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

DENNIS CURTIS HISLE,	)	Case No. 1:17-cv-01400-NONE-SAB (PC)
	)	
Plaintiff,	)	
	)	FINDINGS AND RECOMMENDATIONS
v.	)	REGARDING PLAINTIFF’S AND DEFENDANT
	)	CONANAN’S MOTIONS FOR SUMMARY
MARLYN CONANAN, et al.,	)	JUDGMENT
	)	
Defendants.	)	(ECF Nos. 122, 138)
	)	
	)	

Plaintiff Dennis Curtis Hisle 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 Plaintiff’s motion for summary judgment, filed on August 6, 2020, and Defendant Conanon’s motion for summary judgment, filed on November 10, 2020. (ECF Nos. 127, 128.)

**I.**

**RELEVANT BACKGROUND**

This action is proceeding against Defendants Conanon and Ahmed for deliberate indifference to a serious medical need in violation of the Eighth Amendment.

On April 10, 2018, Defendant Conanon filed an answer to the complaint. (ECF No. 18.) On April 11, 2018, the Court issued the discovery and scheduling order. (ECF No. 19.)

On June 17, 2019, Defendant Conanon filed a motion for summary judgment. (ECF No. 68.)

1 On October 31, 2019, the undersigned issued Findings and Recommendations recommending  
2 that Defendant Conanán's motion for summary judgment be denied. (ECF No. 92.)

3 On December 18, 2019, the Findings and Recommendations were adopted in full. (ECF No.  
4 97.)

5 On March 2, 2020, Defendant Conanán filed a motion for summary judgment for failure to  
6 exhaust the administrative remedies. (ECF No. 107.)

7 On April 13, 2020, Plaintiff filed a third amended complaint. (ECF No. 114.)

8 On April 28, 2020, Defendant Conanán filed an answer to the second amended complaint.  
9 (ECF No. 118.)

10 On August 3, 2020, the undersigned issued Findings and Recommendations recommending  
11 that Defendant Conanán's motion for summary judgment for failure to exhaust the administrative  
12 remedies be granted. (ECF No. 121.) The Findings and Recommendations were adopted in full on  
13 November 6, 2020. (ECF No. 136.)

14 On August 6, 2020, Plaintiff filed a motion for summary judgment as to Defendant Conanán.  
15 (ECF No. 122.)

16 On November 10, 2020, Defendant Conanán filed a motion for summary judgment. (ECF No.  
17 138.)

18 On December 28, 2020, Plaintiff filed an opposition to Defendant Conanán's motion for  
19 summary judgment. (ECF No. 148.)

20 On February 5, 2021, Defendant Conanán filed an opposition to Plaintiff's motion for  
21 summary judgment, and a reply to Plaintiff's opposition. (ECF Nos. 153, 154.)

22 On March 1, 2021, Plaintiff filed a reply to Defendant Conanán's opposition to his motion for  
23 summary judgment. (ECF Nos. 155, 156.)

## 24 II.

### 25 LEGAL STANDARD

26 Any party may move for summary judgment, and the Court shall grant summary judgment if  
27 the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to  
28

1 judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks omitted); Washington Mut. Inc. v.  
2 U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party’s position, whether it be that a fact is disputed  
3 or undisputed, must be supported by (1) citing to particular parts of materials in the record, including  
4 but not limited to depositions, documents, declarations, or discovery; or (2) showing that the materials  
5 cited do not establish the presence or absence of a genuine dispute or that the opposing party cannot  
6 produce admissible evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted).  
7 The Court may consider other materials in the record not cited to by the parties, but it is not required  
8 to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco Unified Sch. Dist., 237 F.3d 1026, 1031  
9 (9th Cir. 2001); accord Simmons v. Navajo Cnty., Ariz., 609 F.3d 1011, 1017 (9th Cir. 2010).

10 In resolving cross-motions for summary judgment, the Court must consider each party’s  
11 evidence. Tulalip Tribes of Washington v. Washington, 783 F.3d 1151, 1156 (9th Cir. 2015); Johnson  
12 v. Poway Unified Sch. Dist., 658 F.3d 954, 960 (9th Cir. 2011). A cross-motion for summary  
13 judgment requires the court to apply the same standard and rule on each motion independently. Creech  
14 v. N.D.T. Indus., Inc., 815 F. Supp. 165, 166–67 (D.S.C. 1993). When both parties have moved for  
15 summary judgment, “[t]he granting of one motion does not necessarily warrant the denial of the other  
16 motion, unless the parties base their motions on the same legal theories and same set of material  
17 facts.” Stewart v. Dollar Fed. Sav. & Loan Ass’n, 523 F. Supp. 218, 220 (S.D. Ohio 1981) (citing  
18 Schlytter v. Baker, 580 F.2d 848, 849 (5th Cir. 1978)). Plaintiff bears the burden of proof at trial, and  
19 to prevail on summary judgment, he must affirmatively demonstrate that no reasonable trier of fact  
20 could find other than for him. Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007).  
21 Defendant does not bear the burden of proof at trial and in moving for summary judgment, he need  
22 only prove an absence of evidence to support Plaintiff’s case. In re Oracle Corp. Sec. Litig., 627 F.3d  
23 376, 387 (9th Cir. 2010).

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

1 entry of judgment, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d at  
2 942 (quotation marks and citation omitted).

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

### 9 III.

#### 10 DISCUSSION

##### 11 A. Summary of Plaintiff's Allegations

12 On April 29, 2016, Plaintiff suffered three broken ribs that went undiagnosed by CRMC  
13 hospital. Upon telling Dr. Conanán at the prison medical unit of his pain and not be able to breath  
14 correctly for five days, simply sent Plaintiff back to his cell. After repeated requests for assistance,  
15 Dr. Conanán concedes to an x-ray that uncovers three broken ribs and internal bleeding. Conanán  
16 simply sends Plaintiff back to his cell with internally bleeding and pneumonia, after three weeks.  
17 Later, an x-ray reveals a large pleural hematoma and strained breathing. X-ray technician Quincy  
18 tried to assist Plaintiff by telling his superiors of Plaintiff's serious state and Plaintiff was again sent  
19 back to his cell. Days later, Plaintiff was rushed to the hospital where Conanán allowed him to lay  
20 two weeks until his lung collapsed before transfer for surgery at Memorial Hospital.

