

1 On December 1, 2016, Plaintiff filed a motion to compel, and Defendant filed an opposition on
2 December 9, 2016.

3 As noted above, on February 27, 2017, Defendant filed the subject motion for summary
4 judgment. (ECF No. 22.) On March 29, 2017, Plaintiff filed a statement of non-opposition. (ECF No.
5 23.) The Court finding no need for a reply brief or oral argument in this case, Defendant's motion for
6 summary judgment is now deemed submitted for review. Local Rule 230(1).

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 Defendants do not bear the burden of proof at trial and in moving for summary judgment, they
21 need only prove an absence of evidence to support Plaintiff's case. In re Oracle Corp. Sec. Litig., 627
22 F.3d 376, 387 (9th Cir. 2010). In judging the evidence at the summary judgment stage, the Court does
23 not make credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc.,
24 509 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all
25 inferences in the light most favorable to the nonmoving party and determine whether a genuine issue
26 of material fact precludes entry of judgment, Comite de Jornaleros de Redondo Beach v. City of
27 Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation omitted).

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

7 **III.**
8 **DISCUSSION**

9 **A. Summary of Complaint Allegations**

10 Plaintiff alleges that he suffers from chronic severe asthma and nasal allergies. Plaintiff was
11 prescribed several self-administered aerosol inhalers. Among these was Dulera and Xopenex. Plaintiff
12 alleges that on July 2, 2014, Defendant refilled Plaintiff's prescription, which had a standing refill
13 order. The order did not expire until December 11, 2014.

14 On September 10, 2014, Plaintiff noted that his inhaler was empty. On the same day, he filled
15 out a Health Care Services Request form, asking for a refill of his Xopenex and Nasacort. Plaintiff was
16 taken to the medical clinic for processing. The next day, Plaintiff began to experience symptoms of a
17 "flare up," or minor asthma symptoms. (Compl. ¶ 12.) Plaintiff used the last two remaining inhalations
18 that he was issued on July 2, 2014.

19 The next day, September 12, 2014, Plaintiff was notified that some medications were available
20 for Plaintiff to pick up. While at the clinic, a nurse returned with only one of the requested
21 medications. Plaintiff did not get the Xopenex. When Plaintiff asked the nurse, he was told that
22 Defendant refused to refill the inhaler because it had not been 90 days since the last issue. Plaintiff
23 alleges that he had a standing refill, and that his "reliance on his rescue inhaler had been well known to
24 the defendant because the plaintiff had submitted other written medication refill requests." (Compl. ¶
25 17.)

26 That night, Plaintiff suffered a "severe asthma attack." (Compl. ¶ 18.) Plaintiff's cellmate
27 summoned help. Plaintiff was taken to the CSP Corcoran Emergency Room, then transported to Mercy
28 Hospital in Bakersfield. Plaintiff was treated with intravenous steroids and bronchodilator therapy, and

1 admitted to the hospital. Plaintiff was eventually diagnosed with chronic obstructive pulmonary
2 disease, and prescribed a third inhaler for daily use, in conjunction with Plaintiff's current
3 prescription.

4 **B. Motion for Summary Judgment**

5 Defendant brings a motion pursuant to Federal Rule of Civil Procedure 56 that there is no
6 triable issue of fact in this case, and that he is entitled to summary judgment as a matter of law.
7 Specifically, Defendant argues that the undisputed material facts shown that he was not deliberately
8 indifferent to Plaintiff's serious medical needs, and he is entitled to qualified immunity.

9 1. Undisputed Material Facts¹

10 1. Defendant Bryan Miller was previously employed by the California Department of
11 Corrections and Rehabilitation ("CDCR") as a Pharmacist-in-Charge at Corcoran State Prison.

12 2. As a pharmacist, Defendant does not partake in the diagnosis and treatment of inmates
13 of CDCR. Rather, an appropriate diagnosis is determined by the inmate's treating physician, who then
14 makes a determination as to appropriate and proper medical care, which care can include the
15 prescription of medications.

