

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EVERETT L SPILLARD,

Plaintiff,

v.

NURSE IVER LIEN, et al.,

Defendants.

Case No. [19-cv-01407-JST](#)

**ORDER GRANTING DEFENDANTS'  
SUMMARY JUDGMENT MOTION;  
GRANTING DEFENDANTS' REQUEST  
TO STRIKE; DENYING PLAINTIFF'S  
SUMMARY JUDGMENT MOTION;  
DENYING PLAINTIFF'S REQUEST  
FOR COUNSEL; SETTING BRIEFING  
SCHEDULE**

Re: ECF No. 36, 40, 42

Plaintiff, an inmate at California Medical Facility, has filed a *pro se* complaint under 42 U.S.C. § 1983 alleging that Humboldt County Jail nurse Iver Lien<sup>1</sup> and Dr. Burluson were deliberately indifferent to his serious medical needs when they gave him psychiatric medication, specifically nortriptyline,<sup>2</sup> without his knowledge, and when, during his first month at Humboldt County Jail, failed to give him his diabetic medication. ECF Nos. 24, 25. Now pending before the Court are Defendants' motion for summary judgment (ECF No. 25); Defendants' motion to strike Plaintiff's sur-reply (ECF No. 40); and Plaintiff's motion for summary judgment (ECF No. 42). For the reasons set forth below, the Court GRANTS Defendants' motion for summary judgment (ECF No. 25); GRANTS Defendants' motion to strike Plaintiff's sur-reply (ECF No. 40); and DENIES Plaintiff's motion for summary judgment (ECF No. 42).

<sup>1</sup> Plaintiff incorrectly identifies Nurse Iver Lien as nurse Ivers. The Clerk is directed to correct the docket to reflect Defendant Lien's correct name, Iver Lien.

<sup>2</sup> Because Plaintiff identified the medication as Nortryoleyne in his complaint, the Court's screening order mistakenly identified the medication. According to Plaintiff's medical records, he was prescribed nortriptyline. *See, e.g.*, ECF No. 37 at 12.

1 **BACKGROUND**

2 **I. Procedural History**

3 Plaintiff’s initial complaint complained that Humboldt County Jail officials failed to  
4 provide meals appropriate to manage his diabetes, failed to release his property to his friend,  
5 housed him with a convict, forced him to sleep on the floor, and failed to provide him with a  
6 blanket. ECF No. 1. The Court dismissed the initial complaint with leave to amend because, *inter*  
7 *alia*, the initial complaint was vague and conclusory in that it failed to state clearly what each  
8 defendant did, when the action happened, and how these actions or inactions rose to the level of a  
9 federal constitutional violation; because the initial complaint failed to make specific allegations  
10 against each named defendant; and because the initial complaint violated Fed. R. Civ. P. 20(a).  
11 ECF No. 11.

12 Plaintiff filed an amended complaint that, similar to the initial complaint, was a conclusory  
13 and vague laundry list of grievances regarding his treatment by Humboldt County Jail officials.  
14 ECF No. 14. The Court identified the deficiencies in the amended complaint and granted Plaintiff  
15 leave to file a second amended complaint that remedied these deficiencies. ECF No. 15.

16 Plaintiff filed a second amended complaint that, similar to the two prior complaints, made  
17 conclusory and vague allegations regarding inadequate medical treatment, referring to Defendants  
18 as “they” and failing to identify which individual violated his constitutional rights, and what action  
19 or inaction caused the alleged constitutional violations. ECF No. 16. The Court identified the  
20 deficiencies in the second amended complaint, again explained the elements of relevant  
21 constitutional claims, and granted Plaintiff leave to file a third amended complaint that remedied  
22 these deficiencies. ECF No. 22.

23 Plaintiff filed a third amended complaint, ECF No. 24, and the Court found that, liberally  
24 construed, the third amended complaint stated cognizable Eighth Amendment claims against  
25 Humboldt County Jail nurse Ivers and Dr. Burleson for giving him psychiatric medication,  
26 specifically nortriptyline, without his knowledge, and failing to give him diabetic medication  
27 during his first month at Humboldt County Jail. ECF No. 25 at 4. The Court dismissed Plaintiff’s  
28 remaining Eighth Amendment claims, which alleged that Nurse Ivers failed to provide him an

1 ADA compliant diet, that Dr. Burleson knew that Plaintiff's toe would "blow up" in a diabetic  
2 infection but did nothing, and that California Forensic Medical Group nurses administered  
3 diabetes medication to Plaintiff one to five hours after his meals because the conclusory  
4 allegations failed to state cognizable Eighth Amendment violations. The Court declined to grant  
5 Plaintiff further leave to amend these claims because Plaintiff had been given three opportunities  
6 to amend these claims to state cognizable Section 1983 claims and had failed to do so. ECF No.  
7 25 at 4-5.

8 **II. Relevant Factual Background<sup>3</sup>**

9 The following facts are undisputed unless otherwise noted.

10 Plaintiff has been diabetic for eleven years. ECF No. 37 at 1. Five years ago, Plaintiff lost  
11 the large toe on his left foot due to diabetes. Subsequently, Plaintiff learned how to control his  
12 diabetes by eating a carb controlled diet. ECF No. 37 at 1.

