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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMAAL THOMAS,  
Plaintiff,  
v.  
ANTIPOV, et al.,  
Defendants.

No. 2:11-cv-1138-MCE-EFB P

ORDER AND AMENDED FINDINGS AND  
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. He alleges Eighth Amendment claims of deliberate indifference to serious medical needs against each remaining defendant. ECF No. 45. Defendants have filed a motion for summary judgment, ECF No. 112-2, and plaintiff filed a counter-motion for summary judgment. ECF No. 122. Proposed findings and recommendations were issued on December 19, 2014, recommending that summary judgment be granted as to defendants Grinde, Ma, Maciel, McGee, and Park, but denied as to defendants Antipov and Downie, and further recommending that plaintiff’s counter-motion for summary judgment be denied as to all defendants. Defendants timely filed objections, arguing that the court should grant their motion for summary judgment as to defendant Downie. ECF No. 127. In light of defendants’ objections, the December 19, 2014 findings and recommendations are vacated and the issues raised are addressed in the following amended findings and recommendations. Specifically, the recommendation is amended to

1 include the recommendation that defendant Downie be granted summary judgment on the  
2 allegations regarding Downie’s prescription of pain medication. However, the recommendation  
3 as to all other claims remains the same.

4 Therefore, for the reasons set forth below, notwithstanding defendants’ Objections, it is  
5 recommended that (1) defendants’ motion for summary judgment be granted as to defendants  
6 Grinde, Ma, Maciel, McGee, and Park, but granted in part and denied in part as to defendant  
7 Downie and denied as to defendant Antipov, and (2) plaintiff’s counter-motion for summary  
8 judgment be denied as to all defendants.

9 **I. BACKGROUND**

10 This action proceeds on plaintiff’s verified second amended complaint filed May 7, 2012.  
11 ECF No. 45 (“SAC”) at 1, 16.<sup>1</sup> Plaintiff alleges that defendants Antipov, Downie, Grinde, Ma,  
12 Maciel, McGee, and Park were deliberately indifferent to his serious medical needs before,  
13 during, and after the extraction of his wisdom teeth. *Id.* at 1, 12. Antipov is an oral surgeon who  
14 performed the extractions while working for the California State Prison, Sacramento as an  
15 independent contractor. ECF No. 112-9 (“Antipov Decl.”) at ¶ 1. Downie, Park, and Maciel are  
16 dentists. SAC at 3. Ma is a physician. *Id.* McGee and Grinde are registered nurses. *Id.*

17 Defendant Antipov removed plaintiff’s four wisdom teeth on August 3, 2010. *Id.* at 4.  
18 According to plaintiff, he informed Antipov before the extractions that he needed to be pre-  
19 medicated with antibiotics before every dental procedure because of his heart murmur, but neither  
20 the dental staff nor Antipov had plaintiff’s medical files on hand to confirm plaintiff’s contention.  
21 *Id.*<sup>2</sup> Before the extraction, plaintiff was given a Dental Health Record form to complete that  
22 asked him to list all medication allergies. Pl.’s Decl. at ¶ 10 (ECF No. 122 at 76). Plaintiff

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23 <sup>1</sup> For ease of reference, all citations to court documents are to the pagination assigned via  
24 the court’s electronic filing system.

25 <sup>2</sup> According to plaintiff, a doctor diagnosed him with a heart murmur on May 14, 2008.  
26 ECF No. 122, 74-96 (“Pl.’s Decl.”) at ¶ 4. That doctor ordered plaintiff to take prescribed  
27 antibiotics thirty minutes before any dental surgery. *Id.* Other doctors made that same  
28 recommendation on January 16, March 5, and March 17, 2009. *Id.* at ¶ 6. Additionally,  
defendant Downie added that recommendation to plaintiff’s progress notes on December 22,  
2009. *Id.* at ¶¶ 7, 8.

1 signed this form before it was completed because the nurse assisting him “made it confusing.” *Id.*  
2 The nurse wrote “Motrin” before returning the form to plaintiff and spelling “Tylenol” and  
3 “Penicillin” for him to add to the form. *Id.* Plaintiff says it was difficult for him to understand  
4 the nurse, who took the form back out of frustration, saying she would add Aspirin and Naproxen.  
5 *Id.* Nevertheless, though the form he signed on the day of the extraction listed only an allergy to  
6 Motrin, plaintiff claims that his Unit Health Record “has [had] allergies to Tylenol, Penicillin,  
7 Aspirin, [and] Motrin written on it since [his] arrival to prison.”<sup>3</sup> *Id.* at ¶ 30 (ECF No. 122 at 81).

8 Antipov injected plaintiff with local anesthesia before the extraction. *Id.* at ¶ 11 (ECF No.  
9 122 at 76). Plaintiff claims that his heart began to beat rapidly and he experienced cold chills  
10 moments later. *Id.* Plaintiff describes the procedure as protracted and problematic. He asserts  
11 that Antipov showed no concern for plaintiff’s well-being, as he left “mouth hinges”<sup>4</sup> in  
12 plaintiff’s mouth for the entire two-hour procedure and failed to prescribe necessary antibiotics  
13 and pain medication. SAC at 4. Plaintiff claims that Antipov struggled to remove plaintiff’s left  
14 and lower right wisdom teeth, and he became “frustrated to [the] point that he applied immense  
15 pressure, that [plaintiff’s] whole head was being pulled to and fro.” *Id.* Plaintiff claims that  
16 Antipov ignored plaintiff’s complaints of pain, Pl.’s Decl. at ¶ 12 (ECF No. 122 at 76-77), and  
17 that because the procedure took longer than expected, plaintiff was rushed out of the dental office  
18 without receiving any pain medication, SAC at 4. Plaintiff also asserts that Antipov later stated  
19 that the surgery was difficult. Pl.’s Decl. at ¶ 86 (ECF No. 122 at 91).

20 Later on the day of the extractions, plaintiff experienced extreme pain, difficulty  
21 breathing, a rapid heartbeat, chest pain, and a fever. *Id.* Correctional officers took plaintiff to the  
22 prison medical facility after he suffered a seizure. SAC at 5. There, he spoke with defendant  
23 McGee, a nurse, who filled out and signed a form indicating that plaintiff’s pain level was ten out  
24 of ten. Pl.’s Decl. at ¶ 71 (citing Ex. E to Pl.’s Opp’n). McGee contacted the on-call doctor, but  
25 allegedly was openly disrespectful towards plaintiff. SAC at 5. Plaintiff asserts that he had a

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26 <sup>3</sup> Plaintiff has not submitted this Unit Health Record to the court.

27 <sup>4</sup> In his declaration, plaintiff adopts Antipov’s terminology and refers to them as “bite  
28 blocks.” Pl.’s Decl. at ¶ 12.

1 temperature of 102.5 degrees, but McGee did not offer any medical assistance. *Id.* He further  
2 claims that McGee “jammed her fingers down [plaintiff’s] throat in search of” gauzes that  
3 plaintiff might have swallowed during his seizure. *Id.* Though McGee could not locate any  
4 gauzes, two correctional officers were able to. *Id.* According to plaintiff, McGee’s actions  
5 caused him great pain. *Id.* When the on-call doctor arrived, he observed plaintiff’s state and  
6 contacted Burns, a dentist. *Id.* at 5-6.<sup>5</sup> Upon learning that plaintiff had not received any pain  
7 medication after the extraction, Burns provided liquid pain medication, prescribed liquid Vicodin,  
8 scheduled plaintiff for an appointment with a prison dentist the following morning, and sent  
9 plaintiff to the Outpatient Housing Unit (“OHU”) to be monitored throughout the night. *Id.* at 6.

10 At OHU, plaintiff met with defendant Ma, the on-call doctor. *Id.* But plaintiff claims that  
11 instead of examining or treating plaintiff, Ma left him in the cell suffering. *Id.* When the pain  
12 became unbearable, plaintiff banged on his door and requested the liquid Vicodin that Burns had  
13 ordered. *Id.* An hour later, a nurse informed plaintiff that the OHU did not carry liquid Vicodin,  
14 and tried to give plaintiff the Tylenol #3 that Ma had ordered. *Id.* Plaintiff told both Ma and the  
15 nurse that he could not take Tylenol, Aspirin, Penicillin, Naproxen, Ibuprofen, or Motrin. *Id.*  
16 Plaintiff, without having seen a dentist in OHU, was sent back to his cell at approximately 2:00  
17 p.m. the following day. *Id.* at 7.

18 Plaintiff was not seen by a dentist until August 10. *Id.* Throughout the preceding week  
19 plaintiff was taking medication that he assumed he was not allergic to, as he had informed Ma of  
20 his medication allergies. *Id.* The Tylenol #3 and Penicillin were “crushed down into water” and  
21 plaintiff “did not know that Liquid T-3 stood for Tylenol #3 . . . .” Pl.’s Decl. at ¶¶ 34, 35 (ECF  
22 No. 122 at 82). But plaintiff was having an allergic reaction to the medication, experiencing chest  
23 and heart pain, rashes, a swollen face, hives, diarrhea, bloody stool, continuous vomiting,  
24 migraines, ear aches, fatigue, difficulty breathing, and dehydration. SAC at 7. The dentist  
25 appointment on August 10 was not for these issues or even a follow-up for his surgery, but rather  
26 a scheduled tooth cleaning. *Id.* Defendant Downie, a dentist, retrieved plaintiff’s medical file

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27  
28 <sup>5</sup> Burns is not a defendant in this case.

