

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA**

CHRISTOPHER I. SIMMONS,	)	Case No.: 1:07-cv-01058-DAD-SAB (PC)
	)	
Plaintiff,	)	
	)	<b>FINDINGS AND RECOMMENDATIONS</b>
v.	)	<b>RECOMMENDING DEFENDANT DR.</b>
	)	<b>AKANNO’S MOTION FOR SUMMARY</b>
GRISSOM, et al.,	)	<b>JUDGMENT BE GRANTED</b>
	)	
Defendants.	)	[ECF No. 179]
	)	
	)	

Plaintiff Christopher I. Simmons is appearing pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983.

Currently before the Court is Defendant Dr. Akanno’s motion for summary judgment, filed May 18, 2016.

I.

**RELEVANT HISTORY**

This action is proceeding against Defendants This action is proceeding against Defendants Grissom, Keiley and St. Lucia for deliberate indifference toward Plaintiff’s “heat risk” condition, in violation of the Eighth Amendment, against Defendants Rients and Akanno for deliberate indifference

1 arising from the deprivation of Plaintiff's pain medication, in violation of the Eighth Amendment, and  
2 against Defendants Rients and Akanno for retaliation, in violation of the First Amendment.<sup>1</sup>

3 On May 18, 2016, Defendant Dr. Akanno filed a motion for summary judgment.<sup>2,3</sup> Plaintiff  
4 filed an opposition on August 31, 2016,<sup>4</sup> and Dr. Akanno filed a reply on September 15, 2016.  
5 Accordingly, pursuant to Local Rule 230(l), this motion is deemed submitted for review without oral  
6 argument.

## 7 II.

### 8 LEGAL STANDARD

9 Any party may move for summary judgment, and the Court shall grant summary judgment if  
10 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to  
11 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mut. Inc. v.  
12 U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's position, whether it be that a fact is disputed  
13 or undisputed, must be supported by (1) citing to particular parts of materials in the record, including  
14 but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials  
15 cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot  
16 produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted).  
17 The Court may consider other materials in the record not cited to by the parties, but it is not required  
18 to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031  
19 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

20  
21  
22 <sup>1</sup> Defendants Grissom, Keiley, Rients and St. Lucia are represented by the Deputy Attorney General Kelly Samson, and  
23 Defendant Dr. Akanno is represented by Janine K. Jeffery.

24 <sup>2</sup> Defendants Grissom, Keiley, Rients and St. Lucia filed a separate motion for summary judgment on April 18, 2016,  
25 which will be addressed by separate Findings and Recommendations.

26 <sup>3</sup> Concurrently with his motion for summary judgment, Defendant served Plaintiff with the requisite notice of the  
27 requirements for opposing the motion. Woods v. Carey, 684 F.3d 934, 939-41 (9th Cir. 2012); Rand v. Rowland, 154 F.3d  
28 952, 960-61 (9th Cir. 1998).

<sup>4</sup> Because Plaintiff's opposition is verified, it is considered as an opposing affidavit for purposes of the summary judgment  
to the extent it is based on facts within Plaintiff's personal knowledge. Johnson v. Meltzer, 134 F.3d 1393, 1399-1400 (9th  
Cir. 1998).

1 In resolving cross-motions for summary judgment, the Court must consider each party's  
2 evidence. Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 960 (9th Cir. 2011). Plaintiff bears the  
3 burden of proof at trial, and to prevail on summary judgment, he must affirmatively demonstrate that  
4 no reasonable trier of fact could find other than for him. Soremekun v. Thrifty Payless, Inc., 509 F.3d  
5 978, 984 (9th Cir. 2007). Defendants do not bear the burden of proof at trial and in moving for  
6 summary judgment, they need only prove an absence of evidence to support Plaintiff's case. In re  
7 Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010).

8 In judging the evidence at the summary judgment stage, the Court does not make credibility  
9 determinations or weigh conflicting evidence, Soremekun, 509 F.3d at 984 (quotation marks and  
10 citation omitted), and it must draw all inferences in the light most favorable to the nonmoving party  
11 and determine whether a genuine issue of material fact precludes entry of judgment, Comite de  
12 Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation  
13 marks and citation omitted).

14 In arriving at this recommendation, the Court has carefully reviewed and considered all  
15 arguments, points and authorities, declarations, exhibits, statements of undisputed facts and responses  
16 thereto, if any, objections, and other papers filed by the parties. Omission of reference to an argument,  
17 document, paper, or objection is not to be construed to the effect that this Court did not consider the  
18 argument, document, paper, or objection. This Court thoroughly reviewed and considered the  
19 evidence it deemed admissible, material, and appropriate.

