APPENDIX A

KAB

NOT FOR PUBLICATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Larry Donnell Dunlap,

Plaintiff,

v.

Charles L. Ryan, et al.,

Defendants.

No. CV-18-00295-PHX-DJH (DMF)

ORDER

Plaintiff Larry Donnell Dunlap, who is currently confined in the Arizona State Prison Complex (ASPC)-Eyman, brought this civil rights action pursuant to 42 U.S.C. § 1983. Defendant moves for summary judgment, and Plaintiff opposes. (Docs. 70, 88.)[1]

I. Background

On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated an Eighth Amendment claim based on deliberate indifference to serious medical needs in Count Seven against Corizon stemming from Plaintiff's allegation that Corizon medical staff denied Plaintiff all medical treatment after he had been found guilty of a disciplinary violation, and that Corizon staff told Plaintiff he would have to be "ticket free" for one year to get medical treatment and medical equipment. (Doc. 10.) The Court dismissed the remaining claims and Defendants. (*Id.*)

. . . .

[1] Plaintiff was informed of his rights and obligations to respond pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc) (Doc. 72).

II. Legal Standards

A. Summary Judgment

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

B. Eighth Amendment

Under the Eighth Amendment, a prisoner must demonstrate that a defendant

acted with "deliberate indifference to serious medical needs." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are two prongs to the deliberate-indifference analysis: an objective prong and a subjective prong. First, a prisoner must show a "serious medical need." *Jett*, 439 F.3d at 1096 (citations omitted). A "'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal citation omitted). Examples of a serious medical need include "[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *McGuckin*, 974 F.2d at 1059-60.

Second, a prisoner must show that the defendant's response to that need was deliberately indifferent. *Jett*, 439 F.3d at 1096. An official acts with deliberate indifference if he "knows of and disregards an excessive risk to inmate health or safety; to satisfy the knowledge component, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). "Prison officials are deliberately indifferent to a prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical treatment," *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (internal citations and quotation marks omitted), or when they fail to respond to a prisoner's pain or possible medical need. *Jett*, 439 F.3d at 1096. Deliberate indifference is a higher standard than negligence or lack of ordinary due care for the prisoner's safety. *Farmer*, 511 U.S. at 835. "Neither negligence nor gross negligence will constitute deliberate indifference." *Clement v. California Dep't of Corr.*, 220 F. Supp. 2d 1098, 1105 (N.D. Cal. 2002); *see also Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980) (mere claims of "indifference," "negligence," or "medical malpractice" do not support a

claim under § 1983). "A difference of opinion does not amount to deliberate indifference to [a plaintiff's] serious medical needs." *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989). A mere delay in medical care, without more, is insufficient to state a claim against prison officials for deliberate indifference. *See Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985). The indifference must be substantial. The action must rise to a level of "unnecessary and wanton infliction of pain." *Estelle*, 429 U.S. at 105.

Finally, even if deliberate indifference is shown, to support an Eighth Amendment claim, the prisoner must demonstrate harm caused by the indifference. *Jett*, 439 F.3d at 1096; *see Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (delay in providing medical treatment does not constitute Eighth Amendment violation unless delay was harmful).

Moreover, to prevail on a claim against Corizon, as a private entity serving a traditional public function, Plaintiff must meet the test articulated in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690-94 (1978). *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (applying *Monell* to private entities acting under color of state law). Accordingly, Plaintiff must show that an official policy or custom caused the constitutional violation. *Monell*, 436 U.S. at 694.

To make this showing, he must demonstrate that (1) he was deprived of a constitutional right; (2) Corizon had a policy or custom; (3) the policy or custom amounted to deliberate indifference to Plaintiff's constitutional right; and (4) the policy or custom was the moving force behind the constitutional violation. *Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110-11 (9th Cir. 2001). Further, if the policy or custom in question is an unwritten one, the plaintiff must show that it is so "persistent and widespread" that it constitutes a "permanent and well settled" practice. *Monell*, 436 U.S. at 691 (internal quotation and citation omitted). "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