1 upon observing plaintiff's swollen face. *Id.* Plaintiff informed Downie of the "severe pain [he]  
2 was in, how [he] was unable to chew nor swallow any food since before the oral surgery, and all  
3 the stomach pain [he] had due to this." Pl.'s Decl. at ¶ 41 (ECF No. 122 at 83). Downie  
4 discontinued Ma's prescription and said that he would prescribe pain medication that plaintiff  
5 could tolerate. SAC at 7. Downie also said that he would have plaintiff return in a week. *Id.*

6 Later on the night of August 10, plaintiff received a bag of Tylenol that defendant Maciel  
7 had prescribed. *Id.* Plaintiff returned the medication to the medical technician and informed her  
8 of his "condition." *Id.* *But cf.* Pl.'s Decl. at ¶ 42 (ECF No. 122 at 83) (stating that he "took this  
9 medication for a couple of days not knowing it was Tylenol."). Plaintiff claims Maciel did not  
10 check plaintiff's dental health history records to see what medications plaintiff was allergic to.  
11 Pl.'s Decl. at ¶ 100 (ECF No. 122 at 93).

12 Plaintiff continued to experience extreme pain after August 10. *Id.* Every night, prison  
13 staff would provide plaintiff with a bag of Tylenol, and plaintiff would inform them that he was  
14 allergic to that medication. SAC at 8. Because plaintiff did not receive any other medication, he  
15 was "forced to either take the medication that [he] was allergic to . . . or just suffer through it all,  
16 in hopes of getting better . . . ." *Id.* On August 17, a nurse became very concerned for plaintiff's  
17 health. *Id.* Upon learning of plaintiff's medication allergies, the nurse made a bold notation in  
18 plaintiff's medical file. *Id.* The nurse also scheduled plaintiff for an appointment with the dentist  
19 the following morning. *Id.*

20 But plaintiff did not meet with a dentist until August 20. *Id.* Upon seeing plaintiff's  
21 condition and weight loss on that date, Downie prescribed Salsalate for plaintiff's pain. *Id.*  
22 Downie did not prescribe anything for plaintiff's swollen face. *Id.* Downie did not examine  
23 plaintiff's mouth because it was too painful for plaintiff to open his mouth. Pl.'s Decl. at ¶ 103  
24 (ECF No. 122 at 93). After informing Downie that he had not eaten anything since the extraction,  
25 plaintiff requested that Downie place him on a liquid diet. SAC at 8. Downie replied that it was  
26 not his department, but rather medical, that determines diet. *Id.* at 9. Medical, however, told  
27 plaintiff that the dental department is responsible for that determination. *Id.* Plaintiff was not  
28 placed on a liquid diet. *Id.* Because of the pain, plaintiff eventually took the Salsalate that

1 Downie prescribed. *Id.* Plaintiff also had an allergic reaction to that medication. *Id.* Upon  
2 learning that Salsalate has Aspirin in it, plaintiff requested another medication. *Id.*

3 Plaintiff, “without receiving any pain medication,” passed out on August 24. *Id.* He was  
4 taken to the medical facility, where the nurse called defendant Park, a doctor. Park prescribed  
5 Morphine for the night and scheduled a dentist appointment for plaintiff. *Id.*

6 On August 25, plaintiff had an appointment at San Joaquin General Hospital concerning  
7 his heart murmur. *Id.* at 10. Because of that appointment, plaintiff was not able to attend the  
8 dental appointment that Park had ordered. *Id.* Upon returning to the prison’s A-facility to be  
9 checked back into the institution, defendant Grinde, a nurse, approved plaintiff’s return to B-  
10 facility without any treatment. *Id.* Plaintiff’s face was severely swollen, and he expressed to  
11 Grinde that he was in severe pain. *Id.*; Pl.’s Decl. at ¶ 104 (ECF No. 122 at 93).

12 At B-facility, plaintiff refused to go back into his cell until he received treatment for his  
13 pain. SAC at 9. After plaintiff argued with medical staff for fifteen minutes, Grinde reported to  
14 B-facility. *Id.* Grinde stated that he could not do anything for plaintiff because plaintiff was just  
15 trying to get drugs. *Id.* When Grinde stated that he would provide Tylenol #3, plaintiff informed  
16 Grinde that he was allergic to that and other medications. *Id.* Grinde called Park, who again  
17 prescribed Morphine for the pain. *Id.* at 11. But Park also prescribed Tylenol #3 and Penicillin,  
18 despite knowing of plaintiff’s allergies to those medications. *Id.* After plaintiff argued with both  
19 Grinde and Park, Park also prescribed Erythromycin for plaintiff’s infection. *Id.*

20 On August 26, plaintiff met with Maciel. *Id.* Maciel prescribed plaintiff liquid  
21 Methadone, continued the Erythromycin treatment, ordered plaintiff a liquid diet, and scheduled  
22 plaintiff for an appointment with the oral surgeon. *Id.* Maciel then prescribed a stronger  
23 antibiotic and called plaintiff in everyday to receive an oral rinse to treat the infection. *Id.* at 12.

24 Plaintiff is still “suffering from the effects of this whole ordeal,” as his jaw unhinges when  
25 he chews and hurts when he speaks. SAC at 12. Specifically, plaintiff claims that Antipov’s  
26 extraction caused “TMJ, a dislocated disk in [plaintiff’s] jaw and a deviation” in plaintiff’s jaw.  
27 Pl.’s Decl. at ¶ 76 (ECF No. 122 at 89). Additionally, his heart condition “worsened  
28 tremendously” as a direct result of the extraction and the medical care he received afterwards,

1 SAC at 12, and he lost weight as a result of not being able to eat from August 3 until the first  
2 week of September, Pl.’s Decl. at ¶ 13 (ECF No. 122 at 77).<sup>6</sup>

## 3 **II. STANDARD**

4 Summary judgment is appropriate when there is “no genuine dispute as to any material  
5 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Summary  
6 judgment avoids unnecessary trials in cases in which the parties do not dispute the facts relevant  
7 to the determination of the issues in the case, or in which there is insufficient evidence for a jury  
8 to determine those facts in favor of the nonmovant. *Crawford-El v. Britton*, 523 U.S. 574, 600  
9 (1998); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50 (1986); *Nw. Motorcycle Ass’n v.*  
10 *U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). At bottom, a summary judgment  
11 motion asks whether the evidence presents a sufficient disagreement to require submission to a  
12 jury.

13 The principal purpose of Rule 56 is to isolate and dispose of factually unsupported claims  
14 or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thus, the rule functions to  
15 “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for  
16 trial.” *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R.  
17 Civ. P. 56(e) advisory committee’s note on 1963 amendments). Procedurally, under summary  
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19 <sup>6</sup> Plaintiff also makes several medical claims based on documents he has filed with the  
20 court. However, those documents do not support the claims that plaintiff derives from them. For  
21 example, plaintiff contends that a heart murmur consultation on June 18, 2013, “showed that [he]  
22 was at risk of encocaditis[,] a heart disease that is caused from not being pre[-]medicated before  
23 oral surgery and an infection from oral surgery getting into the bloodstream traveling to the  
24 heart.” Pl.’s Decl. at ¶ 82 (citing “Exhibit W” to Pl.’s Opp’n). Additionally, plaintiff claims the  
25 extraction caused TMJ, trismus, a displaced disk, and risk of osteomyelitis, and that at an  
26 appointment on June 18, 2014, a doctor explained to plaintiff that his current heart condition was  
27 “impacted from” Antipov’s surgery. *Id.* at ¶ 83, 84 (citing “Exhibit X” to Pl.’s Opp’n).

28 However, the court has reviewed both Exhibits W and X and finds that neither “shows”  
nor even mentions the causation that plaintiff claims. Exhibit W consists of dental progress notes  
from March 1 and May 16, 2011. The note dated March 1 indicates plaintiff’s “jaw doesn’t pop  
anymore” and “opens freely without pain.” ECF No. 122 at 176. The note dated May 16 states:  
“Having soreness on right side of jaw. Palpation on right TMJ—he states he has pain—open is  
limited[.] Bite is normal. No swelling or [illegible] present[.] He said pain has decrease[d.]” *Id.*  
at 177. Exhibit X is a dental progress note from August 3, 2010 (i.e., the day of the extraction).  
*Id.* at 179.

1 judgment practice, the moving party bears the initial responsibility of presenting the basis for its  
2 motion and identifying those portions of the record, together with affidavits, if any, that it  
3 believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323;  
4 *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). If the moving party meets  
5 its burden with a properly supported motion, the burden then shifts to the opposing party to  
6 present specific facts that show there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Anderson*,  
7 477 U.S. at 248; *Auvil v. CBS “60 Minutes”*, 67 F.3d 816, 819 (9th Cir. 1995).

8 A clear focus on where the burden of proof lies as to the factual issue in question is crucial  
9 to summary judgment procedures. Depending on which party bears that burden, the party seeking  
10 summary judgment does not necessarily need to submit any evidence of its own. When the  
11 opposing party would have the burden of proof on a dispositive issue at trial, the moving party  
12 need not produce evidence which negates the opponent’s claim. *See, e.g., Lujan v. National*  
13 *Wildlife Fed’n*, 497 U.S. 871, 885 (1990). Rather, the moving party need only point to matters  
14 which demonstrate the absence of a genuine material factual issue. *See Celotex*, 477 U.S. at 323-  
15 24 (“[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a  
16 summary judgment motion may properly be made in reliance solely on the ‘pleadings,  
17 depositions, answers to interrogatories, and admissions on file.’”). Indeed, summary judgment  
18 should be entered, after adequate time for discovery and upon motion, against a party who fails to  
19 make a showing sufficient to establish the existence of an element essential to that party’s case,  
20 and on which that party will bear the burden of proof at trial. *See id.* at 322. In such a  
21 circumstance, summary judgment must be granted, “so long as whatever is before the district  
22 court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is  
23 satisfied.” *Id.* at 323.

24 To defeat summary judgment the opposing party must establish a genuine dispute as to a  
25 material issue of fact. This entails two requirements. First, the dispute must be over a fact(s) that  
26 is material, i.e., one that makes a difference in the outcome of the case. *Anderson*, 477 U.S. at  
27 248 (“Only disputes over facts that might affect the outcome of the suit under the governing law  
28 will properly preclude the entry of summary judgment.”). Whether a factual dispute is material is



1 determined by the substantive law applicable for the claim in question. *Id.* If the opposing party  
2 is unable to produce evidence sufficient to establish a required element of its claim that party fails  
3 in opposing summary judgment. “[A] complete failure of proof concerning an essential element  
4 of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S.  
5 at 322.