16 3. Plaintiff is a state inmate who, at all times relevant to the complaint, was incarcerated
17 by CDCR at Corcoran State Prison.

18 4. Plaintiff is not a medical doctor.

19 5. Plaintiff has no training in medicine.

20 6. Plaintiff has been diagnosed with asthma since childhood, and that was his diagnosis on
21 September 12, 2014.

22 7. Prior to September 12, 2014, Plaintiff had never been diagnosed with Chronic
23 Obstructive Pulmonary Disease (COPD).

24 8. Defendant's role as a pharmacy supervisor did not provide him with an opportunity or
25 duty to treat Plaintiff's asthma condition.

26 9. Plaintiff alleges that Defendant refused to refill a prescription for medication (asthma
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28 ¹ Separate Statement of Undisputed Facts in Support of Defendant Bryan Miller's Motion for Summary Judgment. (ECF No. 22-3.)

1 rescue inhaler Xopenex) on September 12, 2014, and that Defendant allegedly knew was needed to
2 treat Plaintiff's asthma condition.

3 10. Plaintiff alleges that his refill was refused by Defendant on September 12, 2014,
4 because "it hadn't been 90-days since the plaintiff's last issued asthma rescue inhaler was given to
5 him," which comment was communicated to Plaintiff by LVN Thacker.

6 11. Inmates request prescription refills by submitting a Health Care Services Request Form,
7 also known as a 7362 Form.

8 12. The 7362 Form is processed by nursing staff (without review or input from the
9 pharmacy), who will then input the request, if approved, into Medication Reconciliation, and send the
10 processed form to Medical Records for scanning. Pharmacy does not have access to the form until
11 after Medical Records has scanned the document (after it has been processed).

12 13. Once in Medical Reconciliation, the refill request goes into the pharmacy workflow
13 queue, which in 2014 was monitored by the Central Fill Pharmacy Facility in Sacramento for CDCR
14 facilities. The medication refill request was then pushed from the workflow queue to the batch queue
15 for filling during local (onsite) pharmacy hours Monday through Friday. Here, the local pharmacy
16 staff (in most instances) are seeing the refill request for the first time.

17 14. Once prescriptions are refilled, they are delivered by pharmacy to nursing staff for
18 distribution to inmates.

19 15. Xopenex inhalers, as well as all prescription medications, are only to be taken as
20 directed by a physician, which directions are printed on the label issued with the prescription.
21 Generally, the treating physician will direct a patient to take a certain number of puffs per a certain
22 number of hours as needed based on the inmate's diagnosis, which again, is made by the inmate's
23 treating physician.

24 16. The CDCR formulary includes the list of drug products approved by the Systemwide
25 Pharmacy and Therapeutics (P&T) Committee for prescribing within California Correctional Health
26 Care Services (CCHCS). The P&T Committee, who has the exclusive authority to add or delete drugs
27 from the formulary and to set use criteria, periodically reviews drug products and usage on the list
28 based on current evidence-based clinical practices, guidelines, safety, and pharmacoeconomics.

1 Treating physicians at CDCR facilities are to follow the use criteria included in the formulary.

2 17. Pursuant to the formulary guidelines, inmates receiving asthma protocol Xopenex are
3 provided the following instruction which is printed on every single prescription label accompanying
4 the dispense: ASTHMA RESCUE INHALER - NOT FOR DAILY USE. IF ASTHMA FLARES USE
5 2 PUFFS BY MOUTH EVERY SIX HOURS AS NEEDED. TALK TO YOUR DOCTOR IF USING
6 MORE THAN TWICE WEEKLY. THIS INHALER SHOULD LAST AT LEAST 90 DAYS. 1 for 1
7 exchange "Request Refill" **KOP** (emphasis in original).