III. Arguments

Plaintiff asserts that after he was transferred to Meadows Unit on May 8, 2017, the Corizon Utilization Board Members directed Corizon medical staff to stop providing treatment for Plaintiff's leukopenia and "other medical conditions" due to recent disciplinary tickets Plaintiff received while incarcerated at South Unit. (Doc. 88 at 3-4.) Plaintiff asserts that he was denied Special Needs Orders (SNOs) for a bottom bunk waiver, medical tennis shoes, medical plastic chair beside his bunk, medical plastic insoles for his tennis shoes, medical long sleeve shirts, medical hat, medical sunglasses, and a medical mattress. (*Id.* at 4.) Plaintiff also asserts that he was denied a D.A.S.H. (dietary approaches to stop hypertension) diet on January 24, 2018, and on the same day, was denied a bunion operation for his right big toe. (*Id.* at 4-5.) Plaintiff asserts that he was wrongfully denied an MRI scan for his right hip and right lower back on January 24, 2018. (*Id.* at 5.) Plaintiff asserts that it is Corizon's policy that inmates with disciplinary tickets are treated as lower priority for medical treatment. (*Id.*)

Defendant argues that Plaintiff has had an active SNO for plastic shoe insoles since 2011 as a result of bilateral bunions and there is no evidence the SNO was ever discontinued. (Doc. 70 at 14.) Defendant argues that ADC does not have a D.A.S.H. diet and Plaintiff has not shown that his hypertension requires a special diet not included on ADC's restricted diet list, particularly where the general population diet is designed to meet heart healthy needs of hypertensive patients. (*Id.* at 15.) Defendant argues that there is no evidence that failure to provide Plaintiff with a long sleeve shirt or medical hat constitutes deliberate indifference to serious medial needs. (*Id.*)

Defendant argues that PA Brower and NP Denehy evaluated Plaintiff and saw no clinical medical need for a medical chair, or low bunk and Denehy saw no medical need for a hat, long sleeve shirts, tennis shoes, or a low bunk, but that Plaintiff qualified for insoles. (*Id.*) Defendant argues that Dr. Barker made the same conclusion in May 2017. (*Id.*) Defendant asserts that Plaintiff did not have a low bunk waiver or SNOs for tennis shoes, hat, long sleeve shirt, or chair prior to his arrival at Meadows Unit, and thus his

claim that those SNOs were cancelled after he was transferred to Meadows Unit is meritless. (*Id.*) Defendant asserts that the evidence shows that the medical providers' decisions as to Plaintiff's SNOs were based on medical judgment and there is no evidence their decisions were based on Plaintiff's disciplinary record. (*Id.*)

Defendant argues that the evidence shows that Corizon providers were consistently responsive to Plaintiff's medical needs, including his glaucoma, hip and back pain, bilaterial bunions, and neutropenia, and there is no evidence that any medical care was cancelled when Plaintiff was transferred to Meadows Unit. (*Id.* at 16.)

Defendant argues that there is no evidence that Plaintiff has ever had kidney disease or dysfunction, Plaintiff has been evaluated numerous times by multiple providers concerning his hip and back complaints, and his x-rays have all been normal. (*Id.*) Defendant argues that Plaintiff's providers have reached similar conclusions about the etiology of his pain complaints (piriformis syndrome and/or bursitis) and have elected to treat the symptoms conservatively with stretching, exercises, NSAIDs, analgesics, and hot/cold therapy. (*Id.*) Defendant argues that there is no evidence that Plaintiff has any serious underlying condition or injury such that he requires enhanced imaging, surgery or formal physical therapy. (*Id.*)

Defendant argues that the evidence shows that Plaintiff received appropriate treatment for his bunions and glaucoma, and during his most recent visit with the podiatrist, Dr. Freed opined that Plaintiff did not require surgery, and that his condition was well-managed. (*Id.*) Defendant asserts that Plaintiff's ophthalmologist, Dr. Heller, similarly opined that Plaintiff's glaucoma was stable on his current medication regimen (Latanoprost). (*Id.*) Defendant asserts that Plaintiff has had regular (bi-annual) chronic care visits and chronic care labs to monitor his leukopenia and neutropenia and during each chronic care encounter, Plaintiff's providers review his labs to ascertain any worsening of his condition. (*Id.*) Finally, Defendants assert that Dr. Kosierowski, Corizon's dedicated oncologist/hematologist, opines that Plaintiff has an isolated stable and benign neutropenia of mild to moderate severity and his ANCs (absolute neutrophil count) do not put him at

risk of opportunistic or life threatening infections and his condition has not progressed over time, and Plaintiff's neutropenia is clinically insignificant. (*Id.*)