6 Second, the dispute must be genuine. In determining whether a factual dispute is genuine  
7 the court must again focus on which party bears the burden of proof on the factual issue in  
8 question. Where the party opposing summary judgment would bear the burden of proof at trial on  
9 the factual issue in dispute, that party must produce evidence sufficient to support its factual  
10 claim. Conclusory allegations, unsupported by evidence are insufficient to defeat the motion.  
11 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Rather, the opposing party must, by affidavit  
12 or as otherwise provided by Rule 56, designate specific facts that show there is a genuine issue  
13 for trial. *Anderson*, 477 U.S. at 249; *Devereaux*, 263 F.3d at 1076. More significantly, to  
14 demonstrate a genuine factual dispute the evidence relied on by the opposing party must be such  
15 that a fair-minded jury “could return a verdict for [him] on the evidence presented.” *Anderson*,  
16 477 U.S. at 248, 252. Absent any such evidence there simply is no reason for trial.

17 The court does not determine witness credibility. It believes the opposing party’s  
18 evidence, and draws inferences most favorably for the opposing party. *See id.* at 249, 255;  
19 *Matsushita*, 475 U.S. at 587. Inferences, however, are not drawn out of “thin air,” and the  
20 proponent must adduce evidence of a factual predicate from which to draw inferences. *American*  
21 *Int’l Group, Inc. v. American Int’l Bank*, 926 F.2d 829, 836 (9th Cir. 1991) (Kozinski, J.,  
22 dissenting) (citing *Celotex*, 477 U.S. at 322). If reasonable minds could differ on material facts at  
23 issue, summary judgment is inappropriate. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th  
24 Cir. 1995). On the other hand, the opposing party “must do more than simply show that there is  
25 some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could  
26 not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for  
27 trial.’” *Matsushita*, 475 U.S. at 587 (citation omitted). In that case, the court must grant  
28 summary judgment.

1 Concurrent with their motion for summary judgment, defendants advised plaintiff of the  
2 requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure.  
3 ECF No. 112-1; *see Woods v. Carey*, 684 F.3d 934 (9th Cir. 2012); *Rand v. Rowland*, 154 F.3d  
4 952, 957 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999); *Klinge v. Eikenberry*,  
5 849 F.2d 409 (9th Cir. 1988).<sup>7</sup>

### 6 **III. ANALYSIS**

#### 7 **A. Defendants' Motion for Summary Judgment**

8 Defendants argue that they are entitled to summary judgment because (1) plaintiff's  
9 opposition does not comply with Local Rule 260(b), (2) plaintiff has not produced any evidence  
10 of any defendant's deliberate indifference, and (3) they are entitled to qualified immunity.

##### 11 **1. Local Rule 260(b)**

12 Defendants argue that summary judgment is appropriate because plaintiff's opposition to  
13 their motion for summary judgment does not comply with Local Rule 260(b). That rule states:

14 Any party opposing a motion for summary judgment . . . shall  
15 reproduce the itemized facts in the Statement of Undisputed Facts  
16 and admit those facts that are undisputed and deny those that are  
17 disputed, including with each denial a citation to the particular  
18 portions of any pleading, affidavit, deposition, interrogatory  
answer, admission, or other document relied upon in support of  
that denial.

19 E.D. Cal. L.R. 260(b). In his opposition, plaintiff repeats many of the allegations in his second  
20 amended complaint, maintains his own account of the facts in this case, and includes his own  
21 "Separate Statement of Disputed Facts." ECF No. 122 at 51-62. Plaintiff's filing satisfies the  
22 core purpose for requiring an annotated statement of facts in that it sufficiently identifies the facts  
23 that plaintiff disputes and, importantly, cites to the specific material in the record that plaintiff  
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25 <sup>7</sup> Plaintiff requests that the court take judicial notice of Ninth Circuit cases that address  
26 pro se litigants and the summary judgment standard. ECF No. 123. Supplemental authority is  
27 not an adjudicative fact subject to judicial notice under Federal Rule of Evidence 201. A party  
28 need not request judicial notice of published decisions, as simply citing such decisions in a brief  
is sufficient. Accordingly, the plaintiff's request for judicial notice is denied as both moot and  
unnecessary. The court has considered the authority cited.

1 relies upon for the factual assertion. The argument that this should all be moved to a separate  
2 sheet of paper simply exalts form over substance. Thus, defendants are not entitled to summary  
3 judgment on the ground that plaintiff's opposition failed to comply with Local Rule 260(b).

4 **2. Plaintiff's Eighth Amendment Claim**

5 Defendants also argue that they are entitled to summary judgment because plaintiff has  
6 not produced any evidence of any defendant's deliberate indifference.

7 To succeed on an Eighth Amendment claim predicated on the denial of medical care, a  
8 plaintiff must establish that he had a serious medical need and that the defendant's response to  
9 that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006); *see*  
10 *also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A serious medical need exists if the failure to  
11 treat the condition could result in further significant injury or the unnecessary and wanton  
12 infliction of pain. *Jett*, 439 F.3d at 1096. Deliberate indifference may be shown by the denial,  
13 delay, or intentional interference with medical treatment, or by the way in which medical care is  
14 provided. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988).

15 To act with deliberate indifference, a prison official must both be aware of facts from  
16 which the inference could be drawn that a substantial risk of serious harm exists, and he must also  
17 draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a defendant is liable if  
18 he knows that plaintiff faces "a substantial risk of serious harm and disregards that risk by failing  
19 to take reasonable measures to abate it." *Id.* at 847. A physician need not fail to treat an inmate  
20 altogether in order to violate that inmate's Eighth Amendment rights. *Ortiz v. City of Imperial*,  
21 884 F.2d 1312, 1314 (9th Cir. 1989). A failure to competently treat a serious medical condition,  
22 even if some treatment is prescribed, may constitute deliberate indifference in a particular case.  
23 *Id.*

24 It is important to differentiate common law negligence claims of malpractice from claims  
25 predicated on violations of the Eighth Amendment's prohibition of cruel and unusual punishment.

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28 ////

1 In asserting the latter, “[m]ere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not  
2 support this cause of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.  
3 1980) (citing *Estelle*, 429 U.S. at 105-06); *see also Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th  
4 Cir. 2004).

5 **a. Antipov**

6 Antipov seeks summary judgment on the ground that there is “no evidence that he was  
7 deliberately indifferent to [plaintiff’s] medical needs.” ECF No. 112-2 at 22. Antipov’s motion  
8 is based on his declaration, in which he does not dispute that he removed plaintiff’s four wisdom  
9 teeth after providing local anesthesia but without premedicating plaintiff with antibiotics.  
10 Antipov Decl. at ¶¶ 3, 5-7. Antipov also does not dispute that he did not prescribe plaintiff pain  
11 medication or antibiotics after the extraction. *Id.* at ¶ 10. However, there is a dispute as to  
12 whether he had the authority to do so. Antipov claims he did not prescribe plaintiff with either  
13 pain medication or antibiotics after the extraction because, as an independent contractor not on  
14 the medical staff at the prison, he is not permitted to prescribe medication to inmates; “Instead, it  
15 is up to the medical staff at the prison, such as [plaintiff’s] dentist, to prescribe such medications  
16 following the wisdom tooth extraction.” *Id.* at ¶ 10. Plaintiff claims that Antipov had the  
17 authority but was deliberately indifferent in not prescribing medications necessary to address  
18 plaintiff’s serious medical needs. ECF No. 122 at 12.

19 Antipov’s account differs from plaintiff’s version of events in several other respects.  
20 Antipov claims that he did in fact review plaintiff’s medical chart before the extraction. *Id.* at ¶ 4.  
21 His review indicated that plaintiff had in fact previously been hospitalized with heart murmurs  
22 but was not under treatment on the day of the extraction. *Id.* He contends however, that  
23 premedicating plaintiff with an antibiotic would have been “unnecessary and inappropriate,” and  
24 notes that the American Heart Association and American Dental Association have not  
25 recommended such premedication for individuals with heart murmurs since 2007. *Id.* at ¶ 5.  
26 Contrary to plaintiff’s claim that Antipov struggled to remove some teeth, Antipov describes the  
27 extraction of plaintiff’s wisdom teeth as a “very routine” and “fairly easy” procedure. *Id.* at ¶ 8.  
28 Antipov asserts that the entire procedure took approximately twenty minutes, and plaintiff never

1 indicated to Antipov that he was in any discomfort. *Id.* Antipov explains that he did not place  
2 any “hinges” in plaintiff’s mouth, but rather used “bite blocks,” which make the procedure more  
3 comfortable for the patient. *Id.* at ¶ 9. According to Antipov, infections, slow-healing gums, and  
4 pain and swelling in the gums and tooth socket are common side effects of wisdom tooth  
5 extraction. *Id.*

6 Thus, plaintiff and Antipov dispute whether Antipov reviewed plaintiff’s medical chart  
7 before the extractions and whether Antipov should have premedicated plaintiff with antibiotics.  
8 They also dispute the length and difficulty of the extraction, whether Antipov ignored plaintiff’s  
9 complaints of pain, and—significantly—whether Antipov’s decision not to prescribe pain  
10 medication and antibiotics despite knowing plaintiff’s condition can constitute an Eighth  
11 Amendment violation under these circumstances. As noted, Antipov claims he did not have the  
12 authority to prescribe plaintiff pain medication and antibiotics.

