UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CASEY D. MAYER, Plaintiff, v. LOUIS REDIX, et al., Defendants.	Case No. EDCV 12-515-DMG (OP) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Dolly M. Gee, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

I.

PROCEEDINGS

On June 21, 2010, Casey D. Mayer ("Plaintiff") filed a *pro se* Civil Rights Complaint ("Complaint") pursuant to Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 6 (1971) in the United States District Court for the Eastern District of California. (ECF No. 1.) Plaintiff is a federal prisoner

currently incarcerated at the Federal Correctional Institution ("FCI") in Lompoc, California.

On September 17, 2010, Plaintiff filed a First Amended Complaint ("FAC"). (ECF No. 9.) On June 17, 2011, Defendants Roberto Acosta,[1] Eduardo Ferriol, Cathy Garrett, Ross Quinn, and Louis Sterling ("Federal Defendants"), sued in their individual capacities, filed a Motion to Dismiss the FAC. (ECF No. 31.) On September 1, 2011, Plaintiff filed an Opposition to the Motion to Dismiss. (ECF No. 35.) On September 29, 2011, Defendants filed a Reply to the Opposition. (ECF No. 37.) On February 2, 2012, the Honorable Gregory G. Hollows, United States Magistrate Judge for the Eastern District of California, granted in part and denied in part Defendants' Motion to Dismiss, leaving only Plaintiff's Bivens claims for deliberate indifference to medical needs against Federal Defendants Quinn and Sterling for events occurring while Plaintiff was housed at FCI Victorville, California, and against Federal Defendants Garrett, Ferriol, and Acosta for events prior to September 1, 2009, while Plaintiff was housed at FCI Safford, Arizona. (ECF No. 39; see also ECF Nos. 46, 52.)

On March 30, 2012, this action was transferred to this District. (ECF Nos. 52-54.) On July 26, 2012, Defendants filed an Answer to the FAC. (ECF No. 68.) On September 10, 2012, the Court issued an Order Re: Discovery and Motions. (ECF No. 75.)

On January 2, 2013, Plaintiff filed a Motion for Summary Judgment on the Issue of Liability Only. (ECF Nos. 84, 85.) On May 10, 2013, Defendants filed a Motion for Summary Judgment with Statement of Undisputed Facts and

[1] Plaintiff spells this Defendant's name "Acousta," but it is apparent from the record that the proper spelling is Acosta.

Conclusions of Law (ECF No. 109)[2], declarations and supporting exhibits in support of their Motion for Summary Judgment (ECF No. 110), and an Opposition to Plaintiff's Motion for Summary Judgment. (ECF No. 111.) On July 15, 2013, Plaintiff filed an Opposition to Defendants' Motion for Summary Judgment. (ECF No. 119.) On July 29, 2013, Defendants filed a Reply to Plaintiff's Opposition. (ECF No. 118.) Thus, this matter is ready for decision.

As set forth below, the Court finds that Defendants are entitled to judgment as a mater of law. As a result, Plaintiff's Motion for Summary Judgment should be denied, Defendants' Motion for Summary Judgment should be granted, and this action should be dismissed with prejudice.

II.

STANDARD OF REVIEW

The Court must render summary judgment if the papers show that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable jury could find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is "material" only if it might affect the outcome of the suit under governing law. Id. Inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). At the summary judgment stage, a judge's function is not to weigh the evidence or determine the truth of the matter but, rather, to determine whether there is any genuine issue for

[2] Along with the Motion for Summary Judgment, Defendants provided notice to Plaintiff pursuant to Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998).

trial. Anderson, 477 U.S. at 249; Balint v. Carson City, 180 F.3d 1047, 1054 (9th Cir. 1999) (en banc).

The moving party bears the initial burden of informing the Court of the basis of its motion and identifying evidence of record it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party satisfies its initial burden, Rule 56(e) requires the party opposing the motion to respond by submitting evidentiary materials that designate "specific facts showing that there is a genuine issue for trial." Matsushita, 475 U.S. at 587. Summary judgment is appropriate if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Moreover, summary judgment cannot be avoided by relying solely on conclusory allegations unsupported by factual data or in a pleading. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

In determining any motion for summary judgment or partial summary judgment, the Court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the "Statement of Genuine Disputes" and (b) controverted by declaration or other written evidence filed in opposition to the motion. C.D. Cal. R. 56-3. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact, the Court may consider the fact undisputed for purposes of the motion. Fed. R. Civ. P. 56(e)(2). When a summary judgment motion is unopposed, a court must still determine whether summary judgment is appropriate, even if the failure to oppose violated a local rule. Martinez v. Stanford, 323 F.3d 1178, 1182 (9th Cir. 2003); see also Anchorage Assoc. v. V.I. Bd. of Tax Review, 922 F.2d 168, 175 (3rd Cir. 1990); Fed. R. Civ. P. 56(e)(2) & (3). Thus, a court "cannot base the entry of

summary judgment on the mere fact that the motion [is] unopposed, but, rather, must consider the merits of the motion." United States v. One Piece of Real Prop. Etc., 363 F.3d 1099, 1101 (11th Cir. 2004); see also Fed. R. Civ. P. 56(e) Adv. Comm. Note. A court "need not sua sponte review all of the evidentiary materials on file at the time the motion is granted, but must ensure that the motion itself is supported by evidentiary materials." One Piece, 363 F.3d 1101; see Carmen v. S.F. Unified Sch. Dist., 237 F.3d 1026, 1029-31 (9th Cir. 2001) (court not required to search entire record for document that would have raised genuine issue of fact when adverse party did not refer to it in the opposition papers).

III.

PLAINTIFF'S ALLEGATIONS

The allegations in the FAC relate to the treatment of a shoulder injury Plaintiff sustained prior to his incarceration. The FAC alleges that Defendants violated Plaintiff's Eighth Amendment rights by denying or delaying orthopedic surgery, a shoulder brace, physical therapy, and pain medication. (FAC at 8.) Plaintiff also presents a pendent state law claim for medical malpractice against Defendant Redix, Barstow Orthopaedics Medical Group, Inc., and Barstow Community Hospital.[3] (Id. at 9.) Plaintiff seeks compensatory and punitive damages. (Id.)

