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

11 JAIME IGNACIO ESTRADA,) No. C 12-0592 LHK (PR)
12 Plaintiff,)
13 vs.) ORDER GRANTING DEFENDANTS'
14 DR. MICHAEL SAYRE and C. MALO-) MOTION FOR SUMMARY
15 CLINES,) JUDGMENT; DENYING
16 Defendants.) PLAINTIFF'S MOTIONS FOR
SUMMARY JUDGMENT;
ADDRESSING PENDING MOTIONS
(Doc. Nos. 45, 55, 73, 80, 81, 84, 85.)

17 Plaintiff, proceeding *pro se*, filed an amended civil rights complaint pursuant to 42
18 U.S.C. § 1983 against Dr. Michael Sayre ("Dr. Sayre") and Nurse Practitioner C. Malo-Clines
19 ("Malo-Clines") at Pelican Bay State Prison ("PBSP"). Plaintiff alleges that both defendants
20 were deliberately indifferent to his serious medical needs, in violation of the Eighth Amendment,
21 and that Malo-Clines retaliated against plaintiff, in violation of the First Amendment.

22 Plaintiff has moved for partial summary judgment on the deliberate indifference claim.
23 (Doc. No. 45.) Defendants have filed an opposition. (Doc. No. 58.) Plaintiff has filed a reply.
24 (Doc. No. 63.) Plaintiff has also filed a motion for summary judgment on the retaliation claim.
25 (Doc. No. 73.) Defendants have filed an opposition (doc. no. 77), and plaintiff has filed a reply
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(doc no. 80), and a sur-reply¹ (doc no. 81).

Defendants have moved for summary judgment. (Doc. No. 55.) Plaintiff has filed an opposition (doc. no. 67), and supplemental opposition (doc. no. 72), and defendants have filed a reply (doc. no. 76).

Having carefully considered the papers submitted, the court hereby GRANTS defendants' motion for summary judgment, and DENIES plaintiff's motions for summary judgment, for the reasons set out below.

BACKGROUND

Plaintiff alleges that Dr. Sayre and Malo-Clines were deliberately indifferent to his serious medical needs. In 2006, plaintiff was diagnosed with degenerative disc disease and sciatica in his left leg. (Am. Compl. at 5.) Plaintiff claims that defendants have interfered with plaintiff's receipt of pain medication which he needed to treat his lower back pain.² Specifically, plaintiff asserts that he was not receiving his pain medications despite making repeated requests for them. Plaintiff also claims that Malo-Clines retaliated against him for filing a previous lawsuit against her.³

The following facts are viewed in the light most favorable to plaintiff, and are undisputed unless otherwise indicated.

At the time of the events in plaintiff's amended complaint, Malo-Clines was a nurse practitioner at PBSP. (Doc. No. 55 ("MSJ"), Ex. B ("Malo-Clines Decl.") ¶ 2.) She was one of plaintiff's medical practitioners. (*Id.* ¶ 6.)

¹ Plaintiff's motion for leave to file a sur-reply is GRANTED. (Doc. No. 81.)

² On July 30, 2013, the court granted in part and denied in part defendants' motion to dismiss based on res judicata. The court ordered that plaintiff's deliberate indifference claims concerning events that occurred prior to January 7, 2011, were barred. Thus, plaintiff's underlying deliberate indifference claim only concerns events occurring after January 7, 2011.

³ In 2010, plaintiff filed a civil rights actions against Malo-Clines ins *Estrada v. Malo-Clines*, No. 10-4832 LHK (N.D. Cal.) ("*Estrada I*"), *aff'd*, No. 12-17044, 559 Fed. Appx. 637 (9th Cir. March 3, 2014) (unpublished memorandum disposition).

1 On January 13, 2011, plaintiff was seen by a physical medicine and rehabilitation
2 specialist, Dr. G. Williams, for plaintiff's lower back pain. (*Id.* ¶ 9.) Dr. Williams
3 recommended an exercise program, and suggested that a nonsteroidal anti-inflammatory drug
4 plus Tylenol were appropriate to treat plaintiff's condition. (*Id.*) Dr. Williams also
5 recommended trigger point injections if plaintiff's pain got worse. (*Id.*) On January 27, 2011,
6 plaintiff was seen by his primary care physician in response to plaintiff's request for trigger point
7 injections. (*Id.* ¶ 10.)

8 On February 3, 2011, plaintiff was seen at the physical therapy clinic for evaluation, and
9 also to establish an in-cell exercise program for plaintiff. (*Id.* ¶ 11.) On February 15, 2011, Dr.
10 Sayre completed a review of plaintiff's case and concluded that Dr. Williams' recommendations
11 were consistent with the treatment that plaintiff had been receiving at PBSP for plaintiff's back
12 pain. (*Id.* ¶ 12.) On February 17, 2011, Malo-Clines saw plaintiff for his lower back pain. (*Id.* ¶
13 13.) Malo-Clines recommended that plaintiff stay active, continue the in-cell physical therapy
14 program, and agreed to plaintiff's request to start salsalate at a higher dosage. (*Id.*)

15 On March 10, 2011, Malo-Clines again saw plaintiff for his lower back pain. (*Id.* ¶ 14.)
16 Malo-Clines noted that plaintiff had tolerated the trigger point injections well and felt
17 improvement. (*Id.*) Malo-Clines continued to recommend in-cell exercise as well as salsalate.
18 (*Id.*) On March 18, 2011, Malo-Clines issued a verbal order renewing plaintiff's prescription of
19 salsalate. (*Id.* ¶ 16.) On March 30, 2011, plaintiff complained of back pain and requested trigger
20 point injections. (*Id.* ¶ 17.) Plaintiff was scheduled for an appointment with his primary care
21 physician. (*Id.*)

22 On April 15, 2011, Malo-Clines saw plaintiff for back and leg pain. (*Id.* ¶ 18.) Malo-
23 Clines encouraged plaintiff to exercise, continue yoga, and in-cell physical therapy. (*Id.*) Malo-
24 Clines further directed plaintiff to continue with the Tylenol and salsalate, and ordered plaintiff
25 to be scheduled for trigger point injections. (*Id.*) Plaintiff received those injections on April 28,
26 2011. (*Id.*)

27 On May 8, 2011, plaintiff requested a refill of his pain medication and was told by "staff"

1 that plaintiff had no more refills for salsalate left. (Am. Compl. at 8; Doc. No. 45-2, Ex. D at 2.)
2 Plaintiff believed the withholding of pain medication was in retaliation for litigating *Estrada I*.
3 (Am. Compl. at 7.)

