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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

5 WILLIAM L. EVINS,) No. C 08-2537 CW (PR)
6 Plaintiff,)
7 v.) ORDER DENYING PLAINTIFF'S
8 BEN CURRY, et al.,) MOTION TO COMPEL DISCOVERY, AND
9 Defendants.) GRANTING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT
_____) (Docket nos. 20, 22)

10 INTRODUCTION

11 Plaintiff William L. Evins, a state prisoner, brought this
12 case under 42 U.S.C. § 1983 against officials at the Correctional
13 Training Facility(CTF), where he is currently incarcerated,
14 alleging deliberate indifference to his serious dental needs. In
15 an order dated December 4, 2008, the Court dismissed Plaintiff's
16 claim against Warden Ben Curry for failure to state a cognizable
17 claim and found that Plaintiff stated cognizable Eighth Amendment
18 claims against Defendants P. Babienco, K. Sather, and J. Chudy.

19 On April 14, 2009, Plaintiff filed a motion to compel
20 discovery (docket no. 20).

21 On August 3, 2009, Defendants filed a motion for summary
22 judgment on the grounds that no triable issue of material fact
23 exists and that they are entitled to judgment as a matter of law
24 (docket no. 22). Although given an opportunity to do so, Plaintiff
25 did not file an opposition.

26 For the reasons discussed below, Defendants' motion for
27 summary judgment is GRANTED.
28

BACKGROUND

I. Plaintiff's Claims

In his complaint and attachments thereto¹, Plaintiff makes the following allegations:

Plaintiff has two types of dental diseases that were improperly treated at CTF. The improper treatment has led to Plaintiff's constant pain since 2003 and the degeneration of all of his teeth. Plaintiff also alleges that improper dental treatment has affected his heart. Plaintiff demands that the diseases be treated, the rotted teeth extracted, and that a full set of permanent dental implants be provided. He also seeks monetary and punitive damages. (Compl. at 3.)

II. Factual Background

The following facts are undisputed, except where indicated.

Plaintiff is a fifty-five year old man with a significant history of heart disease and severe dental decay. (Vincent Decl. Ex. B at 0197; O'Neal Decl. ¶ 4.)² Plaintiff's dental disease is evidenced by tooth decay and extraction as far back as 1980, when Plaintiff was incarcerated in the Orange County Jail. (O'Neal Decl. ¶ 4.)

Plaintiff has been in custody at CTF since 1986. Until July, 2007, the procedure for obtaining dental care appointments was that

¹Plaintiff attaches two sets of administrative appeals to his complaint, along with their corresponding responses by CTF officials. (Compl. Ex. A) The Court construes these documents to be incorporated into the complaint.

²The pages of the Defendants' exhibits are not numbered consecutively. Pages in their exhibits are identified herein by the number stamped on the bottom right-hand corner.

1 inmates were to submit a request for dental care by filling out a
2 7362 form. (Babienco Decl. ¶ 8.) The requests were then filed in
3 the order in which they were received. (Id.) Inmates were also
4 able to seek emergency dental care by going to sick call. (Id.)
5 Plaintiff did not submit a 7362 request for dental care during the
6 years from 2000 to 2007. (Id. ¶ 12.) Plaintiff's only requests
7 for dental care during that time were requests for sick call
8 emergency service. (Id. ¶ 16.)

9 In February, 2002, Plaintiff appeared at sick call complaining
10 of pain. (Id. ¶ 9.) Defendant Dr. Babienco, a dentist at CTF,
11 determined that Plaintiff needed extraction of tooth #9 due to
12 severe decay. (Id. ¶ 1, 2, 9.) Tooth #9 was extracted shortly
13 thereafter with Plaintiff's consent. (Id. ¶ 9.) In October, 2002,
14 Plaintiff appeared again at sick call complaining of pain and, due
15 to severe decay, tooth #14 was extracted with Plaintiff's consent.
16 (Id. ¶ 10.)

17 In February, 2003, Plaintiff filed an inmate appeal with CTF,
18 alleging "inadequate dental treatment." (Compl. Ex. A at 11, 13.)³
19 Plaintiff complained that CTF failed to conduct "two year
20 reexamination of inmates under fifty years of age," that "only one
21 tooth will be worked on at a time, and any problems existing during
22 these visits is not done at a return visit as a follow up, and no
23 returns are initiated except by the inmate." (Compl. Ex. A at 11,
24 13.) Plaintiff requested to be seen by an outside dentist as well

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26 ³Because Exhibit A to Plaintiff's complaint does not contain page numbers,
27 the Court refers to the pages of the exhibit in the order in which they are
28 attached.