13 The dispute over Antipov’s alleged failure to review plaintiff’s medical chart before the  
14 extraction appears to be of little consequence. Plaintiff suggests that if Antipov had looked at the  
15 medical chart he would have seen that other doctors had recommended that plaintiff premedicate  
16 with antibiotics before any dental surgery. Pl.’s Decl. at ¶¶ 4, 6-8 (ECF No. 122 at 75). Plaintiff  
17 has certainly established a difference of opinion between he and Antipov and also between  
18 Antipov and other doctors. But the recommendation of other doctors was not binding on  
19 Antipov, who instead relied on guidelines from the American Heart Association and the  
20 American Dental Association. The Ninth Circuit has made clear that a difference of medical  
21 opinion is, as a matter of law, insufficient to establish deliberate indifference. *See Toguchi*, 391  
22 F.3d at 1058. “Rather, to prevail on a claim involving choices between alternative courses of  
23 treatment, a prisoner must show that the chosen course of treatment ‘was medically unacceptable  
24 under the circumstances,’ and was chosen ‘in conscious disregard of an excessive risk to [the  
25 prisoner’s] health.’” *Id.* (quoting *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996)).  
26 Plaintiff has not shown that Antipov’s decision to not premedicate plaintiff with antibiotics was  
27 medically unacceptable under the circumstances, nor that Antipov made that determination in  
28 conscious disregard of an excessive risk to plaintiff’s health; the American Heart Association and

1 American Dental Association guidelines that Antipov refers to suggest just the opposite. Thus,  
2 neither the claim that Antipov did not review plaintiff's medical chart nor the claim that Antipov  
3 should have premedicated plaintiff with antibiotics establishes deliberate indifference. Thus, the  
4 dispute over review of the medical chart is not a dispute over a material issue of fact.

5 However, the disputes over the length and difficulty of the extractions, the level of  
6 plaintiff's pain during and after the extractions, and what, if anything, Antipov did to address the  
7 pain and potential for infection are material. Plaintiff describes a prolonged and problematic  
8 procedure during which Antipov became frustrated over the difficulty removing the left and right  
9 lower wisdom teeth. SAC at 4. He describes Antipov having to apply "immense pressure, that  
10 my whole head was being pulled to and fro." *Id.* He further adds that "[b]eing that my procedure  
11 took longer than expected I was rush[ed] out of the dental office without receiving any pain  
12 medication, even after I was notified that the anethesa [sic] wear off around 4:30 p.m. (dinner  
13 time.)" *Id.* The dispute over whether plaintiff complained of pain and the subsequent dispute  
14 over why Antipov did not prescribe pain medication for post-surgical pain that plaintiff would  
15 reasonably be expected to suffer precludes a grant of summary judgment in Antipov's favor. A  
16 reasonable fact finder could certainly conclude on the evidence presented that Antipov knew that  
17 the extractions would result in severe pain requiring treatment with pain medication. Indeed,  
18 plaintiff asserts that he was warned that the injections used in the procedure would soon wear off.  
19 Likewise, a fact finder could reasonably conclude that Antipov was aware of the risk of infection  
20 following the procedure. *See* Antipov Decl. at ¶ 10 ("infections are also common side effects, as  
21 extraction may allow bacteria to enter the bloodstream"). But, as noted above, Antipov claims  
22 that "[s]ince approximately 2009, [he has] performed work as an independent contractor and  
23 expert for the California Department of Corrections and Rehabilitation . . ." *Id.* at ¶ 2. Antipov  
24 believes that he was therefore not permitted to prescribe medication to inmates.<sup>8</sup> *See id.* at ¶ 11.  
25 However, as an independent contractor, Antipov quite clearly had the authority to prescribe

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26 <sup>8</sup> In support of this position, Antipov's reply brief cites his Statement of Undisputed Facts  
27 numbers 26 and 27 (ECF No. 112-3 at 4), which in turn cite to paragraph 11 of his declaration.  
28 His declaration, however, fails to cite any authority for the assertion that as a contractor he was  
not authorized to prescribe medication.

1 medication to inmates:

2           Only facility-employed health care staff, *contractors paid to*  
3           *perform health services* for the facility, or persons employed as  
4           health care consultants shall be permitted within the scope of their  
5           licensure, to diagnose illness or, prescribe medication and health  
6           care treatment for inmates. No other personnel or inmate may do  
7           so.

8 Cal. Code Regs. tit. 15, § 3354(a) (emphasis added). Thus, contrary to Antipov’s alleged  
9 mistaken belief—one that he appears to have held since 2009—Antipov had the authority to  
10 prescribe medication within the scope of his license to treat plaintiff’s pain and risk of infection.

11 A defendant is liable if he knows that plaintiff faces “a substantial risk of serious harm and  
12 disregards that risk by failing to take reasonable measures to abate it.” *Farmer*, 511 U.S. at 847.

13 Antipov’s choice not to prescribe medication, while seemingly ill-informed, was indisputably  
14 deliberate. Further, he does not deny that prescribing such medication was medically indicated to  
15 address or treat a serious medical condition. Instead, the reason he articulates for not doing so is  
16 his erroneous assertion that he lacked authority to prescribe medication even if needed.

17           Notwithstanding the clear language of section 3354(a), Antipov still insists in his reply  
18 brief that he lacked authority to prescribe medication. Antipov’s stated belief that he could not  
19 prescribe medication even under circumstances that otherwise warrant such treatment raises the  
20 question of whether his deliberate, but ill-informed decision not to prescribe medically necessary  
21 medication can satisfy the test under *Farmer* for deliberate indifference. That question turns on  
22 fact-specific issues of what Antipov knew not only as to plaintiff’s immediate medical needs but  
23 what he knew as to the authority of medical practitioners to respond to those needs, and what  
24 other steps Antipov had available to respond to plaintiff’s serious medical needs. The issue that  
25 requires submission to a jury, however, is not whether Antipov had the authority to prescribe  
26 medication—he did. Cal. Code Regs. tit. 15, § 3354(a). Rather, the issue that precludes summary  
27 judgment is whether Antipov was deliberately indifferent for not prescribing any pain medication  
28 or antibiotics after extracting plaintiff’s wisdom teeth or otherwise taking steps to assure that such  
treatment would be provided. As noted above,

1                     Whether a prison official had the requisite knowledge of a  
2                     substantial risk is a question of fact subject to demonstration in the  
3                     usual ways, including inference from circumstantial evidence, and  
4                     a factfinder may conclude that a prison official knew of a  
5                     substantial risk from the very fact that the risk was obvious.

6       *Farmer*, 511 U.S. at 842. More succinctly: “a trier of fact may infer knowledge from the obvious  
7       . . . .”<sup>9</sup> *Id.* at 844; *see also Harrelson v. Dupnik*, 970 F. Supp. 2d 953, 979 (D. Ariz. 2013) (“The  
8       question is whether the risk of harm . . . was so ‘obvious’ that ignoring it amounted to deliberate  
9       indifference.”). Similarly, a fact finder need not ignore evidence that may show it was obvious  
10      that a contractor for medical services had the authority for which Antipov claims not to have  
11      known.

12                     Here, a fair-minded jury could find that not prescribing pain medication or antibiotics  
13                     after extracting plaintiff’s wisdom teeth posed a substantial risk of serious harm to plaintiff, that  
14                     Antipov had to have known of such an obvious risk, and that Antipov failed to take reasonable  
15                     measures to abate that risk. Because those findings could lead a fair-minded jury to return a  
16                     verdict for plaintiff on the evidence presented, Antipov’s motion for summary judgment must be  
17                     denied.

#### 18   **b. Ma**

19                     Ma also argues that there is “no evidence that he was deliberately indifferent to  
20                     [plaintiff’s] medical needs.” ECF No. 112-2 at 22. Ma submits a declaration acknowledging that  
21                     he was the on-call doctor on the evening of August 3. ECF No. 112-12 (“Ma Decl.”) at ¶ 3.  
22                     However, Ma states that before he even arrived at the medical clinic, he issued an order that  
23                     plaintiff be seen on the dental line the following morning. *Id.* When he arrived at the medical  
24                     clinic a short time later, he conducted an examination that confirmed plaintiff was awake and  
25                     orientated; Ma diagnosed plaintiff with somnolence of an unknown etiology. *Id.* at ¶¶ 4, 5. Ma  
26                     also ordered that plaintiff be admitted to OHU, where the nursing staff was to monitor plaintiff’s

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27                     <sup>9</sup> While the Supreme Court in *Farmer* adopted a subjective test under which a jury must  
28                     conclude that Antipov had knowledge of the risk from his failure to act before liability may be  
                    imposed, it is for the jury to resolve credibility and decide what he actually knew, and in doing so  
                    the jury need not ignore what was obvious. 511 U.S. at 843, n.8.



1 vital signs every thirty minutes for four hours and then every two hours for three hours. *Id.* at ¶ 6.  
2 Ma claims that he reviewed plaintiff’s medical chart during the examination. *Id.* at ¶ 7. That  
3 review indicated that Burns had prescribed Tylenol #3 and Penicillin for plaintiff. *Id.* Ma  
4 ordered that prescription to continue because neither Burns’s order nor plaintiff’s medication  
5 reconciliation form listed allergies to those medications. *Id.*

6 On August 4, nursing staff informed Ma that the prison did not have any liquid Tylenol #3  
7 available, and that plaintiff’s medication reconciliation form identified a drug allergy only to  
8 Motrin. *Id.* at ¶ 11. Ma therefore prescribed Tylenol #3 in tablet form, three times per day for  
9 four days. *Id.* Ma did not become involved in plaintiff’s medical care again until 2013, when he  
10 became plaintiff’s primary care physician. *Id.* at ¶ 13. In Ma’s review of plaintiff’s medical  
11 chart—both in 2010 and later as his primary care physician—Ma has not seen any indication that  
12 plaintiff is genuinely allergic to any medication. *Id.* at ¶ 14. According to Ma, stomach  
13 discomfort, nausea, and vomiting are fairly common side-effects of taking Tylenol #3 and not  
14 necessarily an indication that an individual cannot tolerate the medication. *Id.* at 8. Moreover,  
15 Vicodin and Tylenol #3 contain the same amount of Tylenol; thus, if an individual does not have  
16 an allergic reaction to the Tylenol in Vicodin, he will not have an allergic reaction to the Tylenol  
17 in Tylenol #3. *Id.* at 14-15.<sup>10</sup>

18 Thus, although plaintiff and Ma dispute the extent of Ma’s examination and treatment of  
19 plaintiff, and whether plaintiff is allergic to Tylenol #3 and Penicillin, these disputes are not  
20 material. There is no evidence to show that Ma was aware of any allergies to either medication  
21 yet prescribed it anyway. Thus, a fair-minded jury could not return a verdict against Ma on the  
22 evidence presented. *Anderson*, 477 U.S. at 248, 252.

