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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY DEPUTY

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

DAVID CODELL PRIDE, JR.,
CDCR #H-61218,

Plaintiff,

vs.

M. CORREA, DR. LEVIN, T. OCHOA,
DR. SANTIAGO,

Defendants.

Civil No. 07cv1382 BEN (JMA)

ORDER:

**(1) GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT PURSUANT TO
FED.R.CIV.P. 56(c); and**

**(2) DENYING PLAINTIFF'S
MOTION TO DISMISS MOTION
FOR SUMMARY JUDGMENT**

[Doc. Nos. 62, 77]

I.

STATEMENT OF THE CASE

Plaintiff David Codell Pride, Jr. ("Plaintiff"), a state prisoner currently incarcerated at Calipatria State Prison, is proceeding pro se and *in forma pauperis* under a Complaint filed pursuant to the Civil Rights Act, 42 U.S.C. § 1983.¹ Currently before the Court is Defendants

¹ While this case was randomly referred upon filing to the Honorable Jan M. Adler, United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), the Court has determined that a Report and Recommendation on the disposition of Defendants' Motion is not necessary. *See* S. D. CAL. CIVLR 72.3.a.

1 Correa, Santiago, Levin and Ochoa's Motion for Summary Judgment pursuant to FED.R.CIV.P.
 2 56 [Doc. No. 62] and Plaintiff's "Motion to Dismiss Motion for Summary Judgment" [Doc. No.
 3 77].

4 II.

5 PROCEDURAL BACKGROUND

6 Defendants move for summary judgment on the grounds that the undisputed facts show
 7 Plaintiff cannot satisfy the elements necessary to prove a violation of the Eighth Amendment
 8 right to adequate medical care. On December 17, 2009, the Court advised Plaintiff of his right
 9 and obligation to oppose Defendants' Motion, pursuant to *Klinge* v. *Eikenberry*, 849 F.2d 409
 10 (9th Cir. 1988) and *Rand* v. *Rowland*, 154 F.3d 952 (9th Cir. 1998) (en banc).² On February 23,
 11 2010, Plaintiff filed a Motion for Extension of Time to File an Opposition. The Court granted
 12 the request and continued the hearing date to allow Plaintiff additional time to file his
 13 Opposition. [Doc. No. 69.] Plaintiff filed his Opposition to Defendants' Motion on April 22,
 14 2010, to which Defendants filed a reply. In addition, on April 23, 2010, Plaintiff filed a "Motion
 15 to Dismiss Motion for Summary Judgment." [Doc. No. 76.]

16 Having now exercised its discretion to consider the matter as submitted on the papers
 17 without oral argument pursuant to S.D. CAL. CIVLR 7.1.d.1, the Court hereby **GRANTS**
 18 Defendants' Motion for Summary Judgment pursuant to FED.R.CIV.P. 56, as detailed below.

19 III.

20 PLAINTIFF'S FACTUAL ALLEGATIONS

21 Plaintiff alleges that on August 9, 2004, while incarcerated at Pelican Bay State Prison,
 22 prison doctor J.E. Lazore prescribed for him an "extra mattress"³ due to a permanent shoulder
 23

24 ² *Klinge* and *Rand* require the district court "'as a bare minimum, [to provide a pro se prisoner]
 25 with fair notice of the requirements of the summary judgment rule.'" *Klinge*, 849 F.2d at 411 (quoting
 26 *Hudson v. Hardy*, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). Thus, the district court is required to "tell the
 27 prisoner about his 'right to file counter-affidavits or other responsive materials and [to] alert[] [him]
 to the fact that his failure to so respond might result in the entry of summary judgment against him.'" *Jacobsen*, 790 F.2d at 1365 n.8 (quoting *Klinge*, 849 F.2d at 411).

28 ³ The prescription was made pursuant to a medical "chrono" with an expiration date of August
 9, 2005.

1 injury that causes Plaintiff considerable pain and sleeplessness. Compl. at 6, 18. On June 20,
 2 2005, a prison doctor also prescribed for him a “[right] knee sleeve” due to a sports injury to
 3 Plaintiff’s knee that causes the knee to slide out of joint, resulting in pain and swelling. Compl.
 4 at 4, 7, 17.⁴ Sometime thereafter, Plaintiff was transferred to Calipatria State Prison. Compl.
 5 at 4.