1 as to be provided permanent dental implants. (Id.) In March,
2 2003, Dr. Babienco partially granted Plaintiff's appeal for outside
3 treatment subject to Plaintiff meeting certain conditions.⁴ (Id.
4 at 11, 15.)

5 In May, 2003, Plaintiff appealed to the second level of
6 review, complaining that the March, 2003 response failed to address
7 the issues in his original appeal. (Id. at 12.) In June, 2003,
8 Defendants Dr. Babienco and Dr. Sather, the chief dental officer at
9 CTF, again granted Plaintiff's appeal subject to the same
10 conditions. (Id. at 12, 14.) Dr. Babienco and Dr. Sather also
11 told Plaintiff that his dental condition was a result of his
12 failure to maintain oral hygiene by using a toothbrush, that dental
13 implants were not provided by CDC, that dentures were possible, and
14 that all dental services are done at inmate request. (Id. at 14.)
15 In July, 2003, Plaintiff appealed to the Director's Level Review on
16 the same grounds. (Id. at 12.) In July, 2003, Plaintiff's appeal
17 was rejected on the ground that it had already been granted at the

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19 ⁴The Conditions required for treatment by an outside dentist were explained
as follows:

- 20 (1) The level of treatment you are requesting must exceed the level of
treatment available at the institution where you are incarcerated.
- 21 (2) You must have a legitimate dental basis for the dental treatment you
are requesting.
- 22 (3) You must submit a written request, through your counselor, to the Chief
Dental Officer stating the type of treatment you are requesting and your
reasons for requesting it.
- 23 (4) You must agree, and be able, to pay for the treatment requested.
- 24 (5) You must agree, and be able, to pay for all transportation and
escorting costs incurred in taking you to and from the non CDC dental
facility.
- 25 (6) Your request must be approved by a) the Chief Dental Officer, b) the
Health Care Manager, c) the Warden.
- 26 (7) The outside dental facility must agree to accept you as a patient.

27 Plaintiff was then instructed to submit his request to the Chief Dental
Officer in accordance with the conditions. (Compl. Ex. A at 15.)

1 lower level and because no unresolved issue remained for Director's
2 Level Review. (Id. at 16.)

3 In January, 2007, Plaintiff received a sick call visit, at
4 which time it was determined that tooth #3 was severely decayed,
5 and it was extracted shortly thereafter with Plaintiff's consent.
6 (Babienco Decl. ¶ 11.)

7 In February, 2007, Plaintiff filed an inmate appeal with CTF
8 requesting that he be "seen by CTF dental staff to re-assess [his]
9 dental pain and condition and commence treatment."⁵ (Compl. Ex. A
10 at 1, 3.) In March, 2007, Dr. Babienco and Dr. Sather partially
11 granted Plaintiff's appeal. (Id. at 2, 5.) Dr. Babienco met with
12 Plaintiff and told him that he must turn in a 7362 request for
13 dental care in order to obtain a dental exam. (Babienco Decl.
14 ¶ 13.)

15 In April, 2007, Plaintiff filed a second level appeal
16 complaining about having to fill out a form in order to receive
17 dental care. (Compl. Ex. A at 2, 4, 6.) On May 17, 2007,
18 Defendant Dr. Chudy, the Chief Medical Officer at CTF, partially
19 granted Plaintiff's appeal, instructing Plaintiff to complete a
20 7362 request for treatment form. (Id. at 2, 8.) The response
21 contained an offer for Plaintiff to contact dental staff for
22 assistance in filling out the 7362 form and a copy of the 7362 form

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24 ⁵Plaintiff also requested treatment in accordance with the class action
25 settlement in Perez v. Tilton. (Compl. Ex. A at 1, 3.) To whatever extent he
26 has standing to assert a claim under this settlement, he "must do so by urging
27 further actions through the class representative and attorney, including
28 contempt proceedings, or by intervention in the class action." McNeil v.
Guthrie, 945 F.2d 1163, 1165 (10th Cir. 1991); Gillespie v. Crawford, 858 F.2d
1101, 1103 (5th Cir. 1988) (en banc).

