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**IN THE UNITED STATES DISTRICT COURT**

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**FOR THE DISTRICT OF ARIZONA**

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9 Roger Wayne Preayer,  
10 Plaintiff,

No. CV 15-00069-PHX-DGC (DKD)

11 vs.

**ORDER**

12 Charles L. Ryan, et al.  
13 Defendants.  
14

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16 Plaintiff Roger Wayne Preayer brought this pro se civil rights action under 42  
17 U.S.C. § 1983 against seven Arizona Department of Corrections (ADC) employees:  
18 (1) Deputy Warden D. Schuster; (2) Lieutenant Maryellen Ohshita; (3) Lieutenant Cheryl  
19 Malysa; (4) Corrections Officer (CO) Maria Piller; (5) CO II Jaudiel Barajas; (6) CO II  
20 Eduardo Arreola; and (7) Nurse Practitioner Carey Tucker. (Doc. 61).<sup>1</sup> Before the Court  
21 are a Motion for Summary Judgment filed by Schuster, Ohshita, Malysa, and Piller  
22 (hereinafter “Defendants”) (Doc. 71); Preayer’s Objection to the Motion for Summary  
23 Judgment as Premature (Doc. 73); and Preayer’s Motion to Strike Portions of  
24 Defendants’ Statement of Facts (Doc. 84).<sup>2</sup>

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26 <sup>1</sup> Preayer is currently housed at the Red Rock Correctional Center in Eloy,  
27 Arizona. (Doc. 21.)

28 <sup>2</sup> Also before the Court is Tucker’s Motion for Summary Judgment for Failure to  
Exhaust Administrative Remedies, which will be addressed in a separate Order.  
(Doc. 92.)

1           The Court will overrule Preayer’s Objection, deny Preayer’s Motion to Strike, and  
2 grant in part and deny in part Defendants’ Motion for Summary Judgment.

3 **I. Background**

4           In Count I of his First Amended Complaint, Preayer alleges that he was subject to  
5 unconstitutional conditions of confinement for months when he was housed in an  
6 isolation cell at the Arizona State Prison Complex (ASPC)-Lewis, Morey Unit.  
7 (Doc. 61.) Preayer avers that he did not have a working toilet or sink, was denied  
8 cleaning supplies, was not allowed to wash his clothes, and was not allowed to shave or  
9 comb his hair. (*Id.*) Preayer states that he was forced to drink water from the staff  
10 restroom or the inmate shower using a one-gallon water bottle given to him by staff and,  
11 when he had to use the restroom, he had to push the cell’s emergency call button to get  
12 staff’s attention, but it sometimes took hours for staff to respond. (*Id.*) He also states that  
13 his meals were sometimes served hours late or not at all. (*Id.*) Preayer alleges that  
14 Barajas and Arreola failed to conduct welfare checks or respond to the emergency call  
15 button, and Malysa, Schuster, Pillar, and Ohshita were notified of the conditions of  
16 confinement either in person or via grievances but failed to remedy the situation. (*Id.*)

17           In Count II, Preayer alleges that he received inadequate medical care when Tucker  
18 refused to renew Preayer’s high blood pressure medication and Preayer subsequently lost  
19 consciousness due to extremely high blood pressure and required emergency treatment.  
20 (*Id.*)<sup>3</sup>

21           The Motion for Summary Judgment pertains only to the claim in Count I.  
22 (Doc. 71.) Schuster, Ohshita, Malysa, and Piller argue that they are entitled to summary  
23 judgment because, although Preayer did not have a working toilet or sink, was denied a  
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25           <sup>3</sup> In his summary judgment briefing, Preayer presents facts regarding the May 29,  
26 2014 incident when he was found unconscious in his cell. (*See* Doc. 75 at 6–7; Doc. 76  
27 ¶ 12.) These facts relate only to the claims against Tucker, Barajas, and Arreola. (*See*  
28 Doc. 61 at 15, 17, 20.) Barajas and Arreola were not served until after the pending  
Motion for Summary Judgment was filed. (Docs. 85–86.) As stated, Tucker’s Motion  
for Summary Judgment will be addressed in a separate Order. Therefore, the facts related  
to the May 29, 2014 incident are not addressed in this order.

1 comb, and received late meals, the conditions did not rise to the level of an  
2 unconstitutional violation and Defendants did not act with deliberate indifference. (*Id.*)<sup>4</sup>

3 Preayer filed an Objection to Defendants’ Motion for Summary Judgment as  
4 Premature. (Doc. 73.) He then filed his opposition to Defendants’ Motion and a “Motion  
5 to Strike Portions of Defendants’ [Statement of Facts] and Motion for Summary  
6 Judgment and Request for Sanctions.” (Docs. 75, 84.) Preayer asserts that following his  
7 deposition, he timely completed the Changes and Corrections errata form and mailed it to  
8 defense counsel; however, Defendants did not incorporate the corrections into their  
9 subsequently filed Motion for Summary Judgment and purposely misstated facts to the  
10 Court. (Doc. 84 at 1–2.) Preayer requests that the Court strike those paragraphs in  
11 Defendants’ Statement of Facts that rely on portions of his deposition that were supposed  
12 to be corrected and that the Court sanction defense counsel for its conduct. (*Id.*)

13 Defendants oppose the Motion to Strike on the ground that Preayer made eleven  
14 corrections to his deposition testimony and only one of those corrections has any effect  
15 on Defendants’ Motion for Summary Judgment, but that effect is not material. (Doc. 88.)

## 16 **II. Procedural Issues**

### 17 **A. Preayer’s Objection to Defendants’ Motion for Summary Judgment**

18 This action was initiated in January 2015, and a Scheduling Order was issued that  
19 set an October 5, 2015 discovery deadline and a December 4, 2015 dispositive motion  
20 deadline. (Docs. 1, 5, 16.) The Court granted extensions to discovery and reset the  
21 dispositive motion deadline for January 19, 2016. (Doc. 41.) In December 2015, Preayer  
22 moved for a temporary stay of proceedings so that he could amend his pleading.  
23 (Doc. 58.) On January 8, 2016, the Court granted his request for a stay, stayed all  
24 deadlines, and provided time for Preayer to file a First Amended Complaint. (Doc. 60.)  
25 In its Order, the Court indicated that it would issue a separate revised Scheduling Order.

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28 <sup>4</sup> The Court issued an Order with the Notice required under *Rand v. Rowland*, 154  
F.3d 952, 962 (9th Cir. 1998) (en banc), which informed Preayer of the requirements  
under Federal Rule of Civil Procedure 56. (Doc. 72.)

1 (*Id.*) Preayer filed his First Amended Complaint on January 22, 2016; he set forth the  
2 same claims against Defendants and added three new defendants. (Doc. 61.) On  
3 February 11, 2016, Schuster, Ohshita, Malysa, and Pillar filed their Answer and their  
4 pending Motion for Summary Judgment. (Docs. 66, 71.) On May 23, 2016, the Court  
5 issued an Amended Scheduling Order, which set a new discovery deadline of August 23,  
6 2016, and a new dispositive deadline of October 22, 2016. (Doc. 91.)

7 In his Objection to Defendants’ Motion for Summary Judgment, Preayer asserts  
8 that he added three new defendants in his First Amended Complaint—defendants who  
9 had not yet been served when Defendants filed their Motion for Summary Judgment.  
10 (Doc. 73 at 2.) Preayer contends that discovery as to these new defendants may yield  
11 evidence that corroborates his claims, and, until that discovery is completed, he is unable  
12 to adequately respond to the pending Motion for Summary Judgment. (*Id.* at 2–3.) He  
13 therefore requests that the Court deny the Motion for Summary Judgment as premature.  
14 (*Id.* at 3.)