Specifically, Plaintiff alleges the following:

[3] Plaintiff does not name Barstow Orthopaedics Medical Group, Inc., and Barstow Community Hospital as defendants in this action. On January 24, 2013, Plaintiff moved to amend the FAC to name these defendants in place of "John Does 9 and 10." (ECF No. 91.) This Motion, and the corresponding Motion for Status of Petition to Add John Doe Defendants, should be denied in light of the Court's decision to decline jurisdiction over Plaintiff's state law claims, as discussed below.

(1) On July 22, 2008, while an inmate at FCI Victorville, Plaintiff underwent surgical repair of an acromioclavicular joint separation by Defendant Redix (id. at 4);[4]

(2) Following surgery Defendant Quinn prescribed only Tylenol #3 for pain relief (id.);

(3) On July 26 and 27, 2008, medical staff refused to change Plaintiff's surgical bandages (id. at 4-5);

(4) On July 31, 2008, Plaintiff's bandages were changed at the direction of the warden (id. at 5);

(5) While Plaintiff's bandages were being changed two weeks after surgery, a surgical pin was "clearly visible and protruding" (id.);

(6) Defendant Quinn instructed the physician's assistant not to remove the surgical pin from Plaintiff's shoulder per the order of Defendant Redix (id.);

(7) On August 19, 2008, medical staff again did not remove the pin from Plaintiff's shoulder, which left Plaintiff to suffer continuous pain and experience difficulty sleeping (id.);

(8) Four and a half weeks after surgery, Plaintiff was examined by Defendant Redix who declared the surgery a failure and removed the pin from Plaintiff's shoulder (id.);

(9) Defendant Redix informed Plaintiff that he had instructed Defendant Quinn to remove the pin three weeks prior (id.);

(10) On September 5, 2008, Plaintiff began physical therapy, which had been ordered to begin one week after surgery (id.);

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[4] Plaintiff alleges that the surgery occurred on July 21, 2008. However, the record indicates that the surgery took place on July 22, 2008. The date discrepancy is immaterial to the adjudication of Plaintiff's claims.

(11) Defendant Redix ordered corrective surgery, which was immediately denied by Defendant Quinn (id.);

(12) "The physician overseeing" Plaintiff's physical therapy ordered a shoulder brace for Plaintiff, which was denied by Defendant Quinn (id. at 6);

(13) Plaintiff was transferred to FCI Safford, Arizona, where he requested a shoulder brace and adequate pain medications, but was denied by Defendants Acosta and Ferriol (id.);

(14) Between January 26, 2009, and May 27, 2009, Plaintiff sought administrative remedies for his grievances (id.);

(15) On March 12, 2009, Defendant Acosta denied Plaintiff pain medication (id.);

(16) During March 2009, Defendants Ferriol and Garrett denied Plaintiff's corrective surgery because the institution lacked a contract with an outside surgeon (id.); and

(17) On September 1, 2009, Plaintiff received corrective surgery by Rex Cooley, M.D., who informed Plaintiff that "full recovery is not possible due to the extent of the damage from the first surgery" (id.).

IV.

UNDISPUTED FACTS

Unless otherwise noted, the Court finds the following facts to be undisputed ("UF") with respect to the events that took place at FCI Victorville:[5]

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[5] For ease of reference, the Court cites to the Federal Defendants' Statement of Uncontroverted Facts, which in turn cites to the evidence of record supporting the Court's findings. Plaintiff did not file a statement of uncontroverted facts. Accordingly, the Court cites to Plaintiff's "Chronological Events" presented in the FAC and Plaintiff's declaration attached to his Opposition to Defendants' motion

(continued...)

UF No. 1: Plaintiff was incarcerated at the FCI Victorville from October 11, 2007, to December 9, 2008 (Def't's Statement of Uncontroverted Facts ("DUF") No. 1; FAC at 4, ¶ 2).

UF No. 2: On February 11, 2008, Plaintiff reported right should pain from an injury sustained while playing football eight years prior to his incarceration (DUF No. 2);

UF No. 3: On March 17, 2008, Defendant Redix, a Bureau of Prisons independent contractor orthopedic surgeon, diagnosed Plaintiff with a chronic dislocation of the acromioclavicular joint in his right shoulder and recommended surgery (DUF No. 3);

UF No. 4: On April 17, 2008, the Utilization Review Committee ("URC") deemed Plaintiff's shoulder surgery elective because Plaintiff's condition was over eight years old and was not in danger of worsening over time, and therefore referred Plaintiff's request for surgery to the Regional Clinical[6] Director for approval (DUF No. 4);

UF No. 5: On June 9, 2008, the Regional Clinical Director approved Plaintiff's surgery (Decl. of Quinn Ex. 6);

UF No. 6: Defendant Redix provided a treatment plan in which he explained that Plaintiff's surgical dressing should be removed in the office only, he would be placed in a shoulder immobilizer, his surgical wound should be inspected and physical therapy should begin one week after surgery, Plaintiff's wound

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[5](...continued)
for summary judgment to the extent they correspond to uncontroverted facts.

[6] In their Statement of Uncontroverted Facts, Defendants refer to the Regional Medical Director. (DUF No. 4.) However, it is clear from the exhibits presented by Defendants that the title of the relevant position is Regional Clinical Director. (See Decl. of Quinn Exs. 5-6.)

should be inspected and physical therapy continued three weeks after surgery, and functioning should be assessed and physical therapy continued six weeks after surgery (DUF No. 6);

UF No. 7: On July 22, 2008, Plaintiff underwent shoulder surgery by Defendant Redix at Barstow Community Hospital, during which a metal pin was placed in Plaintiff's shoulder (DUF No. 7; FAC at 4, ¶ 1);

UF No. 8: Following surgery, Plaintiff was given a sling and/or support for his shoulder (see Decl. of Quinn Ex. 20);

UF No. 9: On July 22, 2008, upon Plaintiff's return to FCI Victorville following surgery, Defendant Quinn authorized Plaintiff's prescription for Tylenol #3 for pain, and Plaintiff was instructed to continue taking his previously prescribed ibuprofen in addition to the Tylenol #3 (DUF Nos. 8-9; FAC at 4, ¶ 3; Decl. of Mayer ¶ 5);[7]

UF No. 10: Tylenol #3, like Vicodin, is classified as a Schedule III controlled substance indicated for the relief of mild to moderately severe pain. Tylenol #3 is the Schedule III narcotic carried by the Bureau of Prisons formulary and is therefore administered in lieu of Vicodin (DUF No. 10);

UF No. 11: On July 23, 2008, Defendant Quinn approved an increase in the dosage and duration of Plaintiff's Tylenol #3 prescription (DUF No. 11; FAC at 4, ¶ 4);

UF No. 12: On July 29, 2008, Plaintiff received a prescription for ibuprofen 800 mg (DUF No. 12);

UF No. 13: Plaintiff was given ibuprofen routinely after his surgery (DUF No. 13; Decl. of Mayer ¶ 8);

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[7] Plaintiff does not dispute that Tylenol #3 was prescribed. However, he alleges in his declaration that it was not administered to him until 48 hours after surgery. (Decl. of Mayer ¶ 5.)