4 On May 13, 2011, plaintiff submitted a health care services request form, stating that he
5 was still waiting for a renewal of his salsalate for his severe back and leg pain. (Doc. No. 45-2 at
6 3.) That same day, Malo-Clines submitted a verbal order refilling plaintiff's salsalate
7 prescription for 30 days. (Malo-Clines Decl. ¶ 20; MSJ, Ex. O at CDCR 2466, 2474.) On May
8 15, 2011, plaintiff requested a refill of his Tylenol. (MSJ, Ex. P at CDCR 2478.) Nurse Flowers
9 responded to plaintiff that his medication was refilled. (*Id.*)

10 On May 22, 2011, plaintiff requested that his salsalate, ranitidine⁴, and Tylenol be
11 refilled. (MSJ, Ex. Q at CDCR 2486.) On May 23, 2011, Nurse Flowers responded that
12 plaintiff's medications had been refilled. (*Id.*) Plaintiff was also seen in the clinic after
13 complaining about hip and back pain and requesting renewal of his medication. (Malo-Clines
14 Decl. ¶ 22.) Malo-Clines gave a verbal order to renew plaintiff's prescription for ranitidine, and
15 for plaintiff to receive a urinalysis. (*Id.*) On June 3 and 7, 2011, plaintiff was seen at the clinic
16 after he reported having thoughts of suicide due to his chest, upper back, and shoulder pain. (*Id.*
17 ¶ 23.) Dr. Martinelli renewed plaintiff's salsalate prescription for 10 days, and changed
18 plaintiff's Tylenol prescription. (*Id.*; MSJ, Ex. R at CDCR 2516.)

19 On June 15 and 19, 2011, plaintiff requested a refill of his salsalate and Tylenol. (MSJ,
20 Ex. T at CDCR 2574-75.) Plaintiff was told that his Tylenol request was accepted the same day,
21 and that his salsalate request would be ordered after June 19, 2011. (*Id.*; Malo-Clines Decl. ¶
22 25.) On June 24 and 29, 2011, plaintiff requested refills of his salsalate, and Malo-Clines
23 responded by giving a verbal order for the prescription to be renewed for 30 days. (Malo-Clines
24 Decl. ¶ 27.)

25 On July 4, 12, and 24, 2011, plaintiff's requests for refills of his Tylenol and salsalate

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27 ⁴ Ranitidine is a medication used to reduce the amount of acid in the stomach. (Malo-
28 Clines Decl. ¶ 8.)

1 prescriptions were reviewed and granted. (MSJ, Ex. W.) On July 8, 2011, Malo-Clines saw
2 plaintiff at the clinic, and he was complaining of pain in his lumbar area, so Malo-Clines
3 administered three shots of lidocaine into plaintiff's lumbar area. (Malo-Clines Decl. ¶ 29.)

4 On August 3, 2011, in response to plaintiff's request for an injection for his hip pain,
5 Malo-Clines administered a shot of Kenalog into plaintiff's left hip. (*Id.* ¶ 30.) On August 6 and
6 8, 2011, plaintiff submitted a request for pain medication. (Doc. No. 67 ("Opp.") at 6; MSJ, Ex.
7 Z at CDCR 2653-54.) On August 9, 2011, Malo-Clines issued a verbal order to refill plaintiff's
8 salsalate refill prescription request. (Malo-Clines Decl. ¶ 31.) On August 17, 2011, plaintiff was
9 seen at the clinic for a follow-up after his Kenalog injection. (*Id.*) It was observed that plaintiff
10 ambulated without a limp. (*Id.*) On August 24 and 30, 2011, plaintiff requested a refill of his
11 Tylenol and salsalate. (MSJ, Ex. BB.) On August 31, 2011, plaintiff's prescriptions for salsalate
12 and Tylenol were refilled. (Malo-Clines Decl. ¶ 33.)

13 On September 6, 10, and 14, 2011, plaintiff requested refills of his Tylenol and salsalate.
14 (MSJ, Ex. DD at CDCR 2708-09; Doc. No. 45-2 at 7.) Malo-Clines denied plaintiff's salsalate
15 prescription refill request pending a urinalysis so that Malo-Clines could verify that plaintiff was
16 actually taking the medication. (Malo-Clines Decl. ¶ 35.) On September 15, 2011, after Malo-
17 Clines reviewed the lab work from the urinalysis, she gave a verbal order to refill plaintiff's
18 salsalate prescription for thirty days. (*Id.*; MSJ, Ex. DD at CDCR 2734, 2738.)

19 On September 20, 2011, plaintiff requested a refill of his Tylenol and salsalate
20 prescriptions. (Doc. No. 45-2 at 8.) Plaintiff was told that his salsalate prescription had expired
21 and that his Tylenol prescription would be handled by a private pharmacy called Maxor. (*Id.*;
22 Malo-Clines Decl. ¶ 37.) On September 26, 2011, plaintiff requested a refill of his Tylenol, and
23 was told that it would refill on October 2, 2011 because it was too early to be refilled at that
24 present time. (MSJ, Ex. EE at CDCR 2573.) Plaintiff was seen on September 28 and 30, 2011,
25 for testicular pain, hypertension, and high cholesterol. (Malo-Clines Decl. ¶¶ 38-39.) The
26 examining physician, Dr. Venes, who examined plaintiff observed that plaintiff was probably
27 being over-treated, so Dr. Venes discontinued plaintiff's aspirin and lipid-lowering medication.