15 The allegations in Preayer’s First Amended Complaint against Schuster, Ohshita,  
16 Malysa, and Pillar are identical to the allegations against them in the original Complaint.  
17 (*See* Docs. 1, 61.) From July to December 2015, the parties engaged in discovery as to  
18 the claims against Schuster, Ohshita, Malysa, and Pillar. (*See* Docs. 23, 33, 40, 45, 52.)  
19 Certainly, Defendants could have waited to file a summary judgment motion in  
20 accordance with the new deadlines, but they chose not to, and nothing in the Federal  
21 Rules of Civil Procedure precluded them from filing a summary judgment motion when  
22 they did. *See* Fed. R. Civ. P. 56(b) (“[u]nless a different time is set by local rule or the  
23 court orders otherwise, a party may file a motion for summary judgment at any time until  
24 30 days after the close of all discovery”). Preayer does not identify any specific reasons  
25 why he cannot present facts in opposition to Defendants’ Motion for Summary Judgment;  
26 he merely speculates that there may be additional evidence uncovered during discovery  
27 as to the newly added defendants. This is insufficient to stay a ruling on the Motion or  
28 deny it as premature. *See* Fed. R. Civ. P. 56(d).

1           Accordingly, Preayer’s Objection is overruled, and his request that the Court deny  
2 the Motion for Summary Judgment as premature will be denied.

3           **B.     Preayer’s Motion to Strike**

4           Under Federal Rule of Civil Procedure 30(e), a deponent must be provided 30  
5 days after notice that a deposition transcript is available to review the transcript and sign  
6 a statement listing any changes in form or substance. On January 14, 2016, within the  
7 30-day period, Preayer signed and dated a Change/Correction errata form and returned it  
8 to Defendants. (Doc. 84 at 6–9). It is troubling that Defendants subsequently failed to  
9 incorporate the corrections to Preayer’s deposition transcript in their Statement of Facts.  
10 Preayer does not, however, specify the specific portions of Defendants’ Statement of  
11 Facts that he believes should be stricken in light of the corrections to his deposition  
12 transcript. (See Doc. 84.) Defendants submit that the only erratum relevant to the  
13 Motion for Summary Judgment is Preayer’s correction that he lost weight while housed  
14 at the Morey Unit, and Defendants stipulate to this fact. (Doc. 88 at 2.)<sup>5</sup>

15           The Court will deny Preayer’s Motion to Strike. See *Johnson v. Cal. Medical*  
16 *Facility Health Servs.*, 2015 WL 4508734, at \*6 (E.D. Cal. July 24, 2015) (motions to  
17 strike are generally disfavored and “should not be granted unless it is clear that the matter  
18 to be stricken could have no possible bearing on the subject matter of the litigation”)  
19 (quoting *Neveu v. City of Fresno*, 392 F. Supp. 2d 1159, 1170 (E.D. Cal. 2005)). But the  
20 Court will consider Preayer’s corrections set forth in the Change/Correction errata form,  
21 which is attached to the Motion to Strike. (Doc. 84, Attach.) Also, to avoid unnecessary  
22 disputes over interpretations of the evidence, when possible, the Court will rely directly  
23 on the deposition transcript, the errata form, and other documentary evidence when  
24 ascertaining the relevant facts.

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27           <sup>5</sup> In his deposition, Preayer indicated that his weight has fluctuated throughout his  
28 incarceration, but he could not recall if he had lost weight during his 17 weeks in the  
Morey Unit. (Doc. 69, Ex. A, Preayer Dep. 29:18–30:4, Dec. 15, 2015 (Doc. 69-1 at 1–  
20).)

1     **III. Summary Judgment Standard**

2             A court must grant summary judgment “if the movant shows that there is no  
3 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
4 of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23  
5 (1986). The movant bears the initial responsibility of presenting the basis for its motion  
6 and identifying those portions of the record, together with affidavits, if any, that it  
7 believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at  
8 323.

9             If the movant fails to carry its initial burden of production, the nonmovant need  
10 not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d  
11 1099, 1102–03 (9th Cir. 2000). But if the movant meets its initial responsibility, the  
12 burden then shifts to the nonmovant to demonstrate the existence of a factual dispute and  
13 that the fact in contention is material (a fact that might affect the outcome of the suit  
14 under the governing law) and that the dispute is genuine (the evidence is such that a  
15 reasonable jury could return a verdict for the nonmovant). *Anderson v. Liberty Lobby,*  
16 *Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d  
17 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact  
18 conclusively in its favor, *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–  
19 89 (1968); but it must “come forward with specific facts showing that there is a genuine  
20 issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,  
21 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

22             At summary judgment, the judge’s function is not to weigh the evidence and  
23 determine the truth, but to determine whether there is a genuine issue for trial. *Anderson*,  
24 477 U.S. at 249. In its analysis, the court does not make credibility determinations; it  
25 must accept the nonmovant’s evidence and draw all inferences in the nonmovant’s favor.  
26 *Id.* at 255; *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). The  
27 court need consider only the cited materials, but it may consider any other materials in  
28 the record. Fed. R. Civ. P. 56(c)(3).

1 **IV. Relevant Facts**

2 On January 7, 2014, Preayer was transferred from the Arizona State Prison  
3 Complex (ASPC)-Lewis, Stiner Unit, to an isolation cell in the Transitory Unit, which is  
4 within the Lewis, Morey Unit. (Doc. 69, Defs.’ Statement of Facts ¶ 7.) At the relevant  
5 time, there were 16 inmates housed in the Transitory Unit. (*Id.* ¶ 11.) Inmates are  
6 housed in the Transitory Unit due to disciplinary problems, a need for protection from  
7 other inmates, or to await other housing. (*Id.* ¶ 13.) Preayer was placed in the Transitory  
8 Unit because he had turned over another inmate’s contraband weapons, thereby  
9 compromising his own safety. (*Id.* ¶ 7.) Preayer was housed in an isolation cell for about  
10 17 weeks—from January 7 to May 8, 2014. (*Id.* ¶ 9.)

11 The toilet/sink, which was a single, combined apparatus, did not work when  
12 Preayer was placed in the cell, and there was no running water. (*Id.* ¶¶ 17, 21.) On  
13 January 9, 2014, a repair order to fix the toilet/sink was submitted. (*Id.* ¶ 22.) The  
14 toilet/sink did not work for the first 8 weeks that Preayer was housed in the cell. (*Id.*  
15 ¶ 21.) Defendants state that corrections staff and Preayer “worked out a system” that  
16 when Preayer needed to use the bathroom, he would notify staff by pushing the call  
17 button in his cell and staff would respond and take him to the bathroom. (*Id.* ¶ 24.)

18 Preayer denies that he ever worked out a system with corrections staff. (Doc. 76,  
19 Pl.’s Statement of Facts ¶ 1;<sup>6</sup> Doc. 77, Pl.’s Disputed Facts ¶ 1.) Preayer states that when  
20 he was placed in the cell, a CO handed him a one-gallon water bottle and told him that  
21 the sink and toilet in the cell did not work and Preayer had to use the bottle for water.  
22 (Doc. 76 at 2.) The CO also told him if he needed water or to use the bathroom, to push  
23 the emergency button and someone would assist him. (*Id.*) Preayer states that he  
24 objected to being housed in a cell without running water or an operable toilet, but he was  
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26 <sup>6</sup> Defendants object to Preayer’s ¶ 1 on the grounds that it is speculation and lacks  
27 foundation. (Doc. 82 at 3.) The objection is overruled. The parties simply dispute  
28 whether Preayer and prison staff agreed on a system for Preayer to use the call button  
when he needed to use the restroom or whether staff just told him that this is what he had  
to do. A dispute is not a basis for an objection.