13 The parties do not specify whether, during the relevant time period, Plaintiff was  
14 incarcerated pursuant to a conviction or was a pre-trial detainee. On October 2, 2017, Plaintiff  
15 arrived at Butte County Jail. ECF No. 36 at 2. At the medical intake, Plaintiff reported having  
16 hypertension and diabetes; that he was taking metformin and glipizide; and that his glucose levels  
17 normally ran between 70-80. ECF No. 36 at 2; ECF No. 36-1; ECF No. 36-2 at 1-4. Plaintiff was  
18 found to have an elevated blood pressure of 200/120 and a blood glucose level of 294. As a result,  
19 Plaintiff was sent to St. Joseph Hospital for medical clearance. ECF No. 36 at 2; ECF No. 36-1;  
20 ECF No. 36-2 at 1-4. At St. Joseph Hospital, Plaintiff self-reported that, at that time, he was not  
21 taking his metformin and blood pressure medications as prescribed. ECF No. 37 at 10. St. Joseph  
22 Hospital cleared Plaintiff for incarceration, and Plaintiff was transferred to Humboldt County Jail.  
23 ECF No. 36-2 at 5-8. Upon arrival at Humboldt County Jail, Plaintiff was given metformin,

24

---

25 <sup>3</sup> In Plaintiff's opposition and sur-reply, Plaintiff alleges that Humboldt County Jail officials failed  
26 to provide him appropriate treatment for his diabetes when they (1) failed to provide him meals  
27 that could control his blood glucose levels and failed to allow him to take his diabetes medicine  
28 half an hour prior to meals; (2) failed to take a culture of his toe infection and simply treated the  
infection with antibiotics; and (3) failed to provide him gabapentin. ECF Nos. 37, 39. Because  
these allegations are unrelated to the claims which the Court has found cognizable and because the  
sur-reply was not authorized by the Court, the Court does not consider these allegations in  
deciding the summary judgment motion.

1 hydrochlorothiazide, and lisinopril, and defendant RN Iver Lien ordered amlodipine and  
2 metformin for Plaintiff. ECF No. 36-2 at 5. Humboldt County Jail medical staff contacted  
3 Plaintiff's pharmacy, which confirmed active prescriptions for gabapentin, glipizide,  
4 hydrochlorothiazide, lisinopril, tamsulosin, and atorvastatin. ECF No. 36 at 2; ECF No. 36-2 at 9.  
5 The next day, October 3, 2017, Plaintiff was examined by medical staff and medical staff renewed  
6 Plaintiff's prescriptions for hydrochlorothiazide, glipizide, lisinopril, tamsulosin, and atorvastatin  
7 through December 2017, and ordered Plaintiff an ADA diet with snack. ECF No. 36-2 at 9, 11.  
8 Plaintiff's glucose level on October 3, 2017 was 187 and his blood pressure was 144/90. ECF No.  
9 36-2 at 10-11. The following two days, his blood glucose levels were 129 and 160, respectively.  
10 ECF No. 36-2 at 10. Defendants' expert, Dr. Levin, characterized the blood glucose levels as  
11 within normal limits, but did not specify what constitutes normal limits. ECF No. 36-3 at 2. The  
12 California Forensic Medical Group diabetic chart defines normal blood fasting sugar (glucose)  
13 levels as between 70-110 mg/dl. ECF No. 36-2 at 10. Plaintiff claims that normal limits for blood  
14 glucose levels are between 80 to 120. ECF No. 37 at 2. Plaintiff also states that his blood glucose  
15 levels were 129 and 160 those two days because he was fasting during that time. ECF No. 37 at  
16 20.

17           Between October 2, 2017 and October 27, 2019, Plaintiff was provided daily with  
18 glipizide, hydrochlorothiazide, lisinopril, tamsulosin, and atorvastatin. ECF No. 36-2 at 25.  
19 Plaintiff's medical records indicate that he met with medical staff on October 6, 17, 23, and 26,  
20 2017. ECF No. 36-2 at 12-13. It is unclear what was discussed at these appointments. The  
21 medical notes for these appointments are difficult to decipher and neither party has discussed these  
22 appointments. Plaintiff's blood glucose levels were not checked between October 4 through  
23 October 27, 2017.

24           On October 27, 2017, Plaintiff was seen by medical staff. Plaintiff complained that he had  
25 not received metformin since his arrival and that he was suffering chronic nerve pain in both feet.  
26 ECF No. 36-2 at 12. Metformin was ordered for Plaintiff, with the first dose given at the  
27 appointment. Plaintiff was started on 50 mg daily of nortriptyline to address the nerve pain. ECF  
28 No. 36-2 at 12. According to Plaintiff's medication log, starting October 27, 2017 and until

1 March or May 2018, Plaintiff was offered metformin and nortriptyline daily, and took these  
2 medications, as well as others, most days. ECF No. 36-2 at 25-40.

3 From October 28 through November 1, 2017, Plaintiff's blood glucose levels were  
4 monitored daily, with readings taken in the early morning, and were 168, 221, 82, 136, and 143.  
5 ECF No. 36-2 at 14.

6 Plaintiff was seen again by medical staff on November 3, 2017. At this meeting, Plaintiff  
7 requested that he be allowed to check his blood glucose levels in the evenings, stating that the  
8 current glucose monitoring did not accurately measure his glucose control because the readings  
9 were taken in the morning and his blood glucose levels tended to spike in the evening. Plaintiff  
10 stated that he wanted to control his blood glucose levels by counting his carbohydrates, as he  
11 normally did at home. Plaintiff was informed that this practice would not be available to him  
12 while incarcerated. ECF No. 36-2 at 15.

