

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

EDWARD LUNA,

Plaintiff,

v.

DR. MOON, et al.,

Defendants.

Case No. 1:16-cv-00313-NONE-SAB (PC)

FINDINGS AND RECOMMENDATIONS  
RECOMMENDING GRANTING  
DEFENDANTS' MOTION FOR SUMMARY  
JUDGMENT

(ECF Nos. 79-84, 88-89, 90-92)

OBJECTIONS DUE WITHIN THIRTY  
DAYS

Edward Luna ("Plaintiff"), a state prisoner, 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 Wayne Ulit, M.D., Jong Moon, M.D. and Jeffrey Wang, M.D. ("Defendants") motion for summary judgment.

**I.**

**PROCEDURAL HISTORY**

Plaintiff filed this action on March 7, 2016. (ECF No. 1.) On May 27, 2016, Plaintiff's complaint was found not to state a cognizable claim and Plaintiff was granted leave to file an amended complaint. (ECF No. 7.)

Plaintiff filed a first amended complaint on June 17, 2016. (ECF No. 8.) On March 31, 2017, Plaintiff's first amended complaint was found not to state a cognizable claim and he was granted leave to file a second amended complaint. (ECF No. 9.)

1 After receiving two extensions of time, Plaintiff filed a second amended complaint  
2 (“SAC”) on July 28, 2017. (ECF No. 15.) On November 2, 2017, Plaintiff’s second amended  
3 complaint was found to state a claim against Defendants Ulit, Moon, and Wang for deliberate  
4 indifference to serious medical needs in violation of the Eighth Amendment. (ECF No. 16.)  
5 Defendants filed an answer to the complaint on March 29, 2018. (ECF No. 31.)

6 On August 1, 2018, Defendants filed a motion for summary judgment due to Plaintiff’s  
7 failure to exhaust his administrative remedies. (ECF Nos. 43-46.) Plaintiff filed an opposition  
8 on August 31, 2018. (ECF Nos. 48-49.) Defendants filed a reply and objections to Plaintiff’s  
9 opposition on September 7, 2018. (ECF Nos. 51-52.) On October 16, 2018, an order was issued  
10 granting Defendants’ request to vacate the scheduling order pending resolution of the motion for  
11 summary judgment. (ECF Nos. 53-55, 56.) On January 10, 2019, findings and  
12 recommendations issued recommending granting in part and denying in part Defendants’ motion  
13 for summary judgment. (ECF No 58.) Plaintiff filed objections to the findings and  
14 recommendations on February 4, 2019. (ECF No. 59.)

15 On February 12, 2019, Chief Judge Lawrence J. O’Neill adopted the findings and  
16 recommendations. (ECF No. 60.) This action is now proceeding on Plaintiff’s SAC against  
17 Defendants Ulit, Moon, and Wang for deliberate indifference to serious medical needs in  
18 violation of the Eight Amendment for Plaintiff’s claims regarding denial of pain medication and  
19 failure refer him for treatment for his right arm, wrist, and shoulder pain beginning in February  
20 2013. (Id. at 2.<sup>1</sup>)

21 On November 25, 2019, Defendants filed the instant motion for summary judgment.<sup>2</sup>  
22 (ECF Nos. 79-84.) After receiving an extension of time, Plaintiff filed an opposition on January  
23 21, 2020. (ECF Nos. 88-89.) Defendants filed a reply on January 28, 2020. (ECF Nos. 90-92.)  
24 The matter is submitted for decision pursuant to Local Rule 230(l).

---

25  
26 <sup>1</sup> All references to pagination of specific documents pertain to those as indicated on the upper right corners via the  
CM/ECF electronic court docketing system.

27 <sup>2</sup> Plaintiff was provided with notice of the requirements for opposing a motion for summary judgment by Defendants  
28 in the motion for summary judgment (see ECF No. 82). Woods v. Carey, 684 F.3d 934, 939 (9th Cir. 2012);  
Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

1 **II.**

2 **MOTION FOR SUMMARY JUDGMENT LEGAL STANDARD**

3 Any party may move for summary judgment, and the court shall grant summary  
4 judgment if the movant shows that there is no genuine dispute as to any material fact and the  
5 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks  
6 omitted); Washington Mut. Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Summary  
7 judgment must be entered “against a party who fails to make a showing sufficient to establish the  
8 existence of an element essential to that party’s case....” Celotex Corp. v. Catrett, 477 U.S. 317,  
9 322 (1986). “[A] party seeking summary judgment always bears the initial responsibility of  
10 informing the district court of the basis for its motion, and identifying those portions of ‘the  
11 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
12 affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.”  
13 Celotex Corp., 477 U.S. at 322.

14 If the moving party meets its initial responsibility, the burden then shifts to the opposing  
15 party to establish that a genuine issue as to any material fact actually does exist. Matsushita  
16 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Each party’s position,  
17 whether it be that a fact is disputed or undisputed, must be supported by (1) citing to particular  
18 parts of materials in the record, including but not limited to depositions, documents, declarations,  
19 or discovery; or (2) showing that the materials cited do not establish the presence or absence of a  
20 genuine dispute or that the opposing party cannot produce admissible evidence to support the  
21 fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may consider other  
22 materials in the record not cited to by the parties, but it is not required to do so. Fed. R. Civ. P.  
23 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031 (9th Cir. 2001);  
24 accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

25 In judging the evidence at the summary judgment stage, the court does not make  
26 credibility determinations or weigh conflicting evidence, Soremekun v. Thrifty Payless, Inc., 509  
27 F.3d 978, 984 (9th Cir. 2007) (quotation marks and citation omitted), and it must draw all  
28 inferences in the light most favorable to the nonmoving party and determine whether a genuine

1 issue of material fact precludes entry of judgment, Comite de Jornaleros de Redondo Beach v.  
2 City of Redondo Beach, 657 F.3d 936, 942 (9th Cir. 2011) (quotation marks and citation  
3 omitted).

### 4 III.

#### 5 SUMMARY OF SECOND AMENDED COMPLAINT ALLEGATIONS<sup>3</sup>

6 Plaintiff began experiencing worsening pain in his cervical spine that was radiating to his  
7 shoulders and arms, causing tingling with a pins and needles sensation and numbness to his face,  
8 arms, and digits. (SAC ¶ 1.) In 2010, Plaintiff sought medical attention as the motor function in  
9 his hands, neck, arms and feet began to fail due to his increasing pain level and no effective pain  
10 medication. (SAC ¶ 2.) On January 20, 2011, Plaintiff had an MRI of his cervical spine that  
11 showed he had severe injury with spinal cord compression at C4-C5 and C6-C7 with narrowing  
12 of the spinal cord at C6-C7. (SAC ¶ 3.) Plaintiff had an EMG nerve conduction study on June  
13 10, 2010 which concluded that he had severe left carpal tunnel syndrome (“CTS”) with  
14 decreased sensation in median nerve distribution. (SAC ¶ 4.)

15 On January 11, 2012, Plaintiff had a left carpal tunnel release. (SAC ¶ 5.) Dr. Smith, a  
16 neurosurgeon, told Plaintiff if left untreated for several months, permanent irreversible damage  
17 to the digits would occur. (Id.) Plaintiff required pain medication and Defendant Ulit told  
18 Plaintiff to deal with it that he would not prescribe medication for pain. (SAC ¶ 6.) Plaintiff  
19 continued to be in pain from his left carpal tunnel surgery, his right hand and wrist injury,  
20 cervical spine, lumbar spine, and foot pain. (SAC ¶ 7.)

21 On May 28, 2012, Defendant Ulit examined Plaintiff and Plaintiff requested pain  
22 medication. (SAC ¶ 8.) Defendant Ulit refused to provide Plaintiff with pain medication and  
23 Plaintiff was only receiving ibuprofen which was ineffective for the pain Plaintiff was  
24 experiencing in his cervical spine and his right and left hands and wrist. (Id.) Defendant Ulit  
25 refused to prescribe pain medication for the remainder of 2012. (SAC ¶ 9.) On December 7,

26 \_\_\_\_\_  
27 <sup>3</sup> Neither Plaintiff’s opposition to the motion for summary judgment nor his response to Defendants’ statement of  
28 undisputed facts were signed under penalty of perjury. Therefore, the Court considers Plaintiff’s verified second  
amended complaint in opposition to Defendants’ motion for summary judgment. Schroeder v. McDonald, 55 F.3d  
454, 460 (9th Cir. 1995); McElyea v. Babbitt, 833 F.2d 196, 197 (9th Cir. 1987).

1 2012, Defendant Ulit examined Plaintiff and stated that he would not be prescribing any pain  
2 medication and that there was nothing wrong with Plaintiff. (Id.) Defendant Ulit did not have  
3 Plaintiff's MRI results. (Id.)

4 Over the next two months Plaintiff complained of worsening pain in the right hand as  
5 wrists and was unable to write and he required assistance getting dressed due to the unbearable  
6 pain in his right hand, neck and back. (SAC ¶ 10.)

7 Defendant Ulit examined Plaintiff on February 15, 2013 for pain in his right and left hand  
8 and wrist and his cervical spine. (SAC ¶ 11.) Defendant Ulit refused to provide Plaintiff with  
9 any pain medication other than ibuprofen. (Id.)

10 Defendant Ulit examined Plaintiff on March 13, 2013. (SAC ¶ 13.) Plaintiff was in  
11 extreme pain and requested more effective pain medication as the ibuprofen only relieved about  
12 five percent of his pain, and left him incapacitated at times and unable to perform every day  
13 functions. (Id.) Defendant Ulit informed Plaintiff that a request for services ("RFS") had been  
14 denied and that Plaintiff would not be receiving any additional pain medication. (Id.)

15 On March 20, 2013, Plaintiff was in so much pain from his right and left carpal tunnel  
16 and his lumbar spine that he was suffering from sleep deprivation because the pain would wake  
17 him with the slightest movement. (SAC ¶ 14.) Plaintiff submitted healthcare services forms  
18 over the next six months and he continued to be denied pain medication. (SAC ¶ 15.) His back  
19 pain and right carpal tunnel continued to worsen. (SAC ¶ 16.) Defendant Ulit suspected that his  
20 wrist pain was due to right CTS and he ordered a wrist splint and a nerve conduction study as  
21 well as ibuprofen which was not effective. (Id.)

22 On September 9, 2013, Plaintiff was examined by Defendant Moon who gave Plaintiff  
23 his nerve conduction study results which showed CTS and a cervical spine injury. (SAC ¶ 17.)  
24 Defendant Moon refused to provide Plaintiff with stronger pain medication as the current  
25 medication were ineffective in relieving Plaintiff's extreme pain. (Id.) Plaintiff told Defendant  
26 Moon that the pain was so debilitating that he was at times unable to write, get dressed, get out  
27 of bed or properly bath himself. (Id.)

28 Plaintiff filed an inmate appeal no. CORHC-13053752 due to the extreme pain that he

1 was experiencing. (SAC ¶ 18.)

2 On December 10, 2013, Defendant Moon told Plaintiff the he had again been denied the  
3 request for services to see an orthopedic surgeon. (SAC ¶ 19.) Plaintiff was denied pain  
4 medication to relieve more than five percent of the pain he was experiencing but was kept on  
5 ibuprofen that was ineffective to relieve his pain. (Id.)

6 On January 31, 2014, Plaintiff was seen by Dr. Smith who confirmed that Plaintiff had  
7 moderate to severe CTS of his right hand and wrist. (SAC ¶ 20.) Dr. Smith told him that  
8 surgical intervention was emergent to prevent irreversible deformation of Plaintiff's right digits  
9 and if not done within sixty days permanent injury would likely occur. (Id.)

10 Plaintiff's condition continued to deteriorate with worsening pain to his lumbar spine and  
11 spasms in both leg. (SAC ¶ 21.) Plaintiff was seen by Defendant Moon who refused Plaintiff's  
12 request for stronger pain medication. (Id.) Plaintiff was left to suffer in extreme pain and  
13 discomfort for the next eight weeks. (SAC ¶ 22.) He filed a healthcare services request to be  
14 seen by a physician but was denied. (Id.)

15 On October 21, 2014, Defendant Moon submitted another request for services for right  
16 CTS surgery and Plaintiff received surgery. (SAC ¶¶ 22, 23.) Plaintiff continued to suffer from  
17 pain to his spine that only worsened. (SAC ¶ 24.)