1 (*Id.* ¶ 39; MSJ, Ex. HH at CDCR 2767.)

2 On October 5, 2011, plaintiff submitted a health care services request form. (Doc. No.
3 45-2 at 11.) In that request, plaintiff complained that he did not receive his salsalate renewal
4 after seeing the doctor, and has been having problems getting the medication refilled for his back
5 pain. (*Id.*) Medical staff responded that the doctor had ordered Tylenol for plaintiff's pain, and
6 that the doctor would be back next week. (*Id.*) Plaintiff was further told that if he had any
7 questions for the doctor, plaintiff should send in a "request for interview" form. (*Id.*) On
8 October 7, 2011, plaintiff refused to have a routine blood check. (Malo-Clines Decl. ¶ 39; MSJ,
9 Ex. HH at 2774.) That same day, plaintiff submitted another health care services request form.
10 (Doc. No. 45-2 at 12.) In it, plaintiff complained again that he had not received salsalate for his
11 pain. (*Id.*) Plaintiff was again told to use the "request for interview" form to communicate with
12 his primary care physician regarding the issue. (*Id.*) On October 11, 2011, plaintiff's request for
13 a refill of his Tylenol prescription was granted and refilled by Maxor. (Malo-Clines Decl. ¶ 40.)
14 On October 12, 2011, plaintiff requested trigger point injections, and was told that he would see
15 his primary care physician in a few weeks. (MSJ, Ex. JJ at CDCR 2787.) Plaintiff then
16 submitted a "request for interview" form asking for salsalate for his pain. (Doc. No. 45-2 at 13.)
17 Plaintiff was told that he did not have a refill of his prescription because he had no active
18 salsalate prescription. (*Id.*) On October 16, 2011, plaintiff requested a refill of his salsalate
19 prescription, complaining that he had been out of salsalate for weeks. (MSJ, Ex. JJ at CDCR
20 2789.) On October 18, 2011, plaintiff was seen at the clinic in response to his requests for
21 trigger point injections, and a renewal of his salsalate prescription. (Malo-Clines Decl. ¶ 41.)
22 Plaintiff's prescription was refilled for 30 days. (MSJ, Ex. JJ at CDCR 2802-03.) On October
23 26, 2011, Malo-Clines noted that at times, plaintiff was requesting refills of his prescriptions too
24 early. (MSJ, Ex. KK at CDCR 2806.)

25 On November 13, 2011, plaintiff requested a refill of his Tylenol and salsalate. (MSJ,
26 Ex. NN at CDCR 2850.) Medical staff responded that both medications were ordered and would
27 be received in a few days. (*Id.*) On November 14, 2011, plaintiff saw Malo-Clines to receive

1 trigger point injections for back pain. (Am. Compl. at 8.) Malo-Clines administered two
2 lidocaine injections into plaintiff's lumbar area for pain relief. (Malo-Clines Decl. ¶ 46.) She
3 also ordered that plaintiff continue taking salsalate and Tylenol. (*Id.*) When plaintiff was being
4 escorted back to his cell, one of the escorting officers asked plaintiff why plaintiff was
5 continuing to litigate *Estrada I* when plaintiff was already receiving treatment. (Am. Compl. at
6 8.) Plaintiff felt threatened to drop the lawsuit. (*Id.*) On November 17, 2011, plaintiff's
7 salsalate and Tylenol prescriptions were renewed. (Malo-Clines Decl. ¶ 47.)

8 On December 5, 2011, plaintiff was seen at the clinic complaining about ringing in his
9 ears. (*Id.* ¶ 49.) As a result, plaintiff's salsalate was discontinued. (*Id.*) On December 12, 2011,
10 plaintiff was seen at the clinic and requested that his salsalate be reinstated because even though
11 he wasn't taking salsalate anymore, he still had the ringing in his ear. (*Id.* ¶ 50.) On December
12 13, 2011, Dr. Sayre issued a notification "stopping" plaintiff's Tylenol. (Doc. No. 67 ("Pl.
13 Opp.") at 10.) On December 16, 2011, a verbal order to renew plaintiff's Tylenol was given.
14 (*Id.*) On December 22, 2011, Dr. Sayre again issued a notification stopping plaintiff's Tylenol.
15 (Pl. Opp. at 11.) The following day, Dr. Venes gave plaintiff an order for Tylenol. (*Id.*) On
16 December 30, 2011, Dr. Sayre issued a notification stopping plaintiff's Tylenol. (*Id.*)

17 DISCUSSION

18 A. Requests for Judicial Notice

19 Plaintiff requests that the court take judicial notice, pursuant to Federal Rule of Evidence
20 201, of various documents he has submitted in support of his filings. Rule 201 was intended to
21 obviate the need for formal fact-finding as to certain facts that are undisputed and easily verified.
22 Fed. R. Evid. 201; *Melong v. Micronesian Claims Comm.*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980)
23 (judicial notice under Rule 201 is designed for judicial recognition of scientific or historical fact
24 without resort to cumbersome methods of proof). Rule 201 permits a court to take judicial notice
25 of two kinds of facts: (1) those that are generally known within the court's territorial jurisdiction;
26 and (2) those that are capable of accurate and ready determination by resort to sources whose
27 accuracy cannot reasonably be questioned, for example, an almanac, dictionary, calendar or

1 similar source. In other words, “the fact must be one that only an unreasonable person would
2 insist on disputing.” *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). Documents
3 that are part of the public record may be judicially noticed to show, for example, that a judicial
4 proceeding occurred or that a document was filed in another court case, but a court may not take
5 judicial notice of findings of facts from another case. *See Wyatt v. Terhune*, 315 F.3d 1108,
6 1114 & n.5 (9th Cir. 2003); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). Nor
7 may the court take judicial notice of any matter that is in dispute. *Lee*, 250 F.3d at 689-90.

