

APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 21 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BENJAMIN K. TOSCANO,

No. 19-16288

Plaintiff-Appellant,

D.C. No. 3:16-cv-06800-EMC

v.

NANCY ADAM; et al.

MEMORANDUM*

Defendants-Appellees,

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Submitted July 14, 2020**

Before: CANBY, FRIEDLAND, and R. NELSON, Circuit Judges.

California state prisoner Benjamin K. Toscano appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging deliberate indifference to his serious medical needs. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Cir. 2004), and we affirm.

The district court properly granted summary judgment because Toscano failed to raise a genuine dispute of material fact as to whether Lenoir was deliberately indifferent to Toscano's chronic back problems and pain. *See id.* at 1057-60 (deliberate indifference is a "high legal standard" that requires a defendant is aware of and disregards an excessive risk to an inmate's health; medical malpractice, negligence, or a difference of opinion concerning the course of treatment does not amount to deliberate indifference).

The district court did not err in declining to address Toscano's retaliation claim because it was raised for the first time in his opposition to summary judgment. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) (holding that allowing the plaintiffs to proceed with a new theory of liability at summary judgment after the close of discovery would prejudice the defendants).

The district court properly dismissed Toscano's claims against defendants Strawn, McCabe, McClean, McConnell, and Lewis in the operative second amended complaint because Toscano failed to allege facts sufficient to state a plausible claim. *See Wilhelm v. Rotman*, 680 F.3d 1113, 1118 (9th Cir. 2012) (reviewing de novo a district court's dismissal for failure to state a claim under 28 U.S.C. § 1915A); *Hebbe v. Pliler*, 627 F.3d 338, 341-42 (9th Cir. 2010) (although pro se pleadings are construed liberally, plaintiff must present factual allegations

sufficient to state a plausible claim for relief); *Toguchi*, 391 F.3d at 1057-60 (deliberate indifference standard).

Toscano's request for mediation (Docket Entry No. 23) is denied.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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OCT 13 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BENJAMIN K. TOSCANO,

Plaintiff-Appellant,

v.

NANCY ADAM; et al.

No. 19-16288

D.C. No. 3:16-cv-06800-EMC
Northern District of California,
San Francisco

ORDER

Before: CANBY, FRIEDLAND, and R. NELSON, Circuit Judges.

Toscano's petition for panel rehearing (Docket Entry No. 27) is denied.

No further filings will be entertained in this closed case.

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APPENDIX C

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7 BENJAMIN K. TOSCANO,
8 Plaintiff,
9 v.
10 NANCY ADAM, et al.,
11 Defendants.

Case No. 16-cv-06800-EMC

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

Docket No. 57

12
13 **I. INTRODUCTION**

14 In this *pro se* prisoner's civil rights action, Benjamin Toscano complains about prison
15 officials' response to his back problems. The remaining Defendants, Dr. Lenoir and Dr. Adam,
16 now move for summary judgment. Mr. Toscano opposes the motion. For the reasons discussed
17 below, Defendants' motion for summary judgment will be granted and judgment entered in their
18 favor.

19 **II. BACKGROUND**

20 Mr. Toscano alleges two Eighth Amendment claims in this action: (1) Dr. Lenoir was
21 deliberately indifferent in responding to his requests for treatment, pain medications and medical
22 appliances for his back problems at a medical visit on September 16, 2016; and (2) Dr. Adam was
23 deliberately indifferent in that she repeatedly denied proper medical treatment and appliances for
24 Mr. Toscano's back problems. Docket No. 19. In their motion for summary judgment,
25 Defendants argue that the complaint should be dismissed for nonexhaustion of administrative
26 remedies because Mr. Toscano did not complete the exhaustion process before bringing this action
27 and never named Dr. Adam in an administrative appeal. Defendants also argue that Dr. Lenoir is
28 entitled to judgment as a matter of law on the merits of Mr. Toscano's Eighth Amendment claim.

1 The following facts are undisputed unless otherwise noted.

2 A. The Parties and Relevant Time Period

3 The relevant time period in this action is from September 2016 through the filing of the
4 second amended complaint on December 29, 2017.

5 Mr. Toscano was a prisoner housed at the California State Prison in Corcoran until he was
6 transferred to Pelican Bay State Prison on October 18, 2016. Docket No. 1 at 3-4. He currently is
7 housed at Pelican Bay. He is about 44 years old. *See* Docket No. 57-4 at 9. Mr. Toscano has had
8 back problems for many years, and reported to Dr. Lenoir that the back pain first started in 1994.
9 *See* Docket No. 57-4 at 28.

10 Defendant Dr. Lenoir was Mr. Toscano's primary care provider (PCP) for about a year at
11 Corcoran, and ceased being his PCP when Mr. Toscano was transferred out of Corcoran in mid-
12 October 2016.

13 Defendant Dr. Nancy Adam was Mr. Toscano's PCP at Pelican Bay.

14 B. Medical Care By Dr. Lenoir¹

15 The California Correctional Health Care Services (CCHCS) has adopted Pain Management
16 Guidelines to standardize the effective assessment, treatment, and management of patients with
17 acute and chronic pain. The guidelines recognize that it is generally not possible to relieve all pain
18 in patients with chronic pain. The treatment goal is to maximize function while avoiding the
19 serious side effects of the stronger pain medications and/or procedures. The treatment of pain is
20 an ongoing process. *See* Docket No. 57-4 at 2.

21 The California Department of Corrections and Rehabilitation (CDCR) has a Telemedicine
22 Department. Telemedicine practice operates under regulations and guidelines developed by the
23 CDCR. Although the physician may conduct the visit remotely, an on-site nurse accompanies the
24 inmate-patient and assists with the telemedicine appointments. *See* Docket No. 57-4 at 2.

25 Dr. Lenoir was Mr. Toscano's primary care physician (PCP) for almost a year at Corcoran

26
27 ¹ Only Dr. Lenoir argues that she is entitled to summary judgment on the merits of Mr. Toscano's
28 Eighth Amendment claim. Dr. Adam rests her motion for summary judgment solely on the
 ground that Mr. Toscano failed to exhaust administrative remedies. Thus, little mention is made
 of Mr. Toscano's medical care after he left Corcoran and ceased being Dr. Lenoir's patient.

1 before he was transferred to Pelican Bay in mid-October 2016. She cared for Mr. Toscano via the
2 CDCR's Telemedicine Department, conducting her visits with him from an off-site location.
3 Docket No. 57-4 at 2. Although Mr. Toscano's only claim alleged against Dr. Lenoir pertains to a
4 September 15, 2016, medical appointment, it is necessary to go back a few months from that date
5 to put that medical care in perspective.

6 On January 12, 2016, Dr. Lenoir saw Mr. Toscano. This was the first visit at which Mr.
7 Toscano complained of back pain to Dr. Lenoir. Docket No. 63 at 1 (denying back pain was
8 discussed at October 2015 appointment with Dr. Lenoir). Mr. Toscano reported that he had disc
9 degenerative disease for the last two years with nerve damage in the L5/S1 area, as shown by an x-
10 ray taken two years earlier. Dr. Lenoir thought that Mr. Toscano's report of his history of back
11 pain did not correlate with the physical exam done that day (which was normal) or the imaging in
12 his medical file. Docket No. 57-4 at 3. Dr. Lenoir requested x-rays of the back.² Also at that
13 visit, Mr. Toscano reported that he had had back pain for the past twenty years with no history of
14 injury or trauma, that his back pain fluctuated between 0 and 10 on a ten-scale, and that the non-
15 steroidal anti-inflammatory drugs (NSAIDs) he had been prescribed provided no significant relief
16 from pain. Mr. Toscano said he had radiating pain and needed nerve medication. Dr. Lenoir
17 suggested a trial of Trileptal (also known as oxcarbazepine), which is used to treat nerve pain. Mr.
18 Toscano refused, objecting that he did not want to use an anti-depressant. Dr. Lenoir thought Mr.
19 Toscano was confusing Trileptal with amitriptyline because she saw a note of his earlier refusal of
20 the latter. Dr. Lenoir explained to Mr. Toscano that there is a certain process used to manage
21 chronic pain, and the initial approach consists of trying medications like Trileptal and
22 amitriptyline.³ Dr. Lenoir renewed Mr. Toscano's existing prescription for Sulindac (an NSAID)

23
24 ² The parties disagree as to whether Dr. Lenoir had to submit a request for services for imaging
25 services and the request had to be approved by a committee (as Dr. Lenoir states) or whether Dr.
26 Lenoir could simply request the x-rays or other imaging services without need for further approval
27 (as Mr. Toscano states). *Compare* Docket No. 57-4 at 3 with Docket No. 63 at 1. The
28 disagreement is not as to a material fact because neither party suggests that any radiologic testing
Dr. Lenoir wanted was denied by a committee or any third party.