18 Plaintiff filed an inmate appeal on November 20, 2014, after his body began to swell after  
19 surgery and he was in immense pain. (SAC ¶ 24.) On December 4, 2014, Plaintiff sent a request  
20 for interview form to Defendant Wong, but Defendant Wong ignored his request. (SAC ¶ 25.)

21 From January 1, 2015 through December 2015, Plaintiff continually submitted healthcare  
22 request forms due to his immense pain and he was denied pain medication. (SAC ¶ 26.)

23 From January 1, 2016 through December 2016, Plaintiff continued to suffer from pain in  
24 his cervical spine that caused numbness to both his arms, a burning sensation down the right  
25 side, leg spasms, and limited range of motion in his spine but was still only prescribed ibuprofen  
26 by Defendants Moon, Ulit, and Wang. (SAC ¶ 28.) Plaintiff had an MRI of his cervical spine on  
27 April 4, 2016 that showed mild cord compression at C4-C5 and C6-C7 and narrowing of the  
28 spinal cord at C6-C7. (SAC ¶ 29.) Defendant Wang denied Plaintiff's request to be seen by a

1 neurologist. (SAC ¶ 30.) Defendant Wang denied a second request to be seen by a neurologist  
2 on June 18, 2016. (SAC ¶ 31.) In August 2016, Plaintiff had a nerve conduction study that  
3 showed further progression of his cervical spine injury. (SAC ¶ 32.)

4 **IV.**

5 **MATERIAL UNDISPUTED FACTS<sup>4</sup>**

6 1. Plaintiff is a state prisoner in the custody of the California Department of  
7 Corrections and Rehabilitation (“CDCR”). (SAC at 1.)

8 2. At all times relevant to this lawsuit, Plaintiff was incarcerated at California State  
9 Prison-Corcoran (CSP-COR). (SAC at 7-12.)

10 3. Defendant Ulit was a physician and surgeon at CSP-COR from September 2007  
11 to December 2015 and was Plaintiff’s primary care provider (“PCP”) from May 2012 through  
12 July 2013. (Decl. of Wayne Ulit in Supp. of Defs.’ Mot. for S.J. (“Ulit Decl.”) ¶¶ 4, 5.)

13 4. Defendant Moon was a physician and surgeon at CSP-COR from April 2007  
14 through April 2015 and was Plaintiff’s PCP from September 2013 through February 2015.  
15 (Decl. of Jong Moon in Supp. of Defs.’ S.J. (“Moon Decl.”) ¶¶ 4, 5.)

16 5. Defendant Wang was chief medical officer at CSP-COR from January 31, 2013 to  
17 January 30, 2015 and did not provide direct patient care to inmates at CSP-COR during this time.  
18 (Decl. of Jeffrey Wang in Supp. of Defs.’ Mot. S.J. (“Wang Decl.”) ¶¶ 4, 6.)

19 6. Defendant Wang was a physician and surgeon at CSP-COR from January 31,  
20 2015 to December 31, 2015 and was Plaintiff’s PCP from approximately May 2015 through  
21 December 2015. (Id. ¶ 4, 21.)

22 7. At CSP-COR there is a tracking system for certain medications for the purposes  
23 of monitoring the patient’s use. (Ulit Decl. ¶ 35.)

24 8. For these certain types of medication, the inmate/patient is required to go to the  
25 designated location, receive the medication, and a health care service employee signs off on the  
26 record. (Id.)

27  
28 

---

<sup>4</sup> Hereafter referred to as “U.F.”

1 9. Gabapentin is a non-formulary medication that must be specifically requested by  
2 the PCP and is also tracked for patient use. (Id. ¶¶ 33, 35.)

3 10. In treating his right arm, wrist, and shoulder pain, on diagnosis of neuropathy,  
4 Plaintiff was prescribed gabapentin 600 mg to be taken twice a day.<sup>5</sup> (Id. ¶ 33, Medication  
5 Reconciliation, ECF No. 84-11 at 76, 78, 90; Medication Reconciliation, ECF 84-12 at 115, 188,  
6 191; Nonformulary Drug Request, ECF No. 84-11 at 77; Nonformulary Drug Request, ECF No.  
7 84-12 at 118.)

8 11. Defendants Ulit and Moon, as Plaintiff's PCP, monitored his use of gabapentin as  
9 indication of pain level. (Ulit Decl. ¶ 36; Moon Decl. ¶ 60.)

10 12. Plaintiff's medical records reflect that despite the fact he was initially prescribed  
11 two tablets of gabapentin by mouth twice a day for neuropathy, Plaintiff did not take the  
12 medication as prescribed. (Ulit Decl. ¶ 36, Moon Decl. ¶¶ 47, 60.)

13 13. As reflected in Plaintiff's Medical Reconciliation record, for majority of days,  
14 Plaintiff took the medication only once and on numerous days, Plaintiff failed to take his  
15 medication at all.<sup>6</sup> (Medication Administration Record, ECF No. 84-11 at 56, 57, 63, 71, 81, 87,  
16 88, 89, 96, 97, 103, 107, 114; Medication Administration Record, ECF No. 84-12 at 110, 112,  
17 119, 120, 126, 137, 139, 144, 153, 156, 166, 169, 173, 181, 186, 193, 198, 205, 210, 211, 215.)

18 14. Under California state prison's health care receivership, there are Utilization  
19 Management ("UM") policies and procedures that were developed to ensure the appropriate use  
20 of the limited health care resources in California's state prisons.<sup>7</sup> (Wang Decl. ¶ 7.)

21 15. UM policies and procedures include, but are not limited to, medical procedures,

---

22 <sup>5</sup> Plaintiff disputes numerous facts on the ground that Defendants failed to follow a proper treatment plan and that he  
23 reported that the failure of the medications to effectively treat his condition. However, Plaintiff's disagreement with  
24 the treatment plan or medication's effectiveness is not a dispute as to the facts stated. Plaintiff cannot create a  
25 disputed of fact by merely challenging the credibility of the defendants' facts without citing to any contradictory  
evidence. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Argonaut Ins. Co., 701 F.2d 95, 97 (9th Cir. 1983). Nor is  
a fact disputed because Plaintiff disagrees with it. Plaintiff must point to specific evidence that creates a dispute of  
fact. The Court will only address those issues raised by Plaintiff that contain actual disputes as to the fact set forth.

26 <sup>6</sup> Plaintiff objects on the ground that the fact is argumentative. Plaintiff's objection on this ground is overruled.

27 <sup>7</sup> Plaintiff disputes that Defendants relied on the policies which they admit are limited. To the extent that Plaintiff  
28 challenges the limited resources available to treat prisoner's in California it does not create a dispute of the fact that  
Defendants' relied on the policies in treating Plaintiff.



1 consultation with specialists, and diagnostic studies, to promote the best possible patient  
2 outcomes, eliminate unnecessary costs, and maintain consistency in the delivery of health care  
3 services in California’s state prisons. (Id.)

4 16. Only those medical procedures, specialist consultations, diagnostic studies, etc.  
5 that are considered medically necessary under the UM are provided to the inmate/patient. (Id.)

6 17. “Medically necessary” as defined under the UM, means medical services the PCP  
7 determines are needed to protect life, prevent significant illness or disability, or alleviate severe  
8 pain, and are supported by health outcome data or clinical evidence as being an effective health  
9 care service for the purpose intended, or in the absence of available health outcome data, are  
10 judged to be necessary and are supported by diagnostic information or specialty consultation.  
11 (Id.)

12 18. Evidence-based medical necessity criteria has been implemented statewide in  
13 California state prisons, and the InterQual criteria have been adopted as the guidelines for PCPs  
14 to determine medical necessity. (Id.)

15 19. At CSP-COR, when an inmate requires medical treatment, they fill out a Health  
16 Care Services form and put it in the designated box. (Ulit Decl. ¶ 6; Moon Decl. ¶ 6.)

17 20. A registered nurse (“RN”) reviews the form within one business day and if he/she  
18 determines the request requires an assessment from the PCP, the RN refers to the PCP within  
19 three time frames, the selection of which depends on the RN’s determination of whether the  
20 issue is emergent (same-day), urgent (24 hours), or routine (14 days). (Id.)

21 21. The PCP is responsible for attending to the inmate/patients on his/her schedule for  
22 the day. (Id.)

23 22. During an appointment with an inmate/patient, the PCP listens to his/her  
24 subjective complaints, performs a physical examination, reviews relevant medical history, and  
25 then renders an assessment and plan. (Id.)

26 23. The PCP will determine whether further tests or treatment is medically necessary.  
27 (Id.)

28 24. A Request for Services (“RFS”) is a form that is used by PCPs to request

1 specialty medical services for a patient/inmate that are not available at the prison. (Ulit Decl. ¶  
2 7.)

3 25. The requesting physician prepares the RFS and submits it to the chief medical  
4 examiner, chief medical officer, or designee such as the chief physician and surgeon at the  
5 prison for review. (Ulit Decl. ¶ 7; Moon Decl. ¶ 7.)

6 26. Information submitted in the RFS by the requesting physician must meet  
7 InterQual criteria for medical necessity to get approved. (Wang Decl. ¶ 9.)

8 27. Clinical findings include the reported, observed and verified symptoms of the  
9 patient/inmate by the treating medical staff. (Id.)

10 28. The reviewing physician applies the clinical findings to the InterQual criteria in  
11 order to determine whether the requested service is medically necessary.<sup>8</sup> (Id.)

12 29. InterQual criteria is objective and used in both private and community medical  
13 settings to evaluate and determine the need for diagnostic treatment and testing. (Id. ¶ 10.)

14 30. According to the InterQual criteria, an EMG and/or MRI are not given as a matter  
15 of routine diagnosis for arm, wrist or shoulder pain, but are approved only for suspected nerve  
16 compression when the patient's pain has continued to worsen after clinical treatment with  
17 medication, reduced activities, and the regular use of an arm/wrist brace, to alleviate the pain.  
18 (Id.)

19 31. Defendant Wang did not approve or deny any of the RFS at issue in this  
20 litigation.<sup>9</sup> (Id. ¶ 20.)

21 32. Carpal tunnel syndrome (CTS) is the compression of the median nerve as it passes  
22 into the hand. Swelling inside the wrist causes the compression in CTS and can lead to  
23 numbness, weakness and tingling near the thumb. (Ulit Decl. ¶ 10; Moon Decl. ¶ 10; Wang  
24 Decl. ¶ 12.)

---

25 <sup>8</sup> Plaintiff contends that the facts regarding the InterQual criteria are disputed because there was objective evidence  
26 and a treatment plan that was ignored and he was not treated in a timely manner. Whether there was medical  
27 evidence to support providing additional testing goes to the merits of the action, but does not create a dispute of the  
28 facts stated.

<sup>9</sup> Plaintiff argues that Defendant Wang was directly responsible for discussion and decisions that were made for  
patients by his subordinate staff members. This issue shall be addressed in discussing supervisory liability.

1           33.     The protocol for treating CTS begins with administering anti-inflammatory  
2 medication as the majority of CTS is caused by overuse of the hand or hypothyroid and both  
3 issues can cause compression of the median nerve. Anti-inflammatory medication relieves the  
4 swelling which in turn, reduces compression to the nerve. (Ulitt Decl. ¶¶ 10, 11; Moon Decl. ¶¶  
5 10; Wang Decl. ¶¶ 12, 13.)

6           34.     Clinical management of CTS also includes the use of a brace or splint which assists  
7 in decompression. The brace is typically worn at night. (Ulitt Decl. ¶ 10; Moon Decl. ¶ 10;  
8 Wang Decl. ¶ 12.)

9           35.     A patient with CTS is also told to avoid activities that worsen symptoms. (Id.)

10          36.     CTS is considered a chronic pain condition and is typically treated with Motrin or  
11 acetaminophen. (Ulitt Decl. ¶ 11; Moon Decl. ¶ 11; Wang Decl. ¶ 13.)

12          37.     Gabapentin is also commonly prescribed for CTS pain because it designed to treat  
13 nerve pain and acts by numbing the nerve. (Id.)

14          38.     In treating CTS, surgery is seen as a last resort. (Id.)

15          39.     Cervical spine stenosis is a common cause of neck pain and caused by narrowing  
16 of the spinal canal which puts pressure on the spinal cord. (Ulitt Decl. ¶ 12; Moon Decl. ¶ 12;  
17 Wang Decl. ¶ 14.)

