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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GEORGE MARTIN,

Plaintiff,

v.

W. MUNIZ, et al.,

Defendants.

Case No. 17-01690 BLF (PR)

**ORDER GRANTING
DEFENDANTS' MOTION
FOR SUMMARY
JUDGMENT; GRANTING
MOTION TO RESUBMIT
EXHIBITS**

(Docket Nos. 149, 167)

Plaintiff, a California inmate, filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against prison officials at the Salinas Valley State Prison (“SVSP”). Plaintiff’s second amended complaint (“SAC”) is the operative complaint in this matter. Dkt. No. 129.¹ After screening the SAC, the Court ordered the matter to proceed on the Eighth Amendment claim

¹ All page references herein are to the Docket (ECF) pages shown in the header to each document and brief cited, unless otherwise indicated.

1 with respect to Plaintiff’s pain management, including the denial
2 of corrective surgery to address the chronic pain, against
3 Defendants Dr. Kim R. Kumar, Dr. Darrin M. Bright, Tuan Anh
4 Tran (Pharmacist), Dr. Edward Miles Birdsong, and Dr. Jennifer
5 Villa at SVSP. Dkt. No. 137 at 7.²

6 Defendants filed a motion for summary judgment pursuant
7 to Rule 56 on the grounds that there is no genuine issue as to any
8 material fact, that they are entitled to judgment as a matter of law,
9 and they are also entitled to qualified immunity. Dkt. No. 149.
10 In support, Defendants filed a declaration by Defendant Dr.
11 Bright and exhibits. Dkt. Nos. 149-1, 149-2. Plaintiff filed
12 opposition along with his declaration and exhibits in support.³

13
14 ² In the same order, the Court struck portions of the SAC
15 containing allegations against Defendants Dr. Eric Sullivan and
16 Warden W. Muniz as improperly joined to this action and
terminated them from this action. Dkt. No. 137 at 6.

17 ³ Plaintiff submits over 400 pages of documents separated into
18 Exhibits A through F. Dkt. Nos. 158-1 through 158-7. Exhibit A
19 is labeled as “Re: Dr. Kim R. Kumar participation in a series of
20 negligent events that culminated in deliberate indifference in my
21 medical needs.” Dkt. No. 158-1 at 1 (consisting of 70 pages).
22 Exhibit B is labeled as “Re: Dr. Bright, M. Darrin, participating
23 in a series of negligent events that cause me harm; deliberate
24 indifference to medical needs.” Dkt. No. 158-2 at 1 (consisting
25 of 55 pages). Exhibit C is labeled as “Re: Dr. Edward Miles
26 Birdsong, malicious participation in series of negligent events
27 that caused me harm; deliberate indifference to my medical
28 needs.” Dkt. No. 158-3 at 1 (consisting of 28 pages). Exhibit D
is labeled as “Re: (PIC) T. A. Tran, Defend. Participation in a
series of events that caused Plaintiff known harm; deliberate
indifference to my serious RX pharmacological therapy
medication/regiment care needs [*sic*].” Dkt. No. 158-4 at 1

1 Dkt. Nos. 158, 158-1 through 158-7. Defendants filed a reply.
2 Dkt. No. 159.

3 Defendants later filed a motion to resubmit the exhibits in
4 support of their summary judgment motion attached to an
5 amended declaration by Defendant Dr. Bright, authenticating the
6 resubmitted medical records that are otherwise identical to those
7 originally submitted. Dkt. No. 167 at 2. Good cause appearing,
8 the motion is GRANTED. The amended declaration of
9 Defendant Bright and the authenticated exhibits newly submitted
10 under Docket No. 167-1 shall supersede those previously filed
11 with Defendants' summary judgment motion under Docket Nos.
12 149-1 and 149-2.

13 For the reasons stated below, Defendants' motion for
14 summary judgment is **GRANTED**.

15 **DISCUSSION**

16 **I. Statement of Facts**⁴

17 **A. Plaintiff's Surgery in 2001 and Transfer to SVSP**

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20
21 (consisting of 47 pages). Exhibit E is labeled as "SVSP appeals
22 exhausted in support of motion for opposition to Defend.
23 summary of judgment [*sic*]." Dkt. No. 158-5 at 1 (consisting of
24 78 pages); Dkt. No. 158-6 (consisting of 91 pages). The label for
25 Exhibit F is not legible, Dkt. No. 158-7 at 1, but it contains a
26 copy of Defendants' response to Plaintiff's request for
27 admissions, a copy of a guide from the Medical Board of
28 California, excerpts from California's regulations and the state
prison health care policies, and medical articles. *Id.* at 2-77.

⁴ The following facts are not disputed unless otherwise stated.

1 Plaintiff transferred to SVSP on February 14, 2007. Bright
2 Decl. ¶ 9⁵; Dkt. No. 167-1 at 10-17. At that time, Plaintiff's
3 transfer papers noted that Plaintiff had a post-cervical
4 laminectomy and fusion of his cervical spine from C4-C7 in
5 March 2001. Bright Decl. ¶ 5; Dkt. No. 167-1 at 10. Plaintiff
6 had been issued a wheelchair due to a supposed spinal cord
7 injury. *Id.*