### 20 III.

### 21 DISCUSSION

#### 22 A. Summary of Plaintiff's Complaint<sup>5</sup>

23 On July 28, 2006, Defendant Akanno violated Plaintiff's Eighth Amendment rights when he  
24 "denied the benefits of hot packs for PLAINTIFF's serious medical needs, and based that decision on  
25

---

26 <sup>5</sup> This action is proceeding on Plaintiff's first amended complaint, filed February 17, 2012. (ECF No. 45.) The Court sets  
27 forth the factual allegations relating to Defendant Dr. Akanno only. Because Plaintiff's first amended complaint is verified  
28 it constitutes an opposing affidavit for purposes of ruling on a motion for summary judgment. Jones v. Blanas, 393 F.3d  
918, 923 (9th Cir. 2004).

1 PLAINTIFF not being granted an “extra privilege.” (First Am. Compl. ¶ 20.)

2 On August 22, 2007, Defendant Akanno “conspired to cover-up the illegal actions of Saucedo  
3 when Defendant Akanno changed the medical order from every eight hours to BID or every 12 hours  
4 ... despite PLAINTIFF’s specific requested action not to change the medical order as a reprisal,  
5 violating PLAINTIFF’s 1st Amendment right.” (Compl. ¶ 32.) Plaintiff filed a grievance regarding  
6 his medication. (Compl. ¶ 33.)

7 **B. Defendant’s Statement of Undisputed Facts<sup>6</sup>**

8 1. At all relevant times to his claims, Plaintiff was incarcerated in Facility A at Kern  
9 Valley State Prison (“KVSP”) in Delano, California. (Compl. ¶ 2, ECF No. 45; Jeffery Decl., ¶ 2, Ex.  
10 A, Dep. 20:11-21:20.)

11 2. Plaintiff claims he suffers from chronic severe debilitating pain due to congenital  
12 failure segmentation at C2-3 and his lumbar spine. (Compl. ¶ 27, ECF No. 45.)

13 3. Plaintiff admits that narcotics have effectively treated his chronic pain. (Compl. ¶ 27,  
14 ECF No. 45.)

15 4. On December 30, 2005, Dr. Akanno treated Plaintiff regarding his chronic care needs.  
16 During the visit, Plaintiff reported adhering to his pain regimen. At the conclusion of the exam, Dr.  
17 Akanno prescribed a 30 day prescription for Vicodin and continued Plaintiff’s medications for his  
18 other conditions. (Akanno Decl., ¶ 4, Ex. A.)

19 5. On January 26, 2006, Dr. Akanno again treated Plaintiff. During the exam, Plaintiff  
20 requested a change in analgesics. Dr. Akanno prescribed a 30 day prescription for Hydrocodone.  
21 (Akanno Decl., ¶ 5, Ex. B.)

22 6. On February 9, 2006, Dr. Akanno examined Plaintiff. During this visit, Plaintiff  
23 reported having back pain due to his back surgery and specifically complained of discomfort when  
24 utilizing his lower back. Dr. Akanno adjusted the medication regimen by prescribing a daily double  
25 dose of Roxicet, a narcotic commonly used for moderate to severe pain. Dr. Akanno also discontinued  
26 the Vicodin. (Akanno Decl., ¶ 6, Ex. C.)

27 \_\_\_\_\_  
28 <sup>6</sup> Plaintiff filed a statement of undisputed facts setting forth sixteen undisputed facts. Defendant filed a response to each statement of fact and Defendant’s objections are sustained because the statements are all either irrelevant and/or disputed.

1           7.       On July 28, 2006, Plaintiff again met with Dr. Akanno. Plaintiff requested a medical  
2 order for a hot pot. Plaintiff claimed he needed the hot pot to make heat packs in his cell at night to  
3 help alleviate back pain. (Jeffery Decl., ¶ 2. Ex. A, Dep. 83:1-22, 85:2-20, 86:2-13; Compl. ¶¶ 48, 49,  
4 ECF No. 45.)

5           8.       Plaintiff had the option of requesting a hot pot as one of the optional cell electrical  
6 appliances. (Akanno Decl., ¶ 10.)

7           9.       Plaintiff claims that on July 10, 2007, LVS Saucedo reduced the frequency of his pain  
8 medication by removing the noon-time envelope causing him to suffer severe debilitating pain.  
9 (Compl. ¶¶ 30, 31.)

10          10.      In July 2007, Plaintiff filed a staff complaint against LVN Saucedo for allegedly  
11 reducing his pain medications. (Compl. ¶ 31, ECF No. 45.)

12          11.      Plaintiff claims that after he was interviewed on August 22, 2007, by employee J. Key  
13 regarding the staff complaint, that same day employee J. Key spoke to Dr. Akanno

14          12.      Plaintiff claims that after he was interviewed on August 22, 2007, by employee J. Key  
15 regarding the staff complaint, that same day employee J. Key spoke to Dr. Akanno and caused Dr.  
16 Akanno to change a medical order to reduce the frequency of Plaintiff's medication to cover up  
17 Saucedo's acts. (Compl. ¶ 32; Jeffery Decl., ¶ 2, Ex. A, Dep. 78:11-19.)