##### 21 B. Plaintiff's Motion for Summary Judgment

22 The Court initially denied summary judgment on the merits of Plaintiff's Eighth Amendment  
23 claim because it found that Plaintiff raised a triable issue of act as to whether Defendant Conanán  
24 provided a medical lay-in for Plaintiff on May 5, 2016, whether Conanán made an urgent request for  
25 Plaintiff to see an outside pulmonologist, and whether Dr. Conanán fraudulently misrepresented  
26 Plaintiff's course of treatment in her progress notes. (ECF No. 92.) Defendant Conanán thereafter  
27 moved for summary judgment and argued that Plaintiff never exhausted his administrative remedies  
28 for these specific allegations as required by the Prison Litigation Reform Act. (ECF No. 107.) The

1 Court agreed and dismissed these allegations because Plaintiff failed to exhaust the administrative  
2 remedies. (ECF No. 136.) Thus, the solely issue is whether Defendant Conanen was deliberately  
3 indifferent by failing to provide *any treatment* for Plaintiff’s fractured ribs.

4 Plaintiff moves summary judgment and contends his motion “entails evidence and sworn  
5 declarations by the [D]efendant Marlyn Conanen, that in her professional judgment prior to May 19,  
6 2016, she believed [Plaintiff’s] injuries could be managed with pain medications, rest, and activity  
7 modification. But Dr. Conanen failed to provide what she herself professionally judged medically  
8 plaintiff needed to recover 1) the ability to rest, 2) activity modification (lay-in order). So it is by Dr.  
9 Conanen’s own sworn testimony that allows plaintiff to make a case for deliberate indifference and  
10 not be disqualified based on difference as to medical opinion.” (ECF No. 122, Mot. at 39-40.)<sup>1</sup>

11 In opposition, Defendant Conanen argues Plaintiff’s motion fails because 1) he re-raises claims  
12 previously dismissed as unexhausted, thereby violating the law of the case doctrine; 2) he cannot  
13 generate a genuine issue of material fact that he had pneumonia because the medical records so  
14 thoroughly undermine his unqualified interpretation of the undisputed medical records that no juror  
15 could believe him; and 3) the undisputed evidence shows that Dr. Conanen was not deliberately  
16 indifferent because she treated Plaintiff’s rib fractures. (ECF No. 153 at 12.)

17 1. Statement of Undisputed Facts<sup>2</sup>

- 18 a. Marlyn Conanen, was primary care provider to plaintiff Hisle and treated his rib  
19 fractures while at Pleasant Valley State Prison on May 2, 2016, until his transfer to Mercy Hospital.
- 20 b. Marlyn Conanen states Plaintiff Hisle did not have pneumonia when she treated him.
- 21 c. Marlyn Conanen states Plaintiff did not have a collapsed lung (atelectasis) while under  
22 her care.
- 23 d. Dr. Schultz did not note no collapsed lung or atelectasis. Dr. Shultz only notes no  
24 pneumothorax.
- 25 e. The May 20, 2015 radiology report states that Plaintiff had mild atelectasis.

26 \_\_\_\_\_  
27 <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.

28 <sup>2</sup> Hereinafter “PUdF.”

1 f. “Lay-ins are provided to sick or injured inmates who would benefit from time to rest  
2 and recover, and the form serves to excuse them from work or school. (Feinberg Decl. ¶ 9.)

3 g. Dr. Conanen’s May 12, 2016 progress note observed that Plaintiff was functional on  
4 the yard.

5 h. Dr. Conanen declares that she filled out a request for service on May 19, 2016 for  
6 Plaintiff to see a pulmonologist. (Conanan Decl. ¶ 10, Ex. H.)

7 2. Analysis of Plaintiff’s Motion

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

19 “A difference of opinion between a physician and the prisoner – or between medical  
20 professionals – concerning what medical care is appropriate does not amount to deliberate  
21 indifference.” Snow, 681 F.3d at 987 (citing Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989),  
22 overruled in part on other grounds, Peralta, 744 F.3d at 1082-83; Wilhelm, 680 F.3d at 1122-23 (citing  
23 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1986). Rather, Plaintiff “must show that the course of  
24 treatment the doctors chose was medically unacceptable under the circumstances and that the  
25 defendants chose this course in conscious disregard of an excessive risk to [his] health.” Snow, 681  
26 F.3d at 988 (citing Jackson, 90 F.3d at 332) (internal quotation marks omitted). ). In addition,  
27 “[m]edical malpractice does not become a constitutional violation merely because the victim is a  
28

1 prisoner.” Estelle v. Gamble, 429 U.S. 97, 106 (1977); Snow v. McDaniel, 681 F.3d at 987-88,  
2 overruled in part on other grounds, Peralta v. Dillard, 744 F.3d at 1082-83; Wilhelm, 680 F.3d at 1122.

3 Here, Plaintiff has failed to demonstrate that he is entitled to judgment as a matter of law. As  
4 an initial matter, the Court previously dismissed Plaintiff’s claims that Defendant Conan failed to  
5 offer a lay-in, failed to provide an urgent referral to a pulmonologist, and alleged falsification of  
6 medical records. (ECF No. 136.) Under the law of the doctrine, district courts are “generally  
7 precluded from reconsidering an issue that has already been decided by the same court, or a higher  
8 court in the identical case.” United States v. Alexander, 106 F.3d 874, 876-77 (9th Cir. 1997).  
9 Plaintiff cannot now attempt to move for summary judgment on Conan’s alleged failure to provide a  
10 lay-in and false misrepresentation to argue she was deliberately indifferent to his serious medical  
11 needs. Id.

12 It is undisputed that Defendant Conan, was primary care provider to plaintiff Hisle and  
13 treated his rib fractures while at Pleasant Valley State Prison on May 2, 2016, until his transfer to  
14 Mercy Hospital. (PUdF a.) Defendant Conan states Plaintiff Hisle did not have pneumonia when  
15 she treated him. (PUdF b.) Defendant Conan states Plaintiff did not have a collapsed lung  
16 (atelectasis) while under her care. (PUdF c.) Dr. Schultz did not note no collapsed lung or atelectasis.  
17 Dr. Shultz only notes no pneumothorax. (PUdF d.) The May 20, 2015 radiology report states that  
18 Plaintiff had mild atelectasis. (PUdF e.) “Lay-ins are provided to sick or injured inmates who would  
19 benefit from time to rest and recover, and the form serves to excuse them from work or school. (PUdF  
20 f.) Dr. Conan’s May 12, 2016 progress note observed that Plaintiff was functional on  
21 the yard. (PUdF g.) Defendant Conan declares that she filled out a request for service on May 19,  
22 2016 for Plaintiff to see a pulmonologist. (PUdF h.)