13 On November 4, 2017, Plaintiff's blood glucose level was 110. ECF No. 36-2 at 17. On  
14 November 5, 2017, Plaintiff's blood glucose level was 259 in the morning and 354 in the  
15 afternoon. ECF No. 36-2 at 17. The nurse was notified and seven units of regular insulin were  
16 ordered for Plaintiff. ECF No. 36-2 at 15, 17. Plaintiff refused to take the insulin, stating that he  
17 was not a junkie. ECF No. 36-2 at 15. Plaintiff states that there would be no need for insulin if he  
18 were allowed to control his diabetes through diet and regular testing. ECF No. 37 at 2.

19 From November 6-9, 2017, Plaintiff's blood glucose levels were taken twice daily. ECF  
20 No. 36-2 at 17. On November 6, 2017, Plaintiff's blood glucose levels were 125 in the morning  
21 and 219 in the evening. ECF No. 36-2 at 17. On November 7, 2017, Plaintiff's blood glucose  
22 levels were 98 in the morning and 281 in the evening. ECF No. 36-2 at 17. On November 8,  
23 2017, Plaintiff's blood glucose levels were 118 in the morning and 201 in the evening. ECF No.  
24 36-2 at 17. On November 9, 2017, Plaintiff's blood glucose levels were 83 in the morning and  
25 220 in the evening. ECF No. 36-2 at 17.

26 Plaintiff was seen again by medical staff on November 9, 2017. ECF No. 36-2 at 41. The  
27 medical notes reports, in relevant part, as follows:

28 History of chronic pain with various sources feet including

1 peripheral neuropathy. Has been provided with nortriptyline 50 mg  
2 each evening but finds this does little to alleviate his discomfort.  
3 Wonders what else can be done to address his pain.

4 ECF No. 36-2 at 41. According to the medical notes, Plaintiff informed medical staff that he  
5 wanted his glucose levels checked with his evening meal and his medication to be given just prior  
6 to eating per the directions on the bottle. ECF No. 36-2 at 41.

7 From November 10-23, 2017, Plaintiff's blood levels were checked twice daily, generally  
8 at 5:30 am and 4:00 pm. ECF No. 36-2 at 19-20. Generally speaking, Plaintiff's morning blood  
9 glucose levels were within normal fasting limits for diabetics as defined by California Medical  
10 Forensic Group (70-111 mg/dl) and by Plaintiff (80-120 mg/dl). ECF No. 36-2 at 19-20.  
11 Plaintiff's afternoon blood glucose levels ranged from 140-220, raising to 289 and 266 on two  
12 different occasions. ECF No. 36-2 at 19-20.

13 According to Plaintiff's medical records, he was transferred away from Humboldt County  
14 Jail sometime before June 6, 2018. ECF No. 36-2 at 30-40.

15 Plaintiff's medical records indicate that defendant Burleson was aware of, and approved,  
16 the medical treatment provided Plaintiff. *See, e.g.*, ECF No. 36-2 at 11-13, 15. The record is  
17 unclear as to when, or if, defendant Burleson examined Plaintiff in person. Plaintiff states that he  
18 saw Dr. Burleson only once, three days before his toe exploded. ECF No. 37 at 2. Plaintiff does  
19 not provide the date of his meeting with Dr. Burleson or the date his toe exploded.

## 20 **DISCUSSION**

### 21 **I. Summary Judgment Legal Standard**

22 Summary judgment is proper where the pleadings, discovery and affidavits show there is  
23 "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of  
24 law." *See* Fed. R. Civ. P. 56(a) (2014). Material facts are those that may affect the outcome of the  
25 case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material  
26 fact is genuine if the evidence is such that a reasonable jury could return a verdict for the  
27 nonmoving party. *See id.*

28 A court shall grant summary judgment "against a party who fails to make a showing  
sufficient to establish the existence of an element essential to that party's case, and on which that

1 party will bear the burden of proof at trial [,] . . . since a complete failure of proof concerning an  
2 essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”  
3 *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The moving party bears the initial  
4 burden of identifying those portions of the record that demonstrate the absence of a genuine issue  
5 of material fact. *Id.* The burden then shifts to the nonmoving party to “go beyond the pleadings  
6 and by [his] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on  
7 file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *See id.* at 324  
8 (citing Fed. R. Civ. P. 56(e)).

9 The court’s function on a summary judgment motion is not to make credibility  
10 determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W.*  
11 *Elec. Serv. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). The evidence must  
12 be viewed in the light most favorable to the nonmoving party, and inferences to be drawn from the  
13 facts must be viewed in a light most favorable to the nonmoving party. *See id.* at 631. If the  
14 evidence produced by the moving party conflicts with evidence produced by the nonmoving party,  
15 the court must assume the truth of the evidence submitted by the nonmoving party. *See Leslie v.*  
16 *Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999).

17 **II. Legal Standard for Medical Care Claims**

18 The legal standard for evaluating Plaintiff’s medical care claims depends on whether,  
19 during the relevant time period, he was a pretrial detainee or incarcerated pursuant to a conviction.