18          13.      On April 13, 2007, Dr. Akanno examined Plaintiff. During the visit, Plaintiff  
19 requested a prescription for Methadone for pain relief instead of Oxycodone he had been taking. Dr.  
20 Akanno honored the request and ordered Methadone to be taken twice a day. (Barnett Decl., ¶ 14, Ex.  
21 I.)

22          14.      Methadone is generally effective in alleviating chronic pain. A common symptom  
23 associated with higher doses of Methadone treatment is constipation. (Barnett Decl., ¶ 14; Akanno  
24 Decl. ¶ 16.)

25          15.      On June 25, 2007, Plaintiff complained of having "major problems" with constipation.  
26 (Barnett Decl., ¶ 14; Akanno Decl. ¶ 15, Ex. J.)

27          16.      No licensed vocational nurse, including LVN Saucedo, has authority to order or change  
28 any aspect of prescription medications provided to Plaintiff. (Barnett Decl., ¶ 14.)

1 17. Plaintiff has no medical training. (Jeffrey Decl., ¶ 2, Ex. A, Dep. 77:3-4.)

2 18. Dr. Akanno believed that Plaintiff's pain could be effectively managed through  
3 medications. (Akanno Decl., ¶¶ 10-11 and 18.)

4 **C. Defendant's Objections to Plaintiff's Evidence Attached to Opposition**

5 Defendant raises several objections to Plaintiff's declaration and certain exhibits attached to his  
6 opposition. It is not the practice of the Court to rule on evidentiary matters individually in the context  
7 of summary judgment, unless otherwise noted. However, with regard to relevancy objections, given  
8 the Court's duty to determine whether there exists a genuine dispute as to any *material* fact, an  
9 independent objection to evidence as irrelevant is both unnecessary and unhelpful. See, e.g., Carden  
10 v. Chenega Sec. & Protections Servs., LLC, No. CIV 2:09-1799 WBS CMK, 2011 WL 1807384, at \*3  
11 (E.D. Cal. May 10, 2011); Arias v. McHugh, No. CIV 2:09-690 WBS GGH, 2010 WL 2511175, at \*6  
12 (E.D. Cal. Jun. 17, 2010); Tracchia v. Tilton, No. CIV S-06-2916 GEB KJM P, 2009 WL 3055222, at  
13 \*3 (E.D. Cal. Sept. 21, 2009); Burch v. Regents of the University of California, 433 F.Supp.2d 1110,  
14 1119 (E.D. Cal. Jun. 5, 2006). Only the objections to exhibits and evidence that are relevant and need  
15 to be considered in resolving the instant motions will be addressed below.

16 **D. Findings on Defendant's Motion**

17 As previously stated, Plaintiff contends that Defendant Dr. Akanno was deliberately indifferent  
18 to his serious medical needs by denying him a medical order for a hot pot and by changing his pain  
19 medications. Plaintiff further contends that Dr. Akanno retaliated against him because he filed a  
20 grievance against LVN Saucedo.

21 1. Request for Judicial Notice

22 As an initial matter, Defendant requests that the Court take judicial notice of the fact that in  
23 2004 Plaintiff was declared a vexatious litigant by the Monterey County Superior Court. (ECF No.  
24 206-4, Ex. N.) Defendant requests that the Court assess Plaintiff's claims "with particular scrutiny to  
25 ensure that there is some evidence of a causal link between his claims and the evidence." (Reply, at 3  
26 n.2, ECF No. 206.) Defendant's request for judicial notice should be denied because the  
27 determination that Plaintiff has been declared a vexatious litigant by a state court has no relevance to  
28 the instant action and motion for summary judgment addressed herein.

1           2.       Deliberate Indifference to Serious Medical Need

2           While the Eighth Amendment of the United States Constitution entitles Plaintiff to medical  
3 care, the Eighth Amendment is violated only when a prison official acts with deliberate indifference to  
4 an inmate’s serious medical needs. Snow v. McDaniel, 681 F.3d 978, 985 (9th Cir. 2012), overruled  
5 in part on other grounds, Peralta v. Dillard, 744 F.3d 1076, 1082-83 (9th Cir. 2014); Wilhelm v.  
6 Rotman, 680 F.3d 1113, 1122 (9th Cir. 2012); Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).  
7 Plaintiff “must show (1) a serious medical need by demonstrating that failure to treat [his] condition  
8 could result in further significant injury or the unnecessary and wanton infliction of pain,” and (2) that  
9 “the defendant’s response to the need was deliberately indifferent.” Wilhelm, 680 F.3d at 1122 (citing  
10 Jett, 439 F.3d at 1096). Deliberate indifference is shown by “(a) a purposeful act or failure to respond  
11 to a prisoner’s pain or possible medical need, and (b) harm caused by the indifference.” Wilhelm, 680  
12 F.3d at 1122 (citing Jett, 439 F.3d at 1096). The requisite state of mind is one of subjective  
13 recklessness, which entails more than ordinary lack of due care. Snow, 681 F.3d at 985 (citation and  
14 quotation marks omitted); Wilhelm, 680 F.3d at 1122.