23 Plaintiff contends that he had pneumonia and Defendant Conan failed to provide treatment  
24 for it. (ECCF No. 122 at 4, 8.) However, Defendant submits evidence of Plaintiff’s medical records  
25 which contradict Plaintiff’s contention that he had pneumonia. (Conan Decl. ¶¶ 4-6, 8, 9, 10, Exs.  
26 C, D, G, H; Pl.’s Dep. at 43-46, 48:7-10, 15-25; 49:1-5, 52:8-25, 54, 55, 58-59, 61-62; Feinberg Decl.  
27 10-12, 14, 16, 17, 18, 27, Exs. B, C.) In addition, Plaintiff cannot provide his layperson opinion to  
28 interpret his medical records. Fed. R. Evid. 701; see also United States v. Conn, 297 F.3d 548, 554

1 (7th Cir. 2002) (quoting United States v. Peoples, 250 F.3d 630, 641 (8th Cir. 2001) ); Hanger  
2 Prosthetics & Orthopedics, Inc. v. Capstone, Orthopedic, Inc., No. 2:06-cv-02879-GEB-KJM, 2008  
3 WL 2441067, at \*2 (E.D. Cal. June 13, 2008) (“The distinction between lay and expert witness  
4 testimony is that lay testimony results from a process of reasoning familiar in everyday life, while  
5 expert testimony results from a process of reasoning which can be mastered only by specialists in the  
6 field.”) (internal punctuation and citations omitted). Furthermore, Defendant Conanán has presented  
7 expert testimony that she was not deliberately indifferent to Plaintiff’s medical needs during this  
8 period of time. (Feinberg Decl., ECF No. 153-3.)

9 In deciding a motion for summary judgment, a court may not resolve conflicting evidence.  
10 Soremekun v. Thrifty Payless, Inc., 509 F.3d at 984. Rather, summary judgment may be granted only  
11 when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter  
12 of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 US 242, 248 (1986). Plaintiff has  
13 failed to carry his initial burden of demonstrating that summary judgment is proper and that no  
14 reasonable trier of fact could find other than for him.

15 Defendant has presented expert testimony by Dr. Feinberg who opines that Defendant Dr.  
16 Conanán was not deliberately indifferent to Plaintiff’s medical needs at any time. (Feinberg Decl. ¶  
17 17.) Although Plaintiff disputes whether Defendant Dr. Conanán’s care and treatment was  
18 deliberately indifferent, Defendant’s evidence creates a genuine dispute of material fact regarding  
19 whether Defendant acted reasonably in treating Plaintiff which precludes the grant of summary  
20 judgment in favor of Plaintiff. Based on the evidence presented, Plaintiff has failed to demonstrate, as  
21 a matter of law, that there is no triable issue of material fact as to whether or not Defendant Conanán.  
22 was deliberately indifference to a serious medical for Plaintiff. Accordingly, Plaintiff’s motion for  
23 summary judgment as a matter of law must be denied.

24 **B. Defendant Conanán’s Motion for Summary Judgment**

25 Defendant Conanán moves for summary judgment on Plaintiff’s deliberate indifference claim  
26 because the undisputed evidence shows that she regularly monitored Plaintiff’s rib fractures,  
27 prescribed pain management medications, and activity modifications.  
28



1           1.       Statement of Undisputed Facts<sup>3</sup>

2           a.       Plaintiff was an inmate at Pleasant Valley State Prison. On October 17, 2017, Plaintiff  
3 filed the complaint and alleged that Dr. Conanen was deliberately indifferent to Plaintiff's rib  
4 fractures. (Pl.'s Compl.)

5           b.       Plaintiff has no medical degrees and is not a medical expert. (Pl.'s Dep. at 11:11-19;  
6 56:11-14; 85:10-13.)

7           c.       Plaintiff had to be taken to Community Regional Medical Center ("CRMC") due to an  
8 incident in which staff found Plaintiff unconscious in the dayroom on April 28, 2016. (Conanan Decl.  
9 ¶ 3, Ex. A (ECF No. 138-3); Pl.'s Dep. at 28:15-21; Feinberg Decl. ¶ 9, Ex. B (ECF No. 138-4).)

10          d.       While at CRMC, Plaintiff had a CT scan of his chest, and abdominal area and was  
11 determined to be clinically stable. (Id.)

12          e.       The testing conducted on Plaintiff at Community Regional Medical Center did not  
13 detect any broken ribs.<sup>4</sup> (Conanan Decl. ¶ 3, Ex. A; Pl.'s Dep. at 30:19-23.)

14          f.       No one at Community Regional Medical Center had diagnosed Plaintiff with broken  
15 ribs. (Id.; Pl.'s Dep. at 30-31.)

16          g.       Plaintiff received a lay-in where he was confined to quarters for four days after his  
17 return from Community Regional Medical Center on or about April 29, 2016. (Pl.'s Dep. at 36:25;  
18 37:1-12.)

19          h.       Plaintiff met with Defendant Conanen on May 2, 2016 so that she could review his  
20 treatment at Community Regional Medical Center. Dr. Conanen told Plaintiff that his testing at  
21 CRMC indicated normal results. Plaintiff complained of pain in his right chest area below his rib  
22 cage. For this reason, Dr. Conanen requested that Plaintiff receive a chest x-ray. (Conanan Decl. ¶ 4;  
23 Pl.'s Dep. at 42-46; Feinberg Decl. ¶ 10, Ex. B.)

24          i.       On May 4, 2016, Plaintiff received a chest x-ray, which was interpreted by Dr. C.  
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26 <sup>3</sup> Hereinafter "DUdF."

27 <sup>4</sup> Plaintiff cannot attempt to dispute this statement of fact by way of his lay opinion and interpretation of the medical notes.  
28 Fed. R. Evid. 701.

1 Shultz, M.D. to show rib fractures at the seventh, eighth, and ninth posterior ribs. There was also no  
2 visible pneumothorax or collapsed lung, and there was a small, right pleural effusion or hemothorax  
3 present. These images were new and not visualized on the CT scan taken of Plaintiff at CRMC.<sup>5</sup>  
4 (Conanan Decl. ¶ 5, Ex. C; Pl.'s Dep. at 48:15-25; 49:1-5; Feinberg Decl. ¶ 11.)