³ Mr. Toscano states in his opposition brief that he is "now aware that they prescribe such
medications [i.e., anti-depressants, anti-convulsants, and medications also used for bipolar
conditions] for back pain." Docket No. 62 at 4.

1 as needed for pain. Docket No. 57-4 at 4, 9-10. Dr. Lenoir denied Mr. Toscano's request for
2 approval for a waist-chain-cuffing chrono (i.e., medical permission memorandum). She reviewed
3 with him the various conditions that qualify for waist-chain cuffing and found that he did not have
4 any of those conditions. Docket No. 57-4 at 4, 10.

5 X-rays were done of Mr. Toscano's back on January 19, 2016. *See* Docket No. 57-4 at 12.

6 On February 1, 2016, Dr. Lenoir reviewed the results of the back x-rays with Mr. Toscano.
7 She states that the lumbar spine x-ray showed "no acute fracture or dislocation. Chronic lower
8 thoracic compression deformities are present. Mild spinal curve curvature, may be positional.
9 Mild degenerative changes in the lower thoracic spine," and that the thoracic spine x-ray showed
10 "no acute fracture or dislocation, mild chronic lower thoracic compression deformities. Mild to
11 moderate lower thoracic degenerative changes." Docket No. 57-4 at 4-5, 12. To Dr. Lenoir, the
12 x-rays showed that Mr. Toscano had mild to moderate degenerative changes to his back. *Id.* at 5.
13 Her treatment plan was for Mr. Toscano to receive physical therapy, do core strengthening
14 exercises, and take a low dose of Trileptal to address his reported nerve pain. She continued the
15 prescription for Sulindac (an NSAID). *Id.* at 5, 12. Although Dr. Lenoir may have planned for
16 Mr. Toscano to take Trileptal, Mr. Toscano did not take it. Docket No. 63 at 2. Her notes from
17 the visit indicate that Mr. Toscano wanted to see a neurosurgeon, but Dr. Lenoir planned to try
18 less invasive modalities of treatment before considering invasive treatment and "would not
19 recommend doing invasive treatment at this time, given his results." Docket No. 57-4 at 12.

20 Mr. Toscano's medical records state that he refused to go to an appointment on March 19,
21 2016, for a pain management follow-up. Docket No. 57-4 at 14-15. Mr. Toscano disputes that he
22 refused to attend an appointment and states that he was never called for an appointment. *Id.* at 15;
23 Docket No. 63 at 3. The dispute is not material because the appointment was rescheduled for later
24 and Mr. Toscano does not assert any claim related to the missed appointment.

25 On April 15, 2016, Mr. Toscano had a physical therapy evaluation of his lumbar spine at
26 Dr. Lenoir's request. The physical therapist noted that Mr. Toscano was functional with activities
27 of daily living (ADLs). Docket No. 57-4 at 16. The physical therapist also noted the presence of
28 conditions (i.e., lordosis and kyphosis) that are treated with exercise and education on posture. *Id.*

1 at 16-17. The physical therapist further noted: "Tight hip flexors. Poor self exercise program (leg
2 raises) irritating LS [lumbrosacral] symptoms." *Id.* at 17. The physical therapist gave Mr.
3 Toscano a handout showing exercises for him to perform independently to address his complaints.
4 *Id.* at 17-20.

5 On or about August 9, 2016, Dr. Lenoir saw Mr. Toscano again. At this appointment, Mr.
6 Toscano stated that he had gone to physical therapy and done the stretches given to him but still
7 had pain that averaged between 5 and 7 on a ten-scale. Docket No. 57-4 at 5. A physical
8 examination of Mr. Toscano's back was normal. Dr. Lenoir requested an MRI to ensure that there
9 was no pathology. Docket No. 57-4 at 5.

10 On September 7, 2016, Mr. Toscano went to the appointment for an MRI of his lumbar
11 spine. Either an MRI or a CT-scan of his back was done.⁴ The radiologist's report states the
12 following findings and impression:

13 The gross alignment of the lumbar spine is within normal limits.
14 The vertebral bodies are intact without fracture. The bone marrow
15 signal intensities are unremarkable.
16 The conus medullaris terminates at the L1 level and is
17 unremarkable.
18 There is degenerative signal loss in the intervertebral disks at L4-5 and
19 L5-S1.
20 Findings at specific axial levels:
21 L1-T2: Unremarkable.
22 L2-3: Unremarkable.
23 L3-4: Unremarkable.
24 L4/5: Right foraminal disc protrusion moderately narrows the
25 neural foramen.
26 L5-S1: Right asymmetric disc protrusion impinges upon the right
27 descending S1 nerve and contributes to a mild central canal stenosis.

28 **IMPRESSION:**

1. L4-5 and L5-S1 DEGENERATIVE DISC DISEASE WITH
2 DISC PROTRUSIONS.

3 Docket No. 57-4 at 23.

4 Dr. Lenoir declared that she understood that a CT-scan was done because an MRI could not be performed due to the presence of metal in Mr. Toscano's body, but the imaging report identifies the test as an "MRI Lumbar Spine W/O contrast." Docket No. 57-4 at 6, 23. Mr. Toscano states in different places that an MRI was done or an MRI/CT-scan. See, e.g., Docket No. 19 at 4 ("MRI"); Docket No. 63 at 3 ("MRI/CT scan on 9-7-16"). Neither party contends that it makes any difference to the legal analysis whether the test was an MRI or a CT-scan or both. For present purposes, the Court will use the more inclusive "MRI/CT-scan" term that Mr. Toscano uses.

1 On September 8, 2016, Mr. Toscano refused care from a nurse and refused to attend a
2 medical appointment in connection with his medical appeal, according to his medical records.
3 Docket No. 57-4 at 6, 24, 25.

4 On September 15, 2016, Dr. Lenoir reviewed the results of the September 7, 2016 imaging
5 with Mr. Toscano. According to Dr. Lenoir, the “imaging showed degenerative changes, not a
6 new injury to his back.” Docket No. 57-4 at 6. Mr. Toscano contends that the imaging did show a
7 new injury.⁵ Dr. Lenoir’s notes state that she went over the imaging with Mr. Toscano; she also
8 noted that “the moderate narrowing of the neural foramina and at L4-L5 may explain some of his
9 radiculopathy.” Docket No. 57 at 29.