15           **a.       Denial of Medical Order for a Hot Pot**

16           It is undisputed that Plaintiff has had a back condition since 1995. (Jeffery Decl. ¶ 2, Ex. A,  
17 Dep. 80:2.) In 2005, Plaintiff underwent back surgery. (Akanno Decl., ¶ 3.) According to Plaintiff,  
18 he suffers from chronic severe debilitating pain due to congenital failure segmentation at C2-3 and his  
19 lumbar spine. (Compl. ¶ 27.) When left untreated, Plaintiff contends to experience a burning pain  
20 with tingling and numbness in his neck and shoulders, loss of strength, migraine headaches, and severe  
21 muscle spasms. He also claims to suffer from shooting pain down his legs, burning in the lower back  
22 region and back spasms. (Compl. ¶ 27.)

23           Dr. Akanno submits his declaration and medical records of Plaintiff which establish that  
24 between December 2005 and October 2006-the relevant time at issue here, Dr. Akanno treated  
25 Plaintiff on several different occasions. On December 30, 2005, Dr. Akanno met with and examined  
26 Plaintiff regarding his chronic care needs. During this visit, Plaintiff reported adhering to his pain  
27 regimen. After the examination, Dr. Akanno prescribed a 30 day prescription for Vicodin and  
28 continued Plaintiff’s medications for his other conditions. (Akanno Decl. ¶ 4, Ex. A.) On January 26,

1 2006, Dr. Akanno examined Plaintiff and Plaintiff requested a change in analgesics. Dr. Akanno  
2 prescribed a 30 day prescription for Hydrocodone. (Akanno Decl. ¶ 5, Ex. B.) On February 9, 2006,  
3 Dr. Akanno examined Plaintiff again. During this visit, Plaintiff reported having back pain due to his  
4 back surgery and complained of discomfort when utilizing his lower back. Plaintiff rated his pain at a  
5 level seven on a scale of 1 through 10, and Dr. Akanno adjusted the medication regimen by  
6 prescribing a daily dose of Roxicet, a narcotic commonly used for moderate to severe pain. Dr.  
7 Akanno also discontinued the Vicodin. (Akanno Decl., ¶ 6, Ex. C.) On April 12, 2006, Plaintiff was  
8 again examined by Dr. Akanno. During the examination, Plaintiff told Dr. Akanno that he had  
9 occasional burning pains in his lower back and shooting pains down his leg. In response to these pain  
10 symptoms, Dr. Akanno added Neurontin (Gabapentin) to Plaintiff's pain treatment regimen.  
11 Neurontin is specifically effective for neuropathic pain. (Akanno Decl. ¶ 7; Ex. D.) On May 10,  
12 2006, Dr. Akanno examined Plaintiff and Plaintiff complained of pains in his lower back and  
13 confirmed adhering to the previously prescribed medications of Roxicet and Neurontin. Dr. Akanno  
14 renewed these medications and increased the doses to three times a day for 90 days. (Akanno Decl. ¶  
15 8; Ex. E.)

16 On or about July 28, 2006, Plaintiff met with Dr. Akanno. During the visit, Plaintiff requested  
17 that Dr. Akanno issue a medical order for a hot pot. Plaintiff claimed that he needed the hot pot to  
18 make heat packs in his cell at night to help alleviate back pain until he received the next installment of  
19 medications in the morning. (Jeffery Decl., ¶ 2, Ex. A. Dep. 83:1-22, 85:12-20; 89:13-19.) Plaintiff  
20 further claimed that he wanted the hot pack because his cell area tended to get cold during the night  
21 causing an increase in pain. (Jeffery Decl., ¶ 2, Ex. A, Dep. 85:17-20.) Dr. Akanno denied the request  
22 because he did not believe that the hot packs were medically necessary and were not the treatment  
23 choice for Plaintiff's medical condition. (Akanno Decl., ¶¶ 10, 11.) Dr. Akanno advised Plaintiff that  
24 while there was no medical basis to authorize the heating device, Plaintiff could still choose the hot  
25  
26  
27  
28

1 pot as one of his optional electrical appliances.<sup>7</sup> (Akanno Decl., ¶ 10, Ex. G; Jeffery Decl., ¶ 2, Ex. A,  
2 Dep. 83:1-18; 86:4-13.)

