

1 **II. Legal Standard**

2 Summary judgment is appropriate when the pleadings, disclosure materials, discovery,
3 and any affidavits provided establish that “there is no genuine dispute as to any material fact and
4 the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A material fact is
5 one that may affect the outcome of the case under the applicable law. See Anderson v. Liberty
6 Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine “if the evidence is such that a
7 reasonable [trier of fact] could return a verdict for the nonmoving party.” Id.

8 The party seeking summary judgment “always bears the initial responsibility of informing
9 the district court of the basis for its motion, and identifying those portions of the pleadings,
10 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,
11 which it believes demonstrate the absence of a genuine issue of material fact.” Celotex Corp. v.
12 Catrett, 477 U.S. 317, 323 (1986). The exact nature of this responsibility, however, varies
13 depending on whether the issue on which summary judgment is sought is one in which the
14 movant or the nonmoving party carries the ultimate burden of proof. See Soremekun v. Thrifty
15 Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007). If the movant will have the burden of proof at
16 trial, it must “affirmatively demonstrate that no reasonable trier of fact could find other than for
17 the moving party.” Id. (citing Celotex, 477 U.S. at 323). In contrast, if the nonmoving party will
18 have the burden of proof at trial, “the movant can prevail merely by pointing out that there is an
19 absence of evidence to support the nonmoving party’s case.” Id.

20 If the movant satisfies its initial burden, the nonmoving party must go beyond the
21 allegations in its pleadings to “show a genuine issue of material fact by presenting affirmative
22 evidence from which a jury could find in [its] favor.” F.T.C. v. Stefanchik, 559 F.3d 924, 929 (9th
23 Cir. 2009) (emphasis omitted). “[B]ald assertions or a mere scintilla of evidence” will not suffice
24 in this regard. Id. at 929; see also Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475
25 U.S. 574, 586 (1986) (“When the moving party has carried its burden under Rule 56[], its
26 opponent must do more than simply show that there is some metaphysical doubt as to the material
27 facts.”) (citation omitted). “Where the record taken as a whole could not lead a rational trier of
28 fact to find for the non-moving party, there is no ‘genuine issue for trial.’” Matsushita, 475 U.S.

1 at 587 (quoting First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

2 In resolving a summary judgment motion, “the court does not make credibility
3 determinations or weigh conflicting evidence.” Soremekun, 509 F.3d at 984. Instead, “[t]he
4 evidence of the [nonmoving party] is to be believed, and all justifiable inferences are to be drawn
5 in [its] favor.” Anderson, 477 U.S. at 255. Inferences, however, are not drawn out of the air; the
6 nonmoving party must produce a factual predicate from which the inference may reasonably be
7 drawn. See Richards v. Nielsen Freight Lines, 602 F.Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd,
8 810 F.2d 898 (9th Cir. 1987).

9 In arriving at these findings and recommendations, the Court carefully reviewed and
10 considered all arguments, points and authorities, declarations, exhibits, statements of undisputed
11 facts and responses thereto, if any, objections, and other papers filed by the parties. Omission of
12 reference to an argument, document, paper, or objection is not to be construed to the effect that
13 this Court did not consider the argument, document, paper, or objection. This Court thoroughly
14 reviewed and considered the evidence it deemed admissible, material, and appropriate.

15 **III. Discussion**

16 **A. Evidentiary Objections**

17 Defendants object to certain of Plaintiff’s evidence, statements, and opinions submitted in
18 opposition to Defendants’ motion for summary judgment. As noted above, not every objection
19 will be addressed by the Court individually, as doing so is neither necessary nor is that the
20 practice of this Court in the summary judgment context. For the sake of clarity and to the extent
21 it is appropriate, certain individual objections have been addressed by the Court below. Other
22 objections are better dealt with here, in general terms.

23 The hearsay objections are overruled. Declarations which contain hearsay are admissible
24 for summary judgment purposes if they can be presented in admissible form at trial. Fonseca v.
25 Sysco Food Servs. of Ariz., Inc., 374 F.3d 840, 846 (9th Cir. 2004). Furthermore, “[i]f the
26 significance of an out-of-court statement lies in the fact that the statement was made and not in
27 the truth of the matter asserted, then the statement is not hearsay.” Calmat Co. v. U.S. Dep’t of
28 Labor, 364 F.3d 1117, 1124 (9th Cir. 2004). At this stage, the Court did not find the hearsay

1 objections raised by the Defendants to be preclusive of the evidence submitted.