1 forced to remain in the cell. (Doc. 76, Ex. A, Preayer Decl. ¶¶ 9–10 (Doc. 76 at 14).)  
2 Preayer avers that when he needed to empty his bowels, he would push the emergency  
3 button, but no one would respond. (*Id.* ¶ 14.) He states he would have to resort to  
4 banging and kicking the cell door for a long time before an officer would show up. (*Id.*  
5 ¶ 15.) Preayer testifies that he never soiled his pants because he could not get to the  
6 bathroom on time. (Doc. 69, Ex. A, Preayer Dep. 52:23–25 (Doc. 69-1 at 36).)

7 Preayer further avers that without running water he was unable to wash his hands  
8 or face, brush his teeth, or flush the toilet—which accumulated with urine and created a  
9 stench. (Doc. 76, Ex. A, Preayer Decl. ¶ 17.) Preayer explains that he took the  
10 cellophane wrapping that came with his sack lunch and placed it over the toilet to try to  
11 cover the stink, removing the cellophane when he had to urinate. (Doc. 69, Ex. A,  
12 Preayer Dep. 51:25–52:14 (Doc. 69-1 at 35–36).)

13 Preayer states that he was never provided cleaning supplies to sanitize his sink or  
14 toilet or to sweep or mop his cell. (Doc. 76, Ex. A, Preayer Decl. ¶¶ 64–65 (Doc. 76 at  
15 17).) And he testifies that no one ever entered his cell to clean it. (Doc. 69, Ex. A,  
16 Preayer Dep. 52:22–53:3 (Doc. 69-1 at 36–37).)

17 When Preayer entered the isolation cell, he had only the clothes he was wearing,  
18 and he did not purchase any clothes during the time he was housed in the Morey Unit.  
19 (Doc. 76 ¶¶ 3–4 (Doc. 76 at 2).) Preayer states that he was not allowed to wash his single  
20 set of clothes—a t-shirt, long pants, a sweatshirt, a pair of socks, and underwear—  
21 because the sink in his cell did not work, and officers would not let inmates in isolation  
22 take clothes to the laundry. (*Id.* ¶ 53; Doc. 69, Ex. A, Preayer Dep. 48:6–11, 49:3–8  
23 (Doc. 69-1 at 32–33).) Preayer testifies that he asked for a second set of clothes, which  
24 he had in the property room, but he was told he could only have one set of clothes.  
25 (Doc. 69, Ex. A, Preayer Dep. 48:15–21 (Doc. 69-1 at 32).) Defendants state that  
26 inmates routinely wash their own clothes in the sinks in their cells or when they get a  
27 shower, and that Preayer had the opportunity to wash his clothes in his sink after it was  
28 repaired on March 3, 2014. (Doc. 69 ¶¶ 23, 44–45.)

1           When he was placed in the isolation cell, Preayer was given a “bedroll” consisting  
2 of toilet paper, a little bag of toothpaste and a toothbrush, a little bar of soap, a small tube  
3 of shampoo, a blanket and sheet, and a towel. (Doc. 69, Ex. A, Preayer Dep. 40:15–22  
4 (Doc. 69-1 at 27).) Defendants state that Preayer had soap, shampoo, toothpaste, a tooth  
5 brush, and a towel in his cell. (Doc. 69 ¶ 28.) On January 14 and 22, and February 4,  
6 2014, Preayer purchased soap from the prison store. (Doc. 69, Ex. F-1 (Doc. 69-3 at 13-  
7 15).)<sup>7</sup>

8           Preayer testifies that he was offered recreation out of his cell about every other  
9 day. (Doc. 69, Ex. A, Preayer Dep. 39:1–8 (Doc. 69-1 at 26).) Recreation for those in  
10 the isolation cells was offered late at night; non-detention inmates went to recreation  
11 during the day. (*Id.* 38:5–7.) When Preayer was offered recreation, he could either go to  
12 recreation or take a shower. (*Id.* 38:10–18.) Preayer most often chose a shower; he went  
13 to recreation just 3 or 4 times during the 17 weeks that he was housed at the Morey Unit.  
14 (*Id.* 38:19–23.) When he took a shower, he was not provided soap or shampoo. (*Id.*  
15 39:9–13.) He was provided toothpaste and a toothbrush so he would brush his teeth when  
16 he took a shower every other day. (*Id.* 39:19–40:7.)

17           Preayer states that he asked officers almost daily to let him shave, but they told  
18 him that razors were not permitted. (Doc. 76 ¶ 3.) Defendants confirm that razors are not  
19 allowed in cells in the Transitory Unit, and that Preayer did not shave during the 17  
20 weeks he was housed at the Morey Unit. (Doc. 69 ¶¶ 39–40.) Defendants state that  
21 inmates could ask the officer on duty to use the electric shaver that was stored in the  
22 control room, but the shaver was not always functional. (*Id.* ¶¶ 41–42.) When Preayer  
23 was escorted to the shower, often around 1:00 a.m., he would ask for a barber, but was  
24 told that the inmates who worked as barbers were asleep or was given other excuses.  
25 (Doc. 69, Ex. A, Preayer Dep. 46:6–15 (Doc. 69-1 at 30).) Consequently, Preayer’s  
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27           <sup>7</sup> Defendants also state that Preayer purchased soap and a sweatshirt on January 7,  
28 2014, but the record shows that because Preayer was moved later that same day, he never  
received these items and was refunded his money. (Doc. 69 ¶¶ 36, 47, Ex. F-1; Doc. 76,  
Ex. S (Doc. 76 at 89).)

1 beard grew to 5 or 6 inches long. (*Id.* 42:5–7.)

2 Preayer testifies that he asked for comb, but was told he could not have one in the  
3 isolation cell. (*Id.* 41:15–17, 41:22–23 (Doc. 69-1 at 30).) He states that because he was  
4 never given a comb, he had to put his hair in plats to keep it from knotting up. (*Id.* 42:1–  
5 4.) Defendants state that a comb was not part of the hygiene kit provided to Preayer, but  
6 ADC policy did not prohibit combs in isolation cells. (Doc. 69 ¶ 32.) Defendants note  
7 that Preayer tried to purchase a hair pick on February 4, 2014, and the prison store denied  
8 the order by mistake. (*Id.* ¶¶ 33–34.)

9 The standard meal schedule is three meals a day, Monday through Friday, and two  
10 meals a day on Saturday and Sunday. (Doc. 69 ¶¶ 54–58.) Preayer testifies that during  
11 his time in isolation his meals were served late or not at all. (Doc. 69, Ex. A, Preayer  
12 Dep. 56:1–6 (Doc. 69-1 at 39).) He states that he missed meals once or twice a week; he  
13 would not be served lunch, and then, at dinner time, he would be given two sack lunches.  
14 (*Id.* 55:10–24.) Preayer testifies that it was fair to say he was fed two meals a day, but he  
15 lost weight while he was at the Morey Unit. (*Id.* 57:6–8; Doc. 84, Preayer Dep.  
16 Change/Corr. errata form at 2 (Doc. 84 at 8).) Defendants explain that there are set times  
17 for meal delivery to the isolation cells, but delivery of all meals could be delayed due to  
18 unexpected yard or kitchen issues. (Doc. 69 ¶¶ 54–58.)

19 Preayer states that he spoke personally with Malysa on several occasions about his  
20 complaints, but nothing was done to rectify the situation, and she would only tell him that  
21 she would look into it. (Doc. 76, Ex. A, Preayer Decl. ¶ 19 (Doc. 76 at 14).)

22 On January 29, 2014, Preayer submitted his first Informal Resolution/Inmate  
23 Letter, which is the first step in the ADC grievance procedure. (*Id.*, Ex. C (Doc. 76 at  
24 21).) The face of the form shows that it is addressed to Schuster and Piller, it complains  
25 about his conditions of confinement and the officers’ failure to respond to the call button,  
26 and it states that he has spoken to staff members about the problems. (*Id.*) There was no  
27 response to this Inmate Letter.