18          40.     Most cases of cervical spine stenosis are successfully treated with pain medication  
19 and anti-inflammatory medication, and temporary rest from aggravating activities. (Id.)

20          41.     Degenerative disc disease is when normal changes that occur in the disks of the  
21 spine cause pain and in some cases, numbness and tingling in the arms and legs. (Ulitt Decl. ¶  
22 13; Moon Decl. ¶ 13; Wang Decl. ¶ 15.)

23          42.     Following diagnosis, degenerative disk disease is treated with anti-inflammatories  
24 to ease the pain and reduce swelling. (Id.)

25          43.     Pain from chronic conditions such as CTS and other conditions affecting the  
26 nerves in the upper extremities are properly treated with ibuprofen, Tylenol, and gabapentin.  
27 (Ulitt Decl. ¶ 14; Moon Decl. ¶ 14; Wang Decl. ¶ 16.)

28          44.     Ibuprofen, Tylenol, and gabapentin are also part of a generally recognized

1 treatment plan for CTS. (Ulit Decl. ¶ 14; Moon Decl. ¶ 14.)

2 45. Narcotic medications are not appropriate for treating chronic pain as they are  
3 highly addictive. (Ulit Decl. ¶ 14; Moon Decl. ¶ 14; Wang Decl. ¶ 16.)

4 46. Narcotic pain medication may be prescribed to the patient following surgery at a  
5 maximum of 14 days. (Ulit Decl. ¶ 15; Moon Decl. ¶ 15; Wang Decl. ¶ 17.)

6 47. Prescribing pain medication is the sole responsibility of the patient/inmate's PCP.  
7 (Wang Decl. ¶ 16.)

8 48. The chief medical officer does not have authority to compel a physician to  
9 prescribe narcotic pain medication.<sup>10</sup> (Id.)

10 49. Defendants Ulit and Moon who have both treated many patients with CTS in  
11 private practice and as physicians with CDCR, have never prescribed narcotics to treat pain  
12 associated with CTS, cervical spine stenosis, or degenerative disk disease. (Ulit Decl. ¶ 14;  
13 Moon Decl. ¶ 14.)

14 50. Plaintiff is not a doctor and is not aware of the general protocol for treating pain  
15 resulting from CTS or of the treatment of carpal tunnel syndrome.<sup>11</sup> (Depo. Edward Luna ("Pl.  
16 Depo.") 6:9, 47:18-19:2, 51:11-52:24, ECF No. 84-10 at 176-193.)

17 51. On February 15, 2013, Plaintiff was seen by Defendant Ulit on complaints of pain  
18 in his right arm that radiated down to his elbow with no noted weakness. (Ulit Decl. ¶ 16;  
19 2/15/13 Chronic Care Progress Note ("CCPN"), ECF No. 84-11 at 16.)

20 52. On February 15, 2013, Defendant Ulit assessed that Plaintiff's left arm strength  
21 was weaker than the right, there was no atrophy of the muscle arm and forearm on the right  
22 side. (Id.)

23 53. On February 15, 2013, Defendant Ulit assessed that a consult with neurology  
24 could assist with determining the cause of Plaintiff's pain and that ibuprofen and gabapentin

---

25 <sup>10</sup> Plaintiff objects that Defendants have entered no evidence in support of this fact. However, Dr. Wang's  
26 declaration is such evidence. Plaintiff's objection that the statement lacks support and is vague and ambiguous is  
overruled.

27 <sup>11</sup> Plaintiff objects on the grounds that the statement is argumentative and lacks foundation as Defendants are not  
28 aware of what informational resources are available to Plaintiff. However, Plaintiff is not a physician and is not  
qualified to opine on the issue. Plaintiff's objection is overruled.

1 were the proper method of treating Plaintiff's pain in light of his symptoms. (Ulit Decl. ¶ 16.)

2 54. On February 15, 2013, Defendant Ulit submitted a physician's order and RFS  
3 requesting a neurology consult. (Ulit Decl. ¶ 17; 2/15/13 Physician's Orders, ECF No. 84-11 at  
4 20.)

5 55. On February 28, 2013, Plaintiff was seen by Defendant Ulit for a new chrono and  
6 for persistent neck pain on his right side. (Ulit Decl. ¶ 18; 2/28/13 Medical Progress Note  
7 ("MPN"), ECF No. 84-11 at 22.)

8 56. On February 28, 2013, Defendant Ulit explained to Plaintiff that he had already  
9 submitted the RFS for a neurology consult. (Ulit Decl. ¶ 18.)

10 57. On February 28, 2013, Defendant Ulit assessed that Plaintiff's right arm grip was  
11 slightly weaker than the left and there was no atrophy of the muscles and sensory was intact, and  
12 determined the best course of action was to wait for the results of the RFS and to continue to  
13 treat Plaintiff's pain with ibuprofen and gabapentin. (Ulit Decl. ¶ 18; 2/28/13 MPN, ECF No.  
14 84-11 at 22.)

15 58. On March 13, 2013, Plaintiff was seen by Defendant Ulit and was informed that  
16 the RFS for neurology consult had been denied. (Ulit Decl. ¶ 19; 3/13/13 MPN, ECF No. 84-11  
17 at 26; 3/17/13 PRS, ECF No. 84-11 at 24.)

18 59. On March 13, 2013, Defendant Ulit performed a neurological examination and  
19 assessed Plaintiff's right arm grip was slightly weaker than the left, there was no atrophy of the  
20 muscles, and the plan was to continue current pain medications and clinical management and to  
21 possibly discuss the denied RFS with Utilization Management (UM). (Ulit Decl. ¶ 19; 3/13/13  
22 MPN, ECF No. 84-11 at 26.)

23 60. As a person designated to approve or deny requests for diagnostic services, Dr.  
24 Beregovskaya was responsible for approving or denying requests for neurology consultation at  
25 CSP-COR on February 21, 2013.<sup>12</sup> (Wang Decl. ¶ 20.)

26 \_\_\_\_\_  
27 <sup>12</sup> Plaintiff does not dispute that Dr. Beregovskaya denied the RFS, but contends that Defendant Wang was  
28 responsible because as chief medical officer he was to be consulted for approval in his administrative duty.  
However, Plaintiff has presented no evidence that Dr. Beregovskaya was required to consult Defendant Wang in  
making the decision to deny the RFS.

1           61. Dr. Beregovskaya denied the February 15, 2013 RFS and ordered clinical  
2 management. (Id.)

3           62. The RFS was denied because at the time it was submitted, there was no medical  
4 evidence indicating surgical treatment for Plaintiff's neck conditions could reduce his pain or  
5 avoid disability affecting his major activities of daily living. (Id. ¶ 19.)

6           63. Although Plaintiff alleges that he was seen on March 20, 2013, there is no record  
7 of a March 20, 2013 medical appointment with Defendant Ulit in Plaintiff's medical file.<sup>13</sup>

8           64. On April 9, 2013, Plaintiff came to his appointment with Defendant Ulit with his  
9 Inmate Appeal Form, and requested an MRI scan and referral to a neurologist. (Ulit Decl. ¶ 20;  
10 4/9/13 MPN, 84-11 at 29.)

11           65. On April 9, 2013, Defendant Ulit explained to Plaintiff that since a 2011 MRI  
12 already showed disk disease, there was no need to redo the test. (Id.)

13           66. On April 9, 2013, Defendant Ulit reminded Plaintiff that an RFS for neurology  
14 had been denied with direction to continue with clinical management. (Id.)

15           67. On April 9, 2013, Defendant Ulit assessed that clinical management would  
16 continue and that Plaintiff should avoid traumatic activity. Plaintiff confirmed he understood  
17 Defendant Ulit's assessment and plan and stated he had no further questions. (Id.)

18           68. Pain associated with Plaintiff's disk disease was properly treated with Ibuprofen,  
19 acetaminophen, and gabapentin. (Ulit Decl. ¶¶ 13, 14.)

20           69. On April 23, 2013, Plaintiff was seen by Dr. Edgar Clark instead of Defendant  
21 Ulit for scheduling reasons. (Ulit Decl. ¶ 21; 4/23/13 MPN, ECF No. 84-11 at 32.)

22           70. On April 23, 2013, Plaintiff presented with complaints of pain in his upper right  
23 extremity and said that he had experienced pain since 2008 when he hit his head falling at the  
24 Delano prison. (Id.)

25           71. On April 23, 2013, Dr. Clark assessed a negative Spurling, negative Hoffman,  
26 positive Phalen and positive Tinel, as well as excellent shoulder range of motion, some clicking  
27

---

28 <sup>13</sup> Plaintiff stipulates that there is no record of a March 20, 2013 medical appointment.

1 in the wrists and somewhat decreased sensation over the thumb anteriorly. (Id.)

2 72. Spurling test is used to assess nerve root pain and helps to diagnose cervical  
3 radiculopathy. Phalen test is used to check for nerve problems and commonly used to diagnose  
4 carpal tunnel syndrome. Tinel's sign is a way to detect irritated nerves and is commonly used to  
5 diagnose CTS. Hoffman sign is a test to examine the reflexes of the upper extremities and is a  
6 quick, equipment-free way to test for the possible existence of spinal cord compression. (Ulit  
7 Decl. ¶¶ 22, 24.)

8 73. On April 23, 2013, Dr. Clark assessed that Plaintiff's pain was most consistent  
9 with right CTS and noted that while he had written out an RFS, the InterQual criteria for carpal  
10 tunnel release surgery included whether the patient had thyroid disease. Dr. Clark reviewed  
11 Plaintiff's medical history and found that Plaintiff was taking thyroid medication so referral was  
12 not possible. (Ulit Decl. ¶ 25; 4/23/13 MPN, ECF No. 84-11 at 32.)

13 74. On July 12, 2013, Defendant Ulit was notified that Plaintiff had been referred to  
14 see him after failing to take his gabapentin prescribed for nerve pain, for either 3 consecutive  
15 days or had missed 50% of doses over a 7-day period. (Ulit Decl. ¶ 26; Medication No  
16 Show/Refusal Referral, ECF No. 84-11 at 35.)

17 75. On July 16, 2013, Defendant Ulit met with Plaintiff regarding the notification of  
18 missed medication and Plaintiff requested that Defendant Ulit change his prescription to as  
19 needed only. Plaintiff complained of pain, tingling and numbness of the 3rd and 5th fingers and  
20 stated he believed the issue was carpal tunnel because he had left CTS surgery prior. (Ulit Decl.  
21 ¶ 27; 7/16/13 MPN, ECF No. 84-11 at 37.)

22 76. Plaintiff had carpal tunnel surgery on his left hand prior to his right hand. (Pl.  
23 Depo. 73:18-74:6.)

24 77. On July 16, 2013, Defendant Ulit performed a Tinel's sign test to assess the root  
25 of Plaintiff's pain and Plaintiff's result was a negative finding, assessed that there could still be a  
26 nerve problem and ordered a wrist splint to assist with nerve decompression and continued  
27 Motrin and gabapentin on an as needed basis per Plaintiff's request. (Ulit Decl. ¶¶ 27, 28;  
28 7/16/13 MPN, ECF No. 84-11 at 37; 7/16/13 Physician's Orders, ECF No. 84-11 at 41.)

1 78. Plaintiff did not wear the wrist splint as he was directed by Defendant Ulit. (Pl.  
2 Depo. 61:2-62:14.)

3 79. On July 23, 2013, Defendant Ulit examined Plaintiff on complaints of pain in the  
4 right wrist area and fingers and numbness. Plaintiff requested an electromyography (EMG) and  
5 referral to neurology. (Ulit Decl. ¶ 29; 7/23/13 MPN, ECF No. 84-11 at 43.)

6 80. On July 23, 2013, Defendant Ulit performed a neurological examination and  
7 assessed a positive Tinel's sign on Plaintiff's left wrist, no atrophy of muscle strength, and  
8 sensory claims of mild decreased sensation. As a result of these findings, Defendant Ulit  
9 assessed that Plaintiff possibly had carpal tunnel syndrome. (Id.)

10 81. Defendant Ulit assessed that an EMG should be done prior to the referral because  
11 the results may indicate that neurology would be inappropriate and on July 27, 2013 submitted  
12 an RFS for a nerve conduction study (NCS) and EMG, which was approved on July 29, 2013 by  
13 Dr. Beregovskaya. (Ulit Decl. ¶¶ 29, 31, 32; 7/23/13 MPN, ECF No. 84-11 at 43; 7/23/13  
14 Physician's Orders, ECF No. 84-11 at 46.)