Defendants finally argue that even if an individual provider was deliberately indifferent to Plaintiff's serious medical needs, there is no evidence that such provider was acting pursuant to a policy, practice, or custom of Defendant Corizon. (*Id.*) Defendants present evidence that there is no ADC or Corizon policy that allows delayed or denied medical care for prisoners with disciplinary tickets. (Doc. 91 at 10 ¶¶ 6-8.)

IV. Facts and Discussion

In his Complaint, Plaintiff alleged that he was denied medical treatment due to a directive by Defendant Corizon that Plaintiff be denied medical care until he went one year without being issued disciplinary tickets. This allegation is entirely unsupported by the record before the Court. There is no evidence that Plaintiff was ever denied medical care due to his disciplinary infractions or that Corizon employees ever directed that Plaintiff be denied medical care due to his disciplinary infractions. Rather, the records submitted to the Court indicate that Plaintiff was seen frequently for his various medical complaints and issues. (*See* Doc. 71 ¶¶ 1-59.) Plaintiff does not dispute that he was seen on the occasions listed by Defendants, but rather disagrees with the care he received on certain occasions. (*See* Doc. 89 ¶¶ 1-59.)

While the record shows that Plaintiff was issued an SNO for a chair near his bunk between February 11, 2015 and February 11, 2016, told that his family could send him shoes between December 21, 2014 and December 21, 2015, and was issued an SNO for a lower bunk between May 5, 2015 and May 5, 2016 (Doc. 89-1 at 27-29), the undisputed evidence before the Court shows that NP Brower declined to renew those SNOs based on his examination of Plaintiff on February 1, 2016. (Doc. 71 ¶ 1; Doc. 89 ¶ 1.) There is no evidence that Brower's decision to deny these SNOs was based on anything other than his medical opinion, and indeed, these SNOs were denied prior to Plaintiff's May 2017 transfer to Meadows Unit. Moreover, Plaintiff asserts that his subsequent requests for SNOs were denied not because Plaintiff was issued disciplinary tickets, but rather because Brower and

later, NP Denehy, incorrectly assessed that Plaintiff's medical conditions did not warrant the SNOs. (*See* Doc. 89 ¶ 6 (Plaintiff stating that Brower's medical record has caused other PAs to deny SNOs); ¶ 11 (Plaintiff stating that because of Denehy's comments in the medical records, other NPs are not approving Plaintiff's SNOs.) Although Plaintiff disagrees with Brower's and Denehy's decisions with regard to the SNOs, this disagreement does not demonstrate that Brower and Denehy were deliberately indifferent to Plaintiff's serious medical needs when denying the SNOs nor does it demonstrate that Brower and Denehy were acting pursuant to a policy, practice, or custom of Defendant Corizon.

Likewise, although Plaintiff expresses disagreements with the various providers' treatment of his hip pain (Doc. 89 ¶ 22), his diagnosis of Enthesopathy (*id.* ¶ 28), the denial of an MRI for hip pain (*id.* ¶ 35), and the treatment of his leukopenia (*id.* ¶¶ 53-59), there is no evidence in the record before the Court that the treatment Plaintiff received was the result of deliberate indifference to Plaintiff's serious medical needs, and no evidence that the providers were acting pursuant to an unconstitutional policy, practice, or custom of Defendant Corizon in their treatment of Plaintiff's medical issues.

For the foregoing reasons, Defendant's Motion for Summary Judgment will be granted.

V. Motion for Order for Hearing (Doc. 96)

In his Motion, Plaintiff asserts that filing fees continue to be withdrawn from his inmate trust account even though he has paid his filing fees in full. Plaintiff requests a hearing to discuss this issue. The Court will grant this motion to the extent it will inform Plaintiff that he has a remaining outstanding balance of $405 in court fees. If Plaintiff has further questions regarding the accounting of his filing fees, he should follow-up with the Court's Finance Department.