28 On February 14, 2014, Preayer submitted another Inmate Letter addressed to

1 Schuster and Piller. (*Id.* (Doc. 76 at 22).) In this second Inmate Letter, Preayer wrote  
2 that he previously submitted an Inmate Letter on January 29, 2014; that he has been in  
3 isolation for over a month; and that he still had an inoperable toilet/sink, could not shave  
4 or comb his hair, was not allowed to clean or sanitize his cell, and remained in the same  
5 clothes which he had not been allowed to wash. (*Id.*) Preayer again indicated that he had  
6 spoken with staff members about these issues. (*Id.*) There was no response to this  
7 Inmate Letter.

8 Piller states that she could not find the January 29 and February 14, 2014 Inmate  
9 Letters in her files. (Doc. 69, Ex. B, Piller Decl. ¶ 15 (Doc. 69-2 at 4).)

10 On March 15, 2014, Preayer submitted an Inmate Grievance, the second step in  
11 the grievance procedure. (*Id.*, Ex. C-1 (Doc. 69-2 at 24–25).) He wrote that he had  
12 submitted several Inmate Letters about problems with his cell and with the failure of  
13 building officers to respond to calls or check the isolation cells. (*Id.*) Under the ADC  
14 grievance procedure, a formal Inmate Grievance goes to the CO IV/Grievance  
15 Coordinator, who investigates the complaint on behalf of the Deputy Warden, and the  
16 Deputy Warden has 15 workdays to respond in writing to the inmate. (Doc. 76, Ex. H,  
17 Ohshita Interrog. Resp. No. 19 (Doc. 76 at 46).) Ohshita, the Grievance Coordinator,  
18 states that formal grievances are routed to her administrative mailbox. (Doc. 69, Ex. C,  
19 Ohshita Decl. ¶ 13 (Doc. 69-2 at 20).) She states that she should have received Preayer’s  
20 March 15, 2014 Inmate Grievance a day or two later, but she did not receive it until  
21 May 1, 2014. (*Id.* ¶ 15.)

22 Meanwhile, on April 11, 2014, Preayer submitted another Inmate Letter addressed  
23 to Schuster. (Doc. 76, Ex. C (Doc. 76 at 23).) In this Inmate Letter, Preayer explained  
24 that he had been in isolation since January 7, 2014, and had made every attempt to get  
25 someone to address his problems. (*Id.*) He wrote that he had submitted several Inmate  
26 Letters to Schuster, Piller, CO IV Chavez, and Sergeant Smith, and that he had personally  
27 spoken with Lt. Malysa. (*Id.*) Preayer stated that he had not received a response from  
28 anyone. (*Id.*) There was no response to this Inmate Letter.

1           Having received no response to his March 15, 2014 Inmate Grievance, on  
2 April 24, 2014, Preayer submitted an Inmate Grievance Appeal, the third step in the ADC  
3 grievance policy. (Doc. 76, Ex. I (Doc. 76 at 51).) This Grievance Appeal was directed  
4 to Schuster. (*Id.*)

5           On April 28, 2014, Preayer submitted another Inmate Letter addressed to Schuster  
6 and Piller in which he complained about the conditions of his confinement and requested  
7 various remedies. (*Id.*, Ex. C (Doc. 76 at 25).) There was no response to this Inmate  
8 Letter.

9           Preayer states that on May 1, 2014, Ohshita came to his cell with his unanswered  
10 April 24, 2014 Inmate Grievance Appeal—to which he had attached a copy of his  
11 unanswered March 15, 2014 Inmate Grievance. (*Id.* (Doc. 76 at 28).) Preayer asserts  
12 that Ohshita handed back his Appeal and stated that she was going to answer his Inmate  
13 Grievance. (*Id.* (Doc. 76 at 28).) Preayer explained to her that it was too late because he  
14 had already filed his Appeal, which he was permitted to do after receiving no response to  
15 his Inmate Grievance within the time period specified in the ADC grievance procedure.  
16 (*Id.*)

17           Later on May 1, 2014, Preayer submitted an Inmate Letter to Piller and Schuster  
18 documenting the encounter with Ohshita, complaining that officials were not complying  
19 with the grievance procedure rules, and requesting that he be able to move forward with  
20 his original April 24, 2014 Inmate Grievance Appeal. (*Id.* (Doc. 76 at 27).)

21           On May 2, 2014, Preayer submitted another Inmate Letter form to Piller. (*Id.*  
22 (Doc. 76 at 29).) Preayer again recounted the encounter with Ohshita, stated he would  
23 not acknowledge any untimely response from the Grievance Coordinator, and requested  
24 that his April 24, 2014 Appeal be returned to the Deputy Warden for his response. (*Id.*)

25           On May 5, 2014, Preayer received a response to the March 15, 2014 Inmate  
26 Grievance. (Doc. 69, Ex. C-1 (Doc. 69-2 at 24).) The bottom half of the Inmate  
27 Grievance form was signed by Ohshita and dated May 1, 2014, and attached to it was the  
28 Inmate Grievance Response form, signed by Schuster and also dated on May 1, 2014.

1 (*Id.* (Doc. 69-1 at 23–24).) In his Response, Schuster wrote that he agreed that operation  
2 of the isolation cell area needs to be improved and that officials were putting a system in  
3 place to better manage operation of these cells and ensure that the inmates’ needs were  
4 not neglected. (*Id.*)

5 On May 7, 2014, Preayer filed a Final Grievance Appeal to the Director, the final  
6 step in the grievance procedure. (Doc. 61 at 7.) Preayer was moved out of the Transitory  
7 Unit on May 8, 2014. (Doc. 69 ¶ 9.)

## 8 **V. Eighth Amendment**

9 “The Eighth Amendment prohibition against cruel and unusual punishment  
10 protects prisoners not only from inhumane methods of punishment but also from  
11 inhumane conditions of confinement.” *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th  
12 Cir. 2006). Conditions of confinement may be restrictive and harsh, but they cannot  
13 involve the “wanton and unnecessary infliction of pain” or be devoid of a legitimate  
14 penological purpose. *Id.* (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), and  
15 *Hudson v. Palmer*, 468 U.S. 517, 548 (1984)).

16 Where a prisoner alleges injuries stemming from unsafe conditions of  
17 confinement, prison officials may be held liable only if they acted with “deliberate  
18 indifference to a substantial risk of serious harm.” *Frost v. Agnos*, 152 F.3d 1124, 1128  
19 (9th Cir. 1998). The deliberate indifference standard involves an objective and a  
20 subjective prong. First, the plaintiff must show that the alleged deprivation was  
21 “sufficiently serious” to rise to the level of an Eighth Amendment violation. *Farmer v.*  
22 *Brennan*, 511 U.S. 825, 834 (1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991));  
23 *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000). Extreme deprivations are required  
24 to support an Eighth Amendment conditions-of-confinement claim. *Hudson v.*  
25 *McMillian*, 503 U.S. 1, 9 (1992) (citation omitted). “Only those deprivations denying the  
26 minimal civilized measure of life’s necessities are sufficiently grave to form the basis of  
27 an Eighth Amendment violation.” *Id.* (quotations and citations omitted). When  
28 determining whether an alleged deprivation is objectively sufficiently serious to support a

1 constitutional claim, a court must consider the circumstances, nature, and duration of a  
2 deprivation. *Johnson*, 217 F.3d at 731–32. “The more basic the particular need, the  
3 shorter the time it can be withheld.” *Hoptowit v. Ray*, 682 F.2d 1237, 1259 (9th Cir.  
4 1982), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995).