5 j. On May 5, 2016, Dr. Conanan had a follow-up appointment with Plaintiff to review the  
6 results of his May 4, 2016 x-ray. Dr. Conanan prescribed critical pain medications, and scheduled  
7 Plaintiff for a follow-up appointment on May 12, 2016 to check the status of Plaintiff's rib fractures.  
8 (Conanan Decl. ¶ 6, Ex. D; Pl.'s Dep. at 48:7-10; 52:8-25; 54; 55; 58-59; 61-62; Ex. 5; Feinberg Decl.  
9 ¶ 12.)

10 k. Dr. Conanan believed that Plaintiff's injuries could be treated with regular monitoring,  
11 activity modification, rest, and pain management with pain medications. Dr. Conanan did not believe  
12 Plaintiff required urgent hospitalization. (Conanan Decl. ¶ 12; Feinberg Decl. ¶ 27.)

13 l. Rib fractures heal on their own, and are treated supportively with pain medications and  
14 the tincture of time.<sup>6</sup> (Feinberg Decl. ¶ 27.)

15 m. Small collections of fluid in the pleural space can be expected to reabsorb on their own  
16 and are best managed with observation over time to confirm resolution.<sup>7</sup> (Feinberg Decl. ¶ 27.)

17 n. An invasive procedure to remove small collections of pleural fluid is more likely to  
18 lead to complications such as pneumothorax or an infection than it is to provide a benefit, especially in  
19 a patient without evidence of respiratory compromise such as Plaintiff, who was oxygenating  
20 normally, and had no shortness of breath.<sup>8</sup> (Feinberg Decl. ¶ 27.)

21 o. Plaintiff was specifically advised how to request an early appointment if he felt it was  
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23 \_\_\_\_\_  
24 <sup>5</sup> Plaintiff cannot attempt to dispute this statement of fact by way of his lay opinion and interpretation of the medical notes. Fed. R. Evid. 701.

25 <sup>6</sup> Plaintiff's assertions are beyond the scope of this statement.

26 <sup>7</sup> Plaintiff cannot offer his own medical opinion because Plaintiff as a layperson not qualified to give an expert medical  
27 opinion regarding rib fractures. Fed. R. Evid. 701.

28 <sup>8</sup> Plaintiff cannot dispute this statement by offering his own interpretation of the medical records. Fed. R. Civ. 701.

1 necessary, but he submitted no requests or complaints to Dr. Conanan for uncontrolled pain difficulty  
2 breathing, or any reason.<sup>9</sup> (Feinberg Decl. ¶ 27.)

3 p. On May 9, 2016, Plaintiff refused to take Tylenol No. 3 against medical advice and  
4 signed a “refusal of examination or treatment” form stating that he had refused the medications after  
5 being advised of the risks associated with refusing to take the medications. (Conanan Decl. ¶ 7, Ex. E;  
6 Pl.’s Dep. at 66:10-20; 67:18-25; 68:7-25; 69; Feinberg Decl. ¶ 13.)

7 q. Dr. Feinberg opines that Plaintiff’s refusal to take pain medications “in order to check  
8 his level of pain off of medication” is not consistent with someone experiencing excruciating pain, but  
9 rather, someone whose pain was well-controlled on current medications and trying to determine  
10 whether or not they were needed. (Feinberg Decl. ¶ 27.)

11 r. On May 12, 2016, Plaintiff saw Dr. Conanan again. Plaintiff again complained of pain  
12 to his lower right chest area and had pain when he breathed deeply. Dr. Conanan ordered another x-  
13 ray of Plaintiff and told Plaintiff to take his prescribed pain medications. Dr. Conanan scheduled  
14 another follow-up appointment with Plaintiff for May 19, 2016.<sup>10</sup> (Conanan Decl. ¶ 8, Ex. F; Pl’s  
15 Dep. at 61:20-25; 62:11-22; 63:8-18; 65:17-25; 66:1-9; Feinberg Decl. ¶¶ 14, 27.)

16 s. Given Plaintiff’s new occasional cough, mucus and slight wheezing demonstrated at  
17 Plaintiff’s May 12, 2016 appointment with Dr. Conanan, Dr. Conanan prescribed antibiotics for a  
18 possible upper respiratory infection, renewed Plaintiff’s pain medications, and requested a repeat chest  
19 x-ray. (Conanan Decl. ¶ 8, Ex. F; Feinberg Decl. ¶ 14, Ex. B; Pl.’s Dep. at 59:9-13.)

20 t. On May 16, 2016, Plaintiff had another x-ray. Dr. Schultz interpreted that x-ray and  
21 visualized a large opacity that appeared over Plaintiff’s right lung. This finding was new and had not  
22 appeared on any previous x-ray.<sup>11</sup> (Conanan Decl. ¶ 9, Ex. G; Feinberg Decl. ¶ 15.)

23 u. Technician Richard operated the x-ray imaging equipment for Plaintiff on May 16,  
24

25 \_\_\_\_\_  
26 <sup>9</sup> Plaintiff’s assertions are beyond the scope of this statement.

27 <sup>10</sup> Plaintiff’s assertions are beyond the scope of this statement.

28 <sup>11</sup> Plaintiff cannot dispute this statement by offering his own interpretation of the medical records. Fed. R. Civ. 701.

1 2016. He made no diagnosis or interpretation of this x-ray and did not recommend to Dr. Conanen or  
2 any doctor that Plaintiff needed urgent hospitalization. Technician Richard does not have the training,  
3 knowledge, or experience to interpret x-ray film and diagnose medical conditions. (Richard Decl. ¶  
4 2.)

5 v. On May 19, 2016, Dr. Conanen had a follow-up appointment with Plaintiff to discuss the  
6 findings from Plaintiff's May 16, 2016 x-ray. Dr. Conanen's medical process notes indicate that she  
7 decided, based on the fact that there was an opacity visualized on the May 16, 2016 x-ray, to make an  
8 urgent request for Plaintiff to see a pulmonologist. (Conanen Decl. ¶ 10 Ex. H ; Pl.'s Dep. at 80:18-  
9 23.)

10 w. Plaintiff was transferred to an outside hospital on May 20, 2019. Dr. Conanen  
11 completed a "routine" request for a thoracotomy, which was an evacuation of an extra pleural  
12 hematoma on June 2, 2016. Dr. Conanen believed Plaintiff needed a higher level of care.<sup>12</sup> (Conanen  
13 Decl. ¶ 11; Feinberg Decl. ¶¶ 16-17.)

