPPC, 2022 WL 1271374, at *2 8 (E.D. Cal. Apr. 28, 2022), report and recommendation adopted, No. 221CV00823WBSJDPPC, 9 2022 WL 3358116 (E.D. Cal. Aug. 15, 2022) (denying motion to

dismiss and rejecting 10 argument that the doctor's adherence to a policy or instructions to deny inmate pain medication 11 after surgery demonstrated a lack of deliberate indifference). 12 Here too, Plaintiff alleges that Defendants Holmes and Gu (as well as other defendants, 13 addressed below), denied him orthotics, despite previous medical recommendations and 14 Plaintiff's ongoing need for them to address his pain, solely based on a change in prison policy 15 rather than based on a true opinion about the proper treatment for his condition. 16 The Court thus recommends denying Moving Defendants' motion to dismiss to the 17 extent it argues that Plaintiff's complaint fails to adequately allege deliberate indifference to 18 serious medical needs against Defendants Holmes and Gu. 19 20 B. Moving Defendants' Motion to Dismiss Claims against Defendants Gates and Mevi 21 Moving Defendants next argue that Plaintiff's Claims against Defendants Gates and 22 Mevi should be dismissed because Plaintiff's claims against them are based solely on their 23 review and denial of Plaintiff's health care grievances. (ECF No. 20-1, at p. 18). Defendants 24 assert that such claims are "not cognizable." 25 In support, Moving Defendants cite the case of *Peralta v. Dillard*, 744 F.3d 1076, 1081 26 (9th Cir. 2014) in which the Ninth Circuit affirmed the grant of judgment as a matter of law in 27 favor of Defendants who were involved in denying Plaintiff's appeals. As an initial matter, the 28 1 *Peralta* case concerned the sufficiency of Plaintiff's evidence at trial, rather than a motion to 2 dismiss, and found that Plaintiff had not sufficiently proven that Defendants were in fact aware 3 of Plaintiff's complaints or need for treatment. As to one Defendant, the Ninth Circuit found 4 that the evidence at trial established "he didn't independently review *Peralta's* claims or read his 5 chart before signing off on the second-level appeal. Instead, he relied on the medical opinions 6 of the staff dentists who had investigated *Peralta's* complaints and already signed off on the 7 treatment plan," and "[e]ven if he had looked at *Peralta's* chart, he wouldn't have been able to 8 tell whether *Peralta* had a serious medical need and what the best course of treatment was." 9 *Peralta*, 744 F.3d at 1086-87. As to another Defendant, the Ninth Circuit found that evidence 10 at trial established, "Although he was required to sign *Peralta's* second-level appeal, he didn't. 11 Instead, the appeal was signed by Dr. Cassim, a staff medical doctor. *Dillard* didn't review 12 *Peralta's* medical records or meet with him prior to the filing of the lawsuit. *Dillard* testified 13 that he would authorize someone else to sign the second-level responses on his behalf when he 14 knew he would be absent from the prison because appeals had to be processed quickly." *Id.* at 15 1087-88. 16 Here, in contrast, Plaintiff has alleged that the institution responses authored by 17 Defendants Gates and Mevi indicate that they had reviewed Plaintiff's medical records, and 18 that those medical records indicated a documented diagnosis of bunions, previous prescriptions 19 by medical professional for orthotics, a chrono indicating "current Issued DME 'Therapeutic 20 shoes/orthotics permanent,'" documentation of Plaintiff's complaints of excruciating pain when 21 walking, redness and inflammation and abnormal position of toe, and the doctors' refusal to 22 provided treatment based on prison policy, rather than an individualized assessment of 23 Plaintiff's medical needs. Thus, unlike in *Peralta*, Plaintiff has alleged facts indicating that 24 Defendants