6 On January 3, 2006, Plaintiff was examined by Defendant Santiago, a doctor at Calipatria
 7 State Prison, who stated he would request the “chrono committee to get [Plaintiff’s] chronos
 8 renewed and request an egg crate mattress and chronos for both knee braces,” as Plaintiff’s left
 9 knee had “gotten worse” by compensating for the right knee. Compl. at 7. Defendant Santiago
 10 “explained to [Plaintiff] that Calipatria’s no double mattress policy was the reason he’d request
 11 an egg crate mattress.” Compl. at 7-8. On January 5, 2006, the Chrono Committee denied the
 12 requested treatment. Compl. at 4-5, 7-8. At the time in question, Defendant Levin was a
 13 member of the Chrono Committee; however, he was unable to attend the meeting so Defendant
 14 Correa, a registered nurse, attended on his behalf. Levin Decl., ¶¶ 2-6; Correa Decl., ¶ 6.
 15 Defendant Ochoa was the Acting Warden at the time and enforced the “no double mattress”
 16 policy. Compl. at 6; Ochoa Decl., ¶ 2.

17 Plaintiff alleges he told the nurses he is “in pain day and night.” Compl. at 5. According
 18 to Plaintiff, Nurse Garcia (who is not a defendant in this action) told Plaintiff “that the chrono
 19 committee stated there was no proof of [Plaintiff’s] injuries or an examination. S. Garcia then
 20 called the appeals coordinator and it was determined that an x-ray was needed to determine
 21 [Plaintiff’s] injury, however, no x-ray was ever given.” Compl. at 8.

22 Plaintiff alleges he is in constant pain and does not get enough sleep. Compl. at 8.
 23 Plaintiff must sleep on his sides, shoulders, or stomach on a two and one-half inch thick mattress
 24 on a steel slab, and, therefore, has poor blood circulation, is losing muscle mass, is stressed and
 25 tired all the time, and cannot exercise because of the pain and lack of rest. Compl. at 8-9.
 26 Plaintiff saw a prison nurse on March 13, 2007, who prescribed pain pills. Compl. at 9. He has
 27

28 ⁴ Plaintiff states in the Complaint that “the same doctor,” Dr. Lazore, prescribed the knee brace;
 however, the record indicates another doctor did so. See Compl. at 17.

1 taken so much ibuprofen that it no longer works and is negatively affecting his stomach lining.
2 Compl. at 9.

3 IV.

4 DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

5 A. Standard of Review

6 Federal Rule of Civil Procedure 56 provides, in relevant part, where "there is no genuine
7 issue as to any material fact ... the moving party is entitled to judgment as a matter of law."
8 FED.R.CIV.P. 56(c). Entry of summary judgment is appropriate "against a party who fails to
9 make a showing sufficient to establish the existence of an element essential to that party's case,
10 and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S.
11 317, 322 (1986). The court shall consider all admissible affidavits and supplemental documents
12 submitted on a motion for summary judgment. *See Connick v. Teachers Ins. & Annuity Ass'n*,
13 784 F.2d 1018, 1020 (9th Cir. 1986).

14 The moving party has the initial burden of demonstrating that summary judgment is
15 proper. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970). However, to avoid summary
16 judgment, the nonmovant cannot rest solely on conclusory allegations. *Berg v. Kincheloe*, 794
17 F.2d 457, 459 (9th Cir. 1986). Rather, the nonmoving party must present "specific facts showing
18 there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).
19 The Court may not weigh evidence or make credibility determinations on a motion for summary
20 judgment. Quite the opposite, the inferences to be drawn from the underlying facts must be
21 viewed in the light most favorable to the nonmoving party. *Id.* at 255; *United States v. Diebold*,
22 *Inc.*, 369 U.S. 654, 655 (1962). The nonmovant's evidence need only be such that a "fair
23 minded jury could return a verdict for [him] on the evidence presented." *Anderson*, 477 U.S. at
24 255. However, in determining whether the nonmovant has met his burden, the Court must
25 consider the evidentiary burden imposed upon him by the applicable substantive law. *Id.*

26 B. 42 U.S.C. § 1983

27 Section 1983 authorizes a "suit in equity, or other proper proceeding for redress" against
28 any person who, under color of state law, "subjects, or causes to be subjected, any citizen of the

1 United States ... to the deprivation of any rights, privileges, or immunities secured by the
 2 Constitution.” *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 2122 (2004). The basis of
 3 Plaintiff’s Section 1983 claims in this case is the alleged violation of Plaintiff’s constitutional
 4 rights under the Eighth Amendment.