2 Finally, given the Court's duty to determine whether there exists a genuine dispute as to
3 any material fact, objections to evidence as irrelevant or lacking in foundation are both
4 unnecessary and unhelpful. See e.g., Carden v. Chenega Sec. & Protections Servs., LLC, No.
5 CIV 2:09-1799 WBS CMK, 2011 WL 1807384, at *3 (E.D. Cal. May 10, 2011); Arias v.
6 McHugh, No. CIV 2:09-690 WBS GGH, 2010 WL 2511175, at *6 (E.D. Cal. Jun. 17, 2010);
7 Tracchia v. Tilton, No. CIV S-062919 GEB KJM P, 2009 WL 3055222, at *3 (E.D. Cal. Sept. 21,
8 2009); Burch v. Regents of Univ. of Cal., 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006).

9 **B. Undisputed Material Facts (“UMF”)²**

10 1. Plaintiff, LaKeith McCoy, claims he has an allergy to eggs and that he was being
11 denied adequate food because he did not receive a dietary supplement from his primary care
12 physician, Defendant Garikaparathi, or a food substitution from kitchen supervisors, Defendants
13 Chavez, Keeler, and Steiber. Plaintiff also claims that other portions of his meals were
14 contaminated with eggs. (ECF No. 10, First Amended Complaint (“FAC”) pp. 4–9.)

15 2. Plaintiff claims that his trays would come with the eggs mixed in with or on top of
16 other food items. He claims that this prevented him from eating those other food items and he
17 was denied an adequate meal. (FAC pp. 4–7.)

18 3. Plaintiff was housed in a security housing unit, so his food trays were delivered to
19 him by custody staff in his cell. (Pl.'s Dep. 26:7–9, 57:6–14; Chavez Decl. ¶ 4; Keeler Decl. ¶ 3.)

20 4. Defendant Garikaparathi did not prepare, serve, or deliver inmate food trays, and
21 did not personally witness any cross contamination of Plaintiff's food trays. Kitchen supervisors
22 Defendants Chavez, Keeler, and Steiber also did not prepare, serve, or deliver inmate food trays,
23 and they did not personally witness any cross contamination of Plaintiff's food trays.
24 (Garikaparathi Decl. ¶¶ 15, 20; Keeler Decl. ¶ 4; Steiber Decl. ¶ 4; Chavez Decl. ¶ 3; see also Pl.'s
25 Dep. 69:20–25, 70:1–16.)

26 ² See Defendants' Statement of Undisputed Facts, (ECF No. 58-3), and Plaintiff's Opposing
27 Statement of Undisputed Material Facts, (ECF No. 64, pp. 10–16). Unless otherwise indicated,
28 disputed and immaterial facts are omitted from this statement and relevant objections are
overruled.

1 5. Plaintiff’s medical records do not reflect that he was ever tested and officially
2 diagnosed with an egg allergy, but do contain notes regarding Plaintiff’s egg allergy. (Feinberg
3 Decl. ¶ 7; Garikaparathi Decl. ¶ 9; see also Pl.’s Dep. 29:10–17, 32:5–11; ECF No. 64 p. 21–23,
4 Pl.’s Opp’n, Ex. A.)

5 6. The California Department of Corrections and Rehabilitation (“CDCR”) provides
6 all inmates with a feeding program that assures they receive an adequate diet. This is
7 accomplished by establishing a food control program based upon a ration of each food item
8 sufficient in quantity to maintain an adequate diet and assure a menu pattern which is acceptable
9 to the inmate population. (DOM § 51130.21; Chavez Decl. ¶ 9.)

10 7. The parameters and qualifications for inmates to receive dietary supplements and
11 special diets is established through the inmate health care policies and procedures. When an
12 inmate requests a special diet due to a claimed food intolerance or allergy their primary care
13 physician will evaluate and determine if the allergy can be properly managed by educating the
14 inmate to avoid the identified food. (Feinberg Decl. ¶¶ 4, 8; Garikaparathi Decl. ¶ 5.)

15 8. Inmates allergic or intolerant of a readily identified food will be educated to avoid
16 the offending food, but no food substitution will be given. (Feinberg Decl. ¶ 4; Garikaparathi
17 Decl. ¶ 7; Keeler Decl. ¶ 6; Steiber Decl. ¶ 6; Chavez Decl. ¶ 6.)