5 Second, the plaintiff must show that the prison official acted with a “sufficiently  
6 culpable state of mind” – that is, that the official “kn[ew] of and disregarded an excessive  
7 risk to inmate health or safety . . . .” *Farmer*, 511 U.S. at 837; *Thomas v. Ponder*, 611  
8 F.3d 1144, 1150 (9th Cir. 2010) (“the inmate must show that the prison officials had no  
9 ‘reasonable’ justification for the deprivation”). Thus, a prison official may be held liable  
10 under the Eighth Amendment for denying humane conditions of confinement only if he  
11 knows that a prisoner faces a substantial risk of harm and disregards that risk by failing to  
12 take reasonable measures to abate it. *Farmer*, 511 U.S. at 837–45. Mere negligence is  
13 insufficient to establish liability; the official’s conduct must have been wanton. *Id.* at  
14 835; *Frost*, 152 F.3d at 1128. Prison officials may avoid liability by presenting evidence  
15 that they lacked knowledge of the risk, or by presenting evidence of a reasonable, albeit  
16 unsuccessful, response to the risk. *Farmer*, 511 U.S. at 844–45.

## 17 **VI. Discussion**

### 18 **A. Objective Component**

19 The first step in the deliberate indifference analysis is to determine if Preayer’s  
20 confinement in the isolation cell deprived him of the “the minimal civilized measure of  
21 life’s necessities.” *Hudson*, 503 U.S. at 9. It is well-settled that subjecting “a prisoner to  
22 lack of sanitation that is severe or prolonged can constitute an infliction of pain within the  
23 meaning of the Eighth Amendment.” *Anderson v. Cnty. of Kern*, 45 F.3d 1310, 1314–15  
24 (9th Cir. 1995) (citing cases). In *Anderson*, the Ninth Circuit recognized that confining  
25 an inmate for five days in a strip cell with only a pit toilet and without a sink or other  
26 washing facilities satisfied the objective component of the Eighth Amendment. *Id.* at  
27 1315 (citing *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972)). In *Johnson v.*  
28 *Lewis*, the Ninth Circuit found that substantial deprivations of shelter, food, drinking

1 water, and sanitation for four days were sufficiently serious to establish an Eighth  
2 Amendment claim. 217 F.3d at 731–32.

3 Defendants acknowledge for the purposes of their Motion for Summary Judgment  
4 that, to some degree, Preayer was subject to an inoperable toilet and sink, denied a comb  
5 or the ability to shave, and was served meals late. (Doc. 71 at 7.) But they argue that  
6 these conditions did not rise to a constitutional violation because (1) a repair order for the  
7 toilet/sink was submitted within two days of Preayer’s placement in the cell; (2) Preayer  
8 had access to a toilet during the time his cell toilet was inoperable and was never denied  
9 toilet access for any significant time; (3) Preayer had consistent and daily access to  
10 potable water via a one-gallon water bottle filed upon his request; (4) Preayer suffered no  
11 injury due to the lack of a comb; (5) Preayer had access to a shower usually three times a  
12 week and had a toothbrush, toothpaste, and a towel in his cell; (6) Preayer had the  
13 opportunity to wash his clothes in his sink after it was repaired in March or to send his  
14 clothes to the laundry; and (7) Preayer received at least two meals every day and did not  
15 suffer malnourishment. (*Id.* at 7–13.)

16 Preayer contends that the conditions of his confinement did not meet the minimal  
17 civilized measure of life’s necessities. (Doc. 75 at 12–13.)

### 18 **1. Toilet/Sink**

19 A temporary deprivation of access to a toilet or to water, absent resulting harm,  
20 generally does not amount to a sufficiently serious deprivation under the Eighth  
21 Amendment. *See Johnson*, 217 F.3d at 733 (“toilets can be unavailable for some period  
22 of time without violating the Eighth Amendment”); *Minifield v. Butikofer*, 298 F. Supp.  
23 2d 900, 904 (N.D. Cal. 2004) (a five hour deprivation of water did not rise to the level of  
24 an Eighth Amendment violation); *see also Kanvick v. Nevada*, 3:08-CV-00397-ECR-  
25 VPC, 2010 WL 2162324, at \*1, 5–6 (D. Nev. Apr. 27, 2010) (“a temporary deprivation  
26 of access to toilets, in the absence of physical harm or a serious risk of contamination,  
27 does not rise to the level of an Eighth Amendment violation”; thus, denial of access to  
28

1 restrooms lasting up to two hours was not sufficient to support an Eighth Amendment  
2 claim).

3 But this was no temporary deprivation. Plaintiff was in a cell for months without  
4 an operable toilet, had to use an emergency call button to request use of the restroom, and  
5 then was required to wait—sometimes hours—for a response. (Doc. 75 at 12.) Further,  
6 Preayer alleged that he often had to urinate into the nonworking toilet in his cell and was  
7 exposed to the stench of his own accumulated urine for two months. (Doc. 76, Ex. A,  
8 Preayer Decl. ¶ 17 (Doc. 76 at 14).) *See DeSpain v. Uphoff*, 264 F.3d 965, 972, 974–75  
9 (10th Cir. 2001) (conditions constituted sufficiently serious deprivation under the Eighth  
10 Amendment where, after flooding in the cell unit, the prisoner-plaintiff lacked access to  
11 working toilet for 36 hours and was exposed to his own accumulated urine in his cell  
12 toilet and was exposed to other inmates’ urine and feces via standing water in the  
13 hallways outside of his cell).

14 That Preayer had a toothbrush, toothpaste, and towel in his cell means little  
15 without running water. Preayer could have used water from his one-gallon bottle to  
16 brush his teeth or rinse his face, but only at the risk of having little or no available  
17 drinking water for an undetermined period of time, given his allegations that officials did  
18 not timely respond to the emergency call button or regularly check the isolation cells.  
19 (Doc. 76, Ex. A, Preayer Decl. ¶¶ 14–15, 59 (Doc. 76 at 14, 17).) *Johnson*, 217 F.3d at  
20 732 (evidence that the plaintiffs were denied adequate drinking water or edible food or  
21 adequate access to toilets for four days was sufficient to establish substantial deprivations  
22 of basic human needs). Defendants argue that the circumstances here are similar to those  
23 in *Moran v. Dovey*, where the prisoner did not have running water in his cell but the  
24 district court found no Eighth Amendment violation because there was no indication that  
25 the prisoner did not receive liquids with his meals or that there was any serious risk of  
26 harm to his health. (Doc. 71 at 9–10 & Doc. 82 at 6, citing CV-00016-AWI-SMS PC,  
27 2009 WL 276783, at \*3 (E.D. Cal. Feb. 5, 2009). But the prisoner in *Moran* was housed  
28 in a cell without running water for one day. 2009 WL 276783, at \*3.

1 Preayer’s sworn statements establish that he had insufficient access to a toilet or to  
2 running water for two months, and this satisfies the objective component of the deliberate  
3 indifference analysis.

## 4 2. Hygiene Items and Sanitation

5 A comb is undeniably a basic personal hygiene item. *See May v. Baldwin*, 895 F.  
6 Supp. 1398, 1408 (D. Ore. 1995) (the plaintiff’s personal hygiene needs were satisfied  
7 where he was provided a towel, soap, a comb, and a toothbrush). Indeed, ADC policy  
8 provides that indigent inmates are to be given “the basic necessities,” which include  
9 “toothpaste, toothbrush, deodorant, shampoo, and comb.” (Doc. 69, Ex. E, Malysa Decl.  
10 ¶ 13 (Doc. 69-3 at 4).) The record supports that Preayer had long hair but was denied a  
11 comb or the opportunity to shave for 17 weeks. (Doc. 69, Ex. A, Preayer Dep. 42:1–7  
12 (Doc. 69-1 at 29).) Although Defendants assert that there was an electric shaver—that  
13 sometimes worked—in the control room, there is no evidence Preayer was informed of  
14 this or ever offered this option. (*See* Doc. 71 at 12.) Rather, Preayer alleges that every  
15 day he asked to be allowed to shave, but officers told him that razors were not permitted.  
16 (Doc. 76, Ex. A, Preayer Decl. ¶ 62 (Doc. 76 at 17).)

