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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MICHAEL BLANCO,

Plaintiff,

v.

GREGORY J. DUNCAN, MD; et al.,

Defendants.

Case No.: 15-cv-00407-H (KSC)

ORDER:

**(1) GRANTING DEFENDANTS’
MOTIONS FOR SUMMARY
JUDGMENT; and**

[Doc. Nos. 104, 120, 149.]

**(2) SUA SPONTE DISMISSING
DEFENDANT WILLIAMS**

On October 13, 2016, Defendant Gregory J. Duncan filed a motion for summary judgment. (Doc. No. 104.) On December 8, 2016, Defendants Cheryl Malo-Clines, Barbara Fellows, Lansdale J. Peters, Bondoc, Jonathon E. Akanno, Goyal, and P. Karan also filed a motion for summary judgment. (Doc. No. 120.) On March 21, 2017, Defendant M. Dhah also filed a motion for summary judgment. (Doc. No. 149.) Plaintiff filed oppositions to the respective motions for summary judgment. (Doc. Nos. 140, 143, 156.) Defendants filed replies. (Doc. Nos. 141, 148, 157.) The Court has taken the matters under submission, and the Court has provided Plaintiff with notice pursuant to Rand v. Rowland,

1 154 F.3d 952 (9th Cir. 1998) (en banc) and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir.
2 1988) as to each of the motions for summary judgment. (Doc. Nos. 108, 133, 153.) For
3 the reasons below, the Court grants Defendants’ motions for summary judgment.

4 Background

5 On May 18, 2005, while playing football at Pelican Bay State Prison, Plaintiff
6 injured his left shoulder. (Doc. No. 104-2, Peabody Decl. Ex. A.) That same day, Plaintiff
7 was brought to the emergency room at Sutter Coast Hospital and was seen by Dr. Larry R.
8 Schatz. (Id.) Dr. Schatz diagnosed Plaintiff as having a left shoulder dislocation and
9 suffering a Bankart lesion,¹ and noted that Plaintiff may require surgery in the future. (Id.)

10 Shortly thereafter, Plaintiff was seen by Dr. Gregory J. Duncan on May 25, 2005
11 and June 8, 2005. (Doc. No. 104-2, Peabody Decl. Exs. B-C.) During the visits, Dr.
12 Duncan examined Plaintiff’s shoulder, reviewed x-rays, and diagnosed Plaintiff as
13 suffering a left shoulder dislocation. (Id. Ex. B) Dr. Duncan recommended that Plaintiff’s
14 shoulder be immobilized for 3-4 weeks and that Plaintiff begin physical therapy after about
15 2 weeks. (Id.)

16 After Plaintiff suffered further dislocations of his shoulder and was evaluated by
17 other practitioners, Plaintiff was again seen by Dr. Duncan on November 15, 2006. (Doc.
18 No. 104-2, Peabody Decl. Ex. G.) Dr. Duncan recommended performing surgery on the
19 shoulder, and Plaintiff consented to the surgery. (Id.) Dr. Duncan performed the surgery,
20 a left shoulder capsular shift procedure, on February 20, 2007. (Id. Ex. I.) There were no
21 reported complications. (Id.) Plaintiff was seen by Dr. Duncan on March 7, 2007 and May
22 2, 2007 for postoperative visits. (Id. Exs. J, K.) At the second visit, Dr. Duncan noted that
23 Plaintiff was doing very well with no further episodes of instability and that his range of
24 motion was improving. (Id. Ex. K.) Plaintiff was subsequently seen by two other
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27 ¹ “A Bankhart lesion is a tear in the labrum glenoidale of the shoulder joint.” Dettmer v. Astrue,
28 No. 4:10-CV-1329 CEJ, 2011 WL 3904429, at *5 (E.D. Mo. Sept. 6, 2011); accord Shanda v. Colvin,
No. CIV. 14-1838 MJD/JSM, 2015 WL 4077511, at *12 (D. Minn. July 6, 2015) (“A Bankart tear is a
type of tear in the labrum.”).

1 practitioners on May 16, 2007 and June 19, 2007 and reported experiencing no pain. (Id.
2 Exs. L, M.) Despite this, Plaintiff contends that the capsular shift procedure that Duncan
3 performed may have failed and that his labrum was reinjured a few days later. (Doc. No.
4 140 at 1.)

5 Following the surgery, Plaintiff began to complain of pain again in his left shoulder
6 and was given pain medication by various practitioners over a period of several years.
7 (Doc. No. 104-2, Peabody Decl. Exs. N-W; Doc. No. 12, FAC ¶¶ 8-14, Ex. A at 22-66.)
8 Plaintiff contends that the medications these Defendants prescribed were ineffective and
9 did not alleviate his pain. (Doc. No. 143 at 4-8; Doc. No. 156 at 2.)

10 Eventually, on January 9, 2014, Plaintiff was seen by an Orthopedist, Dr. Roman B.
11 Cham, who ordered an MRI. (Doc. No. 104-2, Peabody Decl. Ex. Y.) Following his MRI,
12 Plaintiff was seen again by Dr. Cham on April 10, 2014. (Id. Ex. X.) Dr. Cham noted that
13 the interpretation of the MRI was a tear of the anterior inferior glenoid labrum and
14 recommended surgery to repair Plaintiff's labrum and Plaintiff consented. (Id.) Dr. Cham
15 performed the surgery on January 14, 2015. (Id. Exs. Z, AA.) Plaintiff asserts that the
16 surgery Dr. Cham performed substantially alleviated his pain.² (Doc. No. 140 at 3; Doc.
17 No. 143 at 10; Doc. No. 156 at 3.)

18 On February 18, 2015, Plaintiff filed a complaint against Defendants, alleging that
19 the Defendants failed to provide Plaintiff with adequate medical care in violation of his
20 constitutional rights. (Doc. No. 1.) Plaintiff also filed a motion to proceed *in forma*
21 *pauperis*. (Doc. No. 3.) On May 29, 2015, the Court granted Plaintiff's IFP motion,
22 declined to screen Plaintiff's complaint, and ordered the U.S. Marshal Service to effect
23 service of the complaint. (Doc. No. 6.)