3 On September 13, 2006, Plaintiff was prescribed Hydrocodone/APAP. On October 17, 2006,  
4 Dr. Akanno examined Plaintiff and Plaintiff complained of pain. Dr. Akanno increased the dosage of  
5 Hydrocodone/APAP (acetaminophen), the medication Plaintiff had been prescribed by the other  
6 physician in September. (Akanno Decl., ¶ 12, Ex. H.)

7 Defendant submits evidence that heat wraps are not a medically accepted modality of treatment  
8 and would not have provided any kind of meaningful relief to Plaintiff. (Barnett Decl., ¶¶ 10-12;  
9 Akanno Decl. ¶¶ 10-11.) Dr. Barnett declares that “Title 15 [of the California Code of Regulations]  
10 section 3350(as) explicitly allows for medical services that are shown ‘by outcome data to be  
11 effective.’ The authoritative study by the Cochrane Collaboration published on January 25, 2006  
12 found ‘[t]here is still not enough evidence’ to recommend heat treatments for treatment of long term  
13 back pain and only moderate evidence in limited trials of any benefit for short term reduction of pain  
14 by heat wraps. Second, the permission for use of a hot pot in any cell room is not under medical  
15 control. Inmates can get permission for heating units in cells through custody. Physicians cannot  
16 generally order a device to heat water in a cell, and should not do so as a medical therapy unless the  
17 physician can articulate a clear medical need and benefit from boiling water in the cell.” (Barnett  
18 Decl. ¶ 11.)

19 A mere difference of opinion between Plaintiff and Defendant regarding medical treatment or  
20 the need for a certain medical device does not give rise to a claim under section 1983. Snow, 681 F.3d  
21 at 987-88; Wilhelm, 680 F.3d at 1122-23; Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).  
22 Rather, Plaintiff must show that the course of treatment chosen was medically unacceptable under the  
23 circumstances and that it was chosen in conscious disregard of an excessive risk to Plaintiff’s health.

24  
25  
26 <sup>7</sup> CDCR policy provides that inmates are allowed to have two electronic devices/appliances in the cell. Plaintiff had the  
27 option to choose a hot pot as one of his optional appliances. (Akanno Decl., ¶ 10, Ex. G; Jeffery Decl., ¶ 2, Ex. A, Dep.  
28 83:1-18; 86:4-13.)

1 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986) (quotation marks omitted); accord Snow, 681  
2 F.3d at 987-88.

3 Defendant has met his burden of setting forth evidence demonstrating that the denial of a  
4 medical order for a hot pot was medically acceptable under the circumstances, which shifts the burden  
5 to Plaintiff to submit admissible evidence showing that the course of treatment chosen by Defendant  
6 was medically unacceptable and that it was chosen in conscious disregard of an excessive risk to  
7 Plaintiff's health. Plaintiff has not done so.

8 As a lay witness, Plaintiff is not qualified to render an opinion that Defendant should have  
9 issued a medical order for a hot pot, and that Defendant's failure to do so was in contravention of  
10 acceptable medical standards. Fed. R. Evid. 701, 702. In opposition, Plaintiff contends that a physical  
11 therapist "recommended" the hot pack as a modality, and it was therefore medically necessary for him  
12 to have access to a hot pot to boil water to make heating packs in his cell. However, a mere  
13 "recommendation" for a certain modality is not sufficient proof that the particular treatment is  
14 medically necessary to treat a condition. Pursuant to Title 15 of the California Code of Regulations  
15 Section 3350, inmates are only entitled to those medical appliances which are medically necessary.  
16 Cal. Code. Regs., tit. 15, § 3350. In addition, the fact that a heating pad device is used during physical  
17 therapy sessions is insufficient to establish that the treatment is medically necessary. (Pl.'s Opp'n,  
18 ECF No. 201, Ex. E, at p.6.) (An undated order for physical therapy from Plaintiff's prior institution  
19 listing a number of modalities to be used during therapy sessions: "Modalities: Traction, Hot Packs,  
20 Ultrasound, TENS.") Furthermore, there is no indication that these records or the therapist's  
21 recommendation was made in response to an assessment of Plaintiff's condition as of 2006. Two of  
22 the physical therapy documents are not dated and the third is date stamped May 2007, one year after  
23 Dr. Akanno denied Plaintiff's July 2006 hot pot request. (Pl.'s Opp'n, Ex. E.)