Gates and Mevi did review Plaintiff's complaints and records, which indicated 25 Plaintiff's serious medical need. 26 Moreover, the Ninth Circuit has held that a defendant may be liable for deliberate 27 indifference to serious medical needs based on denying a medical grievance. Specifically, in 28 1 *Colwell v. Bannister*, 763 F.3d 1060 (9th Cir. 2014), discussed above, the Ninth Circuit held 2 that denying a prison grievance could support a deliberate indifference claim, stating: 3 The defendants urge us to uphold summary judgment because, they argue, 4 neither Dr. Bannister nor former and now-retired NDOC Director Howard 5 Skolnik was personally involved in any constitutional deprivation. See *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir.2002) ("In order for a person acting under 6 color of state law to be liable under section 1983 there must be a showing of personal participation in the alleged rights deprivation...."). . . . 7 8 Although many of the events in this case occurred before Dr. Bannister became NDOC Medical Director in 2005, he personally denied Colwell's second-level 9 grievance even though he was aware that an optometrist had recommended surgery and that Colwell's lower-level grievances had been denied despite that 10 recommendation. Accordingly, a reasonable jury could find that Dr. Bannister, 11 pursuant to a policy rather than a considered medical judgment, contributed to the decision to refuse treatment in conscious disregard of an excessive risk to 12 Colwell's health. . . . 13 *Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014); see also *Carbajal v. Food Servs.*, 14 No. EDCV 20-1029-PA (AS), 2022 WL 18911624, at *6 (C.D. Cal. Dec. 14, 2022), report and 15 recommendation adopted, No. EDCV 20-1029-PA (AS), 2023 WL 2307439 (C.D. Cal. Mar. 1, 2023) (deliberate indifference was sufficiently alleged where prison officials were informed 17 that plaintiff had been prescribed a particular diet, without which the plaintiff would suffer 18 harm, but continued to deny plaintiff's request to receive his medically prescribed diet "even to 19 the extent that Defendants were merely involved in reviewing Plaintiff's administrative 20 grievances or appeals"). 21 Moving Defendants also argue that "the grievances also plainly illustrate why Plaintiff's 22 frequent requests for orthotic footwear were denied: Plaintiff's condition was not of a severity 23 requiring a referral to podiatry or orthotic footwear." (ECF No. 20-1, at p. 19). Notably, 24 Moving Defendants cite to more than 70 pages of exhibits for this proposition without quoting 25 to any actual statement or conclusion by a doctor. Moreover, Moving Defendants fail to 26 address Plaintiff's main allegation—that the doctors and reviewers based their decision to deny 27 Plaintiff's orthotics, despite all contrary medical findings of previous doctors, solely on an 28 1 institutional change in the criteria for when the institution provides orthotic shoes, without any 2 assessment of Plaintiff's pain or medical needs, nor any determination as to whether that 3 revised criteria was medically supported. Again, the Ninth Circuit has clearly held that "the 4 blanket, categorical denial of medically indicated surgery solely on the basis of an 5 administrative policy . . . is the paradigm of deliberate indifference." *Colwell v. Bannister*, 763 6 F.3d 1060, 1063 (9th Cir. 2014). 7 The Court thus recommends denying Moving Defendants' Motion to Dismiss Plaintiff's 8 claims against Defendants Mevi and Gates. 9 C. Moving Defendants' Motion to Dismiss Claims against the RAP Defendants 10