. . . .

. . . .

. . . .

IT IS ORDERED:

(1) The reference to the Magistrate Judge is **withdrawn** as to Defendant's Motion for Summary Judgment (Doc. 70) and Plaintiff's Motion for Order for Hearing (Doc. 96.)

(2) Plaintiff's Motion for Order for Hearing (Doc. 96) is **granted in part and denied in part** as set forth herein.

(3) Defendant's Motion for Summary Judgment (Doc. 70) is **granted**, and the action is terminated with prejudice. The Clerk of Court must enter judgment accordingly.

Dated this 24th day of March, 2020.

Honorable Diane J. Humetewa
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Larry Donnell Dunlap,

Plaintiff,

v.

Charles L Ryan, et al.,

Defendants.

NO. CV-18-00295-PHX-DJH (DMF)

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Court's Order filed March 24, 2020,which granted defendant's Motion for Summary Judgment, judgment is entered in favor of defendant and against plaintiff. Plaintiff to take nothing, and this action is terminated with prejudice.

Debra D. Lucas
Acting District Court Executive/Clerk of Court

March 24, 2020

By s/ W. Poth
Deputy Clerk

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY DONNELL DUNLAP, Plaintiff-Appellant, v. CORIZON HEALTH, INC., Defendant-Appellee, and CHARLES L. RYAN; et al., Defendants.	No. 20-15532 D.C. No. 2:18-cv-00295-DJH-DMF MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Submitted February 17, 2021**

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

Larry Donnell Dunlap, an Arizona state prisoner, appeals pro se from the

* 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).

v. Moynihan, 508 F.3d 1212, 1223 (9th Cir. 2007) (setting forth standard of review and explaining that this court gives "[b]road deference" to a district court's interpretation of its local rules).

We reject as without merit Dunlap's contention that the district court violated his due process rights.

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

district court's summary judgment in his 42 U.S.C. § 1983 action alleging constitutional claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's ruling on cross-motions for summary judgment. *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011). We affirm.

The district court properly granted summary judgment for Corizon Health, Inc., on Dunlap's deliberate indifference claim because under any potentially applicable standard, Dunlap failed to raise a genuine dispute of material fact as to whether any policy or custom of Corizon caused him to suffer a constitutional injury. *See Castro v. County of Los Angeles*, 833 F.3d 1060, 1073-76 (9th Cir. 2016) (en banc) (discussing requirements to establish liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978)); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012) (a private entity is liable under § 1983 only if the entity acted under color of state law and a constitutional violation was caused by the entity's official policy or custom); *Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir. 2011) (requirements for establishing supervisory liability).

The district court did not abuse its discretion by striking Dunlap's first amended complaint or by denying Dunlap's motions for subpoenas because Dunlap failed to comply with the local rules governing amended pleadings and issuance of subpoenas for pro se litigants. *See* D. Ariz. R. 15.1, G.O. 18-19; *Bias*

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY DONNELL DUNLAP,

Plaintiff-Appellant,

v.

CORIZON HEALTH, INC.,

Defendant-Appellee,

and

CHARLES L. RYAN; et al.,

Defendants.

No. 20-15532

D.C. No. 2:18-cv-00295-DJH-DMF
District of Arizona,
Phoenix

ORDER

Before: FERNANDEZ, BYBEE, and BADE, Circuit Judges.

Dunlap's petition for panel rehearing (Docket Entry Nos. 37, 38) is denied.

No further filings will be entertained in this closed case.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY DONNELL DUNLAP,

Plaintiff - Appellant,

v.

CORIZON HEALTH, INC.,

Defendant - Appellee,

and

CHARLES L. RYAN; et al.,

Defendants.

No. 20-15532

D.C. No. 2:18-cv-00295-DJH-DMF
U.S. District Court for Arizona, Phoenix

MANDATE

The judgment of this Court, entered February 23, 2021, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Rhonda Roberts
Deputy Clerk
Ninth Circuit Rule 27-7