20 A pretrial detainee’s medical care claim is evaluated under the due process clause of the  
21 Fourteenth Amendment, which is an objective deliberate indifference standard, whereas a  
22 convicted prisoner’s medical care claim is evaluated under the Eighth Amendment, which is a  
23 subjective deliberate indifference standard. *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1124–25  
24 (9th Cir. 2018). The elements of a pretrial detainee’s Fourteenth Amendment medical care claim  
25 are: (1) the defendant made an intentional decision with respect to the conditions under which the  
26 plaintiff was confined; (2) those conditions put the plaintiff at substantial risk of suffering serious  
27 harm; (3) the defendant did not take reasonable measures to abate that risk, even though a  
28 reasonable official in the circumstances would have appreciated the high degree of risk involved—

1 making the consequences of the defendant’s conduct obvious; and (4) by not taking such  
 2 measures, the defendant caused the plaintiff’s injuries. With respect to the third element, the  
 3 defendant’s conduct must be objectively unreasonable, which is a fact-dependent question. *Id.* at  
 4 1125 (citing *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016)). Although a  
 5 Fourteenth Amendment medical care claim does not require that a plaintiff prove subjective  
 6 elements regarding the defendant’s actual awareness of the risk, the “‘mere lack of due care by a  
 7 state official’ does not deprive an individual of life, liberty, or property under the Fourteenth  
 8 Amendment.” *Castro*, 833 F.3d at 1071 (quoting *Daniels v. Williams*, 474 U.S. 327, 330–31  
 9 (2016)). A plaintiff must “prove more than negligence but less than subjective intent – something  
 10 akin to reckless disregard.” *Castro*, 833 F.3d at 1071.

11 A prison official’s deliberate indifference to a prisoner’s serious medical needs violates the  
 12 Eighth Amendment’s proscription against cruel and unusual punishment. *See Estelle v. Gamble*,  
 13 429 U.S. 97, 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled in*  
 14 *part on other grounds by WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997).  
 15 A determination of “deliberate indifference” involves an examination of two elements: the  
 16 seriousness of the prisoner’s medical need and the nature of the defendant’s response to that need.  
 17 *See McGuckin*, 974 F.2d at 1059. A “serious” medical need exists if the failure to treat a  
 18 prisoner’s condition could result in further significant injury or the “unnecessary and wanton  
 19 infliction of pain.” *McGuckin*, 974 F.2d at 1059 (citing *Estelle*, 429 U.S. at 104). The existence  
 20 of an injury that a reasonable doctor or patient would find important and worthy of comment or  
 21 treatment; the presence of a medical condition that significantly affects an individual’s daily  
 22 activities; or the existence of chronic and substantial pain are examples of indications that a  
 23 prisoner has a serious need for medical treatment. *Id.* at 1059-60 (citing *Wood v. Housewright*,  
 24 900 F.2d 1332, 1337-41 (9th Cir. 1990)). A prison official is deliberately indifferent if he knows  
 25 that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take  
 26 reasonable steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official  
 27 must not only “be aware of facts from which the inference could be drawn that a substantial risk of  
 28 serious harm exists,” but he “must also draw the inference.” *Id.* If a prison official should have



1 been aware of the risk, but was not, then the official has not violated the Eighth Amendment, no  
2 matter how severe the risk. *Gibson*, 290 F.3d at 1188. In order for deliberate indifference to be  
3 established, therefore, there must be a purposeful act or failure to act on the part of the defendant  
4 and resulting harm. *See McGuckin*, 974 F.2d at 1060.

5 **III. Defendants' Motion to Strike**

6 Defendants request that the Court strike ECF No. 39, which Plaintiff filed after Defendants  
7 filed their reply in support of their summary judgment motion and which Plaintiff has titled  
8 "Plaintiff's Facts to Defendants' Reply." ECF No. 40. Per Northern District Local Rule 7-3(d),  
9 once a reply is filed, no additional memoranda, papers or letters may be filed without prior Court  
10 approval except where new evidence was submitted in the reply or a new judicial opinion was  
11 published after the date the opposition or reply was filed. N.D. Cal. L.R. 7-3(d). Accordingly,  
12 Plaintiff's additional pleading opposing Defendants' summary judgment motion (ECF No. 39),  
13 which the Court will refer to as a sur-reply, required Court permission prior to filing. To the  
14 extent ECF No. 39 can be construed as seeking leave to file a sur-reply, the Court DENIES that  
15 request. There are no grounds for such leave, i.e., the reply brief did not contain new evidence or  
16 argument. The Court will not consider the sur-reply in deciding the motion for summary  
17 judgment. The Court also notes that Plaintiff's sur-reply makes allegations unrelated to the claims  
18 which the Court has found cognizable and therefore is not relevant. The Court therefore GRANTS  
19 Defendants' motion to strike ECF No. 39. ECF No. 40.

20 **IV. Defendants' Summary Judgment Motion**

21 **A. Failure to Provide Metformin Prior to October 27, 2017**

22 Defendants argue that they are entitled to summary judgment on this claim because  
23 Plaintiff's care while at Humboldt County Jail met the standard of care because (1) the pharmacy's  
24 records contradicted Plaintiff's claim that he had been prescribed metformin and (2) Plaintiff's  
25 blood glucose levels were within normal limits indicating that the failure to provide Plaintiff with  
26 metformin from October 3-26, 2017 did not harm him. ECF No. 36 at 4. Defendants further  
27 argue that where medical care is compliant with the standard of care, there cannot be a violation of  
28 either the Eighth Amendment or the Fourteenth Amendment. ECF No. 36 at 5-6. Defendants

1 present a declaration from Dr. Levin, an emergency room physician who has been licensed to  
2 practice medicine in California since 1976. After reviewing Plaintiff's medical records, Dr. Levin  
3 concluded that he believed that the medical care provided Plaintiff at Humboldt County Jail met or  
4 exceeded the standard of care and did not reflect any indifference to Plaintiff's medical condition.  
5 ECF No. 36-3.