14 x. Plaintiff has no personal knowledge of who made the decision to transfer him to an  
15 outside hospital for further treatment. (Pl.'s Dep. at 94:21-25; 95:1-25; 97:6-9.)

16 y. Plaintiff saw Dr. George at the TTA on May 20, 2016, and Plaintiff was transferred by  
17 car to Mercy Hospital in order to rule out pneumonia.<sup>13</sup> (Feinberg Decl. ¶ 17.)

18 z. Plaintiff was hospitalized at Mercy Hospital in Bakersfield, California from May 20,  
19 2016 until May 31, 2015. A large right sided pleural hematoma was found on the imaging studies and  
20 a CT guided aspiration was performed by interventional radiologist Dr. David Condie. (Feinberg  
21 Decl. ¶ 18.)

22 aa. Dr. Mustaq Ahmed, the hospitalist overseeing Plaintiff's medical care at Mercy  
23 Hospital, elected to pursue surgical evacuation of the hematoma, and the surgery required Plaintiff to  
24 be transferred to Memorial Hospital in Bakersfield. (Feinberg Decl. ¶ 18.)

25 bb. Plaintiff stayed at Memorial Hospital from May 31, 2016 until June 7, 2016. (Feinberg  
26

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27 <sup>12</sup> Plaintiff's assertions are beyond the scope of this statement.

28 <sup>13</sup> Plaintiff cannot dispute this statement by offering his own interpretation of the medical records. Fed. R. Civ. 701.

1 Decl. ¶ 19.)

2 cc. Thoracic surgeon Dr. Peck consulted with Plaintiff on June 1, 2016, and recommended a  
3 surgical evaluation of the hematoma and discussed with Plaintiff the benefits and alternatives to  
4 Plaintiff who agree to proceed with the surgery. (Feinberg Decl. ¶ 19.)

5 dd. On June 3, 2016, Dr. Peck performed a right thoracotomy and evacuation of the  
6 extrapleural hematoma. There were no complications with the surgery, and Plaintiff was discharged  
7 on June 7, 2016. (Feinberg Decl. ¶ 20.)

8 ee. Plaintiff saw Dr. De La Sierra at Pleasant Valley State Prison for follow-up. He stayed  
9 in the Correctional Treatment Center for the remainder of the month where Dr. De La Sierra saw him  
10 every other day and noted his continued good recovery from the surgery. (Feinberg Decl. ¶ 21.)

11 ff. Plaintiff believes he experiences asthma; however Plaintiff's asthma is not secondary to  
12 surgery. (Feinberg Decl. ¶ 28; Pl.'s Dep. at 111:1-25.)

13 2. Analysis of Defendant's Motion

14 As previously stated, while the Eighth Amendment of the United States Constitution entitles  
15 Plaintiff to medical care, the Eighth Amendment is violated only when a prison official acts with  
16 deliberate indifference to an inmate's serious medical needs. Snow v. McDaniel, 681 F.3d at 985;  
17 Wilhelm v. Rotman, 680 F.3d at 1122; Jett v. Penner, 439 F.3d at 1096. Plaintiff "must show (1) a  
18 serious medical need by demonstrating that failure to treat [his] condition could result in further  
19 significant injury or the unnecessary and wanton infliction of pain," and (2) that "the defendant's  
20 response to the need was deliberately indifferent." Wilhelm, 680 F.3d at 1122 (citing Jett, 439 F.3d at  
21 1096). The requisite state of mind is one of subjective recklessness, which entails more than ordinary  
22 lack of due care. Snow, 681 F.3d at 985 (citation and quotation marks omitted); Wilhelm, 680 F.3d at  
23 1122.

24 "A difference of opinion between a physician and the prisoner – or between medical  
25 professionals – concerning what medical care is appropriate does not amount to deliberate  
26 indifference." Snow, 681 F.3d at 987 (citing Sanchez v. Vild, 891 F.2d at 242), overruled in part on  
27 other grounds, Peralta, 744 F.3d at 1082-83; Wilhelm, 680 F.3d at 1122-23 (citing Jackson v.  
28 McIntosh, 90 F.3d at 332. Rather, Plaintiff "must show that the course of treatment the doctors chose

1 was medically unacceptable under the circumstances and that the defendants chose this course in  
2 conscious disregard of an excessive risk to [his] health.” Snow, 681 F.3d at 988 (citing Jackson, 90  
3 F.3d at 332) (internal quotation marks omitted). ). In addition, “[m]edical malpractice does not  
4 become a constitutional violation merely because the victim is a prisoner.” Estelle v. Gamble, 429  
5 U.S. at 106; Snow v. McDaniel, 681 F.3d at 987-88, overruled in part on other grounds, Peralta v.  
6 Dillard, 744 F.3d at 1082-83; Wilhelm, 680 F.3d at 1122.

7 Here is it undisputed that Plaintiff met with Defendant Conan on May 2, 2016 so that she  
8 could review his treatment at Community Regional Medical Center. Dr. Conan told Plaintiff that  
9 his testing at CRMC indicated normal results. Plaintiff complained of pain in his right chest area  
10 below his rib cage. For this reason, Dr. Conan requested that Plaintiff receive a chest x-ray. (DUdF  
11 h.) On May 4, 2016, Plaintiff received a chest x-ray, which was interpreted by Dr. C. Shultz, M.D. to  
12 show rib fractures at the seventh, eighth, and ninth posterior ribs. There was also no visible  
13 pneumothorax or collapsed lung, and there was a small, right pleural effusion or hemothorax present.  
14 These images were new and not visualized on the CT scan taken of Plaintiff at CRMC. (DUdF i.)

15 On May 5, 2016, Dr. Conan had a follow-up appointment with Plaintiff to review the  
16 results of his May 4, 2016 x-ray. Dr. Conan prescribed critical pain medications, and scheduled  
17 Plaintiff for a follow-up appointment on May 12, 2016 to check the status of Plaintiff’s rib fractures.  
18 (DUdF j.) Dr. Conan believed that Plaintiff’s injuries could be treated with regular monitoring,  
19 activity modification, rest, and pain management with pain medications. Dr. Conan did not believe  
20 Plaintiff required urgent hospitalization. (DUdF k.) Rib fractures heal on their own, and are treated  
21 supportively with pain medications and the tincture of time. (DUdF l.) Small collections of fluid in  
22 the pleural space can be expected to reabsorb on their own and are best managed with observation  
23 over time to confirm resolution. (DUdF m.) An invasive procedure to remove small collections of  
24 pleural fluid is more likely to lead to complications such as pneumothorax or an infection than it is to  
25 provide a benefit, especially in a patient without evidence of respiratory compromise such as Plaintiff,  
26 who was oxygenating normally, and had no shortness of breath. (DUdF n.) Plaintiff was specifically  
27 advised how to request an early appointment if he felt it was necessary, but he submitted no requests  
28 or complaints to Dr. Conan for uncontrolled pain difficulty breathing, or any reason. (DUdF o.)