24 On July 26, 2015, Plaintiff filed a first amended complaint against Defendants
25 Gregory J. Duncan M.D., Barbara Fellows, RN, Cheryl Malo-Clines, FNP, Claire
26

27 ² Although Plaintiff states that the 2015 surgery significantly reduced his pain, he also asserts that
28 he still experiences pain and his shoulder remains loose and at risk for possible dislocation. (Doc. No.
156 at 3.)

1 Williams, M.D., Linda Rowe, M.D., Lansdale J. Peters, PA-C, Jonathon E. Akanno, M.D.,
2 P. Karan, M.D., Goyal PTS, Dhah, NP, and Bondoc, NP, alleging causes of action pursuant
3 to 42 U.S.C. § 1983 for: (1) deliberate indifference to serious medical needs in violation of
4 the Eighth Amendment; (2) violation of the due process clause of the Fourteenth
5 Amendment;³ (3) failure to provide adequate medical care in violation of the Eighth
6 Amendment; (4) failure to provide adequate medical care resulting in emotional distress in
7 violation of the Eighth Amendment;⁴ and (5) a claim that Defendants are not entitled to
8 qualified immunity. (Doc. No. 12, FAC.) Shortly thereafter, Defendants Duncan, Dhah,
9 Malo-Clines, Fellows, Peters, Bondoc, Akanno, and Karan filed motions to dismiss
10 Plaintiff's first amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).
11 (Doc. Nos. 14, 16, 35.) On January 15, 2016, the Court issued an order granting in part
12 and denying in part Defendants' motions to dismiss. (Doc. No. 37.) In the order, the Court
13 dismissed with prejudice Plaintiff's fifth cause of action of no qualified immunity, and
14 declined to dismiss the remainder of the claims in the FAC.⁵ (Id. at 13-14.) The
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17 ³ Plaintiff's second cause of action is alleged against only Defendants Rowe and Goyal. (FAC ¶
18 61.)

19 ⁴ The Court notes that in his motion for summary judgment, Defendant Dhah construes Plaintiff's
20 fourth cause of action as a state law claim for intentional infliction of emotional distress. (See Doc. No.
21 149-1 at 1, 14-15.) Defendant Dhah is incorrect. A review of Plaintiff's allegations in the FAC shows
22 that Plaintiff cites to 42 U.S.C. § 1983 and the Eighth Amendment of the U.S. Constitution in support of
23 this cause of action. (Doc. No. 12, FAC ¶¶ 85-87.) In addition, in support of the cause of action,
24 Plaintiff cites to two cases, Thompson v. Carter, 284 F.3d 411, 417 (2d Cir. 2002), and Allah v. Al-
25 Hafeez, 226 F.3d 247, 250 (3d Cir. 2000), which both involved the issue of whether a plaintiff can
26 recover damages for mental and/or emotion injury for a constitutional violation. (Doc. No. 12, FAC ¶
27 95.) Moreover, neither Plaintiff nor the other Defendants in the action have ever characterized this
28 claim as a state law claim for intentional infliction of emotional distress, and the Court has previously
referred to this claim as an Eighth Amendment claim in its prior orders. (See Doc. No. 37 at 4; Doc. No.
82 at 4.) Accordingly, Plaintiff's fourth cause of action is properly construed as a claim for failure to
provide adequate medical care resulting in emotional distress in violation of the Eighth Amendment.

⁵ In his motion for summary judgment, Defendant Dhah moves for summary judgment of
Plaintiff's fifth cause of action of no qualified immunity. (Doc. No. 149-1 at 15-16.) Because the Court
has already dismissed Plaintiff's fifth cause of action with prejudice, (Doc. No. 37 at 14), this aspect of
Dhah's motion for summary judgment is moot.

1 Defendants subsequently filed answers to Plaintiff’s first amended complaint. (Doc. Nos.
2 41, 42, 43.)

3 On July 21, 2016, after reviewing the sufficiency of Plaintiff’s claims in the FAC
4 against Defendant Rowe, the Court *sua sponte* dismissed Defendant Rowe from the action
5 with prejudice pursuant to 28 U.S.C. § 1915(e)(2). (Doc. No. 82.) On October 11, 2016,
6 the Court denied Plaintiff’s motion for reconsideration of the Court’s July 21, 2016 order
7 dismissing Defendant Rowe with prejudice. (Doc. No. 103.) By the present motions,
8 Defendants Duncan, Malo-Clines, Fellows, Dhah, Peters, Bondoc, Akanno, Goyal, and
9 Karan move for summary judgment of Plaintiff’s remaining claims. (Doc. Nos. 104-1,
10 120-1, 149-1.)

11 Discussion

12 **I. Legal Standard for a Motion for Summary Judgment**

13 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil
14 Procedure if the moving party demonstrates that there is no genuine issue of material fact
15 and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp.
16 v. Catrett, 477 U.S. 317, 322 (1986). A fact is material when, under the governing
17 substantive law, it could affect the outcome of the case. Anderson v. Liberty Lobby, Inc.,
18 477 U.S. 242, 248 (1986); Fortune Dynamic, Inc. v. Victoria’s Secret Stores Brand Mgmt.,
19 Inc., 618 F.3d 1025, 1031 (9th Cir. 2010). “A genuine issue of material fact exists when
20 the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”
21 Fortune Dynamic, 618 F.3d at 1031 (internal quotation marks and citations omitted);
22 accord Anderson, 477 U.S. at 248. “Disputes over irrelevant or unnecessary facts will not
23 preclude a grant of summary judgment.” T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors
24 Ass’n, 809 F.2d 626, 630 (9th Cir. 1987).