6 In relevant part, Plaintiff argues that his medical care was improper because metformin was  
7 necessary to control his diabetes. He argues that the fact that St. Joseph's Hospital had prescribed  
8 him metformin proves that he needed metformin to control his diabetes. ECF No. 37 at 27-28, 30.  
9 He also argues that Defendants inaccurately represent his blood glucose levels as within normal  
10 limits. ECF No. 37 at 27. He argues that normal limits are between 80-120, and anything above  
11 150 is harmful to a diabetic. ECF No. 37 at 27. He further argues that his blood glucose level  
12 readings were inaccurate because they were taken in the morning, eleven hours after he last ate.  
13 ECF No. 37 at 27. Finally, he argues that Dr. Levin is not qualified to evaluate the adequacy of  
14 the medical care provided by Humboldt County Jail. ECF No. 37 at 1-2, 27-28. Plaintiff argues  
15 that emergency room physicians do not have the specialized knowledge to correctly evaluate  
16 medical treatment provided to diabetic patients; and that Dr. Levin practiced so long ago that he  
17 no longer is aware of current treatment protocol for diabetic patients. ECF No. 37 at 1-2, 27-28.  
18 Plaintiff argues that Dr. Levin's incorrect characterization of his glucose levels as within normal  
19 limits indicates that he is unqualified to evaluate medical treatment for diabetic patients. ECF No.  
20 37 at 1-2, 27-28.

21 Defendants argue that Plaintiff's disagreement with Dr. Levin as to the proper medical  
22 treatment for diabetic patients is a mere difference of opinion regarding medical treatment which,  
23 as a matter of law, does not constitute an Eighth Amendment violation. ECF No. 38 at 5-6.

24 The Court has carefully reviewed the record and finds that Defendants are entitled to  
25 summary judgment as a matter of law under both the Fourteenth Amendment and the Eighth  
26 Amendment.

27 **1. Fourteenth Amendment Claim**

28 With respect to the Fourteenth Amendment claim, Plaintiff has failed to make a showing

1 sufficient to establish that Defendants' failure to prescribe metformin for three weeks put him at  
2 risk, was objectively unreasonable, or caused him the identified injury.<sup>4</sup> Specifically, Plaintiff has  
3 failed to establish that his medical condition at intake indicated that metformin was necessary in  
4 addition to glipizide to control his diabetes, and that the failure to prescribe metformin resulted in  
5 his toe being infected. Plaintiff was prescribed metformin for his diabetes at intake on October 2,  
6 2017. After learning that Plaintiff did not have an active prescription for metformin, Humboldt  
7 County Jail medical staff prescribed glipizide to control Plaintiff's diabetes. Plaintiff's blood  
8 glucose levels in the days immediately after starting regular glipizide doses indicate that the  
9 glipizide alone was successful in bringing down his blood glucose levels. His levels dropped from  
10 the initial 294 mg/dl reading at intake to 187 mg/dl, 129 mg/dl, and 160 mg/dl on October 3-5.  
11 While these blood glucose levels are not within the normal levels described by either Plaintiff (80-  
12 120 mg/dl) or the California Forensic Medical Group (70-110 mg/dl),<sup>5</sup> the record indicates that it  
13 takes time for diabetic medication to stabilize blood glucose levels. For example, when Plaintiff  
14 started metformin in late October, his blood glucose levels for the first five days generally  
15 remained above the 120 mg/dl level (168 mg/dl, 221 mg/dl, 82 mg/dl, 136 mg/dl, and 143 mg/dl).  
16 During his second week on metformin, Plaintiff's blood glucose level spiked to 259 mg/dl but fell  
17 to 125 mg/dl the next day. The fact that Plaintiff's blood glucose levels had not dropped below  
18 120 mg/dl by October 5 does not create a triable issue of fact as to whether the intentional decision  
19 to treat Plaintiff with only glipizide, when Plaintiff's pharmacy reported that he had no active  
20 prescription for metformin, objectively put Plaintiff at substantial risk of serious harm. There is  
21 also no triable issue of fact as to whether the failure to prescribe Plaintiff metformin in October

22

---

23 <sup>4</sup> Although the record indicates that defendant Lien met repeatedly with Plaintiff during October  
24 2017 and either managed or directed Plaintiff's medical treatment during that month, the only  
25 indication of defendant Burleson's involvement in Plaintiff's medical care is his stamp on  
26 Plaintiff's medical records. Viewing the record in the light most favorable to Plaintiff, the Court  
presumes that defendant Burleson was contemporaneously reviewing Plaintiff's medical records  
and that his stamp indicated his approval of the treatment provided.

27 <sup>5</sup> Dr. Levin conclusorily states that these blood glucose levels are within normal levels. ECF No.  
28 36-3 at 2. But he fails to specify what he considers to be "within normal levels," making it  
difficult for the Court to understand how he arrived at this conclusion and how to evaluate  
Plaintiff's claim that these levels are not within normal limits.

1 2017 caused the December 2017 infection of Plaintiff's toe (and subsequent amputation).  
2 Presumably Plaintiff's argument is that the failure to properly treat his diabetes, including the  
3 failure to prescribe him metformin in October 2017, caused his large toe to be infected. However,  
4 there is nothing in the record from which it can be reasonably inferred that the December 2017  
5 infection was caused by the failure to prescribe metformin in October 2017. After two weeks on  
6 metformin, Plaintiff's blood glucose levels stabilized at levels that he considers to be within  
7 normal limits. For most of November 2017 and all of December 2017, Plaintiff's blood glucose  
8 levels remained within normal limits, indicating his diabetes was under control.