8 According to Plaintiff's declaration and the papers he
9 submitted in support of his opposition, he underwent an
10 unnecessary surgery at Mercy Hospital in Bakersfield by
11 neurologist Dr. M. Rahimifar, not a party to this action, involving
12 a metal disc implant in his spine in May 2006, the year before he
13 was transferred to SVSP. Martin Decl. ¶¶ 5-8; Dkt. No. 157 at 3-
14 5; Dkt. No. 158-1 at 12-13. The following month he suffered a
15 fall, injuring his neck, and was again seen by Dr. Rahimifar on
16 June 22, 2006. Dkt. No. 158-1 at 14-15. In August 2006, Dr.
17 Rahimifar recommended a "flex/extension C-Spine surgery,"
18 which Plaintiff refused. Dkt. No. 158-1 at 18-22. Plaintiff
19 claims that ever since the May 2006 surgery, he has been unable
20 to use his upper or lower limbs for even a short period of time
21 without suffering paralysis/numbness and agonizing intractable
22 pain. Martin Decl. ¶ 6; Dkt. No. 15 at 5-6. According to the
23 transfer papers, it was also noted that Plaintiff had again refused a
24

25 ⁵ Citations to Defendant Bright's amended declaration refer to
26 Docket No. 167-1 at 1-8. All other citations to Docket No. 167-1
27 are to the exhibits offered in support of Defendants' motion for
28 summary judgment.

1 surgery in December 2006 for spinal cord decompression. Dkt.
2 No. 167-1 at 11.

3 At the time of his transfer to SVSP, Plaintiff was taking
4 three pain medications but not taking any blood pressure
5 medication. Bright Decl. ¶ 10; Dkt. No. 167-1 at 11-12. In
6 March 2007, medical staff refilled Plaintiff's prescription for
7 tramadol, a pain reliever. *Id.* In July 2007, Plaintiff was given
8 atenolol, a blood pressure medication. Bright Decl. ¶ 11; Dkt.
9 No. 167-1 at 17.

10 On July 12, 2007, Plaintiff got into an altercation with
11 another inmate; a Rules Violation Report was issued
12 documenting the incident. Dkt. No. 158-2 at 10. The reporting
13 officer stated that after an inmate began swinging at Plaintiff's
14 face with clinched fists, Plaintiff stood up from his wheelchair
15 and started swinging back with his own clinched fists. *Id.* On
16 July 13, 2007, progress notes from a medical visited also stated
17 that Plaintiff had gotten out of his wheelchair during an assault
18 with another inmate on July 12, 2007. Bright Decl. ¶ 5; Dkt. No.
19 167-1 at 15.⁶ Staff noted that Plaintiff was very flexible and ran
20 about 10 feet during that fight. *Id.* Another medical staff
21 documented witnessing Plaintiff run about 10 feet toward his
22

23 ⁶ In his declaration, Defendant Bright states that this incident
24 occurred on January 3, 2017. Bright Decl. ¶ 5. However, a
25 review of the medical records indicate that this incident took
26 place on July 12, 2007. Dkt. No. 167-1 at 15. It also appears that
27 the separate report of staff witnessing Plaintiff run about 10 feet
28 took place on the same date, perhaps even based on the same
incident. *Id.* at 16.

1 wheelchair and independently sitting down in it. *Id.*; Dkt. No.
2 167-1 at 16.

3 In August 2007, his primary care physician at the time, who
4 is not a party to this action, indicated that Plaintiff had borderline
5 high blood pressure but did not prescribe any additional
6 medications for it. Bright Decl. ¶ 11; Dkt. No. 167-1 at 14.

7 According to the papers submitted by Plaintiff, he filed an
8 inmate grievance (Log No. SVSP-A-07-03523) claiming to have
9 an adverse reaction when taking medication under the “crush and
10 float” policy. Dkt. No. 158-1 at 25. The second level appeal
11 reviewed Plaintiff’s health record and found that he had been
12 taking prescribed medications tramadol three times a day in crush
13 and float form throughout August and September 2007, and only
14 reported experiencing a sore throat on occasion. *Id.* The
15 director’s level appeal also found that Plaintiff was seen various
16 times throughout the period by the PCP and nurses, and none of
17 the documentation of those visits demonstrated there was any
18 clinical correlation to his claim that his medication was the cause
19 of his sore throat. *Id.* at 27.

20 **B. Medical Care Since 2013**

21 Between February 2013 and August 2013, Plaintiff either
22 refused medications or failed to appear at the pill line to receive
23 his medications on more than 100 occasions, which were
24 prescribed by various physicians who are not a party to this
25 action. Bright Decl. ¶ 12; Dkt. No. 167-1 at 15-41. In August
26 2013, Plaintiff also refused a vaccination, and refused to be tested
27 for HIV, Hepatitis C, and Hepatitis B. *Id.* ¶ 13; Dkt. No. 167-1 at
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1 21, 22.

2 Plaintiff filed a health care appeal form in July 2013,
3 complaining about crushed medication. Dkt. No. 158-2 at 28.
4 On September 4, 2013, Defendant Bright prepared the response
5 for the first level appeal, stating that it was denied because
6 Plaintiff was being provided crushed and floated form medication
7 pursuant to policy. *Id.*

8 Plaintiff was also prescribed Tylenol #3 (with codeine) for
9 the first time on December 13, 2013. Bright Decl. ¶ 13. The
10 pharmacist, Defendant Tran, provided the medication in a
11 crushed form. Dkt. No. 158-4 at 17. On January 21, 2014, staff
12 began providing Plaintiff with Tylenol #3 in liquid form, then
13 stopped on February 1, 2014. *Id.*; Dkt. No. 167-1 at 42-44.