1 was attached. (Id.) Before appealing to the Director's Level,
2 Plaintiff filled out a 7362 form requesting dental services. (Id.
3 at 2.) Then, on May 30, 2007, Plaintiff did file an appeal to the
4 Director's Level on the same grounds as his earlier appeals. (Id.)

5 In June, 2007, in response to Plaintiff's 7362 form, Dr.
6 Babienco performed a dental examination of Plaintiff, found that
7 Plaintiff had no dental hygiene, and recommended the extraction of
8 his remaining teeth and fitting for full dentures. (Babienco Decl.
9 ¶ 14.) After conferring with medical personnel about Plaintiff's
10 heart disease, which was described as "end stage heart disease"
11 "with stage 4 heart failure" and "severe cardiomyopathy," Dr.
12 Babienco concluded that the anesthetic required for the extraction
13 of all of Plaintiff's teeth and fitting for dentures posed an undue
14 risk of heart attack for Plaintiff. (Id. ¶ 15.) Dr. Babienco
15 recommended that Plaintiff not receive dental care unless performed
16 at a facility that could provide advanced life support--a capacity
17 that CTF facilities lacked. (Id.) Dr. Babienco placed a note in
18 Plaintiff's file that dental treatment should not be provided
19 except in emergencies. (Id.)

20 In August, 2007, Plaintiff's Director's Level Appeal was
21 denied because "appellant [had] received the necessary dental
22 intervention deemed medically necessary." (Compl. Ex. A at 2, 9.)

23 Between June, 2007 and April, 2009, Plaintiff did not request
24 further dental care. (Babienco Decl. Ex. A at 1038.) In April,
25 2009, Dr. O'Neal took over Plaintiff's primary dental care and
26 examined Plaintiff in June and July, 2009. (O'Neal Decl. ¶ 3, 6.)
27 Dr. O'Neal determined that extraction and fitting for dentures

1 could be provided for Plaintiff at CTF with modified anesthetic
2 procedures, and that permanent dental implants were not appropriate
3 for Plaintiff due to his history of poor hygiene and an inadequate
4 amount of healthy bone in Plaintiff's mouth. (Id. ¶ 6.) Plaintiff
5 has agreed to the extraction of his remaining teeth and fitting for
6 dentures. (Id.) The record does not indicate what, if any, dental
7 care Plaintiff has received since Dr. O'Neal's July, 2009
8 evaluation.

9 DISCUSSION

10 I. PLAINTIFF'S MOTION TO COMPEL

11 Plaintiff has filed a motion to compel discovery (docket no.
12 20). The Court will construe Plaintiff's motion to compel
13 discovery as a request under Federal Rule of Civil Procedure
14 56(f).⁶ See Hancock v. Montgomery Ward Long Term Disability Trust,
15 787 F.2d 1302, 1306 n.1 (9th Cir. 1986) (pending motion to compel
16 discovery was sufficient to raise Rule 56(f) consideration).

17 Rule 56(f) of the Federal Rules of Civil Procedure provides a
18 device for litigants to avoid summary judgment when the non-movant
19 needs to discover affirmative evidence necessary to oppose the
20 motion. See Garrett v. San Francisco, 818 F.2d 1515, 1518 (9th
21 Cir. 1987). Rule 56(f) provides that a court may deny a summary

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23 ⁶ Addressing motions for summary judgment, Rule 56(f),
24 entitled, "When Affidavits are Unavailable," states:
25 If a party opposing the motion shows by affidavit that,
26 for specified reasons, it cannot present facts essential
27 to justify its opposition, the court may: (1) deny the
28 motion; (2) order a continuance to enable affidavits to
be obtained, depositions to be taken, or other discovery
to be undertaken; or (3) issue any other just order.
Fed. R. Civ. P. 56(f).

1 judgment motion to permit discovery if it appears that a party
2 cannot present facts essential to opposing the motion. Fed. R.
3 Civ. P. 56(f). Rule 56(f) requires an affidavit which sets forth
4 the information sought and how it would preclude summary judgment
5 by creating a genuine issue of material fact. See Hall v. Hawaii,
6 791 F.2d 759, 761 (9th Cir. 1986).

7 By filing his motion to compel discovery, Plaintiff meets Rule
8 56(f)'s procedural requirement that he submit an "affidavit"
9 setting forth the discovery requested. Although Plaintiff's
10 discovery motion is not entitled "Affidavit in Support of Rule
11 56(f) Request," the Ninth Circuit has stated that a court is free
12 to construe a discovery motion as a request under and in compliance
13 with Rule 56(f). See Hancock, 787 F.2d at 1306 n.1.