24 Plaintiff further contends that he is entitled to the "hot pot" as an accommodation under the  
25 Armstrong Remedial Plan, citing to Armstrong v. Davis, 275 F.3d 849, 854 (9th Cir. 2001).<sup>8</sup> Plaintiff  
26

---

27 <sup>8</sup> The Armstrong Remedial Plan refers to a remedial order issued in Armstrong v. Davis, No. CV 94-2307-CW, by the  
28 United States District Court for the Northern District of California to enjoin practices that discriminated against disabled  
inmates in California prisons. See Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001); Armstrong v. Wilson, 124 F.3d 1019

1 may pursue a claim for assistance under the Armstrong Plan “via the consent decree or through class  
2 counsel.” Crayton v. Terhune, No. C 98-4386 CRB (PR), 2002 WL 31093590, \*4 (N.D. Cal. Sept. 17,  
3 2002). Plaintiff may not sue for damages and/or injunctive relief in this action on the basis that  
4 Defendant allegedly violated the Armstrong Remedial Plan as such relief must be pursued through the  
5 procedures provided by that plan. See Frost v. Symington, 197 F.3d 348, 358-59 (9th Cir. 1999); see  
6 also Clayton v. Terhune, 2002 WL 31093590, \*4.

7 The fact that some physical therapists recommended a “hot pot” demonstrates only a difference  
8 of opinion between medical professionals, which is insufficient as a matter of law to establish  
9 deliberate indifference. See Snow, 681 F.3d at 987. As a result, Plaintiff’s evidence does not create a  
10 triable issue of fact regarding whether Dr. Akanno was deliberately indifferent to Plaintiff’s medical  
11 needs by denying a medical order for a hot pot. In light of the authoritative findings determining that  
12 the heat treatments do not successfully alleviate pain, there are insufficient facts to demonstrate that  
13 Dr. Akanno was deliberately indifference to Plaintiff’s medical needs. Nor was Plaintiff placed at risk  
14 of any “objectively, sufficiently serious” harm by denying the request because Plaintiff was treated  
15 with other medications. (Compl. ¶ 27; Akanno Decl. ¶¶ 4-8, Exs. A-E.) Indeed, between December  
16 2005 and October 2006 (and after), Dr. Akanno treated Plaintiff with narcotic pain medications to  
17 address Plaintiff’s chronic pain and made necessary adjustments based on Plaintiff’s complaints.  
18 (Akanno Decl. ¶¶ 4-8, Exs. A-E.) Plaintiff admits that narcotics effectively treated his chronic pain.  
19 (Compl. ¶ 27.) Furthermore, Dr. Akanno’s ability to issue an order for use of a hot pot in a cell is  
20 severely restricted and is not subject to medical control. Although an inmate may obtain permission  
21 from custodial staff for use of heating appliances, physicians do not have the authority to order a  
22 heating device for the cell, and may not do so as a means of medical therapy unless a compelling  
23 medical need and benefit exists. (Akanno Decl. ¶ 11; Barnett Decl. ¶ 11.) Here, Defendant submits  
24 evidence that Plaintiff’s medical condition did not warrant use of a hot pot and there was no medical  
25 justification for an order requiring him to boil water in his cell. (Barnett Decl., ¶¶ 9-12; Akanno Decl.,  
26 ¶¶ 10-11.) In any event, Plaintiff was not prevented from requesting a hot pot as one of the optional

---

27  
28 (9th Cir. 1997) (affirming order requiring submission of a remedial plan for CDCR’s compliance with the Americans with Disabilities Act, 42 U.S.C. §§ 12131-34, as well as the Rehabilitation Act of 1973, 29 U.S.C. § 749.)

1 electrical appliances for use as an extra cell privilege. (Akanno Decl., ¶ 10.)

2 In sum, the record demonstrates that Plaintiff’s request for a medical order to obtain a hot pot  
3 was not medically justified and was properly denied by Dr. Akanno. Plaintiff’s mere disagreement  
4 with the course of treatment chosen by Defendant does not support a claim under the Eighth  
5 Amendment, and Defendant is entitled to summary judgment. Snow, 681 F.3d 987-88. Accordingly,  
6 Dr. Akanno is entitled to summary judgment on this claim.

7 **b. Change in Pain Medication**

8 As previously stated, Plaintiff contends that Dr. Akanno was deliberately indifferent to  
9 Plaintiff’s medical needs by changing his pain medications on August 22, 2007. Plaintiff specifically  
10 contends that Dr. Akanno reduced Plaintiff’s pain medications to cover up Nurse Saucedo’s acts of  
11 already reducing the dosage on July 10, 2007.

12 Plaintiff’s medical records demonstrate that Dr. Akanno adjusted Plaintiff’s pain regimen in  
13 response to his complaints of side effects, particularly constipation. As demonstrated above, Dr.  
14 Akanno examined Plaintiff, diagnosed his condition and offered treatments on December 30, 2005,  
15 January 26, 2006, February 9, 2006, April 12, 2006, May 10, 2006, and October 17, 2006. (Akanno  
16 Decl., ¶¶ 4-8, 13, Exs. A-E, H.)