25 A party seeking summary judgment always bears the initial burden of establishing
26 the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. The moving
27 party can satisfy this burden in two ways: (1) by presenting evidence that negates an
28 essential element of the nonmoving party’s case; or (2) by demonstrating that the

1 nonmoving party failed to establish an essential element of the nonmoving party’s case that
2 the nonmoving party bears the burden of proving at trial. Id. at 322-23; Jones v. Williams,
3 791 F.3d 1023, 1030 (9th Cir. 2015). Once the moving party establishes the absence of a
4 genuine issue of material fact, the burden shifts to the nonmoving party to “set forth, by
5 affidavit or as otherwise provided in Rule 56, ‘specific facts showing that there is a genuine
6 issue for trial.’” T.W. Elec. Serv., 809 F.2d at 630 (quoting former Fed. R. Civ. P. 56(e));
7 accord Horphag Research Ltd. v. Garcia, 475 F.3d 1029, 1035 (9th Cir. 2007). To carry
8 this burden, the non-moving party “may not rest upon mere allegation or denials of his
9 pleadings.” Anderson, 477 U.S. at 256; see also Behrens v. Pelletier, 516 U.S. 299, 309
10 (1996) (“On summary judgment, . . . the plaintiff can no longer rest on the pleadings.”).
11 Rather, the nonmoving party “must present affirmative evidence . . . from which a jury
12 might return a verdict in his favor.” Anderson, 477 U.S. at 256.

13 When ruling on a summary judgment motion, the court must view the facts and draw
14 all reasonable inferences in the light most favorable to the non-moving party. Scott v.
15 Harris, 550 U.S. 372, 378 (2007). The court should not weigh the evidence or make
16 credibility determinations. See Anderson, 477 U.S. at 255. “The evidence of the non-
17 movant is to be believed.” Id. Further, the Court may consider other materials in the record
18 not cited to by the parties, but it is not required to do so. See Fed. R. Civ. P. 56(c)(3);
19 Simmons v. Navajo Cnty., 609 F.3d 1011, 1017 (9th Cir. 2010).

20 **II. Plaintiff’s Eighth Amendment Claims**

21 In the FAC, Plaintiff alleges claims for violation of the Eighth Amendment against
22 all of the Defendants. (Doc. No. 12, FAC ¶¶ 48-59, 72-95.) Defendants Duncan, Malo-
23 Clines, Fellows, Dhah, Peters, Bondoc, Akanno, Goyal, and Karan move for summary
24 judgment in their favor on Plaintiff’s Eighth Amendment claims. (Doc. Nos. 104-1, 120-
25 1, 149-1 at 5-14.)

26 A. Legal Standards for Eight Amendment Claims Based on Prison Medical Care

27 “The government has an ‘obligation to provide medical care for those whom it is
28 punishing by incarceration,’ and failure to meet that obligation can constitute an Eighth

1 Amendment violation cognizable under § 1983.” Colwell v. Bannister, 763 F.3d 1060,
2 1066 (9th Cir. 2014) (quoting Estelle v. Gamble, 429 U.S. 97, 103-05 (1976)). “In order
3 to prevail on an Eighth Amendment claim for inadequate medical care, a plaintiff must
4 show ‘deliberate indifference’ to his ‘serious medical needs.’” Id.

5 “To establish an Eighth Amendment violation, a prisoner ‘must satisfy both the
6 objective and subjective components of a two-part test.’” Toguchi v. Chung, 391 F.3d
7 1051, 1057 (9th Cir. 2004). “To meet the objective element of the standard, a plaintiff
8 must demonstrate the existence of a serious medical need.” Colwell, 763 F.3d at 1066.
9 “Such a need exists if failure to treat the injury or condition ‘could result in further
10 significant injury’ or cause ‘the unnecessary and wanton infliction of pain.’” Id. To meet
11 the subjective element of the standard, a plaintiff must demonstrate “(a) a purposeful act
12 or failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by
13 the indifference.” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006). “A prison official
14 is deliberately indifferent under the subjective element of the test only if the official ‘knows
15 of and disregards an excessive risk to inmate health and safety.’” Colwell, 763 F.3d at
16 1066.

17 “The deliberate indifference doctrine is limited in scope.” Wilhelm v. Rotman, 680
18 F.3d 1113, 1122 (9th Cir. 2012); see also Toguchi, 391 F.3d at 1060 (“Deliberate
19 indifference is a high legal standard.”); Hallett v. Morgan, 296 F.3d 732, 745 (9th Cir.
20 2002) (“This is not an easy test for Plaintiffs to satisfy.”). Deliberate indifference “requires
21 ‘more than ordinary lack of due care.’” Farmer v. Brennan, 511 U.S. 825, 835 (1994).
22 “‘Mere negligence in diagnosing or treating a medical condition, without more, does not
23 violate a prisoner’s Eighth Amendment rights.’” Toguchi, 391 F.3d at 1057; see also
24 Estelle v. Gamble, 429 U.S. 97, 106 (1976) (“[A] complaint that a physician has been
25 negligent in diagnosing or treating a medical condition does not state a valid claim of
26 medical mistreatment under the Eighth Amendment. Medical malpractice does not become
27 a constitutional violation merely because the victim is a prisoner.” (emphasis added));
28 Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990) (“While poor medical

1 treatment will at a certain point rise to the level of constitutional violation, mere
2 malpractice, or even gross negligence, does not suffice.”). Further, “[a] difference of
3 opinion between a physician and the prisoner—or between medical professionals—
4 concerning what medical care is appropriate does not amount to deliberate indifference.”
5 Colwell v. Bannister, 763 F.3d 1060, 1068 (9th Cir. 2014); see Toguchi, 391 F.3d at 1058
6 (“[A] mere ‘difference of medical opinion . . . [is] insufficient, as a matter of law, to
7 establish deliberate indifference.’”).

8 B. Defendant Duncan

9 Plaintiff’s medical records reflect that he was first seen by Defendant Duncan, an
10 orthopedic surgeon, on May 25, 2005. (Doc. No. 104-2, Peabody Decl. Ex. B.) Dr. Duncan
11 examined Plaintiff, reviewed x-rays, and assessed Plaintiff as suffering a left shoulder
12 dislocation. (Id.) Dr. Duncan’s prescribed plan was to immobilize the shoulder for three
13 to four weeks, start physical therapy in two weeks, and for Plaintiff to return in two weeks
14 for a follow up with repeat x-rays. (Id.)

15 Plaintiff was next seen by Dr. Duncan on June 8, 2005. (Doc. No. 104-2, Peabody
16 Decl. Ex. C.) Dr. Duncan noted that x-rays of Plaintiff’s left shoulder showed a slight
17 irregularity that might represent a Hill-Sachs lesion. (Id.) Dr. Duncan advised Plaintiff on
18 appropriate rehab exercises and to avoid any high stress activities for at least three more
19 months. (Id.) Dr. Duncan also noted that a capsular repair may be necessary. (Id.)