8 First, plaintiff asks the court to take judicial notice of *Ashker v. Sayre*, No. 05-03759
9 (N.D. Cal. filed February 4, 2010). Defendants oppose the request. Plaintiff’s request that the
10 court take judicial notice of *Ashker* is granted in part and denied in part. The court will take
11 judicial notice of the proceeding for the limited purpose of proving that such a proceeding
12 occurred. *See Wyatt*, 315 F.3d at 1144 n.5. However, to the extent plaintiff wants the court to
13 take judicial notice of *Ashker* to show that Dr. Sayre was deliberately indifferent, the court will
14 not take judicial notice of the facts or findings in that case. Because the liability of Dr. Sayre is
15 in dispute in this action, the court cannot take judicial notice of that disputed fact. *See Lee*, 250
16 F.3d at 689.

17 Second, plaintiff asks the court to take judicial notice of “The Abolitionist Newspaper,
18 summer 2013, issue 20: BORDERS, PAGE 12: Peaceful protest to resume (at Pelican Bay State
19 Prison) July 8, 2013, if demands are not met, # (30).” (Doc. No. 69.) Plaintiff states that the
20 article will “show that [Dr. Sayre] has implemented a systematic pattern of inadequate medical
21 care at [PBSP] and that inmates are tired of Dr. Sayre’s unconstitutional level of medical care.”
22 (*Id.*) The facts contained within this article are not “either (1) generally known within the
23 territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by
24 resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).
25 Further, plaintiff is submitting this article for the truth of the matter asserted, and therefore, it is
26 hearsay. Fed. R. Evid. 801(c). Finally, plaintiff does not provide a copy of this article for the
27 court’s review. Plaintiff’s request that the court take judicial notice of the newspaper article is
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1 denied.

2 B. Motions to Strike and Request for Sanctions⁵

3 Plaintiff requests that the court strike defendants' opposition (doc. no. 77) to plaintiff's
4 motion for summary judgment (doc no. 73) on the retaliation claim. (Doc. No. 80.) Specifically,
5 plaintiff alleges that because Malo-Clines failed to file any supporting declarations in
6 defendants' opposition (doc. no. 58) to plaintiff's retaliation claim in plaintiff's first motion for
7 summary judgment (doc. no. 45), the court should strike defendants' opposition. Defendants
8 have filed an opposition to plaintiff's motion to strike. (Doc. No. 83.) Defendants have also
9 requested leave to submit additional evidence in opposition to plaintiff's motion for summary
10 judgment on the retaliation claim. Plaintiff has filed a reply as well as a motion to strike the
11 additional evidence. (Doc. No. 84.) Moreover, plaintiff requests sanctions against Malo-Clines
12 for perjury. (*Id.*) Defendants have filed an opposition thereto.

13 As defendants point out, defendants have filed their own motion for summary judgment,
14 which includes supporting evidence such as a declaration from Malo-Clines. Plaintiff has not
15 cited to any law that allows a court to strike defendants' opposition in its entirety for failing to
16 attach exhibits, especially when defendants have filed exhibits in support of their own motion for
17 summary judgment and cited to those exhibits in their opposition to plaintiff's motion for
18 summary judgment. Thus, plaintiff's motion to strike is denied. (Doc. No. 80.)

19 In their opposition to plaintiff's motion to strike, defendants state that they believe that
20 they addressed plaintiff's retaliation claim. However, defendants note that plaintiff appears to
21 have added or narrowed his claim to one incident that occurred on November 14, 2011. Thus,
22 out of an abundance of caution, defendants requested permission to submit additional evidence
23 in opposition to plaintiff's more narrow claim about the incident on November 14, 2011. (Doc.
24 No. 83 at 3.)

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26 ⁵ Defendants' motion to for an extension of time to file an opposition to plaintiff's
27 motion to strike is GRANTED. (Doc. No. 85.) Defendants' June 27, 2014 opposition is deemed
28 timely filed.

1 Here, there is no evidence that defendants engaged in any bad faith or malfeasance, nor
2 has plaintiff provided any reason why defendants should not be allowed to supplement their
3 evidence to support their opposition to plaintiff's retaliation claim. Thus, pursuant to Federal
4 Rule of Civil Procedure 56(e), defendants' request to submit additional evidence is granted.

5 Plaintiff has also requested sanctions against Malo-Clines for committing perjury in her
6 responses to plaintiff's requests for admissions. Specifically, plaintiff asserts that in the request
7 for admissions, Malo-Clines denied seeing plaintiff in a medical appointment on November 14,
8 2011. However, argues plaintiff, in Malo-Clines' declaration in support of defendants' motion
9 for summary judgment, Malo-Clines stated that she saw plaintiff for a medical appointment on
10 November 14, 2011.

11 Federal Rule of Civil Procedure 37(c)(2) allows the court to order reasonable expenses,
12 including attorney's fees, incurred in proving that a party failed to admit the truth of some fact.
13 Here, there is no indication that plaintiff, a *pro se* prisoner, incurred any expenses for bringing
14 this motion. Moreover, case law has clarified that "Rule 37 does not empower the district court
15 to award attorney fees to a pro se litigant." *Pickholtz v. Rainbow Technologies, Inc.*, 284 F.3d
16 1365, 1376 (Fed. Cir. 2002). Finally, in the Northern District of California, any motion for
17 sanctions must, *inter alia*, be separately filed. *See* Civil L.R. 7-8(a). Under Civil Local Rule 7-
18 8, a motion for sanctions must comply with the following: (1) the motion must be separately
19 filed; (2) the form of the motion must comply with Civil Local Rule 7-2; (3) the motion must
20 comply with all applicable federal civil rules of procedure, and must be made as soon as
21 practicable after the movant learns of the circumstances alleged to warrant sanctions; and (4)
22 must be served and filed less than 14 days after entry of judgment. *See* Civil L.R. 7-8.
23 Plaintiff's request for sanctions was combined with other requests, and thus, fails to comply with
24 the Civil Local Rules. For all the above reasons, plaintiff's request for sanctions is denied.