15 82. An EMG measures muscle response and is used to detect abnormalities. A related  
16 exam is the NCS which can determine nerve damage and destruction and is often performed at  
17 the same time as an EMG. (Ulit Decl. ¶ 30; Moon Decl. ¶ 17.)

18 83. EMG and NCS are not performed by a neurologist and are done prior to ascertain  
19 the appropriate specialist for referral. (Id.)

20 84. Dr. Beregovskaya approved the RFS and Plaintiff's NCS was scheduled for  
21 September 20, 2013. (Ulit Decl. ¶ 32; 9/20/13 RFS, ECF No. 84-11 at 50.)

22 85. Although Plaintiff alleges that he was seen by Defendant Moon on September 9,  
23 2013, there is no record of an appointment with Defendant Moon on September 9, 2013.<sup>14</sup>

24 86. On September 20, 2013, at the site of Plaintiff's NCS testing, Plaintiff refused to  
25 have his vital signs tested and refused a medical evaluation in the treatment and triage area.<sup>15</sup>

---

26 <sup>14</sup> Plaintiff stipulates that there is no record of an appointment on September 9, 2013.

27 <sup>15</sup> Plaintiff objects on the ground of hearsay. Dr. Moon's declaration referred to a refusal of examination and/or  
28 treatment form signed by Plaintiff on September 20, 2013. (ECF No. 84-12 at 29.) On summary judgment, the  
court does not focus on the admissibility of the form of the evidence, but on the admissibility of its contents. Fraser



1 (Moon Decl. ¶ 20, 9/20/13 Refusal of Examination and/or Treatment, ECF No. 84-12 at 29.)

2 87. On September 30, 2013, Defendant Moon met with Plaintiff to follow up on the  
3 nerve conduction study that had been done on September 20, 2013 but had not yet received the  
4 results. (Moon Decl. ¶ 16; 9/30/13 Treatment Notes, ECF No. 84-12 at 19.)

5 88. On September 30, 2013, Defendant Moon performed a physical examination of  
6 Plaintiff and reviewed his medical records and assessed that the cause of numbness in the fingers  
7 of his right hand was likely the result of CTS. (Id.)

8 89. For the purposes of submitting an RFS for referral to an orthopedic surgeon with  
9 the requisite medical evidence, Defendant Moon determined that the results of the NCS were  
10 required to confirm his diagnosis and that once he received the results, he could submit the RFS  
11 for Plaintiff. Defendant Moon communicated his assessment and plan to Plaintiff who  
12 verbalized understanding. (Id.)

13 90. On October 22, 2013, Defendant Moon had a follow-up appointment with  
14 Plaintiff and reviewed the results of the NCS which concluded that Plaintiff had moderate to  
15 severe right CTS, and no electrophysiological evidence of ulnar neuropathy, radiculopathy, or  
16 polyneuropathy of the right arm. Defendant Moon informed Plaintiff he would submit a referral  
17 to an orthopedic surgeon and Plaintiff verbalized understanding of Dr. Moon's assessment and  
18 plan. (Moon Decl. ¶ 18; 10/20/13 Progress Note, ECF No. 84-12 at 22.)

19 91. On October 22, 2013, Defendant Moon submitted an RFS that Plaintiff receive an  
20 initial outpatient consultation with an orthopedic surgeon based on the NCS findings and a  
21 diagnosis of CTS. (Moon Decl. ¶ 19; 10/22/13 PRS, ECF No. 84-12 at 27.)

22 92. On November 9, 2013, Defendant Moon was informed that the RFS had been  
23 denied by Dr. Beregovskaya because he had not included documentation of his physical findings  
24 such as "weakness of thenar muscle" or "atrophy of thenar muscle," pursuant to InterQual  
25 criteria, and was directed to review InterQual and then resubmit the RFS. (Moon Decl. ¶ 21;  
26 November 2, 2013 PRS, ECF No. 84-12 at 31.)

---

27 v. Goodale, 342 F.3d 1032, 1036 (9th Cir. 2003). Plaintiff's medical records are admissible evidence and Plaintiff's  
28 refusal to receive an evaluation would be admissible evidence at the trial of this matter. Plaintiff's objection on the  
ground of hearsay is denied.

1 93. Defendant Moon did not intentionally omit the InterQual criteria information  
2 from the RFS. (Moon Decl. ¶ 22.)

3 94. On November 26, 2013, Defendant Moon met with Plaintiff in order to conduct a  
4 physical examination to obtain the information required for resubmission of the RFS. (Moon  
5 Decl. ¶ 23; 11/26/13 Progress Note, ECF No. 84-12 at 33.)

6 95. On November 26, 2013, Defendant Moon attempted to review Plaintiff's medical  
7 records and InterQual guidelines pursuant to Beregovskaya's instructions but the Electronic Unit  
8 Health Record ("eUHR") system was down and he was not able to obtain the requisite  
9 information. (Id.)

10 96. On November 26, 2013, Defendant Moon informed Plaintiff that the RFS had  
11 been denied and that he had been unable to access Plaintiff's medical records on eUHR, and  
12 asked Plaintiff to come in for a follow-up appointment in two weeks so that he could submit an  
13 RFS imminently. Plaintiff verbalized understanding of Defendant Moon's assessment and plan.  
14 (Id.)

15 97. On December 10, 2013, Defendant Moon examined Plaintiff and assessed that his  
16 right thumb evidenced no atrophy but it was weaker than his left side and again reviewed the  
17 results of the NCS as eHUR was working. (Moon Decl. ¶ 24; 12/10/13 Progress Note, ECF No.  
18 84-12 at 35.)

19 98. On December 10, 2013, Defendant Moon informed Plaintiff that he would submit  
20 a new RFS requesting consultation with an orthopedic surgeon based on a diagnosis of CTS  
21 evidenced by the test results and the weakness in his right hand. Plaintiff verbalized  
22 understanding of Defendant Moon's assessment and plan. (Id.)

23 99. On December 10, 2013, Defendant Moon resubmitted the RFS which was  
24 approved by Dr. Beregovskaya on December 12, 2013. (Moon Decl. ¶ 26; 12/10/13 Physician's  
25 Order, ECF No. 84-12 at 37, 39, 41.)

26 100. Plaintiff was scheduled for a consultation with Dr. David Smith, an orthopedic  
27 surgeon, on January 31, 2014. (Moon Decl. ¶ 27; 12/12/13 PRS, ECF No. 84-12 at 41.)

28 101. On January 31, 2014, Dr. Smith assessed that Plaintiff had a positive Phalen's test

1 and positive Tinel's sign over the carpal canal and had weakness of the thenar musculature and  
2 the results of the EMG were consistent with his examination. (January 31, 2014 Memorandum,  
3 ECF No. 84-6 at 110.)

4 102. On January 31, 2014, Dr. Smith assessed that Plaintiff had responded very well  
5 following carpal tunnel release surgery on his left side and had no further symptoms on his left  
6 hand. (Id.)

7 103. On January 31, 2014, Dr. Smith recommended Plaintiff undergo carpal tunnel  
8 release surgery for his right hand, put in a request for the surgery and would try to get it  
9 scheduled. (Id.)

10 104. On April 23, 2014, Defendant Moon submitted an order for blood tests to check  
11 Plaintiff's thyroid function in anticipation of surgery. (Moon Decl. ¶ 29; 4/23/14 Physician's  
12 Orders, ECF No. 84-12 at 46.)

13 105. On July 31, 2014, Defendant Moon had a follow up appointment with Plaintiff  
14 and informed him that if he wanted Dr. Smith to perform the surgery it would have to be delayed  
15 because he had learned that Dr. Smith had gone out on leave. (Moon Decl. ¶ 30; 7/31/14 CCPN,  
16 ECF No. 84-12 at 48.)

17 106. On July 31, 2014, Plaintiff informed Defendant Moon that he preferred to wait for  
18 Dr. Smith to return and verbalized his understanding that because of his decision, the surgery  
19 would be delayed. (Id.)

20 107. On August 25, 2014, Defendant Moon met with Plaintiff regarding his prior  
21 request to wait for Dr. Smith to return from leave and Plaintiff informed Defendant Moon that he  
22 changed his mind and did not want to wait any longer. (Moon Decl. ¶ 32; 8/25/14 Progress Note  
23 ECF No. 84-12 at 52.)

24 108. On August 25, 2014, Defendant Moon examined Plaintiff and assessed there was  
25 no deformity and no atrophy in his right hand and told Plaintiff he would submit an RFS for  
26 referral to a different orthopedic surgeon. Plaintiff verbalized understanding of Defendant  
27 Moon's assessment and plan. (Id.)

28 109. On August 25; 2014, Defendant Moon submitted a physician's order and an RFS

1 requesting Plaintiff receive a consultation with an orthopedic surgeon which was approved by  
2 Dr. Beregovskaya on August 26, 2014. (Moon Decl. ¶¶ 33, 34, 35; 8/25/14 Physician's Orders,  
3 ECF No. 84-12 at 54; 8/26/14 RFS, ECF No. 84-12 at 58.)

4 110. Plaintiff was scheduled for a consultation with Dr. Clemont Alade on September  
5 12, 2014. (Moon Decl. ¶ 35; 8/26/14 RFS, ECF No. 84012 at 58.)

6 111. On September 25, 2014, Defendant Moon had a follow up appointment with  
7 Plaintiff regarding his consultation with Dr. Alade and the plan that Plaintiff undergo surgery for  
8 decompression of the right wrist. (Moon Decl. ¶ 36; 9/25/14 Progress Note; ECF No. 84-12 at  
9 60.)

10 112. On September 25, 2014, Defendant Moon had not yet received the report from Dr.  
11 Alade and could not submit an RFS for the surgery until he determined whether it was  
12 recommended. Defendant Moon submitted an order requesting Dr. Alade's report. (Id.; 9/25/14  
13 Physician's Orders, ECF No. 84-12 at 62.)

14 113. On October 20, 2014, Defendant Moon had a follow up appointment with  
15 Plaintiff and found Dr. Alade's notations on the RFS form from his September 12, 2014  
16 appointment that indicate a finding of right CTS and a plan for outpatient surgery for right  
17 median nerve decompression at the right wrist. (Moon Decl. ¶ 38; 10/20/14 Progress Note, ECF  
18 No. 84-12 at 64.)

19 114. On October 20, 2014, Defendant Moon examined Plaintiff's right hand and found  
20 no atrophy but numbness in the 2nd and 3rd fingers. (Id.)

21 115. On October 20, 2014, Defendant Moon submitted an RFS for Plaintiff to undergo  
22 carpal tunnel release surgery which was approved by Dr. Beregovskaya on October 21, 2014.  
23 (Moon Decl. ¶ 39; 10/20/14 Physician's Orders, ECF No. 84-12 at 66; 10/20/14 RFS, ECF No.  
24 84-12 at 68.)

25 116. On November 18, 2014, Plaintiff had carpal tunnel release surgery to his right  
26 wrist, with a 14-day work lay-in. (August 26, 2015 Directors Level Appeal, ECF No. 84-10 at  
27 67; 11/18/14 Physician's Orders, ECF No. 84-7 at 99.)

28 117. On November 18, 2014, Plaintiff started taking acetaminophen with codeine

1 prescribed by Dr. Beregovskaya for 14-days post-surgery pain. (11/19/14 Medication  
2 Reconciliation, ECF No. 84-7 at 97; 11/26/14 Medication Reconciliation, ECF No. 84-7 at 120.)

3 118. On November 26, 2014, Defendant Moon had a follow up appointment with  
4 Plaintiff to check on his recovery from surgery, during which Plaintiff complained that his pain  
5 from surgery was not controlled even though he had been taking the codeine which was a  
6 powerful narcotic and requested more pain medication. (Moon Decl. ¶ 42; 11/26/14 Progress  
7 Note, ECF No. 84-12 at 70.)

8 119. On November 26, 2014, Defendant Moon denied the request for additional pain  
9 medication but agreed to prescribe morphine to replace the codeine. Plaintiff verbalized  
10 understanding of Defendant Moon's assessment and plan. (Id.)