UF No. 14: On July 30, 2008, Defendant Quinn requested that Plaintiff be seen for an orthopedic follow-up appointment on the next available date, which was August 22, 2008 (DUF No. 15);

UF No. 15: On July 30, 2008, Defendant Quinn requested that Plaintiff receive physical therapy to begin "within 2 weeks maximum" (DUF No. 16);

UF No. 16: On July 31, 2008, the URC approved Plaintiff's physical therapy (DUF No. 17);

UF No. 17: On August 1, 2008, Plaintiff's surgical bandages were changed and it was observed that Plaintiff's surgical pin was tenting the skin. A treatment note indicates that Defendant Redix was consulted and advised medical staff to leave the pin in place (DUF No. 18; FAC at 5, ¶ 8; Decl. of Mayer ¶ 6);

UF No. 18: On August 5, 2008, it was again observed that Plaintiff's surgical pin was tenting the skin. It was believed the pin was migrating and an x-ray was ordered (DUF No. 19; FAC at 5, ¶ 8);

UF No. 19: The radiology report of Plaintiff's shoulder x-ray indicated only post-operative changes and the presence of the surgical pin (DUF No. 21);

UF No. 20: On August 18, 2008, Defendant Quinn inspected Plaintiff's wound (DUF No. 22);

UF No. 21: Plaintiff admitted to Defendant Quinn during the August 18, 2008, visit that he had removed the should brace he was given after surgery and had been exercising his shoulder (DUF No. 23);

UF No. 22: Defendant Quinn observed that the surgical pin was "tightly tenting" Plaintiff's skin, but had not broken through the surface. Defendant Quinn applied tape to relieve some pressure from the skin (DUF No. 24);

UF No. 23: Defendant Quinn left the pin in place for Defendant Redix's inspection during his August 22, 2008, orthopedic evaluation and instructed Plaintiff to notify him immediately if the pin broke through the skin (DUF No. 25);

UF No. 24: On August 19, 2008, Plaintiff complained that the pin was still "sticking out." The pin was noted to be tenting Plaintiff's skin but there was no bleeding (DUF No. 26);

UF No. 25: On August 22, 2008, Defendant Redix evaluated Plaintiff, noted that the surgical pin had migrated out of Plaintiff's acromioclavicular joint, declared the surgery failed, and recommended a repeat surgery with a threaded pin (DUF Nos. 28-29; FAC at 5, ¶¶ 10, 12; Decl. of Mayer ¶¶ 9-10);[8]

UF No. 26: During the August 22, 2008, evaluation, Defendant Redix removed the surgical pin (FAC at 5, ¶ 10; Decl. of Mayer ¶ 9);

UF No. 27: On September 3, 2008, against Defendant Quinn's advisement, Plaintiff refused physical therapy (DUF No. 31-32);

UF No. 28: On September 16, 2008, Plaintiff attended physical therapy (DUF No. 33);

UF No. 29: The physical therapist reported that Plaintiff's condition would benefit from further therapy (DUF No. 33);

UF No. 30: On September 22, 2008, Defendant Quinn noted that Plaintiff's repeat surgery would be considered after Plaintiff's rehabilitation from his first surgery was complete and his healing had maximized. Defendant Quinn estimated this would take about six months (DUF No. 34);

UF No. 31: Nevertheless, on September 29, 2008, Defendant Quinn sought approval for Plaintiff's repeat surgery (DUF No. 35);

UF No. 32: On October 1, 2008, Plaintiff's surgery was denied, but continued physical therapy was approved (DUF No. 36-37);

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[8] Plaintiff alleges that Defendant Redix removed the pin from his shoulder during the August 22, 2008 evaluation. (FAC at 5, ¶ 10; Decl. of Mayer ¶ 9.) This fact is not disputed by Defendants. However, the treatment records before the Court do not mention the removal of the pin.

UF No. 33: Plaintiff continued physical therapy through September, October, and November 2008, during which he stated his shoulder was moving a little better (DUF No. 38); and

UF No. 34: On November 13, 2008, Plaintiff stated that he did not want to undergo repeat surgery (DUF No. 39; Decl. of Quinn Ex. 32).[9]

Unless otherwise noted, the Court finds the following facts to be undisputed with respect to the events that took place at FCI Safford:

UF No. 35: On December 17, 2008, Plaintiff was transferred to FCI Safford in Arizona (Decl. Of Louis Sterling ¶ 15; FAC at 6, ¶ 14);

UF No. 36: On December 18, 2008, Defendant Acosta examined Plaintiff, referred him for an orthopedic consultation, and prescribed ibuprofen 600mg (DUF at Nos. 42-43);

UF No. 37: On January 23, 2009, Defendant Acosta examined Plaintiff, and determined that a shoulder brace was not medically necessary and the previously prescribed pain medication was adequate (DUF No. 47; FAC at 6, ¶ 14);

UF No. 38: Later, Plaintiff complained to Defendant Garrett that he was being denied a shoulder brace (DUF No. 50);

UF No. 39: Defendant Garrett consulted with Defendant Ferriol who concluded that a shoulder brace was not medically indicated and could result in Plaintiff developing "frozen shoulder syndrome" (DUF No. 51; FAC at 6, ¶ 14);

UF No. 40: Between January 26, 2009, and June 28, 2009, Plaintiff sought relief for his grievances through the prison administrative process (FAC at 6, ¶¶ 15-16);

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[9] In DUF No. 39, Defendants refer to exhibits 30 and 31. However, the treatment note in which it was indicated that Plaintiff no longer wanted repeat surgery is found at exhibit 32.