10 At the September 15 appointment, Dr. Lenoir and Mr. Toscano also discussed medications
11 to treat Mr. Toscano’s chronic back pain. Mr. Toscano requested a prescription for gabapentin.
12 The prescription of gabapentin is restricted by the Pain Management Guidelines. “Gabapentin
13 cannot be prescribed for the off-label use of treating peripheral neuropathy until and unless the
14 CDCR physician has made an evidentiary showing that (1) an inmate-patient actually had
15 objective evidence of a neuropathy, and (2) the patient had failed other treatment such as a trial of

16
17 ⁵ The parties disagree as to whether the September 7, 2016 MRI/CT-scan showed that Mr.
18 Toscano had a new injury. Mr. Toscano states he had a new injury because the results now
19 showed a problem at the L4-5 disc whereas earlier imaging only showed injury to his L5-S1 disc.
20 Dr. Lenoir does not disagree that the MRI/CT-scan result showed a problem at the L4-5 disc, but
21 states that the MRI/CT-scan result shows “degenerative changes only” rather than a new injury.
22 *Compare* Docket No. 63 at 2, 3 with Docket No. 57-4 at 6. Dr. Lenoir’s statement that
23 degenerative changes were shown is consistent with the radiologist’s impression of “L4-5 and L5-
24 S1 degenerative disc disease with disc protrusions.” Docket No. 57-4 at 23. The parties’
25 disagreement appears to stem from different views of the word “injury.” There is no evidence that
26 a specific event (like a car accident or fall down a flight of stairs) caused Mr. Toscano’s back pain
27 in 2016. In that respect, there is no evidence of a new injury. Insofar as Mr. Toscano uses
28 “injury” to mean symptoms, the parties are in agreement that Mr. Toscano reported low back pain
that occasionally radiated down his leg, and neither party states that he had reported radiating pain
before seeing Dr. Lenoir in early 2016. The parties do not dispute what the MRI/CT-scan imaging
report stated as to the condition of Mr. Toscano’s back, i.e., that it showed “foraminal disc
protrusion moderately narrows the neural foramen” (as well as that there was “disc protrusion” at
L5-S1 and that the radiologist’s impression was “L4-5 and L5-S1 degenerative disc disease with
disc protrusions.” Docket No. 57-4 at 23. Dr. Lenoir presents no evidence that the L4-5 condition
was depicted on imaging before the September 7, 2016 MRI/CT-scan, but it does not flow from
that fact that it must be considered a new injury instead of further evidence of “degenerative
disease” as she states in her declaration. In any event, the disagreement as to whether there was a
new “injury” is not as to a material fact because there is no evidence that the treatment would have
been different if the situation was deemed to have been a new injury instead of further
degenerative changes to his back.

1 formulary" medications. Docket No. 57-4 at 6-7. Dr. Lenoir explained to Mr. Toscano that the
2 first line medications that she would use for treatment of his chronic pain were Tegretol (also
3 known as carbamazepine) and Trileptal. *Id.* at 7, 29. At Mr. Toscano's request, Dr. Lenoir
4 arranged for additional information on Tegretol and gabapentin to be provided to him. Dr. Lenoir
5 also continued the prescription for Sulindac as needed for pain. *Id.*⁶

6 Dr. Lenoir did not have any further appointments with Mr. Toscano after September 15,
7 2016. At the end of the appointment on September 15, Dr. Lenoir noted that Mr. Toscano should
8 be seen in 90 days for a follow-up on his complaints of back pain. Docket No. 57-4 at 29-30.
9 Mr. Toscano was transferred to Pelican Bay in mid-October 2016.

10 Dr. Lenoir declares that her care for Mr. Toscano met "the CDCR's standard of care as
11 well as that of the medical community," and that she "use[d] at least the degree of knowledge and
12 skill ordinarily possessed and exercised by members of my profession under similar
13 circumstances." Docket No. 57-4 at 7.

14 There is no evidence that any doctor recommended surgery, "medical appliances," or
15 gabapentin for Mr. Toscano while he was under Dr. Lenoir's care.

16 C. Mr. Toscano's Inmate Appeal

17 Mr. Toscano filed one inmate appeal that pertained to the medical care for his back
18 problems during the relevant time period.⁷ Specifically, he submitted an inmate appeal on
19 September 16, 2016, that was assigned inmate appeal Log No. COR HC-16061135. Docket No.
20 57-3 at 6. In that inmate appeal, Mr. Toscano complained about Dr. Lenoir's care for him. He
21 wrote that he had seen Dr. Lenoir on September 15, 2016, to discuss the "MRI I had on 9-7-16 for

22
23 ⁶ The parties disagree as to whether Mr. Toscano also requested morphine at the September 15,
24 2016 visit. Mr. Toscano states that he did not do so, Docket No. 63 at 3, and the Court accepts
25 that statement by the nonmoving party as true for purposes of ruling on Defendants' motion for
summary judgment. The disagreement is not as to a material fact, however. Mr. Toscano does not
contend he should have been provided morphine, and Dr. Lenoir does not suggest that Mr.
Toscano asked for morphine for improper purposes.

26 ⁷ In his opposition papers, Mr. Toscano attaches a copy of another inmate appeal, Log No. COR
27 HC-14055248. Docket No. 63 at 2, 31. That inmate appeal was submitted in February 2014,
28 more than two years before any of the acts or omissions giving rise to the claims in this action
occurred and long before he ever was treated by either Defendant. The inmate appeal submitted in
2014 is irrelevant to the administrative exhaustion issue in this case.

1 re occurring back injury.” Docket No. 57-3 at 6, 8. He described the results of the MRI/CT-scan
2 and then wrote that Dr. “Lenoir denied all my request for the proper and effective treatment: back
3 brace, cane, wheel chair, lower tier/lower bunk chrono, waist chain, effective pain medication, and
4 gabapentin – commonly used and issued to inmates with back injury condition like mines. P.
5 Lenoir wants to use me as a guinea pig to experiment some new medications not treated for my
6 serious back injury. She also deny my request for immediate back surgery to relieve the pressure
7 on my back, spine, nerve etc. in violation of the 8th Amend.” *Id.* at 8 (errors in source).

8 Mr. Toscano was interviewed for the inmate appeal on October 6, 2016. Docket No. 57-3
9 at 10; *see* Docket No. 19 at 5.

10 The inmate appeal was “partially granted” at the first level signed on October 28, 2016.
11 Docket No. 57-3 at 10-12; *see* Docket No. 19 at 5. The inmate appeal response stated that Mr.
12 Toscano’s requests for a back brace and effective pain medications were duplicative of other
13 appeals and would not be addressed in this appeal; his request for gabapentin was “partially
14 granted” in that Mr. Toscano had been prescribed oxycarbazepine for his back complaints; and his
15 other requests were denied. *Id.* at 10-11.

16 The inmate appeal was “partially granted” at the second level in a response signed
17 December 22, 2016. *Id.* at 13-14. The response denied all of Mr. Toscano’s requests except that
18 the response (a) “partially granted” his request regarding pain medications, noting that his PCP
19 had prescribed Sulindac for back pain and that Mr. Toscano could discuss the matter with his PCP
20 by submitting a health care services request form if Mr. Toscano had further pain or wanted to
21 discuss different medication options; and (b) granted Mr. Toscano’s request for products to relieve
22 constipation. *Id.*

23 The inmate appeal was denied at the third level in a response dated March 29, 2017.
24 Docket No. 57-3 at 3-5.

25 Dr. Adam did not sign any of the inmate appeal responses.

26 Mr. Toscano’s original complaint in this action is dated November 8, 2016. Docket No. 1
27 at 4. He wrote on that document that he had received “no response” to his inmate appeal. *Id.* at 1;
28 *see also id.* at 4 (“Plaintiff HC #16061135 has *not* been responded to either by PBSP or

1 Corcoran"). Mr. Toscano's statements in his complaint that his health care appeal had not been
2 responded to were false: he already knew the inmate appeal number and had written it on the
3 original complaint; he had been interviewed for the appeal on October 6, 2016, by a nurse who
4 allegedly denied all his requests; and the written decision denying the inmate appeal was issued on
5 October 28, 2016. *See* Docket No. 1 at 4; Docket No. 19 at 5. Mr. Toscano's original complaint
6 did not mention his visit with Dr. Lenoir on September 15, 2016; in fact, his complaint conveyed
7 the impression that no one had bothered to see him after the September 7 MRI/CT-scan was done.
8 Docket No. 1 at 4.