25 (Doc. No. 84.)
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1 C. Motions for Summary Judgment

2 1. Legal Standard

3 Summary judgment is proper where the pleadings, discovery and affidavits demonstrate
4 that there is “no genuine issue as to any material fact and that the moving party is entitled to
5 judgment as a matter of law.” Fed. R. Civ. P. 56(c). Material facts are those which may affect
6 the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute
7 as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a
8 verdict for the nonmoving party. *Id.*

9 The party moving for summary judgment bears the initial burden of identifying those
10 portions of the pleadings, discovery and affidavits which demonstrate the absence of a genuine
11 issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). Where the moving
12 party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no
13 reasonable trier of fact could find other than for the moving party. But on an issue for which the
14 opposing party will have the burden of proof at trial, the moving party need only point out “that
15 there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325.

16 Once the moving party meets its initial burden, the nonmoving party must go beyond the
17 pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a
18 genuine issue for trial.” Fed. R. Civ. P. 56(e). The court is only concerned with disputes over
19 material facts and “factual disputes that are irrelevant or unnecessary will not be counted.”
20 *Anderson*, 477 U.S. at 248. It is not the task of the court to scour the record in search of a
21 genuine issue of triable fact. *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996). The
22 nonmoving party has the burden of identifying, with reasonable particularity, the evidence that
23 precludes summary judgment. *Id.* If the nonmoving party fails to make this showing, “the
24 moving party is entitled to judgment as a matter of law.” *Celotex Corp.*, 477 U.S. at 323.

25 The court’s function on a summary judgment motion is not to make credibility
26 determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W.*
27 *Elec. Serv. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). The evidence

1 must be viewed in the light most favorable to the nonmoving party, and the inferences to be
2 drawn from the facts must be viewed in a light most favorable to the nonmoving party. *See id.* at
3 631.

4 2. Eighth Amendment

5 Plaintiff claims that Dr. Sayre and Malo-Clines were deliberately indifferent to his
6 serious medical needs because they interfered with or delayed his receipt of pain medication.

7 Deliberate indifference to a prisoner's serious medical needs violates the Eighth
8 Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the Eighth
9 Amendment only when two requirements are met: (1) the deprivation alleged is, objectively,
10 sufficiently serious, and (2) the official is, subjectively, deliberately indifferent to the inmate's
11 health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

12 A "serious" medical need exists if the failure to treat a prisoner's condition could result
13 in further significant injury or the "unnecessary and wanton infliction of pain." *Id.* The
14 existence of an injury that a reasonable doctor or patient would find important and worthy of
15 comment or treatment; the presence of a medical condition that significantly affects an
16 individual's daily activities; or the existence of chronic and substantial pain are examples of
17 indications that a prisoner has a "serious" need for medical treatment. *McGuckin v. Smith*, 974
18 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc. v.*
19 *Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

20 A prison official exhibits deliberate indifference when he knows of and disregards a
21 substantial risk of serious harm to inmate health. *See Farmer*, 511 U.S. at 837. The official
22 must both know of "facts from which the inference could be drawn" that an excessive risk of
23 harm exists, and he must actually draw that inference. *Id.* "A difference of opinion between a
24 prisoner-patient and prison medical authorities regarding treatment does not give rise to a § 1983
25 claim." *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a claim of medical
26 malpractice or negligence is insufficient to establish a violation of the Eighth Amendment.
27 *McGuckin*, 974 F.2d at 1059. In particular, a plaintiff's opinion that medical treatment was

unduly delayed does not, without more, state a claim of deliberate indifference. *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985).

The parties do not dispute that plaintiff's back pain is a serious medical condition. Assuming that this is a serious medical need, plaintiff has failed to raise a triable issue of fact that defendants acted with deliberate indifference.

The undisputed evidence shows that during 2011, plaintiff was provided pain medication in the forms of Tylenol and salsalate, and was given trigger point injections as well as lidocaine injections for his leg and hip pain. The record does not show or support a reasonable inference of deliberate indifference by defendants in their treatment of plaintiff's back pain.

The record demonstrates that Malo-Clines spoke with or examined plaintiff on February 17, 2011; March 10, 2011; April 15, 2011; May 10, 2011; July 8, 2011; August 3, 2011; August 8, 2011; and November 14, 2011. (Malo-Clines Decl. ¶¶ 13, 14, 18, 19, 29, 30, 34, 46.) During those interactions, Malo-Clines responded to plaintiff's complaints by recommending that plaintiff continue his yoga and in-cell physical therapy program; continuing the trigger point injections; continuing the salsalate and Tylenol; administering lidocaine and Kenalog for pain relief; and re-evaluating the medications plaintiff was being prescribed. In fact, plaintiff concedes that defendants did provide trigger point injections and pain medications. (Opp. at 19.)

Regarding plaintiff's specific allegation that Malo-Clines was interfering with his receipt of pain medication, plaintiff does not provide any evidence to support this claim. At most, the delay between plaintiff requesting a refill of his pain medication and the time those requests were granted was a matter of a few days. Moreover, there is no indication that Malo-Clines was aware of each and every time plaintiff requested a refill via the health services form. At times, other medical professionals ordered the prescription to be refilled.