5 The Eighth Amendment prohibits punishment involving the “unnecessary and wanton
 6 infliction of pain.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (quoting *Gregg v. Georgia*, 428
 7 U.S. 153, 173 (1976)); *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004). The Eighth
 8 Amendment is violated when prison officials are deliberately indifferent to a prisoner’s serious
 9 medical needs. *Estelle*, 429 U.S. at 105. “Medical” needs include a prisoner’s “physical, dental,
 10 and mental health.” *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982); *Hunt v. Dental Dept.*,
 11 865 F.2d 198, 200 (9th Cir. 1989).

12 To survive summary judgment, Plaintiff must point to evidence in the record from which
 13 a trier of fact might reasonably conclude that Defendants’ medical treatment placed Plaintiff at
 14 risk of “objectively, sufficiently serious” harm and that Defendants had a “sufficiently culpable
 15 state of mind” when they either provided or denied him medical care. *Wallis v. Baldwin*, 70 F.3d
 16 1074, 1076 (9th Cir. 1995) (internal quotations omitted). Thus, Plaintiff must satisfy an
 17 objective and subjective component of a two-part test. *Clement v. Gomez*, 298 F.3d 898, 904
 18 (9th Cir. 2002); *Toguchi*, 391 F.3d at 1057 (“To establish an Eighth Amendment violation, a
 19 prisoner ‘must satisfy both the objective and subjective components of a two-part test.’”) (quoting
 20 *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002)).

21 The “routine discomfort inherent in the prison setting,” by itself, is not enough to satisfy
 22 the objective prong of the Eighth Amendment. See *Johnson v. Lewis*, 217 F.3d 726, 731 (9th
 23 Cir. 1999). Rather, the objective component may be satisfied if the prisoner shows his medical
 24 need is sufficiently “serious” such that the “failure to treat [that] condition could result in further
 25 significant injury or the unnecessary and wanton infliction of pain.” *Clement*, 298 F.3d at 904
 26 (quotations omitted); *Lopez*, 203 F.3d at 1131-32; see also *Doty v. County of Lassen*, 37 F.3d
 27 540, 546 (9th Cir. 1994) (“serious” medical conditions are those a reasonable doctor would think
 28

1 worthy of comment, those which significantly affect the prisoner's daily activities, and those
2 which are chronic and accompanied by substantial pain).

3 The subjective component requires the prisoner to show that prison officials had the
4 requisite culpable mental state, *i.e.*, exhibited "'deliberate indifference' to a substantial risk of
5 serious harm." *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998) (quoting *Farmer v.*
6 *Brennan*, 511 U.S. 825, 835 (1994)). "Deliberate indifference" is evidenced only when "the
7 official knows of and disregards an excessive risk to inmate health or safety; the official must
8 both be aware of the facts from which the inference could be drawn that a substantial risk of
9 serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837; *Toguchi*,
10 391 F.3d at 1057.

11 Inadequate treatment due to "mere medical malpractice" or even gross negligence, does
12 not amount to a constitutional violation. *Estelle*, 429 U.S. at 106; *Hallett*, 296 F.3d at 744; *Wood*
13 *v. Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990). In other words, an "official's failure to
14 alleviate a significant risk that he should have perceived but did not, ... cannot ... be condemned
15 as the infliction of punishment." *Farmer*, 511 U.S. at 838; *Toguchi*, 391 F.3d at 1057 ("If a
16 prison official should have been aware of the risk, but was not, then the official has not violated
17 the Eighth Amendment, no matter how severe the risk.") (brackets, footnote and citations
18 omitted)). The Eighth Amendment prohibits only "the 'unnecessary and wanton infliction of
19 pain,' [] includ[ing] those sanctions that are 'so totally without penological justification that it
20 results in the gratuitous infliction of suffering.'" *Hoptowit*, 682 F.2d at 1246 (quoting *Gregg*,
21 428 U.S. at 173, 183). "This is not an easy test for [a] plaintiff[] to satisfy." *Hallett*, 296 F.3d
22 at 745.