1 On May 9, 2016, Plaintiff refused to take Tylenol No. 3 against medical advice and  
2 signed a “refusal of examination or treatment” form stating that he had refused the medications after  
3 being advised of the risks associated with refusing to take the medications. (DUdF p.) Dr. Feinberg  
4 opines that Plaintiff’s refusal to take pain medications “in order to check his level of pain off of  
5 medication” is not consistent with someone experiencing excruciating pain, but rather, someone whose  
6 pain was well-controlled on current medications and trying to determine whether or not they were  
7 needed. (DUdF q.)

8 On May 12, 2016, Plaintiff saw Dr. Conanán again. Plaintiff again complained of pain  
9 to his lower right chest area and had pain when he breathed deeply. Dr. Conanán ordered another x-  
10 ray of Plaintiff and told Plaintiff to take his prescribed pain medications. Dr. Conanán scheduled  
11 another follow-up appointment with Plaintiff for May 19, 2016. (DUdF r.) Given Plaintiff’s new  
12 occasional cough, mucus and slight wheezing demonstrated at Plaintiff’s May 12, 2016 appointment  
13 with Dr. Conanán, Dr. Conanán prescribed antibiotics for a possible upper respiratory infection,  
14 renewed Plaintiff’s pain medications, and requested a repeat chest x-ray. (DUdF s.)

15 On May 16, 2016, Plaintiff had another x-ray. Dr. Schultz interpreted that x-ray and  
16 visualized a large opacity that appeared over Plaintiff’s right lung. This finding was new and had not  
17 appeared on any previous x-ray. (DUdF t.) Technician Richard operated the x-ray imaging equipment  
18 for Plaintiff on May 16, 2016. He made no diagnosis or interpretation of this x-ray and did not  
19 recommend to Dr. Conanán or any doctor that Plaintiff needed urgent hospitalization. Technician  
20 Richard does not have the training, knowledge, or experience to interpret x-ray film and diagnose  
21 medical conditions. (DUdF u.)

22 On May 19, 2016, Dr. Conanán had a follow-up appointment with Plaintiff to discuss the  
23 findings from Plaintiff’s May 16, 2016 x-ray. Dr. Conanán’s medical process notes indicates that she  
24 decided, based on the fact that there was an opacity visualized on the May 16, 2016 x-ray, to make an  
25 urgent request for Plaintiff to see a pulmonologist. (DUdF v.)

26 Plaintiff was transferred to an outside hospital on May 20, 2019. Dr. Conanán  
27 completed a “routine” request for a thoracotomy, which was an evacuation of an extra pleural  
28 hematoma on June 2, 2016. Dr. Conanán believed Plaintiff needed a higher level of care. (DUdF w.)



1 Plaintiff has no personal knowledge of who made the decision to transfer him to an  
2 outside hospital for further treatment. (DUdF x.) Plaintiff saw Dr. George at the TTA on May 20,  
3 2016, and Plaintiff was transferred by car to Mercy Hospital in order to rule out pneumonia. (DUdF  
4 y.)

5 Plaintiff was hospitalized at Mercy Hospital in Bakersfield, California from May 20,  
6 2016 until May 31, 2015. A large right sided pleural hematoma was found on the imaging studies and  
7 a CT guided aspiration was performed by interventional radiologist Dr. David Condie. (DUdF z.)

8 Dr. Mustaq Ahmed, the hospitalist overseeing Plaintiff's medical care at Mercy  
9 Hospital, elected to pursue surgical evacuation of the hematoma, and the surgery required Plaintiff to  
10 be transferred to Memorial Hospital in Bakersfield. (DUdF aa.) Plaintiff stayed at Memorial Hospital  
11 from May 31, 2016 until June 7, 2016. (DUdF bb.)

12 Thoracic surgeon Dr. Peck consulted with Plaintiff on June 1, 2016, and recommended a  
13 surgical evaluation of the hematoma and discussed with Plaintiff the benefits and alternatives to  
14 Plaintiff who agree to proceed with the surgery. (DUdF cc.) On June 3, 2016, Dr. Peck performed a  
15 right thoracotomy and evacuation of the extrapleural hematoma. There were no complications with  
16 the surgery, and Plaintiff was discharged on June 7, 2016. (DUdF dd.)

17 Plaintiff saw Dr. De La Sierra at Pleasant Valley State Prison for follow-up. He stayed  
18 in the Correctional Treatment Center for the remainder of the month where Dr. De La Sierra saw him  
19 every other day and noted his continued good recovery from the surgery. (DUdF ee.) Plaintiff  
20 believes he experiences asthma; however Plaintiff's asthma is not secondary to surgery. (DUdF ff.)

21 Defendant submits expert testimony by Dr. Bennett Feinberg in support of her motion. Dr.  
22 Feinberg graduated from the University of California at San Francisco School of Medicine in 1994.  
23 (Feinberg Decl. ¶ 2.) He completed his internship and residency in Internal Medicine at the Baylor  
24 College of Medicine in Houston, Texas in 1997. (Id.) He is Board certified in Internal Medicine and  
25 has been licensed to practice medicine in the State of California since 1997, with over 20 years of  
26 experience. (Id.) Dr. Feinberg is currently employed by the California Correctional Health Care  
27 Services (CCHCS) and serves as the Chief Medical Consultant for the CCHCS Office of Legal  
28 Affairs. (Id. ¶ 3.) Prior to his current position, Dr. Feinberg served as a full-time primary care



1 physician in two California prisons from January 2010 to January 2017. (Id.) Prior to employment at  
 2 CCHCS, he served as a physician leader and staff physician at Kaiser Permanente for twelve years.  
 3 There, he supervised a module of ten physician while also providing the full range of primary care  
 4 services to his own adult patients with significant chronic conditions. (Id.)