14 The medical records also include numerous occasions of
15 Plaintiff's non-compliance with SVSP medical staff throughout
16 2014. Bright Decl. ¶ 15. On January 26, 2014, and March 25,
17 2014, Plaintiff refused to take his heart medication. *Id.*; Dkt. No.
18 167-1 at 46. In April 2014, he refused to take Elevil, an
19 antidepressant, and Carbamazepine, which is used to treat pain.
20 *Id.*; Dkt. No. 167-1 at 48-49. In May 2014, Plaintiff refused to
21 take his blood pressure medication, clonidine, even after being
22 informed that such a refusal would increase the risk of a stroke
23 and could lead to paralysis or death. *Id.*; Dkt. No. 167-1 at 51-53.
24 That same month, Plaintiff also refused to take any of his
25 medication unless he received morphine. *Id.*; Dkt. No. 167-1 at
26 54. On May 14, 2014, Plaintiff saw Dr. S. Posson, a nonparty, to
27 discuss an inmate grievance he had filed. Dkt. No. 158-4 at 13.

1 Dr. Posson noted that Plaintiff had a chronic sore throat but
2 denied having any difficulty swallowing. *Id.* He received
3 extended released morphine that same day. Dkt. No. 158-2 at 32;
4 Dkt. No. 158-4 at 16. Then in June 2014, Plaintiff refused to sign
5 for copies of certain medical records, and was uncooperative and
6 argumentative with staff in July, September, and October 2014.
7 Bright Decl. ¶ 16; Dkt. No. 167-1 at 55-58; Dkt. No. 158-1 at 56-
8 57. In November 2014, he refused to wear a mobility vest, which
9 is used to identify inmates who are hearing or visually impaired
10 in the event of an emergency. *Id.*; Dkt. No. 167-1 at 59. He also
11 initially refused to go to an appointment with Dr. Posson on
12 December 26, 2014, but later showed up at the clinic seeking a
13 visit. *Id.*; Dkt. No. 167-1 at 60-61; Dkt. No. 158-1 at 60-61.

14 Plaintiff continued to be uncooperative during 2015. During
15 July and August 2015, Plaintiff refused to take medication for
16 pain and spasms on five separate occasions. Bright Decl. ¶ 17;
17 Dkt. No. 167-1 at 63-67. On March 11, 2015, Defendant
18 Birdsong noted that Plaintiff was belligerent and refusing to
19 cooperate. *Id.*; Dkt. No. 167-1 at 73. On August 14, 2015,
20 Defendant Birdsong met with Plaintiff to discuss his refusal to
21 take his medication and noted that Plaintiff declined to take a flu
22 shot and vaccinations for twinrix (a vaccine against hepatitis A
23 and hepatitis B) and pneumonia. *Id.*; Dkt. No. 167-1 at 71. On
24 August 15, 2015, Plaintiff was not cooperative during a
25 telemedicine consult with a psychiatrist, a nonparty. *Id.*; Dkt.

1 No. 167-1 at 70.⁷ On December 11, 2015, Plaintiff became
2 belligerent while interacting with Dr. Carl Bourne, a nonparty,
3 and called him a “liar.” *Id.*; Dkt. No. 167-1 at 68.

4 Plaintiff’s noncompliance continued during 2016. On May
5 3, 2016, Defendant Dr. Villa discontinued the extended release
6 morphine and ordered immediate release morphine instead.
7 Bright Decl. ¶ 19; Dkt. No. 167-1 at 107-108. However, Dr.
8 Villa discontinued the immediate release morphine on May 13,
9 2016, because Plaintiff refused to take it. *Id.*; Dkt. No. 167-1 at
10 104. Then followed further instances of noncompliance with
11 medical staff: on June 27, 2016, Plaintiff refused to take
12 immediate release morphine for pain, Bright Decl. ¶ 20, Dkt. No.
13 167-1 at 103; on June 30, 2016, he refused to sign a document so
14 that he could receive copies of his medical records which he had
15 requested, *id.*, Dkt. No. 167-1 at 101-102; on July 11, 2016,
16 Plaintiff demanded that staff provide him with early release
17 morphine and again refused immediate release morphine and
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19 ⁷ Defendants also assert that on September 21, 2015, Plaintiff
20 refused an eye exam for glaucoma. Bright Decl. ¶ 17; Dkt. No.
21 167-1 at 69. Plaintiff objects to the admission of this eye exam
22 into evidence, asserting that the Court had ordered no vision care
23 issues could be addressed in this action. Martin Decl. ¶ 13. That
24 prohibition, however, was on Plaintiff, to limit the breath of this
25 action to his pain management issues. Dkt. No. 137 at 6.
26 Defendants submitted this evidence as another example of
27 Plaintiff’s persistent non-compliance in response to their attempts
28 to provide treatment. Even so, the Court will sustain Plaintiff’s
objection and disregard this evidence as there is plenty of other
evidence to support Defendants’ argument regarding Plaintiff’s
non-compliance.

1 gabapentin, *id.*, Dkt. No. 167-1 at 100; he refused to go to a
2 medical appointment on July 29, 2016, *id.*, Dkt. No. 167-1 at 99;
3 on August 22, 2016, he refused his pain medications and
4 demanded that Defendant Birdsong provide him with opioids *id.*,
5 Dkt. No. 167-1 at 98. On August 25, 2016, Plaintiff filed an
6 inmate grievance against Defendant Villa for discontinuing his
7 immediate release morphine. Dkt. No. 167-1 at 97.

8 On October 12, 2016, Plaintiff had an MRI of the cervical
9 and thoracic spine that showed no significant disease. Bright
10 Decl. ¶ 6; Dkt. No. 167-1 at 91; Dkt. No. 158-2 at 38-41. That
11 same month, Plaintiff stated that he would no longer work with
12 medical staff and would “just deal with the courts from now on.”
13 *Id.* ¶ 20; Dkt. No. 167-1 at 96. On December 1, 2016, he was
14 examined by Dr. K. Kaur, not a party to this action, who noted
15 that Plaintiff informed him that he could not take crushed/float
16 medication “due to dysphagia, since 2002.” Dkt. No. 167-1 at
17 94. However, Dr. Kaur noted that after reviewing Plaintiff’s
18 records, he did not find “any limitations as far as dysphagia with
19 crushed liquids” and that Plaintiff was “eating normal.” *Id.* at 95.