14 Plaintiff's discovery motion concerns requests for production
15 two, three, and five. The second request seeks:

16 Any and all documentation reference to Department Operational
17 Manuals ..., any and all dental examination, books, training
18 manuals, and/or tangible things; and the identity and location
19 of persons having of any discoverable matter.

20 (Id. at 2.) The third request seeks "[a]ll sick-call sheets from
21 the period March 5, 2003 to the date of your response." (Id.) The
22 fifth request seeks "[a]ny and all logs, lists, or other
23 documentation reflecting grievances filed by Soledad prisoners
24 relevant to medical mistreatment by defendants from March 5, 2003
25 to date of your response." (Id. at 3.)

26 As the Ninth Circuit stated in Continental Maritime v. Pacific
27 Coast Metal Trades, 817 F.2d 1391, 1395 (9th Cir. 1987), under Rule
28 56(f) "the party seeking a continuance bears the burden to show

1 what specific facts it hopes to discover that will raise an issue
2 of material fact." Id. Plaintiff has not met this burden.
3 Plaintiff fails to demonstrate how "additional discovery would have
4 revealed specific facts precluding summary judgment." See Tatum v.
5 City and County of S.F., 441 F.3d 1090, 1101 (9th Cir. 2006). The
6 requested documents are sought without explanation of what
7 specific, material facts these documents will likely disclose;
8 Plaintiff only states in conclusory fashion that they will help him
9 "show he received disparate dental treatment." (Pl.'s Mot. Compel
10 at 3.) Such conclusory allegations are not sufficient under Rule
11 56(f). Moreover, whether the treatment he received was "disparate"
12 from that of other prisoners is irrelevant to Plaintiff's claim
13 that Defendants were deliberately indifferent in his case. Thus,
14 Plaintiff has not met his burden under Rule 56(f).

15 In addition, Plaintiff's individual requests do not show
16 adequate cause to grant the discovery motion. Plaintiff's third
17 and fifth requests cannot be granted because they request the
18 confidential medical records of other inmates who are not parties
19 to this case. Plaintiff's own dental records have already been
20 provided in response to Plaintiff's fourth request for production.
21 Plaintiff's second request is overly broad in that it asks
22 Defendants to provide "any and all dental examination, books,
23 training manuals, and/or tangible things," without explaining what
24 helpful facts these documents might provide. Therefore, the Court
25 DENIES Plaintiff's motion to compel discovery.

26 The Court will now address Defendants' motion for summary
27 judgment.

1 II. SUMMARY JUDGMENT STANDARD

2 Summary judgment is properly granted when no genuine and
3 disputed issues of material fact remain and when, viewing the
4 evidence most favorably to the non-moving party, the movant is
5 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
6 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
7 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
8 1987).

9 The moving party bears the burden of showing that there is no
10 material factual dispute. Therefore, the Court must regard as true
11 the opposing party's evidence, if supported by affidavits or other
12 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815
13 F.2d at 1289. The Court must draw all reasonable inferences in
14 favor of the party against whom summary judgment is sought.
15 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
16 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
17 1551, 1558 (9th Cir. 1991). A verified complaint may be used as an
18 opposing affidavit under Rule 56, as long as it is based on
19 personal knowledge and sets forth specific facts admissible in
20 evidence. Schroeder v. McDonald, 55 F.3d 454, 460 & nn.10-11 (9th
21 Cir. 1995).

22 Material facts which would preclude entry of summary judgment
23 are those which, under applicable substantive law, may affect the
24 outcome of the case. The substantive law will identify which facts
25 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
26 (1986). Where the moving party does not bear the burden of proof
27 on an issue at trial, the moving party may discharge its burden of
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1 showing that no genuine issue of material fact remains by
2 demonstrating that "there is an absence of evidence to support the
3 nonmoving party's case." Celotex, 477 U.S. at 325. The burden
4 then shifts to the opposing party to produce "specific evidence,
5 through affidavits or admissible discovery material, to show that
6 the dispute exists." Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409
7 (9th Cir. 1991), cert. denied, 502 U.S. 994 (1991). A complete
8 failure of proof concerning an essential element of the non-moving
9 party's case necessarily renders all other facts immaterial.
10 Celotex, 477 U.S. at 323.