For example, in May 2011, five days lapsed between when plaintiff requested a refill of his salsalate and when Malo-Clines issued a verbal order to refill plaintiff's prescription. (Am. Compl. at 8; Doc. No. 45-2, Ex. D at 2-3; Malo-Clines Decl. ¶ 20; MSJ, Ex. O at CDCR 2466, 2474.) Also, one day lapsed between May 22 and May 23, 2011 from when plaintiff requested a

1 refill of his salsalate, ranitidine, and Tylenol, and Nurse Flowers responded that all medications
2 had been refilled. (MSJ, Ex. Q at CDCR 2486.) In June 2011, four days elapsed between when
3 plaintiff requested a refill of his salsalate and when Physical Therapist Tewelde stated that
4 plaintiff's salsalate could be refilled. (MSJ, Ex. T at CDCR 2574-75; Malo-Clines Decl. ¶ 25.)
5 Then, plaintiff requested a refill of his salsalate on June 24 and June 30, and Malo-Clines
6 responded by giving a verbal order for the prescription to be renewed for 30 days. (Malo-Clines
7 Decl. ¶ 27.) On July 4, 12, and 24, 2011, plaintiff's requests for refills of his Tylenol and
8 salsalate prescriptions were reviewed and granted. (MSJ, Ex. W.) In August 2011, two days had
9 elapsed between plaintiff's request for pain medication and the date on which Malo-Clines
10 issued a verbal order to refill plaintiff's prescription. (Opp. at 6; MSJ, Ex. Z at CDCR 2653-54;
11 Malo-Clines Decl. ¶ 31.) A few weeks later, six days elapsed between plaintiff's request for
12 pain medication and the date on which Nurse Flowers indicated that plaintiff's prescriptions for
13 salsalate and Tylenol were refilled. (Malo-Clines Decl. ¶ 33.) In September 2011, plaintiff
14 requested refills of his Tylenol and salsalate. (MSJ, Ex. DD at CDCR 2708-09; Doc. No. 45-2 at
15 7.) Malo-Clines denied plaintiff's salsalate prescription refill request until a urinalysis could be
16 performed so that Malo-Clines could verify that plaintiff was actually taking the medication.
17 (Malo-Clines Decl. ¶ 35.) On September 15, 2011, after Malo-Clines reviewed the lab work, she
18 gave a verbal order to refill plaintiff's salsalate prescription for thirty days. (*Id.*; MSJ, Ex. DD at
19 CDCR 2734, 2738.) Based on this undisputed evidence, plaintiff has not shown that Malo-
20 Clines exhibited deliberate indifference.

21 To the extent plaintiff is alleging that defendants caused the temporary delays in his
22 receipt of pain medication, periodic and temporary lapses of a few days to receive pain
23 medication such as are alleged here are insufficient to amount to deliberate indifference. In
24 *Wood v. Housewright*, 900 F.2d 1332 (9th Cir. 1990), a prisoner injured his shoulder in a
25 jailhouse fight. *Id.* at 1333. A physician inserted two pins in the prisoner's shoulder and
26 prescribed a sling. One of the pins eventually fell out, causing the prisoner pain. *Id.* The doctor
27 prescribed an anti-inflammatory and pain-killing medication and recommended referral to an

1 outside orthopedic specialist. *Id.* Despite the doctor’s orders, the prisoner received no medical
2 treatment or pain medication for approximately two months. The Ninth Circuit concluded that
3 in order to sustain a claim of deliberate indifference the delay in the prisoner’s treatment must
4 have caused “substantial harm”. However, based on the treatment the prisoner received, and the
5 seriousness of the prisoner’s condition, the prisoner did not show such “substantial harm” to
6 warrant an Eighth Amendment violation. *Id.* at 1335. Moreover, the Ninth Circuit reasoned that
7 the delay could not have substantially harmed the prisoner’s treatment, “considering that the only
8 remedy immediately available was a prescription for painkillers.” *Id.* Similarly here, a delay of
9 a few days between plaintiff’s requesting a refill of his pain medication, and Malo-Clines’ order
10 to refill the prescription could not have substantially harmed plaintiff. *See id.* In addition to the
11 pain medications that plaintiff was prescribed, the evidence is undisputed that Malo-Clines
12 ordered other treatments, in accordance with the specialist’s recommendations, to alleviate
13 plaintiff’s back pain. (Malo-Clines Decl. ¶¶ 18, 29, 30, 42, 46.)

14 Moreover, there is an absence of evidence that defendants interfered with or had any
15 knowledge of when or how plaintiff received his medication. Despite plaintiff’s conclusory
16 allegations, there is an absence of evidence that Malo-Clines or Dr. Sayre had a responsibility to
17 investigate or ensure that plaintiff received his medications, once Malo-Clines or another
18 practitioner ordered plaintiff’s prescriptions. Indeed, Malo-Clines declares that she had no
19 involvement in the dispensing or refilling of plaintiff’s medications as that task is undertaken by
20 Maxor and the nursing staff. (Malo-Clines Decl. ¶ 37.) Plaintiff argues that whether or not he
21 received his pain medication is a material fact in dispute. (Opp. at 18.) However, the
22 determination of that fact is not relevant or material to defendants’ liability without any evidence
23 to support plaintiff’s assumption that Malo-Clines or Dr. Sayre had a responsibility to ensure that
24 plaintiff received that medication.

25 Further, although plaintiff states that he “continuously complained” about not receiving
26 his medication, there is an absence of evidence that defendants knew plaintiff was not receiving
27 his medication or that there was any delay in plaintiff’s receipt of medication. Plaintiff’s

1 documentary evidence in support of his assertion that Malo-Clines knew that he was not
2 receiving medication is unpersuasive. (Opp. at 19, citing Ex. G at 13, 24, 25.) The first
3 document is dated in 2010, which precedes the scope of this lawsuit. (*Id.*, Ex. G at 13.) The
4 second document is a copy of plaintiff's health services request form, dated October 11, 2011,
5 which is addressed to Malo-Clines and claims that plaintiff has been having problems receiving
6 his pain medication refills. (*Id.*, Ex. G at 24.) However, in response, a medical staff member
7 directed plaintiff to file a "request for interview" form if he wished to communicate with his
8 primary care physician. (*Id.*) The final document to which plaintiff cites is a copy of his
9 October 12, 2011 request for an interview form. (*Id.*, Ex. G at 25.) Plaintiff addressed the
10 request to Malo-Clines, however, the response stating that plaintiff does not have a current
11 salsalate prescription appears to be written by someone else. (*Id.*) The form itself states, "you
12 will be called in for an interview in the near future if the matter cannot be handled by
13 correspondence." (*Id.*) None of the documents provides evidence that Malo-Clines received
14 notice that plaintiff was not receiving his medication.