20 Throughout 2016 and 2017, Plaintiff was given Tylenol
21 three times per day for pain. Bright Decl. ¶ 21; Dkt. No. 167-1 at
22 92.

23 On January 20, 2017, Plaintiff had a telemedicine consult
24 with Dr. D. Ramberg, to review his current thoracic and cervical
25 MRI. Dkt. No. 158-2 at 42-43. Dr. Ramberg noted that another
26 surgery to address Plaintiff’s back complaints would require a
27 “major operation with significant risks and not a very probable
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1 result that [Plaintiff] would be happy with.” *Id.* at 43. Dr.
2 Ramberg opined, “I doubt that his complaints would improve.”
3 *Id.*

4 On March 9, 2017, Plaintiff was again seen by Dr. Kaur,
5 who noted that Plaintiff sought liquid morphine and refusing to
6 take crush and float meds because of dysphagia. Dkt. No. 158-2
7 at 47. Dr. Kaur stated that Plaintiff had “unfounded claims which
8 medically are not substantiated, such as dysphagia to crush &
9 float medications although he tolerates regular diet.” *Id.*

10 Plaintiff filed this action on March 28, 2017. Dkt. No. 1.

11 **C. Plaintiff’s Claims**

12 This action is proceeding only on Eighth Amendment
13 deliberate indifference claims based on the following allegations
14 in the SAC involving the treatment for Plaintiff’s chronic pain; it
15 does not include the improperly joined claims that were stricken
16 from this action. Dkt. No. 137 at 6. Plaintiff claims that in
17 February 2007, he was given the wrong blood pressure medicine
18 and that another pain medication, tramadol, was improperly
19 cancelled. Dkt. No. 129 at 11-13. Plaintiff claims that Defendant
20 Tran was deliberately indifferent to him from 2007 through 2015,
21 and that he has been falsely labeled as a “non-compliant” patient.
22 *Id.* at 13-14. Plaintiff claims that at some point in 2013, he was
23 given Tylenol with codeine but was later given a different drug
24 which tasted strange. *Id.* at 17-18. Plaintiff claims that his
25 prescription for extended release morphine was cancelled in 2016
26 and replaced with “crush-float morphine” which is inadequate.
27 *Id.* at 22-23. Lastly, Plaintiff claims that he was denied pain
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1 medication, a CAT scan, and surgeries during 2016 and 2017. *Id.*
2 at 23-30.

3 **II. Summary Judgment**

4 Summary judgment is proper where the pleadings, discovery
5 and affidavits show that there is “no genuine dispute as to any
6 material fact and the movant is entitled to judgment as a matter of
7 law.” Fed. R. Civ. P. 56(a). A court will grant summary
8 judgment “against a party who fails to make a showing sufficient
9 to establish the existence of an element essential to that party’s
10 case, and on which that party will bear the burden of proof at trial
11 . . . since a complete failure of proof concerning an essential
12 element of the nonmoving party’s case necessarily renders all
13 other facts immaterial.” *Celotex Corp. v. Cattrett*, 477 U.S. 317,
14 322-23 (1986). A fact is material if it might affect the outcome
15 of the lawsuit under governing law, and a dispute about such a
16 material fact is genuine “if the evidence is such that a reasonable
17 jury could return a verdict for the nonmoving party.” *Anderson*
18 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

19 Generally, the moving party bears the initial burden of
20 identifying those portions of the record which demonstrate the
21 absence of a genuine issue of material fact. *See Celotex Corp.*,
22 477 U.S. at 323. Where the moving party will have the burden of
23 proof on an issue at trial, it must affirmatively demonstrate that
24 no reasonable trier of fact could find other than for the moving
25 party. But on an issue for which the opposing party will have the
26 burden of proof at trial, the moving party need only point out
27 “that there is an absence of evidence to support the nonmoving
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1 party's case." *Id.* at 325. If the evidence in opposition to the
2 motion is merely colorable, or is not significantly probative,
3 summary judgment may be granted. *See Liberty Lobby*, 477 U.S.
4 at 249-50.

5 The burden then shifts to the nonmoving party to "go
6 beyond the pleadings and by her own affidavits, or by the
7 'depositions, answers to interrogatories, and admissions on file,'
8 designate specific facts showing that there is a genuine issue for
9 trial.'" *Celotex Corp.*, 477 U.S. at 324 (citations omitted); Fed.
10 R. Civ. P. 56(e). "This burden is not a light one. The non-
11 moving party must show more than the mere existence of a
12 scintilla of evidence." *In re Oracle Corporation Securities*
13 *Litigation*, 627 F.3d 376, 387 (9th Cir. 2010) (citing *Liberty*
14 *Lobby*, 477 U.S. at 252). "The non-moving party must do more
15 than show there is some 'metaphysical doubt' as to the material
16 facts at issue." *Id.* (citing *Matsushita Elec. Indus. Co., Ltd. v.*
17 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). "In fact, the non-
18 moving party must come forth with evidence from which a jury
19 could reasonably render a verdict in the non-moving party's
20 favor." *Id.* (citing *Liberty Lobby*, 477 U.S. at 252). If the
21 nonmoving party fails to make this showing, "the moving party is
22 entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S.
23 at 323.