23 Further, plaintiff’s claim that Ma did not treat him at the OHU is refuted by plaintiff’s  
24 own verified complaint, which asserts that Ma was the doctor who ordered the Tylenol #3 that he  
25 received the night of the extraction. SAC at 5-6. Plaintiff cannot create a genuine factual dispute

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26 <sup>10</sup> It is unclear whether plaintiff claims an allergy to Vicodin. *See* Pl.’s Decl. at ¶ 27  
27 (ECF No. 122 at 80) (“Being that I never taken Vicodin before August 3, 2010 I never had an  
28 allergic reaction to it nor would I have knowledge that it contains Tylenol. I was never made  
aware by any physician that Vicodin contains Tylenol.”).

1 by contradicting the verified allegations of his own complaint. *See also Jones v. Marshall*, 459 F.  
2 Supp. 2d 1002, 1013 (E.D. Cal. 2006) (granting defendant summary judgment on a deliberate  
3 indifference claim based on defendant’s failure to touch or treat plaintiff because there was no  
4 evidence that defendant’s conduct caused further injury). Moreover, plaintiff does not dispute the  
5 claim that Ma ordered that plaintiff be seen on the dental line the following morning and, shortly  
6 after arriving at the OHU, ordered the nursing staff to monitor plaintiff’s vital signs. Such  
7 attentive care is inconsistent with plaintiff’s claim that Ma was deliberately indifferent to his  
8 serious medical needs. *See Toguchi*, 391 F.3d at 1060 (“Deliberate indifference is a high legal  
9 standard.”); *Hutchinson*, 838 F.2d at 394.

10 The undisputed evidence indicates that Ma ordered that plaintiff be seen by a dentist the  
11 following morning, ordered that plaintiff be admitted to and observed in the OHU, and prescribed  
12 the Tylenol #3 that plaintiff received that night. Of the greatest significance is Ma’s statement—  
13 which plaintiff cannot dispute—that he did not believe plaintiff was allergic to Tylenol. *See Ma*  
14 *Decl.* at ¶ 14 (“In my review of [plaintiff’s] medical chart, both in 2010 and now as his primary  
15 care physician, I have seen no indication of any genuine allergic reaction by [plaintiff] to any  
16 medication.”). Under *Toguchi*, Ma’s decision to prescribe Tylenol #3 cannot constitute deliberate  
17 indifference if Ma did not believe that the medication presented a serious risk of harm to plaintiff.  
18 *See Toguchi*, 391 F.3d at 1058 (“Because she did not believe that Cogentin use presented a  
19 serious risk of harm to [plaintiff], her conduct cannot constitute deliberate indifference.”); *see*  
20 *also Murillo v. Thornton*, No. 07-CV-0197 W(POR), 2008 WL 110899, at \*4 (S.D. Cal. Jan. 9,  
21 2008) (prisoner’s allegations that defendant “prescribed him the wrong medication and did not  
22 inform him about the side effects,” causing plaintiff “severe stomach aches and headaches for  
23 four months,” failed to state an Eighth Amendment claim).

24 Even believing plaintiff’s version of the disputed facts, he has not produced evidence  
25 sufficient to establish that Ma was deliberately indifferent to his serious medical needs.  
26 Accordingly, Ma’s motion for summary judgment must be granted.

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**c. McGee**

McGee, too, seeks summary judgment on the ground that there is “no evidence that she was deliberately indifferent to [plaintiff’s] medical needs.” ECF No. 112-2 at 23. McGee’s declaration does not dispute that she met with plaintiff on August 3, that plaintiff had a temperature of 102.2 degrees, or that she contacted the on-call dentist. McGee Decl. at ¶¶ 3, 4. According to McGee, she measured plaintiff’s vital signs in the Triage and Treatment Area after learning that Antipov had extracted plaintiff’s wisdom teeth earlier in the day. *Id.* Because plaintiff was talking freely, McGee determined that there was no obstruction in plaintiff’s airway. *Id.* at ¶ 4. But McGee was concerned that plaintiff could be bleeding into his airway, so she had plaintiff open his mouth while she inspected the gauze that had been put in place after the extraction. *Id.* at ¶ 5. Because the wisdom teeth are located at the very back of the mouth, inspecting the gauze and ensuring that they were tightly packed into place required McGee to insert her fingers far into plaintiff’s mouth and to press on the gauze. *Id.* at ¶ 6. McGee contends that she performed this task “with as much care and as gently as possible.” *Id.* McGee then contacted Burns, and he instructed only that ice packs be applied bilaterally. *Id.* at ¶ 8. According to McGee, plaintiff did not voice any complaints of pain or make any requests for pain medication or antibiotics during the meeting. *Id.* at ¶ 9.

As noted above, plaintiff contends that McGee was disrespectful towards plaintiff, did not offer any medical assistance, and caused plaintiff great pain when she jammed her fingers down plaintiff’s throat in search of gauzes that he might have swallowed. SAC at 5. Thus, while plaintiff and McGee dispute (1) whether McGee was disrespectful towards plaintiff, (2) whether McGee offered medical assistance, and (3) why McGee put her fingers in plaintiff’s mouth and the degree of care she exercised when doing so, those disputes are not material under the substantive law applicable to plaintiff’s Eighth Amendment claims.

First, the disrespectful behavior alone that is described in plaintiff’s amended complaint—“insisting that I was on some illegal drugs” and “continuely [sic] interrogat[ing] me with erroneous questions”—does not amount to deliberate indifference. See *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (“[v]erbal harassment or abuse . . . is not sufficient to state a

1 constitutional deprivation under 42 U.S.C. § 1983”) (quoting *Collins v. Cundy*, 603 F.2d 825, 827  
2 (10th Cir. 1979)).

3 Second, while failing to render medical assistance can amount to deliberate indifference,  
4 the undisputed evidence here indicates that McGee did in fact provide medical assistance.  
5 Plaintiff’s own complaint indicates that McGee contacted the on-call doctor and searched  
6 plaintiff’s throat for gauzes that he might have become lodged by swallowing during a seizure.  
7 SAC at 5. Plaintiff also does not dispute McGee’s claims that she checked plaintiff’s vital signs  
8 and took his temperature, that the only direction Burns provided McGee was to apply ice packs,  
9 or that he received ice packs. Thus, plaintiff has not shown that McGee was indifferent to  
10 plaintiff’s serious medical needs for failure to provide medical assistance. *See Jones v. Marshall*,  
11 459 F. Supp. 2d. at 1013.

12 Third, while the parties dispute the manner in which McGee placed her hands in plaintiff’s  
13 mouth and her specific purpose for doing so (plaintiff characterizes it as “jamm[ing] her fingers  
14 down [his] throat”) plaintiff has not established that McGee was deliberately indifferent to his  
15 serious medical needs when doing so. Of particular significance is plaintiff’s own evidence  
16 indicating that McGee was searching for gauzes that plaintiff may have partially swallowed  
17 during his seizure. At most, plaintiff own allegations amount to lack of reasonable care for  
18 plaintiff’s discomfort while McGee examined his mouth and throat for gauze that might have  
19 been lodged in those areas. The Supreme Court has made clear that deliberate indifference  
20 “requires more than ordinary lack of due care.” *Farmer*, 511 U.S. at 835 (quoting *Whitley v.*  
21 *Albers*, 475 U.S. 312, 319, (1986)) (internal quotation mark omitted). Not only does McGee’s  
22 purpose for the procedure conflict with plaintiff’s claim that she was deliberately indifferent, but  
23 plaintiff has not produced any evidence that McGee disregard a substantial risk of serious harm.  
24 Again, deliberate indifference is a high legal standard requiring more than a showing of medical  
25 malpractice or negligence. *Toguchi*, 391 F.3d at 1060.

26 Taking plaintiff’s version of the disputed facts regarding McGee as true, he has not  
27 produced evidence sufficient to establish that McGee was deliberately indifferent to plaintiff’s  
28 serious medical needs. Therefore, McGee’s motion for summary judgment must be granted.

1 **d. Maciel**

2 Maciel seeks summary judgment on the ground that there is “no evidence that he was  
3 deliberately indifferent to [plaintiff’s] medical needs.” ECF No. 112-2 at 24. In his declaration,  
4 he describes examining plaintiff on five occasions between August 10 and October 21, 2010.  
5 ECF No. 112-11 (“Maciel Decl.”) at ¶¶ 3, 8, 11, 13, 15.<sup>11</sup> Maciel states that he prescribed  
6 Tylenol, 325 mg after examining plaintiff on August 10. *Id.* at ¶¶ 3, 5. During that examination,  
7 plaintiff told Maciel that he was allergic to Motrin; Maciel then reviewed plaintiff’s dental health  
8 history record and confirmed that Motrin was listed as a drug allergy. *Id.* at ¶ 5. However, at that  
9 time Tylenol and Penicillin were not so listed; according to Maciel’s declaration, allergies to  
10 Tylenol and Penicillin were added when the form was updated on August 20, 2010.<sup>12</sup> *Id.*

11 Maciel claims that plaintiff did complain of “slight pain” from the extraction and that the  
12 Tylenol #3 was causing an upset stomach; however, plaintiff did not claim to be allergic to  
13 Tylenol during Maciel’s examination. *Id.* at ¶¶ 3, 5. Rather, plaintiff claimed only that Tylenol  
14 #3 made him sick to his stomach. *Id.* at ¶ 5. Maciel explains that stomach irritation is a “fairly  
15 common side-effect” of Tylenol #3 and is not an indication of an allergy to the medication. *Id.* at  
16 ¶ 4. Maciel also claims that “[n]o allergic symptoms were present in [plaintiff] during my  
17 examination of him . . . .” *Id.* Maciel prescribed the less powerful pain medication, Tylenol, 325  
18 mg, rather than Tylenol #3 because he believed it would still relieve the pain but be less likely to  
19 cause plaintiff stomach irritation. *Id.* at ¶ 5.