15 With respect to Dr. Sayre, plaintiff claims that Dr. Sayre failed to stop the interference
16 with plaintiff's receipt of pain medication, and further, directly interfered with plaintiff's receipt
17 of medication in December 2011 and January 2012. (Doc. No. 45 at 5-6.) Specifically, plaintiff
18 asserts that in December 2011, and January 2012, Dr. Sayre stopped plaintiff's medication
19 several times for non-medical reasons. (*Id.* at 6.) Dr. Sayre declares that, according to prison
20 procedure, on December 12, 2011, Dr. Sayre issued a notification regarding plaintiff's
21 acetaminophen prescription because the prescription was about to expire. (Sayre Decl. ¶ 52.)
22 Because of the imminent expiration, Dr. Sayre issued a notation for the prescription to be
23 stopped (MSJ, Ex. SS at CDCR 2911) to ensure that plaintiff's primary care physician reviewed
24 the expiring order and determined whether it was medically necessary to renew the prescription.
25 (Sayre Decl. ¶ 52.) After being notified about the discontinuation of plaintiff's acetaminophen,
26 on December 16, 2011, plaintiff's primary care physician renewed plaintiff's prescription. (*Id.*)
27 On December 22, 2011, again, Dr. Sayre noticed that plaintiff's prescription was ending, so Dr.

1 Sayre issued another notification for plaintiff's primary care physician to renew if medically
2 necessary. (*Id.* ¶ 54.) The following day, on December 23, 2011, plaintiff's prescription was
3 renewed. (*Id.*)

4 In order for deliberate indifference to be established, there must be a purposeful act or
5 failure to act on the part of the defendant and resulting harm. *See McGuckin*, 974 F.2d at 1060.
6 Here, although Dr. Sayre purposefully "stopped" plaintiff's prescriptions for Tylenol prior to its
7 expiration date several times, Dr. Sayre did so in order to notify medical staff to re-evaluate
8 plaintiff's need for such medication. (Sayre Decl. ¶ 52.) On both occasions, the medications
9 were renewed by medical staff. Plaintiff does not provide any viable evidence disputing Dr.
10 Sayre's statement. Further, plaintiff does not provide any clear evidence that he was without
11 Tylenol during December 2011 or January 2012 based on Dr. Sayre's orders to stop the
12 prescription. Moreover, plaintiff does not assert that he suffered any harm as a result of Dr.
13 Sayre's orders. Without such evidence, there is an absence of evidence that Dr. Sayre directly
14 interfered with plaintiff's pain medication in a way that exhibited deliberate indifference to
15 plaintiff's medical needs.

16 With respect to plaintiff's assertion that Dr. Sayre failed to stop the interference with
17 plaintiff's receipt of pain medication, plaintiff has failed to demonstrate that Dr. Sayre was aware
18 that plaintiff was not receiving his medications in a timely manner. While plaintiff asserts that
19 Dr. Sayre was put on notice when plaintiff complained to medical staff about his medication
20 prescriptions, plaintiff does not provide any evidence that Dr. Sayre was deliberately indifferent
21 to these complaints. For example, some of the documents plaintiff has provided in support of his
22 claim are of records that precede the events involved in this lawsuit. (Pl. Opp. at 21, Exs. D, E,
23 F, H, I, M.) Plaintiff has also provided Dr. Sayre's June 22, 2011 response to plaintiff's
24 administrative grievance in which plaintiff requested, *inter alia*, that he receive trigger point
25 injections immediately. (*Id.*, Ex. T at 1, 6.) In the response, Dr. Sayre granted plaintiff's
26 request, and noted that on March 8, 2011, Malo-Clines gave plaintiff four lidocaine injections,
27 and on April 28, 2011, Dr. Martinelli gave plaintiff an injection of kenalog. (*Id.* at 6.) Other

1 documents submitted by plaintiff demonstrate that plaintiff submitted administrative grievances
2 complaining that he was not receiving his pain medication, however, there is no indication that
3 Dr. Sayre received these documents. (*Id.*, Ex. U, W.) In fact, the documents suggest that one
4 appeal was returned to plaintiff for failure to submit supporting documents. (*Id.*, Ex. U at 5-8.)

5 Dr. Sayre did respond to several of plaintiff's administrative appeals. In one appeal,
6 plaintiff complained that he felt his medication was being interfered with and wanted the
7 interference to stop. (*Id.*, Ex. V at 3.) In response, Dr. Sayre granted plaintiff's appeal and noted
8 that there was no evidence of retaliation, and plaintiff's salsalate was renewed. (*Id.* at 8.) In
9 December 2011, plaintiff again filed an administrative appeal, demanding a salsalate refill and to
10 be prescribed an alternate pain medication. (*Id.*, Ex. X at 3.) Dr. Sayre denied plaintiff's appeal,
11 explaining that plaintiff's salsalate had been discontinued by Physician's Assistant L. Thomas
12 because plaintiff had been complaining of gastrointestinal discomfort. (*Id.*) Dr. Sayre then
13 noted that, on February 13, 2012, Physician's Assistant L. Thomas evaluated plaintiff again,
14 administered a kenalog injection, and advised plaintiff to alternate cold and warm compresses.
15 (*Id.*) In none of these responses can it be said that Dr. Sayre exhibited deliberate indifference in
16 his treatment of plaintiff.

17 Finally, plaintiff points to a memorandum authored by Dr. Sayre in 2008 directing prison
18 medical staff to deny essential and constitutional medical care. (Doc. No. 72, Ex. FF.)
19 However, a review of that memorandum in fact reveals that Dr. Sayre issued a notice to medical
20 providers that the prison was short staffed in terms of medical providers. (*Id.*) Dr. Sayre
21 instructed all providers "to give only the most essential constitutional care. No common, minor,
22 or uncomfortable issues should be addressed. . . . Move on to essential care." (*Id.*) Nothing in
23 the 2008 memorandum displays a policy or custom wherein Dr. Sayre encouraged medical staff
24 to deny constitutional care.