UF No. 41: On February 24, 2009, Plaintiff was examined by orthopedic surgeon Rex Cooley, M.D. (DUF No. 54; FAC at 6, ¶ 17);

UF No. 42: Dr. Cooley noted that Plaintiff's condition was chronic and that he suffered from degenerative changes. Dr. Cooley recommended revised surgery, but did not give a time frame for the surgery and did not prescribe a shoulder brace or increased pain medication (DUF No. 55);

UF No. 43: Also on February 24, 2009, Plaintiff complained that the ibuprofen was not working, prompting Defendant Ferriol to discontinue the ibuprofen and prescribe indomethicin (DUF No. 57);

UF No. 44: On March 5, 2009, the URC approved Plaintiff's request for revised surgery (DUF No. 58);

UF No. 45: Plaintiff's revised surgery was later approved by the Regional Medical Director (DUF No. 60);

UF No. 46: At the time of the approval of Plaintiff's revised surgery, FCI Safford was in the process of negotiating a new medical services contract and was unable to schedule surgeries that were not deemed immediately medically necessary (DUF No. 61);

UF No. 47: Plaintiff's surgery was deemed not immediately medically necessary and, thus, was not set for scheduling until after a new contract was in place (DUF No. 62; FAC at 6, ¶ 19);

UF No. 48: On June 18, 2009, Plaintiff complained to Defendant Acosta that his pain medication was not working. Defendant Acosta discontinued Plaintiff's indomethicin and prescribed naproxen (DUF No. 63);

UF No. 49: On June 25, 2009, Plaintiff submitted an inquiry regarding the scheduling of his surgery. Defendant Garrett explained to Plaintiff that staff was working with an outside provider to schedule all pending surgeries and that Plaintiff's surgery was prioritized at the top of the list (DUF No. 67);

UF No. 50: On July 7, 2009, a medical services contract was finalized (DUF No. 68);

UF No. 51: On August 21, 2009, Defendant Garrett submitted a request for authorization of Plaintiff's surgery to the Contracting Officer, who approved the request on August 25, 2009 (DUF No. 69);

UF No. 52: On September 1, 2009, Plaintiff underwent corrective surgery by Dr. Cooley (DUF No. 70; FAC at 6, ¶ 20; Decl. of Mayer ¶ 12).

V.

DISCUSSION

A. Federal Defendants Are Entitled to Summary Judgment with Respect to Plaintiff's Claim of Deliberate Indifference to His Medical Needs.

1. Legal Standard.

To establish an Eighth Amendment claim that prison authorities provided inadequate medical care, a plaintiff must show that defendants were deliberately indifferent to his serious medical needs. Helling v. McKinney, 509 U.S. 25, 32, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993); Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed 2d 251 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds by WMX Tech., Inc. v. Miller, 104 F.3d 1133 (9th Cir. 1997). Deliberate indifference may be manifest by the intentional denial, delay, or interference with a plaintiff's medical care, or by the manner in which the medical care was provided. See Gamble, 429 U.S. at 104-05; McGuckin, 974 F.2d at 1059.

The required state of mind is one of "deliberate indifference" to inmate health or safety, which has been described as a "knowing or conscious disregard." Farmer v. Brennan, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). It requires conduct equivalent to acting with "criminal recklessness," such as where a person has disregarded a risk of harm of which he is aware. Id. As a result, a plaintiff must allege that a prison official has actual knowledge of an "excessive

risk to inmate health and safety," possessing both the facts from which an inference of serious medical need could be drawn and then drawing that inference, and then failing to act. Id.; see also Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004); McGuckin, 974 F.2d at 1060 ("[a] defendant must purposefully ignore or fail to respond to a prisoner's pain or possible medical need in order for deliberate indifference to be established."). "If a [prison official] should have been aware of the risk, but was not, then the [official] has not violated the Eighth Amendment, no matter how severe the risk." Gibson v. Cnty. of Washoe, Nev., 290 F.3d 1175, 1187 (9th Cir. 2002). Thus, an inadvertent failure to provide adequate medical care, mere negligence or medical malpractice, a mere delay in medical care (without more), or a difference of opinion over proper medical treatment, are all insufficient to constitute an Eighth Amendment violation. See Gamble, 429 U.S. at 105-07; Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Shapley v. Nev. Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th Cir. 1985).

2. Analysis.

a. Pain Medication.

Plaintiff argues that following his July 22, 2008, surgery, Defendant Quinn did not provide him with any pain medication for a 48-hour period and then prescribed Tylenol #3 instead of Plaintiff's preferred Vicodin. (FAC at 4, 8; Decl. of Mayer ¶¶ 5, 8, 11.)

The record belies Plaintiff's assertion that he did not receive pain medication for 48 hours after surgery. Upon returning from surgery, Plaintiff was continued on ibuprofen 800mg and, in addition, Defendant Quinn ordered that Plaintiff receive Tylenol #3. (Decl. of Quinn Ex. 7.) The following day, in response to Plaintiff's complaints that the pain medication was not working, Defendant Quinn authorized an increase in the dosage and duration of Tylenol #3. (Id.) Thus, it is clear that within 24 hours of surgery, Plaintiff received pain medication, complained that the medication was insufficient, and received an increase in the

dosage of that medication. Nevertheless, even if the record did support Plaintiff's claims that Defendant Quinn delayed the administration of pain medication, he has not presented a valid constitutional claim. The delay in administering pain medication might establish a claim for negligence but does not establish deliberate indifference. See Frost v. Agnos, 152 F.3d 1124, 1130 (9th Cir. 1998).

It seems the core of Plaintiff's claim is that he should have been prescribed Vicodin instead of Tylenol #3. However, the evidence shows that Tylenol #3 is a comparable medication and is used by the BOP in lieu of Vicodin. (Decl. of Quinn ¶ 17.) At best, Plaintiff complains about the opinions that Defendant Quinn reached regarding the appropriate prescription, which might amount to negligence, but certainly not deliberate indifference. Toguchi, 391 F.3d at 1059-60 (finding no Eighth Amendment violation when physician reached a different medical opinion). Plaintiff cites to no authority, under the Eighth Amendment or otherwise, that required Defendant Quinn to administer Plaintiff's preferred medication as opposed to alternative treatment deemed appropriate by the primary care providers.