11 120. On November 26, 2014, Defendant Moon submitted an order to cancel Plaintiff's  
12 prescription for codeine and requested a new prescription for morphine sulfate IR 15 mg, be  
13 provided through December 2, 2014. (Moon Decl. ¶ 44, 11/26/14 Medication Reconciliation,  
14 ECF No. 84-12 at 74.)

15 121. On December 5, 2014, Plaintiff had an appointment with Dr. Alade during which  
16 he was seen and evaluated for an orthopedic follow up at which time his sutures were removed,  
17 he received a wrist brace, and was advised to exercise his hand. (12/5/14 Physician's Orders,  
18 ECF No. 84-12 at 76.)

19 122. At Plaintiff's appointment on December 5, 2014, he refused assessment from an  
20 RN with no vitals. (Moon Decl. ¶ 46; Refusal of Examination and/or Treatment, ECF No. 84-12  
21 at 218.)

22 123. On December 10, 2014, Defendant Moon met with Plaintiff after receiving a  
23 Medication No Show/Refusal Referral and counseled Plaintiff as to the purpose of the  
24 medication and the importance of taking it regularly so as to control his nerve pain. (Moon Decl.  
25 ¶ 47; 12/10/14 Progress Note, ECF No. 84-12 at 80.)

26 124. On December 10, 2014, Plaintiff said he did not understand why he had to see a  
27 nurse for missing his medication since it was prescribed on an as needed basis only. (Id.)

28 125. On December 18, 2014, Defendant Moon had not received a report from Dr.

1 Alade but assessed from his own physical examination of Plaintiff, that the wound from surgery  
2 on his right hand had healed well. (Moon Decl. ¶ 48; 12/18/14 Progress Note, ECF No. 84-12 at  
3 82.)

4 126. On December 18, 2014, Defendant Moon informed Plaintiff he would submit  
5 another request for Dr. Alade's report and then meet with Plaintiff the following week. Plaintiff  
6 verbalized understanding of Defendant Moon's assessment and plan. (Id.)

7 127. On December 18, 2014, Defendant Moon submitted an order that his prior request  
8 for Dr. Alade's report be followed up on. (Moon Decl. ¶ 49; 12/18/14 Physician's Orders, ECF  
9 NO. 84-12 at 84.)

10 128. On December 24, 2014, Defendant Moon had a follow up appointment with  
11 Plaintiff and assessed the right hand surgical site was healed, still seemed mildly swollen and  
12 tender but was setting better from the swelling that occurred after surgery. (Moon Decl. ¶ 50;  
13 12/24/14 Progress Note, ECF No. 84-12 at 86.)

14 129. On December 24, 2014, Defendant Moon advised Plaintiff that swelling was a  
15 natural response after surgery and that narcotics were not appropriate medication for Plaintiff's  
16 pain. Plaintiff requested that his prescription for Ibuprofen be continued. (Id.)

17 130. On December 24, 2014, Defendant Moon submitted an RFS for Plaintiff to have a  
18 four-week follow-up appointment with Dr. Alade. (Moon Decl. ¶ 51; 12/24/14 Physician's  
19 Orders, ECF No. 84-12 at 88.)

20 131. Plaintiff was seen for an orthopedic follow up appointments with Dr. Alade on  
21 January 2, 2015<sup>16</sup> and February 13, 2015, regarding his carpal tunnel surgery. (Moon Decl. ¶ 52;  
22 1/2/15 Physician's Order, ECF No. 84-12 at 88; 2/20/15 Progress Note, ECF No. 84-12 at 90.)

23 132. On February 20, 2015,<sup>17</sup> Defendant Moon had an appointment with Plaintiff  
24 regarding his orthopedic follow ups with Dr. Alade during which Plaintiff complained that he  
25 was still not able to make a fist. (Moon Decl. ¶ 52; 2/20/15 Progress Note, ECF No. 84-12 at

26 \_\_\_\_\_  
27 <sup>16</sup> Dr. Moon states that the first follow up was February 5, 2015, however Dr. Alade's note is dated January 2, 2015.

28 <sup>17</sup> The undisputed fact states that this appointment took place on February 23, 2015, however the progress note is dated February 20, 2015.

1 90.)

2 133. On February 20, 2015, Defendant Moon's review of Dr. Alade's notes led him to  
3 determine that Dr. Alade recommended Plaintiff continue with exercises and also recommended  
4 physical therapy but an RFS had not been submitted. (Id.)

5 134. On February 20, 2015, Defendant Moon performed a physical examination of  
6 Plaintiff which evidenced the right hand surgical site was clean, and swelling in one finger and  
7 determined that a request for physical therapy should be made. (Id.)

8 135. On February 23, 2015, Defendant Moon submitted an RFS that Plaintiff be  
9 referred to physical therapy which was approved. (Moon Decl. ¶ 53; 2/23/15 Physician's Orders,  
10 ECF No. 84-12 at 92; 2/25/15 RFS, ECF No. 84-12 at 95.)

11 136. On March 10, 2015, Plaintiff met with the physical therapist who assessed  
12 Plaintiff was able to make a 70% fist<sup>18</sup> and provided Plaintiff with therapeutic exercises to  
13 increase his strength and alleviate the pain. (Moon Decl. ¶ 55; 3/10/15 PT Note, ECF No. 84-12  
14 at 97-98.)

15 137. On March 10, 2015, the physical therapist recommended Plaintiff for 6 sessions  
16 of physical therapy and gave the prognosis of "fair" that Plaintiff's pain and strength would  
17 improve. (Moon Decl. ¶ 55; 3/10/15 PT Note, ECF No. 84-12 at 98.)

18 138. Plaintiff completed six sessions of physical therapy during April 2015. (Moon  
19 Decl. ¶ 55; PT Notes, ECF No. 84-12 at 101-104.)

20 139. On April 22, 2015, Plaintiff was discharged from physical therapy, found to have  
21 progressed very well, and encouraged to continue with his exercises for strength and flexibility.  
22 Moon Decl. ¶ 56; 4/22/15 PT Discharge Summary, ECF No. 84-12 at 106.)

23 140. Defendant Wang was not directly involved in Plaintiff's medical care until May  
24 14, 2015,<sup>19</sup> when he first saw Plaintiff for a follow up to his physical therapy sessions. (Wang  
25 Decl. ¶ 21.)

---

26 <sup>18</sup> The physical therapy notes state that Plaintiff was able to make a 75% active fist. (3/10/15 PT Note, ECF No. 84-  
27 2 at 97.)

28 <sup>19</sup> Dr. Wang states that he began seeing Plaintiff on May 15, 2015. However, the progress notes shows that date of  
service as May 14, 2015. (5/14/15 Progress Note, ECF No. 84-13 at 16.)





1 officer, Defendant Wang was Defendants Ulit and Moon’s supervisor, and Defendant Wang  
2 failed to respond in a timely manner. Plaintiff contends that Defendants had ample time to  
3 address Plaintiff’s medical issues and the undisputed facts show that they did not do so.  
4 Defendants did not follow Dr. Smith’s recommendation that Plaintiff receive surgery for his  
5 carpal tunnel resulting in long term suffering and pain.

6 **A. Deliberate Indifference Legal Standard**

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

21 A difference of opinion between a physician and the prisoner - or between medical  
22 professionals - concerning what medical care is appropriate does not amount to deliberate  
23 indifference.” Snow, 681 F.3d at 987 (citing Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.  
24 1989)); Wilhelm, 680 F.3d at 1122-23 (citing Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir.  
25 1986)). Rather, Plaintiff “must show that the course of treatment the doctors chose was  
26 medically unacceptable under the circumstances and that the defendants chose this course in  
27 conscious disregard of an excessive risk to [his] health.” Snow, 681 F.3d at 988 (citing Jackson,  
28 90 F.3d at 332) (internal quotation marks omitted).

1           **B.     Serious Medical Need**

2           Deliberate indifference has both an objective and a subjective component. Wilson v.  
3 Seiter, 501 U.S. 294, 298 (1991). The objective component considers whether the deprivation  
4 was sufficiently serious and the subjective component considers if the officials acted with a  
5 sufficiently culpable state of mind. Wilson, 501 U.S. at 298.) Although Defendants state that  
6 even if Plaintiff can establish that he had a serious medical need, neither party addresses whether  
7 Plaintiff had a serious medical need.

8           “Indications that a plaintiff has a serious medical need include the existence of an injury  
9 that a reasonable doctor or patient would find important and worthy of comment or treatment;  
10 the presence of a medical condition that significantly affects an individual’s daily activities; or  
11 the existence of chronic or substantial pain.” Colwell v. Bannister, 763 F.3d 1060, 1066 (9th Cir.  
12 2014) (citation and internal quotation marks omitted); accord Wilhelm, 680 F.3d at 1122; Lopez  
13 v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000).

14           Here, the evidence before the Court demonstrates that Plaintiff suffered from CTS of his  
15 right upper extremity. Plaintiff was continually prescribed some type of pain medication which,  
16 at least in part, was to address his right hand, wrist, and arm pain and it was ultimately  
17 recommended by both Drs. Smith and Alade that Plaintiff required surgery. Plaintiff ultimately  
18 had a right carpal tunnel release. The Court finds that Plaintiff had a serious medical need.

19           **C.     Deliberate Indifference**

20           Plaintiff contends that Defendants violated section 3350 of Title 15 of the California  
21 Code of Regulations<sup>20</sup> which dictates legal process and protocols. Deliberate indifference is not  
22 established by the failure to follow state regulations. Peralta, 744 F.3d at 1087; Case v. Kitsap  
23 Cty. Sheriff's Dep't, 249 F.3d 921, 929 (9th Cir. 2001). There is no liability under section 1983  
24 for violating prison regulations. Cousins v. Lockyer, 568 F.3d 1063, 1070 (9th Cir. 2009).  
25 Plaintiff must show that Defendants violated the constitutional right at issue. A prison official  
26 acts with “deliberate indifference ... only if the [prison official] knows of and disregards an

27 \_\_\_\_\_  
28 <sup>20</sup> This section was renumbered Cal. Code Regs. tit. 15, § 3999.200. Section 3999.200 sets forth only medically  
necessary services shall be provided and sets forth specific services that are not considered medically necessary.

1 excessive risk to inmate health and safety.” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir.  
2 2004) (quoting Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1187 (9th Cir.2002)). The  
3 Court considers whether Defendants acted with deliberate indifference in treating Plaintiff’s right  
4 hand, wrist and arm pain.

5 1. Defendant Ulit

6 Defendant Ulit contends that Plaintiff claims he was deliberately indifferent because the  
7 first RFS was denied and on two different occasions Defendant Ulit examined him and, despite  
8 alleged clinical evidence of causation of the pain, Plaintiff was refused medication other than  
9 ibuprofen. However, Defendant Ulit asserts that he timely submitted the RFS and was not  
10 responsible for the denial. Defendant Ulit argues that the decision to deny Plaintiff’s request to  
11 see a neurosurgeon in February 2013 was consistent with the established medical policies and  
12 procedures and was not deliberately indifferent.

13 Plaintiff was seen by Defendant Ulit on February 15, 2013 and complained of pain in his  
14 right arm that radiated down to his elbow. (U.F. 51.) Defendant Ulit determined that ibuprofen  
15 and gabapentin were the proper method to treat Plaintiff’s pain in light of his symptoms. (U.F.  
16 53.) He also submitted a request for a neurology consult. (U.F. 55.) The request for a neurology  
17 consult was denied by Dr. Beregovskaya who ordered that clinical management was appropriate.  
18 (U.F. 61.) On April 9, 2013, Defendant Ulit assessed that clinical management would continue  
19 and that Plaintiff should avoid traumatic activity. (U.F. 67.)

20 Plaintiff saw Dr. Clark on April 23, 2013, who considered whether to submit an RFS.  
21 (U.F. 73.) Dr. Clark wrote out an RFS but did not submit it because he found that Plaintiff did  
22 not meet the InterQual criteria due to his thyroid and Plaintiff had to proceed with clinical  
23 management. (U.F. 73.)

24 Defendant Ulit next saw Plaintiff when he was notified that Plaintiff had not been taking  
25 his medication as prescribed. (U.F. 75.) Plaintiff requested for Defendant Ulit to change his  
26 medication to as needed only. (Id.) Defendant Ulit examined Plaintiff, and assessed that there  
27 could still be a nerve problem so he ordered a brace for Plaintiff and continued Plaintiff’s Motrin  
28 and gabapentin on as needed basis as requested by Plaintiff. (U.F. 77.) Defendant Ulit had

1 determined that Plaintiff's thyroid was well managed and that his pain could be a nerve issue.  
2 (Ulit Decl. ¶ 27.)