9 Mr. Toscano's amended complaint is dated May 22, 2017. Docket No. 7 at 4. His second
10 amended complaint is dated December 29, 2017. Docket No. 19 at 8.

11 III. VENUE AND JURISDICTION

12 Venue is proper in the Northern District of California because some of the events or
13 omissions giving rise to the complaint occurred at a prison in Del Norte County, which is located
14 within the Northern District. *See* 28 U.S.C. §§ 84, 1391(b). The Court has federal question
15 jurisdiction over this action brought under 42 U.S.C. § 1983. *See* 28 U.S.C. § 1331.

16 IV. LEGAL STANDARD FOR SUMMARY JUDGMENT

17 Summary judgment is proper where the pleadings, discovery and affidavits show that there
18 is "no genuine dispute as to any material fact and [that] the moving party is entitled to judgment as
19 a matter of law." Fed. R. Civ. P. 56(a). A court will grant summary judgment "against a party
20 who fails to make a showing sufficient to establish the existence of an element essential to that
21 party's case, and on which that party will bear the burden of proof at trial . . . since a complete
22 failure of proof concerning an essential element of the nonmoving party's case necessarily renders
23 all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is
24 material if it might affect the outcome of the lawsuit under governing law, and a dispute about
25 such a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict
26 for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

27 In a typical summary judgment motion, a defendant moves for judgment against a plaintiff
28 on the merits of his claim. In such a situation, the moving party bears the initial burden of

1 identifying those portions of the record which demonstrate the absence of a genuine dispute of
2 material fact. The burden then shifts to the nonmoving party to “go beyond the pleadings, and by
3 his own affidavits, or by the ‘depositions, answers to interrogatories, or admissions on file,’
4 designate ‘specific facts showing that there is a genuine issue for trial.’” *Celotex*, 477 U.S. at 324.

5 When a defendant moves for summary judgment on an affirmative defense on which he
6 bears the burden of proof at trial, he must come forward with evidence which would entitle him to
7 a directed verdict if the evidence went uncontested at trial. *See Houghton v. South*, 965 F.2d
8 1532, 1536 (9th Cir. 1992). The failure to exhaust administrative remedies is an affirmative
9 defense that must be raised in a motion for summary judgment. *See Albino v. Baca*, 747 F.3d
10 1162, 1166 (9th Cir. 2014) (en banc). On a motion for summary judgment for nonexhaustion, the
11 defendant has the initial burden to prove “that there was an available administrative remedy, and
12 that the prisoner did not exhaust that available remedy.” *Id.* at 1172. If the defendant carries that
13 burden, the “burden shifts to the prisoner to come forward with evidence showing that there is
14 something in his particular case that made the existing and generally available administrative
15 remedies effectively unavailable to him.” *Id.* The ultimate burden of proof remains with the
16 defendant, however. *Id.* If material facts are disputed, summary judgment should be denied, and
17 the “district judge rather than a jury should determine the facts” on the exhaustion question, *id.* at
18 1166, “in the same manner a judge rather than a jury decides disputed factual questions relevant to
19 jurisdiction and venue,” *id.* at 1170-71.

20 A verified complaint may be used as an opposing affidavit under Rule 56, as long as it is
21 based on personal knowledge and sets forth specific facts admissible in evidence. *See Schroeder*
22 *v. McDonald*, 55 F.3d 454, 460 & nn.10-11 (9th Cir. 1995) (treating plaintiff’s verified complaint
23 as opposing affidavit where, even though verification not in conformity with 28 U.S.C. § 1746,
24 plaintiff stated under penalty of perjury that contents were true and correct, and allegations were
25 not based purely on his belief but on his personal knowledge). Mr. Toscano’s second amended
26 complaint is made under penalty of perjury and therefore is considered as evidence.

27 The court’s function on a summary judgment motion is not to make credibility
28 determinations or weigh conflicting evidence with respect to a disputed material fact. *See T.W.*

1 *Elec. Serv. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The evidence must
2 be viewed in the light most favorable to the nonmoving party, and inferences to be drawn from the
3 facts must be viewed in the light most favorable to the nonmoving party. *See id.* at 631.

V. DISCUSSION

A. Exhaustion of Administrative Remedies

“No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016) (mandatory language of § 1997e(a) forecloses judicial discretion to craft exceptions to the requirement). All available remedies must be exhausted; those remedies “need not meet federal standards, nor must they be ‘plain, speedy, and effective.’” *Porter*, 534 U.S. at 524. Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. *Id.*; *Booth v. Churner*, 532 U.S. 731, 741 (2001). Section 1997e(a) requires “proper exhaustion” of available administrative remedies. *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). Proper exhaustion requires using all steps of an administrative process and complying with “deadlines and other critical procedural rules.” *Id.* at 90. An inmate “need not exhaust *unavailable* [remedies].” *Ross*, 136 S. Ct. at 1858 (emphasis added). An administrative remedy is unavailable if, for example, “it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates”; or if it is “so opaque that it becomes, practically speaking, incapable of use”; or if “prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Id.* at 1859–60.

The State of California provides its inmates and parolees the right to appeal administratively “any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a). In order to exhaust available administrative remedies within this system, a prisoner must proceed through three formal levels of

1 appeal and receive a decision from the Secretary of the CDCR or his designee. *Id.* § 3084.1(b), §
2 3084.7(d)(3).

3 1. Dr. Adam – Failure To Name Defendant In Administrative Appeal

4 Dr. Adam argues that Mr. Toscano did not exhaust administrative remedies for his claim
5 against her because he never named her in his administrative appeal. The Court agrees.

6 The amount of detail in an administrative grievance necessary to properly exhaust a claim
7 is determined by the prison's applicable grievance procedures. *Jones v. Bock*, 549 U.S. 199, 218
8 (2007); *see also Sapp v. Kimbrell*, 623 F.3d 813, 824 (9th Cir. 2010) ("To provide adequate
9 notice, the prisoner need only provide the level of detail required by the prison's regulations").
10 California prisoners are required to lodge their administrative complaint on a CDCR 602 form (or
11 a CDCR 602-HC form for a health care matter). The level of specificity required in the appeal is
12 described in a regulation:

13 The inmate or parolee shall *list all staff member(s)* involved and
14 shall describe their involvement in the issue. To assist in the
15 identification of staff members, the inmate or parolee *shall include*
16 *the staff member's last name, first initial, title or position, if known,*
17 *and the dates of the staff member's involvement* in the issue under
18 appeal. If the inmate or parolee does not have the requested
identifying information about the staff member(s), he or she shall
provide any other available information that would assist the appeals
coordinator in making a reasonable attempt to identify the staff
member(s) in question.

19 Cal. Code Regs. tit. 15, § 3084.2(a)(3) (emphasis added). Another regulation provides that
20 "[a]dministrative remedies shall not be considered exhausted relative to any new issue,
21 information, or person later named by the appellant that was not included" in the originally
22 submitted CDCR-602 inmate appeal form. Cal. Code Regs. tit. 15, § 3084.1(b).