20 Plaintiff was then seen by various practitioners for shoulder pain on February 14,
21 2006, March 24, 2006, and September 11, 2006. (Doc. No. 104-2, Peabody Decl. Exs. D-
22 F.) On November 15, 2006, Plaintiff was again seen by Dr. Duncan. (Id. Ex. G.) After
23 examining Plaintiff, Dr. Duncan recommended surgery for Plaintiff’s shoulder and ordered
24 repeat x-rays of Plaintiff’s shoulder. (Id.) Plaintiff consented to the surgery. (Id.) The
25 report for the x-rays stated that the impression from the four-view examination of
26 Plaintiff’s left shoulder was negative. (Id. Ex. H; see also Doc. No. 104-3, Fronek Decl. ¶
27 17.)

28 On February 20, 2007, Dr. Duncan performed a left shoulder capsular shift

1 procedure on Plaintiff. (Doc. No. 104-2, Peabody Decl. Ex. I.) There were no reported
2 complications. (See id.; Doc. No. 104-3, Fronek Decl. ¶ 18.) On March 7, 2007, Plaintiff
3 was seen by Dr. Duncan for a postoperative visit, and Dr. Duncan ordered physical therapy.
4 (Doc. No. 104-2, Peabody Decl. Ex. J.) On May 2, 2007, Plaintiff was seen by Dr. Duncan
5 for another postoperative visit. (Id. Ex. K.) At that visit, Dr. Duncan noted that Plaintiff
6 was doing very well with no further episodes of instability and that his range of motion
7 was improving. (Id.)

8 Plaintiff was subsequently seen by other practitioners on May 16, 2007 and June 19,
9 2007 and reported experiencing no pain. (Id. Exs. L, M.) On November 13, 2007, Plaintiff
10 reported pain again in his left shoulder. (Id. Ex. N.) Plaintiff does not dispute the above
11 facts.⁶ (See Doc. No. 140 at 10-15.)

12 Even when viewing the evidence in the light most favorable to Plaintiff, the evidence
13 in the record is insufficient, as a matter of law, to support an Eighth Amendment claim for
14 deliberate indifference against Defendant Duncan. There is no evidence in the record
15 showing that Defendant Duncan ignored or failed to respond to Plaintiff’s medical needs
16 or delayed Plaintiff’s treatment. The undisputed evidence shows that Defendant Duncan
17 saw Plaintiff multiple times for his shoulder and provided Plaintiff with medical care and
18 treatment, including performing surgery on his shoulder in February 2007. (Doc. No. 104-
19 2, Peabody Decl. Exs. B, C.) Further, Defendant Duncan has provided the Court with a
20 declaration from a medical expert, Dr. Fronek, opining that Defendant Duncan’s course of
21 treatment complied with the appropriate standard of care for orthopedic surgeons,
22 specifically opining that Dr. Duncan’s examination, impressions and recommendations for
23 a capsular shift procedure were appropriate and that the procedure addressed the pathology
24 in Plaintiff’s shoulder. (Doc. No. 104-3, Fronek Decl. ¶¶ 33-42.) In his opposition brief,
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27 ⁶ The Court notes that Plaintiff disputes whether Dr. Duncan ordered specialized x-rays. (Doc.
28 No. 140 at 11.) But this dispute is immaterial. Plaintiff concedes that Dr. Duncan ordered x-rays on
November 15, 2006 and that those x-rays were interpreted as normal. (Id.) Whether those x-rays were
“specialized” does not materially affect the Court’s analysis of Plaintiff’s claims.

1 Plaintiff states that he does not contradict Dr. Fronek’s opinions regarding the capsular
2 shift procedure. (Doc. No. 140 at 1.) Accordingly, Plaintiff’s claims for deliberate
3 indifference against Defendant Duncan fail as a matter of law. See Jackson v. McIntosh,
4 90 F.3d 330, 332 (9th Cir. 1996) (explaining that to prevail on a claim for deliberate
5 indifference, the plaintiff must show that “that the course of treatment the doctors chose
6 was medically unacceptable under the circumstances”).

7 Plaintiff argues that there is a possibility that the capsular shift procedure that Dr.
8 Duncan performed failed and that his labrum was reinjured a few days later. (Doc. No.
9 140 at 1.) Plaintiff further speculates that a capsular shift procedure might not have been
10 the most effective surgical option for his injury. (Id. at 2.) Even assuming this is true, this
11 does not constitute deliberate indifference. That the capsular shift procedure might not
12 have been successful in fully treating Plaintiff’s injury, would at best only constitute mere
13 negligence in treating Plaintiff’s medical condition, which is insufficient, as a matter of
14 law, to constitute deliberate indifference. See Estelle, 429 U.S. at 105-06 (“[I]n the medical
15 context, an inadvertent failure to provide adequate medical care cannot be said to constitute
16 ‘an unnecessary and wanton infliction of pain’ or to be ‘repugnant to the conscience of
17 mankind.’ Thus, a complaint that a physician has been negligent in diagnosing or treating
18 a medical condition does not state a valid claim of medical mistreatment under the Eighth
19 Amendment. Medical malpractice does not become a constitutional violation merely
20 because the victim is a prisoner.”); Toguchi, 391 F.3d at 1057 (“Mere negligence in
21 diagnosing or treating a medical condition, without more, does not violate a prisoner’s
22 Eighth Amendment rights.”).

23 Further, Plaintiff’s speculation that there might have been a better surgical option
24 for his injury, is also insufficient, as a matter of law, to support a claim for deliberate
25 indifference. A difference of opinion between a physician and a prisoner “concerning
26 what medical care is appropriate does not amount to deliberate indifference.” Colwell,
27 763 F.3d at 1068. The evidence in the record shows that a capsular shift procedure was an
28 appropriate medical option for Plaintiff’s injury. (Doc. No. 104-3, Fronek Decl. ¶¶ 35-37.)