11 III. SUMMARY JUDGMENT DISCUSSION

12 A. Eighth Amendment Standard

13 Deliberate indifference to serious medical needs violates the
14 Eighth Amendment's proscription against cruel and unusual
15 punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Serious
16 medical needs include dental care. Hunt v. Dental Dep't, 865 F.2d
17 198, 200 (9th Cir. 1989).

18 A determination of "deliberate indifference" involves an
19 examination of two elements: the seriousness of the prisoner's
20 medical need and the nature of the defendant's response to that
21 need. McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992). A
22 "serious" medical need exists if the failure to treat a prisoner's
23 condition could result in further significant injury or the
24 "unnecessary and wanton infliction of pain." Id. (citing Estelle,
25 429 U.S. at 104). Indications that a prisoner has a "serious" need
26 for medical treatment include the existence of an injury that a
27 reasonable doctor or patient would find important and worthy of

1 comment or treatment; the presence of a medical condition that
2 significantly affects an individual's daily activities; or the
3 existence of chronic and substantial pain. Id. at 1059-60 (citing
4 Wood v. Housewright, 900 F.2d 1332, 1337-41 (9th Cir. 1990)).

5 A prison official is deliberately indifferent if he knows that
6 a prisoner faces a substantial risk of serious harm and disregards
7 that risk by failing to take reasonable steps to abate it. Farmer
8 v. Brennan, 511 U.S. 825, 837 (1994). The prison official must not
9 only "be aware of facts from which the inference could be drawn
10 that a substantial risk of serious harm exists," but he "must also
11 draw the inference." Id. If a prison official should have been
12 aware of the risk, but was not, then the official has not violated
13 the Eighth Amendment, no matter how severe the risk. Gibson v.
14 County of Washoe, 290 F.3d 1175, 1188 (9th Cir. 2002).

15 Consequently, in order for deliberate indifference to be
16 established, there must be a purposeful act or failure to act on
17 the part of the defendant and resulting harm. McGuckin, 974 F.2d
18 at 1060.

19 The Eighth Amendment requires that prisoners be provided with
20 a system of ready access to adequate dental care. Hunt, 865 F.2d
21 at 200. On the other hand, "delay in providing a prisoner with
22 dental treatment, standing alone, does not constitute an Eighth
23 Amendment violation." Id.; see also Hallett v. Morgan, 296 F.3d
24 732, 746 (9th Cir. 2002). But a constitutional violation can
25 result from deliberate delay which amounts to a wanton infliction
26 of unnecessary pain. Hunt, 865 F.2d at 200.

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1 B. Dr. Babienco

2 Plaintiff complains that, because of Dr. Babienco's deliberate
3 indifference to his dental health, Plaintiff has been in constant
4 pain since 2003, has lost all of his teeth, and has suffered
5 adverse effects to his heart.

6 1. 2003 Administrative Appeal

7 In his 2003 administrative appeal, Plaintiff complained that
8 inmates were not given two-year dental re-examinations, only one
9 tooth was worked on at a time, and follow-up appointments had to be
10 initiated by inmates. Plaintiff complained of pain as a result of
11 this lack of proper dental care, requested to be seen by an outside
12 dentist, and requested dental implants.

13 There is no dispute that Plaintiff's pain resulting from tooth
14 decay was a serious medical need. Plaintiff has failed to show a
15 genuine issue of material fact, however, as to whether Dr. Babienco
16 failed to take a reasonable step to abate Plaintiff's pain in
17 response to Plaintiff's 2003 administrative appeal.

18 To begin with, a plaintiff pursuing an action under section
19 1983 must show that individual defendants proximately caused the
20 constitutional deprivation by setting forth "specific facts as to
21 each individual defendant's" deprivation. Leer v. Murphy, 844 F.2d
22 628, 633-34 (9th Cir. 1988). Plaintiff's complaints about general
23 aspects of CTF dental care--that inmates are not automatically
24 given two-year re-examinations, that only one tooth is worked on at
25 a time, and that inmates are required to schedule follow-up
26 appointments--do not allege or identify any particular actions by
27 Dr. Babienco in treating or failing to treat Plaintiff. Moreover,

1 these procedures reasonably placed responsibility on Plaintiff to
2 request and schedule his own dental appointments, and as such do
3 not on their own constitute deliberate indifference.