24 The Court's function on a summary judgment motion is not
25 to make credibility determinations or weigh conflicting evidence
26 with respect to a material fact. *See T.W. Elec. Serv., Inc. V.*
27 *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.
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1 1987). The evidence must be viewed in the light most favorable
2 to the nonmoving party, and the inferences to be drawn from the
3 facts must be viewed in a light most favorable to the nonmoving
4 party. *See id.* at 631. It is not the task of the district court to
5 scour the record in search of a genuine issue of triable fact.
6 *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996). The
7 nonmoving party has the burden of identifying with reasonable
8 particularity the evidence that precludes summary judgment. *Id.*
9 If the nonmoving party fails to do so, the district court may
10 properly grant summary judgment in favor of the moving party.
11 *See id.*; *see, e.g., Carmen v. San Francisco Unified School*
12 *District*, 237 F.3d 1026, 1028-29 (9th Cir. 2001).

13 **A. Deliberate Indifference**

14 Deliberate indifference to a prisoner's serious medical needs
15 violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97,
16 104 (1976). A prison official violates the Eighth Amendment
17 only when two requirements are met: (1) the deprivation alleged
18 is, objectively, sufficiently serious, and (2) the official is,
19 subjectively, deliberately indifferent to the inmate's health or
20 safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

21 A "serious" medical need exists if the failure to treat a
22 prisoner's condition could result in further significant injury or
23 the "unnecessary and wanton infliction of pain." *Id.* The
24 following are examples of indications that a prisoner has a
25 "serious" need for medical treatment: the existence of an injury
26 that a reasonable doctor or patient would find important and
27 worthy of comment or treatment; the presence of a medical
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1 condition that significantly affects an individual's daily activities;
2 or the existence of chronic and substantial pain. *McGuckin v.*
3 *Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), overruled on
4 other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133,
5 1136 (9th Cir. 1997) (en banc).

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

16 A claim of medical malpractice or negligence is insufficient
17 to make out a violation of the Eighth Amendment. *See Toguchi*
18 *v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004); *Hallett v.*
19 *Morgan*, 296 F.3d 732, 744 (9th Cir. 2002); *Franklin v. Oregon*,
20 662 F.2d 1337, 1344 (9th Cir. 1981); *see, e.g., Frost v. Agnos*,
21 152 F.3d 1124, 1130 (9th Cir. 1998) (finding no merit in claims
22 stemming from alleged delays in administering pain medication,
23 treating broken nose and providing replacement crutch, because
24 claims did not amount to more than negligence); *McGuckin*, 974
25 F.2d at 1059 (mere negligence in diagnosing or treating a medical
26 condition, without more, does not violate a prisoner's 8th
27 Amendment rights); *O'Loughlin v. Doe*, 920 F.2d 614, 617 (9th
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1 Cir. 1990) (repeatedly failing to satisfy requests for aspirins and
2 antacids to alleviate headaches, nausea and pains is not
3 constitutional violation; isolated occurrences of neglect may
4 constitute grounds for medical malpractice but do not rise to level
5 of unnecessary and wanton infliction of pain).

6 **B. Analysis**

7 This action is based on the claim regarding treatment for
8 Plaintiff's chronic pain related to certain longstanding injuries to
9 his neck and back, and the alleged failure to provide corrective
10 surgeries to address that pain. Dkt. No. 137 at 6. With regards to
11 this treatment, Plaintiff claims the following; (1) in February
12 2007, he was given the wrong blood pressure medicine and that
13 another pain medication, tramadol, was improperly cancelled; (2)
14 Defendant Tran was deliberately indifferent to him from 2007
15 through 2015, and that he has been falsely labeled as a "non-
16 compliant" patient; (3) at some point in 2013, he was given
17 Tylenol with codeine but was later given a different drug which
18 tasted strange; (4) his extended release morphine was cancelled
19 in 2016 and replaced with "crush-float morphine" which is
20 inadequate; and (5) he was denied pain medication, a CAT scan,
21 and surgeries during 2016 and 2017. *See supra* at 11.

22 Defendants do not dispute that Plaintiff's pain issues in his
23 neck and back constitute a serious medical issue. Dkt. No. 149 at
24 12. Rather, they assert that they were not deliberately indifferent
25 to his needs. *Id.* Defendants assert that the evidence establishes
26 that Plaintiff's medical needs have not been ignored at SVSP, and
27 that officials have not improperly declined to provide treatment
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1 or surgeries. *Id.* at 13; Bright Decl. ¶ 7. With respect to
2 Plaintiff’s claim that he needs surgery, Defendants assert that
3 there are no physical findings in his medical exams or imaging
4 that support his request for surgery. *Id.* Defendants assert that
5 the biggest challenge that medical staff have faced in treating
6 Plaintiff appropriately is his continuous and long history of
7 refusing medications, treatments, and evaluations, and of being
8 noncompliant with recommended treatments and medications.
9 *Id.*

10 Furthermore, Defendants assert that although Plaintiff insists
11 on receiving opioid medications, there is no medical evidence
12 establishing that opioids are superior to nonsteroidal anti-
13 inflammatory drugs (NSAIDS) or Tylenol in treating pain or
14 improving function in connection with chronic neck or back pain.
15 Dkt. No. 149 at 13. Defendants also dispute Plaintiff’s claim that
16 at least since 2002 he cannot take “crush and float” medication
17 because of dysphagia, the medical term for swallowing
18 difficulties, because there is no medical evidence that he has any
19 limitations with regard to swallowing. *Id.* Accordingly,
20 Defendants assert that there is no evidence to support Plaintiff’s
21 contention that he cannot ingest “crush and float” or “immediate
22 release” morphine. *Id.* With respect to the allegation that he was
23 denied pain medication during 2016 and 2017, Defendants assert
24 that he was given Tylenol three times per day for pain throughout
25 that time. *Id.* at 15; Bright Decl. ¶ 21. When Plaintiff was
26 offered other medications, he refused them. *Id.* Despite
27 Plaintiff’s belligerence and noncompliance with staff, Defendants
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1 assert that they consistently attempted to treat Plaintiff's pain
2 with appropriate medications and concluded that he does not
3 need surgery.