18 9. CDCR’s outpatient dietary intervention procedure states that the CDCR menu
19 purposefully contains an average of 300 to 400 calories per day more than required for the
20 average person. This calorie buffer allows patient-inmates to choose not to eat certain foods,
21 either due to food sensitivity or general dislike, without compromising nutritional health.
22 (Feinberg Decl. ¶ 5, Ex. B; Garikaparathi Decl. ¶ 4; Keeler Decl. ¶ 10; Steiber Decl. ¶ 10; Chavez
23 Decl. ¶ 10.)

24 10. Additionally, the guidelines for managing a food allergy or sensitivity state that
25 prison food service staff is not required to provide inmates with any special food substitutions.
26 The guidelines also state that avoiding the problem food is the inmate’s responsibility. (Keeler
27 Decl. ¶ 8, Ex. B.)

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1 11. Plaintiff was told it was his responsibility to avoid foods with egg protein. (Pl.’s
2 Dep. 32:7–11; Keeler Decl. ¶ 8, Ex. A.)

3 12. Plaintiff received a copy of the guidelines for managing a food allergy or
4 sensitivity, which included a list of foods that contain egg protein that he should avoid. (Pl.’s
5 Dep. 32:7–25, 33:1–14; Keeler Decl. ¶ 8, Ex. B.)

6 13. Plaintiff claims he was malnourished and requested a dietary supplement. (FAC
7 pp. 7–9.)

8 14. There are several factors that must be considered when determining whether or not
9 an inmate needs a food supplement. The need for a nourishment or supplement for moderate to
10 severe protein/calorie malnutrition due to metabolic deficiency or metabolic response to
11 injury/illness is evidenced by: (1) significant weight loss of ten percent or more over the prior six
12 months; (2) serum albumin less than 2.5 milligrams per deciliter (mg/dL); or (3) body mass index
13 (BMI) less than 18. (Feinberg Decl. ¶ 8; Garikaparathi Decl. ¶ 5.)

14 15. Plaintiff was treated by Defendant Garikaparathi on January 3, 2013, February 5,
15 2013, and April 24, 2013. (Feinberg Decl. ¶ 11; Garikaparathi Decl. ¶ 11.)

16 16. Based on Plaintiff’s weight, body mass index, and serum albumin levels during the
17 time he was in the care of Defendant Garikaparathi, the treatment of Plaintiff’s food allergy was in
18 compliance with the established medical services policy and procedure. (Feinberg Decl. ¶ 15;
19 Garikaparathi Decl. ¶¶ 12–14, 16–17; see also Pl.’s Dep. 80:9–14, 81:25, 82:1–2.)

20 17. Plaintiff has also been seen by various medical professionals, before and after
21 Defendant Garikaparathi’s treatment, who did not provide him with a nutritional or dietary
22 supplement because he did not qualify under the established inmate medical services policy and
23 procedure. (Feinberg Decl. ¶ 19.)

24 **C. Analysis**

25 “[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate
26 must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091,
27 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). The two-part test for
28 deliberate indifference requires the plaintiff to show (1) “a ‘serious medical need’ by

1 demonstrating that failure to treat a prisoner’s condition could result in further significant injury
2 or the ‘unnecessary and wanton infliction of pain,’” and (2) “the defendant’s response to the need
3 was deliberately indifferent.” Jett, 439 F.3d at 1096; Wilhelm v. Rotman, 680 F.3d 1113, 1122
4 (9th Cir. 2012).

5 Deliberate indifference is shown where the official is aware of a serious medical need and
6 fails to adequately respond. Simmons v. Navajo Cty., Ariz., 609 F.3d 1011, 1018 (9th Cir. 2010).
7 Deliberate indifference is a high legal standard. Simmons, 609 F.3d at 1019; Toguchi v. Chung,
8 391 F.3d 1051, 1060 (9th Cir. 2004). The prison official must be aware of facts from which he
9 could make an inference that “a substantial risk of serious harm exists” and he must make the
10 inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

11 The Eighth Amendment’s prohibition against cruel and unusual punishment protects
12 prisoners not only from inhumane methods of punishment but also from inhumane conditions of
13 confinement. Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006) (citing Farmer, 511
14 U.S. at 847, and Rhodes v. Chapman, 452 U.S. 337, 347 (1981)) (quotation marks omitted).
15 Prison officials must ensure that inmates receive adequate food, clothing, shelter, medical care
16 and personal safety. Farmer, 511 U.S. at 832.