23 Moreover, a difference of opinion between medical professionals concerning the
24 appropriate course of inmate treatment or care is not enough, by itself, to support a claim of
25 deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). Nor does a
26 difference of opinion between the prisoner and his doctors constitute deliberate indifference.
27 *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996). And, while deliberate indifference can
28 be manifested if a doctor or prison guard intentionally denies or delays access to medical care

1 or otherwise interferes with medical treatment already prescribed, *see Estelle*, 429 U.S. at 104-
 2 05, the delay must also lead to further injury or be somehow harmful. *McGuckin v. Smith*, 974
 3 F.2d 1050, 1060 (9th Cir. 1992) (noting that harm caused by delay need not necessarily be
 4 “substantial”), *overruled on other grounds, WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136
 5 (9th Cir. 1997); *Wood*, 900 F.2d at 1339-40; *see also Shapely v. Nevada Bd. of State Prison*
 6 *Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985); *Hunt*, 865 F.2d at 200 (“[D]elay in providing a
 7 prisoner with dental treatment, standing alone, does not constitute an Eighth Amendment
 8 violation.”).

9 **1. Objective Test**

10 Defendants argue Plaintiff fails to satisfy the objective component of an Eighth
 11 Amendment inadequate medical care claim. The Court disagrees. The Declaration of Defendant
 12 Santiago indicates he examined Plaintiff and found that Plaintiff suffered from “bilateral knee
 13 pain.” *See* Declaration of L. Santiago at ¶ 3. Defendant Santiago also found Plaintiff suffered
 14 from a “post-status gunshot wound, a fracture to his left humerus, an injury to his left scapula,
 15 and instability in both knees.” *Id.* Plaintiff’s medical records and Defendants’ declarations
 16 substantiate Plaintiff’s claim that his medical needs were objectively serious. *See Estelle*, 429
 17 U.S. at 105. Therefore, at least at this stage of the case, Plaintiff has satisfied the objective
 18 component of his claim.

19 **2. Subjective Test**

20 Defendants next argue Plaintiff fails the subjective component of his claim. *See Frost*,
 21 152 F.3d at 1128; *Farmer*, 511 U.S. at 837. The Court agrees, as further set forth below.

22 **a. Defendant Santiago**

23 Defendant Santiago initially examined Plaintiff on January 3, 2006, after Plaintiff
 24 submitted a “Health Care Request Form.” Santiago Decl. at ¶ 3, Ex. “A,” Health Care Services
 25 Request Form dated November 20, 2005. In this request, Plaintiff indicated he was seeking a
 26 renewal of his “soft shoe [chrono], double mattress [chrono], as well as a knee brace, cane and
 27 a request that Plaintiff be handcuffed in the front “due to shoulder injury.” *Id.*

28

1 Following the examination, Defendant Santiago issued a “Physician Orders” in which he
 2 “ordered that Mr. Pride be allowed Motrin, an egg-crate mattress, bilateral knee braces, he be
 3 handcuffed in waist chains, he be assigned to a low bunk on a bottom tier, and he be given soft
 4 tennis shoes.” *Id.* at ¶¶ 4-5. Defendant Santiago also filled out a “Comprehensive
 5 Accommodation Chrono” that requested Plaintiff be “assigned to a ground floor cell, and a
 6 bottom bunk, he be given bilateral knee braces and soft tennis shoes, and he be handcuffed in
 7 waist restraints.” *Id.* at ¶ 6. Defendant Santiago admits he inadvertently omitted the egg crate
 8 mattress in the chrono. *Id.*

9 Nonetheless, the evidence before this Court shows Defendant Santiago attempted to
 10 provide Plaintiff with necessary accommodations to treat his medical needs. Plaintiff argues Dr.
 11 Santiago should have followed up to ensure his recommended treatment was provided to
 12 Plaintiff. *See* Opp. at 13. Even if true, however, this contention is not sufficient to show a
 13 violation of the Eighth Amendment. *See, e.g., Farmer*, 511 U.S. at 838. Rather, the undisputed
 14 facts show Defendant Santiago played no role in the alleged denial of adequate medical
 15 treatment and he was not aware that Plaintiff did not receive the equipment that was initially
 16 prescribed. Therefore, Plaintiff cannot show that Defendant Santiago acted with “deliberate
 17 indifference” and, thus, Plaintiff cannot establish at least one element of his Eighth Amendment
 18 claim. As such, Plaintiff’s claim against Dr. Santiago fails as a matter of law.