17 Defendants rely on several cases. (Doc. 82 at 7, citing cases; Doc. 82 at 6–7  
18 (same).) *See James v. O’Sullivan*, 62 F. App’x 636, 639 (7th Cir. 2003) (the denial of  
19 soap, a toothbrush and toothpaste for the 49 days that the plaintiff was housed in  
20 segregation may satisfy the objective component of the Eighth Amendment inquiry, but  
21 the denial of a comb, deodorant, and cleaning supplies for that period did not jeopardize  
22 his health and fails to meet objective component); *Matthews v. Murphy*, 956 F.2d 275, at  
23 \*4 (9th Cir. Feb. 25, 1992) (unpublished table decision) (no Eighth Amendment violation  
24 where the plaintiff was deprived of a towel, toothbrush, toothpowder, comb, soap, and  
25 other hygiene items for 34 days because there was no evidence that his conditions were  
26 “generally unsanitary”); and *Eady v. Head*, CIV ASA04CA0648 NN, 2006 WL 2663776,  
27 at \*1–3 (W.D. Texas Sept. 15, 2006) (no deliberate indifference where the plaintiff was  
28 provided a “hygiene pack” with basic hygiene items and the showers were out of order

1 for just two days during his 21-day confinement in county correctional center). These  
2 cases concern deprivations lasting far less than the approximately 120 days that Preayer  
3 was housed in the Transitory Unit. *See Johnson*, 217 F.3d at 731–32 (court must  
4 consider duration of a deprivation).

5 Moreover, unlike these cases, Preayer alleges that he was housed in a “filthy” and  
6 unsanitary cell, was denied cleaning supplies, and was denied clean clothes. *See Hutto v.*  
7 *Finney*, 437 U.S. 678, 686–87 (1978) (conditions such as a filthy cell “may be tolerable  
8 for a few days and intolerably cruel for weeks or months”); *Johnson*, 217 F.3d at 731  
9 (prison officials must provide adequate clothing and sanitation); *Toussaint v. McCarthy*,  
10 597 F. Supp. 1388, 1410–11 (N.D. Cal. 1984), *rev’d in part on other grounds*, 801 F.2d  
11 1080 (9th Cir. 1986) (officials have “an obligation to ensure that . . . clothing . . . is  
12 adequately laundered on a regular basis” and the Eighth Amendment is violated when  
13 weeks and months pass without a clothing exchange). Defendants assert that Preayer  
14 could have laundered his clothes or bought more clothes (Doc. 71 at 11), but the Court  
15 must take as true Preayer’s allegations that he was not allowed to send his clothes to be  
16 laundered, that his request for other clothes in the property room was denied, and that he  
17 was told he could have only one set of clothes. (Doc. 76, Ex. A, Preayer Decl. ¶ 66 (Doc.  
18 76 at 17); Doc. 69, Ex. A, Preayer Dep. 48:15–21 (Doc. 69-1 at 32).) Defendants also  
19 assert that inmates can clean their cell at night if they choose to, but they do not explain  
20 how Preayer could have cleaned his cell without cleaning supplies or running water for  
21 the first two months of his confinement. (Doc. 82 at 7.)

22 The Court finds genuine issues of material fact on whether denial of basic hygiene  
23 items, denial of cleaning supplies and clean clothes, and exposure to an unsanitary cell  
24 for 17 weeks constitutes a deprivation of basic necessities under the Eighth Amendment.

### 25 3. Meals

26 “Adequate food is a basic human need[,]” *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th  
27 Cir. 1996), and the Eighth Amendment requires that prisoners receive food that is  
28 adequate to maintain health. *LeMaire v. Maass*, 12 F.3d 1444, 1456 (9th Cir. 1993).

1 “[I]nmates rely on prison officials to provide them with adequate sustenance on a daily  
2 basis[,]” and “[t]he repeated and unjustified failure to do so amounts to a serious  
3 deprivation.” *Foster v. Runnels*, 554 F.3d 807, 814 (9th Cir. 2009). Whether food is  
4 sufficient to maintain health is often determined by its nutritional and caloric values. *See*  
5 *Florer v. Bales-Johnson*, 752 F. Supp. 2d 1185, 1200-01 (W.D. Wash. 2010) (finding  
6 that, in light of the prisoner-plaintiff’s body weight and caloric needs, the prison’s kosher  
7 meals, which provided an average of 2,380–2,910 calories per day, were sufficient to  
8 maintain his health); *see also Green v. Ferrell*, 801 F.2d 765, 770–71 (5th Cir. 1986)  
9 (finding two meals a day sufficient if nutritionally and calorically adequate);  
10 *Cunningham v. Jones*, 667 F.2d 565, 566 (6th Cir. 1982) (finding one meal a day for 15  
11 days, where the meal contained 2,000 to 2,500 calories and was sufficient to maintain  
12 health, constitutionally adequate). In *Foster*, the Ninth Circuit found a sufficiently  
13 serious deprivation where the prisoner was denied 16 meals in 23 days. 554 F.3d at 812–  
14 13. The defendants in *Foster* failed to provide any evidence of the nutritional value of  
15 meals served to the prisoner, and, in light of his allegations that he lost weight and  
16 suffered headaches during the period he was denied meals, the only reasonable inference  
17 was that the meals provided were inadequate to maintain health and the prisoner suffered  
18 harm under the Eighth Amendment. *Id.* at 213 n.2.

19 Defendants acknowledge that Preayer was supposed to receive three meals a day  
20 Monday through Friday and two larger meals on the weekends—a total of 19 meals a  
21 week. (Doc. 69, Ex. E, Malysa Decl. ¶ 19 (Doc. 69-3 at 4).) There appears to be no  
22 record of the number of meals actually served to Preayer during his time in isolation.  
23 Preayer confirms that he was fed at least two meals a day. (Doc. 69, Ex. A, Preayer Dep.  
24 57:6–8 (Doc. 69-1 at 41).) Two meals a day would be just 14 meals a week—a  
25 deprivation of 5 meals a week during the 17-week confinement. This is a much more  
26 significant deprivation than those addressed in the cases relied on by Defendants to argue  
27 that there was no Eighth Amendment violation here. (*See* Doc. 82 at 8, citing *Ahmore v.*  
28 *Davidson Cnty. Sheriff’s Off.*, 3:15-CV-0813, 2015 WL 4758168, at \*2 (M.D. Tenn. Aug.

1 11, 2015) (plaintiff claimed that he was deprived of a meal on one occasion during  
2 Ramadan), and *Cagle v. Perry*, 9:04-CV-1151 (TJM/GHL), 2007 WL 3124806, at \*7, 14  
3 (N.D. N.Y. Oct. 24, 2007) (no Eighth Amendment violation where the plaintiff was  
4 deprived of two meals, one on Jan. 30, 2005, and one on March 18, 2005)). Defendants  
5 provide no evidence of the nutritional or caloric value of the meals provided to Preayer,  
6 and he alleges that he lost weight during the relevant time and often went to bed hungry  
7 due to the inconsistent meal service. (Doc. 84, Preayer Dep. Change/Corr. errata form at  
8 2 (Doc. 84 at 8); Doc. 75 at 13.) Under *Foster*, Preayer has established a sufficiently  
9 serious deprivation implicating the Eighth Amendment.