23 Several Ninth Circuit cases have referred to California prisoners' grievance procedures as
24 not specifying the level of detail necessary and instead requiring only that the grievance "describe
25 the problem and the action requested." *See Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir.
26 2014) (quoting former Cal. Code Regs. tit. 15, § 3084.2); *Sapp*, 623 F.3d at 824 ("California
27 regulations require only that an inmate 'describe the problem and the action requested.' Cal. Code
28 Regs. tit. 15, § 3084.2(a)"); *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (when prison's

1 procedures do not specify the requisite level of detail, ““a grievance suffices if it alerts the prison
2 to the nature of the wrong for which redress is sought””). Those cases are distinguishable,
3 however, because they did not address the regulation as it existed at the time of the events
4 complained of in Mr. Toscano’s second amended complaint. Section 3084.2 was amended in
5 2010 (with the 2010 amendments becoming operative on January 28, 2011), and those
6 amendments included the addition of subsection (a)(3). *See* Cal. Code Regs. tit. 15, § 3084.2
7 (history notes 11-12 providing operative date of amendment). *Wilkerson* and *Sapp* used the pre-
8 2011 version of section 3084.2, as evidenced by their statements that the regulation required the
9 inmate to “describe the problem and the action requested” – a phrase that does not exist in the
10 version of the regulation in effect in and after 2011. *Griffin* is distinguishable because it discussed
11 the Maricopa County Jail administrative remedies rather than the CDCR’s administrative
12 remedies. Whatever the former requirements may have been in the CDCR and whatever
13 requirements may still exist in other facilities, since January 28, 2011, the operative regulation has
14 required California prisoners using the CDCR’s inmate appeal system to list the name(s) of the
15 wrongdoer(s) in their administrative appeals.

16 Defendant Dr. Adam has carried her burden to demonstrate that Mr. Toscano did not
17 exhaust the available administrative remedies as to his claim against her. The undisputed evidence
18 shows that California provides an administrative remedies system for California prisoners to
19 complain about their conditions of confinement, and that Mr. Toscano used that California inmate
20 appeal system to complain about some events that gave rise to his second amended complaint.
21 The regulation requires that the prisoner provide the name of the wrongdoing official and describe
22 the official’s involvement in the issue. Cal. Code Regs. tit. 15, § 3084.2(a)(3). The undisputed
23 evidence shows that the only inmate appeal Mr. Toscano filed pertaining to events alleged in the
24 amended complaint that received a decision at the third level did not mention Dr. Adam and did
25 not assert any wrongdoing by Dr. Adam. Dr. Adam met her initial burden to prove “that there was
26 an available remedy, and that [the plaintiff] did not exhaust that available remedy.” *Albino*, 747
27 F.3d at 1172.

28 Once Dr. Adam met her initial burden, the burden shifted to Mr. Toscano to come forward

1 with evidence showing that something in his particular case made the existing administrative
2 remedies “effectively unavailable to him.” *Id.* Mr. Toscano fails to make the requisite showing.

3 Mr. Toscano offers up several reasons why his failure to file a grievance naming Dr. Adam
4 as a wrongdoer should be excused, but none are persuasive. First, he urges that he “did not have
5 to name any defendant in his appeal because they were documented in his reports.” Docket No.
6 62 at 5. He is wrong on the law: the regulation explicitly requires the prisoner to “list all staff
7 member(s) involved and . . . describe their involvement in the issue,” and to provide the “staff
8 member’s last name, first initial, title or position, if known.” Cal. Code Regs. tit. 15, §
9 3084.2(a)(3). Mr. Toscano’s failure to name Dr. Adam is not surprising, given that he first filed
10 his inmate appeal (Log No. COR HC-16061135) before he was transferred to Pelican Bay, where
11 Dr. Adam worked. That he began his inmate appeal before he even met Dr. Adam does not
12 excuse Mr. Toscano’s failure to name her; to the contrary, it buttresses the conclusion that her
13 conduct was not the subject of his inmate appeal.

14 Second, Mr. Toscano argues that other courts have rejected the argument that a failure to
15 name a defendant amounts to a failure to exhaust, citing to a case he simply refers to as “*Estrada*”
16 from the Eastern District of California. Docket No. 62 at 5, 6. As explained above, the Ninth
17 Circuit cases (*Sapp* and *Wilkerson*) – which are binding precedent, unlike the inadequately
18 identified district court case cited by Mr. Toscano -- indicating that CDCR prisoners’ grievance
19 procedures do not specify the level of detail necessary are based on a regulation that has since
20 been amended. Under the regulation in place at the relevant time, Mr. Toscano was required to
21 name the involved official and describe her conduct but he did neither for Dr. Adam. *See* Cal.
22 Code Regs. § 3084.2(a)(3).

23 Third, Mr. Toscano argues that, “if Defendants had a problem with naming said defendants
24 they should [have] said something during the appeal process.” Docket No. 62 at 6. But
25 Defendants were not the decisionmakers on the inmate appeal and would have had no occasion to
26 notice a problem. Moreover, the actual decisionmakers would have had no reason to believe that
27 the appeal that complained about Dr. Lenoir’s care for Mr. Toscano at Corcoran State Prison also
28 meant to complain about care by a different doctor at a different prison. The fact that the prison

1 officials resolved the appeal that Mr. Toscano had specifically identified as being about Dr.
2 Lenoir's care does not suggest that prison officials "ignore[d] the procedural problem" of Mr.
3 Toscano not identifying other prison officials who may have done something he found
4 objectionable; prison officials had no reason to suspect from the inmate appeal filed that there was
5 a procedural problem of unidentified other wrongdoers who had not even taken action at the time
6 Mr. Toscano filed his inmate appeal. Prison officials did not choose to ignore a problem of which
7 they were not made aware. *Cf Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016) (exhaustion
8 occurred where "prison officials ignore[d] the procedural problem and render[ed] a decision on the
9 merits of the grievance").⁸

10 Finally, Mr. Toscano argues that "[t]here is *no* federal requirement in federal pleading that
11 plaintiff must know and identify the name of every individual who has participated in an alleged
12 wrong for either the administrative claims filings or the pleading of a § 1983 civil rights action."
13 Docket No. 62 at 5. His argument misses the mark because the question at the summary judgment
14 state is whether he did exhaust and not whether he needed to plead that he exhausted.

15 Mr. Toscano failed to properly exhaust his administrative remedies as to Dr. Adam
16 because he did not name her in his inmate appeal or specifically describe her alleged wrongdoing
17 as required by CDCR's regulations. *See Ngo*, 548 U.S. at 90-91 ("Proper exhaustion demands
18 compliance with an agency's deadlines and other critical procedural rules because no adjudicative
19 system can function effectively without imposing some orderly structure on the course of its
20 proceedings."); *see, e.g. Parks v. Chappell*, 2015 WL 3466280 (N.D. Cal. 2015) (Chen, J.)

21
22 ⁸ In *Reyes*, the California prisoner whose health care appeal concerning inadequate pain
23 management failed to identify two prison doctors, as required by CDCR's regulation, nevertheless
24 exhausted his claim of deliberate indifference to serious medical needs against the two prison
25 doctor defendants because the appeal was decided on its merits at all levels of review. *See id.* at
26 656-57. But this does not mean that a claim decided on the merits necessarily exhausts as to all
27 possible defendants. There must be a sufficient connection between the claim in the appeal and
28 the unidentified defendant(s) to provide prison officials with "notice of the alleged deprivation"
and an "opportunity to resolve it." *Id.* at 659. In *Reyes*, the two unidentified prison doctors had a
sufficient connection with plaintiff's claim in the appeal concerning inadequate pain management
because prison officials plainly knew that the two unidentified prison doctors served on the pain
management committee that had determined that plaintiff should not receive narcotic pain
medication. *See id.* By contrast, Mr. Toscano's inmate appeal complaining about Dr. Lenoir's
care would not have alerted prison officials to his problems with another doctor at a different
prison.