19 *b. Defendants Levin and Correa*

20 Plaintiff seeks to hold Defendants Levin and Correa liable for the purported role they
 21 played on the “Chrono Committee.” The purpose of the Chrono Committee was to review all
 22 chronos, such as the one issued by Defendant Santiago, “before the requested medical
 23 accommodation would issue.” *See* Levin Decl., ¶¶ 4-5. Plaintiff alleges these Defendants
 24 wrongfully rejected the recommendations of Defendant Santiago, which resulted in further pain
 25 to him. *See* Compl. at 7-9.

26 On January 5, 2006, the Chrono Committee reviewed Plaintiff’s Chrono issued by
 27 Defendant Santiago. *Id.* at ¶ 6. Defendant Levin did not participate in the meeting. *Id.* Rather,
 28 Defendant Correa, a Registered Nurse at Calipatria, acted as Defendant Levin’s representative.

1 See Correa Decl., at ¶ 6; Levin Decl. at ¶ 6. Defendant Correa's role was to "note the
 2 Committee's decisions regarding their review of the doctor's requested Comprehensive
 3 Accommodation Chronos and sign the chronos on behalf of Dr. Levin." Correa Decl. at ¶ 6.
 4 During the meeting, the Committee denied Defendant Santiago's recommendation for a ground
 5 floor cell and bilateral knee braces. Levin Decl. ¶ 7, Ex. A, Comprehensive Accommodation
 6 Chrono dated January 5, 2006.

7 While Defendant Correa signed the Committee's decision on behalf of Defendant Levin,
 8 Correa admits she is not a medical doctor, is not qualified to assess the medical
 9 recommendations set forth in Dr. Santiago's Chrono, and, in fact, did not assess such
 10 recommendations. Correa Decl., ¶ 6, Ex. A. She "was not an active participant in the decisions
 11 of the Chrono Committee on January 5, 2006." Correa Decl., ¶ 6. Other evidence submitted by
 12 the Defendants corroborate these statements. *See, e.g.*, Levin Decl., ¶ 6. Plaintiff offers no
 13 evidence to the contrary or to otherwise show that Defendant Correa played any role in the
 14 alleged denial of adequate medical care. Therefore, as the undisputed facts show Defendant
 15 Correa did not act with "deliberate indifference" to Plaintiff's serious medical needs, Plaintiff's
 16 claims against Defendant Correa in this action fail as a matter of law.

17 While Defendant Levin did not attend the Committee's meeting on January 5, 2006,
 18 Defendant Levin did review and respond to Plaintiff's administrative grievance challenging the
 19 denial. *See* Defs.' Ex. E, Second Level Appeal Response, dated May 31, 2006, Log. No. CAL-
 20 B-06-00228. In this response, Defendant Levin denied Plaintiff's request to have a chrono
 21 issued for his knee braces and double mattress. *Id.* Specifically, Defendant Levin states that,
 22 based on his "medical education, training, and experience, and my review of Mr. Pride's medical
 23 records, his inmate appeal, Dr. Santiago's Comprehensive Accommodation Chrono, Dr.
 24 Santiago's Physician's Orders, and Dr. Santiago's notes of his exam of Mr. Pride... it is my
 25 opinion that Dr. Santiago's exam of Mr. Pride was insufficient to justify a chrono for an egg-
 26 crate mattress or bilateral knee braces." *See* Levin Decl. at ¶ 14. Plaintiff was informed that if
 27 he was experiencing pain or discomfort, he could submit a new Health Care Services Request
 28

1 Form for a re-evaluation from his primary care physician, but he failed to do so. Levin Decl.,
 2 ¶¶ 16-17.

3 The undisputed evidence shows Defendant Levin treated Plaintiff based on the record
 4 before him. The record shows Defendant Levin disagreed with the findings made by Defendant
 5 Santiago because Levin believed that Santiago's examination was too cursory to support the
 6 conclusion that knee braces and an egg-crate mattress were medically justified at the time. *See*
 7 Levin Decl. at ¶ 15. As noted, a difference of opinion between medical professionals concerning
 8 the appropriate course of inmate treatment or care is not enough, by itself, to support a claim of
 9 deliberate indifference. *Sanchez*, 891 F.2d at 242. Plaintiff has provided no evidence to
 10 contradict the initial showing by Defendants that he received adequate medical care while he was
 11 housed at Calipatria. As such, the Court finds Plaintiff's claims against Defendant Levin fail
 12 as a matter of law.