9 Viewing the record in the light most favorable to Plaintiff, the Court finds that it was not  
10 objectively unreasonable for Defendants to initially only prescribe glipizide to treat Plaintiff's  
11 diabetes. The Court GRANTS summary judgment in favor of Defendants with respect to the  
12 Fourteenth Amendment claim regarding the failure to prescribe metformin between October 3,  
13 2017 to October 27, 2017.

14 **2. Eighth Amendment Claim**

15 Defendants are also entitled to summary judgment with respect to the Eighth Amendment  
16 claim regarding the failure to prescribe metformin between October 3 to October 27, 2017. To  
17 prevail on an Eighth Amendment claim, a prisoner-plaintiff must demonstrate that the prison  
18 official was both "aware of facts from which the inference could be drawn that a substantial risk of  
19 serious harm exists," and drew that inference. *See Farmer*, 511 U.S. at 837.

20 Plaintiff has not presented any evidence from which it can be reasonably inferred that  
21 Defendants were aware that the failure to prescribe him metformin exposed Plaintiff to substantial  
22 risk of serious harm. Plaintiff and Defendants disagree as to what constitutes normal fasting blood  
23 glucose levels, as to whether they should monitor fasting blood glucose levels or non-fasting blood  
24 glucose levels, as to whether metformin is the required first-line medication for managing diabetes  
25 rather than glipizide, and as to how high a blood glucose level must be to trigger the use of  
26 metformin. This disagreement between the parties, where there was no active prescription for  
27 metformin and Plaintiff's blood glucose levels decreased when treated solely with glipizide, does  
28 not rise to the level of an Eighth Amendment violation. *Franklin v. Oregon*, 662 F.2d 1337, 1344

1 (9th Cir. 1981) (“A difference of opinion between a prisoner-patient and prison medical authorities  
2 regarding treatment does not give rise to a § 1983 claim.”). To the extent that Plaintiff is arguing  
3 that Defendants should have realized that the glipizide’s failure to bring his blood glucose levels  
4 within normal limits with three days, this argument states, at best, a claim for negligence or  
5 malpractice, which does not violate the Eighth Amendment. *See Toguchi v. Chung*, 391 F.3d  
6 1051, 1060-61 (9th Cir. 2004) (claim of medical malpractice or negligence is insufficient to make  
7 out a violation of the Eighth Amendment) (summary judgment in favor of defendant doctor  
8 appropriate where evidence showed doctor did not believe that Cogentin use presented a serious  
9 risk of harm to plaintiff, and where there was no indication in the record that doctor was aware of  
10 a risk that plaintiff was suffering from Klonopin withdrawal; claim that doctor failed to conduct a  
11 differential diagnosis did not amount to more than negligence and claim that doctor failed to  
12 employ emergency treatment was conclusory). If Defendants should have been aware of the risk  
13 of not treating Plaintiff’s diabetes with metformin, but were not, then there is no Eighth  
14 Amendment violation, no matter how severe the risk. *Gibson*, 290 F.3d at 1188.

15 Viewing the record in the light most favorable to Plaintiff, the Court finds that there is no  
16 triable issue of fact as to whether Defendants were aware that there was a substantial risk of  
17 serious harm to Plaintiff if his diabetes were treated only with glipizide. The Court GRANTS  
18 summary judgment in favor of Defendants with respect to the Eighth Amendment claim regarding  
19 the failure to prescribe metformin between October 3, 2017 to October 27, 2017.

20 **B. Prescribing Nortriptyline Without Obtaining Consent**

21 It is undisputed that, starting October 27, 2017, Plaintiff was prescribed a daily 50 mg dose  
22 of nortriptyline, and that Plaintiff took nortriptyline daily while housed at Humboldt County Jail.  
23 Defendants allege that the nortriptyline was prescribed to address Plaintiff’s chronic nerve pain,  
24 and Dr. Levin states that nortriptyline is commonly prescribed to address the neuropathic pain  
25 often reported in the extremities of patients with diabetes. ECF No. 36-3 at 1-2.

26 Plaintiff states that he did not learn that he was being prescribed nortriptyline until he  
27 arrived at San Quentin State Prison, presumably sometime after June 2018, and that he never  
28 consented to taking nortriptyline. Plaintiff alleges that Defendants prescribed him nortriptyline

1 solely to “dummy him up” before and during his trial. He argues that Defendants’ claim that  
2 nortriptyline was prescribed to address his nerve pain is not credible because nortriptyline’s sole  
3 use is as an antidepressant, nortriptyline is not used for pain relief, nortriptyline never alleviated  
4 his pain, and Defendants failed to obtain his consent. Plaintiff also argues that Dr. Levin is  
5 unqualified to evaluate whether nortriptyline should be prescribed to address diabetic patients’  
6 neuropathic pain because he is not an endocrinologist or a psychologist/psychiatrist and because  
7 medicine has changed significantly since Dr. Levin started practicing.

8 **1. Fourteenth Amendment Claim**

9 Liberally construed, Plaintiff’s allegation that he was provided nortriptyline without his  
10 consent states two different Fourteenth Amendment claims.

11 First, as explained above, a pretrial detainee’s medical care claim is evaluated under the  
12 Due Process Clause of the Fourteenth Amendment.