3 Defendant Ulit saw Plaintiff on July 23, 2013, and based on his examination determined  
4 that Plaintiff may have CTS. (U.F. 80.) Defendant Ulit submitted an RFS for NCS/EMG which  
5 was approved. (U.F. 81.) Defendant Ulit determined that referring Plaintiff to a specialist  
6 without the tests being completed would be superfluous. (Ulit Decl. ¶ 29.) These tests were  
7 requested to determine the appropriate specialist for the referral. (U.F. 83.) Defendant Ulit has  
8 presented evidence that referral for an EMG is not routine but provided where there is suspected  
9 nerve compression and the patient's pain has continued to worsen after clinical treatment with  
10 medication, reduced activities and the regular use of a brace. (U.F. 30.)

11 Additionally, Defendant Ulit contends that the undisputed facts demonstrate that he did  
12 not only provide ibuprofen for Plaintiff's complaints of pain. The undisputed facts show that, in  
13 addition to ibuprofen, Plaintiff was prescribed gabapentin for nerve pain. (U.F. 53, 57, 59, 67,  
14 77.) However, Plaintiff was not taking his medication as directed and requested that it be  
15 prescribed on an as needed basis. (U.F. 74, 75.) Defendant Ulit also prescribed a wrist splint  
16 for Plaintiff but he was not using the splint that he was provided. (U.F. 77, 78.)

17 Defendants have also presented evidence that the treatment provided by Defendant Ulit,  
18 medications and a wrist splint, was appropriate for pain associated with CTS and other nerve  
19 conditions of the upper extremities. (U.F. 33, 34, 36, 37, 40, 42, 43, 44.) Further, Defendant  
20 Ulit submitted the RFS in February 2013, but it was denied by Dr. Beregovskaya who  
21 determined that clinical management was appropriate. (U.F. 61.) On April 23, 2013, Dr. Clark  
22 determined that Plaintiff did not meet the criteria for referral to an orthopedist due to his thyroid  
23 levels. (U.F. 73.) When Defendant Ulit next saw Plaintiff on July 16, 2013, he ordered the wrist  
24 splint. (U.F. 77.) On July 23, 2013, having determined that Plaintiff's thyroid levels were well  
25 managed, Defendant Ulit submitted an RFS for an NCS and EMG which were approved. (U.F.  
26 81.) This was Defendant Ulit's last visit with Plaintiff as his PCP and Defendant Moon became  
27 Plaintiff's PCP in September 2013. (U.F. 3, 4.)

28 Defendant Ulit has met his initial responsibility of identifying those portions of the record

1 that show there is no genuine issue of material fact that he was deliberately indifferent to  
2 Plaintiff's serious medical needs. Celotex Corp., 477 U.S. at 322. The burden shifts to Plaintiff  
3 to establish that a genuine issue as to any material fact actually exists. Matsushita Elec. Indus.  
4 Co., 475 U.S. at 586.

5 In his opposition, Plaintiff counters that Defendant Ulit referred him to Dr. Smith and did  
6 not support the recommendation that Plaintiff receive surgery. However, the evidence before the  
7 court shows that Defendant Ulit did not refer Plaintiff to Dr. Smith nor did he disregard a  
8 recommendation that Plaintiff should have surgery. Defendant Ulit submitted a request for  
9 services seeking to have Plaintiff referred to a neurologist. In order to obtain a referral, CDCR  
10 requires that the InterQual criteria be met to demonstrate medical necessity. (U.F. 18, 26.) Dr.  
11 Beregovskaya denied the RFS submitted by Defendant Ulit because he determined that Plaintiff  
12 should continue with clinical management because he did not meet the InterQual criteria for  
13 referral. (U.F. 61, 62.)

14 On July 23, 2013, his last appoint as Plaintiff's PCP, Defendant Ulit referred Plaintiff for  
15 an NCS/EMS which was approved. Plaintiff did not see Dr. Smith and receive a  
16 recommendation for surgery until January 31, 2014 approximately six months after Defendant  
17 Ulit was his PCP. (U.F. 3, 103.) Therefore, Plaintiff has not demonstrated that Defendant Ulit  
18 disregarded any recommendation that Plaintiff have surgery for his right CTS.

19 Plaintiff also asserts that Defendant Ulit did not deny that he told Plaintiff to "deal with  
20 it" thus admitting that he was deliberately indifferent to Plaintiff's pain. Plaintiff relies on Beard  
21 v. Banks, 548 U.S. 521 (2006), in which the Supreme Court stated, "by failing specifically to  
22 challenge the facts identified in the" moving party's statement of undisputed facts, the opposing  
23 party is deemed to have admitted the validity of the facts contained therein. However, in Beard  
24 the moving party had set forth a statement of undisputed facts that had not been addressed by the  
25 opposing party. Id. Here, Plaintiff made the statement in the second amended complaint and  
26 Defendant has denied that the statement was made in their answer to the second amended  
27 complaint. (Answer ¶ 11, ECF No. 31.)

28 Further, even if the statement was deemed admitted, Plaintiff has failed to establish that

1 Defendant Ulit made this statement in relation to the claims that are proceeding in this action. In  
2 his second amended complaint, Plaintiff states that he had surgery by Dr. Smith for his left CTS  
3 on January 11, 2012, that he required pain medication, and Defendant Ulit told him to deal with  
4 it and would not prescribe medication for pain. (SAC ¶¶ 5, 6.) However, as the Court  
5 previously found, Plaintiff has only exhausted his administrative remedies as to his complaints of  
6 right hand, wrist and arm pain. Such a statement made by Defendant Ulit after Plaintiff's  
7 surgery on his left hand does not demonstrate that Defendant Ulit was deliberately indifferent in  
8 treating Plaintiff's right hand, wrist, and arm pain. Plaintiff has failed to demonstrate that the  
9 statement has any connection to the allegations regarding his right hand, wrist and arm pain that  
10 are proceeding in this action.

11 Plaintiff's complaint alleges that he did not receive any pain medication after May 28,  
12 2012; he saw Defendant Ulit on December 7, 2012, and was not prescribed pain medication; and  
13 over the next two months he complained of worsening pain in his right hand. (SAC ¶¶ 9, 10.) In  
14 his opposition to the current motion, Plaintiff argues that on May 28, 2012, and December 7,  
15 2012 he was denied pain medication with a statement that there was nothing wrong with him  
16 despite diagnostic findings demonstrating otherwise.

17 Plaintiff has not presented any evidence that he complained of pain in his right hand, arm  
18 or wrist at the May 2012 appointment. The Court was unable to find a record of a May 28, 2012  
19 visit with Defendant Ulit, but the medical record shows that Plaintiff was seen by Defendant Ulit  
20 on May 29, 2012, for lab results and to follow up on his gout, anemia, and hypothyroidism.  
21 (5/29/12 Chronic Care Followup Visit, ECF No. 84-8 at 117.) Plaintiff was not having an acute  
22 attack of his gout on that date. (Id.) He had mild anemia and his B12 was quite low. (Id.) He  
23 was hypothyroid and his triglycerides were mildly elevated. (Id.) Plaintiff had an unremarkable  
24 physical examination. (Id.) Defendant Ulit found that Plaintiff had mild anemia and would be  
25 given oral replacement. (Id.) His hypothyroidism was mild and under fair control and he was  
26 started on 25 mg of thyroid medication. (Id.) Plaintiff's gout medication was decreased. (Id.)  
27 Plaintiff complained of a right ear infection and his throat was red and the right ear was dull.  
28 (Id.) Plaintiff was prescribed azithromycin. (Id.) He was recommended to diet and exercise for

1 his hypertriglyceridemia. (Id.) Plaintiff was to follow up in thirty days. (Id.)

2 Plaintiff was seen by Defendant Ulit on December 7, 2012. (12/7/12 Progress Note, ECF  
3 No. 84-9 at 3.) Plaintiff was seen for a follow up of his anemia, gout, hypothyroidism,  
4 dyslipidemia/hypertriglyceridemia possibly secondary to hypothyroidism, neck pain with  
5 radiculopathy, and foot deformity. (Id.) Plaintiff said that he was doing fine and had no  
6 complaints except neck pain that was radiating down into the right arm with no numbness or  
7 weakness. (Id.) Plaintiff had been prescribed gabapentin and ibuprofen for pain. (Id.) On  
8 examination, Plaintiff's neck was supple and his neck range of motion was good. (Id.) Plaintiff  
9 had no tenderness in the neck spine and motor and sensory in the extremities was intact. (Id.)  
10 As to Plaintiff's neck pain, Defendant Ulit noted that Plaintiff was already on gabapentin. (Id.)  
11 He requested the MRI that had been done in 2011 and noted "will go from that point." (Id.)

12 Further the medication reconciliation statements show that on November 30, 2012,  
13 Defendant Ulit prescribed a ninety day supply of gabapentin to be used as needed for nerve pain.  
14 (11/30/12 Medication Reconciliation, ECF No. 84-7 at 30.) The expected duration of the therapy  
15 was six months. (11/30/12 Nonformulary Drug Request, ECF No. 84-7 at 37.) The medication  
16 was not discontinued on December 7, 2012, and Plaintiff also had a prescription for ibuprofen to  
17 be taken three times per day. (12/7/12 Medication Reconciliation, ECF No. 84-7 at 40.)

18 Defendant Ulit has presented evidence that he did prescribe Plaintiff medication to  
19 address Plaintiff's right hand, wrist, and arm pain prior to December 7, 2012, and the pain  
20 medication was continued during the remainder of the period that he was Plaintiff's PCP.

21 Plaintiff argues that Defendant Ulit did not order further testing for more than a year  
22 despite the neurologist determinations relevant to the MRI. Plaintiff relies on his 2011 MRI  
23 showing that he had spinal cord compression at C4-C5 and C6-C7 with narrowing of the spinal  
24 cord at C6-C7 (SAC ¶ 3). Plaintiff states that his cervical spine was causing pain to radiate to his  
25 shoulders and arms and causing numbness of his face, arms and fingers. (SAC ¶ 1.) A witness  
26 may testify to a matter where they have personal knowledge of the matter. Fed. R. Evid. 602. A  
27 lay witness may offer testimony in the form of an opinion where it is "(a) rationally based on the  
28 witness's perception; (b) helpful to clearly understanding the witness's testimony or to

1 determining a fact in issue; and (c) not based on scientific, technical, or other specialized  
2 knowledge within the scope of Rule 702.” Fed. R. Evid. 701.

3 The cause of Plaintiff’s pain and numbness requires the testimony of a witness that has  
4 specialized knowledge which would fall under Rule 702. Under Rule 702, a doctor is an expert  
5 witness due to his knowledge, skill, experience, training, or education and may testify in the  
6 form of a medical opinion. Fed. R. Evid. 702. Plaintiff is not a doctor and cannot proffer  
7 medical testimony in this matter. (U.F. 50.)

8 Plaintiff has presented no evidence that his degenerative disc disease was a contributing  
9 factor to his CTS. Defendants have presented evidence that the majority of CTS is caused by  
10 overuse of the hand or hypothyroid. (U.F. 33.) Additionally, Dr. Smith’s January 31, 2014  
11 examination notes state that it is the EMG and NCS done on September 20, 2013 that show that  
12 Plaintiff had moderate to severe right CTS. (ECF No. 86-4 at 110.) Plaintiff’s reliance on the  
13 2011 MRI does not create a genuine issue of fact that would defeat the current motion for  
14 summary judgment.

15 Plaintiff contends that Defendant Ulit delayed the surgery recommended by Dr. Smith  
16 thereby contributing to Plaintiff’s injury and irreversible damage. But as discussed, Dr. Smith  
17 did recommend surgery until after Defendant Ulit was no longer treating Plaintiff. Plaintiff has  
18 presented no evidence that surgery was recommended during the time that Defendant Ulit was  
19 treating Plaintiff. Plaintiff’s disagreement with the course of treatment provided does not  
20 amount to deliberate indifference.” Snow, 681 F.3d at 987. Plaintiff has not demonstrated that  
21 the course of treatment Defendant Ulit chose was medically unacceptable under the  
22 circumstances. Id. at 988. The only evidence before the Court shows that the treatment  
23 Defendant Ulit provided to Plaintiff for his right hand, wrist, and arm pain was medically  
24 acceptable. (U.F. 30, 33, 34, 36, 38, 43, 44.)