25 In sum, plaintiff fails to raise a triable issue of fact that defendants were deliberately
26 indifferent to his serious medicals needs by interfering with his receipt of pain medication.

1 Defendants are entitled to summary judgment on plaintiff's deliberate indifference claim.⁶

2 3. Retaliation

3 Plaintiff claims that, on November 14, 2011, plaintiff was seen by Malo-Clines for
4 trigger point injections for his back pain. (Am. Compl. at 7.) When plaintiff was being escorted
5 back to his cell, the escorting officers, Correctional Officer Trimm and Cardenas, asked plaintiff
6 why plaintiff was still litigating *Estrada I* if plaintiff was receiving treatment. (*Id.*; Doc. No. 73
7 at 3.) Plaintiff felt intimidated, and believed that the officers were threatening plaintiff to drop
8 *Estrada I*.⁷ (Am. Compl. at 7; Doc. No. 80 at 1.)

9 "Within the prison context, a viable claim of First Amendment retaliation entails five
10 basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2)
11 because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's
12 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
13 legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005)
14 (footnote omitted).

15 Based on the undisputed facts, plaintiff has failed to establish that Malo-Clines took any
16 adverse action against him, or that she took such action based on *Estrada I*. That plaintiff
17 believes Malo-Clines "must of told [the officers] of the lawsuit" [sic] is based on nothing but
18 speculation. Moreover, even assuming that Malo-Clines told the officers about the lawsuit, that
19 communication can hardly be seen as an "adverse action." Plaintiff would like the court to infer
20 that not only did Malo-Clines inform the officers about *Estrada I*, but Malo-Clines also

22 ⁶ Because the court is granting defendants' motion for summary judgment as to this
23 claim, it is unnecessary to address defendants' argument for qualified immunity.

24 ⁷ To the extent plaintiff claims that Malo-Clines retaliated against him by interfering
25 with plaintiff's receipt of medication because plaintiff was litigating *Estrada I*, there is an
26 absence of evidence that Malo-Clines took any adverse action against plaintiff. Plaintiff's
27 allegations that Malo-Clines failed to ensure that plaintiff received the medication are
28 unsupported by any evidence that Malo-Clines was responsible for doing so. In addition,
plaintiff appears to have narrowed his retaliation claim to encompass solely this November 14,
2011, incident. (Doc. No. 70, Doc. No. 80 at 3.)

1 instructed them to intimidate plaintiff because of the lawsuit. However, the facts as presented by
2 plaintiff do not give rise to a reasonable inference that Malo-Clines actions were “because of”
3 plaintiff’s prior lawsuit against her. *See Wood v. Yordy*, No. 12-35336, 2014 WL 2462575, *4
4 (9th Cir. June 3, 2014) (“We have repeatedly held that mere speculation that defendants acted
5 out of retaliation is not sufficient.”); *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637
6 F.3d 1047, 1061 (9th Cir. 2011) (making a distinction between a set of events that “could
7 conceivably have occurred” and a set of facts that one could reasonably infer in fact occurred).

8 Nor has plaintiff presented any circumstantial evidence of motive, which normally
9 includes, “(1) proximity in time between protected speech and the alleged retaliation; (2) [that]
10 the [defendant] expressed opposition to the speech; [or] (3) other evidence that the reasons
11 proffered by the [defendant] for the adverse . . . action were false and pretextual.” *McCollum v.*
12 *California Dept. of Corrections and Rehabilitation*, 647 F.3d 870, 882 (9th Cir. 2011).

13 The retaliatory act of which plaintiff complains occurred on November 14, 2011.
14 *Estrada I* was filed over a year earlier, on October 25, 2010. Thus, the timing of the incident
15 does not support an inference of motive. *See id.* (citing *Vasquez v. Cnty. of Los Angeles*, 349
16 F.3d 634, 646 (9th Cir. 2004) (recognizing that a thirteen month lapse is too long to support an
17 inference of causality)). Next, there is no evidence demonstrating that Malo-Clines expressed
18 any opposition to Malo-Clines’ prior lawsuit. *See id.* Similarly, because there is no evidence
19 that Malo-Clines expressed opposition to plaintiff’s prior lawsuit, factor 3 regarding whether
20 Malo-Clines’ proffered reasons were pretextual or false is inapplicable. *See id.* Finally, there is
21 no evidence to infer that Malo-Clines had any conversation with the correctional officers
22 regarding plaintiff’s prior lawsuit.

23 In sum, plaintiff fails to raise a triable issue of fact that Malo-Clines retaliated against
24 him for litigating *Estrada I*, and defendants are entitled to summary judgment on plaintiff’s
25 retaliation claim.⁸

26
27 ⁸ Because the court is granting defendants’ motion for summary judgment as to this
28 claim, it is unnecessary to address defendants’ argument for qualified immunity.

1 **CONCLUSION**

2 Plaintiff's motion for leave to file a sur-reply is GRANTED. (Doc. No. 81.) Plaintiff's
3 requests for judicial notice are DENIED. Plaintiff's motion to strike defendants' opposition to
4 plaintiff's motion for summary judgment is DENIED. (Doc. No. 80.) Defendants' motion for an
5 extension of time to file an opposition to plaintiff's motion to strike is GRANTED. (Doc. No.
6 85.) Plaintiff's motion to strike defendants' request to submit additional evidence and for
7 sanctions is DENIED. (Doc. No. 84.)

8 Defendants' motion for summary judgment is GRANTED. (Doc. No. 55.) Plaintiff's
9 motions for summary judgment are DENIED. (Doc. Nos. 45, 73.) Judgment shall be entered in
10 favor of defendants. The clerk shall terminate all pending motions and close the file.

11 IT IS SO ORDERED.

12 DATED: 7/28/14


13 LUCY H. KOH
14 United States District Judge
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