4 With respect to the allegation that he was given wrong
5 blood pressure medication in February 2007, and that another
6 pain medication, tramadol, was improperly cancelled during that
7 period, Defendants assert it is meritless. Dkt. No. 149 at 13.
8 Defendants assert that the medical records indicate that Plaintiff
9 was not taking blood pressure medication when he was
10 transferred to SVSP in 2007. *Id.* Plaintiff was first given
11 atenolol, a blood pressure medication, on July 12, 2007. *Id.* In
12 addition, Defendants assert that medical staff refilled Plaintiff's
13 prescription for tramadol in March 2007. *Id.* at 14.

14 With regard to the allegation that Defendant Tran was
15 deliberately indifferent to Plaintiff and that he was falsely labeled
16 as a "non-compliant" patient, Defendants assert that there were
17 numerous instances in which Plaintiff was noncompliant with
18 medical staff from 2013 through 2016. Dkt. No. 149 at 14-15.

19 With respect to the allegation that Plaintiff was provided
20 Tylenol with codeine at some point in 2013, but was later given a
21 different drug which tasted strange, Defendants assert that their
22 actions during that period did not violate the Eighth Amendment.
23 Dkt. No. 149 at 15. Defendants assert that the medical records
24 show that Plaintiff was first prescribed Tylenol #3 on December
25 13, 2014. *Id.* On January 21, 2014, staff began providing him
26 with liquid Tylenol #3, which likely tasted strange to Plaintiff.
27 *Id.* Staff stopped providing Plaintiff with liquid Tylenol #3 on
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1 February 1, 2014. *Id.* Defendants assert that these actions were
2 part of their ongoing efforts to treat Plaintiff’s pain.

3 In opposition, Plaintiff asserts that Defendants have violated
4 his Eighth Amendment rights with their “excessive denial of pain
5 management medicine,” failure to treat his “pre-existing
6 neurological and orthopedic damages to prevent worsening, and
7 failure to place him in a medical facility conducive to his pre-
8 existing and worsening condition. Dkt. No. 157 at 3. Plaintiff
9 asserts that there are no records to support a 2001 spinal surgery
10 contrary to Defendant Bright’s declaration. *Id.* at 6. Plaintiff
11 asserts that his exhibits “A thru F” show that he has serious
12 neurological and orthopedic injuries to warn of medical treatment
13 or need for corrective surgeries. *Id.* at 9. In his declaration,
14 Plaintiff recounts problems with his neck and back since 2003
15 and a damaging surgery in May 2006. Martin Decl. ¶¶ 4-9, Dkt.
16 No. 158. Plaintiff asserts generally that there remain genuine
17 issues of material facts and that “each Defendant knew and
18 disregarded the laws to maliciously inflict harm and to seek
19 [Plaintiff’s] demise.” *Id.* at ¶ 10. Plaintiff asserts that Defendant
20 Bright has failed “to offer any law or approved state license for
21 the unlawful practice of crush-float drug dispensed... without
22 consent.” *Id.* at ¶ 11. He asserts that he had a right to withhold
23 consent to taking crush-float medication, and that he cannot be
24 deemed non-compliant for withholding consent. *Id.* at ¶14.
25 Plaintiff asserts that Defendants are focusing on covering up and
26 concealing “the thoracic spinal damages that [have] been
27 systemically misdiagnosed and undertreated by each one.” *Id.* at
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1 ¶ 19.

2 In reply, Defendants assert that Plaintiff's opposition is
3 largely incoherent and fails to address any of their contentions.
4 Dkt. No. 159 at 2. Defendants assert that the evidence they
5 submit establishes that Plaintiff does not have a spinal cord injury
6 and does not need surgery. *Id.*; *id.* at 3. They also assert that
7 there is no evidence that Plaintiff has any limitations in
8 swallowing that would prevent him from ingesting "crust and
9 float" medication. *Id.* Rather, Defendants assert, the evidence
10 indicates that medical staff at SVSP have consistently attempted
11 to provide appropriate care for Plaintiff's pain despite his
12 belligerence and noncompliance, and that their biggest obstacle
13 in treating Plaintiff properly has been his continuous history of
14 refusing medications, treatments, and evaluations, and being
15 noncompliant with recommended treatments and medications.
16 *Id.* They assert, therefore, that Plaintiff's Eighth Amendment
17 claim against them must fail. *Id.* at 5.

18 Viewing the evidence in the light most favorable to Plaintiff,
19 the Court finds there exists no genuine dispute as to any material
20 fact relating to Plaintiff's claim of deliberate indifference against
21 Defendants. The evidence submitted by Defendants establishes
22 that there is an absence of evidence to support Plaintiff's claim
23 that Defendants provided constitutionally deficient treatment for
24 his chronic pain, including the failure to provide corrective
25 surgeries. Rather, his medical records and inmate grievances
26 show that Plaintiff's main objections to the treatment provided by
27 Defendants was their decision to provide medication in crush-