1 (granting summary judgment in warden's favor because inmate appeal about injury-causing event
2 did not mention warden by name or title); *Martinez v. Swift*, 2015 WL 1349525, at *2 (N.D. Cal.
3 2015) (Seeborg, J.) (granting summary judgment for nonexhaustion because the grievance "does
4 not mention [defendant], or describe with any specificity his actions or words" and therefore did
5 not comply with section 3084.2(a)(3)); *Panah v. State of Cal. Dep't of Corr. and Rehab.*, 2015 WL
6 1263494, at *9-10 (N.D. Cal. 2015) (Freeman, J.) (even if plaintiff's failure to pursue inmate
7 appeal to highest level is excused, he failed to properly exhaust his claim against the warden
8 because his inmate appeal did not name the warden or describe the basis for his liability); *Gray v.*
9 *Smith*, 2015 WL 875482, at *2-3 (N.D. Cal. 2015) (Alsup, J.) (granting summary judgment for
10 nonexhaustion where inmate appeal described an incident at the prison but did not name the
11 warden and did not describe a widespread practice or that the warden knew of the incident and
12 failed to stop it).

13 Bearing in mind that Dr. Adam has the ultimate burden of proof on the defense and
14 viewing the evidence in the light most favorable to Mr. Toscano, the court concludes that Dr.
15 Adam is entitled to judgment as a matter of law on the affirmative defense that Mr. Toscano failed
16 to exhaust administrative remedies for his § 1983 claim against her.

17 2. Dr. Lenoir – Failure To Exhaust Before Bringing Suit

18 Dr. Lenoir and Dr. Adam argue that Mr. Toscano did not exhaust his administrative
19 remedies for the separate reason that he failed to complete the administrative appeal process
20 *before* he filed this action. The Court disagrees.

21 The administrative exhaustion statute requires that the administrative remedies be
22 exhausted before the action is brought. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought . . .
23 until such administrative remedies as are available are exhausted."). In *McKinney v. Carey*, 311
24 F.3d 1198, 1200-01 (9th Cir. 2002), the court determined that an action had to be dismissed when
25 the plaintiff did not exhaust his administrative remedies before filing suit but was in the process of
26 doing so when a motion to dismiss was filed. Later cases from the Ninth Circuit have refined this
27 rule to address the situation where a plaintiff files an amended complaint. When a prisoner files
28 an amended pleading with new claims, the new claims in the amended complaint are treated as

1 “brought’ within the meaning of § 1997e” when the prisoner tenders the amended complaint for
2 filing. *Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010). Thus, a prisoner may file an
3 amended complaint and add new claims where the additional cause of action arose after the initial
4 filing, as long as he has exhausted administrative remedies as to those additional claims before
5 filing the amended complaint. *See id.; Akhtar v. Mesa*, 698 F.3d 1202 (9th Cir. 2012). Later, the
6 Ninth Circuit gave an even more prisoner-friendly reading of the statute, holding that “claims that
7 arose as a cause of action prior to the filing of the initial complaint may be added to a complaint
8 via an amendment, as long as they are administratively exhausted prior to the amendment.” *Cano*
9 *v. Taylor*, 739 F.3d 1214, 1220 (9th Cir. 2014); *but see id.* at 1221-22 (Silverman, J., dissenting in
10 part) (arguing that majority’s rule was contrary to earlier cases and undermined the purpose behind
11 the exhaustion statute because it allowed prisoner to file first and exhaust later).

12 Here, the original complaint did not mention Dr. Lenoir or the September 15, 2016,
13 medical appointment with Dr. Lenoir. Instead, the complaint named institutional defendants
14 (CDCR and two prisons) and was more of a generalized complaint about the perceived
15 inadequacies of Mr. Toscano’s medical care. Docket No. 1. The complaint was dismissed with
16 leave to amend to correct several deficiencies, including that Mr. Toscano had not named
17 individual wrongdoers and had not specified what those persons had done or failed to do. *See*
18 Docket No. 6. Mr. Toscano did not name Dr. Lenoir and Dr. Adam as Defendants until he
19 submitted his amended complaint on May 22, 2017. *See* Docket No. 7. By that time, he had
20 received a third-level decision on his inmate appeal Log No. COR HC-16061135, which was
21 denied at the third level on March 29, 2017.

22 Under the reasoning of *Cano*, Mr. Toscano complied with the exhaustion requirement as to
23 Dr. Lenoir. That is, by the time he first presented a pleading (i.e., his amended complaint)
24 alleging a claim against Dr. Lenoir, Mr. Toscano had completed the administrative appeals process
25 because he had received a third-level decision on his inmate appeal Log No. COR HC-16061135.
26 As explained in the preceding section, that inmate appeal did not exhaust any claim as to Dr.
27 Adam, so it cannot be said that Mr. Toscano had completed the administrative appeals process as
28 to her by virtue of having received a third-level decision on inmate appeal Log No. COR HC-

1 16061135 about Dr. Lenoir's care.

2 Dr. Lenoir is not entitled to summary judgment in her favor on the affirmative defense of
3 nonexhaustion, but Dr. Adam is. The claim against Dr. Adam will be dismissed without prejudice
4 to Mr. Toscano filing a new action against her after he properly exhausts his administrative
5 remedies for the claim.

6 B. Eighth Amendment Claim

7 Deliberate indifference to a prisoner's serious medical needs violates the Eighth
8 Amendment's proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S.
9 97, 104 (1976); *Toguchi v. Chung*, 391 F.3d 1051, 1057 (9th Cir. 2004). To establish an Eighth
10 Amendment claim on a condition of confinement, such as medical care, a prisoner-plaintiff must
11 show: (1) an objectively, sufficiently serious, deprivation, and (2) the official was, subjectively,
12 deliberately indifferent to the inmate's health or safety. *See Farmer v. Brennan*, 511 U.S. 825,
13 834 (1994). These two requirements are known as the objective and subjective prongs of an
14 Eighth Amendment deliberate indifference claim.

15 1. Objective Prong

16 To satisfy the objective prong, there must be a "serious" medical need. A serious medical
17 need exists if the failure to treat an inmate's condition "could result in further significant injury or
18 the unnecessary and wanton infliction of pain." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
19 2006) (internal quotation marks omitted).

20 There is evidence in the record that Mr. Toscano had back pain for several years. On this
21 record, a reasonable jury could conclude that his back problems amounted to a serious medical
22 need for the Eighth Amendment's objective prong.

23 2. Subjective Prong

24 For the subjective prong, there must be deliberate indifference. A defendant is deliberately
25 indifferent if she knows that an inmate faces a substantial risk of serious harm and disregards that
26 risk by failing to take reasonable steps to abate it. *Farmer*, 511 U.S. at 837. The defendant must
27 not only "be aware of facts from which the inference could be drawn that a substantial risk of
28 serious harm exists," but she "must also draw the inference." *Id.* Deliberate indifference may be

1 demonstrated when prison officials deny, delay or intentionally interfere with medical treatment,
2 or it may be inferred from the way in which prison officials provide medical care. *See McGuckin*
3 *v. Smith*, 974 F.2d 1050, 1062 (9th Cir. 1992) (although surgery was not done until three months
4 after prisoner's need for back surgery was unambiguously diagnosed and over three years after the
5 injury, defendants were entitled to summary judgment because plaintiff did not raise a triable issue
6 that these defendants were responsible for the delay), *overruled on other grounds by WMX Techs.,*
7 *Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (*en banc*). There must be "harm caused by the
8 indifference," although the harm does not need to be substantial. *See Jett*, 439 F.3d at 1096.

9 Negligence does not amount to deliberate indifference and does not satisfy the subjective
10 prong of an Eighth Amendment claim. *See Wilhelm v. Rotman*, 680 F.3d 1113, 1122-23 (9th Cir.
11 2012) (finding no deliberate indifference but merely a "negligent misdiagnosis" by defendant-
12 doctor who decided not to operate because he thought plaintiff was not suffering from a hernia).