1 And Plaintiff does not dispute this opinion evidence. (Doc. No. 140 at 1.) Thus, even
2 assuming a different surgical option was available to address Plaintiff’s injury, Dr.
3 Duncan’s medical decision to choose the capsular shift procedure, a medically appropriate
4 procedure, cannot as a matter of law constitute deliberate indifference. See Jackson, 90
5 F.3d at 332 (explaining that to prevail on a claim for deliberate indifference, the plaintiff
6 must show that “that the course of treatment the doctors chose was medically unacceptable
7 under the circumstances”).

8 Plaintiff further argues that Defendant Duncan failed to properly diagnosis his Hill-
9 Sachs lesion. (Doc. No. 140 at 2, 5, 7.) Specifically, Plaintiff argues that Defendant
10 Duncan should have ordered an MRI, instead of only ordering x-rays, because Hill-Sachs
11 lesions are hard to detect through x-rays. (Id. at 2, 5.) But “Plaintiff’s belief that he should
12 have received a MRI is no more than a difference of opinions between plaintiff and the
13 defendant[] who provided and/or reviewed his medical treatment. Such a mere difference
14 of opinion as to the proper course of treatment does not give rise to an Eighth Amendment
15 claim.” Vaught v. Miranda, No. CIV S-10-1108 DAD P, 2012 WL 525573, at *11 (E.D.
16 Cal. Feb. 16, 2012); see Estelle, 429 U.S. at 107 (“A medical decision not to order an X-
17 ray, or like measures, does not represent cruel and unusual punishment.”). Defendant
18 Duncan’s decision not to order an MRI is supported by the medical expert opinion in the
19 record that given Plaintiff’s history, physical complaints, and the results of his x-rays, an
20 MRI was not warranted at the time he was seen by Duncan. (Doc. No. 104-3, Fronek Decl.
21 ¶ 35.)

22 Further, the evidence in the record shows that Defendant Duncan did evaluate
23 Plaintiff for a Hill-Sachs lesion. Plaintiff’s medical records reflect that in June 8, 2005,
24 Dr. Duncan identified a possible early Hill-Sachs lesion based on limited x-rays. (Doc.
25 No. 104-2, Peabody Decl. Ex. C; see also Doc. No. 104-3, Fronek Decl. ¶ 13.) Later, Dr.
26 Duncan ordered further x-rays, but the report for the x-rays stated that the impression from
27 the four-view examination of Plaintiff’s left shoulder was negative. (Doc. No. 104-2,
28 Peabody Decl. Exs. G, H.) Even assuming Dr. Duncan was incorrect in diagnosing

1 Plaintiff's injury, any such error would at most be mere negligence in diagnosing a medical
2 condition, which is insufficient to establish deliberate indifference. See Estelle, 429 U.S.
3 at 105-06; Toguchi, 391 F.3d at 1057. Moreover, there is no evidence in the record
4 showing that an MRI would have revealed Plaintiff's Hill-Sachs lesion. Even when
5 Plaintiff obtained an MRI from Dr. Cham, Dr. Cham's notes state that the interpretation of
6 the MRI was "a tear of the anterior inferior glenoid labrum" or "a Bankart lesion." (Doc.
7 No. 104-2, Peabody Decl. Exs. X, Z.) There is no mention of a Hill-Sachs lesion. (See
8 id.)

9 Finally, Plaintiff notes that the procedure Dr. Cham performed in 2015 substantially
10 alleviated his pain. (Doc. No. 140 at 3.) But even accepting this as true and drawing all
11 reasonable inferences in Plaintiff's favor, the fact that Dr. Cham might have been more
12 successful than Defendant Duncan in treating Plaintiff's injury, at best, would only mean
13 that the Defendant Duncan was potentially negligent in his diagnosis or treatment of
14 Plaintiff's injury. This is insufficient, as a matter of law, to state a claim for violation of
15 the Eighth Amendment. See Toguchi, 391 F.3d at 1057; Estelle, 429 U.S. at 106.
16 Accordingly, Defendant Duncan is entitled to summary judgment in his favor on Plaintiff's
17 Eighth Amendment claims. See Graham ex rel. Estate of Graham v. Cty. of Washtenaw,
18 358 F.3d 377, 385 (6th Cir. 2004) ("[W]here a prisoner has received some medical
19 attention and the dispute is over the adequacy of the treatment, federal courts are generally
20 reluctant to second guess medical judgments and to constitutionalize claims that sound in
21 state tort law.").

22 C. Defendants Malo-Clines, Fellows, Dhah, Peters, Bondoc, Akanno, Karan, and
23 Goyal

24 Plaintiff's medical records reflect that both before and after his 2007 surgery, he was
25 seen at various times by Defendants Malo-Clines, Fellows, Dhah, Peters, Bondoc, Akanno,
26 Karan, and Goyal for shoulder pain. (Doc. No. 104-2, Peabody Decl. Exs. D-E; Doc. No.
27 12, FAC Ex. A at 9-11, 14-17, 22, 40-55, 57-60; Doc. No. 149-7, Sargizian Decl. Exs. F,
28 G, H at 6; Doc. No. 120-4, Song Decl. ¶¶ 5-34; Doc. No. 149-4, Newman Decl. ¶¶ 14-15,

1 18, 25-30.) The medical records reflect that in each instance, Plaintiff reported that he was
2 experiencing shoulder pain, the Defendant at issue evaluated and examined Plaintiff, and
3 the Defendant then recommended a course of treatment and prescribed Plaintiff pain
4 medication.⁷ (See *id.*) If Plaintiff reported that a particular pain medication failed to
5 alleviate his pain, then the Defendant at issue would prescribe a different pain medication.
6 (See, e.g., Doc. No. 149-7, Sargizian Decl. Ex. G; Doc. No. 12, FAC Ex. A at 40-43.)
7 Plaintiff does not dispute the accuracy of these medical records. (See Doc. No. 143 at 16-
8 19; Doc. No. 156 at 8-9.)