1 float form and switching him from extended relief morphine to
2 immediate relief morphine. *See supra* at 7, 8, 9, 10, 11. He
3 repeatedly asserted throughout 2013 through 2017 that he could
4 not take medication in crush-float form because he has trouble
5 swallowing due to dysphagia. *Id.* However, the various treating
6 physicians, both parties and nonparties, found no evidence to
7 substantiate this claim. *Id.* In fact, one appeal decision noted
8 that during August and September 2007, Plaintiff was able to
9 take tramadol three times a day in crush and float form and only
10 reported experiencing a sore throat on occasion, with no apparent
11 correlation to the form of his medication. *Id.* at 6. Plaintiff's
12 assertion in this regard have also been inconsistent, as during one
13 visit on May 14, 2014, he stated to Dr. Posson that although he
14 had a chronic sore throat, he had no difficulty swallowing. *Id.* at
15 7-8. Furthermore, doctors noted that despite his claim of
16 dysphagia, Plaintiff was still eating normally and tolerating a
17 regular diet. *Id.* at 10, 11. The evidence shows that Defendants
18 were aware that Plaintiff was able to swallow his medication in
19 crush-float form and that his ability to eat a normal diet
20 contradicted any indication that he had dysphagia. Accordingly,
21 it cannot be said that they knew of an excessive risk of harm to
22 Plaintiff if they continued to prescribe crush and float form where
23 Plaintiff was able to ingest it but simply chose not to. The same
24 is true of the extended release morphine versus the immediate
25 release morphine: Defendants provided morphine for his pain
26 which Plaintiff rejected because of the prescribed form of the
27 medication. The evidence clearly shows that the only obstacle to
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1 Plaintiff receiving treatment for his chronic pain was his own
2 conduct, *i.e.*, failing to show up for pill call and refusing to take
3 his medication, because he essentially disagreed with
4 Defendants' chosen course of treatment of giving medication in
5 crush and float form or as extended release or immediate release.
6 However, this mere difference of medical opinion as to the need
7 to pursue one course of treatment over another is insufficient, as a
8 matter of law, to establish deliberate indifference. *See Toguchi*,
9 391 F.3d at 1058; *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.
10 1989). Therefore, it cannot be said that Defendants acted with
11 deliberate indifference to Plaintiff's pain when they continuously
12 prescribed medication which he repeatedly refused.

13 Furthermore, Defendants have also demonstrated the
14 absence of a genuine issue of material fact with respect to
15 Plaintiff's claim that surgery should have been provided to treat
16 his pain. Defendants assert that there are no physical findings in
17 Plaintiff's medical exams or imaging to support his request for
18 surgery. *See supra* at 16-17. A review of the medical records
19 submitted by both parties reveals no evidence that surgery was
20 ever recommended to alleviate Plaintiff's chronic pain but then
21 denied. Rather, Plaintiff states that he had one damaging surgery
22 in May 2006 which caused injuries to his limbs resulting in either
23 "paralysis/numbness" or "agonizing intractable pain," and when
24 the same surgeon recommended another surgery a few months
25 later, Plaintiff refused it. *Id.* at 4. The records also indicate that
26 Plaintiff again refused surgery in December 2006. *Id.* This
27 evidence shows that Plaintiff did not desire surgery at the time he
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1 arrived at SVSP. The only mention of surgery thereafter appears
2 in the medical records submitted by Plaintiff from January 2017,
3 when he had a telemedicine consult with Dr. Ramberg. *Id.* at 10.
4 Dr. Ramberg’s conclusion at that time was that another surgery to
5 address Plaintiff’s back complaints would require a “major
6 operation with significant risks” which was not likely to result in
7 any change that Plaintiff would be happy with. *Id.* Dr. Ramberg
8 opined that he doubted that Plaintiff’s complaints would improve.
9 *Id.* This opinion by a nonparty does indicates that surgery was
10 not a viable option to alleviate Plaintiff’s chronic pain such that
11 Defendants’ denial of the surgery cannot be considered deliberate
12 indifference.

13 To refute Defendants’ showing of an absence of a genuine
14 issue of material fact, Plaintiff must designate specific facts
15 showing there is a genuine issue for trial. *See Celotex Corp.*, 477
16 U.S. at 324. Plaintiff has failed to do so. First of all, although
17 Plaintiff rejects Defendant Bright’s assertion that he had surgery
18 in March 2001 as indicated by his transfer papers to SVSP, *see*
19 *supra* at 14, this dispute is not over a material fact since a surgery
20 that did or did not take place nearly twenty years ago while
21 incarcerated at a different institution is not relevant on the issue
22 of whether SVSP Defendants denied Plaintiff treatment for his
23 chronic pain as he claims. Secondly, Plaintiff asserts that he did
24 not give “consent” to the type of medication prescribed and that
25 he should not be deemed noncompliant thereby. *Id.* However,
26 his decision to reject otherwise appropriately prescribed pain
27 medication is not evidence that Defendants acted with deliberate
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1 indifference with respect to his pain management where they
2 were unaware of any hindrance to his ability to ingest the
3 medication. The risk of harm to Plaintiff was created by his own
4 refusal to take the medication as prescribed, not by any action on
5 the part of Defendants.

6 In support of his opposition, Plaintiff submitted over 400
7 pages of documents separated into Exhibits A through F, but fails
8 to explain the relevancy of much of these papers. Dkt. Nos. 158-
9 1 through 158-7. Plaintiff refers to these exhibits in general as
10 “medical records, documents, appeals, policies, statutes,
11 regulations, CDCR memorandum, letters from state experts, state
12 and federal agencies, actions under president[ial] authority, and
13 local state agencies acting under governor authority and state and
14 federal class action court orders (Plata/Armstrong/Clark).”
15 Martin Decl. ¶ 9, Dkt. No. 158 at 5-6. Other than being grouped
16 into 6 separate exhibits with a general description on the first
17 page, the documents in each exhibit are presented in no apparent
18 order. *See supra* at 2, fn. 3. Some documents included in one
19 exhibit are also duplicated in another. *See, e.g.*, Dkt. Nos. 158-2
20 at 32, 158-4 at 16. Plaintiff’s submission of these documents is
21 also inadequate to establish deliberate indifference because he
22 describes some of the exhibits as containing evidence of a “series
23 of negligent events.” *See supra* at 2, fn. 3. Negligence is
24 insufficient to make out a violation of the Eighth Amendment.
25 *See Toguchi*, 391 F.3d at 1060. Moreover, Plaintiff provides no
26 description of the allegedly negligent events contained in the
27 exhibits nor explains how those events establish that Defendants
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1 knew that he faced a substantial risk of serious harm and
2 disregarded that risk by failing to take reasonable steps to abate
3 it. *See Farmer*, 511 U.S. at 837.