13 Second, the Ninth Circuit has held that the Fourteenth Amendment provides for the right to  
14 be “free from unjustified intrusions into the body.” *Benson v. Terhune*, 304 F.3d 874, 884 (9th  
15 Cir. 2002) (citing *Riggins v. Nevada*, 504 U.S. 127, 134 (1992)). That right includes the right “to  
16 refuse unwanted medical treatment and to receive sufficient information to exercise these rights  
17 intelligently.” *Id.*

18 Liberally construed, Plaintiff’s medical care claim is that provided constitutionally  
19 inadequate medical care, in violation of the Fourteenth Amendment when they prescribed him  
20 nortriptyline for his pain. In considering this claim, the question is not whether the nortriptyline  
21 was effective, but whether prescribing nortriptyline meets the four elements set forth in *Gordon*.  
22 The Court finds that Plaintiff has failed to make a showing sufficient to establish a triable issue of  
23 fact as to whether Defendants’ decision to prescribe him nortriptyline put him at risk, as to  
24 whether it was objectively unreasonable for Defendants to prescribe nortriptyline, and as to  
25 whether nortriptyline caused him injury. The only “risk” or injury that Plaintiff has identified is  
26 his speculative conclusion that the nortriptyline was prescribed to dummy him up before and  
27 during his trial. The evidence that Plaintiff proffers in support of this theory – that the  
28 nortriptyline was ineffective; it was prescribed during his trial; and nortriptyline should not be

1 prescribed to people with heart conditions – fails to establish a triable issue of fact as to whether  
2 Defendants prescribed nortriptyline solely to harm him. While nortriptyline is an anti-depressant,  
3 this does not preclude it from also being prescribed to treat other conditions, including pain  
4 management. In addition, nothing in the record indicates that the nortriptyline was forcibly  
5 administered to him or that Plaintiff could not refuse the nortriptyline. In fact, the record indicates  
6 that Plaintiff did refuse medication on certain dates. ECF No. 36-2 at 23-25.

7 Plaintiff has provided no evidence indicating that nortriptyline does not treat both  
8 depression and pain, even if it was ineffective in treating his pain. Also, the fact that nortriptyline  
9 was ineffective at treating his pain also does not prove that it was prescribed solely for the  
10 nefarious purpose of dummifying Plaintiff up, especially here where Plaintiff had the ability to  
11 refuse it. Finally, there is nothing in the record indicating that nortriptyline caused Plaintiff any  
12 injury. Plaintiff has not alleged that the nortriptyline exacerbated his diabetes, was prescribed in  
13 lieu of treating his diabetes, or caused the infection in his big toe. Plaintiff “cannot defeat  
14 summary judgment . . . with unsupported conjecture or conclusory statements.” *Hernandez v.*  
15 *Spacelabs Med. Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003). Plaintiff’s Fourteenth Amendment  
16 claim that prescribing him nortriptyline constituted deliberate indifference to his serious medical  
17 needs fails as a matter of law.

18 Viewing the record in the light most favorable to Plaintiff, the Court finds that there is no  
19 triable issue of fact as to whether Defendants were aware that there was a substantial risk of  
20 serious harm to Plaintiff if he was prescribed nortriptyline to treat his pain. The Court GRANTS  
21 summary judgment in favor of Defendants with respect to the Fourteenth Amendment claim  
22 regarding prescribing him nortriptyline to treat his pain.

23 With respect to the informed consent claim, the Court did not clearly identify this claim in  
24 the screening order, and neither party has briefed this issue. Accordingly, the Court ORDERS  
25 Defendants to file a dispositive motion with respect to this remaining Fourteenth Amendment  
26 claim in accordance with the briefing schedule set forth at the end of this order.

27 **2. Eighth Amendment Claim**

28 Defendants are also entitled to summary judgment with respect to Plaintiff’s Eighth

1 Amendment claim regarding the prescription of nortriptyline. There is nothing in the record from  
2 which it can be reasonably inferred that nortriptyline harmed Plaintiff, or that nortriptyline is not  
3 prescribed for nerve pain. It therefore follows that there is no triable issue of fact as to whether  
4 Defendants knew that nortriptyline posed a substantial risk of serious harm to Plaintiff.

5 Viewing the record in the light most favorable to Plaintiff, the Court finds that there is no  
6 triable issue of fact as to whether Defendants were aware that there was a substantial risk of  
7 serious harm to Plaintiff if he was prescribed nortriptyline for his pain. The Court GRANTS  
8 summary judgment in favor of Defendants with respect to the Eighth Amendment claim regarding  
9 prescribing him nortriptyline to treat his pain.

10 **V. Plaintiff's Summary Judgment Motion**

11 Plaintiff argues that he is entitled to summary judgment because he was prescribed  
12 nortriptyline without his consent in violation of Cal. Welfare & Inst. Code § 5326.2; because he  
13 was provided with a diet harmful to diabetics; and because he was not properly administered his  
14 medications in that they were provided one to five hours after his meal instead of thirty minutes  
15 prior to meals, as directed by the drug manufacturer. ECF No. 42.

16 As discussed above, the informed consent claim has not been properly briefed by the  
17 parties. Accordingly, at this time, the Court DENIES summary judgment with respect to the  
18 informed consent claim without prejudice to considering this claim in later-filed dispositive  
19 motions.

20 Plaintiff's two remaining arguments are not within the scope of the third amended  
21 complaint. The only cognizable claims set forth in the third amended complaint are that  
22 Defendants violated his constitutional rights when they administered nortriptyline to him without  
23 his knowledge and when they failed to prescribe him metformin from October 5-27, 2017. The  
24 Court therefore DENIES summary judgment on Plaintiff's remaining claims.