17 On April 13, 2007, Dr. Akanno prescribed, at Plaintiff’s request, a prescription for Methadone  
18 to be taken twice daily. (Barnett Decl., ¶ 13; Akanno Decl., ¶ 14, Ex. I.) Methadone is generally  
19 effective in alleviating chronic pain; however, a common symptom associated with higher doses of  
20 Methadone treatment is constipation. (Barnett Decl., ¶ 14; Akanno Decl., ¶ 16.) On June 25, 2007,<sup>9</sup>  
21 Plaintiff complained of having “major problems” with constipation. (Barnett Decl., ¶ 14; Akanno  
22 Decl., ¶ 15, Ex. J.) In response, Dr. Akanno reduced Plaintiff’s Methadone intake to a single pill each  
23 night for ninety days thereafter. (Akanno Decl., ¶ 16, Ex. K.) Thus, the evidence presented by  
24 Defendant demonstrates that Plaintiff’s medication was reduced in June 2007 to address Plaintiff’s  
25 unpleasant side effects. While Plaintiff’s Oxycodone prescription was reduced on August 22, 2017,  
26 from three times daily to twice daily, there is no evidence that it was done with “deliberate

27 \_\_\_\_\_  
28 <sup>9</sup> The note is incorrectly written as 6-26-06, when the visit actually occurred in 2007. (Akanno Decl., ¶ 16; Barnett Decl. ¶ 14.)

1 indifference,” as Plaintiff was also receiving Methadone as part of his pain regime. Furthermore,  
2 Plaintiff’s claim that Dr. Akanno intended to cause Plaintiff pain by reducing his medication is belied  
3 by the medical records which demonstrate that just two days later Dr. Akanno prescribed pain  
4 medications. On August 24, 2007, Dr. Akanno examined Plaintiff again and continued all of his  
5 medications, including Methadone and “strongly advised” Plaintiff to adhere to the medication  
6 schedule after he reported that he had abandoned his medications. (Akanno Decl., ¶ 16, Ex. L; Barnett  
7 Decl., ¶ 15.) Dr. Akanno saw Plaintiff again on October 2, 2007, and when Plaintiff indicated that he  
8 was no longer taking Methadone, Dr. Akanno prescribed Oxycodone three times daily. (Akanno  
9 Decl., ¶ 17; Ex. M.) On November 8, 2007, Dr. Akanno, at the request of Plaintiff, provided a referral  
10 to see a neurologist for back pain. (Jeffery Supp. Decl., ¶¶ 3-4, Exs. O, P.) In December 2007, Dr.  
11 Akanno filled out a Disability Placement Program Form (CDC 1845) confirming that Plaintiff was a  
12 full-time wheelchair user and noted Plaintiff should have a lower bunk. (Jeffery Supp. Decl., ¶ 5, Ex.  
13 Q.) Plaintiff is required to produce admissible evidence that the course of treatment prescribed by  
14 Defendant on August 22, 2017, was medically unacceptable under the circumstances and was chosen  
15 in conscious disregard of an excessive risk to Plaintiff’s health. Plaintiff has failed to do so. While  
16 there were changes in Plaintiff’s medications, nothing about the changes reflect “deliberate  
17 indifference” on the part of Defendant Dr. Akanno. At most, the changes reflect Plaintiff’s  
18 disagreement with Dr. Akanno’s decision to change his pain management regime. The fact that  
19 Plaintiff believes the prescribed course of treatment did not alleviate all of his pain does not  
20 demonstrate that Dr. Akanno was deliberately indifferent to his medical needs. Snow v. McDaniel,  
21 681 F.3d at 987-88; Wilhelm v. Rotman, 680 F.3d at 1122-23; Franklin v. Oregon, 662 F.2d 1337,  
22 1344 (9th Cir. 1981). Because Plaintiff was suffering constipation from high dosages of pain  
23 medications and was taking Methadone, the brief and limited reduction in Oxycodone from three  
24 times daily to twice daily does not demonstrate deliberate indifference. As stated by Dr. Barnett, “Dr.  
25 Akanno’s caution in carefully prescribing narcotics and accommodations was appropriate and  
26 consistent with best practices. That Dr. Akanno did order substantial amounts of medication to treat  
27 Plaintiff’s professed pain, along with appropriate accommodations is evidence of his compassion, not  
28

1 indifference.” (Barnett Decl. ¶ 16.) Accordingly, Defendant Dr. Akanno is entitled to summary  
2 judgment on this claim.

3 3. Retaliation

4 Plaintiff also alleges that Defendant Akanno withheld pain medication from Plaintiff in  
5 retaliation for filing a grievance against Nurse Saucedo regarding his medical treatment.