8 18. Formulary guidelines are not set by the individual treating physicians, nor by any
9 individual pharmacy staff member. If there is deviation from the standard sig code or use criteria, the
10 treating physician is required by the CCHCS Drug Formulary to submit a NonFormulary for approval
11 from the Facility Medical Authority (the Chief Medical Executive or designee), for medical
12 indications.

13 19. Consistent with Formulary guidelines, physician approval is required for an early refill
14 of Xopenex.

15 20. The policy that requires physician approval for early Xopenex refills in place at
16 California prisons considers that Xopenex is a controlled substance that can be deadly when used in
17 excess, and can also foretell life threatening lung condition that requires treatment beyond Xopenex.

18 21. Because physician approval is required for an early refill of Xopenex, it cannot be
19 ordered for ad-lib refills upon Plaintiff's request.

20 22. Defendant was not responsible for the policy in place that required physician approval
21 before early refills of Xopenex. That policy had been made and promulgated by facility medical
22 leadership in the interest of patient safety.

23 23. Plaintiff submitted his 7362 Form with his refill request on September 10, 2014, which
24 form stated: "Please refill the following medications: Xopenex asthma inhaler; and Nasacort allergy
25 nasal inhaler."

26 24. Plaintiffs 7362 Form does not communicate any sense of urgency or dire necessity.

27 25. Plaintiff's 7362 Form was processed by nursing staff on September 12, 2014. The nurse
28 notation dated 9/12/14 reports under A (assessment) that requested medications are "refilled."

1 26. The processed request was then sent to pharmacy for processing, on September 12,
2 2014 (a Friday).

3 27. In September 2014, CSP pharmacy hours were Monday through Friday.

4 28. In 2014, CCHCS prescribing procedures for non-urgent medication refills was two
5 business days from the time of notification to the local pharmacy. With rare exceptions, non-urgent
6 medication refills would not be refilled on the same day they were received by pharmacy.

7 29. Defendant was not scheduled to work and did not work on September 12, 2014, as he
8 was then a 10-hour employee working Monday through Thursday, and was off every Friday, Saturday,
9 and Sunday.

10 30. Defendant did not have any personal involvement whatsoever in the processing of
11 Inmate Thomas' prescription refill request on September 12, 2014.

12 31. LVN Thacker did not have any conversation with Defendant regarding the prescription
13 refills requested by Plaintiff on September 12, 2014, or on any other day. She has never had a
14 conversation with Defendant, about Plaintiff or otherwise.

15 32. During his interaction with LVN Thacker on September 12, 2014, Plaintiff did not say
16 that he was in any respiratory distress.

17 33. During his interaction with LVN Thacker on September 12, 2014, Plaintiff did not say
18 that he was in any urgent need for a refill of his Xopenex inhaler.

19 34. During his interaction with LVN Thacker on September 12, 2014, Plaintiff did not
20 exhibit any signs of respiratory distress, which signs can include shortness of breath, flaring of the
21 nostrils, and difficulty speaking. Rather, he was able to walk away from the interaction on his own
22 without any apparent difficulty.

23 35. Per Manifest Tracking the prescription at issue was filled and sent out by the CSP
24 pharmacy on September 15, 2014 (the first business day following September 12, 2014). It was then
25 distributed to Plaintiff on September 18, 2014 when he returned to CSP from an outside hospital.

26 36. Plaintiff was instructed to seek medical attention for exacerbations of asthma causing
27 him distress more than two times in one week.

28 37. At all times, Plaintiff had the option of seeking medical attention for worsening asthma

1 symptoms.

2 38. Plaintiff did not seek medical attention for his worsening asthma conditions which he
3 alleges began on September 11, 2014.

4 39. Late on the evening of September 14, 2014, Plaintiff was taken to T.T.A. (Triage and
5 Treatment Area) for an exacerbation of his asthma and sent to an outside hospital for further care.