13 A difference of opinion as to which medically acceptable course of treatment should be
14 followed does not establish deliberate indifference. *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.
15 1989) (summary judgment for defendants was properly granted because plaintiff's evidence that a
16 doctor told him surgery was necessary to treat his recurring abscesses showed only a difference of
17 opinion as to proper course of care where prison medical staff treated his recurring abscesses with
18 medicines and hot packs). "[T]o prevail on a claim involving choices between alternative courses
19 of treatment, a prisoner must show that the chosen course of treatment 'was medically
20 unacceptable under the circumstances,' and was chosen 'in conscious disregard of an excessive
21 risk to [the prisoner's] health.'" *Toguchi*, 391 F.3d at 1058 (second alteration in original).

22 Prison officials cannot avoid Eighth Amendment liability by simply declaring that they
23 disagree with a specialist's or treating doctor's prescribed course of care. The limits of the
24 difference-of-opinion rule were illustrated in *Snow v. McDaniel*, 681 F.3d 978 (9th Cir. 2012),
25 *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014), where the Ninth
26 Circuit determined that the district court erred in granting summary judgment for defendants who
27 argued that their refusal to approve double hip-replacement surgery for a prisoner who could
28 barely walk due to hip pain showed a mere difference of opinion. In *Snow*, the prison medical

1 committee repeatedly refused to authorize a double hip-replacement surgery, even though an
2 orthopedic surgeon and the prisoner's treating physician considered the requested surgery to be an
3 emergency. *See id.* at 986. Not only had the medical committee refused to authorize the surgery,
4 the committee "gave no medical reason for the denials" and some evidence suggested the refusal
5 was due to the warden's dislike of death row prisoners such as the plaintiff. *Id.* at 986-87. *Snow*
6 rejected the defendants' argument that their choice to treat the prisoner with medications rather
7 than surgery showed merely a difference of opinion that did not amount to an Eighth Amendment
8 violation. *Id.* at 987-88. Although there was "clearly a difference of medical opinion," the
9 evidence in the record and inferences therefrom could allow a reasonable jury to "conclude that
10 the decision of the nontreating, nonspecialist physicians to repeatedly deny the recommendations
11 for surgery was medically unacceptable under all of the circumstances." *Id.* at 988. Significantly,
12 the defendants sent the prisoner for evaluation by orthopedic surgeons, both of whom
13 recommended double hip-replacement surgery. *Id.* One of those surgeons testified at his
14 deposition that the prisoner's likelihood of success after the surgery was very high, that surgery
15 would help improve the prisoner's health and mobility, and that the surgery would allow the
16 prisoner to avoid the use of the medications that were causing other health problems for the
17 prisoner. On this record, "it should be for the jury to decide whether any option other than surgery
18 was medically acceptable." *Id.* The court acknowledged that "a medication-only course of
19 treatment may have been medically acceptable for a certain period of time," but saw the multi-year
20 delay in approving the recommended surgery as presenting a triable issue as to medical
21 acceptability of defendants' course of treatment under the circumstances. *Id.*

22 *Snow* did not hold that a triable issue is shown whenever prison officials fail to follow a
23 doctor's recommended course of care. Indeed, *Snow*'s discussion shows that it was the unthinking
24 denial-without-medical-reason behavior of prison officials that could allow a jury to conclude that
25 the prison officials had acted with deliberate indifference to that inmate's medical need. The
26 Ninth Circuit distinguished *Snow*'s situation from that in *Toguchi*, where the plaintiff challenged
27 the defendant-doctor's choice to discontinue a particular medication but did not present expert
28 testimony showing that the discontinuation of the medication was medically unacceptable, and the

1 defendant-doctor had submitted expert testimony that her actions met the standard of care. *See*
2 *Snow*, 681 F.3d at 988-89 (citing *Toguchi*, 391 F.3d at 1055-56). The Ninth Circuit also
3 distinguished *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989), on the basis that “only one
4 prison doctor told the inmate that surgery would be necessary” in *Sanchez*, whereas “the consistent
5 recommendation by two outside specialists over the course of three years” in *Snow* was that the
6 prisoner needed double hip-replacement surgery to alleviate his severe pain and mobility issues.
7 *Snow*, 681 F.3d at 989. *Accord Colwell v. Bannister*, 763 F.3d 1060, 1069 (9th Cir. 2014) (finding
8 that case did not involve simply a difference of opinion because evidence showed defendants
9 ignored the recommendations of treating specialists that plaintiff needed cataract surgery and
10 relied instead on nonspecialist/nontreating medical officials to make decisions based on an
11 administrative policy that cataract surgery would not be provided when other eye was functional).

12 In the present case, there is at best a difference of opinion between patient and doctor as to
13 the proper course of care. Mr. Toscano disagrees with the course of care pursued by Dr. Lenoir,
14 but completely fails to present any evidence that the course of care pursued by Dr. Lenoir was
15 medically unacceptable under the circumstances and was chosen in conscious disregard of an
16 excessive risk to Mr. Toscano’s health. *See Toguchi*, 391 F.3d at 1058.

17 There is no evidence on which a reasonable jury could rely to conclude that Dr. Lenoir was
18 deliberately indifferent to Mr. Toscano’s back problems. It is undisputed that, from January 12,
19 2016, when Mr. Toscano first complained of back pain to Dr. Lenoir until September 15, 2016
20 (their last appointment), Dr. Lenoir obtained specialty services for Mr. Toscano, namely lumbar x-
21 rays, physical therapy, and an MRI/CT-scan. And it is undisputed that the physical therapist
22 provided instructions on exercises Mr. Toscano could do for his back and that Dr. Lenoir
23 recommended stretches for him to do for core strengthening. It also is undisputed that Dr. Lenoir
24 addressed Mr. Toscano’s complaints of pain: Dr. Lenoir repeatedly renewed Mr. Toscano’s
25 prescription for Sulindac (an NSAID) so that he would have some pain relief and offered Mr.
26 Toscano a trial of different medications, which he refused. The evidence also is undisputed that
27 Dr. Lenoir denied Mr. Toscano’s request for gabapentin because he did not qualify for that
28 medication under the CDCR Pain Management Guidelines.

1 Mr. Toscano also fails to show a triable issue in support of his allegation that Dr. Lenoir
2 should have provided him “appliances” and a chrono for waist-chain cuffing. He submits a copy
3 of a portion of a policy manual regarding comprehensive accommodation chronos with “x” marks
4 next to the criteria that he contends support his entitlement to various appliances. *See* Docket No.
5 63 at 14-16; *see also* Docket No. 62 at 3. Although he marked that he had various conditions,
6 those conditions had not been diagnosed for him. For example, the policy manual states that
7 canes, walkers, and wheelchairs can be provided for people with “severe chronic pain condition,”
8 “severe lower extremity edema,” and “acute injury”; he marked himself as having each of those
9 conditions but none of them had been determined to exist by any health care provider. Docket No.
10 63 at 15. Mr. Toscano’s self-diagnosis fails to raise a triable issue that failing to provide him
11 appliances for his back pain amounted to deliberate indifference. Dr. Lenoir denied Mr.
12 Toscano’s request for a chrono authorizing waist-chain cuffing, but there is no competent evidence
13 that he qualified for waist-chain cuffing or that the failure to authorize waist-chain cuffing
14 amounted to deliberate indifference to a serious medical need. Although Mr. Toscano might have
15 been more comfortable in waist-chain handcuffs instead of traditional behind-the-back handcuffs,
16 he fails to provide evidence that would allow a reasonable trier of fact to find that the denial of a
17 waist-chain cuffing chrono was “medically unacceptable under all of the circumstances” and done
18 “in conscious disregard of an excessive risk” to Mr. Toscano’s health. *Toguchi*, 391 F.3d at 1058.