20 In response to Maciel’s motion, plaintiff contends that his Unit Health Record has listed  
21 his allergies to Tylenol, Penicillin, Aspirin, and Motrin since he arrived in prison. Pl.’s Decl. at  
22 ¶ 30 (ECF No. 122 at 81).<sup>13</sup> He also contends that he told both Maciel and Downie at the August  
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24 <sup>11</sup> Plaintiff’s only complaint with respect to Maciel, however, appears to be that Maciel  
25 prescribed the bag of Tylenol that plaintiff received on August 10. SAC at 7.

26 <sup>12</sup> As discussed below, defendant Downie states that at an August 20 meeting he asked  
27 plaintiff to review and update the dental health history record plaintiff had completed on August  
28 3. According to Downie, plaintiff had previously identified only Motrin as an allergy drug but he  
added Tylenol and Penicillin at the August 20 meeting.

<sup>13</sup> Again, plaintiff has not submitted this Unit Health Record to the court.

1 10 appointment that he was allergic to the Tylenol #3 that he had been prescribed for the  
2 preceding week, and that he showed them “the rashes and hives that were all over [his] neck,  
3 arms, chest, stomach and back  
4 . . . .” *Id.* at ¶¶ 38, 40.

5 Even if plaintiff had produced the Unit Health Record listing his allergy to Tylenol on  
6 August 10, and even if he showed Maciel the rashes and hives that he believes were caused by his  
7 consumption of Tylenol #3, the undisputed evidence indicates that Maciel did not believe that the  
8 Tylenol presented a serious risk of harm to plaintiff. *See* Maciel Decl. at ¶¶ 4, 5 (stating that he  
9 did not observe any allergic symptoms and “believed that the less powerful pain medication—  
10 Tylenol rather than Tylenol #3—would still relieve the pain but would also be less-likely to cause  
11 [plaintiff] the stomach irritation which he complained about”). As with plaintiff’s claim against  
12 Ma, this fact is critical under *Toguchi*. Moreover, this is not an instance in which Maciel “knew  
13 of a substantial risk from the very fact that the risk was obvious.” *Farmer*, 511 U.S. at 842.  
14 When plaintiff informed Maciel of his allergy to Motrin, Maciel “consulted [plaintiff’s] dental  
15 health history record and confirmed it was listed as a drug allergy.” Maciel Decl. at ¶ 5. The  
16 dental health history record did not at that time list Tylenol or Penicillin as a drug allergy. *Id.*  
17 Because Maciel did not believe that prescribing plaintiff Tylenol would present a serious risk of  
18 harm to plaintiff—a belief based on his examination of plaintiff and review of plaintiff’s dental  
19 health history record—Maciel’s conduct cannot amount to deliberate indifference. *See Toguci*,  
20 391 F.3d at 1058.

21 Even believing plaintiff’s version of the disputed facts, he has not produced evidence  
22 sufficient to establish that Maciel was deliberately indifferent to his serious medical needs.  
23 Therefore, Maciel is entitled to summary judgment.

24 **e. Downie**

25 Downie also seeks summary judgment on the ground that there is “no evidence that he  
26 was deliberately indifferent to [plaintiff’s] medical needs.” ECF No. 112-2 at 25. Downie, a  
27 dentist, states in his declaration that he recalls seeing plaintiff on August 20, but not on August

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1 10. ECF No. 112-8 (“Downie Decl.”) at ¶¶ 4, 5.<sup>14</sup> Downie contends that at the August 20  
2 meeting he asked plaintiff to review and update a dental health history record that plaintiff had  
3 completed on August 3. *Id.* at ¶ 5. Although plaintiff previously identified an allergy only to  
4 Motrin, plaintiff added Tylenol and Penicillin before signing the form on August 20. *Id.* at ¶¶ 5,  
5 6.<sup>15</sup> Plaintiff complained of pain at the appointment, and Downie considered prescribing Aspirin  
6 until plaintiff claimed that he was also allergic to that medication. *Id.* at ¶ 8. Downie doubted the  
7 legitimacy of this claim: not only had plaintiff not claimed an allergy to Aspirin on his dental  
8 health history record—which plaintiff had just updated at the beginning of the appointment—but  
9 plaintiff described his allergic symptom to Aspirin as stomach discomfort. *Id.* According to  
10 Downie, stomach discomfort is not an indication of a drug allergy. *Id.* Downie did not observe  
11 any allergic symptoms during his examination of plaintiff. *Id.* at ¶ 9. Notwithstanding his  
12 skepticism, Downie reviewed plaintiff’s medical chart and contacted plaintiff’s primary care  
13 physician to determine whether plaintiff’s alleged allergies were genuine. *Id.* at ¶¶ 9, 10. Downie  
14 eventually decided to prescribe Salsalate, which is “commonly prescribed to patients who cannot  
15 take Aspirin,” and plaintiff did not claim an allergy to it. *Id.* at ¶ 11. According to Downie,  
16 Salsalate and Aspirin are not the same medication, and Salsalate does not contain Aspirin. *Id.*

17 In his objections, Downie argued that “no liquid diet was necessary and [] no rational trier  
18 of fact could find that [he] should have ordered one when [plaintiff] had actually been gaining  
19 weight since he had last been examined.” ECF No. 127 at 2. In support of this claim, Downie  
20 cites medical records that indicate plaintiff weighed 155 pounds on August 10 and 165 pounds on  
21 August 20. *Id.* (citing Maciel Decl., Ex A and Downie Decl., Ex. B).

22 Thus, in comparing their respective versions of the August appointments, plaintiff and  
23 Downie dispute whether they even met on August 10, whether Salsalate is an alternative for  
24 someone who is allergic to Aspirin, whether Salsalate contains Aspirin, and whether Downie

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25 <sup>14</sup> According to Downie, plaintiff’s medical chart indicates that plaintiff met with a  
26 different dentist on August 10. Downie Decl. at ¶ 4. Downie does not otherwise acknowledge  
27 the allegations stemming from the alleged meeting on August 10.

28 <sup>15</sup> Downie reviewed and signed that form, which is attached to his declaration as an  
exhibit. Downie Decl. (“Exhibit A”).

1 should have ordered plaintiff a liquid diet for plaintiff. For the reasons discussed below, it is  
2 recommended Downie’s motion for summary judgment with respect to the allegations regarding  
3 his prescription for pain medication granted, but his motion as to the allegations regarding his  
4 failure to order plaintiff a liquid diet be denied.

5 For purposes of this motion, the court must take as true plaintiff’s claim that Downie was  
6 present on August 10 and observed rashes and hives on plaintiff’s body. *See Anderson*, 477 U.S.  
7 at 249, 255; *Matsushita*, 475 U.S. at 587. However, even assuming those facts, the only evidence  
8 of plaintiff’s purported allergic reaction to Tylenol and Penicillin is his own lay testimony. *See*  
9 *Hardy v. 3 Unknown Agents*, 690 F. Supp. 2d 1074, 1086 (C.D. Cal. 2010) (sustaining an  
10 objection to plaintiff’s statement as improper lay testimony “to the extent that plaintiff asserts that  
11 the allergic reaction was caused by the [medication]”). There is nothing in the medical records  
12 before the court to establish a diagnosis or medical finding that plaintiff in fact has or had an  
13 allergy to either medication. Moreover, plaintiff claims the bag of Tylenol that he received on the  
14 evening of August 10 was prescribed by Maciel, not Downie. Pl.’s Decl. at ¶ 42 (ECF No. 122 at  
15 83). Furthermore, similar to plaintiff’s claims against Ma and Maciel, his deliberate indifference  
16 claim against Downie fails because Downie did not believe that Salsalate presented a serious risk  
17 to plaintiff’s health. *See Toguchi*, 391 F.3d at 1058. Even if, as plaintiff claims, Salsalate  
18 contains Aspirin and is not an alternative for someone who is allergic to Aspirin—a point for  
19 which plaintiff has no expertise—Downie makes clear that he did not believe plaintiff’s alleged  
20 allergy to Aspirin was legitimate and provides cogent reasons why he did not believe plaintiff.  
21 *See Downie Decl.* at ¶ 8. Accordingly, Downie’s motion for summary judgment as to the  
22 allegations regarding Downie’s prescription of pain medication should be granted.