6 40. Because Plaintiff's asthma condition had been deteriorating (he was found to have
7 asthma mixed with infections (purulent) bronchitis and COPD that was not adequately treated with
8 Xopenex alone), having Xopenex on hand would not have likely prevented Plaintiff's trip to the
9 hospital, and his best treatment was probably in the emergency clinic and at the hospital.

10 41. The subsequent diagnosis of Plaintiff's COPD diagnosis and access to more frequent
11 Xopenex inhaler refills did not prevent a further hospitalization in August 2015.

12 42. At no time did Defendant disregard any significant risk of further injury or pain to
13 Plaintiff.

14 43. At no time did Defendant knowingly or intentionally cause Plaintiff to experience any
15 pain, suffering, or injury of any kind.

16 2. Defendant's Arguments

17 As a threshold issue, Defendant argues that Plaintiff cannot show Defendant personally
18 participated in any alleged deprivation of Plaintiff's rights, and therefore Defendant cannot be liable as
19 a matter of law. Specifically, Defendant asserts that the evidence shows that he was not at work and
20 was not involved in the refill-handling that Plaintiff complains about, and that he had no contact with
21 Plaintiff or the nurse who interacted with Plaintiff on September 12, 2014. Therefore, Defendant
22 argues that he could not have the requisite state of mind to constitute deliberate indifference. Plaintiff
23 cannot show that Defendant was aware of any excessive risk to Plaintiff's health, that Plaintiff suffered
24 injury as a result of any actions or omissions on Defendant's part, or that Defendant knowingly or
25 intentionally cause Plaintiff to experience any pain, suffering, or injury of any kind.

26 Moreover, Defendant asserts that even if he had been present and involved in the events at
27 issue, the evidence shows that he is a pharmacist who is not responsible for Plaintiff's diagnosis,
28 medical care, or any of the policies in place for the safe prescription and distribution of medications to

1 Plaintiff. Thus, he could not prescribe, discontinue, or otherwise alter the frequency of Plaintiff's
2 prescription without an order from a medical doctor or another senior medical officer with prescription
3 authority. And, Defendant further argues that he cannot be held liable for the decisions or conduct of
4 some other CDCR employee, to the extent Plaintiff is asserting that argument.

5 Defendant also argues that, putting aside Defendant's complete lack of involvement in the
6 processing of the refill request, the allegation that Plaintiff was refused a prescription refill on
7 September 12, 2014 does not meet the standard for a claim of deliberate indifference. Defendant
8 asserts that the evidence shows, rather than being refused, Plaintiff's refill request was processed on
9 September 12, 2014, in accordance with policies that allowed for a two-business day turnaround for
10 non-urgent requests. Plaintiff did not communicate any urgency in the refill request, nor did he seek
11 medical attention for his worsening conditions until they were at a critical stage. Plaintiff's statements
12 on the form do not indicate that Plaintiff needed treatment immediately nor do they express that he
13 was in an acute state. Therefore, there was no act or omission on the part of anyone that could support
14 a claim for deliberate indifference against Defendant, or anyone else.

15 Finally, Defendant argues that Plaintiff cannot show any resulting further significant injury, or
16 any injury here. Defendant asserts that the evidence shows that having Xopenex on hand would not
17 have likely prevented Plaintiff's trip to the hospital, and that Plaintiff's best treatment was probably in
18 the emergency clinic and at the hospital, which is the care he received. Because it must be shown that
19 the prison official's act or failure to act actually caused medical harm to the prisoner, Defendant
20 asserts that Plaintiff's claim must fail as a matter of law for this additional reason.

21 3. Plaintiff's Statement of Non-Opposition

22 In response to Defendant's motion, Plaintiff filed a statement of non-opposition. (ECF No. 23.)
23 Plaintiff stated that he had carefully read and considered the evidence submitted in support of
24 Defendant's motion, and found that "there is no point in opposing Defendant's motion." (Id. at 2-3.)
25 Accordingly, Plaintiff stated that he "will respectfully agree with the granting of Miller's motion." (Id.
26 at 3.)