Similarly, to the extent Plaintiff argues that all Federal Defendants denied him appropriate pain medication over the course of months between his first and second surgeries, he alleges nothing more than a difference of opinion. Plaintiff acknowledges he was continued on ibuprofen after his Tylenol #3 prescription ran out. (Decl. of Mayer ¶ 8.) In addition, after being transferred to FCI Safford, Plaintiff received prescriptions for ibuprofen 600mg (Decl. of Acosta Ex. 34), indomethicin (Decl. of Ferriol Ex. 38), and naproxen (id. Ex. 40). Thus, the record shows that Federal Defendants recognized Plaintiff's pain and prescribed medication they believed, in their medical opinion, to be sufficient. As stated above, Plaintiff's difference of opinion as to the pain medication he received does not support a finding of deliberate indifference. Toguchi, 391 F.3d at 1059-60.

Based on the foregoing, the Court finds that there is no genuine issue of material fact to support Plaintiff's claim of deliberate indifference to his medical

needs with respect to the issue of pain medication. Accordingly, Defendants are entitled to judgment as a matter of law as to this claim.

b. Bandages.

Although not clearly stated in the FAC, it appears Plaintiff intended to state a claim that Defendant Quinn violated his Eighth Amendment rights by failing to ensure that Plaintiff's surgical bandages were changes in a timely fashion according to the orders of Defendant Redix. (FAC at 2.)

Without regard to when Plaintiff's bandages should have been changed and when they were changed, Plaintiff fails to present a genuine issue of material fact as to this issue, as he does not present any evidence that he suffered further injury due to the delay in the changing of his bandages. See McGuckin, 974 F.2d at 1060 (where a prisoner is alleging delay of medical treatment he must show that the delay led to further injury); Shapley, 766 F.2d at 407. Accordingly, Defendants are entitled to judgment as a matter of law as to this claim.

c. Pin Removal.

Also not clearly stated in the FAC is a claim that Defendants Quinn and Sterling violated Plaintiff's Eighth Amendment rights by failing to remove the migrating surgical pin. (FAC at 3.)

The evidence shows that Defendant Quinn and other medical staff evaluated the pin, sought advice from Defendant Redix with regard to the pin, issued Plaintiff an order for a no-button shirt, attempted to tape Plaintiff's skin to relieve pressure caused by the pin, and informed Plaintiff to report to medical staff immediately if the pin penetrated the skin. (Decl. of Quinn Exs. 15, 17, 18, 20, 22.) Ultimately, after evaluating Plaintiff and the migrating pin on August 18, 2008, Defendant Quinn came to the conclusion that the pin should be removed by Defendant Redix at his next appointment four days later. (Id. Ex. 20.) Although Plaintiff insists that Defendant Redix told him that he informed Defendant Quinn to remove the pin (FAC at 5), Defendants present contemporaneous treatment notes indicating that

Defendant Redix was contacted and that he advised medical staff not to remove the pin (Decl. of Quinn Ex. 15). In the end, whether Defendant Redix told prison staff to remove the pin or not, the evidence establishes that Defendant Quinn made an independent medical judgment that the pin did not need to be removed before Plaintiff was evaluated by Defendant Redix. Plaintiff's assertion that Defendant Quinn should have removed the pin reflects a mere difference of medical opinion or, at most, negligence or medical malpractice. Toguchi, 391 F.3d at 1059-60.

Because Plaintiff has not presented a genuine issue of material fact as to Defendant Quinn's liability with respect to the removal of the surgical pin, Defendants are entitled to judgment as a matter of law as to this claim.

d. Shoulder Brace.

Plaintiff claims that Defendants Garrett and Ferriol violated his Eighth Amendment rights when they denied him a shoulder brace that he alleges was recommended by "[t]he physician overseeing the therapy." (FAC at 3, 6.)[10] Again, Plaintiff shows nothing more than a difference of medical opinion.

The record reflects that Defendant Acosta did not believe a brace was immediately medically necessary. (Decl. of Roberto Acosta ¶ 11.) In addition, when Plaintiff complained to Defendant Garrett about his need for a brace, she inquired of Defendant Ferriol who concluded a shoulder brace might harm

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[10] Plaintiff states on page 6 of the FAC that Defendant Quinn denied a him a shoulder brace. However, in his identification of the defendants, Plaintiff does not state that Defendant Quinn is being sued here for his actions in denying the brace. Rather, in naming Defendants Garret and Ferriol, Plaintiff describes the action of denying a shoulder brace. To the extent Plaintiff intended to claim that Defendant Quinn also denied him a shoulder brace, the claim fails. The record supports a finding that Plaintiff was supplied some form of shoulder immobilizer following his July 22, 2008, surgery and that he had this immobilizer at least as of August 18, 2008, when he admitted to Defendant Quinn that he had removed the "sling/support" and exercised his shoulder. (Decl. of Quinn Exs. 8, 20.)

Plaintiff. (Decl. of Kathy Garrett ¶ 6; Decl. of Ferriol ¶ 11.) In Defendant Ferriol's opinion, placing Plaintiff in a shoulder brace might result in "frozen shoulder syndrome." (Decl. of Ferriol ¶ 11.) Accordingly, Plaintiff's contentions that he should have received a shoulder brace again merely presents a difference of opinion and does not support an Eighth Amendment claim. Toguchi, 391 F.3d at 1059-60.

Based on the foregoing, the Curt finds that Plaintiff has not presented a genuine issue of material fact as to the issue of a shoulder brace, and Defendants are entitled to judgment as a matter of law as to this claim.

e. Physical Therapy.

Plaintiff further argues that Defendants were deliberately indifferent to his medical needs when they delayed his physical therapy. (FAC at 8.)