25 Plaintiff has not met his burden of demonstrating that a genuine issue of material fact  
26 exists as to Defendant Ulit. The Court recommends that Defendant Ulit’s motion for summary  
27 judgment be granted.

28 ///



1           2.     Defendant Moon

2           Defendant Moon argues that once he took over Plaintiff's treatment, he proactively and  
3 appropriately treated Plaintiff. Defendant Moon first saw Plaintiff on September 30, 2013 as a  
4 follow up to the NCS that had been done on September 20, 2013. (U.F. 87.) Defendant Moon  
5 had not yet received the results of the NCS, but he did an examination of Plaintiff and assessed  
6 that the cause of the numbness in the fingers of his right hand was likely the result of CTS. (U.F.  
7 88.) However, Defendant Moon needed the results of the NCS to confirm his diagnosis to  
8 submit an RFS. (U.F. 89.)

9           Defendant Moon saw Plaintiff again on October 22, 2013 and reviewed the results of the  
10 NCS which showed that Plaintiff had moderate to severe CTS with no electrophysiological  
11 evidence of ulnar neuropathy, radiculopathy, or polyneuropathy of the right arm. (U.F. 90.)  
12 Defendant Moon submitted an RFS for an initial consult with an orthopedic surgeon. (U.F. 91.)

13           On November 9, 2013, Defendant Moon was informed that the RFS was denied because  
14 he had not included documentation of physical findings such as weakness or atrophy of the  
15 thenar muscle as required by the InterQual criteria. (U.F. 92.) Defendant Moon met with  
16 Plaintiff on November 26, 2013 to obtain the information required for him to resubmit the RFS.  
17 (U.F. 94.) He attempted to review Plaintiff's medical records, but the system was down and he  
18 could not obtain the relevant information. (U.F. 95.) Plaintiff was scheduled for a follow up  
19 appointment in two weeks so Defendant Moon could obtain the information and resubmit the  
20 RFS. (U.F. 96.)

21           Defendant Moon saw Plaintiff on December 10, 2013, and resubmitted the RFS which  
22 was approved by Dr. Beregovskaya on December 12, 2013. (U.F. 97, 99.)

23           Plaintiff saw Dr. Smith on January 31, 2014 who recommended a carpal tunnel release  
24 surgery for Plaintiff's right hand. (U.F. 101, 103.)

25           On April 23, 2014, Defendant Moon submitted an order for Plaintiff to have blood work  
26 to check his thyroid function in anticipation of surgery. (U.F. 104.)

27           Defendant Moon had a follow up with Plaintiff on July 31, 2014, and informed Plaintiff  
28 that Dr. Smith had gone out on leave and he would have to wait if he wanted Dr. Smith to

1 perform the surgery. (U.F. 105.) Plaintiff decided to wait for Dr. Smith to return. (U.F. 106.)

2 Plaintiff had an appointment with Defendant Moon on August 25, 2014, and informed  
3 Defendant Moon that he no longer wanted to wait for Dr. Smith and wanted to be referred to  
4 another orthopedic surgeon. (U.F. 107.) Defendant Moon submitted an RFS that same day  
5 which was approved by Dr. Beregovskaya on August 26, 2014. (U.F. 109.)

6 Plaintiff had a consultation with Dr. Alade on September 12, 2014. (U.F. 110.)  
7 Defendant Moon had a follow up with Plaintiff to address Dr. Alade's recommendation on  
8 September 25, 2014, but he had not yet received Dr. Alade's report. (U.F. 111, 112.) Plaintiff  
9 had a follow up on October 20, 2014, at which Defendant Moon saw that Dr. Alade had  
10 recommended outpatient surgery for right median nerve decompression of the right wrist. (U.F.  
11 113.) Defendant Moon submitted a request for services that was approved by Dr. Beregovskaya  
12 on October 21, 2014. (U.F. 115.) Plaintiff had carpal tunnel release surgery to his right wrist on  
13 November 18, 2014. (U.F. 116.) Plaintiff received a 14 day work lay in and acetaminophen  
14 with codeine for post-surgical pain. (U.F. 116, 177.)

15 Defendant Moon saw Plaintiff for a post-surgical follow up on November 26, 2014, and  
16 Plaintiff complained that the medication was not controlling his pain. (U.F. 118.) Defendant  
17 Moon replaced the codeine with morphine. (U.F. 120.) Plaintiff saw Dr. Alade on December 5,  
18 2014 to have his sutures removed. (U.F. 121.) He received a wrist brace and was advised to  
19 exercise his hand. (Id.)

20 Defendant Moon saw Plaintiff on December 10, 2014 after receiving notification that  
21 Plaintiff was not taking his medication as prescribed. (U.F. 123.) Plaintiff questioned why he  
22 had to see the nurse for missing his medication when it was on an as needed basis. (U.F. 124.)  
23 Defendant Moon saw Plaintiff on December 18, 2014 and assessed that Plaintiff's hand was  
24 healing well. (U.F. 125.) He had not received Dr. Alade's report so he scheduled an  
25 appointment with Plaintiff for the following week. (U.F. 125, 126.)

26 On December 24, 2014, Defendant Moon saw Plaintiff for a follow up and noted that the  
27 hand seemed mildly swollen which was a natural response to surgery. (U.F. 128, 129.) Plaintiff  
28 had a follow up appointment with Dr. Alade and saw Defendant Moon on February 20, 2015.

1 (U.F. 131, 132.) Plaintiff complained that he was not able to make a fist. (U.F. 132.) Defendant  
2 Moon realized that Dr. Alade had recommended physical therapy but an RFS had not been  
3 submitted. (U.F. 133.) He submitted an RFS for physical therapy which was approved. (U.F.  
4 135.) Plaintiff began physical therapy on March 10, 2015, and was discharged on April 22,  
5 2015. (U.F. 136, 138, 139.) The physical therapist found that Plaintiff had progressed very well  
6 and he was encouraged to continue with his exercises. (U.F. 139.)

7 Defendant Moon has met his initial responsibility of identifying those portions of the  
8 record that show there is no genuine issue of material fact that he was deliberately indifferent to  
9 Plaintiff's serious medical needs. Celotex Corp., 477 U.S. at 322. The burden shifts to Plaintiff  
10 to establish that a genuine issue as to any material fact actually exists. Matsushita Elec. Indus.  
11 Co., 475 U.S. at 586.

12 Plaintiff argues that on September 9, 2013 Defendant Moon saw him, however the  
13 medical evidence show that Plaintiff first saw Defendant Moon on September 30, 2013 to follow  
14 up on his September 20, 2013 nerve conduction study. (U.F. 85, 87.) Plaintiff states that  
15 Defendant Moon failed to treat his preexisting injury referring to the prior study in 2011.  
16 However, Plaintiff has presented no evidence of how the 2011 study would address his right  
17 hand, wrist, and arm pain. As discussed, he has presented no evidence that his degenerative disc  
18 disease or spinal stenosis contributed to his CTS, and the prior NCS findings for his left hand in  
19 2011 do not establish that he needed surgery for his right hand in 2012.

20 Plaintiff contends that Defendant Moon refused to treat him for his pain. But the record  
21 demonstrates that Plaintiff was receiving gabapentin and ibuprofen for his pain. (U.F. 10.)  
22 Defendant Moon continued to prescribe Plaintiff with gabapentin and ibuprofen. Through the  
23 middle of October 2013, Plaintiff was receiving gabapentin two times per day, but starting on  
24 October 17, 2013, he started missing one dose approximately every other day and then on  
25 October 26, 2013, Plaintiff was only taking one dose every other day. (Medication  
26 Administration Form, ECF No. 84-12 at 111.) On November 25, 2013, Defendant Moon  
27 renewed Plaintiff's prescription for gabapentin. (Medication Reconciliation, ECF No. 84-12 at  
28 115; Nonformulary Drug Request, ECF No. 84-12 at 118.) Plaintiff's acetaminophen continued

1 to be renewed. (Medication Reconciliation Form, ECF No. 84-12 at 163, 178.)

2 In November 2013, Plaintiff was generally only taking one dose a day and did not take  
3 any gabapentin on November 5 or 6 or 28. (Medication Administration Record, ECF No, 84-12  
4 at 218.) In December 2013, Plaintiff missed one dose of his gabapentin the first week, did not  
5 take any gabapentin on December 7, 8, 17, or 28, and generally took only one dose for the  
6 remainder of the month. (Medication Administration Record 84-12 at 119, 126.) By January  
7 2014, Plaintiff generally was taking one dose a day and missed taking his gabapentin on January  
8 1, 11, and 25. (Medication Administration Record, ECF No. 84-12 at 137.) Plaintiff continued  
9 this pattern through May 2014. (Medication Reconciliation Record, ECF No. 84-12 at 139, 144,  
10 153, 156.) By June 2014, Plaintiff was only taking his gabapentin once a day and was not taking  
11 any gabapentin once or twice a week. (Medication Administration Record, ECF No. 84-12 at  
12 166.) Plaintiff continued to take his gabapentin once a day, missing days during the week  
13 through the date of his surgery. (Medication Administration Record, ECF No. 84-12 at 169, 173,  
14 181, 186.)

15 Defendant Moon has presented evidence that he did prescribe medication for Plaintiff's  
16 pain and that Plaintiff was not taking the medication as directed. (U.F. 12, 13.) No reasonable  
17 trier of fact could find that Plaintiff's failure to receive medication for his pain was due any lack  
18 of action by Defendant Moon but was due to Plaintiff's choice not to take the medication. To the  
19 extent that Plaintiff sought a different pain medication, the difference of opinion between the  
20 inmate and physician about the best way to address pain has repeatedly been held not to create a  
21 triable issue on the deliberate indifference prong of an Eighth Amendment claim. Miller v.  
22 California Dep't of Corr. & Rehab., No. 16-CV-02431-EMC, 2018 WL 534306, at \*16 (N.D.  
23 Cal. Jan. 24, 2018) (collecting cases).

24 Further, Defendants have presented evidence that gabapentin and ibuprofen are the  
25 proper treatment for Plaintiff's pain. (U.F. 43, 44.) Plaintiff's disagreement with the treatment  
26 provided is not sufficient to demonstrate deliberate indifference and he has not presented any  
27 evidence that the treatment he received for his pain was medically unacceptable under the  
28 circumstances. Snow, 681 F.3d at 988

1 Plaintiff argues that the defendants ignored the recommendation of Dr. Smith and sought  
2 alternative treatment and failed to appropriately and timely treat his CTS. However, Defendants  
3 have presented evidence that the treatment plan provided was clinically appropriate. Plaintiff  
4 was prescribed gabapentin to be taken two times per day, although the majority of the time he  
5 only took his medication only once and on numerous days he did not take his medication at all  
6 and he was provided with a wrist splint that he did not use. Once Plaintiff's thyroid was  
7 determined to be under control he was referred for NCS testing. At this point, Defendant Moon  
8 took over Plaintiff's care and referred him for a consultation with an orthopedic surgeon which  
9 was approved. (U.F. 99.) Plaintiff had a consultation with Dr. Smith on January 31, 2014, and  
10 surgery was recommended. (U.F. 100.)

11 In his complaint, Plaintiff alleged that he was told by Dr. Smith that he needed to have  
12 surgery within sixty days or permanent damage would occur. (SAC ¶ 20.) Defendants object  
13 that this statement is inadmissible hearsay and Plaintiff has not submitted a declaration from Dr.  
14 Smith nor is this statement contained in the medical records. Hearsay is "a statement that: (1) the  
15 declarant does not make while testifying at the current trial or hearing; and (2) a party offers in  
16 evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c).  
17 Defendants' hearsay objection is sustained.