5 The Court finds that Dr. Feinberg may opine on the evaluation, care, and treatment of Plaintiff  
 6 rendered by Dr. Conanan.<sup>14</sup> Dr. Feinberg possesses knowledge of the standard of professional  
 7 learning, skill, and care required of a physician in the fields of internal medicine and based upon his  
 8 education, training, experience and qualifications, he is thoroughly familiar with the degree of learning  
 9 and skill ordinarily possessed by reputable medical doctors in those fields in the State of California,  
 10 including the area in which Plaintiff was treated by Dr. Conanan. In addition, Dr. Feinberg is  
 11 qualified to testify as to whether Defendant caused Plaintiff's alleged injuries. See, e.g., Brown v.  
 12 Pac. Gas & Elec. Co., Case No. EDCV 16-0654 DMG (KKx), 2018 WL 5270494, at \*7 (C.D. Cal.  
 13 June 25, 2018) (citing Sanderson v. Int'l Flavors & Fragrances, Inc., 950 F. Supp. 981, 1003 (C.D. Cal.  
 14 1996)). In sum, the Court finds that Dr. Feinberg's declaration is admissible as to whether the care  
 15 rendered by Dr. Conanan breached the standard of care. Further, the Court concludes that Dr. Feinberg  
 16 is qualified to testify as to whether Dr. Conanan's care caused Plaintiff harm. Trujillo v. Cty. of Los  
 17 Angeles, 751 F.App'x 968, 970-71 (9th Cir. 2018) ("Expert witnesses may offer opinions on matters  
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19  
 20 <sup>14</sup> Federal Rule of Evidence 702 allows a qualified expert to testify "in the form of an opinion or otherwise" where:

- 21 (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand  
 22 the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the  
 23 testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the  
 24 principles and methods to the facts of the case.

25 Fed. R. Evid. 702. Expert testimony is admissible under Rule 702 if the expert is qualified and if the testimony is both  
 26 relevant and reliable. See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993); see also Hangarter v. Provident  
 27 Life & Acc. Ins. Co., 373 F.3d 998, 1015 (9th Cir. 2004). Rule 702 "contemplates a *broad conception* of expert  
 28 qualifications." Hangarter, 373 F.3d at 1018 (emphasis in original). Courts consider a purported expert's knowledge, skill,  
 experience, training, and education in the subject matter of his asserted expertise. United States v. Hankey, 203 F.3d 1160,  
 1168 (9th Cir. 2000); see also Fed. R. Evid. 702. Under the reliability requirement, the expert testimony must "ha[ve] a  
 reliable basis in the knowledge and experience of the relevant discipline." Primiano v. Cook, 598 F.3d 558, 565 (9th Cir.  
 2010). To ensure reliability, the Court "assess[es] the [expert's] reasoning or methodology, using as appropriate such  
 criteria as testability, publication in peer reviewed literature, and general acceptance." Id. at 564.

1 of which they do not have firsthand knowledge so long as it is permissible in their discipline.”) (citing  
2 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (“[A]n expert is permitted wide latitude to  
3 offer opinions, including those that are not based on firsthand knowledge or observation.”)).

4 There is no dispute that plaintiff had a serious medical need while under the care of Defendant  
5 Conan. Therefore, there is no genuine issue of material fact as to the first prong of Plaintiff’s  
6 deliberate indifference claim. The only remaining issue is whether there is a genuine issue of material  
7 fact concerning Defendant’s failure to respond to Plaintiff’s medical need in a manner that caused him  
8 harm in violation of the Eighth Amendment. Jett, 439 F.3d at 1096.

9 The undisputed evidence demonstrates that Defendant Conan quickly responded to Plaintiff’s  
10 continued complaint of chest pain by requesting an additional chest x-ray on May 2, 2016. When  
11 Conan discovered that Plaintiff suffered three fractured ribs, she promptly provided pain medication  
12 and recommended that Plaintiff rest and modify his activities. Dr. Conan also ordered repeat  
13 follow-up appointments to track the status of Plaintiff’s healing process. While the x-rays on May 4,  
14 2016, showed a small pleural effusion or hemothorax it did not warrant urgent hospitalization.  
15 (Feinberg Decl. ¶ 27.) Dr. Conan believed the pleural effusion was small and could be reabsorbed  
16 into Plaintiff’s body without the need for surgery. (DUdF k.) Plaintiff cannot opine that Dr. Conan  
17 acted with deliberate indifference by not requesting he be transferred to an outside hospital for further  
18 intervention. Indeed, as Dr. Feinberg declares, such procedures run the risk of causing further  
19 complications, such as a collapsed lung, and ribs can heal overtime and with effective pain  
20 management. (DUdF l, m, n.)

21 Defendant continued with the treatment plan by examining Plaintiff on a weekly basis. (DUdF  
22 r, s, v.) At each visit, Dr. Conan noted Plaintiff’s complaints and physical presented and observed  
23 Plaintiff’s pulmonary system. (Id.) When it appeared that Plaintiff’s complaints of pain increased, Dr.  
24 Conan ordered a second x-ray for further observation. (DUdF s.) When the second x-ray revealed  
25 an opacity not previously seen on any x-ray, Dr. Conan believed that a higher level of care was  
26 necessary and her medical process notes indicate she requested Plaintiff receive an urgent evaluation.  
27 (DUdF v, w.) The request was granted, and Plaintiff was transferred to Mercy Hospital the very next  
28

1 day, and later transferred to Memorial Hospital where Plaintiff received surgical intervention for  
2 removal of an extra pleural hematoma. (DUdF w, y-ee.)