6 “Prisoners have a First Amendment right to file grievances against prison officials and to be  
7 free from retaliation for doing so.” Watson v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (citing  
8 Brodheim v. Cry, 584 F.3d 1262, 1269 (9th Cir. 2009)). A retaliation claim in the prison context has  
9 five elements: (1) the plaintiff engaged in protected conduct, (2) the defendant took adverse action  
10 against the plaintiff, (3) there was a causal connection between the adverse action and the protected  
11 conduct, (4) the official’s acts would chill or silence a person of ordinary firmness from future First  
12 Amendment activities, and (5) the retaliatory action did not advance legitimate goals of the  
13 correctional institution. Id.

14 Because the reduction in medication reasonably advanced a legitimate penological goal and  
15 there is an insufficient causal connection between the adverse action and the protected conduct,  
16 Plaintiff’s retaliation claim fails. In responding to Plaintiff’s appeal, on August 22, 2017, Registered  
17 Nurse, J. Key stated:

18 As per our interview conversation, your appeal has been denied. I spoke with Dr. Akanno this  
19 morning after reviewing your chart and it was decided by Dr. Akanno to change your  
20 medication to twice daily. If you feel that you need this medication more than the ordered  
21 dose, you may submit a 7362 and discuss this with your PCP.

22 (Pl. Opp’n, Ex. K.)

23 Dr. Akanno declares that he changed Plaintiff’s pain medication on June 26, 2017, prior to the  
24 August 22, 2017, date in response to Plaintiff’s claimed side effects. (Akanno Decl., ¶ 16.) Plaintiff’s  
25 speculation that Dr. Akanno’s decision was done in retaliation for filing a grievance is belied by  
26 Plaintiff’s medical record both before and after August 22, 2017. A retaliation claim cannot rest on  
27 the logical fallacy of post hoc, ergo propter hoc, literally, “after this, therefore because of this.” See  
28 Huskey v. City of San Jose, 204 F.3d 893, 899 (9th Cir. 2000). As stated above, in 2005 and 2006  
(and thereafter), Dr. Akanno examined and treated Plaintiff with narcotic pain medications to reduce

1 the pain, and frequently re-evaluated Plaintiff's pain management regime. More specifically, Dr.  
2 Akanno examined Plaintiff and provided treatment on December 30, 2005, January 26, 2006, February  
3 9, 2006, April 12, 2006, May 10, 2006 and October 17, 2006. ((Akanno Decl., ¶¶ 4-8, 13, Exs. A-E,  
4 H.) In April 2007, Dr. Akanno prescribed Methadone and referred Plaintiff to physical therapy.  
5 (Akanno Decl., ¶ 14, Ex. I.) Then, on August 24, 2007-just two days *after* the alleged retaliatory  
6 action, Dr. Akanno examined Plaintiff again and continued all of his medications, including  
7 Methadone and "strongly advised" Plaintiff to adhere to the medication schedule after he reported that  
8 he had abandoned his medications. (Akanno Decl., ¶ 16, Ex. L; Barnett Decl., ¶ 15.) Dr. Akanno saw  
9 Plaintiff again on October 2, 2007, and when Plaintiff indicated that he was no longer taking  
10 Methadone, Dr. Akanno prescribed Oxycodone three times daily. (Akanno Decl., ¶ 17; Ex. M.) On  
11 November 8, 2007, Dr. Akanno, at the request of Plaintiff, provided a referral to see a neurologist for  
12 back pain. (Jeffery Supp. Decl., ¶¶ 3-4, Exs. O, P.) In December 2007, Dr. Akanno filled out a  
13 Disability Placement Program Form (CDC 1845) confirming that Plaintiff was a full-time wheelchair  
14 user and noted Plaintiff should have a lower bunk. (Jeffery Supp. Decl., ¶ 5, Ex. Q.) This evidence  
15 refutes Plaintiff's claim of retaliation, and Dr. Akanno's motion for summary judgment on this claim  
16 should be granted.

#### 17 IV.

#### 18 RECOMMENDATIONS

19 Based on the foregoing, it is HEREBY RECOMMENDED that:

- 20 1. Defendant Dr. Akanno's motion for summary judgment be granted in its entirety; and
- 21 2. The Clerk of Court be directed to enter judgment in favor of Defendant Dr. Akanno.

22 These Findings and Recommendations will be submitted to the United States District Judge  
23 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after  
24 being served with these Findings and Recommendations, the parties may file written objections with  
25 the Court. The document should be captioned "Objections to Magistrate Judge's Findings and  
26 Recommendations." The parties are advised that failure to file objections within the specified time

27 ///

28 ///

1 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.  
2 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IT IS SO ORDERED.

Dated: May 19, 2017

  
UNITED STATES MAGISTRATE JUDGE