25 To the extent that Plaintiff seeks to amend his third amended complaint to add claims  
26 alleging that Defendants violated Plaintiff's constitutional rights when they failed to provide him  
27 with a meal plan that was appropriate for diabetics and when they failed to administer his  
28 medications thirty minutes prior to meals, this request is DENIED. While there is a strong policy



1 favoring liberal amendment, a district court may properly deny leave to amend where there is  
2 “apparent or declared” evidence of “undue delay, bad faith or dilatory motive on the part of the  
3 movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice  
4 to the opposing party by virtue of allowance of the amendment, [or] futility of amendment . . .”  
5 *Foman v. Davis*, 371 U.S. 178, 182 (1962). “Not all the factors merit equal weight . . . it is the  
6 consideration of prejudice to the opposing party that carries the great weight.” *Eminence Capital,*  
7 *LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

8 The first factor weighs in favor of Plaintiff. There is no evidence of undue delay, bad faith  
9 or dilatory motive on Plaintiff’s part.

10 The second factor weighs in favor of Defendants. Plaintiff has repeatedly failed to cure  
11 deficiencies in his complaint. As noted in the procedural history provided above, the Court  
12 provided Plaintiff multiple opportunities to file a complaint that presents cognizable claims and  
13 provided specific guidance as to why his claims were found deficient. It is clear that Plaintiff  
14 believes that his medical treatment at Humboldt County Jail violated the federal Constitution.  
15 However, a general allegation that medical treatment did not meet constitutional standards does  
16 not state a cognizable federal constitutional claim. As explained repeatedly to Plaintiff, in  
17 preparing a complaint, a plaintiff must, for each alleged constitutional violation, clearly describe  
18 the action or inaction that allegedly violated the Constitution, identify which defendant committed  
19 the alleged constitutional violation, and explain how these actions or inactions rose to the level of  
20 a federal constitutional violation. Plaintiff has repeatedly failed to follow the Court’s instructions  
21 and repeatedly failed to state cognizable claims other than the two claims currently at issue.

22 The third factor is neutral. Defendants are prejudiced in that allowing an amended  
23 complaint will further delay this case. This case was filed on March 18, 2019, and has been  
24 pending a year and a half. However, Defendants’ summary judgment motion has not ended this  
25 action as the Court has ordered additional briefing on the informed consent claim.

26 The fourth factor weighs against Plaintiff. The record indicates that, despite being  
27 provided an allegedly harmful diet and being administered his medication at allegedly harmful  
28 times, Plaintiff’s blood glucose levels remained within what Plaintiff has identified as normal

1 limits, after stabilizing in November 2017. To the extent that Plaintiff argues that Defendants  
2 were on notice that these practices (inappropriate diet and medication administered after meals)  
3 were harmful, Defendants did not act unreasonably in relying on Plaintiff's blood glucose levels to  
4 determine whether he faced an unreasonable risk, and in refusing to change the diet provided and  
5 in refusing to change the timing of medications. Given this record, Defendants' refusal to provide  
6 Plaintiff with a different diet and to change the timing of his medications would not violate either  
7 the Eighth Amendment or the Fourteenth Amendment.

8 The Court therefore exercises its discretion and declines to allow Plaintiff to amend the  
9 complaint a fourth time, at this late date, to add these claims.

10 **VI. Plaintiff's Request for Appointment of Counsel**

11 Plaintiff argues that he requires an attorney because his facility does not have an adequate  
12 law library. ECF No. 42 at 3. This is Plaintiff's third request for appointment of counsel.  
13 Plaintiff has not demonstrated that exceptional circumstances require appointment of counsel at  
14 this time. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (noting that "a court may under  
15 'exceptional circumstances' appoint counsel for indigent civil litigants pursuant to 28 U.S.C. §  
16 1915(e)(1)."); *Agyeman v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004) (finding of  
17 "exceptional circumstances" requires evaluation of likelihood of plaintiff's success on merits and  
18 plaintiff's ability to articulate claims *pro se* in light of complexity of legal issues).

19 **CONCLUSION**

20 For the reasons set forth above, the Court orders as follows.

- 21 1. The Court GRANTS Defendants' motion for summary judgment on their medical  
22 care claims. ECF No. 36.
- 23 2. The Court GRANTS Defendants' motion to strike ECF No. 39. ECF No. 40.
- 24 3. The Court DENIES Plaintiff's motion for summary judgment, DENIES his request  
25 for leave to amend the third amended complaint, and DENIES his request for appointment of  
26 counsel. ECF No. 42.
- 27 4. The Court ORDERS Defendants to file, within sixty (60) days of the date of this  
28 order, a dispositive motion with respect to the sole remaining claim that Defendants prescribed

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Plaintiff nor triptyline without his consent, in violation of the Fourteenth Amendment. A motion for summary judgment also must be accompanied by a *Rand* notice so that Plaintiff will have fair, timely, and adequate notice of what is required of him in order to oppose the motion. *Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012) (notice requirement set out in *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), must be served concurrently with motion for summary judgment).<sup>6</sup>

Plaintiff's opposition to the summary judgment or other dispositive motion must be filed with the Court and served upon Defendants no later than 28 days from the date the motion is filed. Defendants shall file a reply brief no later than 14 days after the date the opposition is filed. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion.

This order terminates ECF Nos. 36, 40, 42.

**IT IS SO ORDERED.**

Dated: December 28, 2020

  
\_\_\_\_\_  
JON S. TIGAR  
United States District Judge

---

<sup>6</sup> If Defendants asserts that Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), Defendants must raise such argument in a motion for summary judgment, pursuant to the Ninth Circuit's opinion in *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (en banc) (overruling *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative remedies under the Prison Litigation Reform Act, should be raised by a defendant as an unenumerated Rule 12(b) motion).