Moving Defendants next argue that Plaintiff's claims against Defendants Johnson, 11 Magana, Sustaita, Longcor, and Longia ("RAP Defendants") should be dismissed because (1) 12 Plaintiff's allegations are insufficient to establish they acted with deliberate indifference; and 13 (2) Plaintiff fails to allege their personal participation because they acted as part of a panel. 14 Plaintiff's complaint alleges that these defendants were all members of the prison's 15 Reasonable Accommodation Panel (RAP) who denied Plaintiff's request for orthotic shoes. 16 Plaintiff alleges that they jointly notified him that "[t]he RAP considered all information 17 provided and determined your reasonable accommodation request for orthotic shoes has been 18 denied." (ECF No. 1, at p. 13). 19 Moving Defendants first claim that these allegations are insufficient because "the 20 allegations indicate that the RAP Defendants declined to intervene because Plaintiff's concerns 21 regarding his feet were already being addressed by custody and medical staff," and "[r]ather 22 than consciously disregarding a risk of harm to Plaintiff, the RAP Defendants evaluated 23 Plaintiff's case factors and determined that Plaintiff did not require orthotic shoes as an 24 accommodation." (ECF No. 20-1, at p. 19-20). In support of this argument, the Moving 25 Defendants rely on 20 pages of exhibits regarding various grievance correspondence with 26 Plaintiff. (ECF No. 20-1, at p. 19-20). 27 As an initial matter, Defendants do not cite to any specific statement in those documents 28 that support their argument, and Plaintiff's complaint certainly did not make such an allegation. 1 Moreover, for the same reasons discussed above regarding the incorporation-by-reference 2 doctrine, the Court finds that this argument improperly seeks to dismiss the complaint based on 3 evidence not contained in the complaint consisting of hearsay summaries of medical records. 4 Moving Defendants' argument also disregards Plaintiff's allegations that the medical 5 records reviewed by the RAP panel indicated that Plaintiff had a medical need, had previously 6 and repeatedly been found by medical doctors to require orthotics to address that need, and had 7 been informed that orthotics would not be prescribed purely based on a change in institution 8 policy, and not based on any medical assessment of Plaintiff's medical need. 9 The Court thus recommends denying the Moving Defendants' motion to dismiss to the 10 extent it relies on various grievance correspondence to claim that the RAP Defendants did not 11 act with deliberate indifference to Plaintiff's serious medical needs. 12 Moving Defendants also argue that Plaintiff's claim against the RAP Defendants should 13 be dismissed because it does not sufficiently allege their personal participation. Specifically, 14 they argue that Plaintiff's allegation that those Defendants were all part of the panel that denied 15 his request for orthotics "does not articulate how precisely each individual defendant violated 16 Plaintiff's rights." (ECF No. 20-1, at p. 21). 17 In support, Defendants cite to the portion of *Leer v. Murphy*, 844 F.2d 628, 633 (9th

18 Cir. 1988), which generally summarizes the requirements for a deliberate indifference claim, 19 including that "causation must be individualized and focus on the duties and responsibilities of 20 each individual defendant whose acts or omissions are alleged to have caused a constitutional 21 deprivation," and affirms summary judgment in favor of prison officials in a case regarding an

22 assault by another inmate. But here, Plaintiff has alleged that each RAP defendant participated
23 in denying Plaintiff the medically necessary treatment for his serious medical need. 24 Moving
Defendants also rely on the Magistrate Judge's finding and recommendation in 25 the case of
Fairchild-Littlefield v. Atinello, (E.D. Cal., Oct. 25, 2021, No. 26 119CV01579NONEGSAPC)
2021 WL 4951549, at *6, report and recommendation adopted in 27 part, rejected in part sub nom.
Fairchild-Littlefield v. Atinello (E.D. Cal., Feb. 3, 2022, No. 28 119CV01579JLTGSAPC) 2022
WL 326348, where that Plaintiff's claims against a RAP that 1 denied Plaintiff's request for a
wheelchair were dismissed, and the Plaintiff alleged that the 2 panel members "would all be aware
of the danger of using a walker as an 'accommodation' to a 3 wheelchair." Id. at *6. Unlike in that
case, Plaintiff's allegations against the RAP Defendants 4 include that the medical documentation
indicated his serious medical need and are not based on 5 the mere assertion that they "would all
be aware" of that need. Nevertheless, to the extent this 6 case suggests that members of a panel
cannot be held deliberately indifferent because they 7 denied care as a panel, rather than as
individuals, this Court disagrees. See Michaud v. 8 Bannister, 2012 WL 6720602, at *10 (D. Nev.,
Dec. 26, 2012, No. 2:08-CV-01371-MMD) 9 (denying Defendants' motion for summary judgment
as to the official responding to Plaintiff's 10 grievance and the Utilization Review Panel who also
denied that grievance, stating "Williams 11 responded to Michaud's internal prison grievance
arising out of Michaud's medical care claims. 12 This suffices to demonstrate personal
involvement in the underlying violations. Defendants 13 argue that Williams was not responsible
for or personally involved in providing Michaud 14 medical care. . . . Williams personally denied
Michaud's grievance. That is enough to hold 15 Williams liable, for it was both the URP that
denied Michaud's care as well as Williams who 16 refused to review and correct that denial"). 17
Thus, the Court recommends denying Moving Defendants' motion to dismiss Plaintiff's 18 claims
against the RAP Defendants. 19 D. Qualified Immunity 20 Finally, Moving Defendants ask that
Plaintiff's claims against them be dismissed based 21 on qualified immunity. 22 Moving
Defendants first argue that Plaintiff has failed to allege that they acted with 23 deliberate
indifference, briefly referring to their arguments above. The Court has already 24 addressed those
arguments. Notably, Moving Defendants' motion fails to cite the Ninth 25 Circuit's decision in
Colwell, stating "the blanket, categorical denial of medically indicated 26 surgery solely on the
basis of an administrative policy . . . is the paradigm of deliberate 27 indifference." Colwell, 763
F.3d at 1063. 28 1 Next, Defendants argue that there was no clearly established law at the time
that 2 established that Defendants' alleged actions violated the Constitution. Moving Defendants 3
again cite to Peralta (without quotation or discussion) to argue that "the Ninth Circuit has 4 plainly
established that reviewing a health care grievance, without more, is insufficient to 5 establish
liability under § 1983." (ECF No. 20-1, at p. 23). This is not an accurate statement of 6 the Court's
opinion in Peralta, as discussed above. And, again, Defendants ignore the Ninth 7 Circuit's
decision in Colwell, holding that Plaintiff's complaint could proceed against the 8 prison official
who denied Plaintiff's grievance because that defendant "personally denied 9 Colwell's second-