4 Without any specific explanation from Plaintiff, the Court
5 cannot determine the relevancy of much of these documents. *See*
6 *Fed. R. Evid.* 401, 402. Plaintiff makes very little reference to
7 specific documents in the exhibits in either his opposition brief or
8 his declaration to support his arguments and assertions; rather, he
9 frequently refers to the exhibits “A thru F” as a whole or to an
10 entire exhibit or lengthy pages therein. *See, e.g.*, Dkt. No. 157 at
11 4, 7, 9, 10; Dkt. No. 158 at 10. Therefore, the Court has only
12 considered the medical records and inmate appeals therein that
13 contain clearly relevant facts pertaining to the issues in this
14 matter as included in the statement of facts above. *See supra* at
15 2-8. Otherwise, for lack of any specific explanation or argument
16 from Plaintiff establishing the relevancy of these documents, or
17 their authenticity, the remainder of his papers cannot be
18 considered evidence. *See Fed. R. Evid.* 901(a).

19 Based on the foregoing, Plaintiff has failed in opposition to
20 meet his burden of pointing to specific facts showing that there is
21 a genuine issue for trial or produce evidence from which a jury
22 could reasonably render a verdict in Plaintiff’s favor. *See Liberty*
23 *Lobby*, 477 U.S. at 252.

24 Defendants have also shown that there is no genuine dispute
25 as to any material fact with respect to the remaining allegations
26 regarding Plaintiff’s treatment. *See supra* at 12. First with
27 respect to the claim that he was given the wrong blood pressure
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1 medicine in February 2007, the evidence shows that Plaintiff was
2 not taking blood pressure medication when he was transferred to
3 SVSP in February 2007. *See supra* at 3. He was not prescribed
4 blood pressure medication atenolol until July 2007. *Id.* at 4, 13.
5 Accordingly, this claim is without any factual basis. Nor is there
6 any factual basis for Plaintiff’s claim that Defendants improperly
7 cancelled his prescription for tramadol as the medical records
8 show that the prescription was refilled in March 2007. *Id.*
9 Plaintiff offers no evidence in opposition to establish a dispute
10 over this fact.

11 With respect to the claim that Defendant Tran was
12 deliberately indifferent for falsely labelling Plaintiff as “non-
13 compliant,” Defendants have demonstrated that the medical
14 records contain numerous instances of Plaintiff’s non-compliance
15 from 2013 through 2016. *See supra* at 3-11. These instances
16 include repeated failures to appear at the pill line to receive his
17 medication, refusing vaccinations or to be tested for various
18 diseases, refusals to take various medications for his heart,
19 antidepressants, blood pressure, and pain management, being
20 belligerent and argumentative at clinical visits, and refusals to go
21 to medical appointments. *Id.* Accordingly, there is no genuine
22 dispute that Plaintiff was actively non-compliant during the
23 relevant time period.

24 Lastly, with respect to the claim that Plaintiff was given
25 Tylenol with codeine in 2013 but was later given a different drug
26 which tasted strange, Defendants have provided an explanation
27 which Plaintiff does not dispute in opposition. *See supra* at 18.

1 This incident regarding the strange tasting medication contains no
2 indication that Defendants were aware of an excessive risk to
3 Plaintiff which they disregarded. As the undisputed facts show,
4 the medicine in liquid form was shortly discontinued. *Id.* at 5.
5 Accordingly, Defendants have shown the absence of a genuine
6 issue of material fact with respect to this claim.

7 Based on the undisputed facts, Defendants have shown there
8 is an absence of a genuine dispute of material fact with respect to
9 the Eighth Amendment claims against them. *See Celotex Corp.*,
10 477 U.S. at 323. Plaintiff has failed to meet his burden of
11 identifying with reasonable particularity the evidence that
12 precludes summary judgment, *see Keenan*, 91 F.3d at 1279, or
13 submit evidence from which a jury could reasonably render a
14 verdict in his favor, *In re Oracle Corporation Securities*
15 *Litigation*, 627 F.3d at 387. Accordingly, Defendants are entitled
16 to summary judgment on all the claims against them. *See Celotex*
17 *Corp.*, 477 U.S. at 323.⁸

18 CONCLUSION

19 For the reasons stated above, Defendants Dr. Kim R.
20 Kumar, Dr. Darrin M. Bright, Tuan Anh Tran, Dr. Edward Miles
21 Birdsong, and Dr. Jennifer Villa's motion for summary judgment
22 is **GRANTED**. Dkt. No. 149. The Eighth Amendment
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24
25 ⁸ Because the Court finds no constitutional violation, it is not
26 necessary to address Defendants' remaining arguments regarding
27 punitive damages and qualified immunity. Dkt. No. 149 at 16-
28 19.


1 deliberate indifference claims against them are **DISMISSED**
2 with prejudice.

3 This order terminates Docket Nos. 149 and 167.

4 The Clerk shall close the file.

5 **IT IS SO ORDERED.**

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7 **Dated: December 21, 2020**


8 **BETH LABSON FREEMAN**
9 United States District Judge

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United States District Court
Northern District of California

Order Granting MSJ
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