4 With respect to Plaintiff's request for treatment at an
5 outside facility, Plaintiff has not presented any evidence that his
6 dental condition in 2003 required treatment at an outside facility,
7 rather than at CTF. The undisputed evidence demonstrates that Dr.
8 Babienco informed Plaintiff of the procedures for obtaining dental
9 treatment at CTF, as well as the conditions he would have to meet
10 to receive treatment from an outside dentist.

11 Dr. Babienco was also not deliberately indifferent in denying
12 Plaintiff's request for dental implants to replace his teeth and
13 informing him that dentures were a possibility instead. A
14 difference of medical opinion between a medical professional and a
15 prisoner-plaintiff as to proper treatment is insufficient to
16 establish deliberate indifference under the Eighth Amendment.
17 Toquchi v. Chung, 391 F.3d 1051 (9th Cir. 2004). Moreover, Dr.
18 Babienco's determination that dentures were a sufficient treatment
19 option is supported by Dr. O'Neal's recent recommendation of
20 dentures instead of implants. There is no genuine issue of
21 material fact that Dr. Babienco's denial of Plaintiff's request for
22 implants in light of the availability of dentures amounted to
23 deliberate indifference.

24 In sum, there is no genuine issue of material fact as to
25 whether Dr. Babienco treated Plaintiff with deliberate indifference
26 in 2003.

1 2. 2007 Administrative Appeal and Dental Examination

2 In his 2007 administrative appeal, Plaintiff complained that
3 he was given inadequate dental treatment in 2003, leading to the
4 loss of his teeth and dental pain. Plaintiff asked to be treated
5 by CTF dental staff. Plaintiff and Defendants agree that
6 Plaintiff's teeth were severely decayed in 2007. Defendants do not
7 contest that Plaintiff experienced pain as a result of the decay or
8 that such pain amounted to a serious dental need.

9 Plaintiff has failed to show a genuine issue of material fact
10 as to whether Dr. Babienco, in his response to Plaintiff's 2007
11 appeal, failed to take a reasonable step to abate Plaintiff's pain.
12 Plaintiff's own Exhibit A shows that when Plaintiff asked for
13 dental treatment, Dr. Babienco granted his request, with the simple
14 requirement that Plaintiff fill out a request form for treatment.
15 Once Plaintiff completed the form, Dr. Babienco gave Plaintiff the
16 requested dental examination in June, 2007. These were reasonable
17 steps taken by Dr. Babienco to address Plaintiff's dental needs at
18 the time.

19 Plaintiff also has not shown a genuine issue of material fact
20 as to whether Dr. Babienco reasonably addressed Plaintiff's dental
21 needs following the examination in June, 2007. Dr. Babienco
22 decided not to prophylactically remove all of Plaintiff's remaining
23 teeth due to Plaintiff's life-threatening heart condition. This
24 decision did not cause Plaintiff to suffer pain because Plaintiff
25 could still have individual teeth removed in emergencies if he was
26 in pain, as had been repeatedly done for him in the past when he
27

1 complained of pain, including as recently as January, 2007.
2 Plaintiff has not presented any evidence to the contrary, or even
3 opposed Defendants' motion. The fact that Dr. O'Neal decided in
4 2009 that he could safely extract all of Plaintiff's teeth and fit
5 Plaintiff for dentures at CTF does not constitute evidence that CTF
6 had the capacity for performing such procedures safely in 2007 when
7 Dr. Babienco examined him. Thus, no genuine issue of material fact
8 exists as to whether Dr. Babienco took the proper steps to care for
9 Plaintiff's dental needs following the June, 2007 examination.

10 3. Loss of Teeth and Heart Disease

11 Plaintiff also claims that Dr. Babienco's deliberate
12 indifference caused the degeneration of his teeth and affected his
13 heart. As discussed above, there is no evidence that Dr. Babienco
14 was deliberately indifferent to Plaintiff's dental needs prior to
15 the June, 2007 examination, at which time the uncontradicted
16 evidence shows that Plaintiff's teeth were already completely
17 decayed. The record of Plaintiff's dental examinations prior to
18 that time indicates that his tooth decay dated back to the late
19 1980s, and was caused by inadequate dental hygiene, not by any
20 deliberate indifference by Dr. Babienco. Plaintiff has also
21 presented no evidence that Dr. Babienco caused Plaintiff's heart
22 disease. Rather, the evidence shows that Dr. Babienco's decision
23 not to treat Plaintiff more aggressively was made out of a desire
24 to protect Plaintiff's heart. Therefore, no genuine issue of
25 material fact exists as to these two claims.