9 Even when viewing the evidence in the light most favorable to Plaintiff, the evidence
10 in the record is insufficient, as a matter of law, to support an Eighth Amendment claim for
11 deliberate indifference against Defendants Malo-Clines, Fellows, Dhah, Peters, Bondoc,
12 Akanno, Karan, or Goyal. There is no evidence in the record showing that any of these
13 Defendants ignored or failed to respond to Plaintiff's medical needs or delayed Plaintiff's
14 treatment. The undisputed evidence shows that when each of these Defendants saw
15 Plaintiff, the Defendant evaluated Plaintiff's condition, recommended a course of
16 treatment, and prescribed Plaintiff medication in an attempt to alleviate his pain. Further,
17 these Defendants have provided the Court with declarations and reports from medical
18 experts opining that each Defendant's course of treatment was medically appropriate under
19 the circumstances. (Doc. No. 120-4, Song Decl. ¶¶ 5-34; Doc. No. 149-4, Newman Decl.
20 ¶ 35, Ex. 2.) Accordingly, Plaintiff's claims for deliberate indifference against these
21 Defendants fail as a matter of law. See *Jackson*, 90 F.3d at 332 (explaining that to prevail
22 on a claim for deliberate indifference, the plaintiff must show that "that the course of
23 treatment the doctors chose was medically unacceptable under the circumstances").

24 Plaintiff argues that the medications these Defendants prescribed were ineffective
25 and did not alleviate his pain. (Doc. No. 143 at 4-8; Doc. No. 156 at 2.) But, even accepting
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28 ⁷ In addition, Defendants Akanno and Karan ordered additional imaging, specifically x-rays, of Plaintiff's shoulder. (Doc. No. 12, FAC Ex. A at 51, 54-55, 58; Doc. No. 120-4, Song Decl. ¶ 21.)

1 as true that all of the medications were ineffective at treating Plaintiff’s pain, this at best
2 would only constitute mere negligence in treating Plaintiff’s medical condition, which is
3 insufficient, as a matter of law, to constitute deliberate indifference. See Estelle, 429 U.S.
4 at 105-06 (“[I]n the medical context, an inadvertent failure to provide adequate medical
5 care cannot be said to constitute ‘an unnecessary and wanton infliction of pain’ or to be
6 ‘repugnant to the conscience of mankind.’ Thus, a complaint that a physician has been
7 negligent in diagnosing or treating a medical condition does not state a valid claim of
8 medical mistreatment under the Eighth Amendment. Medical malpractice does not become
9 a constitutional violation merely because the victim is a prisoner.”); Toguchi, 391 F.3d at
10 1057 (“‘Mere negligence in diagnosing or treating a medical condition, without more, does
11 not violate a prisoner’s Eighth Amendment rights.’”). There is no evidence in the record
12 showing that any of these Defendants would have known beforehand that the medicine
13 prescribed would be ineffective in treating Plaintiff’s symptoms. Indeed, the evidence in
14 the record reflects that when Plaintiff reported that certain medications were ineffective,
15 the Defendant at issue would then alter Plaintiff’s prescription. (See, e.g., Doc. No. 149-
16 7, Sargizian Decl. Ex. G; Doc. No. 12, FAC Ex. A at 40-43.) Thus, the Defendants were
17 responsive, rather than indifferent, to Plaintiff’s medical issues.

18 Plaintiff also argues that the Defendants failed to properly diagnose his Hill-Sachs
19 lesion. (Doc. No. 143 at 10-11; Doc. No. 156 at 1-2.) Even assuming these Defendants
20 failed to properly diagnose his injury, mere negligence in diagnosing a medical condition
21 does not, as a matter of law, constitute deliberate indifference. See Estelle, 429 U.S. at
22 105-06; Toguchi, 391 F.3d at 1057.

23 Plaintiff also argues that these Defendants should have ordered an MRI and referred
24 him to an orthopedist. (Doc. No. 156 at 2.) But Plaintiff’s disagreement with a Defendant’s
25 chosen course of treatment does not amount to deliberate indifference as a matter of law.⁸

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27 ⁸ The Court notes that Plaintiff contends that these Defendants refused to refer Plaintiff for an
28 MRI or to an orthopedist due to financial considerations. (Doc. No. 143 at 9; Doc. No. 156 at 6.) But Plaintiff fails to support this contention with any evidence in the record.

1 See Colwell, 763 F.3d at 1068 (“A difference of opinion between a physician and the
2 prisoner—or between medical professionals—concerning what medical care is appropriate
3 does not amount to deliberate indifference.”); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir.
4 1989) (“At most, [plaintiff] has raised a difference of medical opinion regarding his
5 treatment. A difference of opinion does not amount to a deliberate indifference to
6 [plaintiff’s] serious medical needs.”); see also Estelle, 429 U.S. at 107 (“A medical decision
7 not to order an X-ray, or like measures, does not represent cruel and unusual punishment.”).
8 Further, there is no evidence in the record showing that an MRI would have revealed
9 Plaintiff’s Hill-Sachs lesion. Even when Plaintiff obtained an MRI from Dr. Cham, Dr.
10 Cham’s notes state that the interpretation of the MRI was “a tear of the anterior inferior
11 glenoid labrum” or “a Bankart lesion.” (Doc. No. 104-2, Peabody Decl. Exs. X, Z.) There
12 is no mention of a Hill-Sachs lesion. (See id.)

13 Finally, Plaintiff notes that he was eventually seen by Dr. Kornbleuth, who referred
14 Plaintiff to see an orthopedist for his shoulder pain. (Doc. No. 143 at 10; Doc. No. 156 at
15 6.) But even accepting this as true, the fact that Dr. Kornbleuth, unlike the above
16 Defendants, referred Plaintiff to an orthopedist is, at best, a difference of medical opinion,
17 which is insufficient to constitute deliberate indifference.⁹ See Sanchez, 891 F.2d at 242;
18 Colwell, 763 F.3d at 1068. Plaintiff also notes that after Dr. Cham ordered an MRI for his
19 shoulder and subsequently performed surgery on him in 2015, his pain was significantly
20 reduced. (Doc. No. 143 at 10; Doc. No. 156 at 3.) But even accepting this as true and
21 drawing all reasonable inferences in Plaintiff’s favor, the fact that Dr. Cham was more
22 successful than these Defendants in treating Plaintiff’s injury, at best, would only mean
23 that the Defendants were potentially negligent in their diagnosis and/or treatment of
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26 ⁹ The Court notes that this particular argument is inapplicable to Defendants Malo-Clines, Fellows
27 and Goyal because, as Plaintiff concedes in the FAC, Malo-Clines and Goyal did refer Plaintiff to an
28 orthopedist, and the medical records reflect that Defendant Fellows did refer Plaintiff to see a doctor.
(Doc. No. 12, FAC ¶¶ 7, 21, Ex. A at 11, 22, 59.) Further, in his opposition, Plaintiff explains that he is
not alleging a claim for deliberate indifference against Defendant Goyal. (Doc. No. 143 at 8.)