3 There is no merit to Plaintiff’s claim that he had pneumonia when Dr. Conanen saw him and  
4 acted with deliberate indifference thereto. Dr. Conanen examined Plaintiff four times between his  
5 return from CRMC and his transfer to Mercy Hospital. (DUdF h, j, k, r, s, v, w.) At each  
6 appointment, Plaintiff’s symptoms did not indicate pneumonia: he did not have a fever or chills and  
7 was oxygenating normally. (Id.) Plaintiff also had two x-rays in that time, and the radiologist did not  
8 interpret any inflammation on Plaintiff’s lungs. (DUdF i, t, u.) Furthermore, when Dr. George saw  
9 Plaintiff in the TTA on May 20, 2016, he had the same symptoms, and Dr. George transferred him to  
10 Mercy to rule out the possibility of pneumonia—not because he had pneumonia. (DUdF y.) When  
11 Plaintiff arrived at Mercy Hospital, Dr. Ahmed did not diagnose him with pneumonia, nor did he have  
12 any symptoms consistent with pneumonia. (DUdF z, aa.) Thus, Plaintiff was seen by several doctors,  
13 and none of them diagnosed him with pneumonia. Plaintiff erroneously contends that CRMC  
14 diagnosed him with “likely pneumonia.” (ECF No. 122 at 33.) However, the progress note from  
15 CRMC states “a differential could include a developing infectious or inflammatory process such as  
16 pneumonia. (Id. at 42, Ex. 1.) A differential diagnosis is a means of distinguishing a condition from  
17 others presenting with similar signs and symptoms; it is not the same as an actual diagnosis, and  
18 neither Doctors Conanen, Schultz, George nor Ahmed found that he had symptoms consistent with  
19 pneumonia. (Conanen Decl. ¶ 4, ECF No. 153-4.) Plaintiff’s cannot create a triable issue of material  
20 fact by attempting to interpret his own medical records.

21 To the extent Plaintiff claims that Dr. Conanen delayed his treatment, and thereby caused him  
22 further harm, there is no factual support for such contention. As stated above, the undisputed evidence  
23 demonstrates that Plaintiff received treatment for his rib fractures, and Plaintiff’s lay opinion about his  
24 disagreement with Defendant Conanen’s care does not give demonstrate a genuine issue of material  
25 fact. Dr. Conanen acknowledged Plaintiff’s fractured ribs, ordered pain medication, advised  
26 modification of activity, and ordered rounds of x-rays. Compare, e.g., Bond v. Arrowhead Regional  
27 Medical Center, EV-CV-11-2049-DDP (PLA), 2015 WL 509823, at \*14-16 (C.D. Cal. Feb. 5, 2015)  
28 (denying summary judgment because undisputed medical evidence demonstrated that defendant

1 physician did not request x-rays of inmate plaintiff's chest despite inmate plaintiff's complaints of  
2 difficulty breathing, and defendant physician failed to diagnose plaintiff's fractured rib). The mere  
3 fact that Plaintiff ultimately required surgical intervention does not demonstrate that Dr. Conanán was  
4 deliberately indifferent or that her actions or omissions led to the result. (Feinberg Decl. ¶¶ 27, 28.)

5 Plaintiff's complaints regarding Dr. Conanán's treatment essentially amount to disagreement  
6 about the care he received. However, it is clearly established that disagreements over "matter[s] for  
7 medical judgment," such as whether additional testing would be required or the level of care  
8 necessary, are insufficient to establish a constitutional violation. In fact, Plaintiff's refusal to take  
9 Tylenol No. 3 with codeine against medical advice demonstrates his disagreement with Dr. Conanán's  
10 proposed course of treatment. Plaintiff testified at his deposition that, "tylenol is no remedy for what I  
11 was going through in terms of broken ribs and internal bleeding." (Pl.'s Dep. at 56:16-22.) However,  
12 it is undisputed that Plaintiff's lay opinion is without foundation as he is not a medical expert. (Id. at  
13 11-14.) While a prisoner is "free to refuse specific medications or types of medication, he does not  
14 have a right to dictate what medications he will be prescribed." Peacock v. Horowitz, No. 2:13-cv-  
15 2506- TLN AC P, 2016 WL 3940346, at \*7 (E.D. Cal. July 21, 2016) (citing Stiltner v. Rhay, 371  
16 F.2d 420, 421 n.3 (9th Cir. 1967)) (allegations that a prisoner feels he is not receiving the "the kind  
17 and quality of medical treatment he believes is indicated" do not "justify federal intervention."); see  
18 also Medina v. Barenchi, No. 3:16-cv-2423-SJB-KSC, 2016 WL 7325508, at \*5 (S.D. Cal. Dec. 16,  
19 2016) (*sua sponte* dismissing Eighth Amendment claims against prison doctors pursuant to 28 U.S.C.  
20 § 1915(e)(2) and § 1915A because "while Plaintiff obviously disagrees with Defendants' assessment  
21 of his need for narcotics to treat his pain," dissatisfaction alone is insufficient to support a deliberate  
22 indifference claim); Hardwick v. California Dep't of Corr. & Rehab., No. 2:16-cv-0854 TLN DB P,  
23 2018 WL 3244028, at \*3 (E.D. Cal. July 3, 2018) ("Plaintiff's allegations fail to show that defendants  
24 denied or delayed treatment or that prescribing Sulindac without simultaneously giving him Prilosec  
25 was medically unacceptable."); Mattson v. Lopez, No. 1:13-cv-00567-RRB, 2015 WL 222510, at \*3  
26 (E.D. Cal. Jan. 14, 2015) (when an inmate complains that a doctor was deliberately indifferent, "it is  
27 somewhat incongruous for [the inmate] to complaint that he was denied a particular course of  
28

1 treatment when at the same time he was refusing medically prescribed treatment.”) Accordingly,  
2 Plaintiff cannot demonstrate that Defendant Conan was fractured ribs.

3 Lastly, Plaintiff disputes Defendant Conan’s testimony that she requested Plaintiff to urgently  
4 see a pulmonologist. (ECF No. 122, at 2.) However, the Court dismissed this allegation because  
5 Plaintiff failed to exhaust his administrative remedies which is the law of the case. United States v.  
6 Alexander, 106 F.3d at 876-77. Accordingly, Plaintiff cannot demonstrate a material issue of disputed  
7 fact based on this allegations, and Defendant Conan’s motion for summary judgment should be  
8 granted.<sup>15</sup>

9 **IV.**

10 **RECOMMENDATIONS**

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

- 12 1. Plaintiff’s motion for summary judgment (ECF No. 122) be denied;  
13 2. Defendant Conan’s motion for summary judgment (ECF No. 138) be granted; and  
14 3. The Clerk of Court be directed to enter judgment in favor of Defendants.

15 These Findings and Recommendations will be submitted to the United States District Judge  
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty (30) days** after  
17 being served with these Findings and Recommendations, the parties may file written objections with  
18 the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and  
19 Recommendations.” The parties are advised that failure to file objections within the specified time  
20 may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir.  
21 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22  
23 IT IS SO ORDERED.

24 Dated: July 27, 2021

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

28 <sup>15</sup> Because, this Court finds Defendant Conan is entitled to summary judgment on the merits of the Eighth Amendment claims there is no reason to reach Defendant’s argument that she is entitled qualified immunity issue in this case.