10 In sum, the Court finds that Preayer's exposure to the above conditions during his  
11 confinement in the isolation cell rise to the level of serious harm within the meaning of  
12 the Eighth Amendment, thereby satisfying the objective component. *See Anderson*, 45  
13 F.3d at 1314.

#### 14 **B. Subjective Component**

15 Under *Farmer*, a prison official is not liable under the Eighth Amendment for  
16 denying an inmate humane conditions of confinement “unless the official knows of and  
17 disregards an excessive risk to inmate health or safety; the official must both be aware of  
18 facts from which the inference could be drawn that a substantial risk of serious harm  
19 exists, and he must also draw the inference.” 511 U.S. at 837. A plaintiff may show  
20 “that a prison official had the requisite knowledge of a substantial risk in the usual ways,  
21 including inference from circumstantial evidence.” *Id.* at 842. Thus, a fact finder may  
22 conclude that an official knew of a substantial risk from the fact that the risk was  
23 obvious. *Id.* at 843 n.8. Moreover, “[t]urning a blind eye to the relevant surrounding  
24 facts will not shield a prison official from liability.” *Swan v. United States*, 159 F. Supp.  
25 2d 1174, 1182 (N.D. Cal. 2001). “*Farmer's* subjective standard does not invite prison  
26 supervisors to bury their heads in the sand.” *Walton v. Dawson*, 752 F.3d 1109, 1119  
27 (8th Cir. 2014). Therefore, liability may be imposed “if the evidence showed that [a  
28 prison official] merely refused to verify underlying facts that he strongly suspected to be

1 true, or declined to confirm inferences of risk that he strongly suspected to exist.”  
2 *Farmer*, 511 U.S. at 843 n.8.

3 The inquiry into a defendant’s liability for deliberate indifference “must be  
4 individualized and focus on the duties and responsibilities of each individual defendant  
5 whose acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v.*  
6 *Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *see Rizzo v. Goode*, 423 U.S. 362, 370–71,  
7 375–77 (1976).

### 8 **1. Deputy Warden Schuster**

9 As a supervisor, Schuster may be liable for an Eighth Amendment violation if he  
10 participated in or directed the violation, or knew of the violation and failed to act to  
11 prevent it. *Maxwell v. Cnty. of San Diego*, 708 F.3d 1075, 1086 (9th Cir. 2013) (citing  
12 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989)); *see Starr v. Baca*, 652 F.3d 1202,  
13 1207 (9th Cir. 2011) (“[a] plaintiff may state a claim against a supervisor for deliberate  
14 indifference based upon the supervisor’s knowledge of and acquiescence in  
15 unconstitutional conduct by his or her subordinates”); *see also Monell v. Dep’t of Soc.*  
16 *Servs.*, 436 U.S. 658, 691–92 (1978) (no respondeat superior liability under § 1983).

17 Defendants assert that subordinates within Schuster’s chain of command—not  
18 Schuster himself—had contact with prisoners and were responsible for overseeing prison  
19 activities. (Doc. 71 at 15.) Schuster avers that he never met Preayer and did not receive  
20 or read anything from Preayer until receipt of Preayer’s Inmate Grievance Appeal on  
21 May 1, 2014. (Doc. 69, Ex. D, Schuster Decl. ¶ 7 (Doc. 69-2 at 28).) Thus, Defendants  
22 contend that Schuster was not aware of the conditions in Preayer’s cell and did not  
23 knowingly refuse to address those conditions. (Doc. 71 at 15, 19.)

24 Preayer argues that Schuster should have known about the conditions in his cell in  
25 light of at least six Inmate Letters that Preayer submitted to Schuster informing him of  
26 the conditions. (Doc. 75 at 10.) Also, on March 15, 2014, Preayer submitted a formal  
27 Inmate Grievance to which Schuster was supposed to respond within 15 workdays.  
28 (Doc. 69, Ex. C-1 (Doc. 69-2 at 24–25).)

1           It is unclear how none of Preayer’s grievance documents appeared to reach  
2 Schuster until May 2014. Even so, there is no evidence to show that this failure in the  
3 grievance processing system was attributable to Schuster. The grievance documents are  
4 therefore insufficient to establish that Schuster knew of the conditions in Preayer’s cell.  
5 But Preayer points to other evidence relevant to whether Schuster had sufficient  
6 knowledge of Preayer’s conditions of confinement. *See Farmer*, 511 U.S. at 842  
7 (circumstantial evidence may show that an official must have known about the risk).

8           In his response to interrogatories, Schuster states that he was aware of the daily  
9 activities of his officers and shift commanders assigned to the Morey Unit and that he  
10 frequented the isolation cell area to ensure that officers there were properly performing  
11 their duties. (Doc. 76, Ex. K, Schuster Interrog. Resp. Nos. 16–17 (Doc. 76 at 57).) Due  
12 to an injury, beginning around February 20, 2014, Schuster was unable to walk the yard  
13 and worked only inside his office. (Doc. 69, Ex. D, Schuster Decl. ¶ 11 (Doc. 69-2 at  
14 28).) Schuster avers that although he was not aware of any specific cell’s situation, he  
15 “was aware of the general situation that the Morey Unit had numerous plumbing  
16 problems during the relevant period.” (*Id.* ¶ 8.) Further, in his May 1, 2014 Response to  
17 Preayer’s Inmate Grievance, Schuster acknowledged that operations of the isolation cell  
18 area needed to be improved. (Doc. 69, Ex. C-1 (Doc. 69-2 at 24).)

19           Schuster’s statements support the inference that he was aware of plumbing issues  
20 and operations problems in the isolation cell area. More importantly, since Schuster  
21 frequented the isolation cell area—at least until late February 2014—and was aware of  
22 his officers’ daily activities, it is reasonable to infer that he would have known that his  
23 officers “worked out a system” to provide water and toilet access to a prisoner with an  
24 inoperable toilet/sink, and that this prisoner was using the employee bathroom since his  
25 arrival in the unit in early January 2014. (*See* Doc. 71 at 4.) As stated, Schuster cannot  
26 avoid liability if the evidence shows that he simply refused to verify facts of which he  
27 was aware or declined to confirm inferences of risk that he suspected were present. *See*  
28 *Farmer*, 511 U.S. at 843 n.8. And here, Schuster does not present any argument to

1 suggest that the obviousness of the risk escaped him or that he believed that lack of  
2 access to a toilet and running water for many weeks posed no risk to a prisoner. *See*  
3 *Farmer*, 511 U.S. at 844 (prison official may preclude liability if he shows he was aware  
4 of underlying facts “but believed (albeit unsoundly) that the risk to which the facts gave  
5 rise was insubstantial or nonexistent”). It is also reasonable to infer that Schuster would  
6 have had knowledge of the meal service delays and that there was no laundry service,  
7 cleaning service, or cleaning supplies provided to inmates in the isolation cells.

8 On this record, there is a genuine issue of material fact whether Schuster should  
9 have been aware of a substantial risk to Preayer’s health or safety but refused to  
10 acknowledge facts known to him and, consequently, whether Schuster acted with  
11 deliberate indifference. *Farmer*, 511 U.S. at 843 n.8. Summary judgment will be denied  
12 to Schuster.

## 13 2. Shift Commander Malysa

14 Malysa avers that subordinates within her chain of command were responsible for  
15 contact with inmates and that no subordinate ever contacted her about Preayer during his  
16 confinement in the Transitory Unit. (Doc. 69, Ex. E, Malysa Decl. ¶¶ 5, 7 (Doc. 69-3 at  
17 3).) She further avers that she never received or read anything in writing from Preayer  
18 until she was served with this lawsuit. (*Id.* ¶ 6.)