1 Plaintiff's injury. This is insufficient, as a matter of law, to state a claim for violation of
2 the Eighth Amendment. See Toguchi, 391 F.3d at 1057; Estelle, 429 U.S. at 106.
3 Accordingly, Defendants Malo-Clines, Fellows, Dhah, Peters, Bondoc, Akanno, Karan,
4 and Goyal are entitled to summary judgment in their favor on Plaintiff's Eighth
5 Amendment claims. See Sanchez, 891 F.2d at 241-42 (affirming a district court's entry of
6 summary judgment in favor of the defendants where the plaintiff was seen by "a
7 physician's assistant, prison doctors, and outside physicians on numerous occasions" and
8 "received substantial treatment and medication for his ailments" although the plaintiff's
9 symptoms continued to recur); see also Graham, 358 F.3d at 385 ("[W]here a prisoner has
10 received some medical attention and the dispute is over the adequacy of the treatment,
11 federal courts are generally reluctant to second guess medical judgments and to
12 constitutionalize claims that sound in state tort law.").

13 D Defendant Williams

14 In the FAC, Plaintiff also alleges Eighth Amendment claims against Defendant
15 Williams, but she has not appeared in the action. Nevertheless, the Court notes that it may
16 review the sufficiency of Plaintiff's allegations against Defendant Williams pursuant to 28
17 U.S.C. § 1915(e)(2), which provides: "Notwithstanding any filing fee, or any portion
18 thereof, that may have been paid, the court shall dismiss the case at any time if the court
19 determines that . . . the action . . . (ii) fails to state a claim on which relief may be granted."

20 A complaint is sufficient if it contains "enough facts to state a claim to relief that is
21 plausible on its face." Twombly, 550 U.S. at 570. "A claim has facial plausibility when
22 the plaintiff pleads factual content that allows the court to draw the reasonable inference
23 that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662,
24 678 (2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of
25 the elements of a cause of action will not do.'" Id. (quoting Twombly, 550 U.S. at 555).
26 "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual
27 enhancement.'" Id. (quoting Twombly, 550 U.S. at 557). Accordingly, dismissal for
28 failure to state a claim is proper where the claim "lacks a cognizable legal theory or

1 sufficient facts to support a cognizable legal theory.” Menciondo v. Centinela Hosp. Med.
2 Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008).

3 In determining whether a plaintiff has adequately stated a claim for relief, a district
4 court must accept as true all facts alleged in the complaint, and draw all reasonable
5 inferences in favor of the plaintiff. See Retail Prop. Trust v. United Bhd. of Carpenters &
6 Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014). But, a court need not accept “legal
7 conclusions” as true. Iqbal, 556 U.S. at 678. Further, it is improper for a court to assume
8 the plaintiff “can prove facts which it has not alleged or that the defendants have violated
9 the . . . laws in ways that have not been alleged.” Associated Gen. Contractors of Cal., Inc.
10 v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983).

11 In the FAC, the only allegations related to Defendant Williams are that Plaintiff was
12 seen by Defendant Williams for shoulder pain on December 18, 2007. (Doc. No. 12, FAC
13 ¶ 8.) The medical records referenced in the FAC and attached as exhibits to the FAC show
14 that Plaintiff saw Defendant Williams on December 18, 2007 and reported pain in his
15 shoulder when he would sleep on that side and when he would work out.¹⁰ (Id. Ex. A at
16 27-28.) The records reflect that Defendant Williams evaluated Plaintiff, instructed him to
17 stop performing exercises which caused him pain “(push ups)”, changed Plaintiff’s
18 prescription from Naprosyn to Ibuprofen 800 mg, and instructed Plaintiff to follow up if
19 his symptoms persisted. (Id.)

20 Even accepting these allegations as true and construing them in the light most
21 favorable to Plaintiff, these allegations are insufficient to state an Eighth Amendment claim
22 for deliberate indifference against Defendant Williams. The medical records attached to
23 the FAC reflect that Defendant Williams responded to Plaintiff’s complaints of shoulder
24 pain and attempted to treat his pain by instructing him to refrain from certain exercises and
25 by altering his pain medication prescription. Plaintiff may allege that the pain medication
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27 ¹⁰ In determining whether a plaintiff has adequately stated a claim for relief, a court may consider
28 documents attached to the complaint. See United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003);
Courthouse News Serv. v. Planet, 750 F.3d 776, 780 n.4 (9th Cir. 2014).

1 Defendant Williams prescribed was ultimately ineffective, (Doc. No. 12, FAC ¶ 8), but,
2 even accepting this as true, it would at best only constitute mere negligence in treating
3 Plaintiff’s medical condition, which is insufficient to state a claim for deliberate
4 indifference. See Estelle, 429 U.S. at 105-06; Toguchi, 391 F.3d at 1057. Accordingly,
5 the Court dismisses Defendant Williams from the action with prejudice pursuant to 28
6 U.S.C. § 1915(e)(2).

7 **III. Plaintiff’s Fourteenth Amendment Claims**

8 In the FAC, Plaintiff alleges a claim for violation of the Due Process Clause of the
9 Fourteenth Amendment against Defendants Rowe and Goyal. (Doc. No. 12, FAC ¶¶ 60-
10 71.) On July 21, 2016, the Court *sua sponte* dismissed Defendant Rowe from the action
11 with prejudice pursuant to 28 U.S.C. § 1915(e)(2). (Doc. No. 82.) In his opposition,
12 Plaintiff explains that he named Defendant Rowe as a defendant to this cause of action by
13 accident and that he instead meant to allege this cause of action against Defendant Karan.
14 Defendants argue that they are entitled to summary judgment of this claim because it is
15 premised on state law. (Doc. No. 120-1 at 16-17.)