On this record, Plaintiff cannot show that Defendants were deliberately indifferent to Plaintiff's need for physical therapy. Defendant Redix's preoperative treatment plan called for Plaintiff to start physical therapy one week after surgery. (Decl. of Quinn Ex. 8.) On July 30, 2008, Defendant Quinn requested that Plaintiff receive physical therapy "within 2 weeks maximum." (Id. Exs. 12, 24.) On July 31, 2008, just nine days after surgery, the URC approved Plaintiff's request for physical therapy. (Id. Ex. 14.) The following day, it was reported for the first time that Plaintiff's surgical pin was tenting the skin. (Id. Ex. 15.) Defendant Quinn declared that a patient with a possible migrating surgical pin should not undergo physical therapy, as it could worsen the patient's condition. (Decl. of Quinn ¶ 25.) Plaintiff has not provided any evidence to contradict Defendant Quinn's assessment. Dr. Redix removed the surgical pin on August 22, 2008. (FAC at 5, ¶ 10; Decl. of Mayer ¶ 9.) On September 3, 2008, prison personnel attempted to escort Plaintiff to physical therapy, but Plaintiff refused treatment. (Decl. of Quinn Exs. 22, 23.) Plaintiff began physical therapy on September 16, 2008, and continued therapy into November 2008. (Decl. of Quinn Exs. 24-26, 30-31.)

Consequently, the uncontroverted evidence establishes that Defendants sought approval for Plaintiff's physical therapy in a timely manner, delayed physical therapy only due to Plaintiff's changed medical condition, and began physical therapy almost immediately after Plaintiff's surgical pin had been removed. This record does not support a finding that Defendants were aware of a medical need and refused to act, but rather shows that Defendants acted in what they believed to be the best interest of Plaintiff's medical condition. McGuckin, 974 F.2d at 1060 (deliberate indifference requires that a defendant purposefully ignore or fail to respond to a prisoner's pain or possible medical need). Moreover, Plaintiff has not alleged that the delay in physical therapy led to further injury. While suffering additional pain and anguish may be sufficient to establish further injury caused by a delay in treatment, id. at 1062, Plaintiff has not offered any evidence that the delay in physical therapy caused him pain and anguish greater than was experienced from Plaintiff's shoulder condition alone. Rather, the evidence shows that the delay of physical therapy guarded Plaintiff against the potential for further pain and damage to his shoulder that might have occurred had he undergone therapy with a migrating pin.

Based on the foregoing, the Court finds that Plaintiff has not presented a genuine issue of material fact as to the issue of physical therapy. Thus, Defendants are entitled to judgment as a matter of law as to this claim.

f. Second Surgery.

Plaintiff claims that Defendants Quinn and Ferriol violated the Eighth Amendment by denying the corrective surgery recommended by Defendant Redix and Dr. Cooley. (FAC at 3, 8.)[11]

[11] Because Plaintiff ultimately received corrective surgery, it appears his claim is one of denial of surgery by Defendant Quinn and delay of surgery by (continued...)

With respect to the denial of a second surgery by Defendant Quinn, the record shows that Defendant Quinn was of the medical opinion that Plaintiff should not undergo another surgery on his shoulder until he had fully rehabilitated and healed from the first surgery. (Decl. of Quinn ¶ 31, Ex. 28.) Defendant Quinn estimated Plaintiff needed about six months before receiving a second surgery. It appears the URC agreed with Defendant Quinn, as the second surgery was denied in lieu of Plaintiff's continued physical therapy. (Decl. of Quinn Ex. 27.) Once again, Plaintiff alleges nothing more than a difference of medical opinion as to the treatment he should have received. This is insufficient to support an Eighth Amendment violation. Toguchi, 391 F.3d at 1059-60.

With respect to the delay of surgery by Defendant Ferriol, Plaintiff has not presented any evidence to support a conclusion that Defendant Ferriol was deliberately indifferent to his medical needs. On February 24, 2009, Dr. Cooley recommended that Plaintiff undergo a second surgery to repair his shoulder. However, he did not indicate that the surgery was urgent. (Decl. of Acosta Ex. 35.) Defendant Ferriol responded to Dr. Cooley's treatment recommendations in a timely manner by requesting approval for Plaintiff's surgery on March 5, 2009. The surgery was subsequently approved. (Decl. of Ferriol Ex. 39.) Unfortunately, between the time of approval and July 7, 2009, FCI Safford did not have a contract with an outside medical facility to perform the surgery. As a result, only surgeries deemed immediately medically necessary were being scheduled. (Decl. of Kathy Garrett ¶ 9.) However, Plaintiff has not shown that Defendant Ferriol had any control over the scheduling of Plaintiff's surgery of the contract negotiations. Accordingly, Plaintiff has not shown that Defendant Ferriol violated was deliberately indifferent to his need for corrective surgery. McGuckin, 974

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[11](...continued)
Defendant Ferriol.

F.2d at 1060 (deliberate indifference requires that a defendant purposefully ignore or fail to respond to a prisoner's pain or possible medical need); Farmer, 511 U.S. at 837 (deliberate indifference defined as "knowing and conscious disregard").

Ultimately, Plaintiff has not provided any evidence that Defendants Quinn and Ferriol knowingly or consciously disregarded his medical condition and need for revised surgery. Accordingly, the Court finds that Plaintiff has not presented a genuine issue of material fact as to this issue. Thus, Defendants are entitled to judgment as a matter of law as to this claim.

3. Qualified Immunity.

Defendants claim they are entitled to qualified immunity. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Saucier v. Katz, 533 U.S. 194, 200, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). Courts evaluate a defendant's qualified immunity defense using a two-step inquiry. Id. However, the Supreme Court has held that this two-step inquiry is no longer "an inflexible requirement." Pearson v. Callahan, 555 U.S. 223, 227, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (explaining "that, while the sequence set forth [in Saucier] is often appropriate, it should no longer be regarded as mandatory"). It is within the court's "sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Id. at 236. Under the first prong of the Saucier test, courts consider whether, "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the officer's conduct violated a constitutional right." Saucier, 533 U.S. at 201. Under the second prong of the Saucier test, courts ask "whether the right was clearly established." Id.

In this case, because the Court has found that there is no genuine issue of material fact to support any of Plaintiff's claims, "there is no necessity for further

inquiries concerning qualified immunity." L.A. Cnty. v. Rettele, 550 U.S. 609, 616, 127 S. Ct. 1989, 167 L. Ed. 2d 974 (2007) (quoting Saucier, 533 U.S. at 201). Thus, the Court declines to further address the issue of qualified immunity.