19 Preayer specifically alleges, however, that on several occasions he personally  
20 spoke with Malysa about his complaints and issues with his cell, but she did not take any  
21 action. (Doc. 76, Ex. A, Preayer Decl. ¶ 19 (Doc. 76 at 14); Doc. 69, Ex. A, Preayer Dep.  
22 79:19–80:10 (Doc. 69-1 at 51–52).) Preayer also documented in his grievance documents  
23 that he spoke with Malysa about his issues. (*Id.*, Ex. C (Doc. 76 at 24).) And in her  
24 response to interrogatories, Malysa confirmed that she checked the isolation cell area at  
25 least once every day that she worked. (*Id.*, Ex. P. Malysa Interrog. Resp. No. 14 (Doc. 76  
26 at 76–77).) Malysa does not deny that she had personal contact with Preayer during the  
27 relevant period; she states only that she “had minimal interaction” with Preayer. (Doc.  
28 69, Ex. E, Malysa Decl. ¶ 6 (Doc. 69-3 at 3).) To the extent that Malysa states that she

1 was not aware of issues with Preayer’s cell, including sanitation, water/toilet access, and  
2 meal problems, this statement conflicts with Preayer’s statements that he personally  
3 notified Malysa of the issues, and the Court must take Preayer’s allegations as true. *See*  
4 *Anderson*, 477 U.S. at 255. Accordingly, there is a material factual dispute whether  
5 Malysa was aware of conditions of confinement posing a risk of serious harm to Preayer  
6 and whether she was deliberately indifferent to that risk. Summary judgment will be  
7 denied as to Malysa.

### 8 **3. Officer Ohshita**

9 Ohshita avers that she did not have any interaction with Preayer until May 1,  
10 2014, when she first received his March 15, 2014 Inmate Grievance and visited his cell.  
11 (Doc. 69, Ex. C, Ohshita Decl. ¶¶ 15, 17–18 (Doc. 69-2 at 21).) Preayer does not dispute  
12 that May 1, 2014, was his first personal encounter with Ohshita. He argues, however,  
13 that his March 15, 2014 Inmate Grievance put Ohshita on notice of his cell conditions  
14 and that she failed to investigate or respond for months. (Doc. 75 at 10.)

15 Preayer does not allege that he personally handed his March 15, 2014 Inmate  
16 Grievance to Ohshita, and, as with Schuster, there is no evidence to suggest that Ohshita  
17 was responsible for problems in the processing or delivery of inmate grievances to the  
18 Grievance Coordinator. Preayer’s allegations that Ohshita purposely failed to timely  
19 respond to or investigate his grievance are unsupported and merely speculative. *See*  
20 *Soremekun*, 509 F.3d at 984 (“[c]onclusory, speculative testimony in affidavits and  
21 moving papers is insufficient to raise genuine issues of fact and defeat summary  
22 judgment”). Preayer makes much of the fact that, in her interrogatory responses,  
23 Ohshita stated that she responded to Preayer’s Inmate Grievance on May 5, 2014, yet the  
24 Deputy Warden’s Response to the Inmate Grievance is dated May 1, 2014. (Doc. 76, Ex.  
25 H, Ohshita Resp. to Interrog. No. 20; Ex. J (Doc. 76 at 46, 54).) But the face of the  
26 Inmate Grievance Response reflects that it was “Received” on May 5, 2014, which  
27 corresponds to the date mentioned by Ohshita. (*Id.*, Ex. J.)  
28

1           In short, the evidence establishes that Ohshita was first put on notice of Preayer's  
2 cell conditions on May 1, 2014. Notably, by this time, Preayer had an operative toilet  
3 and running water, so the most egregious deprivations had been remedied. Even  
4 assuming that Ohshita improperly tried to return Preayer's Inmate Grievance Appeal  
5 during the May 1, 2014 visit, or failed to thoroughly investigate his complaint or  
6 otherwise acted unprofessionally, such conduct does not rise to deliberate indifference.  
7 The documentary evidence shows that upon receipt of Preayer's Inmate Grievance on  
8 May 1, 2014, she forwarded it up the chain of command to the Deputy Warden the same  
9 day, and the Response was delivered to Preayer on May 5, 2014, just two days before his  
10 transfer out of the isolation cell. (*Id.*)

11           Preayer has failed to present sufficient evidence to create a genuine issue of  
12 material fact on whether Ohshita acted with deliberate indifference to his conditions of  
13 confinement. The Court will therefore grant summary judgment to Ohshita.

#### 14           **4. Officer Piller**

15           Piller avers that, in her role as a CO III, she had contact with all inmates in the  
16 Morey Unit, including those in the Transitory Unit. (Doc. 69, Ex. B, Piller Decl. ¶ 3  
17 (Doc. 69-2 at 2).) She explains that her job required her to walk through the entire area,  
18 provide purchase order and grievance forms to inmates, and collect forms from inmates.  
19 (*Id.* ¶ 11.) According to Piller, during Preayer's 17-week confinement in the Transitory  
20 Unit, she spoke with him one or two times a week about grievance forms and procedures.  
21 (*Id.* ¶ 17.) She states that she does not recall Preayer ever talking about shaving, a comb,  
22 or wanting more clothes. (*Id.*) And, as mentioned, Piller could not find Preayer's  
23 January 29, February 14, or April 28, 2014 Inmate Letters, and states that she does not  
24 recall investigating those Inmate Letters. (*Id.* ¶¶ 15–16.)

25           According to the ADC grievance procedure, all Inmate Letters go to an inmate's  
26 CO III, and Piller was Preayer's CO III. (*Id.* ¶ 14.) Piller's statement that she *does not*  
27 *recall* receiving or investigating Preayer's Inmates Letters does not prove that she did not  
28 receive them. *See* Fed. R. Civ. P. 56(c)(4) (sworn statement used to support summary

1 judgment motion must be made on personal knowledge); *Bank Melli Iran v. Pahlavi*, 58  
2 F.3d 1406, 1412–13 (9th Cir. 1995) (declaration on information and belief are entitled to  
3 no weight where declarant lacks personal knowledge). Moreover, Preayer avers that  
4 Piller in fact responded to two of his Inmate Letters, but those responses were unreadable.  
5 (Doc. 76, Ex. A, Preayer Decl. ¶ 20 (Doc. 76 at 15).) Preayer also documented in all his  
6 Inmate Letters that he had spoken to all Morey staff about the problems with his cell.  
7 (*See id.*, Ex. C.)

8 A reasonable inference from the evidence, including Piller’s own averment she  
9 spoke with Preayer once or twice a week during his entire time in the Transitory Unit, is  
10 that she would have been aware of Preayer’s cell conditions. Absent evidence that Piller  
11 took any action in response to those conditions and his complaints, there exists a genuine  
12 issue of material fact whether she acted with deliberate indifference. Summary judgment  
13 will be denied to Piller.

14 **IT IS ORDERED:**

15 (1) The reference to the Magistrate Judge is **withdrawn** as to Defendants’  
16 Motion for Summary Judgment (Doc. 71), Preayer’s Objection to the Motion for  
17 Summary Judgment as Premature (Doc. 73), and Preayer’s Motion to Strike Portions of  
18 Defendants’ Statement of Facts (Doc. 84).

19 (2) Preayer’s Objection to the Motion for Summary Judgment as Premature  
20 (Doc. 73) and Motion to Strike Portions of Defendants’ Statement of Facts (Doc. 84) are  
21 **denied**.

22 (3) Defendants’ Motion for Summary Judgment (Doc. 71) is **granted in part**  
23 **and denied in part** as follows:

24 (a) the Motion is **granted** as to Ohshita, and the Eighth Amendment  
25 claim against her is dismissed with prejudice: and

26 (b) the Motion is otherwise **denied**.

27 (4) Ohshita is dismissed as a Defendant.  
28