level grievance even though he was aware that an optometrist had 10 recommended surgery and that Colwell's lower-level grievances had been denied despite that 11 recommendation. Accordingly, a reasonable jury could find that Dr. Bannister, pursuant to a 12 policy rather than a considered medical judgment, contributed to the decision to refuse 13 treatment in conscious disregard of an excessive risk to Colwell's health.” 763 F.3d at 1070. 14 See also *Snow v. McDaniel*, 681 F.3d 978, 989 (9th Cir. 2012), overruled on other grounds by 15 *Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014) (holding a warden and associate warden who 16 were aware of grievances regarding the denial of a recommended hip surgery and failed to act 17 to prevent further harm were not entitled to summary judgment). 18 Finally, Moving Defendants’ claim that the RAP panel is entitled to qualified immunity, 19 relying on a district court case granting summary judgment in favor of a panel where the 20 treating physician documented that plaintiff did not need the accommodation. ECF No. 20-1, 21 at p. 24, citing *Joshua v. Baker*, 2018 WL 3008682, at *10 (N.D. Cal., June 15, 2018, No. 16- 22 CV-07129-CRB (PR)) (“The undisputed facts show that on June 3, 2016, RAP denied 23 plaintiff’s request for no stairs and ground floor based on plaintiff’s DNM designation by his 24 treating physicians, and found that plaintiff already was housed lower bunk.”). Here, in 25 contrast, Plaintiff has alleged that the RAP had medical records indicating that medical 26 professionals had previously found that he required orthotics, that he has a continuing medical 27 need, and that his treating doctors denied his request based solely on a change in prison policy. 28 See *Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014) (reversing grant of summary 1 judgment, because “[a] reasonable jury could find that NDOC officials denied treatment 2 || because Colwell's medical need conflicted with a prison policy, not because non-treatment was 3 medically acceptable option”). Construing Plaintiff's allegations as true, the RAP defendants 4 || would not be entitled to qualified immunity. 5 Accordingly, dismissal is not warranted at this stage based on qualified immunity.

6 || V. CONCLUSION AND RECOMMENDATIONS

7 For the reasons explained above, IT IS RECOMMENDED that: 8 (1) Moving Defendants’ motion to dismiss (ECF No. 20) be DENIED. 9 These findings and recommendations are submitted to the United States District Judge 10 || assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(). Within thirty 11 || (30) days after being served with these findings and recommendations, any party may file 12 || written objections with the Court. Such a document should be captioned “Objections to 13 || Magistrate Judge’s Findings and Recommendations.” Any response to the objections shall be 14 || served and filed within fourteen (14) days after service of the objections. The parties are 15 || advised that failure to file objections within the specified time may result in the waiver of rights 16 || on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing *Baxter v. 17 || Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)). 18 19 IT IS SO ORDERED. 201! Dated: _ June 12, 2025 [Je hey —

21 UNITED STATES MAGISTRATE JUDGE

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