26 //

1 C. Dr. Sather and Dr. Chudy

2 Dr. Sather is the Chief Dental Officer at CTF. (Sather Decl.
3 ¶ 1.) Dr. Sather was not directly involved in Plaintiff's
4 treatment, but he responded to the second-level administrative
5 appeal in 2003, and the first-level administrative appeal in 2007.
6 (Compl. Ex. A at 5, 14.) With respect to the latter, Dr. Sather
7 claims that he did not actually review Plaintiff's appeal in 2007.
8 (Sather Decl. ¶ 4.) The response to the appeal shows that Dr.
9 Sather's name is typed underneath the signature line, but the
10 signature of a Dr. James Hill appears instead. (Compl. Ex. A at
11 5.) Drawing all reasonable inferences in favor of Plaintiff, as
12 the Court is required to do at this stage of the case, it will be
13 assumed that Dr. Sather reviewed Plaintiff's 2007 administrative
14 appeal at the first level of review.

15 Dr. Chudy is the Chief Medical Officer at CTF. (Compl. Ex. A
16 at 8.) The evidence shows that Dr. Chudy was not the Chief Medical
17 Officer at CTF during Plaintiff's 2003 administrative appeal, and
18 was not involved in the 2003 appeal in any way. (Id. at 14.) The
19 evidence shows that Dr. Chudy's involvement with Plaintiff's case
20 consisted only of his second-level response to Plaintiff's 2007
21 administrative appeal, on May 17, 2007. (Id. at 8.)

22 The evidence shows that Dr. Sather's involvement with
23 Plaintiff's dental treatment ended on March 28, 2007 at the latest,
24 when he responded to Plaintiff's first-level appeal. It is also
25 undisputed that Dr. Chudy's involvement with Plaintiff's dental
26 treatment ended on May 17, 2007, when he reviewed Plaintiff's 2007

1 appeal at the second level. Plaintiff has made no allegations and
2 presented no evidence to the contrary. As discussed above, these
3 decisions did not amount to deliberate indifference to Plaintiff's
4 dental needs.

5 There is furthermore no evidence that Dr. Sather and Dr. Chudy
6 are liable in their capacity as supervisors. Supervisors may be
7 liable under section 1983 upon a showing of (1) personal
8 involvement in the constitutional deprivation or (2) a sufficient
9 causal connection between the supervisor's wrongful conduct and the
10 constitutional violation. Redman v. County of San Diego, 942 F.2d
11 1435, 1446 (9th Cir. 1991) (en banc) (citation omitted). "A
12 supervisor is only liable for constitutional violations of his
13 subordinates if the supervisor participated in or directed the
14 violations, or knew of the violations and failed to act to prevent
15 them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). For
16 the reasons discussed above, there is no genuine issue of material
17 fact that Dr. Babienco, the subordinate of Dr. Sather and Dr.
18 Chudy, was deliberately indifferent to Plaintiff's dental needs.
19 In the absence of a constitutional violation by their subordinate,
20 they cannot be held liable as supervisors.

21 D. Summary

22 For the reasons outlined above, Plaintiff has raised no
23 triable issue of fact as to whether Dr. Babienco acted with
24 deliberate indifference to Plaintiff's serious dental needs.
25 Plaintiff has also not raised a triable issue of fact as to whether
26 Dr. Sather and Dr. Chudy acted with deliberate indifference to
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Plaintiff's serious dental needs. Accordingly, Defendants Dr. Babienco, Dr. Sather and Dr. Chudy are entitled to summary judgment.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment (docket no. 22) is GRANTED. Plaintiff's motion to compel discovery (docket no. 20) is DENIED. Docket nos. 20 and 22 are terminated. The clerk shall enter judgment and close the file. The parties shall bear their own costs.

IT IS SO ORDERED.



DATED: 2/3/10

CLAUDIA WILKEN
United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 WILLIAM L. EVINS,
5 Plaintiff,

Case Number: CV08-02537 CW

CERTIFICATE OF SERVICE

6 v.

7 BEN CURRY et al,
8 Defendant.

9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
10 Court, Northern District of California.

11 That on February 3, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
14 located in the Clerk's office.

15 William L. Evins
16 D14797
17 Correctional Training Facility
18 P.O. Box 689
19 Soledad, CA 93960

20 Dated: February 3, 2010

21 Richard W. Wieking, Clerk
22 By: Sheilah Cahill, Deputy Clerk