13 *c. Defendant Ochoa*

14 Plaintiff sues Defendant Ochoa as the Acting Warden for Calipatria State Prison who was
 15 responsible for the prison's rules and policies at the time in question, including the double
 16 mattress policy at issue in this case. Compl., pgs. 2-5. Plaintiff alleges Calipatria's "no double
 17 mattress" policy deprived him of adequate medical care because it deprived him of the egg crate
 18 mattress prescribed by Defendant Santiago. *Id.*

19 To establish his claim, Plaintiff must show Defendant Ochoa implemented "a policy so
 20 deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force
 21 behind the constitutional violation.'" *Redman v. County of San Diego*, 942 F.2d 1435, 1446-47
 22 (9th Cir. 1991) (citations omitted). In this case, Defendant Ochoa declares "Calipatria's no
 23 double-mattress policy is based on security concerns of the prison." *See* Ochoa Decl., ¶ 7.
 24 Defendant Ochoa further declares that prisoners "regularly use their mattresses to hide weapons,
 25 drugs and other contraband." *Id.* In addition, prisoners use their mattresses to "board up,"
 26 meaning inmates use their mattresses "as a shield or barrier to prevent correctional officers from
 27 using O.C. spray on the inmate and to inhibit the correctional officers' access into the cell during
 28 a cell extraction." *Id.* at ¶ 8.

1 While there is no dispute that Calipatria instituted a policy against double mattresses, the
2 record does not show Calipatria instituted a policy against egg crate mattresses, which is the
3 medical treatment at issue in this case. Plaintiff also does not allege that an egg crate mattress
4 would have been insufficient for his medical needs. Plaintiff offers no admissible evidence or
5 expert opinion to demonstrate that a double mattress was even necessary for his medical
6 condition. Thus, the Court cannot find that the policy prohibiting Plaintiff from having double
7 mattresses was "so deficient" that Plaintiff's constitutional rights were violated. As such, the
8 Court finds Plaintiff's claims against Defendant Ochoa fail as a matter of law.

9 As detailed above, the undisputed facts show Plaintiff cannot establish the elements
10 necessary for an Eighth Amendment violation based on alleged inadequate medical care. As
11 such, Plaintiff's claims fail as a matter of law.

12 Accordingly, the Court **GRANTS** Defendants' Motion for Summary Judgment.

13 **V.**

14 **MOTION TO DISMISS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

15 Plaintiff has filed a "Motion to Dismiss Defendants' Motion for Summary Judgment."
16 [Doc. No. 77]. In this Motion, Plaintiff refers to "Defendant Garcia" and seeks a dismissal of
17 Defendants' entire motion pursuant to FED.R.CIV.P. 56(f). *Id.*

18 However, Plaintiff failed to name Garcia as a Defendant in this matter. *See* Compl. at 1-
19 3. Thus, any request for discovery related to Garcia is not grounds for a dismissal or continuance
20 of the Motion. Plaintiff appears to now want to add Garcia as a Defendant nearly three years
21 after he initially filed this action but he does not set forth any facts as to why he did not seek this
22 information sooner. Moreover, he does not set forth any grounds by which the purported
23 affidavit he seeks from Garcia would be helpful to his Opposition.

24 Thus, Plaintiff's Motion to Dismiss Defendants' Motion for Summary Judgment is
25 **DENIED.**

26 ///

27 ///

28 ///

VI.

CONCLUSION AND ORDER

In light of the above, the Court hereby **GRANTS** Defendants' Motion for Summary Judgment pursuant to FED.R.CIV.P. 56 [Doc. No. 62] and **DENIES** Plaintiff's Motion to Dismiss Defendants' Motion for Summary Judgment [Doc. No. 77]. The Court further **CERTIFIES** that an IFP appeal from this Order would be frivolous and, therefore, would not be taken in good faith pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United States*, 369 U.S. 438, 445 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) (indigent appellant is permitted to proceed IFP on appeal only if appeal would not be frivolous). The Clerk of Court is directed to enter judgment and close the file.

IT IS SO ORDERED.

DATED: 5/27/2010

HON. ROGER T. BENITEZ
United States District Judge