B. Plaintiff's Attempt to Amend the First Amended Complaint Must Be Denied.

In the FAC, Plaintiff claims Eighth Amendment violations based on the alleged denial of medication, a shoulder brace, physical therapy, and corrective surgery, in addition to a pendent state law claim for medical malpractice. (FAC at 8-9.) In his motion for summary judgment, Plaintiff adds new allegations and bases for relief. Plaintiff alleges that the evidence he obtained during discovery "necessitates modification and amend[ment]" of Plaintiff's FAC. Plaintiff requests that the Court consider the new allegations in the motion for summary judgment "[t]o the extent that this Memorandum of Law and Supporting Points and Authorities contradicts the First Amended Complaint." (Pl.'s Mem. of P. & A. in Supp. of Mot. for Summ. J. at 2.)

Under Rule 15, a party may amend a pleading once as a matter of course within 21 days of serving the pleading or within 21 days of the service of a responsive pleading. Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Plaintiff has neither obtained the written consent of Defendants nor sought the Court's leave to amend the FAC. Thus, Plaintiff's amended allegations are not properly before the Court.

In addition, even if the Court were to construe the language in Plaintiff's motion for summary judgment as a motion to amend the FAC, the Court finds that such a motion should be denied as futile. See Gentala v. City of Tucson, 213 F.3d 1055, 1061 (9th Cir. 2000) ("Although there are strong public policy justifications urging liberality in granting leave to amend, '[f]utility of amendment can, by itself, justify the denial of a motion for leave to amend.'") (quoting Bonin v. Calderon, 59

F.3d 815, 845 (9th Cir. 1995)). "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Sweaney v. Ada Cnty., 119 F.3d 1385, 1393 (9th Cir. 1997) (citation omitted) (internal quotation marks omitted). The Court has considered Plaintiff's additional allegations in light of the evidence presented in both parties' motions for summary judgment and finds that they have no more merit than do the claims discussed and dismissed above.

To the extent Plaintiff holds Defendants Quinn, Garrett, Ferriol, Acosta, and Sterling accountable for the failed surgery performed by Defendant Redix (Pl.'s Mem. of P. & A. in Supp. of Mot. for Summ. J. at 7, 8, 12), there is no evidence in the record suggesting that any of these defendants had any reason to believe that Defendant Redix would fail to adequately repair Plaintiff's shoulder or that they failed to take some sort of remedial action in light of this knowledge. In sum, Plaintiff cannot show that these Defendants were deliberately indifferent with regard to Defendant Redix's failed surgery. Farmer, 511 U.S. at 837.

Plaintiff's new claim that Defendants Ferriol and Acosta violated the Eighth Amendment by ordering Plaintiff to continue working (Pl.'s Mem. of P. & A. in Supp. of Mot. for Summ. J. at 9, 10), also fails, as he cannot show deliberate indifference. The record shows that upon Plaintiff's arrival at FCI Safford, medical staff indicated that he was permanently disabled due to his right shoulder. (Decl. of Acosta Ex. 33.) Despite this disability, it appears Plaintiff was ordered to work within the prison. Both Defendants Acosta and Ferriol declared that they did not have the authority to change Plaintiff's work assignment (Decl. of Roberto Acosta ¶ 12; Decl. of Ferriol ¶ 12.) In addition, Defendant Acosta noted that he did not believe Plaintiff's medical condition warranted work restrictions. (Decl. of Roberto Acosta at 12.) Plaintiff's disagreement with Defendant Acosta about the need for work restrictions represents nothing more than a difference of medical

opinion and is not proof that any Defendants purposefully disregarded Plaintiff's medical need with respect to his ability to work. Toguchi, 391 F.3d at 1058.

Finally, to the extent Plaintiff alleges Eighth Amendment violations against Defendant Redix for failing to competently perform the first surgery (Pl.'s Mem. of P. & A. in Supp. of Mot. for Summ. J. at 7, 8, 11, 12), Plaintiff shows nothing more than potential negligence or medical malpractice, which is insufficient to support an Eighth Amendment claim. Gamble, 429 U.S. at 105-07.

Despite having engaged in the discovery process with respect to the current action, Plaintiff has not presented sufficient evidence to support the proposed new claims.[12] Even if the Court allowed Plaintiff to amend the FAC to add these new claims, they would be subject to dismissal for the reasons cited above. Accordingly, Plaintiff's proposed amendments are futile and the proposed amendments are denied.

C. Plaintiff's Motion for Default Judgment Against Defendant Redix Should Be Denied.

On February 11, 2013, Plaintiff filed a Request and Affidavit for Default Judgment against Defendant Redix on the basis of the order by the Eastern District of California finding Defendant Redix in default. Plaintiff seeks a judgment against Defendant Redix in the amount of $6 million, plus interest. (ECF No. 96.)

The court may enter a default judgment against a defendant following entry of that defendant's default by the Clerk of Court. However, "[a] defendant's default does not automatically entitle the plaintiff to a court-ordered judgment." See Fed. R. Civ. P. 55(b); Pepsi Co., Inc. v. Cal. Sec. Cans, 238 F. Supp. 2d 1172,

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[12] The Court notes that two of Plaintiff's requests for an order compelling disclosure of documents remain outstanding. (ECF Nos. 87, 95.) However, even if Defendants were in possession of the requested documents and the Court ordered their disclosure, the Court does not find that these documents would assist Plaintiff in presenting viable claims. Thus, the Court denies Plaintiff's requests.

1174 (C.D. Cal. 2002). Rather, it is within the district court's discretion to determine whether or not to grant judgment by default. Aldabe v. Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980).

Upon entry of default, the well-pleaded factual allegations in the complaint, other than those relating to the amount of damages, are accepted as true. TeleVideo Sys., Inc. v. Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (per curiam); Danning v. Lavine, 572 F.2d 1386, 1388 (9th Cir. 1978). "However, a defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law." DIRECTV, Inc. v. Hoa Huynh, 503 F.3d 847, 854 (9th Cir. 2007) (internal quotation marks omitted).