23 As to the other allegations concerning Downie, his objections raise arguments for the first  
24 time after the close of briefing on the motion and after the court’s earlier analysis of the issues.  
25 The purpose of the objection period is not to brief the merits of the motion in the first instance.  
26 Defendants already had the opportunity to brief their motion. However, even considering the  
27 evidence and argument that Downie raises for the first time in his objections, the court must deny  
28 Downie’s motion for summary judgment with respect to the allegations regarding his failure to



1 order a liquid diet for plaintiff.<sup>16</sup> Downie’s specific argument is that “[t]he evidence before the  
2 court establishes that no liquid diet was necessary and that no rational trier of fact could find that  
3 Downie should have ordered one when [plaintiff] had actually been gaining weight since he had  
4 last been examined.” ECF No. 127 at 2.<sup>17</sup> But when Downie says “the evidence before the  
5 court,” he is referring to his evidence to the exclusion of plaintiff’s evidence. On Downie’s  
6 motion for summary judgment, however, the court not only considers plaintiff’s evidence but also  
7 believes that evidence for purposes of the motion. *See Anderson*, 477 U.S. at 249, 255;  
8 *Matsushita*, 475 U.S. at 587. Contrary to Downie’s claim that the evidence “establishes that no  
9 liquid diet was necessary,” plaintiff’s evidence indicates that on August 10, he informed Downie  
10 of the “severe pain [he] was in, how [he] was unable to chew nor swallow any food since before  
11 the oral surgery, and all the stomach pain [he] had due to this.” Pl.’s Decl. at ¶ 41 (ECF No. 122  
12 at 83). Plaintiff’s evidence also indicates that on August 20, Downie observed plaintiff’s weight  
13 loss and that plaintiff was unable to open his mouth for examination because it caused him pain,  
14 and plaintiff again informed Downie that he had not eaten anything since the day of the  
15 extraction. SAC at 8-9.<sup>18</sup>

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18 <sup>16</sup> Indeed, the court is not required to consider the evidence and argument presented for  
19 the first time in Downie’s objections. *See United States v. Howell*, 231 F.3d 615, 621 (9th Cir.  
20 2000) (“[A] district court has discretion, but is not required, to consider evidence presented for  
21 the first time in a party’s objection to a magistrate judge’s recommendation.”); *cf. Brown v. Roe*,  
22 279 F.3d 742, 745 (9th Cir. 2002) (explaining that a functionally illiterate pro se petitioner’s  
failure to raise an argument before filing objections to a findings and recommendations is more  
excusable than the failure of “the litigant in *Howell*, who was represented by counsel . . .”).

23 <sup>17</sup> Although the medical records noting the fluctuations in plaintiff’s weight were  
24 submitted with the various declarations that defendants submitted in support of their motion for  
25 summary judgment, *see* ECF Nos. 112-8, 112-9, 112-1, the claim that Downie did not order a  
liquid diet because of the fluctuations in plaintiff’s weight is one that defendants did not present  
until filing their objections.

26 <sup>18</sup> The allegations of a verified complaint may serve as an affidavit for purposes of  
27 summary judgment if they are based on personal knowledge and set forth the requisite facts with  
28 specificity. *See Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1022 (9th Cir.  
2010).

1           The argument that Downie did not order a liquid diet because plaintiff had been gaining  
2 weight is unconvincing. The medical records do indicate that plaintiff weighed 155 pounds on  
3 August 10 and 165 pounds on August 20. *See* Maciel Decl., Ex. A; Downie Decl., Ex. B. Thus,  
4 Downie’s argument superficially appears reasonable. But Downie fails to mention in his  
5 objections that the medical records also indicate that plaintiff weighed 174 pounds on August 3,  
6 the day of the extraction. *See* Antipov Decl., Ex. A (ECF No. 112-9 at 7). If the medical records  
7 are accurate—an assumption underlying Downie’s argument—then plaintiff lost nineteen pounds  
8 in the seven days after the extraction. Thus, Downie is essentially arguing that he could not have  
9 been deliberately indifferent to plaintiff’s serious medical needs by not ordering a liquid diet  
10 because plaintiff had gained back ten of the nineteen pounds that plaintiff lost in the week after  
11 the extraction. A jury may well agree with Downie, but it also may well determine instead that a  
12 more reasonable baseline is the loss of nineteen pounds in light of plaintiff’s claim that he had a  
13 serious medical need for, and sought, a liquid diet but was refused, and that denial put him at  
14 unreasonable risk and unnecessary suffering. In short, the argument does not warrant summary  
15 judgment in favor of Downie.

16           Additionally, as noted above, Downie and plaintiff dispute whether they met on August  
17 10. If the jury believes plaintiff’s evidence, Downie will have to convince the jury that he was  
18 not deliberately indifferent for not ordering a liquid diet for plaintiff on August 10 when plaintiff  
19 had lost nineteen pounds in the preceding week. Again, the court does not determine witness  
20 credibility on summary judgment; rather, it believes the non-moving party’s evidence and draws  
21 inferences most favorably for that party. *Anderson*, 477 U.S. at 249, 255; *Matsushita*, 475 U.S. at  
22 587. Downie’s objections emphasize that, under *Matsushita*, the court is to consider “the record  
23 taken as a whole” when determining if there is a genuine issue of material fact. He further argues  
24 that no rational trier of fact, considering the record as a whole, would find for plaintiff with  
25 respect to the liquid diet allegations against Downie. Contrary to Downie’s argument, the record  
26 does not undermine plaintiff’s claim that he was unable to eat after the extraction (or at least not  
27 to the point that no rational trier of fact could find for plaintiff). In fact, with respect to plaintiff’s

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1 alleged request on August 10, the record actually corroborates plaintiff’s claim; again, he lost  
2 nineteen pounds in the week preceding that alleged meeting with Downie.

3 Downie has shown no basis for granting summary judgment on this claim. There is a  
4 genuine dispute whether Downie met with plaintiff on August 10. If a jury believes plaintiff  
5 testimony it will then have to take into account that request and the request on August 20. A fair-  
6 minded jury could—on the undisputed evidence that Downie did not order a liquid diet for  
7 plaintiff on either August 10 or August 20 despite plaintiff’s pain, weight loss, and inability to  
8 chew and swallow food after the extraction on August 3—return a verdict for plaintiff on his  
9 deliberate indifference claim against Downie.<sup>19</sup> See *Anderson*, 477 U.S. at 248, 252; see also  
10 *Foster v. Runnels*, 554 F.3d 807, 815 n.5 (9th Cir. 2009) (“This conclusion, that the deliberate and  
11 unnecessary withholding of food essential to maintain normal health can violate the Eighth  
12 Amendment, is well supported by case law.”).

13 Thus, it is recommended that Downie’s motion for summary be granted as to plaintiff’s  
14 allegations regarding Downie’s prescription of pain medication, but denied as to plaintiff’s  
15 allegations regarding Downie’s failure to order a liquid diet on August 10 and August 20.

16 **f. Park**

17 Park, too, seeks summary judgment on the ground that there is “no evidence that he was  
18 deliberately indifferent to [plaintiff’s] medical needs.” ECF No. 112-2 at 26. Park states in his  
19 declaration that he was the on-call dentist on August 24 and 25. ECF No. 112-10 (“Park Decl.”)  
20 at ¶¶ 3, 7. In the evening on both of those days, Park received a telephone call informing him that  
21 plaintiff was experiencing pain three weeks after having his wisdom teeth extracted and that  
22 plaintiff was claiming an allergy to Tylenol, even though plaintiff’s medication administration  
23 record listed an allergy only to Motrin. *Id.* On August 24, Park ordered a one-time dosage of  
24 Morphine, that plaintiff apply ice to the right side of his face, and that plaintiff be scheduled for  
25 an appointment in the dental clinic the following day. *Id.* at ¶ 4. Park did not order an antibiotic

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27 <sup>19</sup> The December 19, 2014 Findings and Recommendations incorrectly suggested that  
28 Downie did not dispute that plaintiff’s was suffering from a “painful infection.” Downie’s  
Objections reiterated that he “did not find the presence of any infection during his examination on  
August 20, 2010.” ECF No. 127 at 3. Downie does dispute plaintiff’s assertion in that regard.

1 at that time because he expected plaintiff to be seen at the dental clinic the following day. *Id.* On  
2 August 25, Park learned that plaintiff was unable to attend the dentist appointment because he had  
3 conflicting medical appointments. *Id.* at ¶ 8. Park therefore ordered another dosage of Morphine  
4 and the antibiotic Erythromycin. *Id.* at ¶¶ 9-10. Park ordered the Erythromycin because plaintiff  
5 claimed to be allergic to Penicillin. *Id.* at ¶ 10. Park does not dispute that the August 25  
6 physician’s order includes an order for Tylenol #3, but he does not recall ordering that medication  
7 and suspects it was included by mistake. *Id.* at ¶ 13.

8 Plaintiff does not dispute any part of Park’s account (including Park’s claim that the order  
9 for Tylenol #3 was included by mistake), and plaintiff’s deliberate indifference claim against Park  
10 appears to be based solely on the prescription for Tylenol #3. *See* SAC at 11; Pl.’s Decl. at ¶ 57  
11 (ECF No. 122 at 84). The issue, then, is whether Park’s mistake amounts to deliberate  
12 indifference.

13 “[D]eliberate indifference entails something more than mere negligence,” *Farmer*, 511  
14 U.S. at 835, and mistakes by medical professionals are not sufficient to meet the high legal  
15 standard, *see Jones v. Sahota*, 570 F. App’x 638, 638 (9th Cir. 2014) (citing *Toguchi*, 391 F.3d at  
16 1057-58, 1060); *Ross v. McGuinness*, 471 F. App’x 608, 609 (9th Cir. 2012). Moreover, even if  
17 the Tylenol #3 prescription was not a mistake, Park—similar to Ma, Maciel, and Downie—  
18 believes “there is no evidence of [plaintiff] suffering [ ] a genuine allergic reaction at any time.”  
19 Park Decl. at ¶ 13. Thus, because he did not believe that the Tylenol #3 that he prescribed  
20 presented a serious risk of harm to plaintiff, Park’s conduct cannot amount to deliberate  
21 indifference. *Toguchi*, 391 F.3d at 1058. Furthermore, Park’s mistake was of no consequence, as  
22 plaintiff has not even alleged that he consumed the Tylenol #3 that Park prescribed.

23 Park was not deliberately indifferent for mistakenly prescribing Tylenol #3—a mistake  
24 without any consequences. Therefore, Park is entitled to summary judgment.