18 Further in his deposition, Plaintiff admitted that Dr. Smith never made the statement but  
19 that he felt there was enough medical evidence that surgery should have been provided. During  
20 his deposition, Plaintiff stated that Dr. Alade told him that the damage starts the moment that  
21 there is numbing and tingling in his hand. (Pl. Depo. 151:8-10.) Dr. Alade did not tell Plaintiff  
22 that the surgery needed to be done immediately. (Id. 151:14-16.) No one ever told him that  
23 surgery needed to be done immediately, but Plaintiff stated that there should have been enough  
24 evidence because of his pain, the tingling and his inability to use his hand, the EMG that was  
25 done on his hand, and Dr. Smith's recommendation that he needed surgery. (Id. 151:17-152:3.)  
26 No one told Plaintiff that he needed to have surgery within sixty days. (Id. 152:15-21.)

27 However, Dr. Smith opined that Plaintiff needed surgery on January 31, 2014, and  
28 Defendant Moon did not submit an RFT for surgery until almost seven months later in August

1 2014. The record shows that on February 3, 2014, Defendant Moon saw Plaintiff for a follow up  
2 and entered an order for Plaintiff was to return in three months for lab work. (ECF No. 84-7 at  
3 86; ECF No. 84-9 at 170.) Defendant Moon received and reviewed Dr. Smith's report on  
4 February 4, 2014. (ECF No. 84-6 at 110.)

5 On April 23, 2014, Defendant Moon saw Plaintiff and submitted an order for Plaintiff to  
6 have blood work to check his thyroid function in anticipation of surgery and Plaintiff was to  
7 follow up the next week. (U.F. 104, ECF No. 84-10 at 199.) Plaintiff's blood was drawn and  
8 tested on April 24, 2014. (ECF No. 84-5 at 89-90.) Defendant Moon saw Plaintiff on July 31,  
9 2014, and informed him that Dr. Smith was on leave; Plaintiff decided to wait for surgery until  
10 Dr. Smith returned. (U.F. 106.) Defendant Moon saw Plaintiff on August 25, 2014, at which  
11 time Plaintiff stated that he no longer wanted to wait for Dr. Smith to return and Defendant  
12 Moon submitted an RFS for referral to another orthopedist. (ECF No. 84-6 at 119.) The RFS  
13 was approved and Plaintiff had a consultation with Dr. Alade on September 12, 2014. (ECF No  
14 84-6 at 121.)

15 Defendant Moon does not address this six month delay between the date that he reviewed  
16 Dr. Smith's report and the appointment at which Plaintiff decided to wait on his surgery for Dr.  
17 Smith to return. Further, following surgery, Dr. Alade prescribed physical therapy, but  
18 Defendant Moon did not submit an RFS until February 2015 noting that Dr. Alade had  
19 recommended physical therapy that had not been ordered. (U.F. 133, 135.)

20 Even if there was a delay in providing Plaintiff with surgery or physical therapy after  
21 surgery, that is not enough to show deliberate indifference, the delay in providing surgery must  
22 have caused substantial harm. Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404,  
23 407 (9th Cir. 1985) (citing Estelle v. Gamble, 429 U.S. 97, 106 (1976)); McGuckin v. Smith, 974  
24 F.2d 1050, 1060 (9th Cir. 1992), overruled on other grounds by WMX Techs., Inc. v. Miller, 104  
25 F.3d 1133 (9th Cir. 1997). Here, Plaintiff states that due to the delay he was denied medication  
26 to relieve his pain (SAC 12), however, as discussed above, Plaintiff was provided with pain  
27 medication and a wrist splint to address his complaints of pain. Further, following surgery,  
28 Plaintiff was prescribed acetaminophen with codeine for post-surgery pain. (U.F. 117.) On

1 November 26, 2014, Plaintiff complained that the acetaminophen with codeine was not  
2 controlling his pain and Defendant Moon replaced the medication with morphine. (U.F. 118,  
3 119.)

4 Plaintiff argues that he was exposed to permanent damage and disfigurement as described  
5 by Dr. Smith, however, as discussed above, such statements are inadmissible hearsay and  
6 Plaintiff admitted in his deposition that Dr. Smith did not make such a statement.

7 Plaintiff has not presented any evidence that he suffered any substantial harm due to the  
8 failure to provide him with surgery on an earlier date. The record consistently notes that Plaintiff  
9 had no atrophy in his hand despite some positive testing and weakness on the right prior to  
10 surgery. (U.F. 80, 97, 101, 108, 114.) Following surgery, Plaintiff's hand was found to be  
11 healing well. (U.F. 125, 128, 134.)

12 Plaintiff was referred to physical therapy and had an initial assessment on March 10,  
13 2015. (U.F. 137.) Physical Therapy Notes 84-12 at 41.) Plaintiff was discharged from physical  
14 therapy on April 22, 2015. (4/22/15 Physical Therapy Discharge Summary, ECF No. 84-6 at  
15 146.) Plaintiff reported that he was doing okay but still had soreness and difficulty gripping.  
16 (Id.) The record notes "Wrist Flex: 75, Ext: 75. Incision well healed. No atrophy, no swelling,  
17 no redness noted. Wrist flex and ext = 4+/5 Rad dev/ulnar dev. = 4+/5." (Id.) Objectively  
18 Plaintiff was found to be "progressing very well." (Id.) He was to continue self exercises for  
19 strength and flexibility. (Id.) Plaintiff has not presented any evidence that he sustained any  
20 substantial harm from any delay in providing him with surgery or with physical therapy.  
21 Compare Jett, 439 F.3d at 1098 (physician's own notes record the harm caused by the delay).

22 Plaintiff has not met his burden of demonstrating that a genuine issue of material fact  
23 exists as to Defendant Moon. The Court recommends that Defendant Moon's motion for  
24 summary judgment be granted.

25 3. Defendant Wang

26 Defendant Wang argues that there is no evidence to demonstrate that he was deliberately  
27 indifferent to Plaintiff's arm, wrist, and shoulder pain. Rather, Defendants state that Plaintiff  
28 contends that Defendant Wang is liable because he supervised Defendants Ulit and Moon.

1 Plaintiff argues that Defendant Wang is liable because he supervised Defendants Ulit and Moon  
2 and he was required to be consulted by Dr. Beregovskaya in the denial of the RFS for the  
3 neurological consult.

4 **a. Official Capacity**

5 Plaintiff argues that Defendant Wang is liable in his official capacity. However, this action  
6 is not proceeding against Defendant Wang in his official capacity. “The Eleventh Amendment  
7 bars suits for money damages in federal court against a state, its agencies, and state officials acting  
8 in their official capacities.” Aholelei v. Dept. of Public Safety, 488 F.3d 1144, 1147 (9th Cir.  
9 2007). The Eleventh Amendment does not bar claims for prospective injunctive relief against an  
10 officer of the state who acts in his official capacity. Flint v. Dennison, 488 F.3d 816, 825 (9th Cir.  
11 2007); Cerrato v. San Francisco Cmty. Coll. Dist., 26 F.3d 968, 973 (9th Cir. 1994).

12 A suit brought against government officials in their official capacity is generally  
13 equivalent to a suit against the government itself. McRorie v. Shimoda, 795 F.2d 780, 783 (9th  
14 Cir. 1986). Therefore, officials may be held liable if “‘policy or custom’ . . . played a part in the  
15 violation of federal law.” McRorie, 795 F.2d at 783 (quoting Kentucky v. Graham, 473 U.S.  
16 159, 166 (1985); Hafer v. Melo, 502 U.S. 21, 25 (1991)).

17 In this action, Plaintiff is seeking only monetary damages and the second amended  
18 complaint did not allege that a policy or custom played a part in the denial of medical care. For  
19 these reasons, this action is not proceeding against Defendant Wang in his official capacity.

20 **b. Supervisory liability**

21 Plaintiff seeks to hold Defendant Wang liable due to his position as chief medical officer  
22 arguing that he supervised Defendants Ulit and Moon and had to be consulted by Dr.  
23 Beregovskaya in deciding the RFS. “Under Section 1983, supervisory officials are not liable for  
24 actions of subordinates on any theory of vicarious liability.” Crowley v. Bannister, 734 F.3d  
25 967, 977 (9th Cir. 2013) (citation and internal quotation marks omitted); Ashcroft v. Iqbal, 556  
26 U.S. 662, 676 (2009). “A supervisor may be liable only if (1) he or she is personally involved in  
27 the constitutional deprivation, or (2) there is ‘a sufficient causal connection between the  
28 supervisor’s wrongful conduct and the constitutional violation.’” Crowley, 734 F.3d at 977



1 (citation and internal quotation marks omitted). Plaintiff has not demonstrated that Defendant  
2 Wang had any personal involvement in the denials of his request for surgery. Further, Defendant  
3 Wang has presented evidence the he was chief medical officer from January 31, 2013 through  
4 January 30, 2015 and did not provide any direct patient care to inmates during this period of  
5 time. (U.F. 5.) He did not approve or deny any of the RFS at issue here. (U.F. 31.) Dr.  
6 Beregovskaya had been designated as the person who approved or denied requests for  
7 neurological consultation at CSP-COR. (U.F. 60.)

8 Dr. Wang did deny Plaintiff's appeal of the denial of the referral to a neurologist on June  
9 18, 2013 at the second level of appeal. (ECF No. 84-13 at 13-14.) Plaintiff was seeking a  
10 referral for an MRI, but it was found that he had not previously requested an MRI but a referral  
11 to the neurologist. (Id. at 13.) At the time, Plaintiff did not meet the criteria for an MRI and  
12 clinical management was recommended. (Id.) Plaintiff also had stated that Dr. Clark had written  
13 a referral for an EMG. (Id. at 14.) However, this was not true. (Id.) Dr. Clark noted that he did  
14 write an RFS but did not state what it was for. (Id.) He then determined that the RFS would be  
15 denied because Plaintiff did not meet the InterQual criteria because his thyroid levels were off.  
16 (Id.) The RFS was not completed because Dr. Clark had spoken with Defendant Ulit who said  
17 that they were working to get Plaintiff's thyroid levels within normal limits. (Id.) The test that  
18 Dr. Clark wanted to have done could not be done until Plaintiff's thyroid levels were within  
19 normal limits. (Id.) Defendant Ulit had ordered blood tests for this reason and was adjusting  
20 Plaintiff's medication. (Id.) Once the thyroid levels were normal, further testing would be able  
21 to be completed. (Id.) As discussed above, Plaintiff has failed to demonstrate that any defendant  
22 was deliberately indifferent by denying his request for an orthopedic consult prior to his thyroid  
23 issues getting resolved. Plaintiff has failed to meet his burden to show that a genuine issue of  
24 material fact exists that Defendant Wang acted with deliberate indifference toward Plaintiff's  
25 serious medical needs while he was the chief medical officer.

26 **c. Defendant Wang's treatment of Plaintiff**

27 Defendant Wang first saw Plaintiff as his PCP on May 14, 2015. (U.F. 141, 5/14/15  
28 Medication Reconciliation, ECF No. 84-7 at 131.) At that visit, Plaintiff complained of

1 numbness in his right hand and wanted to change his medication from gabapentin and ibuprofen  
2 to an NSAID. (Id.) Defendant Wang changed Plaintiff’s medication to Naproxen. (U.F. 142.)  
3 None of the later visits with Defendant Wang addressed Plaintiff’s right hand, wrist or arm pain.  
4 (Wang Decl. ¶¶ 22, 23, 24.) While Plaintiff alleges that Defendant Wang denied an RFS in  
5 2016, Defendant Wang was not at CSP-COR for any part of 2016. (U.F. 143.) His last day as a  
6 physician & surgeon at CSP-COR was December 31, 2015. (Wang Decl. ¶ 25.)

7 Plaintiff has not met his burden to demonstrate that a genuine issue of material fact exists  
8 as to Defendant Wang. The Court recommends that Defendant Wang’s motion for summary  
9 judgment be granted.

10 **VI.**

11 **CONCLUSION AND RECOMMENDATION**

12 Based on the foregoing, IT IS HEREBY RECOMMENDED that Defendants’ motion for  
13 summary judgment be GRANTED in its entirety.

14 This findings and recommendations is submitted to the district judge assigned to this  
15 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court’s Local Rule 304. Within thirty (30)  
16 days of service of this recommendation, any party may file written objections to this findings and  
17 recommendations with the court and serve a copy on all parties. Such a document should be  
18 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” The district  
19 judge will review the magistrate judge’s findings and recommendations pursuant to 28 U.S.C. §  
20 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may  
21 result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014)  
22 (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

23 IT IS SO ORDERED.

24 Dated: April 17, 2020

25   
26 \_\_\_\_\_  
27 UNITED STATES MAGISTRATE JUDGE  
28