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4. Analysis

The Court finds that Defendant’s arguments are supported by the undisputed evidence and applicable law in this case, and that summary judgment should be granted in Defendant’s favor on Plaintiff’s Eighth Amendment deliberate indifference claim. First, Defendant has shown that Plaintiff cannot establish any triable issue of fact as to Defendant’s personal involvement in the alleged violation here. “Liability under section 1983 arises only upon a showing of personal participation by the defendant.” Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (citing Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979)). Plaintiff’s theory of liability is predicated on his allegations that Defendant was aware of serious medical need for a rescue inhaler, Xopenex, but nevertheless denied the refill for that medical because it had not been 90 days since the last issue. However, the undisputed evidence is that Plaintiff submitted his refill request on September 10, 2014, it was processed by the nursing staff on September 12, 2014, and then sent to the pharmacy that same day, when Defendant was not working. Nor did Defendant have any conversation with the nurse who discussed the prescription refill with Plaintiff on September 12, 2014 or with Plaintiff. Thus, it is not genuinely disputed that Defendant had no personal involvement in processing, refusing, or otherwise denying or delaying Plaintiff’s refill request. As a result, Plaintiff cannot show that Defendant took any actions in “in conscious disregard” of a serious risk to Plaintiff’s health, as required to establish liability against Defendant here. See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (citing Farmer v. Brennan, 511 U.S. 825, 839 (1994)).

Further, Defendant has submitted substantial evidence that even if he had been involved in the refill processing, he would have had no authority or capability of providing the refill the same day it was sent to the pharmacy to be filled. In fact, the undisputed evidence is that the prescription for Xopenex was not refused, but was in fact approved and merely was not ready for pickup on September 12, 2014 when Plaintiff came to retrieve his medications. Instead, it was processed in the regular course under standard policies, as there was no sign that it was urgently needed, nor any authorization for urgent processing. Finally, the undisputed evidence is that Plaintiff’s asthma condition was deteriorating due to other medical complications which could not be addressed with Xopenex alone, that Xopenex would not have prevented his asthma attack or hospitalization, and that the best

1 treatment for him was the hospitalization itself. Thus, there is no evidence in the record to support
2 Plaintiff's theory that Defendant was deliberately indifferent to Plaintiff's serious medical need for
3 Xopenex by denying a refill request, or that the failure for Plaintiff to receive his refill on September
4 12, 2014, and instead receive it some days later when he returned from the hospital, caused any harm
5 or injury to him. See Estelle v. Gamble, 429 U.S. 97, 106 (1976) (a prisoner must show acts or
6 omissions by the defendant sufficiently harmful to evidence deliberate indifference to serious medical
7 needs); see also Smith v. Schneckcloth, 414 F.2d 680, 681 (9th Cir. 1969) (plaintiff must show a
8 "tangible residual injury" resulting from the failure or refusal to provide urgently needed medical
9 care). For these reasons, the Court recommends that Defendant's motion for summary judgment be
10 granted due to the failure of Plaintiff to raise any genuine issue of material fact, and because the
11 undisputed evidence shows Defendant is not liable here.

12 Having found that Plaintiff has not shown any triable issue with regard to his Eighth
13 Amendment deliberate indifference claim against Defendant, the Court does not find it necessary to
14 reach Defendant's alternative argument that he is entitled to qualified immunity here. In addition,
15 Plaintiff's pending motion to compel is rendered moot and should be denied.

16 IV.

17 CONCLUSION AND RECOMMENDATIONS

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

- 19 1. Defendant's motion for summary judgment, filed February 27, 2017 (ECF No. 22), be
20 GRANTED; and
- 21 2. Plaintiff's pending motion to compel be denied as MOOT.

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 **fourteen (14) days**
24 after being served with these Findings and Recommendations, the parties may file written objections
25 with 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

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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)).

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IT IS SO ORDERED.

Dated: March 31, 2017


UNITED STATES MAGISTRATE JUDGE