25 **g. Grinde**

26 As with the other defendants, Grinde seeks summary judgment on the ground that there is  
27 “no evidence that he was deliberately indifferent to [plaintiff’s] medical needs.” ECF No. 112-2  
28 at 26. Grinde, the nurse who approved plaintiff’s return to B-facility, describes speaking with

1 plaintiff on the evening of August 25. ECF No. 112-13 (“Grinde Decl.”) at ¶ 5. Upon learning of  
2 plaintiff’s pain and the fact that plaintiff had missed his dental appointment that day, Grinde  
3 contacted Park, the on-call dentist. *Id.* at ¶¶ 4-5. Grinde informed Park that plaintiff was  
4 experiencing pain but was unable to see a dentist that day due to conflicting medical  
5 appointments. *Id.* at ¶ 5. Grinde also informed Park that although plaintiff was claiming to be  
6 allergic to Motrin and Tylenol, plaintiff’s medication administration record indicated only the  
7 allergy to Motrin. *Id.* at ¶ 6. According to Grinde, Park ordered a single dosage of Morphine,  
8 Tylenol #3, an antibiotic, and that plaintiff be seen in the dental clinic the following day. *Id.* at ¶  
9 7. Park initially ordered Penicillin, but instead prescribed Erythromycin after learning that  
10 plaintiff claimed to be allergic to Penicillin. *Id.* Grinde prepared the “physician’s orders”  
11 document that Park signed later. *Id.* at ¶ 8.

12 Plaintiff’s deliberate indifference claim against Grinde is based on (1) Grinde’s approving  
13 of plaintiff to return to B-facility after plaintiff’s heart murmur appointment without any  
14 treatment for his swollen face and extreme pain, (2) Grinde’s statement that he could not do  
15 anything for plaintiff because plaintiff was just trying to get drugs, and (3) the August 25  
16 prescription for Tylenol #3. Even believing plaintiff’s evidence, plaintiff has not established that  
17 Grinde was deliberately indifferent to his serious medical needs.

18 First, plaintiff does not dispute that Grinde contacted and informed Park of plaintiff’s pain  
19 and drug allergies before preparing the “physician’s orders,” nor does plaintiff contend that he did  
20 not receive the prescribed medication. Second, accusing plaintiff of feigning pain to get drugs  
21 does not amount to deliberate indifference to plaintiff’s serious medical needs. *Oltarzewski*, 830  
22 F.2d at 139. Third, as noted above, the mistaken Tylenol #3 prescription of August 25 was of no  
23 consequence, as plaintiff has not even alleged that he consumed that mistakenly prescribed  
24 medication. Thus, even believing plaintiff’s version of the disputed facts, he has not produced  
25 evidence sufficient to establish that Grinde was deliberately indifferent to his serious medical  
26 needs. Therefore Grinde is entitled to summary judgment.

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1                                   **3. Qualified Immunity**

2           Antipov and Downie contend that they are entitled to qualified immunity. ECF No. 112-2  
3 at 28.<sup>20</sup>

4           Qualified immunity protects government officials from liability for civil damages where a  
5 reasonable person would not have known that their conduct violated a clearly established right.  
6 *Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). “In resolving questions of qualified  
7 immunity at summary judgment, courts engage in a two-pronged inquiry.” *Tolan v. Cotton*, \_\_\_  
8 U.S. \_\_\_, \_\_\_, 134 S. Ct. 1861, 1865 (2014) (per curiam). “The first asks whether the facts,  
9 ‘taken in the light most favorable to the party asserting the injury, . . . show the officer’s conduct  
10 violated a federal right.’” *Id.* (internal bracketing omitted) (quoting *Saucier v. Katz*, 533 U.S.  
11 194, 201 (2001)). “The second prong of the qualified-immunity analysis asks whether the right in  
12 question was ‘clearly established’ at the time of the violation.” *Tolan*, 134 S. Ct. at 1866 (quoting  
13 *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). A plaintiff invokes a “clearly established” right when  
14 “the contours of the right [are] sufficiently clear that a reasonable official would understand that  
15 what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. at 640. “The salient  
16 question is whether the state of the law at the time of an incident provided fair warning to the  
17 defendants that their alleged conduct was unconstitutional.” *Tolan*, 134 S. Ct. at 1866 (internal  
18 bracketing and quotation marks omitted).

19           Antipov’s assertion of qualified immunity is based on his contention that the care he  
20 provided plaintiff was reasonable and therefore did not violate a plaintiff’s Eighth Amendment  
21 rights. As explained above, there are triable issues of material fact with respect to whether  
22 Antipov acted with deliberate indifference to plaintiff’s serious medical needs in violation of the  
23 Eighth Amendment. Those same issues preclude summary judgment on Antipov’s assertion of  
24 qualified immunity. Moreover, at the time of the alleged constitutional violations in this case,  
25 “the general law regarding the medical treatment of prisoners was clearly established,” and “it  
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27                                   <sup>20</sup> Because it is recommended that summary judgment be granted as to the Eighth  
28 Amendment claims against Grinde, Ma, Maciel, McGee, and Park, a discussion of qualified  
immunity as to those defendants is unnecessary.

1 was also clearly established that [prison staff] could not intentionally deny or delay access to  
2 medical care.” *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir. 2002) (citing *Hamilton v. Endell*,  
3 981 F.2d 1062, 1066 (9th Cir. 1992) and *Estelle*, 429 U.S. at 104-05)).

4 Downie’s assertion of qualified immunity is also unconvincing. As explained above,  
5 Downie does not dispute the fact that he denied plaintiff’s request for a liquid diet, even after  
6 learning that plaintiff had not eaten anything in the seventeen days before the August 20  
7 appointment. Not only does such undisputed evidence show a violation of a constitutional right,  
8 but that right was clearly established when Downie violated that right. *See Foster*, 554 F.3d at  
9 815 (“There is no question that an inmate’s Eighth Amendment right to adequate food is clearly  
10 established.”).

11 Neither Antipov nor Downie are entitled to qualified immunity.

#### 12 **B. Plaintiff’s Counter-Motion for Summary Judgment**

13 Plaintiff filed an opposition to defendants’ motion for summary judgment and a counter-  
14 for summary judgment. ECF No. 122. In their reply, defendants argue that the court should deny  
15 plaintiff’s counter-motion as untimely and construe it only as an opposition to defendants’  
16 motion. ECF No. 125 at 12. Although defendants correctly point out that the deadline for filing  
17 dispositive motions was March 24, 2014, *see* ECF No. 101, and that plaintiff did not file his  
18 counter-motion for summary judgment until July 31, 2014,<sup>21</sup> *see* ECF No. 122, plaintiff’s motion  
19 is considered on its merits and is denied. Plaintiff’s motion is denied not because it is untimely,  
20 but because it is a counter-motion for summary judgment in name only.

21 Only in conclusory statements at the beginning and end of plaintiff’s counter-motion does  
22 plaintiff argue that the court should grant summary judgment in his favor. *See* ECF No. 122 at 5,  
23 27. He makes no claim that there is an absence of a genuine issue of material fact as to the facts  
24 which would entitle him to judgment in his favor, *see Celotex*, 477 U.S. at 323, and seems to

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26 <sup>21</sup> Defendants emphasize that while the court granted plaintiff an extension of time to file  
27 his opposition, *see* ECF Nos. 114, 120, the court did not grant plaintiff an extension to file a  
28 dispositive counter-motion for summary judgment. *But see* E.D. Cal. L.R. 230(e) (explaining that  
counter-motions “shall be served and filed in the manner and on the date prescribed for the filing  
of opposition”).

1 misunderstand the standard for summary judgment, *see* ECF No. 122 at 9 (arguing that “[t]he  
2 issue for the court is whether plaintiff has *sufficiently alleged* that individual defendants were  
3 deliberately indifferent to his medical needs.”) (emphasis added). First, plaintiff is not simply  
4 opposing a Rule 12(b)(6) motion to dismiss for failure to state a claim. Federal Rule of Civil  
5 Procedure 56 and *Celotex* require more than sufficient allegations. Secondly, as to his counter-  
6 motion for summary judgment plaintiff overlooks the point that it is he, not the defendants, who  
7 bear the ultimate burden of proof as to each of the elements of his claims. For the same reasons  
8 discussed above in the context of defendants’ motions, plaintiff has produced no evidence  
9 indicating that he can meet that burden. Because plaintiff has not met his burden of providing a  
10 properly supported motion for summary judgment, his “counter motion” for summary judgment  
11 must be denied.<sup>22</sup>

#### 12 **IV. ORDER AND RECOMMENDATION**

13 Accordingly, it is hereby ORDERED that the December 19, 2014 findings and  
14 recommendations are VACATED. Further, it is hereby RECOMMENDED that (1) defendants’  
15 motion for summary judgment (ECF No. 112) be granted as to defendants Grinde, Ma, Maciel,  
16 McGee, and Park, but granted in part and denied in part as to defendant Downie and denied as to  
17 defendant Antipov, (2) plaintiff’s counter-motion for summary judgment (ECF No. 122) be  
18 denied as to all defendants.<sup>23</sup>

19 These amended findings and recommendations are submitted to the United States District  
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen  
21 days after being served with these amended findings and recommendations, any party may file  
22 written objections with the court and serve a copy on all parties. Such a document should be  
23 captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file  
24 objections within the specified time may waive the right to appeal the District Court’s order.

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25 <sup>22</sup> This resolution moots defendants’ request for the opportunity to respond to the merits  
26 of plaintiff’s counter-motion. *See* ECF No. 125 at 12.

27 <sup>23</sup> If the court adopts this recommendation, the action will proceed solely as to plaintiff’s  
28 Eighth Amendment claims against defendants Antipov and Downie. As to Downie, plaintiff’s  
claim is limited to the allegations regarding his request to be placed on a liquid diet on August 20.



1 *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.  
2 1991).

3 DATED: February 12, 2015.

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5 EDMUND F. BRENNAN  
6 UNITED STATES MAGISTRATE JUDGE  
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