19 Mr. Toscano’s failure of proof is particularly glaring with regard to his demand for back
20 surgery. The evidence shows that Dr. Lenoir rejected Mr. Toscano’s request to see a
21 neurosurgeon at a visit on February 1, 2016, because she wanted to try less invasive modalities of
22 treatment before considering invasive treatment and “would not recommend doing invasive
23 treatment at this time, given his results.” Docket No. 57-4 at 12. Mr. Toscano presents no
24 evidence that surgery was medically appropriate in February 2016 or at any time during which Dr.
25 Lenoir was his PCP. No health professional made such a recommendation. Mr. Toscano’s
26 “evidence” amounts to his own lay opinion that “non-invasive back surgery” should have been
27 done because it “is commonly performed on back injuries like plaintiff’s. And is highly televised
28 on commercials like the Laser Spine Institute.” Docket No. 63 at 4. The sales pitch in a television

1 commercial plainly does not establish the standard of care in the medical community. Mr.
2 Toscano provides no competent evidence that back surgery would have worked; in fact, he does
3 not even specify what kind of back surgery he supposedly needed or was appropriate before less
4 invasive measures were utilized to attempt to address his back pain. Unlike the situation in *Snow*,
5 and like the situation in *Toguchi*, Dr. Lenoir has presented medical reasons for her choice to deny
6 the surgery that Mr. Toscano contends should have been provided. Dr. Lenoir determined that
7 surgery was inappropriate given Mr. Toscano's normal physical exam and x-rays, which showed
8 mild to moderate degenerative changes in his back, and given the fact that less invasive methods
9 of treatment had not yet been tried. And, as in *Toguchi*, Mr. Toscano does not present expert
10 evidence to show that Dr. Lenoir's course of care was medically unacceptable.

11 Mr. Toscano urges that the x-rays and MRI/CT-scan showed that he needed appliances,
12 gabapentin, and back surgery. This is the sort of speculation without any competent supporting
13 medical evidence that plagues Mr. Toscano's case. There is no evidence that Mr. Toscano has any
14 medical training or is otherwise competent to opine as to the appropriate care of back problems.

15 Mr. Toscano attempts to re-introduce dismissed defendants and introduce new claims in
16 his opposition papers, but he may not do so. The Court earlier dismissed several defendants and
17 denied Mr. Toscano's motion to reinstate those defendants. *See* Docket No. 24 at 4-5; Docket No.
18 28. Mr. Toscano's arguments regarding those defendants are misguided because they have been
19 dismissed from this action. Mr. Toscano also attempts to introduce a retaliation claim by making
20 unsupported conclusory assertions that he received deficient medical care in retaliation for
21 exercising his First Amendment right to file medical complaints for treatment. *See* Docket No. 63
22 at 1. He did not allege a retaliation claim in his complaint, amended complaint or second amended
23 complaint and it is too late to do so now that Defendants have filed their motion for summary
24 judgment. *Cf. Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) (district court
25 properly refused to allow plaintiffs to proceed with new theory of liability first raised at summary
26 judgment stage because it would prejudice defendant: "complaint guides the parties' discovery,
27 putting the defendant on notice of the evidence it needs to adduce in order to defend against the
28 plaintiff's allegations").

1 Moreover, the timing cannot give rise to a retaliation claim against Dr. Lenoir because Mr.
2 Toscano indisputably did not file his inmate appeal complaining about her medical care until *after*
3 he ceased being her patient. First Amendment activity that follows allegedly retaliatory conduct is
4 not the *cause* of that allegedly retaliatory conduct. *Cf. Rhodes v. Robinson*, 408 F.3d 559, 567-68
5 (9th Cir. 2005) (“Within the prison context, a viable claim of First Amendment retaliation entails
6 five basic elements: (1) An assertion that a state actor took some adverse action against an inmate
7 (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
8 exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate
9 correctional goal.”) (footnote omitted). Insofar as Mr. Toscano means that Dr. Lenoir’s refusal to
10 accede to his demands at the medical appointments means she was retaliating for those demands,
11 Mr. Toscano misunderstands the essence of a retaliation claim. Merely making a decision adverse
12 to a prisoner is not inherently retaliatory.

13 A physician is not required to be a guarantor of a patient’s good health, regardless of
14 whether the patient is in prison or at liberty. What the prison physician cannot do is be
15 deliberately indifferent to an inmate’s serious medical needs. Mr. Toscano fails to present
16 evidence that would allow a reasonable jury to find that Dr. Lenoir was deliberately indifferent to
17 his back-care needs. Unlike the situation in *Snow*, and like the situation in *Toguchi*, Dr. Lenoir
18 presents evidence that the chosen course of care was medically acceptable. And, as in *Toguchi*,
19 Mr. Toscano does not present expert evidence to show that Dr. Lenoir’s decisions were medically
20 unacceptable and made in conscious disregard of an excessive risk to his health. Even when the
21 evidence is viewed in the light most favorable to Mr. Toscano, and inferences therefrom drawn in
22 his favor, no reasonable jury could return a verdict for him and against Dr. Lenoir on the Eighth
23 Amendment claim. Dr. Lenoir therefore is entitled to judgment as a matter of law on the Eighth
24 Amendment claim.

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VI. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is **GRANTED**. Docket No. 57. Dr. Lenoir is entitled to judgment as a matter of law in her favor on the merits of Mr. Toscano's Eighth Amendment claim. Defendant Dr. Adam is entitled to judgment as a matter of law in her favor on the affirmative defense of nonexhaustion of administrative remedies. As to Dr. Adam only, the complaint will be dismissed without prejudice. The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: May 29, 2019

EDWARD M. CHEN
United States District Judge

APPENDIX D

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7 BENJAMIN K. TOSCANO,
8 Plaintiff,
9 v.
10 NANCY ADAM, et al.,
11 Defendants.

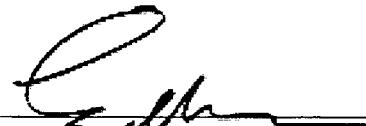
Case No. 16-cv-06800-EMC

JUDGMENT

12
13 Judgment is now entered in favor of all Defendants and against Plaintiff. As to Defendant
14 Dr. Nancy Adam only, Plaintiff may file a new action against her if he ever properly exhausts
15 administrative remedies for his claims against her.

16
17 **IT IS SO ORDERED AND ADJUDGED.**
18

19 Dated: May 29, 2019
20
21


22 EDWARD M. CHEN
23 United States District Judge
24
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BENJAMIN K. TOSCANO,

Plaintiffs,

V.

NANCY ADAM, et al.,

Defendants.

Case No.: 16-cv-06800-EMC

CERTIFICATE OF SERVICE

10 I, the undersigned, hereby certify that:

(1) I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California; and

(2) On 5/29/2019, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's office.

Benjamin K. Toscano ID: H57647
Pelican Bay State Prison P.O. Box 7500
Crescent City, CA 95532

Dated: 5/29/2019

Susan Y. Soong
Clerk, United States District Court

By: Leni Doyle-Hickman, Deputy Clerk to
the Honorable Edward M. Chen

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 10 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BENJAMIN K. TOSCANO,

Plaintiff-Appellant,

v.

NANCY ADAM; et al.

Defendants-Appellees,

No. 19-16288

D.C. No. 3:16-cv-06800-EMC
Northern District of California,
San Francisco

ORDER

Before: CANBY, FRIEDLAND, and R. NELSON, Circuit Judges.

Toscano's motion for an extension of time to file a petition for rehearing (Docket Entry No. 25) is granted. Any petition for rehearing must be filed on or before September 9, 2020.

**Additional material
from this filing is
available in the
Clerk's Office.**