16 Plaintiff’s medical records reflect that on July 29, 2013, Defendant Karan prescribed
17 Plaintiff ibuprofen and oxcarbazepine for his pain, and on October 15, 2013, Defendant
18 Goyal prescribed Plaintiff nortriptyline for his pain. (Doc. No. 12, FAC Ex. A at 57-62.)
19 Plaintiff argues that in prescribing these medications, Defendants failed to provide him
20 with notice that these medications were antipsychotic drugs as required by California Penal
21 Code § 2602. (Doc. No. 143 at 3, 7-8, 13; see also Doc. No. 12, FAC ¶ 61.) But “Section
22 1983 requires [a plaintiff] to demonstrate a violation of federal law, not state law.” Galen
23 v. Cty. of Los Angeles, 477 F.3d 652, 662 (9th Cir. 2007). Thus, Plaintiff cannot establish
24 a violation of the due process clause by simply attempting to show that Defendants Karen
25 and Goyal failed to comply with California Penal Code § 2602.¹¹ See id.; Ove v. Gwinn,

27 ¹¹ In his opposition, Plaintiff argues that the Court has supplemental jurisdiction under 28 U.S.C. §
28 1367 over his state law claim for violation of California Penal Code § 2602. (Doc. No. 143 at 13.) But
there is no claim for violation of California Penal Code § 2602 in the FAC, the operative pleading. (See

1 264 F.3d 817, 824 (9th Cir. 2001).

2 Plaintiff argues that the Supreme Court has recognized that there is a liberty interest
3 in freedom from unwanted antipsychotic drugs. (Doc. No. 143 at 11 (quoting United States
4 v. Williams, 356 F.3d 1045, 1053 (9th Cir. 2004)).) The Supreme Court and the Ninth
5 Circuit have recognized that “[b]oth convicted prisoners and pretrial detainees ‘possess[]
6 a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs
7 under the Due Process Clause of the Fourteenth Amendment.’” Williams, 356 F.3d at 1053
8 (quoting Washington v. Harper, 494 U.S. 210, 221-22 (1990)). Thus, the Due Process
9 Clause will permit a State to treat “‘a prison inmate who has a serious mental illness with
10 antipsychotic drugs against his will’” only if “‘the inmate is dangerous to himself or others
11 and the treatment is in the inmate’s medical interest.’” United States v. Loughner, 672
12 F.3d 731, 746 (9th Cir. 2012) (quoting Harper, 494 U.S. at 227); accord United States v.
13 Hernandez-Vasquez, 513 F.3d 908, 912 (9th Cir. 2008).

14 But there is no evidence in the record showing that Plaintiff was ever given
15 antipsychotic drugs against his will. Even assuming that oxcarbazepine and nortriptyline
16 qualify as antipsychotic drugs, there is no evidence showing that Plaintiff was forcibly
17 given these medications. The evidence in the record merely shows that Defendants Karan
18 and Goyal prescribed the medications at issue, not that they ordered that the medication be
19 forcibly administered. (See Doc. No. 12, FAC Ex. A at 57-62.) Indeed, in his briefing,
20 Plaintiff states that he began refusing the oxcarbazepine. (Doc. No. 143 at 7; see also Doc.
21 No. 12, FAC ¶ 40, Ex. B at 6-7, Ex. E at 25.) Accordingly, Defendants Goyal and Karan
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24 generally Doc. No. 12, FAC.) Moreover, even assuming Plaintiff had pled such a state law cause of
25 action in the FAC, because the Court has either dismissed or granted summary judgment on all of
26 Plaintiff’s federal claims in this action, see infra, the Court would decline to exercise supplemental
27 jurisdiction over Plaintiff’s claim for violation of California Penal Code § 2602 and dismiss that claim
28 without prejudice. See Carnegie–Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1998) (“[I]n the usual
case in which all federal-law claims are eliminated before trial, the balance of factors to be considered
under the pendant jurisdiction doctrine judicial economy, convenience, fairness, and comity-will point
toward declining to exercise jurisdiction over the remaining state-law claims.”); Bryant v. Adventist
Health Sys./W., 289 F.3d 1162, 1169 (9th Cir. 2002).

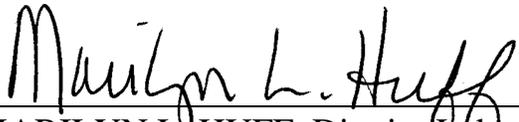
1 are entitled to summary judgment in their favor on Plaintiff's due process claims.

2 **Conclusion**

3 For the reasons above, the Court grants Defendants Duncan, Malo-Clines, Fellows,
4 Dhah, Peters, Bondoc, Akanno, Goyal, and Karan's motions for summary judgment.¹² In
5 addition, the Court dismisses Defendant Williams with prejudice pursuant to 28 U.S.C. §
6 1915(e)(2). Accordingly, the Court has resolved all of Plaintiff's claims against all of the
7 Defendants. The Clerk is directed to enter a judgment in favor of Defendants and against
8 Plaintiff and close the case.

9 **IT IS SO ORDERED.**

10 DATED: June 2, 2017

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12 _____
13 MARILYN L. HUFF, District Judge
14 UNITED STATES DISTRICT COURT
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24 ¹² In their motions for summary judgment, Defendants Malo-Clines, Fellows, Dhah, Peters,
25 Bondoc, Akanno, Goyal, and Karan also move for summary judgment of Plaintiff's claims on the
26 grounds that the claims are barred as a matter of law by the applicable statute of limitations. (Doc. No.
27 120-1 at 13-16; Doc. No. 149-1 at 5-8.) In addition, Defendants Malo-Clines, Fellows, Peters, Bondoc,
28 Akanno, Goyal, and Karan also move for summary judgment on the grounds that they are entitled to
qualified immunity. (Doc. No. 120-1 at 17-22.) Because the Court holds that these Defendants are
entitled to summary judgment because Plaintiff's constitutional claims fail as a matter of law on the
merits, the Court declines to address these additional grounds for summary judgment.