17 “Adequate food is a basic human need protected by the Eighth Amendment.” Keenan v.
18 Hall, 83 F.3d 1083, 1091 (9th Cir. 1996). The Eighth Amendment requires only that prisoners
19 receive food that is adequate to maintain health. LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir.
20 1993). However, the Ninth Circuit has found that “[t]he sustained deprivation of food can be
21 cruel and unusual punishment when it results in pain without any penological purpose.” Foster v.
22 Runnels, 554 F.3d 807, 812–13 (9th Cir. 2009) (finding the denial of sixteen meals in twenty-
23 three days a sufficiently serious deprivation for Eighth Amendment purposes).

24 In their motion for summary judgment, Defendants contend that Plaintiff’s self-diagnosed
25 egg allergy did not qualify him for a food substitution or supplement, based on the established
26 inmate medical services policies and procedures. Specifically, Defendants argue that Defendant
27 Garikaparathi’s treatment was within the standard of care and not deliberately indifferent to any
28 serious medical need, that CDCR’s heart healthy menu provided Plaintiff with enough calories

1 for adequate nutrition even without eating eggs and egg protein, and that Defendants Chavez,
2 Keeler, and Steiber did not personally prepare, serve, deliver, contaminate, or witness
3 contamination of Plaintiff's food trays. In addition, Defendants argue that they are entitled to
4 qualified immunity. (ECF No. 58-2.)

5 Plaintiff, in turn, argues that his chief complaint is that the food he receives is in smaller
6 portions than required by the CDCR feeding program, and that the food was contaminated with
7 eggs. As a result, he cannot eat a majority of food on the tray, and was therefore in need of a
8 dietary supplement. (ECF No. 64.) In reply, Defendants argue that Plaintiff primarily relies upon
9 the allegations of his complaint to support his position, and that he has otherwise failed to provide
10 evidence to support his contentions. (ECF No. 67.)

11 **1. Defendant Garikaparathi**

12 Plaintiff's argument that Defendant Garikaparathi denied him medical care by failing to
13 order him a dietary supplement or substitution in response to his egg allergy is unavailing. First,
14 although there is some dispute regarding whether Plaintiff was officially diagnosed by a medical
15 professional with an egg allergy, the undisputed evidence demonstrates that Defendant
16 Garikaparathi treated Plaintiff as though he had received an official diagnosis. (UMF Nos. 5, 11,
17 12, 16.) Accordingly, the undisputed evidence further shows that Defendant Garikaparathi
18 followed CDCR policy while treating Plaintiff's egg allergy and in reviewing Plaintiff's medical
19 records, and under those parameters Plaintiff did not qualify for a dietary supplement. (UMF
20 Nos. 7, 16, 17.)

21 Though Plaintiff argues that his weight dropped as low as 139 pounds following the
22 identification of his egg allergy, following a peak weight of 185 pounds when he entered the
23 prison system, Plaintiff does not provide the date at which his weight dropped to 139, or the date
24 that he entered the prison system. (See ECF No. 64, p. 18.) Plaintiff also does not provide any
25 evidence that even at a weight of 139 pounds, and his claimed height of "nearly 6' 0" tall," that
26 his BMI calculation dropped low enough to qualify him for a dietary supplement. (See id.)

27 Rather, the undisputed evidence demonstrates that Defendant Garikaparathi considered the
28 relevant policies, conducted an assessment based on Plaintiff's medical records and health at the

1 time of his treatment of Plaintiff, and determined that Plaintiff did not qualify for a supplement.
2 (UMF No. 16.) Specifically, Plaintiff's medical records state that he was treated by Defendant
3 Garikaparathi on January 3, 2013, February 5, 2013, and April 24, 2013, only. (Garikaparathi
4 Decl., Ex. A.) During those appointments, Plaintiff's height was recorded as 69 inches, and his
5 weight was recorded at 146, 149, and 151 pounds, and Plaintiff's BMI was calculated at 21.56,
6 22, and 22.3, respectively. (*Id.*) Defendant Garikaparathi states that, based on Plaintiff's records,
7 Plaintiff's BMI never dropped below the threshold of 18, and he did not have a substantial weight
8 loss over a period of six months, as required under CDCR policy. (*Id.* ¶ 16.) Thus, based on
9 Plaintiff's medical history, medical procedures, and Defendant Garikaparathi's training,
10 knowledge, and expertise, it was determined that Plaintiff did not qualify for a supplement for his
11 food allergy pursuant to CDCR outpatient dietary intervention procedures. (*Id.* ¶¶ 16, 18.)