The Ninth Circuit has identified factors that a court may consider to guide its discretion in ruling on a motion for a default judgment. Those factors are: (1) the merits of the plaintiff's substantive claims; (2) the sufficiency of the complaint; (3) the amount of money at stake in the action; (4) the possibility of prejudice to the plaintiff if relief is denied; (5) the possibility of a dispute concerning material facts in the case; (6) whether the default resulted from excusable neglect; and (7) the strong public policy favoring decisions on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986); accord Pepsi Co., Inc., 238 F. Supp. 2d at 1174. The Eitel test is a disjunctive balancing, so not all seven factors must point in the same direction. See Eitel, 782 F.2d at 1472 (affirming denial of an application for a default judgment were five of the factors, including the merits of the plaintiff's substantive claim, the amount of money at stake, and the defaulting party's excusable neglect supported the district court's decision, and declining to address the remaining factors); see also DIRECTV, Inc., 503 F.3d at 855-956 (affirming denial of motion for a default judgment because the complaint failed to state a claim); Aldabe, 616 F.2d at 1092-93 (affirming denial of a motion for a default judgment where the plaintiff-appellant's substantive claims lacked merit); Pepsi

Co., Inc., 238 F. Supp. 2d at 1172-74 (granting a default judgment where all but the final Eitel factor supported that result).

Here, only factors 2 and 6 of the Eitel factors conclusively weigh in favor of Plaintiff's request for a default judgment against Defendant Redix. To the contrary, as to factor 3, the amount of money at stake is $6 million, twice the amount found to be too large to warrant a default judgment in Eitel. Eitel, 782 F.2d at 1472 (affirming denial of default judgment because, among other factors, plaintiff sought almost $3 million in damages). As to factor 4, Plaintiff will not suffer undue prejudice from the denial of a default judgment against Defendant Redix because he can seek relief for his state medical malpractice claim in state court. But cf. Landstar Ranger, Inc. v. Parth Enter., Inc., 725 F. Supp. 2d 916 (C.D. Cal. 2010) (finding prejudice where denying default judgment would leave plaintiff without a remedy). In fact, such a state tort claim is more properly heard in the state venue. In addition, as to factor 5, there would undoubtedly be a dispute concerning material facts in the case, namely how Defendant Redix repaired Plaintiff's shoulder, whether his method was medically appropriate, and whether Defendant Redix's acts led to the failure of Plaintiff's surgery. As to factor 7, of course, public policy always favors decisions on the merits and disfavors default judgments. Eitel, 782 F.2d at 1472 (as a general rule default judgment is disfavored). Finally, as to factor 1, Plaintiff's claim does not lack merit on its face. However, neither is it apparent to the Court that Plaintiff's medical malpractice claim against Defendant Redix is clearly meritorious where the evidence before the Court merely shows that the surgery Defendant Redix performed failed, and that Plaintiff's subsequent orthopedic surgeon was of the opinion that Defendant Redix did not repair Plaintiff's shoulder as ordinarily might have been done.

As the weight of the Eitel factors disfavor the entry of a default judgment, the Court denies Plaintiff's request for a default judgment against Defendant

Redix. (ECF No. 96.) The Court also denies Plaintiff's Motion for Status of Default Judgment as moot. (ECF No. 129.)

To the extent that issues regarding the pendent state law medical malpractice claims remain, the Court declines to exercise jurisdiction over those claims in light of the Court's dismissal of Plaintiff's federal constitutional claims. 28 U.S.C. § 1367(c)(3).

D. Plaintiff's Remaining Motions Should Be Denied.

On December 26, 2012, Plaintiff filed a "Request and Motion for Time Extension Within Which to File Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Reconsideration." (ECF No. 83.) On January 7, 2013, Plaintiff filed his Reply to Defendants' Opposition to the Motion for Reconsideration. (ECF No. 121.) Accordingly, Plaintiff's December 26, 2012, Motion for an Extension of Time is denied as moot.

On January 31, 2013, Plaintiff filed a Second Additional Request for Production of Documents, seeking the evidence Defendants planned to present in support of their motion for summary judgment and "[a]ny and all contracts, agreements, and understandings by and between Louis Redix, M.D., and/or Barstow Orthopaedic Medical Group, Inc., and/or any related individual(s) or entities and the Federal Bureau of Prisons, United States Department of Justice, United States of America, Victorville Federal Correctional Institution, and/or any similarly named or situated individual(s) or entities, relating to, medical care, treatment, diagnosis, prognosis, surgeries, physical therapy, pre and/or post surgical examinations, consultations, referrals and/or treatments, x-rays as well as any and all medically related services bargained for or the subject matter which is otherwise expressed within any and all written agreements by and between the aforementioned parties, their affiliates, alter egos or the like." (ECF No. 95.) On March 29, 2013, Plaintiff filed a Motion to Compel the production of the documents at issue. (ECF No. 104.) On April 29, 2013, Defendants filed an

Opposition to Plaintiff's Motion to Compel. (ECF No. 107.) Again, Plaintiff's request for documents is overbroad. Moreover, the Court concludes that the requested documents, even if found to be within Defendants' custody, could not save Plaintiff's claims from dismissal for the reasons discussed herein. Thus, the Court denies Plaintiff's Second Additional Request for Production of Documents (ECF No. 95) and the related Motion to Compel (ECF No. 104).

On May 6, 2013, Plaintiff requested the District Judge extend the discovery cutoff. (ECF No. 108.) In light of the Court's findings and recommendations herein, this Motion is denied as moot.

On May 10, 2013, Plaintiff filed a document entitled "Plaintiff's Final Request to Comply with Rule 34 Request for Production of Documents." (ECF No. 114.) This document appears to be a response to Defendants' request to Plaintiff for an extension of time within which to provide discovery responses. Accordingly, as a "notice," there is nothing for this Court to rule upon.

On May 24, 2013, Plaintiff filed a Request for Extension of Time Within Which to Reply to Defendants' Motion for Summary Judgment. (ECF No. 115.) On July 15, 2013, Plaintiff filed his Opposition to Defendants' Motion for Summary Judgment. (ECF No. 119.) Accordingly, Plaintiff's Motion for Extension of Time is denied as moot.

On June 10, 2013, Plaintiff filed a document titled "Motion for Appointment of Counsel, Authorize Cost for Expert Witness and to Stay the Proceedings." (ECF No. 116.) In light of the Court's findings and recommendations herein, this Motion is denied as moot.

VI.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order as follows: (1) accepting this Report and Recommendation; (2) denying Plaintiff's Motion for Default Judgment (ECF No. 96); (3) denying Plaintiff's

Motion for Summary Judgment (ECF Nos. 84, 85); (4) granting Defendants' Motion for Summary Judgment (ECF No. 109); and (5) directing that Judgment be entered dismissing the First Amended Complaint with prejudice.

DATED: March 19, 2014

HONORABLE OSWALD PARADA
United States Magistrate Judge