12 Under Federal Rule of Evidence 701, Plaintiff, a layperson, is not qualified to offer
13 medical opinions or conclusions based on his symptoms or the course of his medical treatment.
14 Plaintiff's unsupported opinion that he required a dietary supplement or substitution, or that he
15 was being provided an insufficient quantity of food, is not admissible. Only an expert witness
16 with specialized knowledge may determine whether Defendant Garikaparathi's conduct was within
17 the appropriate standard of care, whether Defendant's actions or failure to act were the cause of
18 any harm, or if the denial of a dietary supplement caused Plaintiff harm.

19 Plaintiff presents only his own unsupported assertions that Defendant Garikaparathi acted
20 unreasonably in failing to order him a dietary supplement. At most, Plaintiff's declarations raise
21 a question as to whether there was a lapse in Defendant Garikaparathi's professional judgment. In
22 other words, there may be an issue of fact as to whether Defendant acted negligently. However,
23 well-established precedent is clear that any perceived lapse of Defendant's professional judgment
24 in this context would not equate to an Eighth Amendment violation. *See Toguchi*, 391 F.3d at
25 1057 ("Mere negligence in diagnosing or treating a medical condition, without more, does not
26 violate a prisoner's Eighth Amendment rights.") (citation omitted).

27 This evidence, construed in favor of Plaintiff, is insufficient to raise a genuine dispute for
28 trial as to whether Defendant "disregarded an excessive risk to inmate health and safety" as is

1 required to show deliberate indifference. See Toguchi, 391 F.3d 1057. The Court concludes that
2 there is no genuine issue of material fact preventing summary judgment in favor of Defendant
3 Garikaparathi concerning the failure to order Plaintiff a dietary supplement. Defendant
4 Garikaparathi treated Plaintiff the same as a patient with an official diagnosis of an egg allergy,
5 considered the applicable factors for inmates to receive dietary supplements under CDCR policy,
6 and based on Plaintiff's medical history and Defendant Garikaparathi's professional expertise
7 determined that a supplement was not necessary. Therefore, summary judgment should be
8 granted as to Defendant Garikaparathi.

9 **2. Defendants Chavez, Keeler, and Steiber**

10 With respect to Defendant Chavez, Keeler, and Steiber, Plaintiff has failed to provide
11 evidence, beyond his bare assertions, that these Defendants were personally involved in the
12 preparation, service, or delivery of his food trays. At most, the undisputed evidence shows that
13 Defendants Chavez, Keeler, and Steiber supervised kitchen staff, not that they had any personal
14 involvement in food service or preparation. (UMF No. 4.) Again, Plaintiff's bare allegations,
15 without any foundation, that Defendants personally witnessed cross-contamination of his food is
16 purely speculative, and unsupported by evidence for a reasonable fact finder to consider. Finally,
17 CDCR policy provides that food service staff is not responsible for providing dietary supplements
18 to inmates with food restrictions, and Defendants cannot be held liable on that basis. (UMF No.
19 10.)

20 Based on the foregoing, the Court finds that Plaintiff has failed to raise a genuine dispute
21 for trial regarding his claims against Defendants Chavez, Keeler, and Steiber. There is no
22 evidence to demonstrate an actual link between the Defendants' actions or inactions and the
23 alleged deprivation of inadequate food or contaminated food, or that Defendants acted in a
24 manner that was out of compliance with CDCR policy with respect to dietary supplements.

25 **2. Qualified Immunity**

26 Defendants also assert that the Court should grant summary judgment on the basis of
27 qualified immunity. However, the Court finds that this argument need not be reached, based
28 upon the above determination regarding the undisputed facts in this case.

1 **IV. Conclusion and Recommendations**

2 For the reasons explained above, IT IS HEREBY RECOMMENDED that Defendants’
3 motion for summary judgment, (ECF No. 58), be granted.

4 These Findings and Recommendations will be submitted to the United States District
5 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
6 **fourteen (14) days** after being served with these Findings and Recommendations, the parties may
7 file written objections with the court. The document should be captioned “Objections to
8 Magistrate Judge’s Findings and Recommendations.” The parties are advised that failure to file
9 objections within the specified time may result in the waiver of the “right to challenge the
10 magistrate’s factual findings” on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838–39 (9th Cir.
11 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

12 IT IS SO ORDERED.

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14 Dated: February 26, 2019

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE

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